IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2005
[2007] NZSC 30

ALLISTAIR PATRICK BROOKER

v

POLICE

Hearing: 7 December 2005

Court: Elias CJ, Blanchard, Tipping, McGrath and Thomas JJ

Counsel: A P Brooker in Person
T Arnold QC and J Davidson for Crown
A J F Wilding as Amicus Curiae

Judgment: 4 May 2007

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The appellant's conviction is set aside.

REASONS

	Para No
Elias CJ	[1]
Blanchard J	[51]
Tipping J	[71]
McGrath J	[98]
Thomas J	[149]

ELIAS CJ

[1] Allistair Patrick Brooker was convicted of disorderly behaviour for his actions when making a public protest in the street outside the house of a police constable. His appeal concerns the meaning of "behaves in [a] disorderly manner" under s 4(1)(a) of the Summary Offences Act 1981:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; …

[2] The protest constituted expressive behaviour protected by s 14 of the New Zealand Bill of Rights Act 1990:[1]

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[3] Section 14 is enacted to "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights",[2] which provides in art 19:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

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1 Mr Brooker was expressing a grievance. Such action engages freedom of expression for reasons given in *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at para [32] per McLachlin CJ and LeBel J in relation to picketers. See also *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927 at p 978 per Dickson CJ, Lamer and Wilson JJ.

2 As the long title to the Act provides.

[4] Under s 6 of the New Zealand Bill of Rights Act, s 4(1)(a) of the Summary Offences Act must be given a meaning consistent with the right to freedom of expression in s 14 of the New Zealand Bill of Rights Act, if it can be given such a meaning. The right to "impart information and opinions of any kind in any form", affirmed in s 14, is not however unqualified. By art 19(3), it is subject to reasonable restrictions prescribed by law which are necessary to protect other important interests, including public order and the rights and reputations of others. Section 4(1)(a) is such a restriction. Its scope depends on its meaning and purpose.

[5] The District Court Judge who convicted Mr Brooker[3] considered the meaning of "disorderly behaviour" was as settled by *Police v Christie*[4] and *Melser v Police*,[5] cases decided under s 3D of the Police Offences Act 1927. He held that behaving in a disorderly manner is "behaving in a way that right thinking members of the public would consider inappropriately annoying to members of the public".[6] The Solicitor-General in this Court does not support the test for disorderly behaviour in this abbreviated form. He maintains however that the Judge went on to identify the passages from *Melser* and *Christie* which set out the proper principles and correctly undertook the balancing of interests they require, including in those interests Mr Brooker's right to freedom of expression.

[6] The meaning to be given to disorderly behaviour under s 3D of the Police Offences Act has been variously described in the authorities. Henry J in *Christie* (the case principally relied upon by the District Court Judge) started with "orderly" (as the antonym of "disorderly"), and noted that its dictionary definitions included "well-behaved". Since "behaviour" was the focus of the section and "to behave" meant to "conduct oneself with propriety", he considered that "disorderly behaviour" was to act or conduct oneself in a manner which contravenes good conduct or proper conduct as recognised by "right thinking members of the public" and which "well-disposed persons would stigmatise and condemn as deserving of punishment".[7] The requirement that the conduct be deserving of punishment provided a higher threshold

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3 *Police v Brooker* (District Court, Greymouth, 30 June 2003, Callaghan DCJ).
4 [1962] NZLR 1109 (HC).
5 [1967] NZLR 437 (CA).
6 At para [5].
7 At p 1113.

than a bare notion of deviation from personal standards of good behaviour (conduct contra bonos mores).

[7] In *Melser*, the Court of Appeal did not entirely endorse the approach in *Christie*. The judgments in *Melser* emphasise the impact of the conduct on others present and indicate doubt about the emphasis in *Christie* on good behaviour. So, North P considered that disorderly behaviour must both "seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public … [and] must at least be of a character which is likely to cause annoyance to others who are present".[8] Turner J regarded disorderly behaviour as "conduct which, while sufficiently ill-mannered, or in bad taste to meet with the disapproval of well-conducted and reasonable men and women" must also "tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law".[9] McCarthy J regarded disorderly behaviour as conduct which seriously interferes with the rights and freedoms of others and which is "unnecessarily disorderly and objectionable" and "likely to engender considerable annoyance".[10]

[8] Neither the High Court[11] nor the Court of Appeal,[12] in confirming the judgment of the District Court, considered whether the Judge had accurately applied *Melser* in the test he adopted (set out in para [5] above). Both appellate courts proceeded on the basis that the meaning of disorderly behaviour accepted in *Melser* remains good law, notwithstanding the repeal of s 3D of the Police Offences Act and the enactment of the Summary Offences Act and notwithstanding enactment of the New Zealand Bill of Rights Act 1990. They took the view that the pre-Bill of Rights Act cases (especially *Melser* and *Wainwright v Police*[13]) had already made it clear that the assessment of whether behaviour is disorderly "must allow for rights of free

8 At p 443.
9 At p 445.
10 At p 446.
11 *Brooker v Police* (High Court, Greymouth, CRI 2003-418-000004, 16 October 2003, John Hansen J).
12 *R v Brooker* (2004) 22 CRNZ 162.
13 [1968] NZLR 101 (SC).

expression and peaceful assembly".[14] Although the meaning of disorderly behaviour was unchanged, the Court of Appeal acknowledged that its application depends on context. It approved the view expressed in *R v Ceramalus* that what constitutes disorderly behaviour (described in *Ceramalus* as "essentially a question of fact and degree") turns on an "evaluative assessment" of its tendency "as it would be seen by members of the public".[15] That turns on the facts of the case, in the social context in which it occurs. The Court of Appeal accepted that what constitutes disorderly behaviour evolves with changing public expectations (and that *Wainwright*, in particular, might have been differently decided today).[16] The rights affirmed in the New Zealand Bill of Rights Act are part of the context in which behaviour is assessed today. But the Court of Appeal considered that such evolution was not confined to the values in the New Zealand Bill of Rights Act. The context includes "changes in social attitudes towards dissent"[17] and other rights:[18]

> [I]t is right to remember that the rights and freedoms affirmed by the New Zealand Bill of Rights Act are not the only ones which are deserving of legal protection. Rights to privacy are an obvious example and so too is what might be regarded as an associated right to feel secure in one's home. The rights to freedom of expression and peaceful assembly do not trump all other rights, interests and obligations: see *Jeffrey v Police* (1994) 11 CRNZ 507 (HC) and *Police v Beggs* [1999] 3 NZLR 615 (HC).

[9] The Court of Appeal treated the offence of disorderly behaviour as entailing a question of degree: was the behaviour such as to merit criminal sanction when measured by its tendency seriously to annoy or offend a reasonable person. Freedom of speech was a relevant and important consideration in assessing whether right thinking members of the public would think the behaviour serious enough to attract criminal consequences. Since there was evidence upon which it was "open" to the District Court Judge to have found Mr Brooker's behaviour to have constituted

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14 *R v Brooker* (CA) at para [20]. In the view that *Melser* did not require reconsideration of the authorities under s 3D of the Police Offences Act, the appellate courts followed *R v Ceramalus* (Court of Appeal, CA 14/96, 17 July 1996).
15 At para [19].
16 At para [28].
17 At para [28].
18 At para [29].

disorderly behaviour within this meaning,[19] the appeal was dismissed in both the High Court and Court of Appeal.

[10] For the reasons I later develop, I am of the view that the courts appealed from have misconstrued s 4(1)(a) of the Summary Offences Act. I think they have gone astray in two principal respects.

[11] First, they treat s 4(1)(a) as protective of the privacy and feelings of the individual who is the subject of expressive conduct, even if the conduct is not disruptive of public order. I do not think that conforms to the meaning of s 4(1)(a). Other provisions of the criminal law and other civil law remedies protect privacy interests. Privacy in the home is an important value, recognised by art 17 of the International Covenant. It may properly lead to restrictions on freedom of expression, even if public order is not at risk. But s 4(1)(a) does not provide such protection. A broader view of "disorderly behaviour", unanchored to the public order purpose of the offence created by s 4(1)(a) and arrived at by balancing competing interests identified as deserving of protection by a judge after the event, is unnecessarily restrictive of freedom of expression and offends the principle that criminal law should be certain. As a result of the approach taken, I think the courts below insufficiently addressed the critical question whether Mr Brooker's behaviour was disruptive of public order.

[12] Secondly, I am of the view that the courts below were wrong to accept the *Melser* test for disorderly behaviour of seriousness measured against the tendency of behaviour to cause annoyance to those present. Unpopular expression will often be unsettling and annoying to those who do not agree with it. As Douglas J pointed out in speaking of the First Amendment to the United States Constitution, "a function of free speech under our system of government is to invite dispute":[20]

> It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it

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19 This is the language of the Court of Appeal which, being of the opinion that there was no other question of law, seems to have required the appellant to establish that the conclusion of "fact and degree" was not open on the evidence (and therefore an error of law on that basis).

20 *Terminiello v City of Chicago* 337 US 1 at p 4 (1949).

> presses for acceptance of an idea. That is why freedom of speech, though not absolute … is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest.

A tendency to annoy others, even seriously, is insufficient to constitute the disruption to public order which may make restrictions upon freedom of expression necessary.

Background to the appeal

[13] Mr Brooker believed the police constable had acted unlawfully towards him. She had obtained a search warrant which the police had then attempted to execute at Mr Brooker's house late on a Saturday night. The warrant authorised forensic examination of a car which proved not to be on the property. Since the forensic examination was for the purposes of a court case the following Monday and it seemed unlikely that any tests of the vehicle could be carried out in time, Mr Brooker believed that he had been the victim of an abuse of police power and that the constable's purpose had been to harass him. Whether that belief was well-founded is not a matter with which we are concerned. But it was the basis upon which Mr Brooker decided to make a public protest outside the constable's home.

[14] Mr Brooker went to the constable's address at about 9:20 am, knowing that she had been on night duty. His evidence was that he knocked on her door to make sure she was there. (She had not been at home at 4:30 pm the previous afternoon when he had first attempted his protest.) He continued knocking until the constable answered the door, the District Court Judge estimated three minutes after he had begun to knock. The constable had been woken up by his footsteps on the veranda as he walked up to the door. When she answered the door he made a remark to the effect that she obviously did not like being woken up. When she told him emphatically to leave, he withdrew to the grass verge on the road outside her house to begin his protest. The protest comprised displaying a sign facing the road saying "No more bogus warrants" and singing (in what was described by a police witness as a "normal singing voice") accompanied by guitar. The songs contained slogans such

as: “Safer communities together, Fiona”; “Freedom from unreasonable search and seizure”; “You just don’t know when to quit – no more 3 am visits, Fiona”; and “Too many bogus warrants, no more malicious prosecutions”. Before the singing began, the constable had already rung the police station. The first police officer was on the scene 15 minutes after Mr Brooker arrived. Two other police officers, one an Inspector, arrived shortly afterwards. After speaking to the complainant, the Inspector advised Mr Brooker that he would be arrested for intimidation if he did not leave. Mr Brooker held out his hands in response, apparently inviting handcuffs. It was pointed out to Mr Brooker that his car would be towed away if left on the grass verge and pavement where he had parked it. He moved the car and then returned. When asked to leave again, he refused and again held out his hands. He was then arrested for intimidation. The entire episode took perhaps 25 minutes, at the outside.

[15] The constable in her evidence did not complain about Mr Brooker’s activity so much as his presence. She felt he had no reason to turn up at her address. She was “shocked” to see him there. Her complaint to the police was that she didn’t want him at her address. She did not complain of any threatening or intimidatory comments, rather believing that Mr Brooker’s “mere presence on my address was intimidating” and “impeded” her “normal day of life”. There were no complaints about Mr Brooker’s conduct from members of the public using the street or neighbouring properties. There was no evidence that anyone else was aware of what was going on, although the District Court Judge inferred that the singing could have been audible to neighbours and in the grounds of a school across the road. Later that day, after being released from police custody, Mr Brooker spent some hours singing his protest outside the Greymouth police station without incident and without further arrest.

[16] Mr Brooker was first charged with loitering with intent to intimidate under s 21(1)(d) of the Summary Offences Act. That charge reflects the concerns expressed by the constable. As relevant to the charge laid, s 21(1)(d) provides:

> (1) Every person commits an offence who, with intent to frighten or intimidate any other person, or knowing that his or her conduct is likely to cause that other person reasonably to be frightened or intimidated, –

…

(d) Watches or loiters near the house or other place, or the approach to the house or other place, where that other person lives, or works, or carries on business, or happens to be;

…

(3) Every person who commits an offence against this section is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000.

[17] Mr Brooker pleaded not guilty in the District Court at Greymouth. After hearing the evidence, Judge Callaghan used s 43 of the Summary Proceedings Act 1957 to amend the charge by substituting for the charge of intimidation a charge of disorderly behaviour under s 4(1)(a) of the Summary Offences Act. The amendment was not the subject of a recorded ruling. It appears from the judgment on the substituted disorderly behaviour charge that the Judge ruled that the evidence did not demonstrate that Mr Brooker intended to intimidate the complainant, a necessary element of the original charge. As the Judge then put it:[21]

> rather the most that could be said was that he may have just wanted to annoy her by making it quite clear to her that he was protesting in respect of the issue of bogus search warrants with the particular emphasis on her conduct.

Whether the behaviour of Mr Brooker in making his protest on the grass verge outside the complainant's house amounted to "loitering" does not seem to have been separately considered.

[18] The hearing was adjourned after the amendment of the charge so that further evidence could be called at Mr Brooker's request. At the resumed hearing, Mr Brooker was convicted of behaving in a disorderly manner in a public place. He was fined $300 with court costs of $130.

[19] The Judge took the view that the off-duty police officer was properly to be regarded as "an ordinary member of the public".[22] "Right thinking members of the public" would, he thought, have considered Mr Brooker's actions in protesting

[21] At para [17].
[22] At para [23].

outside a "private residence" went "too far".[23] Mr Brooker had intended to "shame", "annoy", and "harass" the constable by bringing to the attention of her neighbourhood his view that she had acted unlawfully.[24] His actions in "taking this protest and acting in the way he did outside an off duty police constable's private residence" (where she and others within reasonable proximity could hear and observe his actions) were "an affront to recognised public standards of good conduct in a public place", and amounted to disorderly behaviour.[25]

[20] In the High Court, John Hansen J followed the Court of Appeal decision in *Ceramalus*. On that view, the test for disorderly behaviour established in *Melser* was unaffected by the enactment of the New Zealand Bill of Rights Act because the rights and freedoms it protects are weighed in application of the test. The District Court Judge was held to have correctly identified the legal test**,** although his reliance on *Christie* and his formulation of the test were not discussed. Hansen J agreed with the conclusion reached, treating the fact that the behaviour had taken place in a residential street as decisive:[26]

> While [the behaviour of Mr Brooker] would hardly have raised an eyebrow outside the Greymouth police station, in a residential neighbourhood it meets the requisite test and the Appellant's behaviour warrants the interference of the criminal law. Busking and most of the other protests referred to by the Appellant did not take place in a residential neighbourhood. In such a setting right thinking members of the public would be seriously offended by the Appellant's behaviour. In that area it was taking the right to protest too far.

[21] In coming to the conclusion that the further appeal should be dismissed, the Court of Appeal was influenced by the view it took that Mr Brooker's purpose was not principally to exercise his rights to express his opinions:[27]

> In the end, we think that it was open to the District Court Judge to conclude that the appellant's actions constituted the offence of disorderly conduct in conformity both with the existing authorities and the New Zealand Bill of Rights Act.
>
> The salient features of the case which lead us to that conclusion and to reject the arguments of the appellant are as follows:

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23 At para [32].
24 At para [31].
25 At para [32].
26 At para [24].
27 At paras [30] – [31].

> 1. The techniques which the appellant employed (display of a placard, the use of a guitar and singing and chanting) no doubt are common enough incidents of protest action (and indeed busking) but his actions in targeting a single individual at her home lie outside the range of accepted or recognised protest actions. Indeed they can be seen as more aligned with a rather different course of conduct, regrettably all too common, in which disaffected people set out to harass individuals in ways which are sometimes explicitly or implicitly threatening. In reaching this conclusion we note that the appellant knew that the policewoman had just come off night duty, he knocked on her door to ensure that she was there and his purpose was to harass and annoy her.
>
> 2. We accept that the appellant was, to some extent, expressing opinions about the policewoman's prior conduct (and in this sense his actions could be seen to involve the exercise of his rights under s 14, New Zealand Bill of Rights Act 1990). Rights under that section, however, may be subject to reasonable limits prescribed by law (as indeed is the case with laws of defamation). Perhaps more importantly, in this case the apparent exercise by the appellant of rights under s 14 were merely incidental to his primary purposes which were to annoy and harass the policewoman.
>
> 3. It is perfectly clear from the authorities that it is sufficient if one person observes or is affected by the conduct that is alleged to be disorderly. In this case the conduct was directed towards the policewoman and her reactions (entirely predictable we would have thought) were relevant in terms of the District Court Judge's evaluation of the appellant's conduct. In any event, a charge of disorderly conduct does not require evidence that a particular person was in fact annoyed or disturbed by the conduct complained of; rather it is the natural tendency of that conduct that is important.
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> 4. The features of the case that we have mentioned seem to us to take the conduct to a level in respect of which it was open to the District Court Judge to conclude that the intervention of the criminal law was warranted.

[22] I do not find the reasoning of the Court of Appeal easy to follow. It does not address the test used by the District Court Judge. The Court seems to suggest that because a targeted protest against an individual at home is "outside the range of accepted or recognised protest actions" (a proposition that is not further substantiated either on the basis of findings of fact or legal principle), the exercise of any right of freedom of expression by Mr Brooker was "merely incidental" to his "primary purpose" of annoying and harassing the policewoman. On this basis the Court clearly thought the right to freedom of expression was to be discounted to some extent in assessing whether the behaviour was disorderly. The fact that the protest was "incidental" was one of two features identified as "salient" (the other being the "predictable" reaction of the police constable) which took the conduct "to a level in respect of which it was open to the District Court Judge to conclude that the

intervention of the criminal law was warranted". The Court does not discuss the implications of its view that whether rights of freedom of expression are engaged depends on an assessment of the motives of the speaker and the quality of the speech. Care is needed in using qualitative assessments in limiting a right that is broadly expressed as protecting the right to express "information and opinions of any kind in any form".[28] The view taken by the Court of Appeal that Mr Brooker's exercise of freedom of speech was "incidental" to his wish to annoy or harass the constable seems hardly consistent with the findings of the District Court Judge set out in paras [17] and [19] above which make it clear that the message to the neighbourhood about the bogus warrants was the very behaviour which caused annoyance to the constable. It was expression which was unwelcome and no doubt was annoying – even seriously annoying – but it did not lose the character of protected expression simply because it was predictable that it would annoy the constable.

[23] Although the Court of Appeal allows that it is the tendency of conduct objectively assessed according to the standards of "members of the public" that is important,[29] the "predictable" reactions of the policewoman were identified as the second salient feature which justified the conclusion that Mr Brooker's conduct was disorderly.[30] This is close to suggesting that whether the offence has been committed turns on whether the "natural tendency" of the expressive conduct is to cause annoyance or disturbance to the person who is its subject. That is not what *Melser* suggests. In *Melser*, the "right-thinking person" was a proxy by which the judges arrived at an objective measure of the minimum standards of orderly conduct in a public place, enforced by criminal sanction. *Melser* did not suggest that the subjective reaction of those referred to or directly implicated by expression of view was sufficient measure of disorder, even if "entirely predictable". While McCarthy J referred to the embarrassment of the Speaker and members of the House of Representatives, the test he was using was the objective one of whether a right thinking person would consider that causing such embarrassment offended proper

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28 *Levy v State of Victoria* (1997) 146 ALR 248 at p 274 (HCA) per McHugh J; *Committee for the Commonwealth of Canada* [1991] 1 SCR 139 at p 182 per L'Heureux-Dubé J. Compare *Watson v Trenerry* (1998) 122 NTR 1 at p 6 (CA) per Angel J; p 14 per Mildren J.

29 At para [19].

standards of conduct in a public place and warranted the intervention of the criminal law. The Court of Appeal focus in the present case on the "entirely predictable" reactions of the police constable may have skewed its assessment from the objective impact on public order.

"Disorderly behaviour" under s 4(1)(a) of the Summary Offences Act 1981 is behaviour disruptive of public order

[24] The meaning of s 4(1)(a) must be ascertained from its text and in the light of its purpose.[31] The indications provided in the Summary Offences Act provide important context.[32] In addition, if an enactment can be given a meaning consistent with the right to freedom of expression, that meaning is to be preferred to any other.[33] Other aids to interpretation include the wider legislative and common law context and any relevant legislative history. In my view, all suggest that disorderly behaviour under s 4(1)(a) means behaviour seriously disruptive of public order. Simply causing annoyance to someone else, even serious annoyance, is insufficient if public order is not affected.

(i) The derivation of s 4(1)(a)

[25] The offence of disorderly behaviour has been part of New Zealand legislation since 1924. The former legislation, the Police Offences Acts of 1884 and 1908, made it an offence to:[34]

> [use] any threatening, abusive, or insulting words or behaviour in any public place … within the hearing or in the view of passers by, with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned.

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30 Although the judgment lists three considerations, the first and second are aspects of the same point.
31 Section 5(1) of the Interpretation Act 1999.
32 Section 5(2) and (3) of the Interpretation Act.
33 Section 6 of the New Zealand Bill of Rights Act.
34 Section 3(29) of the Police Offences Act 1884; s 3(ee) of the Police Offences Act 1908.

[26] Section 2 of the Police Offences Amendment Act 1924 dropped the reference to likely breaches of the peace and introduced the concept of disorderly behaviour. By it, it was an offence to behave "in a riotous, offensive, threatening, insulting, or disorderly manner" in or in view of any public place. The same provision was retained in s 3(ee) of the Police Offences Act 1927, when the 1908 Act was repealed.

[27] Most of the authorities relied upon in the District Court and on appeal as to the meaning of s 4(1)(a) of the Summary Offences Act were decided under s 3D of the Police Offences Act 1927. It was enacted in 1960,[35] in substantial re-enactment of the earlier s 3(ee) of the 1908 Act. Section 3D provided:

> **3 Riotous, etc., behaviour in public place**
>
> (1) Every person commits an offence, and is liable to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred pounds, who in or within view of any public place as defined by section 40 hereof, or within the hearing of any person therein, behaves in a riotous, offensive, threatening, insulting, or disorderly manner, or uses any threatening, abusive, or insulting words.

