

The University of Waikato

A Review of the Case of Hans Joachim Kupka

The report of a review carried out for the
Vice Chancellor of the University of Waikato
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September 2002

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Introduction

1. The fire was in the fern long before it burst spectacularly into full public view in April 2000. It started in July 1995 when a student in the German department of the university discovered that Hans Joachim Kupka, a BA (Hons) student in the same department, was posting what he considered to be neo-Nazi, anti-semitic statements on the Internet. It flared briefly in May 1998 when Mr Kupka's doctoral proposal was ready to be registered by the Higher Degrees Committee. It moved to the university mediator's office in October 1999 when ten Jewish members of the academic staff made a complaint of harassment against Mr Kupka. It spread to the Faculty of Arts and Social Sciences Ethics Committee in late November. The Vice Chancellor and the executive group of the Postgraduate Studies Committee became involved in December. Mr Kupka became national news on 11 April 2000, when *Nexus*, the student newspaper, featured him as an alleged Holocaust denier. For the next six months a deeply divided university community tried to quell the blaze. Small numbers of people were directly engaged on campus but deep issues of human rights, academic freedom, and ethical standards were at stake.

Terms of reference

2. In the university Official Circular of 20 December 2000, the Vice Chancellor, Professor Gould, announced that he had set up 'a full review of the university's handling of the case of Hans Joachim Kupka' and that I would undertake it. Referring to what was expected, Professor Gould wrote:

[The reviewer] will have access to the full documentary record and to any further papers he requests. He will receive submissions, both oral and written, from those who wish to make submissions to him. He may also wish to request interviews with and seek further information from any of those involved.

He will be free to report on any aspects of the case he chooses. He is invited to pay particular attention to the integrity and efficacy of the university processes, to the good faith and motivations of all those involved, to the balance of issues which were or should have been taken into consideration, and to the general outcome.

The Official Circular of 15 January 2001 advertised procedures that would be followed in the conduct of the review¹ (Appendix A).

The conduct of the review

3. The initial expectation that the review could be completed in about three weeks was a serious underestimate. The announcement on 15 January 2001 that written submissions would be received until 7 February proved to be unrealistic. Many persons and organisations asked for more time and I allowed them until 25 February to let me have their submissions or a statement of their intention to provide one. The last of those submissions reached me in July. I later accepted three substantial submissions that had not been foreshadowed, judging that it was better to receive them than rule them out. All stages of the review took very much longer to complete than had been foreseen.

4. The main source of evidence for the review was the university's extensive file of documents relating to its handling of Mr Kupka's studentship. These documents were already in the public domain as a result of the university's responses to requests under the Official Information Act, and were frequently cited in submissions to the review. There were 54 written submissions, several of them long and detailed. Of those who made written submissions, 33 also made oral

¹ *Official Circular*, no. 50, 20 December 2000; *ibid*, no. 2, 15 January 2001.

submissions. Altogether I held 21 days of hearings during which I heard 34 oral submissions and interviewed 29 persons, a number of them more than once and some several times (Appendix B). I had extensive correspondence with many members of the academic and management staff and with several of those who made submissions. As foreshadowed in the university *Official Circular*, (Appendix A). I sent drafts of relevant sections of the report to interested parties, invited their comment, and took careful note of such comment when preparing the report in its final form. Footnotes record the sources of the information I have drawn on in the report. In carrying out the review I was greatly assisted by many persons who were helpful in providing information and open and candid in response to my questions and I record my thanks for their contributions.

5. Where possible I have called on expert advice to assist me in assessing contested matters that are at the heart of the Kupka case. In company with most members of the university who have been required to exercise their judgement on Mr Kupka's Internet publications, I do not read German. Emeritus Professor Rolf Brednich, University of Gottingen, read selections of Mr Kupka's postings and advised me on them. Dr Nelson Wattie and Mr Barry Empson translated some correspondence between Associate Professor Knuefermann and Mr Kupka, and part of a draft chapter of Mr Kupka's thesis. Associate Professor Bade and Associate Professor Voit, University of Auckland, assessed an essay written by Mr Kupka for one of his MA papers. Professor Alan Kirkness, University of Auckland, wrote an assessment report on Mr Kupka's doctoral proposal. Mr Jack Hodder, Ms Helen McQueen and Mr Daniel Kalderimis of Chapman Tripp, Barristers and Solicitors, provided legal advice. All of this advice has been of great assistance and I thank those who gave it. All the judgements and conclusions in the report are of course mine. I was particularly well served throughout the review by Jeremy Callaghan, Assistant Vice Chancellor, and Sara Young, Secretary to the Assistant Vice Chancellor, and thank them for their assistance.

The scope of the report

6. A number of people made the point in their submissions that, whatever else the report might include, they hoped it would provide a narrative of the Kupka affair from beginning to end. Most who became involved in the affair did so in its latter stages and were curious to know how it originated and where their contributions fitted in. Part 1, *Narrative*, provides an account of what I consider to be the important events and decisions relevant to Mr Kupka's case from his enrolment in March 1995 to Professor Gould's announcement in October 2000 that he would subject it to an independent review. Part 2, *The General Outcome*, summarises the attitudes of those most closely involved in the Kupka affair at the time of Professor Gould's announcement. Part 3, *Issues and University Processes*, discusses the university's handling of various matters that required decisions to be made in the course of Mr Kupka's studentship. My identification of the issues to be discussed is based on my reading of the documentary record and the submissions to the review. In dealing with them I have kept in mind the requirement to consider the integrity and efficacy of university processes, and the motivations and good faith of those who became involved in Mr Kupka's studentship. My consideration of motivations is based on the accounts given by those who played leading parts in the Kupka case in their submissions or interviews. I did not invite people in the course of oral submissions or interviews to offer opinions on the motives of others but some did so of their own volition. I have interpreted the concept of integrity to refer to the extent to which university processes worked in the ways expected of them and whether, considered as a whole, they were coherent. Efficacy I have taken to refer to results from the application of university processes and the extent to which they achieved what was intended and for whom. Part 4, *The Balance of Issues*, is my response to the requirement of the terms of reference of the review to consider that matter. Part 5, *Findings*, and Part 6, *Conclusions and Recommendations*, complete the report.

7. The terms of reference for the review permitted me to decide what to include in my report. The documentary record of the case was densely detailed and, as submissions confirmed, much of it was contentious. Some equally contentious issues from the latter stages of Mr Kupka's doctoral candidacy emerged as sub-themes in the course of the review. Two of these – the *Nexus* leak and the report of an incident at a sharemilkers cottage – featured prominently in campus discussion during the public phase of the Kupka affair and in some submissions. I gave much thought to what I should include in a report of a review that by its terms of reference was to focus on Mr Kupka's studentship. I decided that I would not discuss incidents in the sometimes adversarial relationships that developed between individuals and groups who became prominent in the public phase of the affair unless they bore directly on the university's handling of Mr Kupka's doctoral candidature. See paragraphs 582–85.

The Review Archive

8. The documents amassed in the course of the review will be deposited in the university library. They will comprise the university collection of documents on Mr Kupka, submissions to the review, memoranda and reports prepared for the review, and correspondence relating to it. Some who made submissions marked them 'confidential' or 'strictly confidential', and I gave them the option of having them returned or of lifting the restriction and having them placed in the review archive. Some chose to have their submissions returned. Many who made submissions expressed the hope that the report of the review will mark the end of the Kupka case and the starting point for reconciliation between the university and members of its Jewish community. With the aim of encouraging that outcome, I have decided that a temporary withholding of the review archive would help all concerned to put the past behind them during the next few months when constructive thinking and a spirit of goodwill will be essential. The review archive will be available to the public without restriction from 1 February 2003.

Part 1: Narrative

Mr Kupka's enrolment

9. Mr Kupka was 44 when he enrolled at the University of Waikato. He was born in Germany and had spent most of his life there. He and his family migrated to New Zealand in 1988, and he became a New Zealand citizen, living in Tauranga. He studied as an extramural student at Massey University during 1991–94, graduating a Bachelor of Arts on 18 May 1995.

10. Mr Kupka's application for enrolment as a BA Hons/MA student was received in the Academic Services Division of the University of Waikato on 7 February 1995. A transcript of his academic record at Massey was received on 15 February. Mr Kupka had two passes in the A range, six in the B range and the rest were in the C range, giving him a C+ average. He had a pass in a 300 level course in German, the subject in which he was seeking to enrol for a Waikato B.Hons degree. He thus met the formal requirement for enrolment and the Academic Services Division sent his application and the necessary supporting papers to the School of Humanities for consideration. The papers on which the decision was made to admit Mr Kupka to the B.Hons course in German no longer exist. The details of his enrolment are, however, stored in the university's computer records and were available to me. Mr Kupka enrolled in person on 1 March 1995. Professor Oettli, the dean of the school, approved his study programme and enrolled him for the BA Hons degree in German².

11. Mr Kupka informed me that he was interviewed on the day of his enrolment by Professor Oettli and Associate Professor Knuefermann, the chairperson of the German department. Dr Knuefermann told me, however, that he had no formal involvement in Mr Kupka's enrolment. He had met Mr Kupka for the first time some time previously, when Mr Kupka had told him that he intended to transfer to Waikato to do an MA and would eventually like to do a Ph.D. Associate Professor Knuefermann told me that Mr Kupka had told him that Massey would enrol him for postgraduate studies.³

Working relations in the German department

12. Two of the key figures in the Kupka case as it unfolded were Associate Professor Knuefermann, chairperson of the German department and, from 1987, chairperson of the department of German and Hispanic Studies, and Mr Norman Franke, a lecturer in the department. Associate Professor Knuefermann retired in mid-2000.

13. Submissions from teachers in the department conveyed impressions of strained relations with Associate Professor Knuefermann. His colleagues found him affable and charming but also strong-willed and determined, and a man who played his cards close to his chest. They found him difficult to engage in meaningful discussion in staff meetings on matters to do with the teaching and further development of their subjects. He preferred, they said, to talk to them informally, one at a time. Dr Knuefermann told me that he placed great importance on doing things according to 'proper process,' and that he conducted staff meetings openly and transparently. Associate Professor Knuefermann was in charge of the programmes of postgraduate students in the department.⁴

² Pamela Moss, Group Manager Statistical Reporting, memorandum to Review, 23 February 2001; Knuefermann interview, 19 February 2001.

³ Hans Joachim Kupka submission, 8 March 2001; Dr Knuefermann to Review, 8 July 2001.

⁴ Franke submission and oral submission 19 February 2001; Dr William Jennings submission and oral submission, 20 February 2001; Dr Stan Jones oral submission, 22 February 2001; Dr Jay Corwin submission and oral submission, 23 February 2001; Nieschmidt interview, 20 February 2001; Knuefermann interview, 21 February 2001; Knuefermann to Review, 29 June 2001.

14. Mr Franke was appointed lecturer in German in 1993. He was born, brought up, and educated in Germany. He taught for twelve years in universities in Germany, Britain and the United States before coming to New Zealand. He struck me as a man with a deep sense of the tragic consequences of Nazism for Germans, Jews, other peoples and groups, and a conviction that he has a moral duty to ensure that they never recur. His discovery that a postgraduate student in the German department was publishing anti-semitic, racist, neo-Nazi statements on the Internet was for him a defining moment. He explained his position in an email to the mediator:

The core of the issue can be summed up in an old German proverb: 'Wer die Wuerde der Opfer nicht wahrt, toetet sie zum zweiten Mal und bringt ihr Blut auf sein Haupt.' (Whoever does not honour the dignity of the victims, kills them a second time and brings their blood upon their head.)⁵

15. Dr Knuefermann told me that he had supported Mr Franke's appointment to the department and had a high opinion of him. But the two colleagues found that they were in deep conflict over the significance of Mr Kupka's Internet postings and their implications for his doctoral proposal, the German department, and the university. Mr Franke, though a junior member of the department, was as determined as Associate Professor Knuefermann to pursue the matter to what he considered to be the right conclusion on academic and moral grounds.

Mr Kupka's BA (Hons) course

16. The MA degree at Waikato, as at other New Zealand universities, requires students to pass in eight papers or their equivalent, and is taken by full-time students over two years. In the first year of his course, in accordance with the university regulations then in force, Mr Kupka was enrolled as a BA Hons student. He passed 0204.505 German Literature and Film; 0204.510 Contemporary German Issues; and 0204.532 Language, Culture and Business (two papers). Dr Stan Jones, the senior lecturer in the department, taught the first and Associate Professor Knuefermann the second. Mr Kupka was reclassified as an MA student after successfully completing his first year papers.

Mr Kupka's Internet postings

17. Some time during 1995, Mr Steven Judd, a student in the German department, discovered Mr Kupka's Internet postings and was disgusted by their anti-semitic, neo-Nazi character. He had come upon them by way of the Nizkor Project, one of the main Internet sites that registers alleged Holocaust deniers and maintains archives of Holocaust-denying postings. He asked Mr Franke to do something about them. They also shocked Mr Franke, who drew them to Associate Professor Knuefermann's attention, and they were discussed at a department staff meeting on 1 August 1994. The minutes of the meeting noted that Kupka's 'right-wing radical' behaviour was discussed and staff members were asked to 'keep an eye on him'.⁶

Mr Kupka's MA course

18. Associate Professor Knuefermann knew that in Mr Kupka's mind his MA studies were a stepping-stone to a Ph.D. research topic. He knew that prospective doctoral candidates in other departments frequently wrote a thesis in their second MA year or did a dissertation combined with courses but that it was not uncommon for students to do course work only. The MA prescriptions in German did not provide for a thesis. They did, however, include a one-paper dissertation but Associate Professor Knuefermann did not think that Mr Kupka was ready to do one. He knew, having taught two of Mr Kupka's first year courses, that his writing skills needed

⁵ Franke to Weir, email, 27 March 2000.

⁶ Minutes of German department staff meeting, 1 August 1995; Norman Franke submission, p. 1; Franke to Review, 26 August 2001; Franke to Review, 18 November 2001.

to be improved. Mr Kupka was more at home in language than in literature papers and Associate Professor Knuefermann thought that any Ph.D. research he might do would be on an applied, not a literary topic. He also knew that Mr Kupka would probably have difficulty putting a second-year MA course together from existing course prescriptions. He judged that Mr Kupka's academic development would be served best by having him take courses that would give him more experience in writing short essays and the opportunity to undertake an investigation under close supervision. His second year courses were 0204.540 Report of an Investigation (two papers), and 0204.550 Special Topic (two papers). Both were new courses that were available to students for the first time in 1996. Mr Kupka was the only student enrolled in them.⁷

19. Associate Professor Knuefermann asked Mr Franke to teach Mr Kupka's special topic, commenting, according to Mr Franke, that Mr Kupka's academic writing skills were deeply deficient. Mr Franke told Associate Professor Knuefermann that he could not teach Mr Kupka. A member of his family had been persecuted for his beliefs by the Nazis. He did not think he 'could establish a working relationship with a man who shared basic ideas with the murderous ideology of *Nationalsozialisten*.'⁸

20. Associate Professor Knuefermann engaged the late Dr Hans-Werner Nieschmidt, a former professor of German at Waikato University, to teach Mr Kupka's special topic. Professor Nieschmidt and Mr Kupka met for two hours a week during the academic year. (The extra cost to the department was commented on adversely in some submissions. Professor Nieschmidt was paid \$1,000 for his services.) After some initial discussion of possible subjects, Professor Nieschmidt taught Mr Kupka a course on Brecht. This required close study of two of Brecht's plays: *Die Rundkopfe und die Spitzkopfe*, (Roundheads and Peakheads), 1932–34; and *Der Aufhaltsame Aufstieg des Arturo Ui* (The Resistible Rise of Arturo Ui), 1941. Professor Nieschmidt chose these plays for their commentaries on Hitler's Germany. He was already aware of Mr Kupka's supposed political leanings. He told me, however, that although Mr Kupka showed no great liking for the texts, he gave no indication of his political preferences during their weekly meetings. He would not have thought of him as a one-time senior official in the *Bavarian Republikaner Partie*.⁹ Associate Professor Knuefermann supervised Mr Kupka's report investigation. This was an examination of the presentation of Germany and Germans in New Zealand between 1989–91.

21. Mr Kupka completed his MA course with the following grades:

0204.505	German Literature and Film	B
0204.510	Contemporary German Issues	B –
0204.532	Language, Culture and Business (two papers)	B+
0204.540	Report of an Investigation (two papers)	B
0204.550	Special Topic (two papers)	B

22. The three teachers of Mr Kupka's MA papers did not meet as a formal meeting of examiners to consider his results.¹⁰ Associate Professor Knuefermann met Professor Nieschmidt to record his grade and discussed Dr Jones's mark with him during a staff meeting. Professor Oettli, as dean, and Associate Professor Knuefermann, as chairperson of the department, certified Mr Kupka's graduate results. Mr Kupka graduated Master of Arts, Second Class (First Division) in April 1997.

⁷ Knuefermann interview, 19 February 2001; Helen Matich, Deputy Group Manager, Academic Administration, to Review, 5 June 2001; Knuefermann to Review, 8 July 2001.

⁸ Franke submission, p. 2.

⁹ Professor Hans-Werner Nieschmidt, oral submission, 20 February 2001.

¹⁰ Jones oral submission, 22 February 2001; Franke, Nieschmidt, and Beata Jones, letter to Review, 12 March 2001.

The doctoral proposal takes shape

23. When Mr Kupka had completed his MA, Associate Professor Knuefermann advised him to take his time in formulating a Ph.D. proposal. Both men understood that his research would be in the field of applied German studies and that Associate Professor Knuefermann would supervise it. Associate Professor Knuefermann has a professional interest in the maintenance and use of German language in countries where it is not the first language and in policies for its use in education, business, and tourism. He has published in this field and built up the department's teaching in it. The other doctoral candidate in the department, Ms Kristina McGuiness-King, whom he was also supervising, was researching in the same general field.

24. Associate Professor Knuefermann had by this time assessed Mr Kupka's academic abilities. He knew that Mr Kupka had not followed a course of secondary education leading to the *Arbitur*. That had left him with some academic deficiencies. But he was 'eager to learn,' he did the required reading, and he was 'enthusiastic and responsive.' Mr Kupka would not in Associate Professor Knuefermann's view be able to tackle a subject that required an interpretive approach but he was a very efficient collector of information and could do something that was more programmatic. He believed that, with 'calm, firm supervision,' Mr Kupka would be able to do a Ph.D. Mr Kupka informed me that he and Associate Professor Knuefermann considered a number of topics before settling on the one he enrolled for. Dr Knuefermann told me his reasons for modelling Mr Kupka's research on Ulric Ammon's book *Die Internationale Stellung der Deutschen Sprache* (1991). Ammon had written on a wide range of aspects of the current use of German in various parts of the world. His researches were based largely on published research and data published by various organisations. New Zealand was not included in the comprehensive study he had published in 1991. Associate Professor Knuefermann believed that Mr Kupka's doctoral research would fill that gap.¹¹

25. Professor Nieschmidt and Dr Jones, Mr Kupka's other teachers, did not agree with Associate Professor Knuefermann's assessment of his abilities. Neither considered that Mr Kupka had the necessary academic aptitudes or skills. Professor Nieschmidt informed me that he indicated when he submitted his mark for Mr Kupka's work in the paper he had supervised 'that he was not doctoral material and by implication that he should not receive Second Class (First Division).' In Dr Jones's opinion, Mr Kupka was not an academic and would need much more training in academic methods before he could do a doctorate. Dr Jones informed me: 'I simply declared that he should try it if he felt like it, my half-conscious position being that the process of vetting candidates would probably preclude his admission.' Associate Professor Knuefermann did not discuss Mr Kupka's doctoral proposal with Dr Jones. There was, he informed me, no one in the German department 'either competent or qualified' in terms of the university regulations to supervise it. He had, he informed me, an informal discussion with Professor Nieschmidt, who did not express any reservations. Mr Franke had not taught Mr Kupka but had read some of his essays. He considered that they were 'normally poorly written and their form and content were often insufficient.'¹²

26. The matter of Mr Kupka's application came to a head in the department in May 1998. Mr Franke had not been consulted but had become aware that Mr Kupka was getting to the point where he would be submitting a proposal to the Higher Degrees Committee. Associate Professor Knuefermann set out his position in a memorandum to Mr Franke, which he copied to Dean Oettli. He would not support Mr Kupka's candidature if it was found that he was propagating views that were illegal. But as Mr Kupka's application was ready to go to the Higher Degrees

¹¹ Kupka to Review, 28 June 2001; Knuefermann interview, 3 April 2001.