[28] The Summary Offences Act 1981 repealed this general provision. The Minister of Justice, in moving the introduction of the Bill, indicated that, because the Police Offences Act set limits "on how we can behave and what we can say in a public place", and because of "its potential reach into the area of free speech", these laws were "of central importance to our criminal and constitutional law".[36] He referred to the significant amount of criticism directed at the breadth of the sections governing public behaviour and gave, as an example, the "well-known section 3D dealing with disorderly behaviour". In response to criticisms such as these, the Bill split the offence of disorderly behaviour into two separate offences:

- those where "serious public disturbance with violent overtones" is in prospect and where it was thought undesirable to leave matters on the basis of "conduct that caused annoyance of a rather indeterminate nature";[37] and

35 By the Police Offences Amendment (No 2) Act 1960.
36 Hon J K McLay MP (16 June 1981) 437 NZPD 418.
37 At pp 418 – 419.

- minor offences, punishable by fine only, where the offence could "properly be expressed in somewhat wider terms".[38]

(ii) The text of ss 3 and 4 of the Summary Offences Act 1981

[29] As enacted, the two separate offences are contained in ss 3 and 4 of the Summary Offences Act. They are found under the heading "Offences Against Public Order", and relevantly provide:

> **3 Disorderly behaviour**
>
> Every person is liable to imprisonment for a term not exceeding 3 months or a fine not exceeding $2,000 who, in or within view of any public place, behaves, or incites or encourages any person to behave, in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue.
>
> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
>
> (c) In or within hearing of a public place,—
>
> (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
>
> (ii) Addresses any indecent or obscene words to any person.

[30] The reform of the previous law achieved by the Summary Offences Act divides disorderly behaviour into the more serious offence where violence is likely (where it is associated with "riotous, offensive, threatening, insulting" behaviour), and the lesser offence (associated with "offensive" behaviour only), where it is not necessary to establish the likelihood of violence. There are three points to be made about this gradation.

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38 At p 419.

[31] First, I do not think the word "disorderly" can have a different meaning in ss 3 and 4.[39] The additional element of seriousness in s 3 arises from the likelihood of violence. As the heading "Offences Against Public Order" suggests, and as the word "disorderly" itself conveys, disorderly behaviour is behaviour which disturbs public order. If the behaviour comprises an expression of opinion, it is not sufficient if it annoys or even wounds the feelings of the person addressed unless it is disruptive of public order. In *Coleman v Power*, the High Court of Australia was divided on the question whether the offence of using insulting words (under a provision equivalent to s 3D of the Police Offences Act)[40] required the likelihood of a breach of the peace.[41] But it was in agreement that the legislation served "public, not private purposes".[42]

[32] A similar conclusion was reached by the Supreme Court of Canada in considering what constitutes the offence of causing a disturbance in or near a public place under s 175(1)(a) of the Criminal Code.[43] The Court rejected the submission that emotional disturbance was sufficient. In this conclusion, the Court thought it significant that the offence was confined to acts in or near a public place:[44]

> Had Parliament sought to protect society from annoyance and anxiety, the section would not be confined to acts occurring in or near a public place, nor would it single out particular forms of objectionable conduct – many other types of conduct disturb us.

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39 A view taken in relation to "insulting behaviour" by Gleeson CJ in the High Court of Australia in *Coleman v Power* (2004) 220 CLR 1 at para [5].

40 Section 7 of the Vagrants, Gaming and Other Offences Act 1931 (Qld) provides:
(1) Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear –
  (a) sings any obscene song or ballad;
  (b) writes or draws any indecent or obscene word, figure, or representation;
  (c) uses any profane, indecent, or obscene language;
  (d) uses any threatening, abusive, or insulting words to any person;
  (e) behaves in a riotous, violent, disorderly, indecent, offensive, threatening, or insulting manner;
shall be liable to a penalty of $100 or to imprisonment for 6 months …

41 Gummow, Kirby and Hayne JJ held that it did, to avoid unacceptably eroding the constitutional right to express political views. Gleeson CJ, McHugh, Callinan and Heydon JJ held it did not, influenced in particular by the fact that the Australian legislation had removed the earlier requirement of breach of the peace (as the New Zealand legislation had also done).

42 Gummow and Hayne JJ at para [179]. See also Gleeson CJ at para [32]; McHugh J at para [35]; Kirby J at para [224]; Callinan J at paras [296] – [297]; Heydon J at para [324].

43 *R v Lohnes* [1992] 1 SCR 167. Section 175(1)(a) of the Canadian Criminal Code made it an offence to cause a disturbance "in or near a public place" by "fighting, screaming, shouting, swearing, singing or using insulting or obscene language".

44 At para [22].

> … By addressing “disturbance” in the public context, Parliament signaled that its objective was not the protection of individuals from emotional upset, but the protection of the public from disorder calculated to interfere with the public’s normal activities.

[33] The line which divided the High Court of Australia in *Coleman v Power* has been drawn by the legislation in New Zealand. It is clear that behaviour which is disorderly under s 4 need not be likely to lead to violence because behaviour likely to cause that effect is covered by s 3. What is essential however is that the behaviour is disruptive of public order and is not simply a private affront or annoyance to a person present or to whom the behaviour is directed.

[34] The second point to be made about s 4(1)(a) is that, although it describes an offence properly characterised as minor, it is nevertheless a criminal offence. A person thought to be behaving in a disorderly manner may be arrested without warrant. The existence of the offence impacts directly on personal freedom and liberty and has the capacity to be a tool to control unpopular and unwelcome speech. In particular, the power to arrest permits prior restraint of freedom of expression. It would therefore be wrong to be complacent about an expansive meaning of s 4(1)(a) because the penalty for transgression is a fine only. It is an offence which is capable of significant impact upon important freedoms.[45]

[35] The third point to be made is that while the offences contained within s 4 overlap to some extent, they describe a general scheme. Section 4 subdivides aspects of behaviour formerly lumped together with disorderly behaviour in s 3D of the Police Offences Act. In some cases it adds an additional element to a particular offence which could be undermined if an expansive meaning is given to an overlapping offence under the section which does not contain the additional element. So, words addressed in a public place to any person, if not indecent or obscene, are not an offence under s 4(1)(b) or (c) unless they are *intended* to “threaten, alarm, insult, or offend” the person to whom they are addressed, or unless they are *themselves* words properly characterised as “threatening or insulting” *and* are used

[45] Including the right to freedom of movement and right to peaceful assembly, in ss 16 and 18 of the New Zealand Bill of Rights Act respectively.

recklessly as to whether they alarm or insult. I do not think disorderly behaviour under s 4(1)(a) can consist solely of words directed at any person without the identified intent or recklessness, even if their effect is to "threaten, alarm, insult, or offend" or even if the words themselves can be properly characterised as "threatening or insulting". I accept that behaviour covers both the words used and the manner in which they are used. But unless there is something additionally disruptive of order about the manner of expression, words which are predictably annoying to the person to whom they are directed would otherwise amount to disorderly behaviour on a lower standard than is provided for in s 4(1)(b) or (c).

(iii) The wider context

[36] As indicated, I think it clear from the structure and language of the Summary Offences Act that the offence of disorderly behaviour protects public order. I also think the same conclusion is prompted by wider contextual considerations: the general protections provided by law for values other than public order; the uncertainty of the scope of the offence if not confined to preservation of public order (an uncertainty which is both inconsistent with basic principle in criminal law and which erodes freedom of expression); and the distortion entailed by judicial identification and application of values to restrict rights under the New Zealand Bill of Rights Act.

[37] Many provisions of our law are designed to protect interests and values which qualify the scope of the rights contained in the New Zealand Bill of Rights Act. Thus s 21(d) of the Summary Offences Act (under which Mr Brooker was first charged) protects against unlawful interference with the home, an aspect of privacy interests recognised in art 17 of the International Covenant as permitting restriction of the scope of freedom of movement and freedom of expression.[46] In *Hosking v Runting*,[47] Gault P and Keith J reviewed the statutory provisions which provide

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46 Article 17 provides:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference and attacks.

47 [2005] NZLR 1 at paras [91] – [107] and [185] – [201].

protection for privacy interests in New Zealand. So, the Trespass Act 1980 makes it an offence to trespass after being warned to leave by the occupier of premises or after being warned to stay off.[48] The Harassment Act 1997 recognises that behaviour which may seem trivial in isolation may amount to harassment when seen in context.[49] It provides protection through criminal offences and civil remedies, including restraining orders. Acts capable of constituting harassment include loitering near or watching a person's place of residence or making contact in any way with a person.[50] To constitute harassment, the specified conduct must occur on at least two separate occasions within a period of 12 months.[51] In addition, as the judgment in the Court of Appeal in the present case notes,[52] civil remedies under the general law of defamation are available to those who are defamed. This framework of legal protection is part of the context in which s 4 of the Summary Offences Act falls to be considered. It suggests that an expansive meaning of s 4(1)(a), unconnected to public order, is unnecessary.

[38] A narrower interpretation of "disorderly behaviour", anchored in disruption of public order, is also more consistent with the fundamental principle that criminal law must be predictable. That was a consideration which influenced the Supreme Court of Canada in concluding in *Lohnes* that a public "disturbance" was an overt disturbance of the use of public space, rather than the creation of emotional upset in those present. McLachlin J, for the Court, took the view that the interpretation was driven by the principle of legality "which affirms the entitlement of every person to know in advance whether their conduct is illegal".[53] Imprecision in the criminal law which leaves it to judges to identify what is deserving of penalty is inconsistent with the rule of law for reasons also identified by the Permanent Court of International Justice in the *Danzig Legislative Decrees* case:[54]

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48 Sections 3 and 4.
49 Section 6(1).
50 Section 4.
51 Section 3.
52 At para [31].
53 At p 180.
54 *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (Advisory Opinion) 1935 serié A/B, No 65, 39 at p 53; referred to by Lewin in an article on the Summary Offences Act: "Spirit of reform …?" (1986) 16 VUWLR 55. See generally Ashworth, *Principles of Criminal Law* (5th ed, 2006), p 405.

> [A] man may find himself placed on trial and punished for an act which the law did not enable him to know was an offence, because its criminality depends entirely upon the appreciation of the situation by the Public Prosecutor and by the judge.

[39] In the same vein, the European Commission of Human Rights was of the opinion that the expression "prescribed by law"[55] (used in art 19 of the International Covenant to indicate how the qualified right to freedom of expression may be restricted) leads to two requirements: first, that the law be adequately accessible to citizens; secondly, that it "be formulated with sufficient precision to enable the citizen to regulate his conduct and foresee with reasonable certitude the consequence which a given action may entail".[56] If it is impossible to know whether conduct expressing a particular view or conveying information constitutes an offence, freedom of expression is inhibited.[57] The more elastic the meaning, the wider the discretion left to enforcement officers and the greater the difficulty of any check for legality after the event.

[40] Moreover, I have misgivings about whether it is open to the courts (which are bound by s 3 of the New Zealand Bill of Rights Act) to adjust the rights enacted by Parliament by balancing them against values not contained in the New Zealand Bill of Rights Act, such as privacy,[58] unless the particular enactment being applied unmistakably identifies the value as relevant. If "disorderly behaviour" is not anchored to protection of order in and near public places and can be used to protect other values identified by the judge, the register of rights and freedoms contained in the New Zealand Bill of Rights Act may well be distorted.[59]

(iv) Conclusion

[41] It is consistent with the right of freedom of expression that restrictions on that right may be imposed where necessary to protect interests such as privacy or

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55 In art 10(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221. The same expression is found in s 5 of the New Zealand Bill of Rights Act, with which we are not in my view directly concerned in the present appeal.

56 *Steel v United Kingdom* (1998) 28 EHRR 603 at p 627. See also *Hashman v United Kingdom* (1999) 30 EHRR 241 at p 256.

57 See Keith, "The Right to Protest" in Keith (ed), *Essays on Human Rights* (1968) 49, p 51.

58 See *Hosking v Runting* at para [181] per Keith J.

59 See *R v Central Independent Television Plc* [1994] Fam 192 at p 203 per Hoffmann LJ (CA).

residential quiet, as art 19 of the International Covenant permits. But s 4(1)(a) is not designed for that end. It exists for the purpose of preservation of public order, not to protect privacy or personal sensitivities alone. Other criminal provisions protect these values to the extent that the legislature has considered necessary. Section 4(1)(a) of the Summary Offences Act cannot be used as a grab-bag to scoop up any behaviour thought to be deserving of condemnation through criminal law, unless the behaviour is disruptive of public order. To constitute disorderly behaviour under s 4(1)(a) there must be an objective tendency to disrupt public order, by behaviour or because of the effect of words used. Whether behaviour is disorderly is not to be assessed against the sensibilities of individuals to whom the behaviour is directed or who are present to see and hear it, but against its tendency to disrupt public order.

Disorderly behaviour must be seriously disruptive of public order: creation of annoyance is not enough

[42] As foreshadowed in para [12], I consider that the meaning of disorderly behaviour adopted in *Melser v Police* does not comply with s 6 of the New Zealand Bill of Rights Act. It is more restrictive of freedom of expression than is necessary in protection of public order. I accept that what disrupts public order cannot be divorced from the circumstances and ultimately entails a value judgment. But its measure must not be too nice. I agree with the views expressed by Douglas J in *Terminiello v Chicago*: freedom of speech should be restricted for reasons of public order only when there is a clear danger of disruption rising far above annoyance.

[43] McLachlin J, speaking for the Supreme Court of Canada in *Lohnes*, made the point that a commitment to freedom of speech requires toleration of much activity in the streets which disturbs and annoys others sharing the public space or in its vicinity. She suggested it was necessary that the behaviour, to be criminal, should be such as to lead to "some external manifestation of disorder in the sense of interference with the normal use of the affected place".[60] The Supreme Court of

[60] At p 181.

Canada took the view that in providing for offences of disorderly behaviour, Parliament had in mind "not the emotional upset or annoyance of individuals, but disorder and agitation which interferes with the ordinary use of a place".[61] It was "far from self-evident that the goal of peace and order in our public places requires the criminal law to step in at the stage of foreseeability of mental annoyance". The conduct must rather cause "an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question".[62]

[44] In *Coleman v Power*, Gleeson CJ, while disagreeing with the view that insulting words must amount to "fighting talk" likely to provoke a breach of the peace, nevertheless considered that:[63]

> In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence.
>
> … Intimidation and bullying may constitute forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute. However, the degree of personal affront involved in the language, and the circumstances, may be significant.

[45] I have found these views helpful. Behaviour which amounts to intimidation, victimisation, or bullying is disruptive of public order even if no violence is reasonably in prospect.[64] Such behaviour is likely to alarm or be seen as threatening by those present. It is likely to cause others to withdraw from or avoid the area and it is behaviour which inhibits normal public use of the place.

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61 At p 179.

62 At p 177.

63 At paras [12] and [15] respectively.

64 It is not necessary for the conduct to give rise to a likelihood of violence, because s 3 of the Summary Offences Act is directed to preventing that measure of disruption. For that reason, the reasoning of the majority in the High Court of Australia in *Coleman v Power* in interpreting "insulting language" as language likely to give rise to a breach of the peace (in order to protect the constitutional right of freedom of political expression) is not directly applicable to s 4(1)(a).

[46] Such a standard for disorderly behaviour is I think consistent with the scheme of s 4(1) of the Summary Offences Act. Where criminal liability attaches under s 4(1)(b) to words addressed to another person, they must be intended to "threaten, alarm, insult, or offend that person". Where criminal liability attaches under s 4(1)(c) the words themselves must be "threatening or insulting" and they must be used recklessly as to whether they cause any person to be "alarmed or insulted by those words". In each of these provisions, the word "insult" is associated with "alarm" and "threat" and must comprehend comparably serious effect. The effects of alarm or apprehension of threat therefore provide some measure for what behaviour is disorderly, given that the penalty for the three offences under s 4(1) is the same. The culpability provided for would not be comparable if the effect produced by disorderly behaviour is simply annoyance or embarrassment.

[47] I accept that in a residential area interference with the "ordinary and customary use" of the area may be more readily created than in a shopping mall or outside a railway station. The victimisation or bullying inherent in a sustained or intrusive targeted protest against a particular home is likely to disrupt public order in the sense of causing alarm or perception of threat. But a peaceful protest or picket which is simply annoying or embarrassing and which does not seriously interfere with use of the neighbourhood by others does not become disorderly simply because it is conducted in a residential street.[65]

Was Mr Brooker's protest disorderly behaviour?

[48] For the reasons given, I am of the view that courts below did not focus on the critical question whether Mr Brooker's behaviour was disruptive of public order and applied the wrong standard for disorderly behaviour. Their approach was in error of law. I would allow the appeal on this basis. The matter does not seem to me to warrant rehearing and I would quash the conviction.

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65 In *Frisby v Schultz* 487 US 474 at p 480 (1988) per O'Connor J the Supreme Court of the United States affirmed that the right to protest in the street is not limited to non-residential areas.

[49] It is strictly speaking unnecessary, given the approach I take, to express a conclusion on the question of whether the behaviour was disorderly. Since other members of the Court have divided on this point, however, I think it appropriate to indicate that, had the matter been approached correctly, I am of the view that a conviction could not have been entered. My reasons for this assessment do not differ in substance from those expressed by Blanchard and Tipping JJ. They can be put shortly.

[50] The protest itself was not sustained for long. It began after Mr Brooker had retreated to the street immediately after being told to leave. It seems to have lasted approximately 15 minutes. I do not agree that the behaviour can properly have included Mr Brooker's knocking on the door to ascertain whether the constable was at home. The inference that he deliberately woke the constable up is not one I would be prepared to draw from the evidence. And it is significant that the District Court Judge did not.[66] While the constable said she felt intimidated while Mr Brooker was outside her house, it is clear that her concern was with his presence rather than with his behaviour. In any event, I do not think his behaviour can be characterised as intimidatory on any objective view. He immediately left the property and withdrew to the roadside when told to leave. The District Court Judge held that Mr Brooker did not intend to intimidate the constable (had he such intent, the charge under s 21 of the Summary Offences Act would have been maintained). There is no suggestion that any of the messages Mr Brooker was conveying were in themselves objectively alarming or threatening. They were expressed without abuse or bad language and with apparent good humour. They were delivered in a "normal singing voice" and so were not unduly coercive or intrusive in volume. There was no evidence of

[66] The suggestion was not put to Mr Brooker. He had attempted to find the constable at 4:30 pm the previous afternoon both at her house and at the police station. That does not suggest that waking her up was an intended part of his protest. While Mr Brooker had been told at the police station the preceding afternoon that she would be coming on night duty (and decided that a protest at night outside the police station would not suit his purpose of making a public protest), I do not think it can be confidently inferred that he expected the constable to be asleep at 9:20 am. Mr Brooker did realise when she came to the door that the constable had been asleep. But his remark that she did not like being woken up may have been a comment on her immediate reaction to him. Such matters cannot properly be resolved on appeal.

disruption to use of the road; Mr Brooker immediately moved his car when told it was in the way. The behaviour occurred during the daytime. There is no evidence that members of the public were aware of the protest, much less that they were alarmed or disturbed in their use of the neighbourhood by it. The police officers who responded to the constable's telephone call did not give evidence of any disturbance of public order. If it had been necessary to do so, I would on this basis also have allowed the appeal and quashed the conviction.

BLANCHARD J

[51] This appeal requires the Court to consider when behaviour which involves protest action can properly be called disorderly for the purposes of a conviction under s 4(1)(a) of the Summary Offences Act 1981. Section 4 reads in relevant part:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place, behaves in an offensive or disorderly manner; or
>
> (b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or
>
> (c) In or within hearing of a public place,—
>
> (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or
>
> (ii) Addresses any indecent or obscene words to any person.
>
> (2) Every person is liable to a fine not exceeding $500 who, in or within hearing of any public place, uses any indecent or obscene words.

[52] The section deals with offending which can be truly described as minor. It is one of a number of provisions grouped under the collective heading "Offences Against Public Order". Subsection (1) subjects a convicted person to no more than a fine of a maximum amount of $1,000, the same maximum penalty as is prescribed

for fighting in a public place.[67] It can be seen from that modest level of penalty and from the position in which the section appears in the statute that it is intended to provide the sanction of a criminal penalty for conduct regarded by the legislature as deserving of condemnation and punishment but falling at the least significant end of the spectrum of criminal offending. In contrast, when behaviour in or within view of a public place is "riotous, offensive, threatening, insulting, or disorderly" and "is likely in the circumstances to cause violence against persons or property to start or continue" (in other words, a breach of the peace), the conduct is regarded more seriously and under s 3 of the same Act can attract a prison term not exceeding three months or a maximum fine of $2,000.

[53] For conduct to come within s 4 it must have a public element. Under para (a), it is not enough that the conduct is offensive or disorderly. It must have occurred in or within view of a public place. Under para (b), words addressed to a person intending to threaten, alarm, insult or offend them must have been said in a public place. Under para (c), if threatening or insulting words were used with recklessness as to whether they caused alarm or insult, they must have been so used in or within hearing of a public place; so must any indecent or obscene words addressed to a person. Mere use of indecent or obscene words, without the relevant intent and not addressed to any person, is punishable under subs (2) only if done in or within hearing of a public place, and then subject to a maximum fine of only $500. The behaviour intended to be proscribed by s 4(1) is thus less serious than conduct which is likely to cause a breach of the peace but more blameworthy than the mere utterance of indecent or obscene words in or within hearing of a public place.

[54] Section 4(1)(a), like s 3, distinguishes between behaviour which is offensive and that which is disorderly. The two words are not synonyms but obviously some behaviour could be both disorderly and offensive at the same time. In terms of maximum penalty the sections treat each type of conduct as of potentially the same seriousness.

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[67] Section 7.

[55] Both words bear their ordinary meanings in everyday speech. Behaviour which is offensive is behaviour in or within view of a public place which is liable to cause substantial offence to persons potentially exposed to it. It must, in my view, be capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs.[68]

[56] Disorderly behaviour is not necessarily offensive in that way. It is behaviour which disturbs or violates public order. To fall within s 4(1)(a) it must be behaviour in or within view of a public place which substantially disturbs the normal functioning of life in the environs of that place. It must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors.

[57] Whether behaviour can truly be characterised as disorderly therefore depends not only upon what the defendant says and does but also upon when and where the behaviour occurs and its effect on the lives of other people. Whilst the meaning of "disorderly behaviour" is constant, the application of that expression will adjust to the circumstances. Something which could not properly be seen as a disorderly act when done in a public place during daylight hours may be in breach of s 4(1)(a) if done there in the middle of the night; and it is likely to take less to disturb public order in a quiet suburban street than in a busy city square. I would observe that it is not just in locations which are entirely residential that public order may be more easily found to have been disturbed to a degree meriting the sanction of the criminal law during the hours when people in general have a heightened expectation that their sleep will not be intruded upon by noisy activity. The Canadian Supreme Court in *R v Lohnes*[69] said that the court must "weigh the degree and intensity of the conduct complained of against the degree and nature of the peace which can be expected to prevail in a given place at a given time".

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68 *O'Brien v Police* (High Court, Auckland, AP 219/92, 24 September 1992).
69 [1992] 1 SCR 167 at p 180.

[58] In a typical incident leading to a charge of disorderly behaviour, for example where the defendant behaves in a drunken and noisy manner in a public place, there will be no Bill of Rights dimension. The court merely determines whether, bearing in mind the seriousness of any criminal conviction, in all the circumstances the defendant's conduct in or in view of the particular public place can properly be described as causing a substantial disturbance to persons in the environs of that place at the time in question.

[59] But when the behaviour in question involves an exercise of the right to convey information or express an opinion,[70] which is protected by s 14 of the New Zealand Bill of Rights Act 1990, or engages some other right guaranteed by that Act there is a further and most important consideration. A characterisation of the behaviour of the defendant as disorderly then cannot be made without an assessment against the overriding requirement of s 5 of the Bill of Rights that the exercise of any guaranteed right may be subjected only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The value protected by the Bill of Rights must be specifically considered and weighed against the value of public order. The court must ask itself whether treating the particular behaviour in the particular circumstances as disorderly constitutes a justified limitation on the defendant's exercise of the right in question. As a result, public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour. The manner in which the defendant chose to exercise the right and the time and place are of course relevant to that inquiry.

[60] As discussed above, the fact that s 4(1)(a) is concerned with behaviour in or within view of a public place necessarily influences the meaning of "disorderly". In this instance, as will often be the case, the public place was a street. Members of the public are ordinarily entitled to use a public street for any purpose consistent with the passage of vehicles and persons.[71] Streets are also customary places for people to gather and to exchange their opinions, sometimes in the form of protest action. That will be a more common activity in some street locations than in others. The exercise

[70] Something going beyond mere vulgar abuse.
[71] *Director of Public Prosecutions v Jones* [1999] 2 AC 240.

of the s 14 right in the form of a protest is not confined to non-residential streets.[72] However, what has to be borne by residents in an exclusively or predominantly residential area will be less than in areas where there is little or no residential character. This is because the common law has long recognised that men and women are entitled to feel secure in their homes, to enjoy residential tranquillity – an element of the right to privacy. They are justifiably entitled not to be subjected there to undue disturbance, anxiety or coercion.[73] The State's interest in protecting the well-being, tranquillity, and privacy of the home has been described by the United States Supreme Court as "certainly of the highest order in a free and civilized society".[74] It may be an important consideration in assessing whether the conduct of a defendant has disturbed public order and is therefore in breach of the statutory prohibition on disorderly behaviour.

[61] In considering whether behaviour in the nature of a protest is disorderly in terms of s 4(1)(a), a court should weigh the manner but not the content of the expression. If the concern is that what was said and done was offensive to those affected by the protest in the sense and to the degree described in para [55] above, the charge should be one of offensive behaviour. At the extreme, other provisions of the criminal law could be invoked, for example where there are expressions of racial or ethnic hatred.[75]

[62] Nor is activity disorderly merely because it is directed at an individual as the target of a protest, whether personally or as a representative of some organisation. It is in the nature of protest that it is targeted; as Thomas J remarked during argument in this case, the purpose of protest is to make someone listen to something they do not want to hear.

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72 "[A] public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood": *Frisby v Schultz* 487 US 474 at p 480 (1988) per O'Connor J, delivering the opinion of the United States Supreme Court.

73 In *Frisby* at p 493 Brennan J said in his dissenting opinion, in which Marshall J joined:

> A crowd of protesters need not be permitted virtually to imprison a person in his or her own house merely because they shout slogans or carry signs. But so long as the speech remains outside the home and does not unduly coerce the occupant, the government's heightened interest in protecting residential privacy is not implicated.

74 *Carey v Brown* 447 US 455 at p 471 (1980) per Brennan J, delivering the opinion of the Court.

75 See s 131 of the Human Rights Act 1993; *King-Ansell v Police* [1979] 2 NZLR 531 (CA).

[63] Section 4 and its predecessors have always been easier to explain or interpret in the abstract, as I have attempted to do, than to apply to the facts of an individual case. The difficulty increases for a trial judge when there is a need to factor in a provision of the Bill of Rights. Little guidance can now be obtained from pre-Bill of Rights cases. The leading case in that period involving protest action was the decision of the Court of Appeal in *Melser v Police*,[76] in which the common theme in two of the judgments affirming the convictions was that the defendants' behaviour was "of a character which is likely to cause annoyance to others who are present"[77] or "conduct at least causing annoyance to well-conducted citizens".[78] That, it seems to me, is an inappropriate test of what is disorderly behaviour, especially in a case involving protest action. It would criminalise behaviour which, while impolite or inconsiderate to other persons, is not necessarily a cause of public disorder. McCarthy J was minded to require something more, for his test was that the defendant's conduct must have been "likely to cause a disturbance or to annoy others considerably".[79] That formulation is also unsatisfactory, even in cases which do not involve the Bill of Rights, because it does not sufficiently recognise that someone should not be convicted of disorderly behaviour unless there has been a substantial disruption of public order in or about a public place, although that disruption does not have to have created or been likely to create a breach of the peace. Causing annoyance, even considerable annoyance, to citizens does not suffice. I should perhaps make it clear, however, that in criticising the tests enunciated in *Melser* I am not expressing a view on the result in that case on its own facts.

[64] In the course of time trial courts will be informed by a body of individual cases applying s 4(1)(a) to differing factual situations. It may be that in the meantime there will be room for the minds of judges to differ as to results, as they clearly have done in the present case. But, as I have already indicated, I see that as inevitable, at least at the present stage of our legal development, when courts are confronted with provisions such as s 4(1) which address a potentially wide range of factual situations using everyday language which is relatively imprecise.

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76 [1967] NZLR 437.
77 At p 443 per North P.
78 At p 444 per Turner J.
79 At p 446.

[65] I come, then, to the case now before the Court. The salient features are these. Mr Brooker was intent on voicing an opinion about police behaviour in general and the behaviour towards him of Constable Croft in particular. His primary purpose may have been, as the courts below have thought, simply to annoy the police constable and to get his own back, but what he did was undoubtedly motivated materially by the wish to bring home to her his disapproval of her conduct in obtaining a search warrant which she had intended to execute at his home some time previously. His protest occurred in the residential area outside her home at about 9:20 am on a weekday morning. He had a placard which proclaimed "Stop the bogus warrants". His action continued for about 15 minutes before being brought to an end by his arrest. It was not an especially noisy protest. Mr Brooker sang in a normal singing voice (one police witness said "louder than talking but quieter than shouting") and he played his guitar, which apparently was not amplified. There was no use of a loudspeaker or megaphone, which I consider to be of some significance where a protest occurs in a residential area.

[66] I agree with the Crown's submission that the behaviour in question included Mr Brooker's action of knocking on the front door of the house. That door was close to and in view of the street. Mr Brooker knocked on the door for at least three minutes to attract Constable Croft to the door. She was certainly disturbed in her enjoyment of the security and tranquillity of her home by the knocking on the door and by the serenade which followed but there is no evidence that anyone else was disturbed or was even aware of what was occurring. The constable said she felt intimidated while Mr Brooker was outside her home. She said she was not prepared to leave her home because if she personally went out to remonstrate with him, the situation might escalate. There is, however, nothing in the evidence suggesting that Mr Brooker would have tried to prevent her from leaving or indeed that she ever contemplated doing so. She herself has in essence described a situation in which she was very annoyed by Mr Brooker's behaviour. To call Mr Brooker's behaviour objectively intimidating is really a misdescription, particularly since he had immediately retreated to the footpath when the constable told him to "piss off".

[67] The feature which has caused concern in the lower courts is that Mr Brooker deliberately woke Constable Croft up. He had been told the previous day that she

was starting night shift at 10:00 or 11:00 pm that evening. He knew she was likely to be asleep in the morning. The District Court Judge found that when she came to the door, Mr Brooker said "you are on night shift and you do not like being woken up".[80] It should be noted that Constable Croft said she had actually woken up when he walked onto the porch and before he started knocking, and that Mr Brooker said he heard her moving in the house, so his continued knocking was to get her to the door (she was dressing) rather than to get her awake. Nonetheless it is plain enough that Mr Brooker intended to begin his protest by waking the constable from her sleep.

[68] The District Court Judge said that Constable Croft was intimidated.[81] But, it seems to me that her state of mind is more accurately described as one of anger and an unwillingness to leave the house to remonstrate with Mr Brooker in the street lest that should inflame him. The Judge had earlier found that an initial charge under s 21 of the Summary Offences Act involving intentional intimidation was not appropriate. He had amended the information to the charge of disorderly conduct. The Judge also referred to the protest being designed to annoy or harass the constable,[82] as did the Court of Appeal.[83] As to that, I have already concluded that conduct which merely causes annoyance is not aptly characterised as disorderly. Furthermore, what Mr Brooker did does not come within the ordinary meaning of "harass":[84]

> Trouble by repeated attacks. Now freq., subject to constant molesting or persecution.

It should be noted that Mr Brooker's conduct certainly did not constitute harassment as defined in the Harassment Act 1997.[85] This requires a "pattern of behaviour" directed against another person, which includes doing any "specified act"[86]on at least two separate occasions within a period of twelve months.

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80 *Police v Brooker* (District Court, Greymouth, 30 June 2003, Callaghan DCJ) at para [13].
81 At para [12].
82 At para [31].
83 *R v Brooker* (2004) 22 CRNZ 162 at para [31].
84 *Shorter Oxford English Dictionary* (5th ed, 2002).
85 Section 3.
86 A "specified act" includes watching, loitering near, or preventing or hindering access to or from a person's place of residence, entering their property, or acting in any other way that reasonably causes the person to fear for their safety: s 4(1).

[69] Although the approach to s 4(1)(a) which I favour involves considering, first, whether the defendant's behaviour could be properly characterised as disorderly apart from any Bill of Rights considerations, in this instance it is not altogether easy to imagine a comparable case arising without at least some protest dimension, including of course the motivation for waking up the person subjected to the behaviour in the knowledge that they would be asleep during daylight hours. If someone were merely to sing and play a guitar outside the window of a room where they knew someone to be asleep for about 15 minutes during daylight hours without using amplified sound and for the purpose of causing them annoyance, without any disturbance other than to the sleep of the person concerned, it seems to me that such behaviour would fall well short of creating a disturbance of public order. A fortiori when the Bill of Rights dimension is taken into account. Even allowing for the fact that Mr Brooker intended to wake the constable in a protest targeted at her, it would not be a justified limitation of his right of freedom of expression to find that such a protest, of short duration and during daylight hours, was proscribed by the criminal law. The disturbance he caused to her, and to her alone, was not especially intensive nor was it extensive.

[70] Had Mr Brooker's behaviour been repetitive or continued for a rather longer period, or involved the noisy participation of other people or amplification, a different view might legitimately have been taken by the trial Judge. But, as the facts of the matter stand, I respectfully cannot agree with the courts below. In my view Mr Brooker's question "Is it disorderly yet?" was in point. My answer would be in the negative. I would allow the appeal and quash the conviction.

TIPPING J

[71] This appeal concerns whether the appellant, Mr Brooker, was correctly convicted of behaving in a disorderly manner.[87] His conviction was based on what happened at about 9:20 am on Tuesday 18 March 2003 outside the home of Constable Fiona Croft of the Greymouth Police. Mr Brooker visited her home believing that he had been the subject of harassment over a number of years by the

[87] *Police v Brooker* (District Court, Greymouth, 30 June 2003, Callaghan DCJ).

police, and by Constable Croft in particular. His purpose was to remonstrate with her on this general subject and in particular about a search warrant which she had obtained. Mr Brooker considered that this warrant had been unnecessarily taken out.

[72] He decided he would stage a protest. He regarded Constable Croft as the best target of his protest and spent some time finding out where she lived. Having tried to contact her at work, he went to her home, knowing that she had been on night duty and was likely to be there. He parked his car on the grass verge outside her front fence, walked onto the property and knocked on the front door. After about three minutes the constable came to the door. He suggested to her that she did not like being woken up, and she told him to "piss off". He withdrew to the street and began his protest outside her front fence. He had with him a square metre placard on which was written "No more bogus warrants" and which he lent against the fence. He then began playing his guitar and singing in what the trial Judge described as a "relatively" loud voice.[88] His singing, which was not electronically amplified, included chants of protest about bogus warrants and the police not knowing when to quit. The Judge found that this singing could have been heard by any neighbours who were present and by anyone who happened to be across the road in the grounds of the local primary school. There was, however, no evidence that anyone other than Constable Croft heard Mr Brooker's singing or observed his conduct.

[73] As she was concerned about what was happening, Constable Croft rang the police station. She said in evidence that she felt intimidated by Mr Brooker and was not prepared to go outside for fear of a confrontation. After a few minutes three police officers arrived. The group comprised an inspector, a senior sergeant and a constable. The inspector went inside to talk to Constable Croft. The senior sergeant and the constable remained outside. Mr Brooker asked the constable if his conduct was "yet" disorderly. The constable replied "I do not know, is it?" When the inspector came out of the house, he told Mr Brooker he had a minute to leave and that he should move his car from the grass verge outside Constable Croft's house, otherwise he would be arrested for intimidation.

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88 At para [12].

[74] Mr Brooker put his guitar and placard into his car and moved it to the opposite side of the road. He locked the car and returned to the inspector with his hands held out in the form of an invitation to the inspector to arrest and handcuff him. He was duly arrested for intimidation.

[75] When that charge was heard, Judge Callaghan considered there was insufficient proof of an intent to intimidate. The intimidation charge was amended to one of behaving in a disorderly manner contrary to s 4(1)(a) of the Summary Offences Act 1981. Mr Brooker maintained his defence to the amended charge, largely on the basis that he was exercising his freedom to protest and, for that and other reasons, his conduct was not disorderly.

[76] After traversing a number of authorities, some of which will feature later in these reasons, the Judge said that it was one thing to protest outside a public office/institution such as a police station, but another to protest outside the private residence of an off-duty police constable. The Judge then observed that "what is orderly *and reasonable* conduct will depend on the circumstances".[89]

[77] He concluded his judgment with these words:[90]

> What he [Mr Brooker] did in my finding was to act in a way which seriously offended against the orderly conduct, which would be recognised by right thinking members of the public. Right thinking members of the public would, in my view, consider his actions as going too far thus being an affront to recognised public standards of good conduct in a public place. Actions outside the police station, particularly in a city environment may be a different situation depending on the circumstances. In my view his behaviour in taking this protest and acting in the way he did outside an off duty police constable's private residence, particularly where not only the police constable did but others within reasonable proximity could hear and observe his actions amounts, in my view, to disorderly behaviour.

[78] Mr Brooker appealed to the High Court. His appeal was dismissed.[91] In the course of his judgment, John Hansen J said:[92]

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89 At para [31] (emphasis added).

90 At para [32].

91 *Brooker v Police* (High Court, Greymouth, CRI 2003-418-000004, 16 October 2003, John Hansen J).

92 At para [24] (emphasis added).

> In such a setting [a residential neighbourhood] right thinking members of the public would be seriously *offended* by [Mr Brooker's] behaviour. In that area it was taking the right to protest too far.

[79] It is necessary to recall at this point that Mr Brooker was not charged with behaving in an offensive manner. The question of the level to which members of the public, right thinking or otherwise, would be offended was not the ultimate issue.

[80] Mr Brooker was granted leave to appeal to the Court of Appeal, where his appeal was also dismissed.[93] The Court treated the issue of law as being whether Mr Brooker's conduct was capable of being disorderly within the proper meaning of the Act. William Young J, who delivered the judgment of the Court, traversed the well-known authorities on what constitutes disorderly conduct. The cases referred to included *Police v Christie*,[94] *Melser v Police*[95] and *Wainwright v Police*.[96] *Melser* was the principal case upon which the Court of Appeal relied. The following passages were cited from each of the three judgments given in that case:

[81] North P:[97]

> I agree that a person may be guilty of disorderly conduct which does not reach the stage that it is calculated to provoke a breach of the peace, but I am of opinion that not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present.

[82] Turner J:[98]

> Disorderly conduct is conduct which is disorderly; it is conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well-conducted and reasonable men and women, is also something more − it must, in my opinion, tend to annoy or insult such persons as are faced with it − and sufficiently deeply or seriously to warrant the interference of the criminal law.

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93 *R v Brooker* (2004) 22 CRNZ 162.
94 [1962] NZLR 1109 (SC).
95 [1967] NZLR 437 (CA).
96 [1968] NZLR 101 (SC).
97 At p 443.
98 At p 444.

[83] McCarthy J:[99]

> The task of the law is to define the limitations which our society, for its social health, puts on such freedoms. Sometimes the law defines with precision the boundaries of these limitations; often the definition is stated only in general terms. In these latter cases, the Courts must lay down the boundaries themselves, bearing in mind that freedoms are of different qualities and values and that the higher and more important should not be unduly restricted in favour of lower or less important ones.
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> It is in this spirit that we should, I think, approach the application of s 3D. I accept unhesitatingly the appellants' right to protest; but I remember, too, that the Speaker and Members of the House of Representatives had a right to freedom from interference at the doorway of their House and the right freely to entertain their visitors within that House unembarrassed by unseemly behaviour on the part of intruders. Should the appellants then be entitled to exercise their freedom of protest in a way which seriously interfered with these freedoms of the Members of the House? I think not. ...
>
> ...
>
> I agree that the appellants' conduct here was unnecessarily disorderly and objectionable. It was likely to engender considerable annoyance and, therefore, I believe that the appellants were properly convicted.

[84] The concentration on annoyance in each of the three judgments is, in my respectful view, problematic. I agree with what the Chief Justice has said in that regard.

[85] In the present case the Court of Appeal expressed its reasons for dismissing the appeal in the following terms:[100]

> The salient features of the case which lead us to that conclusion and to reject the arguments of the appellant are as follows:
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> 1. The techniques which the appellant employed (display of a placard, the use of a guitar and singing and chanting) no doubt are common enough incidents of protest action (and indeed busking) but his actions in targeting a single individual at her home lie outside the range of accepted or recognised protest actions. Indeed they can be seen as more aligned with a rather different course of conduct, regrettably all too common, in which disaffected people set out to harass individuals in ways which are sometimes explicitly or implicitly threatening. In reaching this conclusion we note that the appellant knew that the policewoman had just come off night duty, he knocked on her door to ensure that she was there and his purpose was to harass and annoy her.

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99 At pp 445 – 446.
100 At para [31].

> 2. We accept that the appellant was, to some extent, expressing opinions about the policewoman's prior conduct (and in this sense his actions could be seen to involve the exercise of his rights under s 14, New Zealand Bill of Rights Act 1990). Rights under that section, however, may be subject to reasonable limits prescribed by law (as indeed is the case with laws of defamation). Perhaps more importantly, in this case the apparent exercise by the appellant of rights under s 14 were merely incidental to his primary purposes which were to annoy and harass the policewoman.
>
> 3. It is perfectly clear from the authorities that it is sufficient if one person observes or is affected by the conduct that is alleged to be disorderly. In this case the conduct was directed towards the policewoman and her reactions (entirely predictable we would have thought) were relevant in terms of the District Court Judge's evaluation of the appellant's conduct. In any event, a charge of disorderly conduct does not require evidence that a particular person was in fact annoyed or disturbed by the conduct complained of; rather it is the natural tendency of that conduct that is important.
>
> 4. The features of the case that we have mentioned seem to us to take the conduct to a level in respect of which it was open to the District Court Judge to conclude that the intervention of the criminal law was warranted.

[86] Mr Brooker was granted leave to appeal to this Court on the same question of law as that identified by the Court of Appeal: whether his conduct was capable of being disorderly within the proper meaning of s 4(1)(a) of the Summary Offences Act. The argument focused on whether there was a need to revisit the conventional tests for disorderly conduct in the light of contemporary values and particularly following the enactment of the New Zealand Bill of Rights Act 1990. Mr Brooker presented his own submissions. The Court was assisted by submissions made on his behalf by Mr Wilding, who had been appointed amicus curiae for that purpose. We also benefited from the detailed submissions made by the Solicitor-General on behalf of the respondent. I have taken all the submissions into account and will cover them to the extent necessary in what follows.

[87] The words "behaves in [a] disorderly manner", found in s 4(1)(a) of the Summary Offences Act, are, on their face, deceptively simple. But they carry within them important issues concerning how to strike the right balance between citizen and citizen, and between citizen and state, as regards the enjoyment of reasonable expectations and the exercise of fundamental rights. Section 4 is one of a group of sections introduced by the heading "Offences Against Public Order". Section 4(1) provides:

4 Offensive behaviour or language

(1) Every person is liable to a fine not exceeding $1,000 who,—

(a) In or within view of any public place, behaves in an offensive or disorderly manner; or

(b) In any public place, addresses any words to any person intending to threaten, alarm, insult, or offend that person; or

(c) In or within hearing of a public place,—

(i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words; or

(ii) Addresses any indecent or obscene words to any person.

[88] Section 3 is also concerned with disorderly behaviour but in that section the behaviour must be likely to cause violence against persons or property to start or continue. Disorderly behaviour of that kind renders an offender liable to imprisonment for three months or to a fine not exceeding $2,000. Disorderly behaviour without the aggravating element of likelihood to cause violence is punishable only by a fine not exceeding $1,000. There is, however, an ability to arrest without warrant for the lesser offence, despite there being no liability for imprisonment.

[89] The offence of disorderly behaviour is designed to reflect the expectation that citizens should generally be able to go about their lives in an orderly fashion without interference from the conduct of others which takes place in, or within view or hearing of, a public place. That expectation is not, of course, absolute. Its enjoyment by one may necessarily involve interference with the same expectations of others. If I speak my mind forcibly on a public street, my words may interfere with expectations of quiet enjoyment possessed by those living nearby. Society has to find a way of accommodating this kind of potential conflict between its citizens. Some level of tolerance may be required of one so that the activities of another are not unreasonably circumscribed. The question often involves how much one citizen has to tolerate in order to accommodate the rights and freedoms of others. In the end the law has to strike the necessary balance.

[90] Any modern test for determining when conduct is disorderly must be capable of application both to ordinary cases and to those that are less simple because aspects of the rights and freedoms affirmed by the New Zealand Bill of Rights Act are engaged. With that in mind I would reformulate earlier tests in the following way. Conduct in a qualifying location is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear. Unless that is so, the conduct will not warrant the intervention of the criminal law. If it is so, the public has a legitimate interest in proscribing the behaviour, and thereby protecting citizens from it. In this way public order is protected.