¹² Knuefermann interview, 19 February 2001; Nieschmidt interview 20 February 2001; Jones interview 22 February 2001; Nieschmidt to Review, 27 March 2001; Knuefermann 3 April 2001; Franke to Review 20 May 2001; Jones to Review, 27 June 2001; Knuefermann to Review, 29 June 2001; Knuefermann to Review, 15 September 2001.

Committee, Associate Professor Knuefermann wanted Mr Franke to produce any material that in his view would be a ‘breach of New Zealand law’.¹³

27. Mr Franke set down his views for Associate Professor Knuefermann, with copies to Dean Oettli and Dr McKim, pro dean graduate studies and the School of Humanities’ representative on the Higher Degrees Committee (Appendix C). He remained unconvinced of Mr Kupka’s suitability on three grounds. He questioned whether his MA grades were an accurate academic gauge given that, as a native speaker of German, he had advantages over non-native speakers. He had serious doubts about his mental and moral maturity as a Ph.D. student despite his age. He raised again Mr Kupka’s advocacy of extreme right-wing views and quoted from three of his Internet postings as examples. He informed Associate Professor Knuefermann that Massey University had not permitted Mr Kupka to write a paper about a German neo-Fascist party led by Dr Franz Schoenhuber, a former SS officer. Mr Franke warned that the German department, the School of Humanities, and the university would be placed at risk if Mr Kupka’s candidature was approved.

28. Mr Franke had been informed, he told Associate Professor Knuefermann, that Mr Kupka’s proposed doctoral research would:

*involve an analysis of the German language in Aotearoa. Can you, as a proposed supervisor, guarantee that the candidate will proceed with the necessary independence and fairness? We should not forget that both the present and the past have seen an outstanding contribution by German-speaking Jews and Czecks to the German language in New Zealand and thus, as you know, the topic has dimensions that go far beyond the empirical.*¹⁴

29. Associate Professor Knuefermann acknowledged that Mr Franke’s allegations were serious and deserved to be investigated thoroughly. But he warned him that he would be exposed to the risk of litigation if he disseminated them widely before they could be authoritatively examined. Dr Knuefermann told me that it was clear to him that differences over Mr Kupka’s candidature could not be resolved within the department. ‘People from Europe,’ he said, ‘have such strong views that they take up positions and the time comes when further discussion becomes impossible. When that happens, the only way forward is to have the matter referred to a higher authority for consideration and decision.’ The issues surrounding Mr Kupka were deeply contentious wherever there were German-speaking communities and could not be resolved through debate within the department. He was also aware that, as departmental chairperson and Mr Kupka’s prospective chief supervisor, he could have a conflict of interest. He decided that Mr Franke’s objections to Mr Kupka as a Ph.D. candidate should be referred to the dean of the school, Professor Oettli.¹⁵

Dean Oettli’s meeting

30. Professor Oettli convened a meeting with Associate Professor Knuefermann, Mr Franke, and Dr McKim, the School of Humanities representative on the Higher Degrees Committee. Mr Franke’s memorandum of 11 May was the basis of discussion (Appendix C). Dr McKim does not read German. Mr Franke visited her before the meeting, explained his position, and gave her an oral translation of the three excerpts in German.

31. The purpose of the meeting was to consider Mr Franke’s views on Mr Kupka. Professor Oettli checked the regulatory requirements before the meeting. The meeting was, in his view, an informal one and no record was kept. Professor Oettli had not seen Mr Kupka’s proposal but knew about it in general terms from Associate Professor Knuefermann, who had assured him

¹³ Memorandum, Knuefermann to Franke, 11 May 1998.

¹⁴ Memorandum, Franke to Knuefermann, 11 May 1998.

¹⁵ Knuefermann interview, 19 February 2001.

that it would ‘stand up.’ He had not read any of Mr Kupka’s Internet postings apart from the ones in Mr Franke’s memorandum. It seems that Mr Franke’s concerns were discussed in general terms. In his submission to the review he said that his memorandum was not considered. His recollection is of Associate Professor Knuefermann comparing Mr Kupka to the Hon. Winston Peters. Professor Oettli does not remember the detail of the discussion. He may, he told me, have asked Mr Franke if he would have been similarly concerned if a prospective researcher into the topic proposed by Mr Kupka was a left-wing Trotskyite. Associate Professor Knuefermann told me that he thought that Dr McKim was uncomfortable about the excerpts from Mr Kupka’s Internet postings. Dr McKim wrote in her submission to the inquiry that she was asked whether, in the light of Mr Franke’s objections, there was anything in the higher degrees regulations that would prevent Mr Kupka’s registration. She replied that to the best of her knowledge there was not.¹⁶

32. Professor Oettli listened to the views expressed at the meeting. In a confidential memorandum written a few days later, he informed Associate Professor Knuefermann, Dr McKim, and Mr Franke that he had decided that Mr Kupka should be permitted to proceed with his application. ‘The decision about the academic merit of his application rests with the Higher Degrees Committee,’ he wrote, ‘any other matters would now have to be considered by the Vice Chancellor on behalf of Council in the first instance.’¹⁷

33. Professor Oettli did not brief Professor Gould about the meeting.¹⁸ Mr Franke did not read Professor Oettli’s memorandum as an implied invitation to take up ‘any other matters’ with the Vice Chancellor. He found it obscure on the point of actions that would follow from it. He took the tone of the memorandum to be ‘predominantly procedural’. His understanding at the time was that the Higher Degrees Committee would decide on the academic merits of Mr Kupka’s proposal before ‘any other matters’ were to be raised with Professor Gould. He assumed that Professor Oettli or Dr McKim would inform the Higher Degrees Committee that a concern had been raised about the risk of cultural safety. He did not know when Mr Kupka’s proposal would come before the committee. Associate Professor Knuefermann had impressed upon him, he informed me, that only chairpersons of departments could approach university committees: clearly defined lines of communication would otherwise be compromised. Dr Knuefermann denied placing that prohibition on Mr Franke and expressed surprise that Mr Franke did not know that any member of staff could approach any university committee. Neither Professor Oettli nor Dr McKim told Mr Franke that the committee had approved Mr Kupka’s proposal at its meeting of 24 July. It was not until several months later that he became aware that it had. Mr Franke believed at the time that Professor Oettli would act on his concerns and that Associate Professor Knuefermann ‘would understand that [Mr] Kupka’s doctorate could turn into a liability for the department and the university.’ He acted, he told me, ‘with what from hindsight turns out to have been a naïve belief that the procedural avenues that the former dean suggested had to be followed.’¹⁹

Professor Bing becomes concerned

34. Professor Bing of the department of Political Science and Public Policy was alerted to Mr Kupka’s Internet postings in April 1998 by Mr Geof Levy, the Commissioner for New Zealand for the Anti-Defamation Commission of B’nai B’rith. Mr Levy had become aware of the postings two months earlier through a person living in Germany who is active in anti neo-Nazi

¹⁶ Franke written submission, p. 4; Professor Peter Oettli interview, 22 February 2001; Knuefermann interview, 19 February 2001; Dr Anne McKim written submission and oral submission, 22 February 2001; Franke to Review, 20 May 2001.

¹⁷ Oettli, confidential memorandum to Knuefermann, McKim, and Franke, 2 June 1998.

¹⁸ Oettli interview, 24 May 2001.

¹⁹ Franke to Review, 20 May 2001; Knuefermann to Review 30 August 2001; Knuefermann to Review, 15 September 2001.

organisations. That person had the impression from his postings that Mr Kupka was a lecturer at the University of Waikato and held a Ph.D. degree. After forming his own view of Mr Kupka's postings, Mr Levy alerted Professor Bing. The Anti-Defamation Commission of B'nai B'rith exists to combat anti-semitic and racist activities. It keeps a 'watching brief on those matters which may affect the Jewish community, as well as other matters affecting other ethnic groups which normally fall within the compass of the Human Rights Act.'²⁰

35. Professor Bing read some of Mr Kupka's postings and considered them to be anti-semitic, racist, and neo-Nazi, and 'written in the language of the gutter'. It was clear to him that he had a moral duty to act. He had been a founding member of the Waikato Jewish Association thirty years earlier, had been its president and spokesperson until 1998, and continued to serve as immediate past-president. He was a senior professor. He had actively promoted good race-relations within the university. He had worked with Dr Simms and Dr Pratt to convene several seminars in the university on Christian–Jewish relations. During the last decade he had researched and written on the history of Dutch Jews during the Holocaust. He told me that Mr Kupka's racism, anti-semitism, and Holocaust-denying statements raised for him a matter of deep conscience. His loyalty to his family and community meant that he must challenge them in the most vigorous way possible. Professor Bing's father, grandmother, aunts and uncles, and many of his extended family were killed by the Nazis in the Holocaust. Many of Professor Bing's wife's family were also killed. His 'sole consideration,' as President of the Waikato Jewish Association and a member of the New Zealand Jewish Council, 'was protecting the elderly in our community'.²¹

36. Professor Bing and Associate Professor Knuefermann had been colleagues for a quarter of a century and were on good terms. Professor Bing told me that he had always regarded Associate Professor Knuefermann as a liberal-minded person. Associate Professor Knuefermann spoke in similar terms about his relationships with Professor Bing over the years. Professor Bing told Associate Professor Knuefermann of the concerns of the Anti-Defamation Commission and warned him that the Jewish community was certain to draw public attention to Mr Kupka's Internet postings. A person holding the views expressed by Mr Kupka, he said, should not be undertaking research that would bring him into contact with the Jewish community in New Zealand. He suggested that a topic that did not involve Jews would be preferable. In his submission to the review, Professor Bing stated that he suggested the Austrian adventurer Von Tempsky as a possibility. Associate Professor Knuefermann does not remember the suggestion being made. Professor Bing asked to see a copy of Mr Kupka's proposal but Associate Professor Knuefermann refused to give it to him. In Professor Bing's opinion, Dr Knuefermann considered Mr Kupka's views to be 'somewhat conservative' but 'harmless'. It was in those terms that Associate Professor Knuefermann would later advise Ms Weir, the University Mediator (see paragraph 70). Professor Bing concluded that his colleague 'seemed in total denial'. Associate Professor Knuefermann and Professor Bing exchanged emails on Mr Kupka's Internet postings again some months later when their personal relationship was under increasing strain. Associate Professor Knuefermann assured Professor Bing: 'I have never backed Kupka nor have I 'persisted' in backing irresponsibility, racism or anti-semitism and I never will. In this I am absolutely united with you.'²²

37. In his submissions to the review, Professor Bing recorded that Mr Kupka had discussed with him the possibility of doing a doctorate in political science in March 1998. He had referred him

²⁰ Mr G. P. M. Levy, Commissioner for New Zealand for the Anti-Defamation Commission of B'nai B'rith, written submission.

²¹ Bing written submission #3; oral submission, 5 April 2001; Professor Bing to Review, 5 September 2001; Professor Bing to Review, 14 November 2001.

²² Bing written submission #3; Knuefermann interview, 19 February 2001; Bing, oral submission 5 April 2001; Bing to Knuefermann, 8 March 2000; Knuefermann to Bing, 9 March 2000.

to a colleague and there had been some discussion of Marxism in the former East Germany but his colleague did not consider Mr Kupka to be a suitable candidate. Mr Kupka informed me that he had not heard of Professor Bing before the latter part of 1999. He was himself, he informed me, ‘by no means a specialist on Marxism.’²³

38. Professor Bing was indignant that he was not invited to the meeting that Professor Oettli held with Associate Professor Knuefermann, Dr McKim, and Mr Franke. The meeting took place after Associate Professor Knuefermann had become aware of Mr Franke’s and Professor Bing’s objections to Mr Kupka’s proposed research topic. Associate Professor Knuefermann had told Professor Bing that the meeting was to take place. Professor Bing expected that, as a professor in the School of Humanities and as President of the Waikato/Bay of Plenty Jewish Association, he would be invited to the meeting to express his reservations. Professor Oettli told me that he did not know at the time of the meeting that Professor Bing was aware of the Mr Kupka’s Internet postings.²⁴

39. Professor Bing and Mr Franke scarcely knew each other until May 1998, when they found that they shared a common concern. They met to consider the import of Professor Oettli’s memorandum of 2 June. Professor Bing thought that Associate Professor Knuefermann could be persuaded to change his mind if he were to be presented with a bigger selection of Mr Kupka’s postings. Mr Franke sent Associate Professor Knuefermann 150 more pages and gave him their message IUDs. But this did not, as Professor Bing hoped, stop Mr Kupka’s proposal ‘in its tracks’.²⁵

The D.Phil. proposal

40. The research proposal that Mr Kupka submitted to the Higher Degrees Committee is included in Appendix D. It followed the standard form for a D.Phil. application at the time. It comprised an outline of the objectives of the study (two and a quarter pages); a brief description of the research methodology/theoretical framework (a page and a half); a list of the literature already researched (three pages); a list of relevant literature (four pages); an outline timetable for the study (one page); a short statement on ethical issues involved in the study; a statement about resources required for the study; and a request for the thesis to be written in German.

41. ‘German in New Zealand’ was the proposed title of the study with, in parenthesis, ‘*Zur Stellung der Deutschen Sprache in Neuseeland*’, a translation of the title into German. The title in English was very broad. The second paragraph of the proposal stated the limits within which the research would be conducted. It would take stock of the role of the German language in contemporary New Zealand. It would close a gap in the research literature. There had recently been major studies of the international position of German. These included regional studies on eastern and southern Asia, Europe and Australia, but no comparable study of New Zealand had yet been done. Mr Kupka’s research would ‘shed some light on one specific strand of New Zealand’s ever more complex and rich social, economic and cultural texture: Her “German Connection”’. What that light would be was not spelt out.

42. The main theoretical model for the research had been provided by the work of Ulrich Ammon, whose book *Die Internationale Stellung der Deutschen Sprache* (The International Position of the German Language) had been published in 1991. Mr Kupka’s homage to Ammon is evident in the title of his research in German. ‘Stellung’ translates as ‘position’. By presenting the position of German in New Zealand he would add a case study to Ammon’s work and that of more recent researchers. The German title of Mr Kupka’s proposal was thus more accurate to

²³ Kupka to Review, 27 June 2001; Bing to Review, 6 September 2001.

²⁴ Bing submission #3; Bing oral submission 5 April 2001; Oettli interview, 22 February 2001.

²⁵ Bing written submission #3; Franke written submission.

his intention than the title in English. A study of the position of German in New Zealand connotes a contemporary setting in a way that ‘German in New Zealand’ does not.

43. The research would be in the field of applied German studies. The ‘scientific framework’ would be the eleven criteria used by Ammon ‘to measure the relative importance of German against other languages’, one of which was the use of German by minority groups. Mr Kupka’s research methodology was stated in one sentence: ‘Following a comprehensive analysis of literature, I shall proceed to collect extensive statistical data, held by the Ministry of Education, embassies, the Chamber of Commerce, the New Zealand–German Business Association, the Goethe Institute and other relevant institutions.’ Here, too, Mr Kupka was following Ammon. Dr Knuefermann told me that Ammon’s international study was based on published materials and statistical and other information provided by official and other agencies and organisations in the countries included in his survey.²⁶

44. Dr Knuefermann explained to me the significance that he, as Mr Kupka’s chief supervisor, placed on the research. Associate Professor Knuefermann had been promoting the cause of German-language teaching in New Zealand for many years. But he was disappointed that official policies aimed at teaching and maintaining the language in this country had not been more supportive. He hoped that if German companies in the homeland were to become more responsive to what should be done, their offshoots in New Zealand would follow suit. He saw Mr Kupka’s research as a contribution to the policy debate. German officials and opinion leaders would be forced to face up to the issue of language maintenance in this country when presented with the situation through a case study. That was also a reason for requesting that the thesis be written in German.²⁷

The Higher Degrees Committee

45. In 1998 the Higher Degrees Committee administered the university’s doctoral degrees under the delegated authority of the Academic Board. It comprised a representative from each school of study and a chairperson appointed by the Academic Board. Mr Kupka’s proposal was on the agenda for the meeting of the committee on 24 July.

46. Dr McKim had been the Humanities’ representative on the committee for about two years. It was her duty to ensure that all humanities D.Phil. applications met the regulatory requirements. It involved, she wrote in her submission:

reading the completed application form and accompanying research proposal outline to establish whether the applicant possessed a suitable qualifying degree; whether an appropriate supervisory panel, including a chief supervisor, had been nominated, and endorsed by the chairperson of the department in which the candidate proposed to enrol; whether the department had agreed to provide any necessary resources for the completion of the research project; and whether the thesis proposal, which had to be prepared in consultation with the proposed chief supervisor (and other proposed supervisors where possible), demonstrated that the nature and scope of the proposal were appropriate for a PhD degree. A statement identifying any ethical issues that might be involved in the conduct of the research and an undertaking to submit the proposal to the School of Humanities Research and Ethics Committee were also required.

Dr McKim considered that Mr Kupka’s candidature met these requirements.²⁸ Before the meeting, Dr McKim rang Professor Middleton, the deputy chairperson, and asked whether the committee should give any consideration to a candidate’s political views. No name was

²⁶ Knuefermann interview, 3 April 2001.

²⁷ Knuefermann interview, 3 April 2001.

²⁸ McKim written submission, p. 2; oral submission, 22 February 2001.

mentioned and the question was answered in general terms. Dr McKim told me that the conversation confirmed her view that ‘objections which had been addressed at the school level need not be raised at the university level committee.’ Dr McKim told me that it would be a worrying precedent if the Higher Degrees Committee became involved in vetting political views. Professor Middleton told me that she did not remember the telephone conversation but did not doubt Dr McKim’s account.²⁹

47. In her submission to the review, Professor Middleton stated that Mr Kupka’s proposal went through the committee ‘as a matter of course’. Associate Professor Barton, who was a member of the committee, concurred. The only discussion related to the request to write the thesis in German. Mr Kupka was informed in a letter dated 27 July that his D.Phil. proposal had been approved. His research topic had been recorded as ‘German in New Zealand.’ Associate Professor Knuefermann would be his chief supervisor. Associate Professor Harlow had agreed to act as ‘secondary supervisor’ on the understanding that Associate Professor Knuefermann would provide the bulk of the supervision. Professor Dr Graf von Nayhaus, Paedagogic Institute, Karlsruhe, was added as a supervisor soon after.³⁰

Request to submit the thesis in German

48. The request to submit the thesis in German is in Appendix D. Mr Kupka stated in his proposal that he hoped his thesis would ‘prove valuable to language policy planners, teachers and government departments and agencies, both in New Zealand as well as in German speaking countries.’ Research that was relevant to his topic was published in German. Its main impact was on the ‘German market’, which he defined as individuals and organisations with ‘a professional interest in international processes of communication as far as they affect the German language.’ He pointed out that appropriate supervision would be available locally and internationally.

49. Professor Middleton stated that this request was unusual only because Waikato had few foreign language doctoral candidates. The university’s regulations and past practice allowed for it.³¹ There appear to have been two such approvals, one in Maori and one in Chinese. The request was granted.

Ethical considerations

50. In 1998, when Mr Kupka’s doctoral proposal was approved, the responsibilities of chief supervisors and candidates were set out in the University of Waikato *Higher Degrees Information Booklet*, which had been re-issued by the Higher Degrees Committee in 1997. Section 3.2 of the booklet stated the obligations of chief supervisors. The first is to:

*ensure that any research involving the participation of human or animal subjects has been approved by the relevant Schools’ Ethics Committees **before any research is undertaken by the student.***

The emphasis is in the original. All doctoral candidates were required, when they applied to be enrolled, to include in their research proposals a statement on ethical issues associated with their topic. Mr Kupka’s doctoral proposal included the following statement:

(6) *Ethical Issues Involved in this Study:*

²⁹ McKim, written submission, and oral submission, 22 February 2001; Professor Sue Middleton, oral submission, 23 February 2001.

³⁰ Middleton written submission; Associate Professor Barry Barton, written submission; Juliana Smithells, Graduate Office Administrator, to Kupka, 27 July 1998; Associate Professor Harlow to Chairman, Postgraduate Studies Committee, 4 May 2001.

³¹ Middleton written submission.

Please Note that I am aware of the ethical considerations involved in obtaining information of the kind sought and will inform all participants – prior to their providing any information – of the intended use of their information. Confidentiality, if requested, will also be guaranteed.

A copy of this proposal will be forwarded to the Humanities Research and Ethics Committee.

51. Mr Kupka did not forward the proposal to the Humanities Research and Ethics Committee. The other doctoral student in the German department, Ms Kristina McGuinness-King, had included an identical statement on ethical issues in her application to the Higher Degrees Committee eighteen months earlier. She sent a copy of her application to the Humanities Research and Ethics Committee at that time. The committee considered her proposal and gave her a general clearance. It advised her of the requirements of the university's guidelines on informed consent and, for her guidance, sent her a copy of the appendix on 'General Principles for Research Involving Human Participants.' Ms McGuinness-King followed that advice when she drafted questionnaires she sent to German departments in New Zealand and Australian universities.³²

The research gets underway

52. Mr Kupka was registered as a D.Phil. candidate on 1 October 1998. Doctoral students are required to submit six-monthly progress reports to the Higher Degrees Committee. These are endorsed by the candidate's chief supervisor, who is required to state whether the candidate is making satisfactory progress and to advise the committee on any 'extraordinary difficulties' a candidate might be having. Mr Kupka submitted three reports: the first for the period October 1998 – March 1999; the second for April 1999 – September 1999; and the third for October 1999 – March 2000.

53. Mr Kupka's first two reports and Associate Professor Knuefermann's comments record that the research was progressing satisfactorily. Mr Kupka had completed the section on the methodology of the study and was working on a detailed plan for the main body of the work. Associate Professor Knuefermann wrote on 20 October 1999 that Mr Kupka had made 'significant progress' on 'chapter III (National Languages Policies) and chapter V (Cultural Policies of German speaking countries in N.Z)' [sic].³³

54. Mr Kupka's plans for the next six months were:

- a. final review of critical literature;
- b. analysis of German immigration and language use;
- c. investigation into German organisations and companies located in New Zealand regarding their language and staff policies;
- d. first draft of (b) and (c) and of the chapter in which I investigate into cultural policies of German speaking countries in N.Z.'

55. Mr Kupka did not foresee any difficulty arising. Associate Professor Harlow was satisfied with progress. There are sections in the six-monthly reports for candidates and their supervisors to comment on plans for the research during the coming six months. Mr Kupka's first report submitted on 8 March 1999 noted that he had prepared 'outlines of various questionnaires' during the previous six months. But neither Mr Kupka nor Associate Professor Knuefermann mentioned them again in the report of progress for the next six months or in plans for the following six-monthly reporting period.³⁴

³² Letter from Kristina McGuinness-King to review, 26 February 2001, and attachments.

³³ Higher Degrees Candidates Progress Report, 1 April – 30 September 1999, 20 October 1999.

³⁴ Higher Degrees Candidates Progress Reports, 12 April 1999 and 20 October 1999.

56. Questionnaires figured prominently, however, in the third (and last) report that Associate Professor Knuefermann signed off on 1 May 2000. As a result of a decision of the FASS Ethics Committee (which had replaced the Humanities Research and Ethics Committee), Mr Kupka's research had been suspended since 1 December 1999. The report was written in the expectation that it would soon get the ethical clearance that would allow it to resume. Mr Kupka and his research were by that time the subject of growing concern on campus. Mr Kupka reported: 'Following complications and interpretations and application of ethical issues and Ethics Committee Procedures my work was unfortunately held up. My chief supervisor, Ass. Prof. Knuefermann, has raised the matter with the Vice Chancellor. I hope to be able to proceed in the near future.' He would then complete his review of the critical literature, analyse German immigration and language use, investigate the 'cultural policies of German-speaking countries in N.Z.', evaluate 'various questionnaires', and draft relevant chapters. Associate Professor Knuefermann considered this outline to be 'realistic and achievable'. He added a comment from Professor von Nayhaus, who was satisfied with progress.³⁵

57. Mr Kupka's D.Phil. file includes 17 pages of draft texts of his uncompleted thesis. Two pages from chapter two are on methodology. Four are from chapter four on the position of German in New Zealand. Eleven are from chapter five. Professor Bing stated in his submission that Mr Kupka drafted 89 pages of four chapters and appended four pages of part of chapter 4 that is not in the university file.³⁶

58. Included in Mr Kupka's file are copies of Associate Professor Knuefermann's advice to Mr Kupka on draft texts he read in the course of supervising his research. These strike me as good candid guidance. In response to Mr Kupka's draft text for chapter 5, for example, he set out 'three key concerns' he wanted him to deal with and made specific recommendations about how he should do so. Associate Professor Knuefermann's comments show, however, that Mr Kupka was still having trouble dealing with his research material according to acceptable scholarly standards. The organisation of the chapter, he wrote, needed to be more systematic. Material not strictly related to his subject should be removed. There were too many summaries of other people's work and not enough evidence of his own evaluation. Linkages in a line of argument were frequently lacking. Associate Professor Knuefermann's recommendations included:

*Within each section: proceed from one statement to the next in logical sequence, list evidence...in support of your analysis and line of argument (but the summary of text cannot be [a] substitute for your own analytical presentation.*³⁷

Mr Kupka's questionnaires

59. Questionnaires had not been mentioned in Mr Kupka's research proposal. Dr Knuefermann told me that Ammon had collected statistical information through questionnaires in some of his studies. Once Mr Kupka's research got underway, he and Associate Professor Knuefermann decided that they would also need to make use of some questionnaires. The sort of questionnaire to be used raised the question of whether they would require ethical approval before being administered. Associate Professor Knuefermann's view was that they would be used to gather information about the use of the German language and would not record personal information. That was a reasonable conclusion to reach about the first questionnaire, which was to be responded to by the presidents of the six Goethe societies in the country. It asked them to draw on their knowledge of the activities of their society and provide information in response to thirteen questions. Associate Professor Knuefermann approved the questionnaire as chief supervisor and Mr Kupka distributed it.

³⁵ Higher Degrees Candidates Progress Report, 1 October 1999 – 31 March 2000, 1 May 2001.

³⁶ Bing written submission #4.

³⁷ Kupka D.Phil. file, Knuefermann's notes, 17 September 1999.

60. Mr Kupka devised four more questionnaires. They were drafted in German and were to be responded to in German. In English translation, they were:

- Questionnaire for New Zealand Subsidiaries of German Companies
- Questionnaire for Businesses in the Tourist Industry
- Questionnaire: Perception of Foreign Languages and of German in New Zealand
- Questionnaire for German Immigrant Families

Copies of the questionnaires are in Appendix F.

61. It had, since October 1998, been a requirement of the Humanities Research and Ethics Committee that research proposals that included ‘recorded interviews or written questionnaires’ had to be approved by the committee. Opinions among colleagues differed, however, on whether questionnaires to be used for gathering information, as, for example, in some market research, needed to be submitted for approval. On 14 October 1999, Associate Professor Knuefermann raised that question informally with Dr Anna Green, chairperson of the recently constituted Faculty of Arts and Social Sciences (FASS) Ethics Committee, in relation to Mr Kupka’s next questionnaire, which was to be distributed to the subsidiaries of German companies in New Zealand. In his view they would not be seeking personal or confidential information. Dr Green approved the questionnaire in her capacity as chairperson of the FASS Ethics Committee but suggested to Associate Professor Knuefermann that he submit any others to the committee as ‘a sensible precaution’. Associate Professor Knuefermann then spoke to Dr Foster, pro dean research in the Faculty of Humanities and Social Sciences and a member of the Postgraduate Studies Committee, who endorsed Dr Green’s advice. Associate Professor Knuefermann disagreed with it but he and his candidate were nevertheless prepared to comply. At that stage, Dr Green received from Mr Franke a copy of Mr Kupka’s questionnaire to the Goethe societies and discovered that the questionnaire had not been approved by an ethics committee.³⁸

Discipline complaints against Mr Kupka

62. On 12 October 1999, ten Jewish members of the academic staff wrote a confidential letter to the mediator (Appendix L). They told her that Mr Kupka was identified by the Nizkor Project as one of the persons most actively posting anti-Holocaust messages on the Internet. He had been posting since 1996 and was listed in the archive directory with seven files amounting in all to 1878 kilobytes. They pointed out that denying the Holocaust (the Shoah) has no more credibility than asserting that the earth is flat. No crime in history was so well documented.

63. The letter ended:

Several of the Jewish academic staff of this university who are signing this letter to you have lost numerous family members in the Nazi gas chambers of Auschwitz, Sobibor and so on. To have the world’s memory of our loved ones who died at the hands of the Nazis, publicly undermined by a postgraduate student at this university, is a form of harassment which is deeply distressing to us. Mr Kupka’s correspondence, through various website discussion groups, moreover, is ‘prejudicial to the functioning or interest of the university, as well as behaviour which could reasonably be taken to bring the reputation of the university into disrepute.’³⁹

³⁸ Green submission; Knuefermann to Green, 2 November 1999; Green to Knuefermann, 11 November 1999; Green to Knuefermann, 11 November 1999; Knuefermann to Review, 14 October 2001.

³⁹ Confidential letter to Weir, 12 October 1999.

Professor Bing informed me that he and his colleagues lodged their claim at the earliest opportunity after learning of Mr Kupka's enrolment for doctoral research on 'German in New Zealand'.⁴⁰ Ms Weir wrote to Mr Kupka on 20 October to say that a number of staff had raised a matter with her and she would appreciate an opportunity to discuss it with him. No names were mentioned.

64. On 9 November, Mr Franke lodged a formal complaint of harassment against Mr Kupka. During the previous six months he had had several discussions with the mediator over his concerns about Mr Kupka's extreme views as evidenced by his Internet postings, his doctoral enrolment, and Mr Franke's own relationships with Associate Professor Knuefermann. The point of his letter, Mr Franke explained, was to make a separate complaint from his Jewish colleagues because he was not Jewish, though some members of his family had a Jewish background. Some members of his family had been victimised by the Nazi regime and he felt 'personally offended by many of Mr Kupka's statements.' He was appalled by Mr Kupka's statements about the Holocaust and Hitler's National Socialism. He believed that some of Mr Kupka's anti-semitic, racist remarks 'create racial hatred'. He was also deeply concerned about some of Mr Kupka's statements about Maori. He believed that these public statements were bringing the university and its European and Hispanic Studies department into disrepute. He believed he was being intimidated by Mr Kupka, with some support from Associate Professor Knuefermann, because of his efforts to draw attention to the problems for the university resulting from Mr Kupka's 'public statements of a racist character'.⁴¹

Mr Kupka's complaint of harassment

65. Mr Kupka met Ms Weir on 1 November and she informed him of the allegations against him. Ms Weir informed me that Mr Kupka told her at that meeting that he was prepared to meet his complainants but that that was unacceptable to them. Mr Kupka wrote to Ms Weir two days later to record his response to their allegations.⁴² They were, he said, 'unfounded accusations', and it appeared that Mr Franke did not know that he and his wife had Jewish ancestry. His letter concluded:

*For years now Mr Franke assassinates my character and harasses me because we hold differing political views. Mr Franke however goes as far as to try and prevent me from furthering my university studies. Therefore and under the provisions of the Policy Statement on Equal Opportunity and Freedom from Harassment (see page 78 in the 1999 Calendar of the University of Waikato) I request the university to take appropriate steps to protect me.*⁴³

66. Mr Kupka also wrote to the Assistant Vice Chancellor, Mr Callaghan, who managed the university's duties under the Privacy Act 1993. He asked for copies of all correspondence and documents relating to him held by Ms Weir, Associate Professor Knuefermann, Mr Franke, and Professor Bing. Copies were sent to him on 12 December.⁴⁴

67. Ms Weir wrote to Mr Kupka on 9 November to clarify one point from their discussion. She had made a distinction between his 'individual political views', which lay outside the university's interests, and the two matters that were of concern to the university: the ethical clearance for his research questionnaires; and the use of the university's name in ways that could bring it into disrepute.⁴⁵

⁴⁰ Confidential Letter to B. Weir, 12 October 1999; Bing to Review, 20 July 2001.

⁴¹ Franke to Weir, 9 November 1999.

⁴² Weir to Review, 12 April 2001.

⁴³ Kupka to Weir, 3 November 1999.

⁴⁴ Kupka to Jeremy Callaghan, 2 November 1999; Callaghan to Kupka, 9 November 1999.

⁴⁵ Weir to Kupka, 9 November 1999.

68. Ms Weir sought advice from Dr Gunn, Chairperson, University Human Research Ethics Committee. He informed her that he had no knowledge of the details of the case she was dealing with but offered general comments on the *Code of Conduct for Academic Staff*, the *Student Discipline Regulations*, and the role of the University Human Research Ethics Committee. He drew her attention to regulation 1(f) of the discipline code about ‘behaviour which could reasonably be taken to bring the reputation of the university into disrepute, wherever it may occur.’ He pointed out that it would be necessary to consider the behaviour with the reputation of the university: ‘for example by using a university email account or by prominently stating that they are a student of the university.’

69. Dr Gunn noted that the brief of the University Human Research Ethics Committee was limited to the research itself: its ‘design, conduct, data storage, privacy and confidentiality, informed consent, etc.’ A student’s or a staff member’s concerns outside the research were of no concern to the committee. Then he added a general comment:

[T]he university is and should be committed to freedom of expression, subject to specific legal and contractual constraints. This is recognised in the Education Amendment requirement that universities be ‘critic and conscience’ of society. More generally, New Zealand law allows the expression of any political opinion provided that it does not breach the law in such ways as obscenity, defamation, making threats against individuals etc. Specifically, NZ law does not restrict the expression of opinions that allegedly support racist, sexist, antireligious positions even though [they] may be offensive to some people.⁴⁶

70. Associate Professor Knuefermann also knew that Ms Weir was trying to find a way of handling the conflicting complaints of harassment she was dealing with. He was himself seeking her advice with respect to his intention to lay a complaint against Mr Franke. He knew that, as a non-German reader, she needed help to come to terms with Mr Kupka’s Internet postings. She gave him copies of the material she had received and he read it. He could give her ‘an absolute assurance’, he wrote in an email to her on 10 November, ‘that the few references (Kupka-quotes) could in no way be interpreted as even remotely right-wing or worse: They are utterly harmless comments!! This is indeed a campaign with substandard techniques.’ He would be happy to translate the material if that was necessary. Associate Professor Knuefermann later modified his opinion. He told me that he had come to regard his remarks as ‘unfortunate’. They were, he said, ‘loose remarks, made off the cuff.’⁴⁷

A petition to the mediator

71. Knowledge of the harassment claims against Mr Kupka soon circulated in parts of the Schools of Humanities and Social Sciences, Education, and Law. Mr Kupka was identified by name as a person listed by the Nizkor Project as a Holocaust-denier and neo-Nazi. His Internet postings had been given an international character when, in its issue of 8 November, the American news magazine *Time* ran a piece on the impending trial of Frederick Toben in Mannheim, Germany. Toben was the founder and director of the Adelaide Institute, a Holocaust-denying organisation. He had been arrested on arrival in Germany in April and charged with inciting hatred against cultural groups and defaming the memory of the dead in print, speech, and on the Internet. *Time* described Holocaust revisionism as a pseudo-historical attempt to establish that the Holocaust was a Jewish ‘swindle’.⁴⁸ Some members of Waikato’s academic staff who became involved in the Kupka affair told me that the Toben article was their first awareness that Holocaust denial was an issue.

⁴⁶ Alastair Gunn to Weir, email, 12 November 1999.

⁴⁷ Knuefermann to Weir, email, 10 November 1999; Knuefermann interview, 3 April 2001.

⁴⁸ *Time*, 8 November 1999, pp. 41–2.

72. Nine members of the academic staff signed a petition to the mediator initiated by Mr Franke and expressing ‘solidarity’ with their Jewish colleagues (Appendix M). They were, they affirmed, deeply distressed by Mr Kupka’s Internet postings. They were petitioning in the spirit of their responsibility to uphold a tolerant and hate-free academic environment. Ms Weir told me that she asked the representative of the petitioners who delivered the petition what they wanted her to do with it apart from taking note of their concerns. She heard no more from them and the petition remained in her files. She thinks that she probably did not mention it to the Vice Chancellor in the context of her handling of the harassment complaints.⁴⁹

73. Dr Bolstad, of the Statistics Department, was a signatory. He was a member of the Postgraduate Studies Committee. On 22 November he sent an email to all members of the committee alerting them to what he saw as a threat to the university. A postgraduate student, he informed them, was making Holocaust-denying statements to ‘chatrooms on the net.’ He might be using the university ‘as a cover to legitimize racist propaganda.’ There could be bad publicity that could ‘seriously harm’ the university’s reputation. He drew his colleagues’ attention to the *Time* article. He quoted the section in the discipline regulations about behaviour that might bring the university into disrepute. Dr Bolstad copied this email to the Vice Chancellor the following day. The Postgraduate Studies Committee discussed the case in general terms at its next meeting, but that was not until 10 March 2000. Professor Gould did not reply to Dr Bolstad’s email.⁵⁰

The request of the Human Rights Commission

74. Ms Weir discussed with the Vice Chancellor and, separately, with Professor Bing the possibility of seeking advice from the Human Rights Commission on Mr Kupka’s Internet postings. Professor Gould decided to seek advice from the Human Rights Commission. He knew that the commission did not normally advise on hypothetical cases. But it seemed to him that the issue that had been raised was about to become a real one and that it would be in everyone’s interest to have the commission’s advice. Ms Weir wrote to the commission and she also wrote to the interested parties to let them know what she had done. These were the ten Jewish staff who had written to her on 12 October, Mr Franke, and Mr Kupka.⁵¹ Her letter drew their attention to the protections of the Human Rights Act against victimisation, quoting section 66 of the Act.

75. Her letter to the Human Rights Commission outlined in general terms the matters on which she was seeking advice. The material in question was for the most part in German and a translation was being sought. Some members of the staff considered it to be Holocaust-denying and a ‘vitriolic form of racism’. The student concerned claimed that he was being discriminated against by some members of the staff because of his ‘supposed political opinion’. The letter included the following statement:

The student has not used university computer access in his discussions on the Internet nor has he used the name of the university in relation to the views he has expressed. This being the case the disciplinary regulations for student behaviour which ‘brings the university into disrepute’ are not applicable.

76. Some 15–20 pages of Mr Kupka’s Internet postings were enclosed with the letter. A week later, Ms Weir was told by the Human Rights Commission that the matters she had raised should be more properly considered by the Race Relations Office. She was also told that the Race Relations Office had two lawyers fluent in German. They would deal with the request and make their own translations. Ms Weir’s subsequent dealings were with the Race Relations Office. She

⁴⁹ Weir to Review, email, 29 May 2001; Bolstad to Review, 12 November 2001. CORRECT FN? or for following?