[91] The involvement of one of the rights and freedoms affirmed by the Bill of Rights is likely to influence the level of anxiety and disturbance which a reasonable member of the public should be expected to bear. In the present case it is the right to freedom of expression which is involved. Section 5 of the Bill of Rights provides that this freedom should be limited only to an extent that is reasonable and can be demonstrably justified in a free and democratic society. The level of anxiety or disturbance which citizens are expected to bear should be consistent with that legislative mandate. In a case like the present the application of the disorderly conduct test requires the court to balance the competing interests of those exercising their right to freedom of expression, and more particularly their freedom to protest, against the legitimate interests and expectations of those affected by that exercise.

[92] Where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case. This may be necessary to prevent an unjustified limitation of the freedom and is consistent with the purpose of s 6 of the Bill of Rights. There must, however, come a point at which the manner or some other facet of the exercise of the freedom will create such a level of anxiety or disturbance that the behaviour involved becomes disorderly under s 4(1)(a) and, correspondingly, the limit thereby imposed on the freedom becomes justified under s 5.[101] No abstract guidance can be

[101] This approach was endorsed by the majority in *Hansen v R* [2007] NZSC 7.

given as to when that level will be reached. That decision is a matter of judgment according to all the relevant circumstances of the individual case.

[93] In the present case it is not easy to see Mr Brooker's conduct as being disorderly, even if no reference is made to the fact that the relevant circumstances involved freedom of expression issues. It is doubtful whether, even without that factor, Mr Brooker's behaviour disturbed public order to the necessary extent. I say this because, bearing in mind all relevant matters of time, place and circumstance, I doubt whether his behaviour could properly be regarded as causing anxiety or disturbance at a level which was beyond that which a reasonable person in Constable Croft's position should be expected to bear.

[94] I am, in any event, of the view that when the freedom of expression dimension is factored in, it cannot be said, beyond reasonable doubt, that Mr Brooker's behaviour was disorderly in terms of the legal test I have posited. He was expressing his views about the conduct of the police and in particular that of Constable Croft. I appreciate he knew that she had only recently returned home after night duty and was therefore probably trying to get some rest. He walked onto her property and knocked on her door in order to speak to her. That was at about 9:20 am. It is a reasonable inference from his words and actions that he intended to disturb her rest. But, however uncivilised his conduct may have been up to this point, I do not consider it was capable of being regarded as disorderly within the correct meaning of that concept. There was at this stage no element of public disorder in what occurred even though Mr Brooker was, strictly speaking, within view and hearing of a public place. Nothing he did up to this point was in any way apt to disturb anyone in the vicinity. It was at this stage a purely one on one encounter between Mr Brooker and the constable.

[95] She told Mr Brooker to leave and he did so, withdrawing to a public place, namely the public footpath. His singing and the words he used would obviously have been unwelcome and a nuisance to the constable. Indeed, I accept they must have caused her some anxiety and disturbance. But, all in all, it was a rather low key affair which had lasted only a relatively short time before the police arrived and intervened.

[96] Bearing in mind the significance of the right to freedom of expression and all other issues, I do not consider that it was possible for the trial Judge to be satisfied beyond reasonable doubt that Mr Brooker's behaviour disturbed public order to the necessary extent. His behaviour, viewed objectively, did not in all the circumstances cause anxiety or disturbance at a level beyond that which a reasonable person in Constable Croft's shoes should be expected to bear. She was the only person affected by his conduct. Whatever description might otherwise be given to Mr Brooker's behaviour, I do not consider it was capable of being described as disorderly in terms of the correct legal test.

[97] I would therefore allow the appeal and set aside the conviction.

McGRATH J

Introduction

[98] This appeal is concerned with the scope of disorderly behaviour, a generally expressed summary offence which can cover a variety of forms of conduct. The present focus is on the use of the disorderly behaviour offence by the police as a means of regulating the manner in which a citizen's right to protest against official policy or action may be exercised. The particular manner in which the appellant, Mr Brooker, protested against what he regarded as an overbearing exercise of police powers against him on an earlier occasion had a negative impact on an individual police officer who was a target of the protest. By arresting him when he refused to desist, the police brought his protest at the place concerned to an end. The essential issue in the appeal is whether the appellant's protesting activity reached the threshold to warrant his conviction in the District Court for disorderly behaviour under s 4(1)(a) of the Summary Offences Act 1981.

[99] The relevant facts and legal consequences for the appellant in the courts below have been set out in the judgment of Tipping J and I adopt them as part of these reasons. I have reached a different view on the outcome of this appeal to that of the majority of the Court. In my view the District Court Judge was entitled to

reach the conclusion he did and to convict Mr Brooker of behaving in a disorderly manner under s 4(1)(a).

Statutory context

[100] Section 4 is one of a group of offence provisions appearing under the heading "Offences Against Public Order" in the Summary Offences Act 1981. It creates an offence as follows:

> **4 Offensive behaviour or language**
>
> (1) Every person is liable to a fine not exceeding $1,000 who,—
>
> (a) In or within view of any public place behaves in an offensive or disorderly manner;

[101] Section 4(1) goes on to provide for further similar offences, more particularly expressed, with the same maximum penalty. An offence under s 4(1)(b) is committed by every person who addresses words to another in any public place intending to threaten, alarm, insult or offend the other person. An offence under s 4(1)(c)(i) is committed by any person who uses any threatening or insulting words in or within hearing of a public place and is reckless as to whether anyone is alarmed or insulted by those words. It is also an offence under s 4(1)(c)(ii) to address any indecent or obscene words in or within the hearing of a public place to any person.

[102] In the 1981 Act, s 4 follows a provision for a separate offence of disorderly behaviour, committed by any person who, in or within view of any public place, behaves, incites or encourages any person to behave in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue. Section 3 accordingly addresses behaviour at an extreme point on the range of what is disorderly – where the behaviour is such as to be likely to trigger a breach of the peace or cause it to continue. Anyone convicted of this more serious offence is liable to be imprisoned for a term of up to three months, or to a fine not exceeding $2,000. Section 4, on the other hand, covers conduct involving a lesser level of

disturbance. For that reason it has a lower maximum fine and is not subject to the penalty of imprisonment.

[103] Both provisions may be said to regulate freedom of expression. In the case of s 4, this is not only because of the possibility of prosecution for disorderly behaviour after the event. Section 4 also sets the point at which the police may lawfully intervene and exercise the power to arrest without a warrant a person suspected of committing the offence. This power can be used effectively to stop a protest which is unlikely to result in violence if it continues.[102] In a protest context, it is this feature of s 4(1)(a), coupled with the imprecision of the concept of disorderly behaviour, which has a tendency to curtail freedom of expression.

[104] Since 1924 it has not been a necessary element of "disorderly behaviour" that a breach of the peace must arise as a result of the conduct. Although there was discussion in Parliament in 1974 concerning the inclusion of such a requirement,[103] a limiting provision of that kind has not been put back into the legislation since. This has left the courts with the role of defining the offence of disorderly behaviour under s 4(1)(a) with sufficient precision to make the limits of the criminalised conduct clear. The High Court and Court of Appeal have continually done that over the years, stating relevant principles when delivering judgments in appeals by persons convicted of this offence.

The *Melser* decision

[105] To date the leading case has been the Court of Appeal's judgment in *Melser v Police*.[104] The appellants had been protesters who were chained to pillars in the grounds of Parliament on a day during which an overseas dignitary was to visit. They were convicted of disorderly behaviour under s 3D of the Police Offences Act 1927. Their counsel submitted in the Court of Appeal that the term

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102 McBride, "The Policeman's Friend" (1971) 6 VUWLR 31, p 33.

103 Statutes Revision Committee, "Report on Police Offences Act 1927" [1974] IV AJHR I.5A, pp 11 – 13.

104 [1967] NZLR 437.

"disorderly" required that there be behaviour that, at the very least, was likely to cause annoyance or disturbance. Counsel argued that the appellants, as passive protesters, had done no more than cause some embarrassment and inconvenience to public officials. He submitted that the conduct did not meet the threshold for being disorderly.

[106] Each of the Judges in the Court of Appeal held that behaviour did not need to be calculated to lead to a breach of the peace in order to be disorderly under the statute. Each, however, was also concerned that the offence should not be applied so as unduly to restrict the right to protest. North P held:[105]

> I am of opinion that not only must the behaviour seriously offend against those values of orderly conduct which are recognised by right-thinking members of the public but it must at least be of a character which is likely to cause annoyance to others who are present.

He later added:[106]

> [T]he collation of words in that section in my opinion show that they are directed to conduct which at least is likely to cause a disturbance or annoyance to others. To lay down a wider test would, I think, be contrary to the public interest and might unduly restrict the actions of citizens who, for one reason or another, do not accept the values of orderly conduct which at the time are recognised by other members of the public.

[107] Turner J observed that insulting a woman, although always reprehensible, was not always criminal – it was a matter of degree whether the conduct was sufficiently grave to bring it within the particular statutory provision. The position was the same with disorderly conduct. It was:[107]

> conduct which, while sufficiently ill-mannered, or in bad taste, to meet with the disapproval of well conducted and reasonable men and women, is also something more – it must, in my opinion, tend to annoy or insult such persons as are faced with it – and sufficiently deeply or seriously to warrant the interference of the criminal law.

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105 At p 443.
106 At p 443.
107 At p 444.

Later Turner J added that "it is not enough that the conduct charged should be disapproved of by the majority as merely ill-mannered or in bad taste …".[108] In every case it was a matter of degree.

[108] McCarthy J said:[109]

> There must be conduct which not only can fairly be described as disorderly, but also is likely to cause a disturbance or annoy others considerably.

He also observed that the matter was one of degree.

[109] Each Judge decided that the appeal failed on the application of the test. What was significant, however, is that no member of the Court was prepared to give the word "disorderly" its widest possible meaning. Although the omission of any reference to a tendency to breach the peace meant that this element could not limit the concept of disorderly behaviour, each Judge sought to restrict the extent of the protest behaviour that was criminalised. They each did this, explicitly or implicitly, by reference to freedom of expression.[110] This approach, most obviously in the judgment delivered by McCarthy J, requires the balancing of the competing public interests, rights and freedoms according to their relative importance in the particular situation. McCarthy J pointed out that "freedoms are of different qualities and values".[111]

[110] Ultimately McCarthy J concluded that by insisting on making their protest at the front door of Parliament the appellants had interfered with the right of the Speaker and Members to access the House. In the context that was the more important freedom. As the manner of their protest meant the appellants' conduct was unnecessarily objectionable, and likely to engender considerable annoyance, they were properly convicted. This approach has required judges, who have since had to decide whether an offence of disorderly behaviour under s 4 has been committed, to look at the essence of the particular situation, considering the conduct

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108 At p 444.
109 At p 446.
110 In particular Turner J at p 444 and McCarthy J at p 445.
111 At p 446.

in issue in the context of the surrounding circumstances, before deciding whether it is disorderly.[112]

[111] Subsequent reported judgments of the High Court and Court of Appeal have often applied *Melser*.[113] Of particular importance has been the emphasis they have placed on the need for behaviour to seriously offend against values of orderly conduct before it can be categorised as disorderly. *Melser* has also, correctly, been treated as incorporating freedom of expression as a balancing factor in deciding if conduct reaches the level of being disorderly.

[112] Nevertheless, *Melser* has rightly been criticised in other respects, in particular for incorporating into "disorderly behaviour" the notion of the right thinking person, sometimes referred to as the "person of decent instincts".[114] This attempt to express objectively the standard of behaviour which, if seriously breached, would give rise to disorderly conduct, brings its own biases, including sympathy for the majority viewpoint. As well, as one academic writer pointed out in 1968:[115]

> Is there not a real danger that the preference of 'right-thinking persons' is likely to be the *status quo*, that all strong action by a minority group challenging accepted opinions is likely to cause resentment in such persons' minds?

The redescription of the right thinking man as a person of decent instincts does not meet these objections. As the Statute Revision Committee pointed out, the views of such paragons are both "vague and subjective and this is the basis of criticism that the section infringes the liberties of the subject".[116]

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112 Keith, "The Right to Protest" in Keith (ed), *Essays on Human Rights* (1968) 49, p 65.

113 Instances include *Kinney v Police* [1971] NZLR 924 (SC); *R v Ceramalus* (Court of Appeal, CA 14/96, 17 July 1996); *Stemson v Police* [2002] NZAR 278 (HC) and the Court of Appeal judgment in this case, *R v Brooker* (2004) 22 CRNZ 162.

114 The latter term was coined by Wilson J in *Derbyshire v Police* [1967] NZLR 391 (SC). He referred at p 392 to "persons of decent instincts regardless of their political opinions".

115 Keith, p 64.

116 Statutes Revision Committee, p 11. The Committee also observed at p 12 that the provision was "so broadly framed that it is capable of catching virtually every type of non-conforming activity, by which we mean activity that a well-conducted adult would not indulge in".

[113] Since *Melser* was decided in 1966, the value of freedom of expression, from which the right to protest is partially derived, has been affirmed by s 14 of the New Zealand Bill of Rights Act 1990. The Bill of Rights Act directs the courts to interpret legislation consistently with protected rights where they can and provides for rights to be the subject of justified reasonable limits.[117] The enactment of the Bill of Rights Act, coupled with the criticisms of *Melser* that I have mentioned, make it appropriate for this Court to reconsider the principles laid down in *Melser* as to the meaning and application of the "disorderly behaviour" provisions in the 1981 Act in relation to the right to protest. As this question involves competing rights, interests and freedoms, it is first necessary to identify the main features of the protected right involved and the relevant countervailing values and societal interests.

Freedom of expression

[114] Freedom of expression is a right which is basic to our democratic system. As the Supreme Court of Canada has said:[118]

> The core values which free expression promotes include self-fulfillment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.

[115] In association with the right of peaceful assembly, which is also protected by the Bill of Rights Act,[119] freedom of expression provides the basis for what is known as the right to protest. When citizens protest at what they regard as inappropriate police conduct, the importance to society of freedom of expression is particularly high. Such criticism serves the public interest in the continuous, proper and effective conduct by the police of their responsibilities.[120]

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117 See ss 5 and 6 of the Bill of Rights Act and *R v Hansen* [2007] NZSC 7.
118 *RWDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd* [2002] 1 SCR 156 at para [32].
119 Under s 16.
120 *Billens v Long* [1944] NZLR 710 at p 732 (SC) per Northcroft J.

[116] Protest in general involves the physical presence of the protester or protesters where the protest takes place, the conveying of information, attempts at persuasion and pressure on the subject of the protest. To these ends protesters will seek to draw the attention of their immediate or wider audience to perceived public mischiefs in ways that will bring home to those at whom the protest is directed the force of their criticisms. Protesting actively in or within view of a public place will normally be thought to have a greater impact on public opinion than a more passive approach, especially if it generates media attention. In assessing the particular weight to be given to freedom of speech in a protest context, respecting the freedom to choose the means of protesting which are seen to be most effective is important. Respect for protest as a means of pressing for change in official policy or conduct is very much part of New Zealand's culture and societal values. A protest concerning perceived overbearing police conduct is well within the spirit of the right to freedom of expression. As Andrew Geddis has put it:[121]

> [T]he overall health of our body politic may be judged by how far our legal ordering provides [the individual dissenter] with the space to make her opinions known to the public.

[117] Freedom of expression has the status of a protected right under s 14 of the Bill of Rights Act, as well as under international instruments. Article 19(3) of the International Covenant on Civil and Political Rights, which is a source of s 14, does however state that restrictions may be imposed on freedom of expression by law, where necessary, including for the protection of public order. This right of limitation is not expressly included in s 14 of the Bill of Rights Act but, as previously mentioned, is stipulated by s 5. Accordingly I now turn to the considerations which are said to limit the right to freedom of expression in relation to what is disorderly behaviour.

121 Geddis, "Free Speech Martyrs or Unreasonable Threats to Social Peace? – 'Insulting' Expression and Section 5 of the Public Order Act 1986" [2004] PL 853, pp 853– 854.

Conflicting interests and values

(i) Protecting public order

[118] The first societal interest that is in conflict with freedom of speech in the present case is that of protecting public order. As the heading to ss 3 to 8 of the 1981 Act indicates, the disorderly behaviour offences are concerned with this interest. The heading also signals that the disruptive impact of the behaviour is required to be of a nature and extent that it infringes public *order* before the offence of disorderly behaviour is committed.

[119] Public order protects the community's expectations of enjoyment of tranquillity and security from disruptive behaviour in certain situations. There is a necessary public element to disorderly behaviour which is expressed in s 4(1)(a) and requires that the behaviour in issue takes place in, or within view of, a public place. The public element of the offence of disorderly behaviour excludes conduct which takes place within the private sphere. That element is, however, satisfied if the conduct is visible from a public place, even if the disruption or harmful impact is felt exclusively by a single person who is on private premises. Criminalisation of such conduct as disorderly behaviour is a legitimate end in the interest of public order.

[120] Infringement of public order necessarily involves a serious interference with community standards of behaviour, in the sense that the behaviour goes beyond what a society respectful of democratic values can be expected to tolerate.[122] The right to express dissenting opinions concerning official action or policy is central to democratic values. It will be rare that expressions of opinion which have no tendency seriously to upset their audience will be categorised as sufficiently intruding on public order. It is not necessary, however, that the conduct is likely to produce a physical response or other reaction resulting in a breach of the peace before the behaviour may properly be found to be disorderly. In any particular situation self-discipline, apprehension or the good judgement of affronted persons

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122 In *Coleman v Power* (2004) 220 CLR 1 at para [14], Gleeson CJ said that a breach of public order went "beyond what … is simply an exercise of freedom to express opinions on controversial issues".

may control their overt response to a manner of behaviour which, objectively, they should not have to tolerate.

[121] The *Melser* judgment offers limited guidance as to when the reactions of annoyance, embarrassment, anxiety or emotional upset, amongst those affronted by the manner of protest, result from conduct that sufficiently interferes with community standards to require protection of the public. There is, however, assistance in decisions of the Supreme Court of Canada. In *R v Lohnes*,[123] the Supreme Court of Canada said that the answer to that question turns on "the degree and intensity of the activity complained of, and on the degree and nature of the 'peace' which should be expected to prevail in the particular public place at the particular time". When speaking of the nature of conduct that breaches public order, the Court said that the context in which the activity takes place must be considered in order that the countervailing interests may properly be weighed.[124] There must be some identifiable overt aspect of the person's activity which constitutes a disruptive interference with the ordinary expectation of members of the public that they can enjoy amenities of their environment without disturbance caused by the activity of, in this case, the protester. This additional dimension, which will usually not be met in the case of a passive and peaceful protest, moves a situation from one causing mere upset and annoyance into what must, objectively, be properly characterised as disruptive of public order and, ultimately, disorderly behaviour. As Dickson CJ put it in an earlier judgment of the Supreme Court of Canada:[125]

> There must be some activity in the nature of a disorder which occurs as a result of this conduct before a trial judge would be entitled to find the order or solemnity of a meeting had been disturbed. Where on the other hand the impugned actions are not passive or peaceful in nature, they may in themselves constitute activity in the nature of a disorder sufficient to found a conviction …

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123 [1992] 1 SCR 167 at p 175 per McLachlin CJ, citing from *R v Swinimer* (1978) 40 CCC (2d) 432 (NSCA).

124 The judgment illustrated the importance of context at p 175 by saying that: "The lawful jangling of the street musician at an urban intersection at noon may become criminal if conducted outside a citizen's bedroom window at three o'clock in the morning."

125 *Stoke-Graham v R* (1985) 1 SCR 106 at para [33].

(ii) Privacy interests

[122] The other competing interest in the present case is the right to privacy of the complainant, Constable Croft. Privacy interests are not, as such, among the fundamental rights that are affirmed in New Zealand's Bill of Rights. They are, however, recognised in international human rights instruments. They have also received increasing recognition in recent years in New Zealand both in statute law[126] and by New Zealand courts at appellate level. The Court of Appeal has recognised that there is a right of action in tort in New Zealand where a citizen is aggrieved by the publication of facts in respect of which there is a reasonable expectation of privacy.[127] It has also made plain that privacy concerns are to be taken into account in the exercise of the judicial discretion to allow the media access to court records of criminal proceedings under the search rules.[128] The right to privacy in the home has been strongly protected by New Zealand courts in cases such as *Choudry v Attorney-General* where the Court of Appeal refused to imply into legislation conferring powers on the Security Intelligence Service an incidental power of entry onto private property.[129]

[123] Privacy is "an aspect of human autonomy and dignity".[130] Although, as a police constable, the complainant is a public official, in her private life she is entitled to enjoyment of the rights of an ordinary citizen. Her privacy interest in the present appeal is her right to be free from unwanted physical intrusion into the privacy of her home. The desire of a person to be free from unwanted physical access by others has been usefully contrasted with a separate but overlapping category of privacy which is concerned with the desire to be free from unwanted access to private information.[131] The former aspect of the right to privacy is recognised in art 17 of the International Covenant on Civil and Political Rights which provides:

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126 In particular under the Privacy Act 1993.

127 *Hosking v Runting* [2005] 1 NZLR 1 at paras [117], [124] and [249].

128 *Mafart v Television New Zealand Ltd* [2006] 3 NZLR 18 at para [7]; *R v Mahanga* [2001] 1 NZLR 641 at para [32].

129 [1999] 2 NZLR 582.

130 *Campbell v MGN Ltd* [2004] 2 AC 457 at para [50] per Lord Hoffmann.

131 See the discussion in Moreham, "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628, pp 640 – 641.

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

[124] Both aspects of privacy have also been recognised by the courts. In *Campbell* the House of Lords dealt with the aspect of intrusion on informational privacy which arises on the publication by the media of private facts about a celebrity. Lord Nicholls observed:[132]

> The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual.

[125] In New Zealand two Judges of the Court of Appeal have recognised that there is a physical aspect to privacy, although refraining from deciding whether it should be protected by the tort of privacy.[133]

[126] The Supreme Court of the United States has given strong recognition to the importance of what Brennan J has described as "the right of the individual 'to be let alone' in the privacy of the home".[134] In delivering the majority opinion of the Court in *Carey v Brown*, Brennan J said that:[135]

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.

He later added:[136]

> The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilised society.

[127] In *Frisby v Schultz*[137] O'Connor J, in delivering the Court's majority opinion, affirmed what the majority of the Supreme Court had said in *Carey* and emphasised

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132 At para [12].
133 *Hosking v Runting* per Gault P and Blanchard J at para [118].
134 *Carey v Brown* 447 US 455 at p 471 (1980).
135 At p 471.
136 At p 471.
137 487 US 474 (1988).

that an important aspect of residential privacy was protection of the unwilling listener in her home:[138]

> Although in many locations, we expect individuals simply to avoid speech they do not want to hear … the home is different. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech … does not mean we must be captives everywhere. … Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

[128] Despite the presumptive approach which gives strong protection to the right to free speech in the United States, under the First Amendment, it is now generally recognised among members of the Supreme Court of the United States that there is a legitimate government interest in residential privacy and in acting to curtail freedom of expression to protect unwilling recipients from having to receive unwanted expression of opinions in their homes.[139]

[129] I am satisfied that New Zealanders regard the right to enjoyment of domestic tranquillity as highly as do citizens of the United States. It is part of the cultural and social make-up of New Zealanders to be respectful of that environment. I regard the interest of New Zealand citizens to be free from intrusions into their home environment, whether on account of their conduct as public officials or otherwise, as a value that, in the abstract, is close to being as compelling as freedom of speech.

Reconciling the conflicts

The appropriate framework

[130] Under s 5 of the New Zealand Bill of Rights Act, all fundamental rights and freedoms may be made subject to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society.[140] In order to be such a limit on the protester's right of free expression, the offence of disorderly behaviour must be restricted to conduct that amounts to a sufficiently serious and reprehensible

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[138] At pp 484 – 485.
[139] As indicated by the dissent of Scalia J in *Hill v Colorado* 530 US 703 at p 752 (2000).
[140] See *R v Hansen* at paras [60], [92] and [191] – [192].

interference with the rights of others to warrant the intervention of the criminal law. At that point the protester's legitimate exercise of freedom of expression ends. In determining the content and scope of the offence of disorderly behaviour under s 4 of the 1981 Act, in a case such as the present, it is necessary to ascertain when the protection of public order, and of residential privacy, should prevail over the appellant's right of free speech.

[131] In *Gisborne Herald Co Ltd v Solicitor-General*[141] the Court of Appeal developed a framework, which protects conflicting rights, to be used when deciding if an expressive activity is an offence under the law. That case concerned whether pre-trial publicity concerning the past criminal record of a person who had been charged with an offence of serious violence amounted to contempt of court by the publisher. The Court of Appeal first considered whether other measures (which would not intrude on free speech values) would adequately address the potential conflict between the rights of freedom of expression and a fair trial. It decided that none would be adequate to do that in the particular case.[142] In those circumstances the Court decided that neither the right of the arrested person to a fair trial, nor the right of the media to freedom of expression was entitled to automatic precedence. The Court should closely assess the importance and impact of the particular rights in the circumstances. All relevant circumstances were to be taken into account so that all interests were given due consideration according to their importance in the particular situation. The Court took the view that this would lead to a principled decision as to which interest should prevail and on what basis. It was by application of that balancing process that the Court of Appeal determined that fair trial considerations affecting the trial of the arrested person outweighed the free expression interests in the pre-trial publication.

[132] This approach reflects the need to ensure that the essence of the particular situation is examined, with due weight given to conflicting interests. It is not dissimilar to an approach being followed in the United Kingdom in the case of conflicts between freedom of speech and privacy values under the Human Rights Act

141 [1995] 3 NZLR 563.
142 At p 575.

1998.[143] In undertaking the balancing of the conflicting interests it must be kept firmly in mind that the purpose of the court is to reach its decision through structured reasoning rather than an impressionistic process.[144]

[133] The value of a balancing approach to determine when the criminal law would apply to set the limit of freedom of expression has been recognised as long ago as 1967 in *Melser*. The values, however, must receive the weight they should be given in the circumstances without the bias that referential concepts such as the right thinking person introduce. The judgement on whether the protester's conduct passes the point at which freedom of expression ends is "in every case a matter of degree depending on the relevant time, place and circumstances".[145] A contemporary judgement is called for. Conduct which courts have held to be disorderly in past decades will not always meet a contemporary judicial assessment of what is sufficiently serious and reprehensible to justify restricting free speech.

[134] One possible alternative approach would be for the court to undertake a type of definitional balancing by reference to a rule reflecting a primary value, with some flexibility as to whether a particular competing interest could reasonably be accommodated to take account of the circumstances of the case. This, however, tends to give inherent primacy to one right or interest over others, rather than provide a true balancing of the values involved for the weight they carry in the particular circumstances. True balancing has connotations of quantity and precision when used to describe relative weights of, for example, quantities of metal.[146] Only if this aspect of the balancing metaphor is respected will its application ensure full recognition of the significance of each competing interest in the particular

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143 *Campbell v MGN Ltd* [2004] 2 AC 457 at para [55] per Lord Hoffman; paras [105] – [106] per Lord Hope; and para [134] per Baroness Hale.

144 In his discussion of the possible striking of a new balance between individual liberty and society's need for security in the aftermath of the terrorist attacks of 11 September 2001, Professor Waldron observed:

> Almost everyone believes that adjustments in rights require structured arguments for their justification – arguments that pay attention to their special character, to the ordered priorities of moral theory, and to the intricacies of various possible relations between one person's rights and another's.

Waldron, "Security and Liberty: The Image of Balance" (2003) 11 Journal of Political Philosophy 191, p 200.

145 *Wainwright v Police* [1968] NZLR 101 at p 103 per Wild CJ (CA).

146 A point made by Waldron at pp 192 – 193.

circumstances of the case.[147] It would also be possible to incorporate in the process a subjective standard, such as that of the "right thinking" person. But, for reasons already indicated, that gloss would perpetuate an element of vagueness of the term "disorderly behaviour". It also has an in-built bias that precludes it from being the basis for a principled approach.

[135] For these reasons I am satisfied that it is necessary in the present case to balance the conflicting rights in order to determine the extent to which it is necessary to qualify freedom of speech to protect the conflicting values.

Balancing free speech against public order and privacy

[136] The right to freedom of expression in protest over official policy and the conduct of government officials is, as I have previously stated, subject to reasonable limits prescribed by law, which include the requirements of public order and the rights of citizens to privacy in their homes.

[137] I have already indicated that I regard the right to protest as of great importance and particularly so in the circumstances of this case. As well, I am conscious of Woodhouse J's caution in *Kinney v Police* that s 4:[148]

> should not be allowed to scoop up all sorts of minor troubles and it certainly is not designed to enable the police to discipline every irregular or inconvenient, or exhibitionist activity or to put a criminal sanction on over-exuberant behaviour, even when it might be possible to discern a few conventional hands raised in protest or surprise.

I have also set out the competing factors that must be weighed and the scope of what is required to establish disorderly conduct. Against that background, it is possible, without going to great length, to undertake and determine the outcome of the balancing process in the circumstances of this case.

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147 *Gisborne Herald* at p 571.

148 [1971] NZLR 924 at p 926 (SC).

[138] The Court of Appeal's judgment[149] indicates that, although the appellant was expressing opinions about the complainant's official actions, the Court considered his "apparent" exercise of his right of freedom of expression was incidental to a primary purpose of annoyance and harassment of the complainant. That analysis is unhelpful in weighing the value of free speech in the circumstances. It obscures the fact that the appellant was expressing genuine opinions concerning the manner in which the police were executing search warrants generally and on a particular occasion. As earlier emphasised, protest against official action is an important function of free speech. The manner in which the appellant conveyed his views will only be relevant to whether he went beyond the acceptable forms of public dissent in our society. That falls for consideration on the other side of the scale in deciding whether his actions sufficiently interfered with the rights and interests of the community and the complainant to constitute disorderly conduct. It does not lessen the weight given to free speech itself in the balancing exercise.

[139] The key features of the intrusion on the complainant's privacy are that the protest took place outside the complainant's home and on her doorstep. The fact that it took place in a residential area is not of itself a matter of particular concern. The key factors rather concern the time, and circumstances in which the protest took place and the nature and degree of intrusion.

[140] While the appellant's activities commenced at about 9:20 am, the District Court Judge found that the appellant knew that the complainant had recently arrived home, having worked through the night, and was almost certainly wishing to rest at the time he started his protest. That knowledge colours the factor of time, which otherwise would be neutral in relation to the nature and extent of his invasion of the complainant's privacy. The appellant knocked on the front door for at least three minutes, an action which compelled the complainant to confront him in circumstances that would obviously give rise to concern over her security and peace of mind. She was, of course, at this time not acting in any official capacity, but off-duty and in her private home. The appellant expressed his opinions about her official conduct in circumstances in which it was plain she was an unwilling

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149 At para [31].

audience who had no choice but to listen to what the appellant had to say. He thereafter continued his protest by singing and playing music in circumstances that were likely to maintain her anxiety. The complainant was alone in the house.

[141] Taken together and accepting that the protest was of relatively short duration, these factors to my mind amount to an overt indication of disturbance of a nature that was highly disruptive of the complainant's expectation of privacy. It was a serious departure from community expectations of enjoying a peaceful environment in one's own home. The nature and intensity of his protest at a time when he knew she wanted to rest was objectively intolerable. I emphasise that her situation and likely desire for rest was known to the appellant and it is a fair inference from the facts that the appellant intended to disturb her rest. His actions were highly intrusive of Constable Croft's enjoyment of tranquillity and privacy in her home and her right to go about lawful activities there.

[142] From the perspective of the invasion of her privacy, it is also important that the complainant was a captive audience for the appellant in the sense that she was not able to walk away from the protest to do what she wanted to do in another place. Home is the place of rest at the end of a day's work, especially during the time when a citizen wishes to sleep.

[143] All this took place within view of or on the street. The appellant's conduct overall met the requirements of public disorder as I have explained them by the time that he was asked to desist by the police and refused to do so.

[144] I emphasise that I do not accept that it is always outside the bounds of legitimate protest to target a person at his or her home. The focus must be on the nature of the intrusion and its impact having regard to the circumstances. The location of the protest is relevant only to the extent it bears on those considerations as it did here.[150]

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[150] *Pepsi-Cola Canada Beverages* at para [75].

[145] Had his protest been more passive, and had it taken place at that location at a time when the targeted person was not trying to rest, other considerations concerning the appellant's rights may have come into play and altered the balance.

[146] I am satisfied that treating the appellant's conduct as disorderly from the time he refused the police request that he desist did not involve a major restriction on the appellant's right to express his opinions in a protest over police conduct. Exception was not taken by the police, and correctly so, to a protest outside the Greymouth Police Station following the release of the appellant. The detriment to the complainant's privacy interests, because of the time, place and manner of the appellant's protest which sought to interrupt her from resting at her home, went well beyond what any citizen, public official or not, should have to tolerate in her home environment. That detriment is a countervailing factor which, in all the circumstances of this case, outweighs the intrusion on the appellant's free speech rights.

Conclusion

[147] My reading of the transcript of the oral judgment of the District Court Judge, in which he found that the charge of disorderly behaviour had been proved, is that it was the harmful features of the appellant's behaviour for the complainant, and in particular his acting in the way he did outside her private residence, that were the essential reasons why the appellant was convicted in the District Court. I also consider those reasons and that result were consistent with a fair balancing of the important competing rights and interests involved. The Judge was accordingly entitled to conclude that at the time that the police arrested the appellant, bringing his protest at that location to an end, his conduct was in breach of s 4(1)(a).

[148] I would uphold the conviction of Mr Brooker for disorderly behaviour and dismiss the appeal.

THOMAS J

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Introduction

[149] I consider that, in the circumstances of this case, Mr Brooker was properly convicted of disorderly behaviour under s 4(1)(a) of the Summary Offences Act 1981. I admit to being surprised that the matter has reached this Court. I am even more surprised that the appeal is to be allowed by a majority of three to two.

[150] Until the matter reached this Court the judges who have been involved have been of the same mind: the District Court Judge who convicted Mr Brooker,[151] the Judge of the High Court who disallowed Mr Brooker's appeal to that Court,[152] and the three Judges of the Court of Appeal who disallowed his appeal to that Court.[153]

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151 *Police v Brooker* (District Court, Greymouth, 30 June 2003, Callaghan DCJ).

152 *Brooker v Police* (High Court, Greymouth, CRI 2003-418-000004, 16 October 2003, John Hansen J).

153 *R v Brooker* (2004) 22 CRNZ 162.

I, along with McGrath J, would dismiss the appeal to this Court. But the majority of three take a different view. Hence, of the ten judges who have been involved, seven perceive Mr Brooker's behaviour to have been disorderly in the circumstances.

[151] Counting judicial heads in this way before entering upon the substantive reasoning to follow is neither frivolous nor idle in this case. The appeal does not involve a profound or significant question of law. What is in issue is essentially a balancing exercise, and balancing competing considerations is the stuff of judicial adjudication.

[152] I acknowledge that the Chief Justice has sought to find errors of law in the judgment of the Court of Appeal and, based on an uncompromising perception of the right to freedom of expression, advanced a "narrow" interpretation of the words "disorderly behaviour". Ms Croft's sensibilities are rightly excluded from consideration. But, ultimately, the Chief Justice's decision rests on the view that, in the circumstances of this case, the right to freedom of expression must prevail over all other considerations, including the fact that the location of Mr Brooker's protest action was a residential area outside Ms Croft's home and that his protest activity was directed at her. Nothing in this case is accepted as outweighing that right or as limiting that right.

[153] Balancing competing values and interests in order to reach a decision is endemic to the adjudicative process. Indeed, Oliver Wendell Holmes's oft-quoted maxim about where to draw the line[154] in itself requires judges to balance various considerations in order to know where they wish to strike the line. A more generic description would be to acknowledge that the essential function of judicial decision-making is the task of balancing one or more interests or values against one or more other interests or values in order to reach a decision. The much-vaunted value judgement is brought to bear in the course of this exercise. Hold judicial decision-making upside down and turn it inside out as you will, a balancing exercise is an inescapable attribute of that process.[155] But the inevitable balancing exercise need

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[154] "where to draw the line … is the question in pretty much everything worth arguing in the law": *Irwin v Gavit* 268 US 161 at p 168 (1925).

[155] Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005), pp 271 – 272.

not be a post hoc rationalisation of the undisclosed value judgement. It can and should be a principled, structured and transparent exercise.

[154] Although seven of the ten judges who have addressed this case have determined that the balance favours Ms Croft's interest or value in privacy, it is the perception of the three judges in this Court who take a contrary view which will prevail. This situation may give rise to some disquiet. It would be disingenuous not to accept that, if there were a further right of appeal, or if the composition of this Court were to change in the future, the Court then undertaking the same balancing exercise could reach the opposite conclusion. All that would change, apart from the composition of the Court, would be the weighting given the competing interests or values in issue. The conclusion is unavoidable; to a large extent the outcome depends on the subjective perception of the individual judge. I believe that, at this appellate level, something more is required than a "rejigging" of the balance.

[155] Three initial points may be shortly made.

[156] First, where the varying contentions simply reflect the different judicial perceptions of the appropriate balance, it behoves the members of this Court who seek to reverse the unanimous conclusions of the judges in the courts below to make out a more compelling argument in support of their perception of the balance. It is unsatisfactory, reading the judgments, to be left with the impression that the issue is no more, or not much more, than a contest between varying subjective judicial perceptions or that the argumentation can be reduced to the rationalisation of a judicial intuition.

[157] Secondly, I do not consider that the balancing exercise can be undertaken without a greater measure of judicial discipline and intellectual rigour. Notwithstanding its inherent flexibility, a balancing exercise can be approached in a principled manner. Reasoning can be structured. I do not say this critically. I freely admit to having discarded an earlier draft judgment.

[158] Thirdly, while "disorderly behaviour" may be incapable of a precise definition, the test to be applied should be one which, as far as possible, overtly

promotes an objective standard. At the very least, it should, again as far as possible, seek to transcend the subjective perception of the individual judge. I will address the question of the appropriate test in due course.

[159] The length of this judgment, for which I apologise, reflects an attempt to do something more than simply "rejig" the balance. I confess, however, that being in a minority in this Court, I have written at length in the hope that what I have to say may be of assistance to a future court.

Outline of judgment

[160] In this judgment, I propose to adhere to the following structure.

[161] The first task is to determine whether a reasonably firm definition of the words "disorderly behaviour" is possible. I conclude that the words do not admit of a precise definition, or even a remotely precise definition. A broad meaning may be possible, but disorderly behaviour is largely indeterminate. As part of this inquiry, it is necessary to address a number of questions: the significance of the fact that the offences under ss 3 and 4 are offences against "public order"; the extent to which, if at all, the meaning or application of s 4(1)(a) is affected by the other provisions in ss 3 and 4; and whether the nature and scope of disorderly behaviour is to be restricted because other offences may be thought more appropriate in the circumstances.

[162] I suggest that, in the absence of a precise or firm definition, the best that the law can do is provide a test or benchmark by which the courts can assess whether the behaviour in question is disorderly for the purpose of s 4(1)(a). I introduce the concept of the reasonable person. In effect, the pretentious "right thinking member of the public" is replaced by the law's paradigm benchmark for the assessment of human conduct.

[163] Having determined the broad meaning of the test for determining whether the behaviour in question is disorderly, the second step is to identify the rights, values or interests that are in issue. There is no difficulty in respect of Mr Brooker. He was

exercising his right to freedom of expression and his expression took the form of protest action. The competing value is that of privacy; a person's interest in being let alone in the seclusion of the home. But what is the status of this value or interest? Is it a right, or a value, or a limitation on a right? This question is not unimportant for it determines what is to be balanced: a right against a right; a right against a value; or a right against a limitation. A different outcome is possible depending on how privacy is classified.

[164] I favour regarding privacy as an existing right which has not been abrogated or restricted by reason only that it has not been expressly referred to in the New Zealand Bill of Rights Act 1990.[156] At the very least, I believe that it should be regarded as a "fundamental value".[157] As privacy has not yet been judicially accorded the status of a right, however, I proceed on the basis that what is to be evaluated is the fundamental value underlying the right to freedom of expression against the fundamental value of privacy. Two fundamental values compete for ascendancy.

[165] This approach means that I depart from the thinking of the majority. While I acknowledge that it may be helpful to refer to s 5 of the Bill of Rights, I do not think that the framework of that section should be imported into the present case lock, stock and barrel.

[166] The values to be weighed are not values in the abstract, but the value of Mr Brooker's exercise of his right and the value of Ms Croft's, or any resident's, interest in being let alone in the home in the circumstances of this case. A close analysis of both Mr Brooker's right to freedom of expression exercised by means of protest action and Ms Croft's interest or value in privacy in the home is required to determine the weight to be ascribed to each.

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156 Section 28 of the Act provides that "[a]n existing right or freedom should not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part".

157 See Butler and Butler, *The New Zealand Bill of Rights Act: a commentary* (2005), paras [6.9.8] – [6.9.10]. The authors argue that many limitations placed on rights are "fundamental". Their argument is compelling.

[167] Finally, the balancing exercise is carried out. I conclude that the weight to be ascribed to Mr Brooker's right to freedom of expression in the circumstances of this case is not high. Conversely, I hold that much weight must be ascribed to the value of privacy in a home located in a residential neighbourhood. My conclusion is that the value of Ms Croft's, or any resident's, seclusion far outweighs the value to be placed on Mr Brooker's exercise of his right to freedom of expression.

[168] Nothing in this judgment is to be taken as suggesting that the value of privacy or, more particularly, the value of being let alone in the home, invariably outweighs the right to freedom of expression. Time, location and circumstances will be decisive in all cases.

[169] Before pursuing this outline, however, I wish to advance two preliminary points that should not be overlooked in cases involving the Bill of Rights. They are particularly relevant in a case of this kind.

The function of bills of right

[170] The first point relates to the function of bills of right in a democracy and the judge's perception of that function. Bills of right are commonly perceived as charters protecting the individual who is different or the minority that is repressed in a system of majoritarian government. But such a perception, while correct, does not convey the full import of bills of right or the vision of their proponents. Bills of right reflect the fundamental and enduring values of society as a whole. They comprise the basic principles by which the community wish to interact and live in a representative democracy. This undertaking prevails even when, in a particular case, the popular view may not conform to the courts' interpretation of those fundamental values. The courts then perform a legitimate democratic function in adopting an interpretation which accords with those values, whatever the transient mood of the populace might be.

[171] Necessarily, of course, the issue presented to the court will reflect a conflict or difference and the proceeding and argument will almost certainly be confrontational. But the adversarial presentation of the dispute should not be

permitted to obscure the role of a bill of rights as a unifying and integrating force in society. Ultimately, the legitimacy of judicial decision-making in this area rests on the community's acceptance that a bill of rights reflects the fundamental values of the society in which its members wish to live and interact. Viewed in this way, a bill of rights is not just the machinery for resolving the conflicts and tensions which will inevitably arise in a representative democracy, but a dedicated charter with the capacity to be a cohesive and harmonising agent within the community. It is a pact. It need not be, and should not be, the medium for divisiveness within the community. Everyone, not just the individual who is different or the minority that is repressed, is entitled to be treated with equal concern and respect.

[172] The consequence of this perception is that rights are to be exercised responsibly with concern and consideration for others. They are to be exercised with the appropriate sense of community. Exercised in this way, those who feel adversely affected by the exercise of a right can nevertheless be expected to respect the right and the exercise of that right.

[173] The notion that rights are to be exercised responsibly with concern and consideration for others and their responsible exercise respected by others must have particular application where the difference is essentially a difference between citizen and citizen rather than citizen and state. Tipping J has pointed out that the New Zealand Bill of Rights Act is designed to operate between citizen and state but that it will nevertheless often be appropriate for the values which are recognised in that context to inform the common law in its function of regulating relationships between citizen and citizen.[158] The learned Judge's insight is correct. This is not to say, of course, that there is not a public interest in protecting freedom of expression. Nor is it to say that there is not a public interest in protecting an individual's privacy. But this public component does not detract from the fact that the resolution of the present case is the resolution of what is essentially a difference between citizen and citizen. At what point does the behaviour of one citizen in a public place affect another, or other citizens, so as to constitute an offence?

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158 *Hosking v Runting* [2005] 1 NZLR 1 at para [229] (CA).

[174] In regulating the difference and giving effect to the values underlying the rights affirmed in the Bill of Rights it is appropriate to bear in mind this wider perception of the function of bills of right as briefly indicated above. In particular, this perception means that the framework provided by the Bill of Rights and, in particular, the justificatory format of s 5, need not be adopted without appropriate adjustment or reservation.

[175] I am not, I stress, saying that the test to be applied in this case is whether Mr Brooker exercised his right to freedom of expression responsibly and with proper concern and consideration for a resident. Rather, I am suggesting that the test which is adopted, and the balancing exercise involved in applying that test, should not be immune to this wider perception of the function of a bill of rights.

[176] I should add in passing that I prefer not to adopt the language advanced by Tipping J in his judgment. The learned Judge argues that the question becomes "how much does one citizen have to tolerate in order to accommodate the rights and freedoms of others".[159] Behaviour becomes unacceptable when it is "beyond what a reasonable member of the public should be expected to bear".[160] The key phrase, "expected to bear", is repeated.[161] It would be unrealistic to deny that Mr Brooker was confronting Ms Croft. Indeed, that was the object of his protest. But I tend to dislike the notion that the proper exercise of a right is something to be "tolerated". If Mr Brooker's behaviour is protected as an exercise of the right to freedom of expression, it is to be respected as the exercise of a right the community accepts represents a fundamental value. The court must strike the line in other terms.