⁵⁰ Dr Bill Bolstad to Postgraduate Studies Committee members, email, 22 November 1999, and to Vice Chancellor Gould, email, 23 November 1999; Bolstad written submission, Appendix A; Sally Parker to Review, 3 July 2001.

⁵¹ Weir interview, 21 February 2001; Gould to Review, 7 August 2002.

faxed to the Office between 700 and 900 additional postings and some translations that Mr Franke had made of some of Mr Kupka's postings. The translations made by the officers of the Race Relations Office were retained by the Office.⁵²

77. Ms Weir reported to the Vice Chancellor on the Human Rights Commission's response on 3 December. She told him that the Commission was doing the translations and that it did not consider that Mr Kupka had so far been discriminated against because of his political opinions. That could change, however. She also told him that the FASS Ethics Committee had met to consider his 'questionnaire and doctoral proposal' (see paragraph 99). Dr Green, its chairperson, had told her that the committee 'had grave ethical concerns' and would be 'effectively suspending any further study' until Mr Kupka had addressed the committee's concerns. Ms Weir could 'only guess' at what the committee's decision might entail for the university's acceptance of Mr Kupka's doctoral proposal eighteen months ago.⁵³

78. The Race Relations Office replied to Ms Weir on 9 December. There was, first, it informed her, the question of whether section 61 of the Human Rights Act 1993 applied to the Internet. This had yet to be tested in the courts but there was a presumption among lawyers with whom the matter had been discussed that it did. On the question asked, whether Mr Kupka's opinions 'could be said to constitute political opinion' under the Act, the Race Relations Office's answer was 'probably yes.'

79. The Race Relations Office assumed that the university was concerned that Mr Kupka might claim that he was being discriminated against because of his political opinions if it tried to stop him from expressing his views on the Internet. That would always be a possibility so long as his postings 'could be said to fall within one of the prohibited grounds' under the Human Rights Act. Mr Kupka was not using university facilities to make his Internet postings and that could add a further difficulty. The university would have to be mindful of his right to freedom of expression.

80. The advice then explained the effect of section 61. For Mr Kupka's postings to fall within that section it was necessary:

- a. *that the material is published;*
- b. *that the content is threatening, abusive or insulting; and*
- c. *that it is likely to excite hostility against, or bring into contempt, any group of persons in or coming to New Zealand on the ground of their colour, race, or ethnic or national origins.*

The material provided fell under (a) and (b) but there was a question whether it would 'excite hostility against Jewish people in New Zealand'. This was a difficult test to apply. It was always to be 'balanced against the right to freedom of expression'. The material was thought to be unlikely to excite hostility against Jewish people because:

- i. *the fact that it is in German would significantly limit its effectiveness; and*
- ii. *it is more likely to impact adversely on the person writing it, than Jewish people.*

While it is indisputable that any attempt to refute the fact that the Holocaust occurred is insulting, in itself discussions about it are unlikely to lead to a negative reaction on the part of the people reading it.⁵⁴

81. On 13 December, Ms Weir sent copies to the Vice Chancellor of the advice she had received from the Human Rights Commission and the Race Relations Office. She also informed the interested parties of the essential points conveyed in those letters. She told them she would be on

⁵² Weir interview, 21 February 2001; Sylvia Bell to Review 31 May 2001.

⁵³ Weir to Vice Chancellor, 3 December 1999.

⁵⁴ Bell to Weir, 9 December 1999.

leave from late December until mid-January. She needed time to consider what should now be done about the complaints she had received. She undertook to meet Mr Kupka for further discussion on her return to work. She informed Mr Franke and the ten Jewish members of staff that, given the guidance it had received from the Race Relations Office, the university would 'be open to a claim of discrimination on the grounds of political opinion' if it stopped Mr Kupka from publishing material on the Net.⁵⁵

82. Ms Weir informed Professor Bing that, on her return, she would discuss with the Vice Chancellor the options, if any, that remained open to the university. She told him that he was in no way precluded from 'acting as an individual either as an individual or concurrently'. Professor Bing got in touch with the Complaints Manager of the Human Rights Commission.⁵⁶

83. The Race Relations Office considered whether section 63 of the Human Rights Act might also be relevant. Section 63 prohibits racial harassment: the expression of hostility, contempt or ridicule against another person which is hurtful or offensive to that person, and which has a demonstrably detrimental effect on them. For Mr Kupka's conduct to be considered under section 63, however, an identifiable person or persons would have had to experience detriment as a result of his Internet postings, the detriment would have to involve access to educational facilities, and there would have to be a complaint from a member or members of the university students or staff. The Race Relations Office received no complaints of racial harassment.

84. The university did not seek another legal opinion on the advice it had received from the Race Relations Office. My legal advice concurred with the advice received from the Race Relations Office but drew attention to the fact that Ms Weir did not seek legal advice on 'the more pertinent issue' of whether the university's discipline regulations should be invoked.⁵⁷

The question of translations

85. One of the confounding issues in the handling of complaints against Mr Kupka was the fact that few of the people within the university who were required to form a view on his Internet postings were able to read them in German. About 90 per cent were in German. Of those to whom the Vice Chancellor looked for advice, Professor Oettli and Associate Professor Knuefermann were the only German speakers. As it happened, Professor Gould did not consult Professor Oettli. English translations would have to be made.

86. Ms Weir and Professor Bing exchanged emails and held discussions during November. Professor Bing recommended the translation of a sample of the postings by an independent translator who was also qualified to advise on the nature of their contents. The translations so far made had been done by Associate Professor Knuefermann and Mr Franke, neither of whom were Holocaust historians. Professor Bing considered that the Vice Chancellor should receive the advice of an independent Holocaust historian of repute. Ms Weir informed him that Professor Gould concurred. At Ms Weir's request, he approached Professor Konrad Kwiet, Professor of German and Director of the Centre for Comparative Genocide Studies, Macquarie University, and recognised as the foremost scholar in Australasia.⁵⁸ Professor Kwiet was willing to assist but the proposal foundered because of the likely cost.⁵⁹ Then Ms Weir was advised that the Race Relations Office had two German-speaking lawyers and the office would make their own translations. That resolved the matter of translations for the purposes of her investigation.

⁵⁵ Weir to Franke, 13 December 1999.

⁵⁶ Weir to Bing, 13 December 1999; Bing to Weir, 10 December 1999.

⁵⁷ Chapman Tripp to Review, 16 October 2001; Rosslyn Noonan, Chief Commissioner, Kaikomihana, Human Rights Commission, to Review, 6 May 2002.

⁵⁸ Bing to Weir, email, 11 and 19 November 1999.

⁵⁹ Konrad Kwiet to Weir, email, 26 November 1999.

87. But it left the main issue unresolved. The translations remained in the Race Relations Office and were not open to scrutiny by anyone in the university. More importantly for Professor Bing, the lawyers in the Race Relations Office were not Holocaust historians and their judgement would not in his view help the university to resolve the issues surrounding Mr Kupka's research. The outcome was in his opinion 'unprofessional'. Without translations, the issue could not be considered seriously by colleagues who could not read German. He consulted Mr Franke and Dr Pratt, Director of the Religious Studies Programme, and arrangements were then made for some Holocaust scholars to translate a selection of Mr Kupka's postings and write reports on them.⁶⁰

88. The opinions of four of these became important in later argument on campus. They were from Professor Kwiet; Professor Emeritus John Moses, History Department, University of Queensland; Ms Louise Freudenberg, Research Scholar in the German History Department, University of Berlin; and Professor Peter Longerich, Director, Institute for Holocaust Studies, University of London. Professor Longerich was at the time an expert adviser to the defendants in the Irving libel case in the High Court, London. Three of these scholars are native speakers of German. The fourth, Professor Moses, has masters and doctoral degrees from German universities and is fluent in German and an astute observer of German affairs.

89. Ms Freudenberg initiated the examination. She called up at random Mr Kupka's postings for the period 14 November – 29 December 1997, analysed them, and wrote a report on them for Dr Pratt. The other three read the same postings and wrote their reports. Professor Nieschmidt made English translations of the postings they examined and these are in Appendix H. The opinions of the four scholars are in Appendix I.

90. Ms Freudenberg concluded that Mr Kupka's postings were neo-Nazi and anti-semitic and apparently 'denied that there was a Holocaust (or at least that there were gas chambers)'. His 'tone and language' when writing about Jews and the Holocaust 'is openly anti-semitic' and could have come 'straight from Goebel's speeches'. Professor Moses agreed with that assessment. 'The man is a right-wing fanatic who is incapable of taking on board the findings of mainstream post-war German scholarship on the Holocaust.' Professor Moses linked Mr Kupka with Dr David Irving, the internationally-known Holocaust denier who had been banned from re-entering Australia. They had in common 'an ability to play with language to give the impression of objectivity'. Professor Longerich wrote: 'From these quotations it is clear that Mr Kupka's argumentation follows, in a very characteristic manner, the typical patterns of Holocaust-denial.' Professor Kwiet found Mr Kupka's 'discussions' or 'dialogues'... not only disturbing and confusing but also quite boring, not to say garbage, or I rather should say cyberspace junk.' He agreed with Professor Moses and Ms Freudenberg, adding:

Herr Kupka presents himself – and is pleased with his role – as an intellectual who does not hide his anti-Semitism, Holocaust-denial and racism. His views indeed often expressed in a coded language, are marked by arrogance and cynicism, stupidity and hatred.

91. The views of the four Holocaust scholars were conveyed to members of the Postgraduate Studies Committee and to members of the University Council in one of the appendices to Professor Bing's letter of 2 April 2000 to Professor Middleton, Deputy Chairperson, Postgraduate Studies Committee (Appendix I).

The Waikato Goethe Society

92. Mr Kupka had distributed questionnaires (Appendix F) to the presidents of the six Goethe societies in mid-1999 and five of them answered them and returned them. The one who did not co-operate was the president of the Waikato Goethe Society, Mr Norman Franke. The Waikato Goethe Society had about 30 members, several of whom were members of the University of

⁶⁰ Bing written submission #21; Franke written submission, p. 10; Dr Douglas Pratt written submission.

Waikato. Some had known of Mr Kupka's Internet postings since 1995. Between a third and a half were aware of them when Mr Franke received Mr Kupka's questionnaire. Jews and non-Jews among them were disturbed by what they read. Ms Beate Jones, who succeeded Mr Franke as president, told me how unsettling they were to her. With other Germans, she lives with the burden of guilt for the Holocaust. She told me that to come to the other end of the globe as she had done and to be confronted by 'a Kupka' was extremely hurtful. She acknowledged Mr Kupka's right to free speech. But she was doubly offended that a neo-Nazi was also a graduate student in the German department of the university.⁶¹

93. Mr Franke had several objections to the questionnaire. It did not indicate that it was part of a University of Waikato research project, nor did it indicate how it related to such a project. It had some 'semantic ambiguities'. It did not guarantee anonymity and confidentiality to those who completed it. Mr Franke had asked Associate Professor Knuefermann for a copy of Mr Kupka's research proposal and raised his concerns at the German staff meeting on 28 September 1999. Associate Professor Knuefermann told him that all university research was bound by a code of ethics. The information sought, he said, did not involve members of the society other than the president. It was not 'information on individuals, nor was it related to individuals'. He refused to give Mr Franke a copy of the research proposal. The request was 'entirely inappropriate'. Furthermore, he was 'seriously concerned about [Mr Franke's] professional judgement'. He was 'equally concerned' that Mr Kupka might well seek legal redress for harassment with all its 'destructive consequences'.⁶² He took exception, furthermore, to Mr Franke's continuing interest in the questionnaire to the Goethe societies. This, Associate Professor Knuefermann told Dr Green, was to be 'seen in the context of his prolonged and serious campaign of harassment and defamation against Mr Kupka and myself'.⁶³

94. On 15 November, Mr Franke wrote to Dr Green on behalf of the Waikato Goethe Society to ask the FASS Ethics Committee to consider the questionnaire Mr Kupka had sent to him as president. As president, he wrote, he had to 'insure that sensitive information about the cultural and linguistic make-up of its membership is protected and is not used by any person, for any project, or any purpose that may be cultural[ly] unsafe.' On 9 December, Dr Green replied to Mr Franke. The committee was actively considering the matter, she informed him, and his concerns were being addressed.⁶⁴

The Bing–Franke letter of 26 November 1999

95. With Professor Gould's agreement, Ms Weir gave Professor Bing and Mr Franke copies of an abridged version of Mr Kupka's doctoral proposal. The bibliographical lists had been removed. They were dismayed by what they read. They could see no sign that the Higher Degrees Committee, when it considered Mr Kupka's application in July 1998, had taken any notice of the objections that Mr Franke had raised with Associate Professor Knuefermann and in the meeting that Professor Oettli had convened and at which Dr McKim, the Humanities member of the committee had attended. They concluded that Mr Kupka's registration as a doctoral candidate had not been in accordance with normal university processes. They decided to make their concerns known. The purpose was not to ask for personal information about Mr Kupka but to raise questions about the way the university had dealt with his doctoral registration.⁶⁵

⁶¹ Waikato Goethe Society submission; oral submission, 20 February 2001.

⁶² Franke submission, Knuefermann to Franke, email, 8 October 2000; Franke to Knuefermann, and his reply, emails, 10 October 2000.

⁶³ Green written submission and appendices 2, 3, and 4; Associate Professor Mary Foster interview, 4 April 2001.

⁶⁴ Green written submission, appendix 3.

⁶⁵ Bing to Review, 5 June 2001.

96. They were uncertain about how to proceed. Professor Bing exchanged emails with Dr Gunn, Professor Middleton, Associate Professor Foster, and others. Professor Bing at first thought that an approach should be made to the Postgraduate Studies Committee as the successor of the Higher Degrees Committee that had registered Mr Kupka's research proposal. Then he became aware that Mr Kupka's research proposal had not been approved by the Humanities Research and Ethics Committee, and that the issue of cultural safety had not been dealt with. Professor Middleton also informed him that it 'would have made a difference at the time of enrolment' if the Higher Degrees Committee 'had been aware of a question of "cultural safety"'. Professor Bing and Mr Franke decided to make a complaint to the FASS Ethics Committee. Dr Gunn informed Professor Bing that that committee would be considering Mr Kupka's research proposal at its next meeting. The committee would not, as Professor Bing had requested, receive a deputation. Its terms of reference did not permit the attendance of members of the academic staff who were not involved in a research project. He advised Professor Bing to make a written submission to it.⁶⁶

97. On 26 November, Professor Bing and Mr Franke wrote to Dr Green, Chairperson, FASS Ethics Committee (Appendix N). Copies of the letter were sent to the nine Jewish academics who had also signed the letter of 12 October to the mediator.

98. The Bing–Franke letter argued that Mr Kupka's doctoral application had not been dealt with according to university processes, explained in considerable detail the contribution of German-speaking Jews to New Zealand's cultural life since the late 1930s, pointed out that the co-operation of German-speaking Jews would be essential to any soundly based research into the subject of Mr Kupka's research, and emphasised that their cultural safety must be an essential consideration in any such research. The 'ad hoc' meeting that Professor Oetli had convened in May 1998, they contended, was in breach of proper process. The 'considerable reservations about the suitability of Mr Kupka as a doctoral student and about the "cultural safety" of the proposal' had not, to the best of their knowledge, been referred to the Humanities Research and Ethics Committee. The Higher Degrees Committee had not been adequately informed when it registered the proposal. Mr Kupka had taken for his research proposal the phrase 'the German connection' from the title of a book of essays about Germans in New Zealand in the nineteenth century, edited by James Bade and published in 1993. His proposal stated that, by 'taking stock of the role of the German language in contemporary New Zealand', he would 'shed some light on one specific strand of New Zealand's ever more complex and rich social, economic and cultural texture: Her "German Connection."' But Bade, they pointed out, had in 1998 published another book of essays, *Out of the Shadows of War: The German Connection in New Zealand in the Twentieth Century*. It underlined the central role that German-speaking Jews from Germany, Austria, and Czechoslovakia had played in keeping that connection alive. 'No serious Doctoral study of "German in New Zealand,"' they wrote, 'can be undertaken without extensive reference to these Jewish refugees from Nazi Europe and without the cooperation of these refugees and their families.' To undertake the research without reference to the German-speaking Jewish community would make it Judenrein.⁶⁷

The FASS Ethics Committee and the Bing–Franke letter

99. The FASS Ethics Committee had only recently been established and was not yet fully resourced administratively. Mr Kupka's research was the first to be put to it. It was also the first time in the memories of those dealing with ethical issues in the School of Humanities that an ethics committee had been called on to deal with a complaint from members of the general

⁶⁶ Professor Sue Middleton to Bing, 24 November 1999; Dr Gunn to Bing, 26 November 1999; Weir to Review, [14 May 2001]; Bing, submission #5; Bing to Review, 7 September 2001.

⁶⁷ Bing–Franke letter to Green, Chairperson, FASS Human Research Ethics Committee, 26 November 1999; Bing to Middleton, with copy of the letter for the Postgraduate Studies Committee, 12 December 1999.

public.⁶⁸ The complaint and what stood behind it would have tested any ethics committee. Nor were the members of the committee to be allowed to consider it in a state of calm detachment. Mr Kupka was not mentioned by name in the petition that had circulated within the faculty (see paragraph 72) but the word was being passed around the faculty that a postgraduate student was a Holocaust denier. One of the members of the committee, Dr Goldsmith, had signed the petition.

100. The committee met on 29 November. Dr Goldsmith brought to it what was described in the chairperson's notes of the meeting as a 'package of information from Dov Bing', and this was 'tabled'. There were three copies of the package, one for each member of the committee who was present (the fourth member was absent overseas). Each included the letter dated 26 November, jointly signed by Professor Bing and Mr Franke, nine pages of Mr Franke's translations of Mr Kupka's Internet postings, and a copy of an abridged version of his research proposal. Dr Goldsmith's recollection of the discussion is that:

there were problems with the proposed methodology of Mr Kupka's research, that there were also problems with the process of ethical approval up to that point, and that there were wider historical issues that should probably be explored more extensively, by the University HREC [Human Research Ethics Committee] or other bodies.

Dr Green's recollection was similar. The wider historical issues for Dr Goldsmith were the Holocaust.⁶⁹

101. Dr Goldsmith was at first unaware of the purpose of the meeting but had a pretty good idea what it would be about before it met. When he found that it was to consider Mr Kupka's questionnaires, he told his colleagues that he had signed the petition and might have a conflict of interest. The committee meeting effectively ended at that point. So that its other members could benefit from his point of view, there followed what Dr Green referred to as 'a general and informal discussion of the issues.' Dr Green told her colleagues that, after the meeting, she would consult Dr Gunn, Chairperson, University Human Research Ethics Committee, and Dr Foster, pro dean research. That meeting took place and concluded that Dr Goldsmith had a conflict of interest and should not be a member of the committee when Mr Kupka's research was under discussion. Dr Gunn decided that Dr Goldsmith should be replaced. The committee had not made any decisions about the research with Dr Goldsmith present. Dr Green's notes of the meetings record that '[t]he meeting was declared void, and reconvened with a new member, the following day.' Dr Bernard Guerin was the new member.

102. The meeting on 30 November was the first of three during which the committee considered Mr Kupka's research. It had before it Mr Kupka's research proposal, the three questionnaires for which he was seeking ethical clearance, and the letter of 15 November from Mr Franke, President, Waikato Goethe Society. Professor Bing's package was available at the meeting. The letter that Mr Franke wrote on behalf of the Waikato Goethe Society asked that its members be protected from uses of sensitive information that might be used for purposes that were 'cultural[ly] unsafe.' The Bing-Franke letter focused on 'cultural safety.' The FASS Ethics Committee accepted that it would need to deal with these concerns under the sixth of the general principles under which it was required to work. This required it to take '[a]dequate steps ... to respect the social and cultural sensitivities, and language preferences, of all participants' in researches involving human subjects. It decided to exercise its power under paragraph 3.1.1 of the *University Human Research Ethics Committee Procedures* (Appendix T) to suspend Mr Kupka's research until it was satisfied that his research complied with the university's ethical standards. It also asked Dr Gunn, as chair of the University Human Research Ethics Committee

⁶⁸ Green to Review, 21 June 2001.