The "right" to dignity

[177] The second preliminary point relates to the dignity and worth of the human person.

[159] At para [89].
[160] At para [90].
[161] At paras [91] – [93] and [96].

> Most central to all human rights is the right to dignity. It is the source from which all other rights are derived. Dignity unites the other human rights into a whole.

These words, with which I entirely agree, are the words of Aharon Barak, the immediate past President of the Supreme Court of Israel, in his outstanding book, *The Judge in a Democracy*,[162] a book which I unhesitatingly recommend should be compulsory reading for every judge.

[178] Barak observes that human dignity constitutes a right in itself and is expressly recognised as a right in a number of constitutions. The right to dignity, he continues, reflects the "recognition that a human being is a free agent, who develops his body and mind as he wishes, and the social framework to which he is connected and on which he depends".[163] When identifying the elements which make up the "right to dignity", Barak states that human dignity is the freedom of the individual to shape an individual identity. It is the autonomy of the individual will. It is the freedom of choice. Human dignity, Barak adds, regards a human being as an end, not as a means to achieve the ends of others.[164]

[179] Barak concludes with the observation that where human dignity is not mentioned expressly in a constitution (and he mentions the United States and Canada as examples), the right to dignity can nevertheless be recognised through the interpretation of specific rights or by the interpretation of the bill of rights as a whole. Human dignity either is implied by the overall structure of the rights or is derived from their "penumbras".[165]

[180] For the purpose of this judgment, I wish to do no more than emphasise that the dignity and worth of the human person is the key value underlying the rights affirmed in the Bill of Rights. Thus, we accept that discrimination assails a person's dignity; that the arrest, detention, trial and punishment of a person must accord with a procedure which recognises the dignity of the suspect, accused or prisoner; that the

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162 (2006), p 85 (footnote references omitted).

163 At pp 85 – 86.

164 At p 87.

165 At p 88. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance": *Griswold v Connecticut* 381 US 479 at p 484 (1965).

death penalty is a direct denial of a person's dignity; that torture is utterly incompatible with human dignity; that subjecting a person to medical or scientific experimentation, or to medical treatment, without consent intrudes upon that person's freedom of will to determine his or her own fate as part of their essential dignity; and so on.

[181] Other rights and freedoms provide the conditions in which a person's dignity is fostered. The right to manifest a person's religion or belief creates an environment in which that person can develop his or her identity as they see fit. Human dignity is also at the root of the right of everyone to freedom of thought, conscience, religion and belief without interference. More particular to this case, the right to freedom of expression provides and secures a democratic form of government in which the individual possesses the autonomy to thrive as a citizen treated with equal concern and respect. Freedom of assembly and freedom of association also serve the same end of preserving conditions in which human dignity has the opportunity to flourish.

[182] All these rights either protect or recognise the dignity and worth of the person or are designed to promote or protect conditions in which human dignity may exist and flourish. Probably, none are more basic to human dignity than privacy. It is within a person's sphere of privacy that the person nurtures his or her autonomy and shapes his or her individual identity. The nexus between human dignity and privacy is particularly close, including the link between a person's dignity and the sanctity of his or her home where their privacy is nurtured.

The definition or test

[183] I am satisfied that it is not possible to articulate a precise, or even a remotely precise, definition of "disorderly behaviour". The facts of each case will vary greatly. As the Solicitor-General observed in response to questions from the Court: "I would say disorderly means disorderly". The remark is not facetious. It simply recognises that behaviour which may disrupt public order is as unbounded as human imagination.

[184] The pitfalls of trying to essay a firm definition are evident in the attempt of the Chief Justice to do so. The meaning which she ascribes to the words "disorderly behaviour" is rooted in a relatively inflexible perception of the right to freedom of expression. But there are, and will continue to be, many circumstances where the right to freedom of expression, or any other right for that matter, will not be in issue. An example is where a person behaves in a noisy and annoying manner to the consternation of persons using the footpath, thereby disrupting the public order.

[185] Moreover, an inflexible definition is unlikely to cover all the circumstances that will disturb public order, thus defeating the intention of the section. In some circumstances, for example, the behaviour will not be disorderly because the disruption is relatively minor compared to the significance of the exercise of the right to freedom of expression, or some other right. The same behaviour, however, may be properly considered disorderly in the absence of the right, or some other right, being implicated.

[186] Consequently, the most that can be said is that s 4(1)(a) encompasses, and is intended by Parliament to encompass, a range of conduct that may contravene public order. Disorderly behaviour may range from behaviour which disrupts public order to behaviour which, because it is an annoyance, impacts on public order. Such behaviour may, or may not, implicate a right or rights. The court's decision in any given case will depend on the time, location and circumstances and will essentially be a question of fact and degree.

[187] The Statutes Revision Committee reviewed the Police Offences Act 1927 in 1974. It considered that a minor offence should be retained as a control over misbehaviour in public places which, while not serious, might nevertheless constitute an "annoyance".[166] Imprisonment for this offence would be removed and replaced by a maximum fine. In introducing the Summary Offences Bill in 1981, the then Minister of Justice stated that conduct that caused annoyance of a rather indeterminate nature could in theory be punished by imprisonment.[167] To deal with this situation the Government had decided to reserve the penalty of imprisonment,

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166 "Report on the Police Offences Act 1927" [1974] IV AJHR 1.5A, p 13.
167 Hon J K McLay MP (16 June 1981) 437 NZPD 419.

limited to three months, for situations where the behaviour was coloured by violence. The Minister then stated: "Because imprisonment is not available for the lesser offence of disorderly behaviour, it is felt that it can properly be expressed in somewhat wider terms."

[188] It is clear that Parliament contemplated a lesser offence couched in wide terms that would cover behaviour in public places which, while not particularly serious, could constitute annoyance and warrant the attention of the criminal law.[168] Of course, these statements and the ensuing legislation preceded the enactment of the Bill of Rights and must now be read subject to that Act. But this does not mean that the provision is to be judicially amended so as to exclude behaviour that Parliament intended be included within the section. Parliament's intent still matters. Because the "wide words" remain, the section is self-adjusting. Where a right is in issue behaviour which "while not serious, might constitute an annoyance" is unlikely to be regarded as an offence under s 4(1)(a). Where no significant right is involved the same behaviour may well be regarded as disorderly behaviour. The impact on "public order" would remain the same, but the values or interests would be different and obtain a different weighting in the inevitable balancing exercise. There is nothing novel in this viewpoint; it is another way of saying that what is or is not disorderly behaviour will depend on the circumstances. For that reason it is unnecessary to raise the bar as to what constitutes disorderly behaviour to guard against the possibility that a fundamental right or rights may be diminished.

[189] In the absence of a serviceable definition, the best that the law can do is to provide a test or benchmark against which the behaviour that is impugned can be assessed. It is for that reason that I will shortly introduce the concept of the reasonable person.

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[168] I fully agree with Blanchard J when he states that "[t]he section deals with offending which can be truly described as minor". See para [52] of Blanchard J's reasons.

(i) Public order

[190] The majority have emphasised that the offences under ss 3 and 4 are offences against "public order". Certainly, this is so. It says so in the heading. All offences are circumscribed by the requirement that the offending occur "in or within view of any public place"[169] or "in or within hearing of a public place".[170] As s 4 is aimed at setting standards of public order, the breach of which will attract the criminal law at the lower end of the sentencing scale, the "public order" element of the offences is satisfied if the offending takes place in a public place, or within view or hearing of a public place. The question under s 4(1)(a), then, is whether the behaviour is disorderly and therefore fails to meet the standards of public order which Parliament has sought to protect in enacting the section.

[191] It is an error to seek, in effect, to graft on to the provision an added element requiring the degree or intensity of the behaviour to be such as to provoke public disorder falling short of violence. If the behaviour is disorderly, it is against public order by virtue of being within view of a public place, and it is inappropriate to seek to elevate the threshold of disorderly conduct by reading some added significance into the words "public order".

(ii) The context

[192] I consider that the efforts to limit the scope of s 4(1)(a) by reference to other wording in ss 3 and 4 are somewhat strained. The use of the word "disorderly" in s 3 cannot have the effect of elevating the seriousness of the behaviour contemplated in s 4(1)(a). They are different offences, the one more serious than the other. Section 3 gives way to s 4 at the point where the behaviour is unlikely to cause violence. Thus, the word "disorderly" describes a spectrum of behaviour ranging from the more serious to the less serious, both as between s 3 and s 4 and within each section itself.

169 Section 3 and s 4(1)(a) and (b).
170 Section 4(1)(c) and (2).

[193] Nor do I think that other language in s 4 bolsters the attempt to vest the words "disorderly behaviour" with a narrower meaning than those words naturally convey. No assistance can be gained from reference to s 4(1)(b) other than that the provision does not lose its impact on public order should the recipient of the abusive words be on private property providing, of course, the speaker is in a public place. In particular, I cannot agree that the words "is reckless whether any person is alarmed or insulted by those words" in s 4(1)(c)(i) inform the meaning of disorderly behaviour in s 4(1)(a) by some form of statutory osmosis. Those words are intended to widen the scope of the offence specified in s 4(1)(c)(i) by making it clear that an actual intention to alarm or insult is not required. This qualification has no application to the offence proscribed in s 4(1)(a). Furthermore, the phrase is not repeated in s 4(1)(c)(ii). It is enough that the words are "indecent or obscene".

[194] It is also a fruitless exercise to try and limit disorderly behaviour to conduct that is not covered in the other paragraphs in the section. There is no reason why the section should be approached as if it were a sudoku puzzle. The offending can overlap. In respect of s 4(1)(a), for example, the behaviour may be offensive but not disorderly, disorderly but not offensive, or both offensive and disorderly.

(iii) Other offences

[195] I regard the suggestion that Mr Brooker's behaviour should not be held disorderly because there are other offences which protect, or are thought more appropriate to protect, privacy interests as an indirect attempt to limit the scope of s 4(1)(a). Nor is this consideration relevant to the balancing exercise. Certainly, other provisions serve the purpose of protecting privacy interests: s 21(d) of the Summary Offences Act 1981; ss 3 and 4 of the Trespass Act 1980; and ss 4 and 6 of the Harassment Act 1997.[171] What Mr Brooker did does not constitute an offence under any of these provisions, but it is difficult to see why that fact should mean that his behaviour cannot be considered disorderly under s 4(1)(a). Offences can and do

[171] For a comprehensive review of the statutory provisions which protect privacy interests, see the judgment of Gault P and Blanchard J, delivered by Gault P, in *Hosking v Runting* at paras [91] – [116]. The Privacy Act 1993 also secures a measure of people's privacy. So, too, the law of defamation is available to those who are defamed in the course of having their privacy invaded.

overlap and often, as in the case of each of the above offences, have a different purpose.

[196] I believe that the reason other offences which can be said to serve privacy interests are adverted to is the belief or feeling that Ms Croft's privacy is not or should not be relevant to an offence under s 4(1)(a). This is to erroneously "personalise" the privacy interest in issue. I make the point later that Ms Croft's interest in her privacy is relevant simply because she is a member of the public. The question remains whether Mr Brooker's behaviour is disorderly because it was undertaken in a public place outside the home of a resident whom he was deliberately targeting.

Public "disorder"

[197] I sense, however, that the reluctance of the majority to accept that s 4(1)(a) is intended to cover the behaviour of the kind in question stems from this intuitive feeling that Ms Croft's privacy interest in the seclusion of her home is a private interest and one that is best protected by other provisions. But that notion cannot withstand scrutiny. The public "disorder" in this case exists in the fact that Mr Brooker, in a public place, carried out a protest action for a period of not less than 30 minutes at a distance of three metres from the home of a resident he was targeting, thereby disrupting her "right" to be let alone in the seclusion of her home.

[198] If Mr Brooker had chosen to "trail" Ms Croft on a public street for over 30 minutes keeping a distance of three metres from her (and not interfering with her duties as a policewoman) carrying exactly the same placard and chanting exactly the same chant, his behaviour would be surely regarded as "disorderly". What logical difference can it make that Ms Croft was on private property? It would be an absurd gloss on the provision to insist that a citizen or citizens who are affected by the behaviour must themselves be in a public place. Annoyance, disturbance or disruption emanating from a public place need not, in the nature of things, be restricted to that public place.

The perdurable reasonable person

[199] I return to the test to be adopted and the concept of the reasonable person. The appropriate test can be framed in straightforward terms:

> A person behaves in a disorderly manner if he or she causes a disturbance or annoyance to any person or persons or interferes with the rights or interests of another person or persons to such a degree that a reasonable person would regard the behaviour as disorderly. In determining this question, regard shall be had to the time, place and circumstances of the behaviour and the rights and interests of the alleged offender, the rights and interests of the person or persons affected by the behaviour, and the interest of the public in protecting the rights and interests in issue.

[200] Because of the myriad circumstances which arise in real life, it is not possible to devise an entirely objective test to determine what is or is not disorderly behaviour. There must, of course, be a benchmark against which the conduct in issue can be judged, but it is unavoidable that the benchmark will include a subjective element. Either the judge will subjectively determine whether the behaviour is disorderly or there will be a subjective element in the judge's perception whether the behaviour meets the requisite test. This subjective element was present when the defendant's conduct was judged against the "right thinking members of the public" test, and it will necessarily infiltrate a test involving the standards of the reasonable person. But, as I have said, while I have acknowledged that it is not possible to have an entirely objective test, the test or benchmark I have proposed minimises the subjective element as far as possible, and it does so to a greater extent than any alternative approach.

[201] The concept of the reasonable man (or woman) has longstanding currency in other areas of the law, and I am reluctant to believe that the Clapham omnibus does not run to Molesworth Street. While not entirely eliminating the judge's subjective perception, it charges the judge with the task of assessing the behaviour in issue against the contemporary attitudes, practices and values of the community. The judge must seek to ascertain the reaction of the reasonable person. That is as it should be. Disorderly behaviour should be assessed according to the prevailing standards of the community. Just as the reasonable person in negligence is presumed to be free from over-apprehension and over-confidence, the reasonable person in this

context can be presumed to be neither insensitive nor over-sensitive to the preservation of public order. Using similar language, courts in Australia have defined the reasonable man as one who is mature enough to tolerate expression of views violently at odds with his own, and who is reasonably understanding and contemporary in his reactions.[172]

[202] I wish to stress the importance of a test which imports the standards of the community for good reason. First, as I have suggested, what is or is not disorderly conduct should, as far as possible, be determined by reference to the values of the community and not the predilections of judges. Reference to the Bill of Rights automatically tends to enlarge the scope for judicial evaluation of the behaviour in issue. Rights and freedoms, and the protection of rights and freedoms, it is thought, are more naturally the province of judges. But the application of the Bill of Rights does not mean that what is essentially a question of fact and degree is to be converted into a question of law or that the contemporary attitudes, practices and values of the community are to be set to one side. The reaction of the reasonable person can be informed by due recognition of the rights and values affirmed in the Bill of Rights.

[203] Secondly, I consider that a test importing the standards of a reasonable person is to be preferred to the use of adjectives such as "undue" or "serious" to delimit conduct which can be said to be disorderly. Such adjectives serve the purpose of emphasising that not all behaviour that causes a disturbance or annoyance will be disorderly. But that is to state the obvious. The word used in the statute is "disorderly", and it adds little to the evaluation to be carried out to suggest that conduct must be "undue" or "serious" before it can be held to be disorderly.

[204] If something along these lines must be said, it should be enough to say (but not as part of the formulation of an approach or test) that, self-evidently, it is not every behaviour that causes disturbance or annoyance which will be disorderly for

172 *Worcester v Smith* [1951] VLR 316 (SC); *Inglis v Fish* [1961] VR 607 (SC); *Ellis v Fingleton* (1972) 3 SASR 437 (SC); *Khan v Bazeley* (1986) 40 SASR 481 (SC); *Wurramura & Pregelj v Haymon* (1987) 24 A Crim R 195 (SC (NT)).

the purposes of the provision. The introduction of the concept of the reasonable person avoids this judicial perambulation. The court determining the issue can cut to the quick: would the reasonable person, seized of the rights and interests involved and having regard to all the circumstances, regard the behaviour in question as disorderly?

[205] Similarly, stipulating that the behaviour must disturb public order to an extent that warrants the intervention of the criminal law begs the question. Again, it may be a legitimate means of drawing attention to the fact that it is not every piece of behaviour that causes an annoyance that is disorderly. But it does not in itself provide a benchmark. The use of the phrase, as with such adjectives as "undue" and "serious", seems to indicate a fear that the lower courts will be unduly expansive in their interpretation and application of s 4(1)(a). If this is so, the fear reflects the drive discernible in many appellate judges to confine and control the manner in which the judges of the lower courts discharge their function. Guidance quickly becomes regulation.[173] When the question in issue is essentially a matter of fact and degree requiring the application of common sense, this evident lack of trust is difficult to justify.

[206] Thirdly, the test importing the reasonable person serves as the conduit for the introduction of common sense into the courtroom in respect of an issue needing the full advantage of that virtue. It provides a pressing invitation to the judge to resort to common sense in evaluating the seriousness and impact of the behaviour in issue. The judge must necessarily be informed by the common sense of the reasonable man and woman when exploring the contemporary attitudes, practices and values of the community. The application of that attribute will not then be impeded by recourse to a legal or quasi-legal formula which may not adapt itself to particular circumstances and which will, with time, become the subject of minute analysis. It is not an unfitting question to ask in this case: standing back and looking at all the circumstances, does a decision that Mr Brooker's conduct was disorderly accord with common sense?

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173 Thomas (2005), pp 266 – 267.

[207] Finally, the test of the reasonable person seems to have emerged as the preferred test in recent cases in both Australia and New Zealand. The test was adopted in Australia.[174] It is "the Australian equivalent of our right-thinking man".[175] Further, the hypothetical opinion of the reasonable person has been applied in more recent cases in New Zealand.[176] The fact that judges in New Zealand have moved to the reaction of the reasonable person, apparently without a close examination of the merits of that test, would suggest an intuitive preference for a more tenably objective approach.

[208] Before applying this test it is necessary to define the nature of the rights or interests to be evaluated in accordance with that test. More particularly, it is necessary to determine whether privacy is a "right" or "value".

Privacy: a "right" or a "value"?

[209] The answer to the question whether privacy is a "right" or a "value" will determine whether the court is required to balance a right against another right or a right against a limitation of the right. In the first case, the court is confronted with competing rights. As rights, they have equal standing. The balancing is essentially horizontal.[177] Such balancing leads naturally to the crafting of reciprocal compromises of the rights in order to preserve, as far as possible, the values underlying each right.

[210] Where the balance is to be struck between a right and a limit, however, the right tends to assume a dominant status. The "non right" must be justified as a reasonable limit on the right. Indeed, in terms of s 5 of the Bill of Rights it must not only be "reasonable" but also must be "demonstrably justified". The balancing exercise has a vertical cast and, whether the label is adopted or not, the limit falls to

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174 See footnote 172 above.

175 See Keith, "The Right to Protest" in Keith (ed), *Essays on Human Rights* (1968) 49, p 66.

176 *Ceramalus v Police* (1991) 7 CRNZ 678 at pp 682 – 683 (HC); *R v Ceramalus* (Court of Appeal, CA 14/96, 17 July 1996); *R v R* (2005) 21 CRNZ 610 at p 616 (CA); and *Stemson v Police* [2002] NZAR 278 at para [50] (HC). Note that the first three cases related to the alternative offence in s 4(1)(a), that of offensive behaviour.

177 Barak, p 171.

be considered in what Andrew and Petra Butler have called a "culture of justification".[178]

[211] To argue that the same outcome would be reached irrespective of whether the balancing exercise is between a right and another right and a right and a limitation would be a judicial pretence. Certainly, what is being assessed is the value underlying a right and the value underlying the limit. It may also be accepted that limits can be regarded as fundamental.[179] But nothing can gainsay the fact that the limit must be justified, or "demonstrably justified", as a reasonable limit on the value underlying the right. The balancing exercise cannot escape the requisition that the limit be justified. All too easily, judges will be prone to import a presumption in favour of the right.

[212] Such an approach seems inappropriate where the contest is not between citizen and state but essentially a difference between citizen and citizen. Surely, the balance should be struck between the value of freedom of expression in the circumstances of the case and the value of privacy in those same circumstances. Neither should be weighted, the one with a positive weighting by being an affirmed right and the other with a negative weighting by requiring justification as a limitation on that right. The approach I prefer avoids the infection of what Anderson J called, in another context in a phrase I am pleased to abstract, the "semantic imprecision and questionable analysis of the relationship between rights and values".[180]

[213] The artificiality of the distinction between a right and a limit, and the balancing exercise which results in the context of this case, can be demonstrated by challenging the notion that privacy is not a right. The Court of Appeal had the opportunity to proclaim that privacy is a right in *Hosking v Runting*, but chose not to do so.[181] I will briefly marshal the arguments why the protection of one's privacy should be regarded as a right.

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178 Butler and Butler, paras [6.8.1] – [6.8.3] and [6.9.10].

179 Butler and Butler, paras [6.9.8] – [6.9.10].

180 *Hosking v Runting* at para [263].

181 See Keith J at para [184]; Tipping J at paras [224] and [237] – [241]; and Anderson J at para [265]. In a masterly judgment delivered by Gault P, Gault P and Blanchard J arrive at the conclusion that a tort of invasion of privacy exists in New Zealand without negating the notion that privacy may be a right or asserting that it is to be treated as a "value".

[214] Without strain to the words, s 28 of the Bill of Rights allows the courts the freedom to recognise other rights or freedoms not specifically affirmed in the Act. The courts need only be satisfied that the value in issue is an "existing right".

[215] Immediate support for the contention that privacy is an existing right is to be found in the long title to the Bill of Rights itself. Paragraph (b) proclaims that the Act is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. Article 17 of the International Covenant provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

[216] Having regard to the clear legislative objective in the long title and the enactment of s 28 it seems to me to be faintly aberrant to suggest that privacy is not an existing right to be given recognition under that section. As such, it is not to be "abrogated or restricted" by virtue of the fact that it has not been specifically affirmed in the Bill of Rights.

[217] Secondly, the right to privacy is widely recognised in other international covenants. A further, but incomplete list, follows:

(i) Article 12 of the Universal Declaration of Human Rights (1948):

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.

(ii) Article 8 of the European Convention on Human Rights (1950):[182]

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

[182] Convention for the Protection of Human Rights and Fundamental Freedoms (1950) 213 UNTS 221.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

(iii) Article 16 of the United Nations Convention on the Rights of the Child (1989):[183]

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

(iv) Article 7 of the Charter of Fundamental Rights of the European Union (2000):[184]

Everyone has the right to respect for his or her private and family life, home and communications.

(v) Article 11 of the American Convention on Human Rights (1969):[185]

1. Everyone has the right to have his honour respected and his dignity recognised.

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.

3. Everyone has the right to the protection of the law against such interference or attack.

(vi) Article 18 of the Cairo Declaration on Human Rights in Islam (1990):[186]

…

(b) Everyone shall have the right to privacy in the conduct of his private affairs, in his home, among his family, with regard to

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183 (1989) 1577 UNTS 3.
184 OJ (C 364) 1.
185 (1969) 1144 UNTS 123.
186 OIC Resolution No 49/19-P.

his property and his relationship … The State shall protect him from arbitrary interference.

(c) A private residence is inviolable in all cases. It will not be entered without permission from its inhabitants or in any unlawful manner, nor shall it be demolished or confiscated and its dwellers evicted.

[218] It is to be noted that privacy in the home, and the notion of the inviolability of the home (and also the family), are recurring features of the universally articulated right to privacy.[187]

[219] Thirdly, privacy has been judicially recognised as a "right". An authoritative assertion of privacy as a right is to be found in *Morris v Beardmore*.[188] In this case, the validity of a constable's action in entering into a private property in order to take a breath test was in issue. Lord Scarman had this to say:[189]

> In formulating my reasons for allowing the appeal and restoring the decision of the magistrates … I have deliberately used an adjective which has an unfamiliar ring in the ears of common lawyers. I have described the right of privacy as 'fundamental'. I do so for two reasons. First, it is apt to describe the importance attached by the common law to the privacy of the home. It is still true, as was said by Lord Camden CJ in *Entick v Carrington* (1765) 19 State Tr 1029 at 1066, cf [1558–1774] All ER Rep 41 at 45:
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> > "No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; … If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him."

[220] Lord Scarman continued:[190]

> The present appeal is concerned exclusively with the suspect's right to the privacy of his home ... The appeal turns on the respect which Parliament must be understood, even in its desire to stamp out drunken driving, to pay to the fundamental right of privacy in one's own home, which has for centuries been recognised by the common law.

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187 See also art 5(b) of the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live (1985) UN Doc A/40/53; art 14 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); and art 10 of the African Charter on the Rights and Welfare of the Child (1990).

188 [1981] AC 446.

189 At p 464.

190 At p 465.

[221] Sedley LJ, who enjoys the reputation of being an enlightened judge, said in *Douglas v Hello! Ltd*:[191]

> Nevertheless, we have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy … equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everyone has a right to some personal space.

[222] Later, Sedley LJ said:[192]

> I would conclude, at lowest, that Mr Tugendhat has a powerfully arguable case to advance at trial that his two first-named clients have a right of privacy which English law will today recognise and, where appropriate, protect. To say this is in my belief to say little, save by way of a label, that our courts have not said already over the years.

[223] Of lesser authority, I acknowledge, are my comments in *R v Jefferies*.[193] I pointed out, with reference to s 21 of the Bill of Rights, that the right affirmed in that section is concerned to protect those values or interests which make up the concept of privacy. I continued:

> Privacy connotes a variety of related values; the protection of one's property against uninvited trespass; the security of one's person and property, particularly against the might and power of the state; the preservation of personal liberty; freedom of conscience; the right of self-determination and control over knowledge about oneself; and when, how, and to what extent it will be imported; and recognition of the dignity and intrinsic importance of the individual. While necessarily phrased in terms of individual values, the community has a direct interest in the recognition and protection of this broad right to privacy. It is a valued right which is esteemed in modern democratic societies.
>
> Nor does the fact that the full nature and extent of the right to privacy may be still evolving mean that it is not a fundamental right. Counsel for the Crown's attempt in argument to describe it as something less than that is misplaced. Care must always be taken not to confuse the difficulty in closely defining a right with the existence and importance of the basic values which inspire that right lest they be unthinkingly discounted as a result. In a society which is increasingly complex and sophisticated, and yet dedicated to freedom of thought and action and notions of inviolate personality, human dignity, tolerance, private relationships; and shared intimacies, the right to privacy is imperative. It embodies a basic respect and consideration for persons which is the unarticulated premise in much of our law.[194]

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191 [2001] 2 WLR 992 at paras [100] – [111] (CA). See also paras [113] – [127].

192 At para [125].

193 [1994] 1 NZLR 290 at p 319 (CA).

194 These cases do not exhaust the occasions on which a judge has referred to privacy as a right. They provide, however, examples of the most deliberate use of that term.

[224] Finally, there can be little doubt that the community regards privacy as a right and that people will speak of and assert privacy as a right. Rights are the property of the people. They serve the people. They represent the enduring values of the community. It is therefore appropriate for the courts to seek to reflect the community's perception of those values which are regarded as fundamental. The right to privacy is a deeply held and recurring belief. It cannot be dubbed a passing trend. It is not a belief that has resulted from public opinion polls or mere populism but a fundamental belief that has passed the test of time.[195]

[225] The courts, therefore, should not sever themselves from the fundamental values of society but rather seek to extract and apply the underlying values which the community holds fast to as basic democratic and human rights. Indeed, this attitude should prevail over the force of the doctrine of precedent and traditional analogical reasoning where the precedent or reasoning does not reflect the community's current commitment to human rights. To recognise privacy as a right is simply to bring legal discourse into harmony with an established and fundamental community value.[196] If this intellection is adhered to, it is difficult to see how the courts can refuse, or persist in refusing, to describe privacy as a right.

[226] In this brief discussion I have not sought to rebut the arguments of those who have hitherto opposed the notion that privacy should be accorded the status of a right. In the fullness of time, the arguments will come to be regarded as thin. The notion, for example, that privacy is so ambiguous and uncertain as to defy reasonable definition would seem to be belied by the successful efforts of the draftspersons in so many international instruments in so many different jurisdictions, some of which are mentioned above, to do just that. Similarly, the arguments rehearsed by Richardson J in *R v Jefferies*[197] that it would be inappropriate to attempt to entrench a right that is not by any means fully recognised, which is in the course of development, and whose boundaries are uncertain, seem parochial. Sight has apparently been lost of the fact that, however broad and diverse the concept of privacy and the values underlying privacy, it is the circumstances of an individual

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195 Barak, p 133.
196 Barak, pp 58 and 132 – 133; Thomas (2005), pp 332 – 333.
197 At p 302.

case which will serve to identify the value in issue and delimit the scope of the right in the particular circumstances. Indeed, this process occurs whenever abstract rights are applied in concrete situations.

[227] Another brief point may be noted. It will be recalled that, in the history of this country's Bill of Rights, the recommendation that privacy should not be expressly affirmed as a right initially applied to the proposal that the enactment constitute a supreme law. But the proposal for an entrenched bill of rights met with considerable opposition and when, by 1987, it was clear that such a measure could not be passed, the Government at the time introduced the Bill of Rights as an ordinary statute. The transition from a supreme law to an ordinary statute was completed without the legislature making any significant amendments to the rights affirmed in the Bill.[198] The Bill of Rights would serve an interpretive function only.[199] Having regard to this more limited function, it seems incongruous to suggest that when interpreting a statute, the courts should not prefer a meaning that is consistent with the citizens' "right" to privacy in terms of s 6. Of course, in many cases, such as search and seizure cases, the courts do have due regard to that value. But in a document designed to protect and promote fundamental rights by ensuring that legislation is interpreted in harmony with those rights, the express omission of a right of privacy should not inhibit the court from giving privacy the status of a right.

[228] In recommending the enactment of what is now s 28, the authors of the White Paper presented to the House of Representatives in 1985 expressly spelt out, not only that the specific guarantee of certain rights and freedoms in the proposed Bill did not deny the existence of other rights, but also that there was nothing in the Bill which

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198 The notion of a supreme law, however, was expressly negated by the addition of s 4. For a brief history of the Bill of Rights, see Thomas, "A Bill of Rights: The New Zealand Experience" in Debono and Colwell (eds), *Comparative Perspectives on Bills of Rights* (2004) 23, pp 24 – 26.

199 The White Paper presented to the House in 1985 contemplated an entrenched statute as a supreme law. Thus the Paper speaks of it being inappropriate to attempt to "entrench" a general right to privacy that was not fully recognised: *A Bill of Rights for New Zealand: A White Paper* (1985), para [10.144]. The Interim Report of the Select Committee which followed in 1987 adopted the same position: "Inquiry into the White Paper – A Bill of Rights for New Zealand" [1986 – 1987] X AJHR I.8A, pp 63 – 64. In the Final Report presented to the House in 1988, however, the Select Committee recommended that the Bill of Rights be introduced as an ordinary statute: "On a White Paper on a Bill of Rights for New Zealand" [1987 – 1990] XVII AJHR 1.8C, p 3. Notwithstanding its diminished status, the Bill contained in the Appendix to the Report substantially followed the Bill proposed in the White Paper.

would prevent Parliament or the courts from creating and recognising new rights.[200] The Select Committee in its Interim Report was of the same view. It stated that the purpose of the provision (then art 22) was to make it clear that other rights and freedoms are not somehow diminished simply because they are not included in the Bill of Rights. A claim to a "non-bill right", it added, cannot be denied on the basis that it is not guaranteed by the Bill of Rights.[201] It is not tenable to suggest that the White Paper in 1985, or the Select Committee which reported on that Paper in 1987 and 1988, or Parliament itself in enacting the Bill of Rights in 1990, intended to place some sort of embargo on the recognition of a general right of privacy for all time.

[229] In these circumstances, s 28 can be invoked. Parliament did not intend existing rights to be abrogated or restricted simply because they were not expressly included in the legislation. Scope for an acknowledged right to be recognised and developed by the courts was clearly contemplated. In this way, s 28 confirms that the Bill of Rights is not a static document. As with written constitutions, it can be approached as a "living" instrument. Just as the interpretation of the affirmed rights may vary and develop over time, existing rights can be identified and given the sanction of a fundamental right to be protected and promoted in this country.

[230] For present purposes, the value of this discourse is to show the tenuous hold of the framework adopted by the other members of this Court for the resolution of this appeal. Only the proverbial whisker prevents the issue being approached as a conflict between competing rights, neither of which assumes a presumptive or paramount status.

Fundamental value v fundamental value

[231] For these reasons I believe that the appropriate basis on which to evaluate the competing interests is to treat both the right to freedom of expression and privacy as

200 At para [10.179].
201 At p 68.

fundamental values and accord neither presumptive or paramount status. The value underlying free expression is undoubtedly fundamental. But, as I will shortly demonstrate, the value underlying privacy is also a fundamental value. As the issue is essentially an issue between citizen and citizen, it can be approached outside the justificatory format in s 5 and the "culture of justification" attached to or deriving from that section. In the result, one fundamental value falls to be balanced against another fundamental value.[202]

[232] This approach places the competing values of the participants on a more level judicial playing field. Labels are dispensed with in favour of the values underlying those labels and the "culture of justification" is not permitted to obscure the fact that privacy, however described, is a fundamental value. Had this approach been adopted by the majority, I believe that the outcome of this appeal would have been quite different. If, as is acknowledged, the decision is a difficult one when the approach is to require Ms Croft's privacy to be justified as a limit on Mr Brooker's right to freedom of expression, it must necessarily cease to be difficult if the balancing exercise does not require that element of justification. Certainly, it must be much less difficult. Conversely, because of my analysis of the significance of the value of privacy in the home, there would be nothing to prevent me holding that the value of the resident's privacy imposed a reasonable limit on Mr Brooker's right to freedom of expression if I were compelled to adopt the framework of justification. In that event, I would endorse the judgment of McGrath J.

[233] In accordance with the outline of this judgment given above, I will next touch upon the right to freedom of expression in the abstract before analysing the value to be ascribed to that right in the particular circumstances of this case. I will then examine privacy, including the privacy of being let alone in the seclusion of the home, as an interest or value and analyse that value in the circumstances. This closer analysis of the respective values ultimately determines the weight which should be ascribed to each.

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202 For a most perceptive exposition of the nature of a "right", see Butler and Butler, paras [6.9.1] – [6.9.3].

The right to freedom of expression

[234] Freedom of expression is a hallowed right and needs no enlargement. Its critical importance in a free society has been recognised on countless occasions in numerous judgments. Indeed, the courts have been zealous in assuming a responsibility to protect the right to freedom of expression from perceived encroachment. It is a right which lends itself to immensely strong formulations in the abstract. Proponents, including judges, with or without a rhetorical flair, quickly and earnestly portray the right to freedom of expression as the central pillar of a free and democratic society, the true bastion against tyranny of thought. The judiciary tends to see itself as the anointed guardian of this fundamental right. A presumption reflecting this predilection can quickly become a "trump" card. The right, it seems, is seen to implicitly constitute a superior law and judgments can at times exhibit a crusading or missionary zeal which is a trifle discomforting.

[235] If anything, therefore, what is required when touching upon this hallowed right is a note of caution. As Tipping J observed in *Hosking v Runting*,[203] the right to freedom of expression as affirmed in s 14 of the Bill of Rights is not to be relied upon as if it were some universal social panacea which must be seen as trumping other rights and values in most, if not all, circumstances. I agree. Not all expression, or all means of expression, are deserving of judicial approbation.

[236] A clear example of the over-zealous application of the right to freedom of expression is to be found in the decision of the High Court of Australia in *Australian Capital Television Pty Ltd v Commonwealth of Australia*.[204] The High Court struck down part of a Commonwealth Act which provided for free air time for all political parties and permitted unrestricted journalistic coverage, but barred broadcasters from broadcasting political advertisements for a period prior to the election.[205] The legislature's objective was to "cleanse" the electoral process by limiting political

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[203] At para [231].

[204] (1992) 177 CLR 106.

[205] Part IIID of the Broadcasting Act 1942 (Cth), introduced by the Political Broadcasts and Political Disclosures Act 1991 (Cth).

expenditure on campaigns. The effect of the legislation would have been to negate or reduce the advantage of political candidates or parties having wealthy backers able to buy up expensive television time to promote their chosen candidates or parties. The High Court accepted that it had no express power to review primary legislation, but held that a power to do so was implied in the constitutional primacy of representative government. As representative government depends on the full and free communication of ideas, any legislation which obstructs the fullest flow of opinion in the electoral process was held to be unconstitutional.

[237] I have no quibble with the High Court's discovery that the Court's jurisdiction to preserve representative government is implied in the country's then 92 year old constitution. But the exercise of the jurisdiction in that case represents a provocative lack of judicial restraint. Democracy demands a free flow of ideas, but it is difficult to accept that legislation which seeks to provide a more level playing field in the public expression of those ideas is damaging to the preservation of representative government. Indeed, it may credibly be argued that such a measure would be beneficial in achieving a more truly representative democracy. As Sir Stephen Sedley has observed, the High Court assumed a symmetry between freedom of speech and freedom of information which simply does not exist.[206]

[238] Why did this judicial overreaching occur? The reason is simple. Notwithstanding that it is a final appellate court of the highest calibre, the Court pursued the right to freedom of expression with misplaced and disproportionate zeal. The balance which was required, as well as the balancing exercise, was seriously deficient.

[239] Undue judicial deference of this kind to the right of freedom of expression arises in moving from the abstract to the particular. Applied to a particular situation,

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[206] "Human Rights: a Twenty-First Century Agenda" [1995] PL 386, p 391. Lord Cooke of Thorndon, while not averse to the implied limitation, has also expressed a respectful query about the actual result propounded by the High Court. See "The Dream of an International Common Law" in Saunders (ed), *Courts of Final Jurisdiction: the Mason Court in Australia* (1996) 138, p 140.

the exercise of the right may not deserve, or fully deserve, the weighting generally accorded the right. The right to freedom of expression may be involved, but to grace the particular use of that freedom with the full panoply of that right in the abstract is to dismember sound judicial reasoning.

[240] The reality therefore, is that the courts must deal with the right as exercised in a particular situation; that is, move from the abstract concept to its concrete application. This requirement does not mean that the courts should judge the validity of the particular expression. Rather, because the right to freedom of expression will never fall to be considered in isolation, but always in conjunction with other rights, interests or values, the courts must recognise that the application of the right must be approached with a fair sense of proportion. Freedom of expression is of immense importance in a democracy, but its importance in a particular case will always turn on the circumstances.

The "right" to protest

[241] Bearing directly on the right to freedom of expression is the means used in exercising that right. Mr Brooker chose the protest action in question. Protest action is undertaken under the cognomen of the right to freedom of expression. It is frequently referred to as a "right" in itself and I would not cavil at that. But protest action is not conterminous with freedom of expression. Just as the High Court of Australia in the *Australian Capital Television* case was in error in assuming a symmetry between freedom of speech and freedom of information, it is an error to assume a symmetry between the right to freedom of expression and the "right" to protest. Protest action is the form in which the protestor has chosen to exercise his right. It is that form, and not the content or substance of the expression, which is challenged in this case.

[242] Self-evidently, some means of expression, including the form of protest action which is undertaken, will be inappropriate in a free and democratic society dedicated to the well-being of the individuals that make up that society. In the present case, therefore, it is legitimate to subject Mr Brooker's protest action to close

scrutiny. It becomes relevant that there are other equally effective means or locations by which Mr Brooker could have pursued his cause.

Freedom of expression in the circumstances of this case

[243] In moving from the abstract to the particular, I am attracted to the approach adopted by Tipping J in *Hosking v Runting*[207] when determining the value to be placed on the right to freedom of expression in that case. I am conscious, of course, that the learned Judge was addressing the publication of written material, but I believe his approach lends itself to a wider application.

[244] In the course of his judgment, Tipping J proceeded to analyse the value of freedom of expression in the circumstances of that case by reference to the theories or bases on which the right to that freedom is founded. There are, of course, different formulations of these bases, but it is convenient to take the bases helpfully proffered by Professor Paul Rishworth[208] and adopted by the learned Judge.[209] The three bases are:

(i) the marketplace of ideas theory;

(ii) the maintenance and support of democracy theory; and

(iii) the liberty theory.

[245] Measured against the bases on which the right to freedom of expression is founded, the value of that right in the particular circumstances of this case fall far short of its pristine articulation in the abstract. Take the "marketplace of ideas" basis first. Mr Brooker could not sensibly contend that he was making a major or significant contribution to the "marketplace of ideas". He was expressing a personal grievance and, while I accept that it is important that he be at liberty, subject to the law of defamation, to express that grievance, it cannot be said that the wealth of ideas which are so important in a liberal democracy is appreciably enlarged.

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207 At paras [233] – [235]. As indicated above, I am not attracted to the importation of the format in s 5 of the Bill of Rights lock, stock and barrel in the circumstances of this case.

208 Rishworth and others, *The New Zealand Bill of Rights* (2003), pp 309 – 311.

209 At para [233].

[246] The "maintenance and support of democracy" basis fares no better. Undeniably, it is important to the working of representative government that citizens be able to protest the corrupt and unacceptable behaviour of the police. It is of lesser importance, but still important, that the citizen be able to protest that a particular police officer is corrupt. But, again, the value to be attributed to that right can be diminished by the means used to voice that protest. Thus, the true question is how important it is to the "maintenance and support of democracy" that Mr Brooker be permitted to pursue his protest in a residential neighbourhood targeting the occupant of a particular home. I cannot accept that representative government would be significantly impaired if Mr Brooker's right to freedom of expression were not exercised in this particular manner.

[247] To avoid being misinterpreted, I reiterate that I fully accept that Mr Brooker must be entitled to express his grievance. The content, substance, or merits of his expression is not questioned, challenged or in issue in this case. To recognise that some forms of protest serve the bases of the right to freedom of expression better than others is not to judge the merits of the protest, in this case Mr Brooker's complaint about Ms Croft's activities as a policewoman. His complaint may or may not be justified. That issue is irrelevant. If it were otherwise, all expressions pursuant to the right to freedom of expression would have to be given equal weight. Mr Brooker's expression of his personal grievance against Ms Croft would have to be given equal weighting with a mass protest to a threatened inroad into, say, the universal franchise. For this reason, it is permissible to hold that Mr Brooker's expression of his grievance, or the method he chose to give vent to his grievance, do not contribute greatly to either the "marketplace of ideas" or "maintenance and support of democracy" bases of the right to freedom of expression, without intruding upon the question of truth or otherwise of his complaint.

[248] As I have suggested above, it at once becomes relevant to acknowledge that Mr Brooker had other equally effective and democratic means of voicing his protest. It is, for example, common ground that Mr Brooker could protest outside the police station with impunity. He could no doubt have done so when Ms Croft was at work without detriment to her privacy or the public good.

[249] I emphasise, however, that I am not saying that because Mr Brooker had, and has, the right to protest elsewhere, his conduct outside Ms Croft's home is therefore disorderly. The point is that, when assessing the weight to be placed on Mr Brooker's right to freedom of expression pursued as protest action, it is relevant to bear in mind that it is not his right to freedom of expression or his "right" to protest that is in issue. Rather, it is Mr Brooker's right to freedom of expression expressed in that protest action in a residential neighbourhood targeting a resident in the privacy of her home that is in issue.

[250] With respect to the "liberty" basis, I endorse what Tipping J said in his judgment in *Hosking v Runting*.[210] When the expression in issue provides little public benefit, except possibly in theory, but significant individual harm in concrete terms, the theory must give way. The mode of expression in this case confers minimal public benefit and, in concrete terms, resulted in a significant invasion of Ms Croft's privacy, her "right" to be let alone in the seclusion of her home.

[251] I therefore consider that Mr Brooker's exercise of his right to freedom of expression in the circumstances of this case does not attract conspicuous value in serving any of the recognised theories or bases upon which the right to freedom of expression is based.

Privacy

[252] Privacy can be more or less extensive, involving a broad range of matters bearing on an individual's personal life. It creates a zone embodying a basic respect for persons. This zone of privacy is imperative if our personal identity and integrity is to remain intact. Recognising and asserting this personal and private domain is essential to sustain a civil and civilised society. It is, as I have mentioned, closely allied to the fundamental value underlying and supporting all other rights; the dignity and worth of the human person.

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[210] At para [234].

[253] This perception is captured in the definition of privacy by N A Moreham, an acknowledged expert in this field, in her seminal article in the *Law Quarterly Review* in 2005.[211] Posing the question: "What is privacy?", Moreham expresses the view that privacy is best defined as the state of "desired 'inaccess'" or as "freedom from unwanted access".[212] She continues:

> Something is therefore "private" if a person has a desire for privacy in relation to it: a place, event or activity will be "private" if a person wishes to be free from outside access when attending or undertaking it and information will be "private" if the person to whom it relates does not want people to know about it.

It is the first part of this definition which is pertinent. The "place" in this instance is the home and the "outside access" is the intrusion of Mr Brooker's protest action into the home.