⁶⁹ Dr Michael Goldsmith submission; oral submission, 16 March 2000.

with whom the matters in the letter had first been raised by Professor Bing, to reply to the letter on behalf of the committee. Ms Weir, who was dealing with the harassment claims for the Vice Chancellor and was reporting to him on progress, was aware of the FASS Ethics Committee's decisions. On 3 December she reported to Professor Gould that the committee had 'grave ethical concerns' about Mr Kupka's research and had suspended it (see paragraph 77).

103. Professor Bing informed me that he did not receive a letter from Dr Gunn.⁷⁰ He is convinced that the Bing–Franke letter was not tabled by the reconstituted FASS Ethics Committee at its resumed meeting on 30 November. But there was no need for it to have been. Dr Green, the committee chairperson, knew that the three members of the committee had received copies of the package at the committee meeting the previous day. Dr Priya Kurian, the other remaining member, confirmed for me that she had received the Bing–Franke letter at that meeting. She also informed me that she 'attached considerable significance to the issue of "cultural safety" that the letter raised,' and that she 'attached considerable weight to the ethical issues first raised in the letter when the committee addressed the cultural safety issue at its meeting on 10 May.' Dr Guerin, the new member, informed me that Professor Bing's package was available at the meeting of the committee on 30 November but not referred to. It was his understanding that material in the package was being considered by 'Ms Weir, legal people, and German translators and there was no point in doing what they were better at doing.' The committee concentrated on the questionnaires because he 'was happier to consider the proposed study itself first on ethical and methodological grounds before considering anything else.' He did not wish to be 'swayed if those other matters were eventually considered by the Human Rights, legal and other people to be not relevant.' Dr Green noted in her submission that, at its meeting on 30 November, the committee 'considered Mr Kupka's research proposal in a manner consistent with the nine primary ethical principles outlined in [its] terms of reference.' It had 'a number of serious reservations about the research methodology, in particular concerning issues such as consent, confidentiality, and the potentially limited value of the research.' It then began its consideration of Mr Kupka's questionnaires.⁷¹

104. For the meetings of 29 and 30 November, the committee also had a report written by Associate Professor Vowles of the department of political science and public policy. The chairperson had sought his advice in the light of his extensive experience in questionnaire survey research. Associate Professor Vowles drew attention to omissions and technical shortcomings in Mr Kupka's questionnaires and identified several respects in which they would need to be improved to meet acceptable technical standards. He noted, too, that the committee would need to be assured 'that special issues and concerns that are raised by requiring sometimes sensitive data from German speaking families in New Zealand have been considered.' 'Unfortunately,' he concluded, 'the student does not appear to have provided sufficient material for the committee to properly assess whether or not the appropriate ethical procedures have been followed.'

105. A further complication arose in the context of the discussions that Professor Bing was having with Dr Gunn about the possibility of addressing the Bing–Franke letter to the Postgraduate Studies Committee (see paragraph 106). Dr Green's recollection is that, a few days after the meeting, Dr Goldsmith, acting for Professor Bing, asked for the letter so that he could return it to Professor Bing. She made a copy for herself for future reference when the committee would consider cultural sensitivity issues and handed it back to Dr Goldsmith to return to Professor Bing. Dr Goldsmith's recollection is that the meeting referred to by Dr Green did not take place. He had, he informed me, kept his own copy of the letter and would have returned it

⁷⁰ Green submission and Appendix 8; Bing submission #28; Goldsmith submission; Green to Review, 3 April 2001; Goldsmith to Review, 1 June 2001; Bing to Review, 11 June 2001; Gunn to Review, 15 August 2001; Goldsmith to Review, 30 August 2001; Bolstad to Review, 7 September 2001; Gunn to Review, 28 February 2002.

⁷¹ Dr Kurian to Review, 8 February 2002; Dr Guerin to Review, 27 February 2002; Green submission.

to Professor Bing if Professor Bing had asked for a copy. In Dr Green's recollection, she was left unsure whether, by asking for the letter to be returned to him, Professor Bing was withdrawing it from the committee's consideration. I do not attach any significance to these differing accounts. I am satisfied that the FASS Ethics Committee received the Bing–Franke letter at its meeting on 29 November, and that the three members of the reconstituted committee were aware that it was intended to have a bearing on decisions they would be making on Mr Kupka's questionnaires. Whether it was 'tabled' again at the reconvened meeting of the committee the next day is unimportant. Later, Dr Green had reason to wonder if the letter was still before the committee but, letter or no letter, issues of cultural sensitivity were clearly in her mind and in Dr Kurian's mind. Dr Guerin was aware that the committee had received a package of materials that might be relevant to its consideration of Mr Kupka's questionnaires at some later stage. Regardless of what was in the package, Dr Guerin was aware that Mr Kupka's questionnaires raised questions about cultural sensitivity. Dr Green's doubts were resolved when a copy of the letter which Ms Bliss and five other members of the Waikato/Bay of Plenty Jewish Association wrote on 4 April to the Postgraduate Studies Committee was referred to the committee for its attention (see paragraph 167). The committee dealt with the cultural sensitivity issues at its meeting on 11 May 2000.⁷²

The Postgraduate Studies Committee and the Bing–Franke letter

106. Professor Bing wanted to get the university to address the issues raised in the Bing–Franke letter. Soon after the meeting of the FASS Ethics committee on 30 November, he formed the impression that Dr Green had passed the letter to Dr Gunn for his consideration as chairperson of the University Human Research Ethics Committee. Professor Bing emailed Dr Gunn, who was at a conference in Dunedin, and asked him if he could confirm whether he had decided not to bring the Bing–Franke letter to the attention of the University Human Research Ethics Committee. Dr Gunn confirmed that Dr Green had referred the letter to him. 'I looked at the terms of reference of may [sic] committee,' he continued, 'and decided that the issue was not within those terms of reference as our function is only to look at proposals not at the candidate. Perhaps the appropriate Committee would be the postgraduate studies committee.' Professor Bing interpreted Dr Gunn's reply as confirmation that the Bing–Franke letter would not be considered either by the faculty ethics committee or the university ethics committee. If the issue it raised fell outside the terms of reference of the University Human Research Ethics Committee, he reasoned, it must also be outside the jurisdiction of the FASS Ethics Committee because both committees operated under the same terms of reference.⁷³

107. On 12 December, Professor Bing wrote to Professor Middleton, Deputy Chairperson, Postgraduate Studies Committee, enclosing a copy of the Bing–Franke letter (Mr Franke was by then absent on study leave).⁷⁴ His covering letter explained that Dr Gunn had decided that the 'issue' raised in the Bing–Franke letter did not fall within the terms of reference of the University Human Research Ethics Committee but had suggested that the Postgraduate Studies Committee might be the appropriate committee. He asked the committee to deal with it as soon as possible (Appendix O). A meeting of the committee was set down for 17 December but was not held. The committee's executive group considered Professor Bing's request at its meeting on 22 December.

⁷² Goldsmith submission; Bing submission #28; Green submission; Green to Review, 3 April 2001; Goldsmith to Review, 1 June 2001; Bing to Review, 11 June 2001; Gunn to Review, 15 August 2001; Goldsmith to Review, 30 August 2001; Green to Review, 8 June 2001; Green to Review, [13] October 2001; Bing to Review, 24 November 2001; Goldsmith to Review, 4 and 12 December 2001.

⁷³ Gunn to Bing, 7 December 1999; Bing submission # 36.

⁷⁴ Professor Bing to Sally Parker, 24 November 1999; Sally Parker to Professor Bing, 24 November 1999; Professor Bing to Review, 13 November 2001.

108. The Bing–Franke letter had initially been addressed to the FASS Ethics Committee and was largely concerned with the contributions of German-speaking Jews to New Zealand’s cultural life since the war and with the cultural safety of German-speaking Jews in the context of Mr Kupka’s research. But it did, by way of introduction, set out the reasons for their present concerns. It pointed out that, before Mr Kupka’s proposal had been submitted to the Higher Degrees Committee, they had expressed reservations about his suitability as a doctoral candidate and about the ‘cultural safety’ of his research. To the best of their knowledge, however, their reservations had not been conveyed to the Humanities Research and Ethics Committee. Nor had the Higher Degrees Committee been informed of the controversial nature of Mr Kupka’s doctoral application. Instead of being considered within the university’s ‘established committee structure,’ they wrote, their reservations had been dealt with by Associate Professor Knuefermann, Professor Oettli, and Dr Mc Kim in ‘their new ad hoc committee to which Mr Franke but not Professor Bing was invited’. That meeting had decided, they wrote,

That Mr Kupka was entitled to his political views and that there was nothing ‘threatening, abusive, or insulting’ to the Jewish community in Mr Kupka’s writings. Moreover, it was agreed that there were no concerns about the ‘cultural safety’ of Mr Kupka’s Doctoral proposal. (Appendix N)

109. The executive group decided that the only matter for the Postgraduate Studies Committee to consider was whether Mr Kupka had been properly enrolled by the Higher Degrees Committee. ‘The P[ostgraduate S[tudies] C[ommittee], Professor Selby minuted on Professor Bing’s letter, ‘is concerned with process NOT the topic or content of the research. The Schools are responsible for the fields of research.’ Professor Selby examined the records of the Higher Degrees Committee and decided that Mr Kupka’s doctoral registration and subsequent progress was in order.⁷⁵ The executive group knew that the FASS Ethics Committee was already aware of the issues of cultural safety raised in the Bing–Franke letter. They also knew that the mediator was inquiring into a harassment claim against Mr Kupka that could have disciplinary implications. They did, however, wonder if a situation might arise in which Mr Kupka’s enrolment as a doctoral candidate might need to be considered. At their request, Mr Callaghan, Assistant Vice Chancellor, reviewed the academic record and concluded that his enrolment and subsequent progress as a doctoral candidate were in order. There was, in his opinion, no case for ‘cancellation of candidature.’⁷⁶ The executive group decided not to refer the Bing–Franke letter to the Postgraduate Studies Committee for consideration. The remaining matter in the letter that was not being dealt with was whether the meeting that Professor Oettli had chaired was in some way irregular. Any inquiry into that, in Professor Selby’s and Professor Middleton’s view, would need to be done on the authority of the Vice Chancellor. The executive group decided, therefore, to refer that matter to the Vice Chancellor’s Office.

The FASS Ethics Committee considers Mr Kupka’s questionnaires

110. The FASS Ethics Committee had an initial problem when it turned to Mr Kupka’s questionnaires. Most of his Internet postings that they had been asked to consider were in German. No member spoke German, so translations would be needed. Members had, however, become aware before the start of the meeting that the mediator had received a letter from Professor Bing and a more extensive selection of Mr Kupka’s Internet postings. Ms Weir was arranging to have translations made. The committee decided to defer consideration of cultural safety issues until these were available and began its ethical scrutiny of Mr Kupka’s questionnaires.⁷⁷

⁷⁵ Professor Michael Selby’s minute on Bing to Middleton, 12 December 1999.

⁷⁶ Bing to Middleton, 12 December 1999; Bing to Middleton, email, and her reply, 27 January 2000.

⁷⁷ Green to Review, 8 June 2001.

111. The committee did not know that some of the questionnaires they were about to consider had already been sent to agencies that had agreed to distribute them for Mr Kupka. Nor until it received Mr Franke's letter of complaint was it aware that questionnaires to the presidents of the six Goethe societies had already been distributed. It examined Mr Kupka's research proposal and the questionnaires he proposed using in the light of the General Principles for Research Involving Human Participants (Appendix T). The members of the committee were all of the view that Mr Kupka's thesis proposal should 'be suspended until the methodology was substantially changed'. Dr Green wrote to Mr Kupka on 1 December outlining ten points of concern and told him that his research was suspended until he had dealt with them to the committee's satisfaction. Suspension, he was informed, did not mean a halt to work on the research project. Developing questionnaire instruments that were methodologically sound was an essential requirement of the project. Mr Kupka was asked to reply to the committee by 16 January 2000.⁷⁸

112. Neither Mr Kupka nor Associate Professor Knuefermann was at first prepared to accept the committee's decision. Associate Professor Knuefermann had agreed that it would be prudent for the committee to decide whether Mr Kupka's questionnaires required ethical approval. When, however, it decided that they did, he argued that their purpose was to collect information on the use of the German language and participants would not be asked to provide personal information. Mr Kupka, he argued, was being penalised for inconsistencies in the university's policies and a lack of adequate information and guidance. Associate Professor Knuefermann assured the committee that he and Mr Kupka 'were aware of the ethics considerations involved in doctoral research'. Dr Green sought the advice of the dean of the faculty, who asked Dr Gunn, as the convenor of the University Human Research Ethics Committee to consider their objections. He gave Mr Kupka a point-by-point reply in a letter dated 23 December, and Mr Kupka agreed to comply with the committee's requirements. One of these was the suggestion that he seek advice on survey and statistical methodology from Dr Barnes, a lecturer in the Social Science Research Programme.⁷⁹

113. Mr Kupka and Associate Professor Knuefermann met Dr Barnes on 14 January and Mr Kupka replied to the committee on 11 February 2000. The committee considered it on 2 March. It concluded that Mr Kupka had made 'only minor revisions of his questionnaires' and the letters that would accompany them. He needed to give more attention to the size of the samples he intended to use and to sampling procedures. In its letter to him dated 14 March, the committee repeated a point made in its earlier letter: 'It is not enough simply to indicate awareness of ethical and methodological issues; researchers must show how ethical standards will be achieved in practice.' The committee asked Mr Kupka for further clarification on nine matters which it tabulated in its letter. A copy of the letter was sent to Associate Professor Knuefermann.⁸⁰

114. Associate Professor Knuefermann wrote to Dr Green to inform her that the FASS Ethics Committee was seriously disadvantaging his student's research. To protect Mr Kupka's interests he would have to raise the matter with the Vice Chancellor. On 30 March, Associate Professor Knuefermann emailed the Vice Chancellor to lay a formal complaint against Professor Bing and Mr Franke 'for their continued harassment of me in matters J. Kupka'.⁸¹

115. Mr Kupka, who had been living in Germany since February, emailed the Vice Chancellor on 6 April. He told Professor Gould that he was feeling victimised by some staff members,

⁷⁸ Green written submission and Appendix 9; telephone interview, 11 June 2001.

⁷⁹ Kupka to Green, 6 December 1999; Knuefermann to Green, 17 November 1999; Knuefermann to Green, 8 December 1999; Green submission, Appendices 4 and 10; Green to Review, 23 May 2001.

⁸⁰ Green to Kupka, 14 March 2000, Green written submission, Appendix 10.

⁸¹ Knuefermann to Green, 24 March 2000; Green submission, Appendix 13; Knuefermann to Gould, email, 30 March 2000.

Professor Bing and Mr Franke in particular. It was his understanding that Professor Gould was aware of the ‘lengthy and continuing campaign of harassment against him’. He rehearsed the background and his defence. He did not ‘deny the Holocaust’. Regardless of what he wrote, however, it was always interpreted against him. The allegations had been ‘ever changing and have become ever more comprehensive’. The current allegation, based on the opinions of ‘experts,’ was that he used ‘coded’ language.

116. The ethics committee’s decision to place its research ‘on hold’ appeared to be an ‘arbitrary interpretation of Ethics Procedures’. He was feeling ‘seriously disadvantaged and unfairly treated’. He asked for a six-month extension of his enrolment. If Professor Gould thought that he should withdraw from his doctoral research to protect the university’s reputation, he would do so. But the campaign against him had gone on long enough and should stop. He called on the Vice Chancellor to protect him.⁸²

117. Professor Gould replied that it would be ‘inappropriate’ for him to withdraw. He was confident that the university processes were working well in his case. ‘The University has no intention of departing from the values it stands for, including its commitment to ensuring that staff and students are free from harassment.’⁸³

Frustrated initiatives

118. As well as pursuing his objections to Mr Kupka’s postings with the mediator, Mr Franke hoped to engage his colleagues in the faculty in discussion of the academic and moral issues raised by his doctoral research. He spoke to the dean of the faculty, Professor Koopman-Boyden, on 25 November 1999 and asked her to convene a meeting. He thought such a meeting would be ‘healthy’. It would allow people to ‘get together to discuss the matter rather than continue with piecemeal communication by informal discussion and memos.’ He hoped it might resolve differences. He did not think that Mr Kupka should be invited. He suggested that Professor Koopman-Boyden could meet him afterwards to convey the main points of the discussion and hear his response. Professor Koopman-Boyden agreed to convene a meeting. Mr Franke left the university on study leave a few days later.⁸⁴

119. Professor Bing wrote to Professor Koopman-Boyden in February requesting a meeting with members of the Jewish community. He had, he informed her, been trying unsuccessfully to find out if the Bing–Franke letter had been tabled by the FASS Ethics Committee. He had written to Dr Green but had not received a reply. His letter asked Professor Koopman-Boyden if she would ask Dr Green for an explanation. Professor Koopman-Boyden replied that she would inform herself about the issues, which she proceeded to do, and then arrange a meeting. When Professor Bing wrote again on 15 March and repeated his request, Professor Koopman-Boyden replied that it was outside her jurisdiction as dean to do so. The committee was appointed by the faculty but derived its authority from Academic Board through the University Human Research Ethics Committee whose regulations it administered under delegation from that committee. It reported to the University Human Research Ethics Committee, not the dean of the faculty. Professor Koopman-Boyden’s reply to Professor Bing was a statement of the official university position (see paragraph 576).⁸⁵ In Professor Bing’s view, however, the FASS Ethics Committee was a faculty committee whose convener and members were appointed by the dean and answerable to her.

120. Professor Bing thought that Professor Koopman-Boyden was stonewalling and that there would be little point in having a meeting if the information he had asked for could not be provided. He wrote in his letter to her that he considered her ‘attitude and response’ to him ‘was

⁸² Kupka to Vice Chancellor, email, 6 April 2000.

⁸³ Gould to Kupka, email, 6 April 2000.

⁸⁴ Franke written submission and Appendix 22.

⁸⁵ Gunn to Review, 1 May 2001; Koopman-Boyden to Review, 22 November 2001.

not very different from the treatment meted out to [him] by other academic colleagues' on the subject of the Bing–Franke letter. She was treating his Jewish colleagues and himself 'with contempt, you make us invisible'. Professor Koopman-Boyden felt that the tone and content of Professor Bing's letter impugned her integrity. She spoke to Professor Gould a day or so later, expressed her frustration at the way things had gone, and suggested that he might consider convening a meeting with Professor Bing and his Jewish colleagues who were acting with him.⁸⁶

121. Professor Bing wrote to Professor Koopman-Boyden again on 24 March. He and his Jewish colleagues would be happy to meet her after a reply had been received from the FASS Ethics Committee. He informed her that Jewish members of the academic staff would be meeting on campus with the Waikato/Bay of Plenty Jewish Association, after which he 'would be in touch to organise a meeting with you and other senior people in the university'. Professor Bing left the university on 7 April and a meeting was not convened (see paragraph 134).⁸⁷

122. Mr Franke got his opportunity to have an academic discussion of issues raised by the Kupka case in August in the European and Hispanic Studies Department open seminar series. His lecture placed Mr Kupka in the context of economic and psychological conditions for the rise of neo-Nazism, drawing on the *Appeal for Vigilance* endorsed by more than a thousand European intellectuals, among them Derrida, Habermas, and Eco. Mr Franke informed me that unlike the other seminars in the series, his was not publicised, and in his view, that amounted to an act of censorship and a breach of his academic freedom. The lecture was well attended by staff and students.⁸⁸

The mediator's report to the Vice Chancellor

123. On 8 March 2000, Ms Weir sent Professor Gould a comprehensive memorandum, marked private and confidential, reporting the results of her investigations into the harassment complaints she had received (Appendix P). But there were still, she noted, some outstanding issues that required his 'intervention'. Various people continued to send her material allegedly published by Mr Kupka. Given the advice of the Race Relations Office that Mr Kupka's Internet postings appeared not to be illegal, however, she was concerned that 'any undue actions' by the university 'to prohibit publication' could be considered to be attempts to limit his freedom of expression. It was her view that 'the university should cease having any further interest in Mr Kupka's Internet discussions, and that all parties should be advised of this.' Anyone wishing to take action could do so in a private capacity. Some persons were in touch variously with the New Zealand Police, the Human Rights Commission, and United Nations.