[254] Dennis Galligan's analogy also has some appeal:[213]

> [Privacy] can be thought of as an expanding circle with individual personality at its centre so that the further a particular instance is from the centre the less weight it carries against competing considerations.

Galligan is, of course, referring to an individual's personality. The deeper the intrusion into that circle, the greater the intrusion into the individual's core of privacy. The same principle applies, however, to the various locations people frequent or inhabit: public streets, public squares, public parks and recreational spaces on land or sea, sporting arenas, clubhouses, public buildings, schools, workplaces – and the home. Of all these places, the home is the individual's private enclave. The home is the one obvious place where the individual has a commanding interest in being let alone.

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211 "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 121 LQR 628. See also "*Douglas and others v Hello! Ltd* – the Protection of Privacy in English Private Law" (2001) 64 MLR 767, by the same author.

212 At p 636.

213 "The Right to Silence Reconsidered" (1988) 41 CLP 69, p 89.

The right or interest in privacy in the home

[255] My plea that this Court should reflect long and hard before sanctioning, or appearing to sanction, protest action of the kind in issue in residential neighbourhoods has not been sufficiently persuasive to carry a majority. Such is the importance of the right or interest to be let alone, and the appreciation of that right or interest in the community, however, that I suspect that the last word has not been said. The appropriate balance between the right to freedom of expression and a resident's interest in being let alone in the seclusion of his or her home, has not yet been set in stone.

[256] The right or interest to be let alone in one's home is a vital aspect of privacy. One frequently hears the phrase "the privacy of one's home". The law reflects, or should reflect, the value underlying the use of that phrase and respect the sanctity of the home. I acknowledge at once that, in entering upon a discussion of the interest to be let alone, much of my language is freely borrowed from American jurisprudence where the values underlying the interest have been more fully explored.[214]

[257] The home is a place where the well-being of the occupants can be nurtured and protected and the peace and quiet provided within the four outer walls (or fences) enjoyed by the occupants without unwanted intrusions. It provides its occupants with a sanctuary, a place to retreat or repair to in order to escape from the tensions and tribulations of the daily world. As courts in the United States have often observed in remarking on the unique nature of the home, it is "the last citadel of the tired, the weary, and the sick".[215]

[258] Observations of this kind are not just rhetoric. Those resorting to the home can include persons from all walks of life: office workers turning their backs on a busy or frustrating day; manual workers whose energies have been spent by arduous labour; school teachers with a bag of work to prepare for the following day; pilots

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[214] As the American Law Institute's *Restatement (Second) of Torts* states at §652A – 652B, the right to privacy is invaded by unreasonable intrusion upon the seclusion of another.

[215] *Gregory v Chicago* 394 US 111 at p 125 (1969).

wishing to rest and conserve their resources for the long flight the next morning; doctors who turn from the close concentration of a long day's surgery and wish to read; shopkeepers who, having endured the conversations and complaints of their customers, seek quiet in the comfort of their home; taxi drivers who, having driven patrons all day or all night, simply want to relax untroubled by those passengers; houseparents, who, having toiled all day, wish to enjoy the company of their families; parents who want to enjoy time with their children in the seclusion of their home; children who are uncomfortable in the school playground and find security in the space of their parents' home; and so on. Everyone from all walks of life seeks and expects to enjoy the privacy of their home. Their quest and expectations do not differ from the interest of Ms Croft to be let alone after she had retired from her night shift on police duty to the seclusion of her home. The need for privacy in all such cases is met by acknowledging that the home is not just a dwelling house, it is a haven and sanctuary from the outside world.

[259] A significant aspect of the right or interest in residential privacy is the need to protect residents from unwanted intrusions. Both the civil and criminal law serve this interest if the intrusion takes place on private property. Section 4(1)(a) protects the same right or interest where the intrusion is moved across the front boundary[216] and takes place in or within view of a public place. The home remains the individual's refuge.

[260] It is, of course, in the nature of protest that it is targeted; either against an event or an idea or a particular person or persons. The objective of protesters is, as often as not, to make people listen to something they do not or may not wish to hear. But this sentiment does not apply with any force or conviction to a person in the privacy of his or her home. In the home the unwilling listener enjoys protection.[217] When in public, unwilling listeners may be able to avoid speech they do not want to hear by simply moving away. If they are unable to do so, however, they may effectively be "captive" to speech they consider wrong or objectionable. Such intrusions can be seen as part and parcel of the workings of a democracy. But a

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216 The front fence was only three metres from Ms Croft's house and Mr Brooker was protesting just outside the fence; see below at footnote 231.

217 *Frisby v Schultz* 487 US 474 at pp 484 – 487 (1988).

person who is the target of protest activity while in the home cannot readily avoid being unaware of or hearing what he or she does not want to see or hear. They can feel "trapped".[218] The notion that a "captive" audience may be acceptable for the purposes of protest does not mean that persons must be "captives" everywhere.[219] The interest to be let alone, to enjoy the peace and quiet of the home, to escape from unwanted pressures in the seclusion of the home, and to preserve the quality of the environment means that residents should be generally spared the coerced status of unwilling listeners.

[261] It is for reasons such as these that the United States courts have recognised the importance of residential privacy and the sanctity of the home and repeatedly rejected the notion that there is some sort of right to force speech into the home of an unwilling listener.[220] The courts affirm the view that a free and democratic society does not rest upon a right to freedom of expression alone; it rests as well on recognition of the rights and interests of an individual to be let alone in the privacy of their home. This recognition is not just the mark of a free and democratic society, it is the mark of a civil and civilised society.[221]

[262] The Supreme Court case which is of most assistance is *Frisby v Schultz*. In that case a town board had passed an ordinance making it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield". Notwithstanding the Court's hardened commitment to free speech, a majority of the Court upheld the validity of the ordinance. It was noted that the ordinance prohibited only "picketing" focused on and taking place in front of a particular residence.[222] Acknowledging the protection of residential privacy, the Court said:[223]

> [A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.

218 *Frisby v Schultz* at p 485.
219 *Rowan v United States Post Office Department* 397 US 728 at p 738 (1970): "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech … does not mean that we must be captives everywhere."
220 *Frisby v Schultz* at p 485.
221 *Carey v Brown* 447 US 455 at p 471 (1980).
222 At p 482.
223 At pp 484 – 485.

> Thus, we have repeatedly held that individuals are not required to welcome unwarranted speech into their own homes …

Then:[224]

> Moreover, even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt:
>
> > "To those inside … the home becomes something less than a home when and while the picketing … continue[s] … [The] tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquillity."

[263] Finally, the Court asserted that the size of the group picketing a home is irrelevant: "… even a solitary picket can invade residential privacy".[225]

[264] As *Frisby v Schultz* related to the validity of an ordinance, it is not on all fours with the balancing exercise being carried out in this case. Nevertheless, a balancing exercise took place between the right of free speech and the right to privacy in the home and the sentiments which the Court spelt out, particularly its perception of the important value which attaches to privacy in the home, remain applicable. The Court firmly spelt out the iniquity of targeting a particular residence. Although it had the power to strike out the ordinance as invalid, the Court was adamant that the value of the protestor's right to freedom of speech did not justify picketing a particular home.

[265] This landmark decision recognises that, by and large, occupiers within the home have a choice as to what they want to watch, read and hear within the home: they can turn television programmes they do not like off or turn to another channel; they can do the same with radio programmes; they can log into the internet or not and participate in or resist "blogs" as they see fit; they can skip or skim over news items or articles in newspapers they do not want to read; they do not have to read, or even allow into the house, magazines of which they do not approve; they do not have to invite persons whose views they dislike into their home if they do not want to; and

224 At p 486. The quotation is from *Carey v Brown* at p 478.
225 At p 487.

they have remedies to prevent or curb the noise or behaviour of neighbours. But when someone protests outside their home, targeting someone within the home, they have no or little choice but to see and hear the "message". They are effectively "captive" to the intrusion. It would be an exercise in unreality to suggest that a person who is the target of such a protest, and those in his or her family, will shut themselves away oblivious to the activity at their front boundary.

[266] The pressures from protest action outside the home may not necessarily be physical or give rise to fear of physical harm; they may be psychological. Apprehension at being targeted, a feeling of being harassed, and real concern or dismay at the possibility of publicity attending the protest are likely to be common reactions. Few people would feel anything other than apprehension knowing that someone who is hostile to them is protesting outside their home. As said in the Supreme Court of the United States, "there are few of us that would feel comfortable knowing that a stranger lurks outside our home".[226] Residents are likely to feel inhibited in leaving their property and going about their lawful business. They may, like Ms Croft, feel intimidated. Further, there is the ever-present possibility that the home may shelter persons other than the targeted individual: children, a widowed parent, a sick relative, an aged and infirm dependent, a shift worker (not uncommon today), a person grieving a loss, or visiting friends or guests. All these persons also have the interest to be let alone.

[267] Moreover, it is realistic to acknowledge that one or more occupants in the house may be particularly vulnerable. The vulnerability is also most unlikely to be known to the protestor. An occupant may be a young woman sensitive to the fact that she has had an abortion (or a doctor or nurse who has undertaken an abortion); or a convicted sex offender or paedophile located in the community; or a clerk (or a judge or counsel for the child) who has worked in the Family Court; or a gay couple who have entered into a civil union under the Civil Union Act 2004; or any one of a number of persons or groups who are prone to be the targets of protesters every bit as sincere and single-minded as Mr Brooker.

[226] *Carey v Brown* at pp 478 – 479.

[268] Yet other occupants in the home who are not the target of the protest may be physically, psychologically or mentally unwell. An occupant may be seriously unwell and resting in bed; or an elderly person who is physically and mentally frail; or a child who is disturbed; or a housewife at the end of a trying day; or anyone else who suffers from the ills and misfortunes that from time to time beset good people. Their reaction to protest activity outside the home of the kind undertaken by Mr Brooker will necessarily reflect their vulnerability. It is not beyond the bounds of possibility that in some cases the consequences could be serious.

[269] My immediate point is that, because an offence under s 4(1)(a) is an offence against public order, the existence of any of the situations referred to in the preceding paragraphs is irrelevant. They do not bear on "public order". They do not increase the level of disorder. The offence is an offence against public order and behaviour which is not considered a disturbance to public order cannot become a disturbance to public order simply because of the circumstances of an occupant in the house. Consequently, if the level and intensity of a protester's behaviour is the same as Mr Brooker's in this case, his or her behaviour will not be disorderly even though one or other of the kinds of persons referred to in the above paragraphs is present in the house. The impact on public order remains the same. The only way of according such people protection is to recognise the true value of the sanctity provided by the home. That sanctity extends, not only to the owner who may be the person targeted by the protester, but also to the family and those who happen to share the home and who may, for one reason or another, be deserving of consideration and a measure of compassion. The privacy envelops the home and family.

[270] In addition, of course, there are those who, like Ms Croft on this occasion, work night time hours. It is difficult to believe that the majority would insist that Mr Brooker's behaviour was not disorderly if he had carried it out in the middle of the night. Daylight hours attract a more benign tolerance than night time hours.[227] Yet, as at 1999, which is the latest date that statistics on this topic are available, 10% of women and 11% of men in the labour force worked between the hours of 8:00 pm

[227] Blanchard J, for example, states that something done in a public place in daylight hours may be in breach of s 4(1)(a) if done there in the middle of the night: para [57].

and 6:00 am.[228] These persons, approximately one in ten of the workforce, are deserving of concern and consideration. They are equally entitled to resort to the home for the purpose of obtaining their sleep as are those who have the good fortune to work during daylight hours.

[271] It is not good enough to say that each of the above instances will fall to be decided on their own facts. To make that statement in the context of this case would be platitudinous. To any objective observer, the protest action of individuals protesting a range of causes, the validity of which the courts will not inquire into, could be indistinguishable on the facts from this case. The Court's decision will necessarily provide the benchmark for any similar cases coming before the District Court.

[272] I do not say, of course, that the courts, or this Court, will find in favour of the protester in all or any of the above cases. Indeed, I suspect that in some cases the would-be protester will find that what was good for Mr Brooker is not good for him or her. But in that process judicial rationalisation will be transparent, strained findings of fact will be made, fine distinctions will be drawn, and past cases and dicta will be "distinguished" or reinterpreted. The administration of the law gains nothing in public confidence and respect from such judicial merry-go-rounds. This state of affairs will come about, however, simply because too little consideration or weight has been given to a person's "right" or interest to be let alone in the home and the community's longstanding endorsement of that "right" or interest.

[273] Finally, and again to avoid misinterpretation, I am not saying that protest action should be totally precluded in residential areas. Stating and restating that proposition achieves nothing. It is not in dispute. As the question whether behaviour is disorderly turns on the circumstances and is largely a question of fact and degree, circumstances may well arise where the courts would not regard protest action in a residential area as disorderly behaviour. For example, a protest outside a house situated further back from the road than three metres, or on a right of way, or up a long drive, or obscured and protected by trees, might not attract the same

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228 Statistics New Zealand, *New Zealand Time Use Survey* (1999). The percentage can be expected to be higher today.

censure. Again, an orderly procession passing along or through a residential street may not amount to disorderly behaviour in the circumstances. Similarly, protest action outside an embassy of a foreign state might not necessarily be considered disorderly behaviour. In short, I am not promoting a blanket ban on protest action in residential streets. Accepting, however, that there is no absolute bar on protest action in residential areas, the burden of the question remains whether, in the circumstances of this case, Mr Brooker's exercise of his right to freedom of expression outweighs the value of Ms Croft's privacy.

And so, the balance

[274] First and foremost, I would revert to my analysis of the value to be placed on Mr Brooker's right to freedom of expression in the circumstances of this case. His expression does not serve any of the recognised theories or bases for the right in any significant way. Divorced from the abstract, the value of Mr Brooker's protest action does not merit the full panoply of the protection the law is prepared to accord freedom of expression.

[275] In contrast, the value of being let alone in the seclusion of the home in a residential area must be accorded considerable weight. In all of the human rights instruments referred to above,[229] the "home" is expressly referred to as part of the right to privacy. The sanctity of the home, and the family in the home, is to be respected. Ms Croft was entitled to enjoy the seclusion that sanctity provides and to have it respected.

[276] The public interest in upholding the right to freedom of expression and the value of privacy in the circumstances of this case follow from this analysis. Certainly, the public generally have a real interest in securing the "right" to protest and ensuring that the boundaries of legitimate protest are not drawn too narrowly in response to the unreasonable sensitivities or the expectations of a targeted person or persons or those likely to be targeted. But the public interest in securing the right to freedom of expression, including protest action, must also be seen in the context of

[229] At paras [215] – [218].

the facts of this case. I do not consider that on those facts, the public interest is negated when the right is exercised outside a private home in a residential neighbourhood, more particularly, when the expression takes the form of protest action and is directed at a particular individual. Conversely, the public have an interest in privacy, including the interest in being let alone in the home. In some circumstances, such as the present, the public interest in privacy is every bit as important as the right of freedom of expression and the "right" to protest. The fabric of our democratic and civil society would lose nothing if the right to freedom of expression were required to give way to a reasonable recognition of privacy and the interest of being let alone in the seclusion of the home. Indeed, I believe that society would be all the stronger in being prepared to protect the sanctity of the home.

[277] Throughout this judgment it has been convenient for the most part to refer to Ms Croft's interest in the privacy of her home. Certainly, it was Ms Croft personally who was the casualty of Mr Brooker's protest action. For the purpose of the balancing exercise involved, however, it would be more apposite to speak of the resident occupying a home in a residential area who was the object of Mr Brooker's protest action and outside whose home he carried out that activity. Framed in this way it can be seen that Ms Croft's "sensibilities" are irrelevant. We are concerned with a member of the public occupying a home whose sensibilities remain unknown.

Further considerations

[278] I have already acknowledged that Mr Brooker had a grievance which he was entitled to express and that the public have an interest in ensuring that expression of his grievance is not suppressed. His grievance against Ms Croft, or the police generally, may or may not be well-founded. The courts cannot judge that issue in these proceedings. But even if his claims are sound and his motives understandable, I do not think they have a significant, if any, bearing on the issue in question beyond establishing that he was genuinely protesting. His protest, in other words, was not a façade; it was genuine protest against a perceived wrong done to him and, it can be accepted, a protest designed to constrain police conduct of that kind being repeated in respect of himself or others. But this consideration does not enlarge the value of

his right. Mr Brooker's motivation does not bear on the impact of his behaviour on "public order".

[279] I also acknowledge that Mr Brooker did not adopt a particularly intense means of making his protest felt. Although he chanted in a "relatively loud voice" that would have been audible to neighbours,[230] he did not shout. Nor did he use a megaphone (at just over three metres he hardly needed one) and his placard was relatively innocuous. Such points as these, while relevant, are of a negative nature. They are certainly relevant to penalty. Ultimately, however, regard must be had to the degree of disturbance and annoyance involved in what Mr Brooker actually did. What he did was calculated. Frustrated that Ms Croft was not on duty, he deliberately targeted her in her home in a residential neighbourhood. Ms Croft's home was a relatively short distance from the roadway, a bare three metres.[231] Small wonder, having regard to the proximity of her home to the roadway, that she complained in evidence that his very presence intimidated her. The District Court Judge observed in his oral judgment that he had "no doubt about that".[232]

[280] I do not accept that the fact Mr Brooker's protest action may have taken a relatively short time precludes his behaviour from being held to be disorderly. The disturbance to Ms Croft and the intrusion into the privacy of her home was complete well before he was arrested. She became a "captive" to Mr Brooker's expression and an "unwilling listener". Moreover, there is something artificial in the notion that behaviour which is not an offence against public order may become an offence against public order only if persisted in for what the court considers an unreasonable period of time. Privacy is not temporally elastic.

[281] While I do not regard the duration of Mr Brooker's behaviour as critical, I am not satisfied that his protest activity was as brief as is claimed; the "entire episode took perhaps 25 minutes, at the outside" although his protest behaviour on the grass verge "seems to have lasted approximately 15 minutes" (Chief Justice, paras [14] and [50]), and "about 15 minutes" (Blanchard J, para [65]). The figure of 15 minutes

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230 *Police v Brooker* (DC) at para [11].

231 Inspector Morris, who attended the scene, said in evidence that Mr Brooker, while on the grass verge, was standing "very close" to Ms Croft's front fence.

232 At para [12].

is based on the evidence of Mr Brooker to the effect that he protested for about that length of time. His evidence was not challenged in cross-examination. The District Court Judge said only that Mr Brooker arrived at Ms Croft's home at "about 9:00 am".[233] He did not make a finding as to how long the protest lasted or at what time Mr Brooker was arrested. In fact, it would appear that the duration of the episode exceeded 30 minutes. Ms Croft stated in evidence that she was awoken by heavy footsteps on her porch and heavy knocking on her door at about 9:20 am. Both Inspector Morris and Senior Sergeant Paxton, who attended the scene, testified that they arrived at the property at about 9:50 am, that is, 30 minutes after Ms Croft heard Mr Brooker on her porch and telephoned the police. Further activity would have added another five to ten minutes before Mr Brooker was arrested.[234]

[282] Finally, I place considerable weight on the fact that Mr Brooker's protest action was directed at Ms Croft in the privacy of her home. This case is far removed from a case where a protestor or protesters carry out protest action in a public place relating to a public issue. It was not, for example, a march by protesters down Ms Croft's street protesting at police corruption generally. Rather, while containing an element of public interest, Mr Brooker's protest action reflected a personal grievance and was largely, if not wholly, directed at Ms Croft personally.

[283] For these reasons I believe Mr Brooker's behaviour was beyond the pale. That view, I am satisfied, would be the view of the reasonable person seized of the circumstances and alert to the respective values and interests in issue, including the rights affirmed in the Bill of Rights. Having regard to the time, location and circumstances it was not a necessary or desirable exercise of the right to freedom of expression, or "right" to protest, and constituted an unwarranted intrusion into the privacy and seclusion of Ms Croft's home. If the reasonable person had any initial doubts, those doubts would ultimately be dispelled by the fact that Mr Brooker targeted a particular residence. The balance falls in favour of the "right" or interest

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233 At para [10].

234 The time it took for the police officers to observe Mr Brooker's activity, for Inspector Morris to talk to Ms Croft and then with Mr Brooker, and for Mr Brooker, on instructions from the Police, to remove his car which was straddling the footpath. Mr Brooker was then given one minute to leave and, when he did not do so, he was arrested.

to be let alone in the seclusion of the home and the public's interest in preserving that right or interest.

[284] I would dismiss the appeal with costs.

Concluding note

[285] It is impossible not to feel some disquiet about the outcome of this case. The issue has been resolved by vesting the exercise of the right to freedom of expression with paramount status and requiring the citizen's privacy and interest in seclusion in the home to be justified as a limit on that right. In the result, the true value of that right and that interest has been consciously or subconsciously distorted. I would much prefer that both freedom of expression and privacy be recognised as fundamental values and, as such, weighed one against the other in a manner designed to afford the greatest protection to both.

[286] The value placed by the majority on a resident's privacy, and his or her interest in seclusion in the home, provides a stark contrast with the sentiments of the Supreme Court of the United States, which I have referred to above.[235] That Court, which is otherwise noted for its commitment to an almost absolute concept of freedom of speech, expresses sentiments which find no, or only a faint, echo in the judgments of the majority. Why is there this difference? Does Parliament have to expressly affirm privacy as a right before it can be recognised as a fundamental value and given the weight of a fundamental value?

[287] A number of specific factual points may also give rise to concern. Take the prevalence of night shift workers in the labour force. If the Court were to hold that Mr Brooker's protest action would not constitute disorderly behaviour if carried out in the middle of the night, its decision would be regarded, as not just wrong, but as an aberration. Some explanation is required as to why the same activity carried out in daylight hours should not be regarded as disorderly having regard to the significant number of residents who work at night and must necessarily seek the

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[235] See paras [260] – [265] above.

privacy and seclusion of their home to rest in the daytime.[236] Further, and significantly, it is surely a key material circumstance that the boundary of the street where Mr Brooker's protest action took place is a bare three metres from Ms Croft's house. Yet, there is not a single mention of this fact in the judgments of the majority.[237]

[288] The outcome of this appeal will also, I believe, cause some concern that the scope for protest action has been extended beyond that traditionally recognised in permitting persons with a grievance or grudge, and an understandable desire to obtain publicity for their cause, to protest in residential neighbourhoods outside the home of a particular resident and deliberately target that resident. What has been abandoned, in pursuit of an exalted perception of the right to freedom of expression, is the notion that s 4(1)(a) can be applied to promote public order in the sense of decorum and orderliness in public places to the benefit of all citizens. This objective can be achieved without proscribing trivial or inconsequential behaviour. No more is required than that, in a democratic and civil society, citizens exercise their rights responsibly with concern and consideration for their fellow citizens.

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236 See paras [266] and [269] – [270] above.
237 See paras [196] – [197], [273] and [279] above.