124. She had found no cause for the university to discipline Mr Kupka:

The discipline regulations permit for a student to be disciplined if their conduct has brought the university into disrepute. Mr Kupka has expressed his views in an entirely individual capacity, and I have been provided with no evidence that he has used the name or resources of the university to give validity or support to his views. Mr Kupka has acknowledged that on two occasions to the best of his recollection, and in direct response to questions on the Internet, he has stated that he is a student at this university. These in my view are simple statements of fact.

125. Ms Weir summarised Professor Bing's and Mr Franke's allegations about Mr Kupka's enrolment as a masters student, the grades awarded, and his later acceptance as a doctoral candidate. She set down the results of her inquiries. Mr Kupka had been awarded a B grade for

⁸⁶ Bing to Professor Koopman-Boyden, 15 February 2000; Koopman-Boyden to Bing, 3 March 2000; Bing to Koopman-Boyden, 15 March 2000; Koopman-Boyden to Review, 5 March 2001; Bing submission, #16; Bing to Review, 7 September 2001; Bing to Review, 9 November 2001.

⁸⁷ Professor Bing to Professor Koopman Boyden, 24 March 2000.

⁸⁸ Franke submission; Franke to Review, 14 December 2001.

his MA. His enrolment as a doctoral candidate ‘was academically sound’. Concerns had been raised about his alleged political views at the time of his doctoral enrolment. But an ‘ad hoc’ committee chaired by Professor Oettli had considered them to be no barrier to his enrolment and the Higher Degrees Committee had registered him. The only comment in the committee’s minutes was that the thesis would be written and presented in German. Ms Weir asked for the Vice Chancellor’s direction on whether she was to investigate these matters further. For her part, she was ‘loathe to continue to investigate what at best are allegations based on misinformation, or at worst are vexatious.’

126. Professor Bing and Mr Franke, she noted, nevertheless continued to challenge the academic processes that had resulted in Mr Kupka becoming registered as a doctoral candidate. They had written to the Postgraduate Studies Committee and asked it to review Mr Kupka’s research proposal on the grounds of its ‘cultural safety’. Professor Bing had told her that he had had no response from the committee, ‘and this remains one of the outstanding matters which needs to be addressed’. Her information was that the executive group of the Postgraduate Studies Committee had considered the Bing–Franke letter and referred it to the Assistant Vice Chancellor.

127. What was apparent, she wrote, was that the Higher Degrees Committee had not been aware of the cultural safety issue when it considered Mr Kupka’s application in July 1998. ‘One of the difficulties is whether the [Postgraduate Studies Committee] can or should now consider the Doctoral proposal some eighteen months into its progress.’ She was uneasy about the possibility that Mr Kupka’s doctoral proposal be subjected ‘to a test of “cultural safety”’ based on his Internet postings. That could be construed as discriminating against him on the basis of his political opinion. She had no such concerns about the review that the FASS Ethics Committee was undertaking. All students had to meet ethical requirements for the conduct of their research. Mr Kupka’s research was suspended until the committee gave him an ethical clearance. He remained an enrolled candidate.

128. A question was arising over Mr Kupka’s supervision. Dr Harlow had withdrawn as a supervisor but was still named as one. Associate Professor Knuefermann would be leaving the university in the middle of the year. Under the regulations of the Postgraduate Studies Committee, two of the supervisors must be based at Waikato. She was concerned that Mr Kupka might claim that he was being discriminated against if the university was unable to replace Associate Professor Harlow because of the controversy surrounding him.

129. It was, Ms Weir wrote, ‘abundantly clear that there was no resolution to this matter’. Professor Bing had stated his grounds for resolution: the university must discipline Mr Kupka for insulting the Jewish community and stop his doctoral research. The resolution for Mr Kupka must allow him to continue his studies without any further harassment. Ms Weir said she was in no doubt that the media would become interested in Mr Kupka’s enrolment. There were also some administrative details arising from her inquiries that the university would need to deal with. The Vice Chancellor might wish to consider whether members of the university acting in a private capacity should use ‘use university resource, name, or reputation’ when pursuing their interest in Mr Kupka. A staff circular should inform all staff of the advice of the Human Rights Commission that materials posted on the Internet ‘are subject to the Human Rights Act’. Ms Weir ended her memorandum on a personal note. ‘I cannot complete my part of the process,’ she wrote, ‘without acknowledging the deep feelings of grief and insult felt and expressed by our Jewish staff whilst this issue remains.’

130. Ms Weir discussed her report with the Vice Chancellor. He agreed with her conclusions. On 21 March, she wrote privately and confidentially to the interested parties. She repeated what she had told them on 13 December. The Office of the Race Relations Conciliator did not consider that there was a case to answer under the Human Rights Act. Mr Kupka had ‘not used any university resources, or our name, to publish or give weight’ to his Internet publications. In her

view, the university was not being brought into disrepute, which would be a requirement for disciplinary action. She had not found ‘any grounds why Mr Kupka ‘should not be able to continue his programme of study with us’. Individuals were free to take the matter further if they so wished.

131. Ms Weir also recorded that she was satisfied that Mr Kupka had met the academic requirements for enrolment as a doctoral candidate. Allegations to the contrary had not been substantiated. She further recorded that the FASS Ethics Committee was considering matters referred to it about Mr Kupka’s thesis. The Postgraduate Studies Committee had also been asked ‘to review materials’. The actions of those committees were ‘entirely distinct’ from the inquiry she had conducted. The committees would be in touch with those who had written to them as they thought appropriate. She also referred in general terms to a further complaint against Mr Kupka that had been referred to her as well as to the police. She did not intend to take any further action on it. The Vice Chancellor had been ‘fully briefed on all aspects of the issue and is aware of the steps I have taken in concluding this process’.⁸⁹

The Waikato/Bay of Plenty Jewish Association makes a stand

132. Some fifteen members of the Waikato/Bay of Plenty Jewish Association held a lengthy meeting in the evening of 29 March. The association includes a cross-section of the Jewish community. Several of its leading members are members of the university’s academic staff. The mood of the meeting, I was told, was a mixture of disappointment, exasperation and sadness at the way that Jewish concerns were being ignored, and uncertainty about what the association should do. Until they had become caught up in the Kupka affair, several members of the association had not had to make a public stand on a Jewish issue that involved them directly. Some had signed the letter of 12 October 1999 to the mediator but had thought at the time that the university management would sort things out. When, however, the new academic year got underway and nothing so far as they knew had happened they became restive. They were reluctant as an association to take a stand but felt that they now had no option. Members who are also members of the university were conscious of the code of conduct for academic staff and were clear that any action that they took must be based on principle.

133. From their point of view, the position could not be more dire. Some had received the mediator’s letter of 21 March with the information that, except for the continuing deliberations of the FASS Ethics Committee, the university had no further interest in the matter. They were humiliated that the university should be prepared to protect Mr Kupka’s rights but not acknowledge ‘the real hurt’ to the Jewish community. In their view, the Human Rights Commission and the Race Relations Office had sidestepped the issue. The university was doing the same. It had decided that there was not a case for Mr Kupka to answer under the university discipline regulations. Professor Bing was adamant that the Postgraduate Studies Committee had not tabled the Bing–Franke letter. He believed that the FASS Ethics Committee had also refused to table the letter. On the evidence available to them it seemed that the university was treating its Jewish members as if they did not exist.⁹⁰

134. Professor Bing proposed a course of action that he had foreshadowed in his memorandum to Professor Koopman-Boyden a few days earlier: the convening of a meeting with the university’s two senior academic members. ‘The intention,’ he informed me, ‘was to set up a meeting with the Vice Chancellor and the Deputy Vice Chancellor (Academic).’ These were the two persons in the ‘hierarchy senior to the Chairperson and Deputy Chairperson of the P[ost] G[raduate] S[tudies] C[ommittee] and the two Conveners of the H[uman] R[esearch] E[thics] Committees.’ But the ‘consensus’ of the meeting was that Professor Bing and Mr Franke should

⁸⁹ Weir, private and confidential memorandum to interested parties, 21 March 2000.

⁹⁰ Waikato/Bay of Plenty Jewish Association submission; Waikato/Bay of Plenty Jewish Association oral submission, 12 March 2001; Elaine Bliss and Rachel Bolstad, interview 23 May 2001.

first get a response from the ‘Chairperson and Deputy Chairperson of the P[ost] G[raduate] S[tudies] C[ommittee]’ before steps were taken to set up that meeting. The association decided that letters should be sent to the Postgraduate Studies Committee, the Vice Chancellor, and the University Council, reminding them that the Postgraduate Studies Committee was under an ‘obligation ... to respond to the issues we had raised’. The association decided that, once it had received that response, it would try to set up a meeting with Professor Gould and Associate Professor Turner.⁹¹

135. Three letters were written on behalf of all the members of the association who were present at the meeting. Ms Katzenellenbogen, their president, and five co-signatories, wrote to the Vice Chancellor on 4 April. They had been told, they wrote, that it was his view that the Kupka issue had not been formally referred to him. They were writing to him to set out their concerns and to put the matter ‘fairly and squarely on his desk’. Their major concern was the issue of ‘cultural safety’. The Bing–Franke letter of 26 November had raised it. But that letter had ‘been passed around the university in a shameful manner with each layer passing the buck to someone else. No one had explained why the issue of cultural safety, ‘which goes to the heart of professional ethics’, should not be regarded as a human ethics issue by the university. They asked the Vice Chancellor to deal with their concerns ‘forthwith’.⁹² The same six members of the association wrote to the members of the Postgraduate Studies Committee and the members of the University Council. The association’s decision to involve all members of the committee and all members of council was to alert them to the ‘stonewalling’ tactics it believed the university management had been engaged in during the previous four months. It believed it had no choice but to appeal to the council to intervene. It was their view, they said, that the Bing–Franke letter of 26 November 1999 had been withheld from the full committee, whose members were thus not fully briefed on the cultural safety aspects of Mr Kupka’s doctoral research proposal. ‘Certainly,’ they wrote, ‘the [committee] would not allow a member of the Ku Klux Klan to write a thesis on Maori Sovereignty, so why do you allow Mr Kupka to write a thesis about the Holocaust survivors in our community who have made a significant contribution to New Zealand society?’ They drew attention to the criticisms that had been made of Mr Kupka’s ‘below average academic achievement’. They also drew attention to the views of the four Holocaust experts on Mr Kupka’s Internet postings. These views, they wrote, should be given greater weight than any expressed by Professor Oettli or Associate Professor Knuefermann. They asked the committee, after four months of procrastinating, to deal with the issue ‘fairly and squarely’. They asked the University Council to table their correspondence in the confidential part of its next meeting and put it on the agenda for the following one.⁹³

136. Professor Bing wrote another, longer letter to Professor Middleton, Deputy Chairperson, Postgraduate Studies Committee, with copies to the other members of committee and to members of the University Council (Appendix O). Professor Bing’s letter was his response to the mediator’s report to the Vice Chancellor. He repeated criticisms he had previously made of the way the university had handled Mr Kupka’s MA studies and his enrolment as a doctoral candidate. He included details of Mr Kupka’s marks for his BA degree. (Ms Weir had given this information to him and other complainants in the course of mediation.) He drew attention to the comments that the Holocaust scholars had made of Mr Kupka’s Internet postings and asked the university to take note of them. He alleged a ‘serious brakedown’ [sic] in the management of the university. He accepted that the university was not able to exclude Mr Kupka on the basis of his political opinion. He asked for the issue of cultural safety to be dealt with by the Postgraduate

⁹¹ Bing to Review, 28 February 2002.

⁹² Elaine Bliss, Rob Baum, Judy Katzenellenbogen, Benny Tobias, and Esther Cohen, Waikato/Bay of Plenty Jewish Association, to Vice Chancellor, 4 April 2000.

⁹³ Elaine Bliss, Rob Baum, Judy Katzenellenbogen, Benny Tobias, Esther Cohen, and Dov Bing to Members of the Post Graduate Research Committee [sic], 4 April 2000; Bliss et al to Members of the University of Waikato Council, 4 April 2000; Bliss to Review, 30 April 2002.

Studies Committee ‘in full committee’. He asked the university to deal with the matters raised ‘and not treat us as if we are invisible’. There were five enclosures: the Bing–Franke letter of 26 November; translations of some of Mr Kupka’s Internet postings; Mr Kupka’s doctoral proposal; the reports of the four Holocaust experts; and an email from Associate Professor Knuefermann to Professor Bing in which he said that he would not support Mr Kupka’s doctoral candidature if it were to be shown that his Internet postings were anti-semitic. Copies of Professor Bing’s letter and enclosures were distributed to the Vice Chancellor, members of the Postgraduate Studies Committee, and members of council by the end of the week ending 7 April.⁹⁴ The next meeting of the council would be held on 12 April.

The April council meeting

137. On Monday 10 April, Professor Gould sent a memo to members of council and members of the Postgraduate Studies Committees. His aim was to set the record straight and counter the interpretations of events in the letters that members of the committee and council had received from the Waikato/Bay of Plenty Jewish Association and Professor Bing. The memo formed the basis of his oral report to council two days later. His report was taken in open meeting⁹⁵ (Appendix R).

138. He pointed out that allegations about Mr Kupka had been circulating within the university for more than a year but had not been substantiated by supporting evidence. That was the opinion of the Human Rights Commission and the Race Relations Office as well as the university committees and other staff that had considered them. Allegations against particular members of staff were without foundation. Mr Kupka’s case had been handled by the Postgraduate Studies Committee in ‘an exemplary fashion’. The Human Rights Commission and the Race Relations Office had advised the university that Mr Kupka’s publications did not breach the Human Rights Act. ‘We are advised that any action taken against Mr Kupka by the University could be regarded as harassment and a breach of the Human Rights Act.’ The ‘University’s Human Ethics Committee’ was considering some ‘ethical concerns’ that Mr Kupka’s research must meet and was in touch with him about them.

139. Professor Gould was satisfied that the university had discharged its obligations to its student and to all of its other stakeholders in a proper and even-handed way. ‘Cultural safety is of great concern to us but so too is freedom of expression.’ As well as complaints against Mr Kupka, there were formal complaints from other parties to the dispute. Dr Ryan, an academic member of council, told me that there was not much discussion of Professor Gould’s report. Members of council thought that the matter was one for the Vice Chancellor to deal with.

The Nexus Scoop

140. But the Vice Chancellor had been scooped. The previous day, *Nexus*, the student newspaper, featured what it called the ‘Kupka Case’ in its April issue. Its cover showed campus buildings flanked by the New Zealand flag and the flag of the Third Reich, and carried two statements: *Freedom of Speech* and *If you read only one issue of Nexus all year, make it this one*. Its editorial and a five-page ‘loosely related feature story’ introduced readers to the controversy surrounding Mr Kupka.⁹⁶ Mr Kupka was identified by name as a doctoral student in his fifties. There followed a chronology of events and a photograph of his house at Mt Maunganui; two pages of quotations from his Internet postings; brief biographies of what it called ‘key people in the Kupka Case’; a page of quotations from the opinions expressed by Ms Freudenberg, Emeritus Professor Moses, Professor Kwiet, and Professor Longerich; a letter from Associate Professor Knuefermann; a panel of explanation about Holocaust denial; a resumé of the history

⁹⁴ Bing to Middleton, 2 April 2000; Bing to Review, 20 May 2001.

⁹⁵ Middleton to members of Postgraduate Studies Committee, 1 May 2000.

⁹⁶ *Nexus*, Issue VI, 11 April 2000, pp. 2 and 7–12.

of the case written by David Young, the editor, and a short statement from the Vice Chancellor in which he said he was satisfied with the way the university was dealing with Mr Kupka's studentship.

141. The *Nexus* story, Mr Young explained, was based on more than 200 pages of leaked documents. It was not normal *Nexus* policy, he also explained, to use unnamed sources but he believed that public interest justified the decision to do so. His editorial, 'Freedom of Speech', summarised the issues of principle. Freedom of speech was undoubtedly important in a democracy. But how far should it go?

Some say we must let everybody have their piece. We should be allowed to hear all arguments and then make up our own minds about what we believe in.

Others argue we must draw a line somewhere: some opinions are so disgusting and so vile they must not be heard. Certain people – such as paedophiles and racists – do not deserve equality because they abuse it.

142. Mr Kupka, he noted, had done nothing illegal. But in his own time, off-campus, he had published some 3,000 pages on the Internet that had offended the Jewish community and some members of the staff. He had been cleared after an inquiry carried out by the mediator and by 'all the on-campus ethics committees'. He had the support of his professor.

We present details of this case in order to show you what is deemed acceptable behaviour by university management and by our nation's moral guardians. Think of it as a yardstick to measure what is allowed in New Zealand.

Pause for a second and reflect on freedom of speech.

Think about how far you think it should be allowed to go.

Decide for yourself if freedom of speech is an honourable ideal or useful tool of hatred.

143. The *Nexus* spread was worked up from a package of documents that had been made available to David Young, augmented by comments, most of them anonymous, from members of staff who were dealing with Mr Kupka's research, and a statement from Professor Gould. The source or sources of the leaked information that provided the documentary basis of the spread was a matter of campus rumour several days before *Nexus* was published and became a highly contentious issue in later developments in the Kupka affair (see paragraphs 582–85).

144. The *Nexus* account converted inside knowledge into a national sensation. But it had been written quickly and included some factual errors and wrong inferences. The most important of these were the statement that Mr Kupka's research proposal had been cleared by 'all the university's ethics committees,' and the mistaken inference in one of Ms Freudenberg's statements, which was quoted, that Mr Kupka might want to interview German-speaking Jewish refugees or members of their families as part of his research. *Nexus* claimed a circulation of 8,000 and it was from its pages that most people on campus will have formed their initial impression of what the Kupka case amounted to. Professor Gould's report to council was released to the media after the council meeting the following day but attracted little attention. Its circulation within the university was restricted to members of council and members of the Postgraduate Studies Committee.

The Irving libel case

145. The *Nexus* story was campus news. An accident of timing immediately made it national news. The day of the council meeting coincided with the handing down of the judgment of a London high court in the case of *D. J. C. Irving v. Penguin Books Ltd and Deborah E. Lipstadt*. Dr Irving is the best-known Holocaust denier in the English-speaking world. Professor Lipstadt,

in her book *Denying the Holocaust: The Growing Assault on Truth and Memory*, accused Irving of being a Nazi apologist and admirer of Hitler who distorted facts and manipulated documents to support his contention that the Holocaust did not take place. Dr Irving claimed in his defence that Professor Lipstadt's book was a concerted attempt to destroy his reputation as a historian, and sought damages. The court found for the defendants. Mr Justice Gray concluded that a case had been established that Dr Irving had a 'political agenda'.

It is one which, it is legitimate to infer, disposes him, where he deems it necessary, to manipulate the historical record in order to make it conform with his political beliefs.

Irving was motivated by a desire to present events in a manner consistent with his own ideological beliefs even if that involved distortion and manipulation of the historical record.

146. Mr Justice Gray made no finding on the 'historicity of the Holocaust'. That, he said, was a task for historians. His judicial role had been to resolve the 'issues between [the] parties and the role of the historian seeking to provide an accurate narrative of past events.'⁹⁷

147. The decision on the Irving libel case was worldwide news. It broke in New Zealand on the morning of 12 April and was reported and commented on prominently on television, radio, and in print.

Mr Kupka in the news

148. Media reports on the controversy over Mr Kupka received widespread national coverage the same evening. His name was immediately linked in the media with Dr Irving's as another Holocaust denier. The *Sunday Star Times* introduced its story 'On the trail of Nazi sympathy' with this lead-in: 'In a week which saw British historian David Irving branded by the London High Court a "Holocaust denier", the term came much closer to home.' The photograph accompanying the story was of Dr Irving but the piece was about Mr Kupka, described as one of the world's 400 'Holocaust deniers'. For a week or more, Mr Kupka and Waikato University remained prominently in the news. Mr Kupka was a popular subject of comment on talkback radio. Attentive readers of the *Waikato Times*, the *New Zealand Herald*, and the *Sunday Star Times* were able to piece together the arguments of Mr Kupka's opponents, the university, and Mr Kupka himself.

149. His main opponents were stated to be some university staff and students and the Waikato/Bay of Plenty Jewish Association. They argued on two fronts: against Mr Kupka, and against the university for the way it had handled his doctoral research and their complaints against him. They pointed to the opinions of Professor Langerold and Ms Freudenberg as evidence that he was anti-semitic and a Holocaust denier. Their argument against the university, they were quoted as saying, was that it appeared to believe 'that Mr Kupka's Holocaust denying beliefs were beside the point in a thesis that may involve interviewing Holocaust survivors or their families.' They took 'profound exception' to the possibility that he might approach Holocaust survivors or members of their families 'without disclosing his political convictions'. The issue for them was not the principle of freedom of political thought but the university's moral responsibility to its staff and students and to the wider Jewish community in New Zealand.

150. Some made statements on the record. Mr David Zwartz, President of the New Zealand Jewish Council, said that the university was arguing that it was dealing with Mr Kupka's case even-handedly and fairly. His complaint, however, was that 'you don't deal with a Holocaust denier in the same way as you deal with other people.' Two members of the university's

⁹⁷ *Judgment*, section 3, 162; section 3, 163; and section 1, 31.

academic staff were reported on the basis of their answers to journalists. Dr Bolstad, Senior Lecturer in Statistics, said that the university was coming down on the wrong side: it was saying that 'freedom of speech was more important than truth.' Dr Pratt, Senior Lecturer in Religious Studies, feared that by not being able to resolve the matter, the university was running the risk of being seen as being 'passively anti-semitic'. He was worried about the effect on the university's international reputation. An independent inquiry was needed to clear the air. The Race Relations Conciliator, Dr Rajen Prasad was quoted as agreeing that the university had 'passed the buck'. It was for the university to decide what it was appropriate for people to study. It should itself have dealt with the Holocaust issue instead of referring it to his office.

151. The university's position was explained variously by Professor Gould and Mr Callaghan, Assistant Vice Chancellor. The university, they commented, had not passed the buck. It had carried out its duty to inquire fairly and even-handedly into the various concerns raised by Mr Kupka's studentship. Those inquiries had been comprehensive. Faced with complaints against Mr Kupka, it had two choices: to reach its own decision and wait 'to be sued', or to go to the Race Relations Office for advice at the outset. That advice was that Mr Kupka's publications were not in breach of the Human Rights Act. The Race Relations Office, furthermore, had advised that Mr Kupka's human rights must be respected. He had a right not to be harassed. Freedom of expression, Professor Gould pointed out, was as important as cultural safety. The university would be put 'at risk' if it acted inappropriately in its dealings with Mr Kupka.

152. Mr Kupka supplied statements to the *Waikato Times* and the *New Zealand Herald*. The 'proof' of his Holocaust denial and anti-semiticism, he wrote, 'consisted largely of falsified statements taken out of context'. His writings were not intended to 'incite racial hatred anywhere in the world'. His clearance by the Human Rights Commission should have been sufficient for his complainants but it was not. His 'study had nothing to do with interviewing victims of the Holocaust' and his opponents were aware of that fact. Furthermore, he had never denied the Holocaust. The Holocaust was 'a fact of history'. In his Internet 'discussions' he had quoted from the 'literature', where differing numbers of those killed were to be found. But he had pointed out that that was not the deciding question. The important issue was that 'mass killings did take place'. He wanted to get on with his research. He accepted that his opponents had a democratic right to raise questions. But those questions had been answered and his opponents were still pursuing him unfairly. 'Once one avenue had been blocked, a new allegation is fabricated or new obstacles were raised.' He added that his research was currently suspended 'for largely technical reasons quite unrelated to the allegations in question'.

153. 'The case is not over,' the *Sunday Star Times* wrote at the end of its piece. The university ethics committee still had to decide whether 'there is an ethical basis for Mr Kupka's research'. It quoted an anonymous staff member: 'they will be asked if a student who was a member of the Ku Klux Klan would be allowed to undertake a thesis on Maori sovereignty.'⁹⁸

A call for a public inquiry

154. On 28 April, Ms Bliss wrote again to the Vice Chancellor, this time on behalf of herself and thirteen others who were members of the Waikato/Bay of Plenty Jewish Association or were members of the academic staff or students of the university. The letter expressed their 'extreme concern' at the way the university was handling Mr Kupka's enrolment.

155. Mr Kupka, they wrote, was one of the most prolific of the 400 Holocaust deniers listed by the Nizkor Project. His statements concerned Jewish people in a general sense but also in relation to his doctoral study, which 'will involve him in interviewing German immigrants to this country'. His topic might not directly involve Holocaust survivors but would have direct

⁹⁸ *Waikato Times*, 12, 13, 14, 17, 18, 18 19 April 2000; *New Zealand Herald*, 12, 13, 14, 17 April 2000; *Sunday Star Times*, 16 April 2000.

consequences for Holocaust survivors and their families. The university, however, seemed to regard Mr Kupka's extra-curricular activities as 'irrelevant to the ethical appropriateness of his study'. But it was:

academically inconceivable that such a study be undertaken without reference to Holocaust survivors and their families, and morally repugnant that a Holocaust denier should approach such people – with the approval of the university – without disclosing his own political convictions.

156. The letter referred to the outcome of the inquiry that had stemmed from the letter that some of the signatories had written to the mediator in October 1999. They accepted the principle of freedom of speech and did not deny Mr Kupka the right of freedom of expression within the law. But it was their view that the findings of the Human Rights Commission and the Race Relations Conciliator 'do not absolve the university of its moral responsibility to its staff and students, and to the Jewish community in New Zealand.' They believed, furthermore, that the university had failed to act in line with 'its goals and rules of government'. They referred to the commitments in the university charter to conduct all university research in accordance 'with appropriate ethical considerations', and to work towards a 'learning environment ... characterised by processes of consultation with students and staff on academic, cultural, social and other issues.' They believed Mr Kupka's 'hate-speech' activities were in breach of the university discipline regulations. In their view, the university's actions had been 'unsatisfactory in the extreme'. It had defended Mr Kupka's rights but 'side-step[ped] its responsibilities to its staff, students, and the wider Jewish community in New Zealand.'

157. The university, they pointed out, was committed to the effective resolution of grievances. They therefore 'requested' it to:

establish an independent board of inquiry to explore and review the manner in which the university has handled the entire process of Hans Joachim Kupka's PhD proposal, its ethical review and subsequent acceptance.

158. Citing the university charter, they said they expected to be consulted on the terms of reference of the inquiry before it was set up. They asked that it be in place within a month. Because of its importance to the New Zealand Jewish community, they expected the inquiry to receive submissions from the Jewish community at large.⁹⁹

159. In his reply, written on 5 May, Professor Gould said he was concerned about the issues raised in the letter and had given them considerable thought in recent weeks. There was no doubt that Mr Kupka used language and expressed opinions that he and many others profoundly disagreed with. The 'real question', however, was whether Mr Kupka's Internet statements 'constitute Holocaust denial'. The advice from the expert opinion the university had consulted was that Mr Kupka had not committed any offence under New Zealand law. Professor Gould informed them that he had read Mr Kupka's published opinions and, though he 'did not profess any expertise in the area,' was 'able to make a proper and balanced judgement,' and did not find that his statements 'constitute Holocaust denial'.

160. He emphasised that a failure by the university to uphold the freedom of expression of its members put it at risk to a breach of the Human Rights Act and the possibility of having to defend its actions in the courts. Unless further evidence was presented to him, the university 'would be wrong and would place itself at risk if it were to deny Mr Kupka his freedom of expression'. He noted that some of the material circulating about Mr Kupka was 'misleading and wrong'.¹⁰⁰

⁹⁹ Bliss and thirteen others to Vice Chancellor, 28 April 2000.

¹⁰⁰ Vice Chancellor to Bliss, 5 May 2000.

161. The day before Professor Gould wrote this, the Council of the University of Canterbury announced the setting up of a working party to investigate the circumstances in which an MA came to be awarded to Joel Hayward for his thesis ‘The fate of Jews in German hands: An historical enquiry into the development and significance of Holocaust revisionism.’¹⁰¹ For the Jewish and other members of the academic staff advocating an independent inquiry into the university’s handling of Mr Kupka’s academic record, that decision became a precedent for their efforts during coming months.

The FASS Ethics Committee completes its review

162. On 6 April, Dr Green replied to Associate Professor Knuefermann’s memo of 24 March. Her committee was seriously concerned that the changes it required to Mr Kupka’s methodology had not been made and urged him to ensure that they were. If he wanted to take his concerns further, he should do so through the University Human Research Ethics Committee.¹⁰²

163. Associate Professor Knuefermann met Professor Gould on 27 March to inform him of his understanding of the contentions surrounding Mr Kupka’s doctoral research. This included, as he put it in an email to Mr Kupka, ‘the steps of the FASS Ethics Committee against you, which would have meant you were not allowed to go on working officially since December.’ This prompted Professor Gould to send Dr Green a cautionary memorandum. He told her that among the complaints of harassment arising from the case of Mr Kupka was one from Mr Kupka himself. The university must be able to defend itself against any charge from him and would have to show that he had ‘been dealt with even-handedly and fairly’. Professor Gould asked for Dr Green’s assurance that the suspension of Mr Kupka’s research was ‘in line with the Committee’s usual processes and powers’ and owed nothing to any ‘extraneous or irrelevant factors’. Professor Selby spoke to Dr Green and asked her committee to provide the Postgraduate Studies Committee with a written report.

164. In reply to Professor Gould, Dr Green explained why the committee had suspended Mr Kupka’s research. It had received a complaint from the public about one of his questionnaires. It then discovered that his research had not been submitted as required to the committee for ethical approval. The committee had decided that changes needed to be made to his questionnaires. It was in correspondence with Mr Kupka and Associate Professor Knuefermann but the changes so far made did not meet its requirements. The committee was awaiting Mr Kupka’s response to a letter it had sent him on 14 March.¹⁰³

165. Mr Kupka replied on 20 April. He had made changes asked for by the committee to the four questionnaires and their covering letters. He responded to its questions about ‘sampling procedures and sample size’, which seemed to him to be the committee’s ‘major concerns’. He pointed out, however, that the questionnaires and the information to be derived from them ‘are only a minor part of my dissertation’.¹⁰⁴

166. The committee considered Mr Kupka’s letter at its meeting on 11 May. Except on one or two small points, it was satisfied with Mr Kupka’s questionnaires. What Mr Kupka now said about the part his questionnaires would play in his research plan raised another issue, however. If the information from the questionnaires was to form only a ‘minor part’ of the research, would the proposal meet the requirements of doctoral research? This presented the committee with a difficulty. Apart from his questionnaires and the abridged version of his doctoral proposal, it had received no additional information on Mr Kupka’s research plan. The questionnaires it had approved were small-scale surveys of four non-representative samples. The

¹⁰¹ University of Canterbury, *Report of the Joel Hayward Working Party*, December 2000.

¹⁰² Green to Knuefermann, 6 April 2000.

¹⁰³ Kupka to Knuefermann, email, 28 March 2000; Vice Chancellor to Green, and Green to Vice Chancellor, 10 April 2000.

¹⁰⁴ Kupka to Green, 20 April 2000.

committee wrote to the Postgraduate Studies Committee to ask whether, if the questionnaires now formed a ‘minor part’, the project as a whole still met the requirements for higher degree research.

167. It then took up the issue of cultural safety raised in the Bing–Franke letter of 26 November 1999 and repeated in the letters written by Ms Bliss and others on 4 April to Professor Gould and the Postgraduate Studies Committee. A copy of the letter to the Postgraduate Studies Committee had been referred to the FASS Ethics Committee. Dr Green circulated copies of the letter to members of the committee before the meeting. She circulated that letter instead of the Bing–Franke letter because she was unsure whether or not the latter was still formally before the committee and because Ms Bliss’s letter ‘reiterated the concern regarding cultural safety at the centre of the Bing–Franke letter’ (see paragraph 105). Dr Green also circulated copies of Mr Kupka’s Internet postings that had been enclosed with the Bing–Franke letter. She informed me that the issue of cultural safety was discussed ‘at length’ at the 11 May meeting.¹⁰⁵

168. The committee had become aware that there was another ethical matter that needed to be taken into account. Mr Kupka’s political views had become the subject of widespread local and national publicity. The ethical issue that this raised was whether persons receiving a questionnaire might be ‘offended and disturbed,’ thus ‘contravening’ the university’s human research ethics procedures. Section 4 of those procedures refers to the minimisation of risk (Appendix T). It states:

The researcher should endeavour to minimise any risks – physical, psychological, social or cultural – to individuals or collectivities arising from the research project. The researcher should make every attempt to identify and inform participants of potential risk prior to obtaining informed consent.

Risks include pain, stress, emotional distress, fatigue, embarrassment, cultural dissonance, and exploitation. Participants should be consulted to ascertain any risks which they may identify or concerns which they may have.

Where during the course of the research, it becomes apparent to the researcher that the risk of harm is greater than had originally been envisaged, participants should be so informed, and the research should be re-evaluated in terms of the first of these principles [the value of the research].

169. The minutes of the meeting record a ‘prolonged discussion’. Dr Green told me that the committee considered all aspects of the research proposal, including the claim that it should not be allowed to proceed on grounds of cultural safety. At the beginning of the discussion there were widely differing views on what, if anything, Mr Kupka should be required to do when seeking the informed consent of people to fill out his questionnaires. They ranged from the view that Mr Kupka would need to make a full disclosure of his political opinions to the opposing view that his political opinions were irrelevant to the topic he was researching. The committee decided that it would try to reach a consensus decision, and it did. It decided unanimously that:

Mr Kupka would have no access to the names and addresses of respondents, and therefore could not use this information for any other purpose. Individuals were free to choose whether or not to respond to the anonymous questionnaires, and the subject matter of the questionnaires concerned the German language in New Zealand. For these reasons the committee considered that ‘cultural safety’ would not be compromised.¹⁰⁶

¹⁰⁵ Green to Review, 3 April 2001.

¹⁰⁶ Minutes of FASS Ethics Committee meeting, 11 May 2000; Green submission; Green to Review, 2 August 2001.

The committee set out its views and referred them to the University Human Research Ethics Committee for it to consider and make a decision.

170. Dr Green's letter of 11 May explained the background. The committee had reached the unanimous decision that extensive national publicity meant that 'many of the people' likely to be asked to respond to Mr Kupka's questionnaires would be 'distressed or emotionally disturbed'. That would be contrary to the university's protocol covering the minimising of risk. The committee believed that the research project should be 're-evaluated'. Because of 'the wider ramifications of the case' it believed that the University Human Research Ethics Committee, as the university-wide committee, should make the decision. Its letter mentioned that the committee was also asking the Postgraduate Studies Committee to consider whether Mr Kupka's research plan still met the requirements of higher degree research.¹⁰⁷

171. The FASS Ethics Committee's report to the Postgraduate Studies Committee covered the same ground as its report to the University Human Research Ethics Committee. The question for the Postgraduate Studies Committee to consider was whether Mr Kupka's research plan 'still met the requirements of higher degree research'. The Postgraduate Studies Committee was asked to 'revisit' Mr Kupka's research proposal.¹⁰⁸

172. Dr Green emailed Mr Kupka in Germany on 17 May to tell him that the FASS Ethics Committee had completed its ethical review of his research proposal. She told him that her committee had referred the proposal to the University Human Research Ethics Committee and the Postgraduate Studies Committee and they would make the final decisions. She sent copies of her email to the Vice Chancellor and Professor Selby.¹⁰⁹

Yom Hashoah Commemoration

173. Yom Hashoah (International Holocaust Remembrance Day) is an annual commemoration in the Jewish calendar. It was held for the first time on campus on 1 May, organised jointly by the Waikato/Bay of Plenty Jewish Association and the University of Waikato Students' Union. Posters announcing the event were displayed widely around the university. For the members of the Waikato/Bay of Plenty Jewish Association, it was an occasion to be visible on campus, and an opportunity to inform people about the Holocaust and speak out against Holocaust denial and historical revisionism. It was an emotional, dignified ceremony attended by non-Jewish as well as Jewish students and staff and some people from the wider community. The president of the New Zealand Jewish Council, Mr David Zwartz, attended and spoke.¹¹⁰

174. Dr Pratt, speaking as a Christian, gave an address. His theme was anti-semitism in the consciences of post world-war Christians. His message was for his fellow academics at Waikato University. He acknowledged that universities in New Zealand are secular institutions and that they are committed to values of academic freedom. But 'free speech is not an absolute.'

[T]oday there is abroad a new and insidious version of anti-Semitism: the attempt of Holocaust revisionism, the engagement in a discourse of denial and depreciation of the Shoah [Holocaust]. It masquerades under the banner of free speech. It infiltrates the halls of academia under the guise of free inquiry. But free speech, free inquiry, especially in the context of a university, is debased if it is not accompanied by a counterpoint of sound academic critique. We are none of us free to proclaim a lie as a fact; to proffer an inauthentic judgement as authentic; to argue the cause of evil as

¹⁰⁷ Green to Goldsmith, Chairperson, University Human Research Ethics Committee, 11 May 2000; Green to Review, 25 June 2001; Guerin to Review, 27 February 2002.

¹⁰⁸ Green to Selby, 11 May 2000.

¹⁰⁹ Green to Kupka, 17 May 2000.

¹¹⁰ Waikato/Bay of Plenty Jewish Association submission.

*if it were a good; to draw a conclusion of supposed truth from a tissue of fabrication.*¹¹¹

175. Members of the Waikato/Bay of Plenty Jewish Association were reassured by the ceremony. They were encouraged to find that others supported their cause and that freedom of speech was not the 'real issue'. In their submission to the review they wrote:

*Sheltering and sanctioning historical revisionists in an Institution of Higher Learning was the issue. Exposing survivors of persecution to people with this ideology in the name of scholarship was the issue.*¹¹²

The May 11 student demonstration

176. The *Nexus* exposé of an alleged neo-Nazi in their midst caused a stir among students. There was much debate over what if anything the Waikato Students' Union should do. Mecina Stanbury, who was co-president at the time, told me that students believe in freedom of speech but were divided on whether a student should be allowed to publish neo-Nazi views. The executive decided to support a protest against the university for having a neo-Nazi on the roll. Her understanding was that Mr Kupka was writing a Holocaust-denying book and would use a Waikato Ph.D. to bolster his views.¹¹³

177. About 60 students and others took part in a demonstration on 11 May. Posters and placards carried the message of opposition to racism and Holocaust denial: 'Never Again', 'Zero Tolerance for Holocaust Denial'. Members of the Waikato/Bay of Plenty Jewish Association told me that their members were determined not to personalise the issues. Some members of the Waikato/Bay of Plenty Jewish Association, led by Ben Tobias, their vice president, (himself a former Waikato student), took part in what he called a 'vigil demonstration'. Mr Tobias addressed the assembly and conveyed a copy of his text to the Vice Chancellor. Students were right, he said, to demonstrate. They, 'unlike some academics in prominent places' in the university, understood that 'morality and ethical standards are central to the way the university should be run.' Their action contrasted with the 'dubious "sweep-it-under-the-carpet" and "pass-the-buck" attitude' the university was taking over the enrolment of a 'known Holocaust denier.' By doing nothing, the university was 'aiding and abetting Holocaust denial'.¹¹⁴

New information about Mr Kupka

178. On 2 May, Associate Professor Viereg, German section, European Languages and European Studies, Massey University, wrote an open letter about Mr Kupka. Mr Franke (who had returned from study leave) received a copy. On 12 May, Dr Laurs, Head, European Languages and European Studies, Massey University, wrote a confidential letter to Professor Gould that covered the same ground. Associate Professor Viereg stated that Mr Kupka had been an extramural student in the German section of the department during the mid 1990s. He was a native speaker and received A passes in language papers but marginal results in cultural/literature papers. His grades averaged C+ but a 'plain C' would have been a better indication of his abilities. Dr Laurs informed the Vice Chancellor that Mr Kupka had not been allowed to proceed to MA and explained why. There were 'serious reservations' about the content of the thesis he proposed and his 'poor academic profile'. The members of the department considered that he should not be allowed to proceed to BA (Hons), 'let alone an MA,' and no one was prepared to supervise his thesis.

¹¹¹ Address by the Reverend Canon Dr Pratt, International Holocaust Remembrance Day (Yom Hashoah) 1 May 2000. Pratt submission, annex.

¹¹² Waikato/Bay of Plenty Jewish Association.

¹¹³ Waikato Students Union, Mecina Stanbury oral submission, 2 April 2001.

¹¹⁴ Benny Tobias, 11 May 2000; Waikato/Bay of Plenty Jewish Association, and oral submission, 12 March 2001; *Waikato Times*, 12 May 2000.

179. Dr Laurs' letter made an incidental reference to Mr Kupka's political beliefs. Associate Professor Vieregg's open letter was explicit on the subject. Mr Kupka had proposed writing a 'vindication' of the German Republikaner Party 'as a democratic party'. That party, Associate Professor Vieregg explained, resembled the Republican party in the United States in name only. It was a party of the extreme right, headed by Dr Franz Schonhuber, a 'former member of Hitler's infamous SS'. He added that members of the German staff 'had reason to believe that Mr Kupka wanted to use a Massey MA in an attempt to whitewash, with academic approval, a party to which, as was later revealed, he had belonged.'

180. Dr Laurs expressed 'profound disquiet' that Mr Kupka had apparently been accepted as a Ph.D. student at Waikato. Professor Gould was away from the university and Professor Selby replied on his behalf as Acting Vice Chancellor. He could not, he wrote, comment on matters directly private to Mr Kupka. But he explained Waikato's requirements for registration for a Ph.D. that Mr Kupka had met by passing a masters degree with second-class honours (class 1).¹¹⁵

181. Also in May, Mr Franke received information that alleged that Mr Kupka had been active in the security wing of the Republikaner Party and had been involved in criminal activity. He received another letter (via Professor Bing, who was away on study leave), written by the Public Prosecutor, Mannheim, Germany. The public prosecutor had initiated proceedings against Hans-Joachim Kupka for 'suspicion of "Incitement to hatred and violence against minority groups" (German Criminal Code Section 130).' Mr Kupka dismissed the allegations when Associate Professor Knuefermann informed him of them. A charge of misrepresentation of qualifications had been brought against him by a 'political opponent' but there was nothing in it and no charge was laid. Suggestions of improper use of party funds were also wide of the mark because, as secretary, he had nothing to do with party finances. 'What do these allegations have to do with my doctorate,' he asked. 'I wonder how long it will be before someone finds out that I lost my driver's licence for a month in 1985 for exceeding the speed limit?'¹¹⁶

Giving the Vice Chancellor advice

182. Some of his academic colleagues spoke or wrote to Professor Gould to let him know how they thought he should handle the Kupka affair. Some urged him to meet the Jewish colleagues who were voicing their concerns. Some teachers from other New Zealand universities informed him of their deep misgivings.

183. Dr Pratt wrote to him on 6 April. He explained his part in seeking the opinions of Ms Freudenberg and Professor Moses. Then he gave his reason for writing.

I am deeply concerned that the processes undertaken by the university thus far have not resulted in a just resolution but rather appear to be giving evidence of a passive anti-Semitism in respect of the responses of the university, as an institution, to the concerns that have been raised from a Jewish perspective. I am aware that, as a secular institution espousing values of academic freedom, there will be an inherent reluctance to undertake action that could be interpreted as foreclosing on free speech and free academic inquiry. However, I would contend that such freedoms, unless exercised in a context of a pursuit of truth and the espousal of good, amount to the promotion of a value-denying laissez-faire context wherein falsehood and error may flourish.

¹¹⁵ Dr Axel Laurs to Gould, 12 May 2000; A. J. A. Vieregg, To Whom It May Concern, 2 May 2000; Selby to Laurs, 17 May 2000.

¹¹⁶ Franke submission; Kupka to Knuefermann, 27 May 2001.

Despite his misgivings, Dr Pratt felt sure that Professor Gould would ‘act decisively and appropriately.’¹¹⁷

184. Dr Bolstad sent two emails to Professor Gould in the wake of the *Nexus* publication. He told Professor Gould that his statement to council would not quell the controversy. It would be interpreted as ‘implicitly sanctioning the student’s statements’. How, he asked, ‘can the university as a truth-seeking institution allow its name to be associated with a student whose clear aim is to deny the historical truth?’ The university had passed the buck to the Human Rights Commission but it should have exercised its discipline regulations. All the Commission could do was to comment on the legality of the student’s freedom of speech. It could have nothing to say about his ‘suitability as a student of the University of Waikato.’ There was a conflict between freedom of speech and cultural safety, and hard decisions had to be made. They were hard ‘because choices had to be made between conflicting principles, both of which are deeply held.’

185. In Dr Bolstad’s view, Professor Gould was ‘getting bad advice’. The issue was ethical more than it was legal, although there were legal implications. He was nevertheless confident that, now that it had become aware of the issue, ‘the university would not allow the student to interview Holocaust survivors or their families’. He suggested that the university should make a public statement to that effect.¹¹⁸

186. Early in March, Professor Koopman-Boyden had told Professor Gould of her unsuccessful attempt to have a meeting with Jewish colleagues, and it was left for him to consider taking an initiative himself. At another meeting at the end of May, she talked to Professor Gould again about Mr Kupka. She advised him to set up an independent committee of inquiry into Mr Kupka’s doctoral enrolment. She later sent him suggested terms of reference and, as a guide, a description of the way the University of Canterbury was conducting its review of the Hayward thesis.¹¹⁹

187. In mid-May, members of the Postgraduate Studies Committee wrote to Professor Gould to let him know that they were worried about the adverse effects of the publicity that followed the publication of the *Nexus* issue and subsequent national publicity. The university was being perceived to have ‘a limited concern for the issues raised by the Jewish community’ and this was harming its reputation. It seemed, too, that the Jewish staff members actively involved were not well enough informed about university processes for the enrolment and supervision of Ph.D. research. They asked Professor Gould to consider meeting with members of the Jewish community. The aim would be to assure them that, by adhering to its processes, the university was not denying ‘their proper concerns over the Kupka case, as they see it, and Holocaust denial by Mr Kupka’.

188. Professor Middleton, who had chaired the meeting, wrote to Professor Gould on her own behalf a few days later. She knew, she said, that he had written letters defending the university’s handling of the case. Such letters dealt with ‘the legal, regulatory, and intellectual environment.’ But there were ‘wider and deeper issues that could not be dealt with satisfactorily in correspondence. Emotions were rising. She urged him to have ‘an urgent face-to-face meeting with the Waikato-Bay of Plenty Jewish Association and Jewish academic staff.’ Several people told me that they thought there would have been better prospects for such a meeting if it were to be held while Professor Bing was out of the country.¹²⁰

¹¹⁷ Pratt to Vice Chancellor, 6 April 2000.

¹¹⁸ Bolstad to Vice Chancellor, 12 and 14 April 2000.

¹¹⁹ Koopman-Boyden to Gould, 15 May 2000.

¹²⁰ Sally Parker, Secretary, Postgraduate Studies Committee, to Vice Chancellor, 19 May 2000; Middleton to Vice Chancellor, 23 May 2000; Middleton, oral submission, 23 February 2001; Koopman-Boyden to Vice Chancellor, 30 May 2000.

189. Professor Gibbs, Professor of Philosophy, wrote to Professor Gould on 22 May. He was to have a meeting with the Vice Chancellor the next day. He would be acting as colleague-in-support for Mr Franke, who had asked for a meeting with Professor Gould to explain his involvement in the Kupka affair. Mr Franke had returned from study leave to discover that he and Professor Bing were the subjects of complaints of harassment by Associate Professor Knuefermann.

190. The Kupka case, Professor Gibbs wrote, had been ‘a public relations disaster for the university’. The issue, he said, was not whether Mr Kupka’s freedom of speech should be restricted. No one wanted to deny him his legal right.

What is being suggested is simply that the university should terminate Kupka’s registration as a PhD student. There is no reason to suppose that if the university were to do this – which I believe it is legally entitled to do – it would somehow be infringing Kupka’s right of free speech.

191. Professor Gibbs thought the university could resolve the Kupka affair in one of two ways. Associate Professor Knuefermann was soon to retire and, according to university regulations, would no longer be entitled to be Mr Kupka’s chief supervisor. The question would then have to be asked whether the university could legally discontinue Mr Kupka’s Ph.D. registration. Alternatively, as Vice Chancellor, Professor Gould could set up an independent committee of inquiry to examine the concerns outlined in his letter. The University of Canterbury had recently authorised such a committee to inquire into a ‘somewhat similar case’. By taking that course, Professor Gould would be relieved of the ‘onerous responsibility of determining the Kupka case’, something would be done to ‘satisfy the legitimate concerns of the Jewish community and other critics of the university’ and to restore the university’s reputation.¹²¹

192. On 12 June, Professor de Ras, Professor of Women’s and Gender Studies, wrote to Professor Gould and to members of the University Council. She was responding to Professor Gould’s statements that he was prepared to consider new evidence. She wrote as ‘something of an expert’ in the analysis of ‘nationalism, Nazism, and neo Nazism,’ having written Bachelor, Master, and Ph.D. theses on Germany 1940–45. She agreed with others who argued that Mr Kupka’s research had to be taken ‘extremely seriously’. Her letter concentrated on issues of language and ‘discourse’.

193. Professor de Ras was disturbed that Mr Kupka’s thesis topic was the German language in New Zealand. Most German speakers, she wrote, ‘and researchers of Nazism and of extreme right wing nationalism will immediately recognise’ the ‘language Mr Kupka was using in his Internet postings’. That language lost some of its political and cultural meaning when translated into English but anyone who had studied neo-Nazism would ‘notice the similarity of Mr Kupka’s Internet writings’. She instanced his description of Elie Wiesel as a ‘malicious agitator’. This was bad enough in English translation but the linguistic associations in German – ‘ubelster sorte’ – were immediately recognisable as the language of Nazi anti-semitic propaganda. Mr Kupka’s language was ‘full of such examples’. It ‘resonates sombreness, hatred and violence’. The university should take Mr Kupka’s language ‘very seriously’. The person who wants to write a Ph.D. on German language at our university’ was also publishing on the Internet ‘his language of violence, exclusion and erasure targeted at the Jewish population’.¹²²

194. Among other letters that Professor Gould received, the ones from academics in other New Zealand universities were particularly relevant. Dr Gerrit-Jan Berende, Head, German Department, University of Canterbury, wrote on 4 April. He told Professor Gould that he had come across Mr Kupka’s postings while preparing a course ‘(Re)presenting Evil: Fascism, the

¹²¹ Professor B. R. Gibbs to Vice Chancellor, 22 May 2000.

¹²² Professor Marrison E. P. de Ras to Vice Chancellor and Members of the Council, 12 June 2000.

Holocaust and the long Shadow of Germany's Past,' to be taught in his department. They had disturbed him. As a 'critical observer and commentator' on German affairs, he was 'personally abused by Mr Kupka's abominable remarks on Jews and the Holocaust'. He was under the impression that Mr Kupka had yet to arrive at Waikato. He was convinced that Mr Kupka was 'ventilating' anti-semitic and neo-Nazi ideas. Dr Berende was writing to protest against any attempt to let Mr Kupka begin a research before his 'hidden agenda' had been investigated.' He reminded Professor Gould that the New Zealand universities 'are not only tied to a charter in which the freedom of speech is guaranteed but also to a code of ethics'. Mr Kupka's enrolment would badly damage German studies in New Zealand. He hoped Professor Gould would register his concern and act accordingly.¹²³

195. The four full-time members of the German section of the School of European Languages, Victoria University of Wellington, wrote in similar terms. Professor Delbruck and his colleagues had read Mr Kupka's Internet postings and were 'dismayed' that he had been 'accepted as a PhD student at a New Zealand university'. They found it 'difficult to believe' that a thesis on the German language in New Zealand could be written 'without dedicating part of it to the investigation of the input of Jewish immigrants'. The founding professor of their department and four lecturers had all been forced out of the Reich because they were Jewish. Other examples, past and present, underlined the importance of German-speaking Jews in New Zealand. Professor Delbruck and his colleagues were worried about the consequences of Mr Kupka's research for 'the teaching of the German language in New Zealand at large'. Also at stake were Waikato's reputation and 'the country's moral integrity'. They copied their letter to Associate Professor Knuefermann.¹²⁴

196. Associate Professor Hyman, a teacher in the economics and women's studies departments at Victoria University of Wellington, wrote to Professor Gould in her personal capacity. She wrote as a Jew and a feminist. She knew the intimate detail of the tragedy visited on members of her family by the Holocaust. As a feminist she knew that many things, good and bad, were written out of history. She was 'very determined' to do everything she could to ensure that history never repeated itself. She wrote, too, from 'a strong passion for social justice'. Academic freedom and free speech were both very important principles but they must be exercised honestly and responsibly, not 'as a smokescreen for the inciting of hatred and denial of historical facts'. From what she had read of his Internet postings, she was convinced of the depth of Mr Kupka's Holocaust denial, but she had been told that he, Professor Gould, was not. Given the views of expert witnesses, she thought it very important that he explain how he had reached that view. She supported the call for a full inquiry into the matter.

197. She made a general observation, supported by a particular example, about the place of Jews in New Zealand.

New Zealand is a country with a small Jewish minority. It has been reasonably welcoming to Jews. However, there is a degree of invisibility around Jewish people and issues, with widespread ignorance of Jewish history and concerns in the general population – rather than any systematic anti-Semitism. One small manifestation of this was the scheduling this year at my own university degree ceremonies on the first night of Passover – something which would never happen elsewhere in the western world, and I hope will not occur again here, after I drew it to the attention of the administration.

She hoped Professor Gould would 'amend his position.'¹²⁵

¹²³ Dr Gerrit-Jan Berendse to Gould, 4 April 2000.

¹²⁴ Professor H. Delbruck, Associate Professor Peter Russell, Dr Margaret Sutherland, and Monika Smith to Vice Chancellor, 8 May 2000, and to Acting Vice Chancellor Michael Selby, 17 May.

¹²⁵ Associate Professor Prue Hyman to Gould, 29 May 2000.

198. Professor Gould also received advice from Dr Prasad, the Race Relations Conciliator. Some members of the university academic staff had remained in correspondence with his office, and he had met with them to hear their concerns. It would be in the university's interests, he believed to conduct an inquiry into the allegations that it was acting 'in an anti-semitic manner by disregarding the concerns of the Jewish Academics on its staff and condoning Kupka's views by permitting his continued enrolment as a doctoral student.' He thought that an inquiry similar to the one that the University of Canterbury had recently resorted to 'would allay the concerns of the Jewish community' and others who had been in touch with him. He thought that the chair of an ethics committee from another university would be an appropriate person to conduct the inquiry.¹²⁶

The Vice Chancellor in reply

199. Professor Gould's replies attempted to reassure his correspondents that the university had the problems raised by Mr Kupka's enrolment well in hand. Except in his reply to Associate Professor Hyman, he did not comment directly on the concerns that had prompted them to write to him. To Dr Berende he wrote that 'the matters had been thoroughly ventilated and considered by the university's normal processes.' It would not 'compromise the values it stood by'. He was 'more than willing to consider any further hard evidence' that might be produced. He enclosed a copy of the letter Associate Professor Knuefermann had sent to the editor of the *Jewish Chronicle*¹²⁷ (Appendix S).

200. Professor Gould's letters to his colleagues followed similar lines. He was satisfied, he told Dr Pratt, that the various university processes that had become involved had 'worked well and were without reproach'. There was no foundation to allegations about academic matters. His reply to Dr Bolstad included a caution. University staff must be careful not to 'gratuitously besmirch the university's reputation on the basis of misinformation'.¹²⁸ Professor de Ras did not get a reply.¹²⁹

201. Professor Gould was more forthcoming in his reply to Associate Professor Hyman. He told her that the university was 'also very concerned' about the Kupka case. It wanted to act in ways that showed 'full respect to the justified sensibilities of those (including myself) who regard the Holocaust as a uniquely horrible event in human history.' But the termination of Mr Kupka's doctoral study would be a very serious step to be taken 'only on the clearest and most persuasive grounds'. He 'profoundly disagree[d]' with a number of Mr Kupka's statements. But it was by no means clear that his published statements amounted to Holocaust denial. He was taking account of the many representations he had received 'but the reiteration of assertions does not necessarily increase their force'.¹³⁰

202. The reply to Professor Delbruck and his fellow Germanists was written by Professor Selby as acting Vice Chancellor. It contained some misinformation. The university, he wrote, was unaware of Mr Kupka's Internet postings when he was accepted as a doctoral candidate. No one was aware at the time that his views on the Holocaust might have a bearing on the research he was proposing. Nor, initially, was it understood that 'a large proportion of German migrants to New Zealand would be Jewish'.¹³¹

¹²⁶ Dr Rajen Prasad, Race Relations Conciliator, to Gould, 28 June 2000.

¹²⁷ Gould to Berendse, 6 April 2000.

¹²⁸ Gould to Bolstad, 5 May 2000.

¹²⁹ de Ras to Review, 15 May 2001.

¹³⁰ Gould to Hyman, 1 June 2000.

¹³¹ Selby to Delbruch, 11 May 2000.

Breakdowns in collegial relationships

203. From October 1999, personal relationships among all colleagues who were in any way involved in the issues surrounding Mr Kupka were placed under increasing strain. For the Jewish staff and students who took a stand, the experience was one that they look back on as being extremely painful. They had lived in New Zealand for varying lengths of time and until the Kupka affair had never felt uncomfortable about living here. They knew of the Vice Chancellor's reputation in race relations and were at first confident that he would sort things out. When, however, by the end of March nothing seemed to be happening to allay their concerns they decided that they must act for themselves.

204. It was the first time that any of them had publicly identified themselves as Jews campaigning on a Jewish issue. They felt, they told me, that they were walking on eggs. They were soon dismayed and hurt by what they perceived to be the reactions of colleagues. Dr Simms, Senior Lecturer in English, wrote in his submission that Jews on campus had from time to time experienced anti-semitic 'remarks, gestures and actions' but these were 'isolated, random and often inadvertent'. Once, however, Jewish members of staff 'expressed themselves openly and collectively on an issue of vital interest to them as Jews, the reaction, formal and informal, overt and insinuated, has been hostile, contemptuous and threatening.' Others told me that colleagues had snubbed and ignored them and subjected them to negative comments. They saw themselves as expressing the conscience of the university on a vitally important matter – cultural safety – but were dealt with as troublemakers.¹³²

205. Those who, as academics and managers, had to deal with Mr Kupka's studentship found themselves responding to unfolding events with disbelief and, in time, anger. Everyone I spoke to was disgusted by Mr Kupka's racist, anti-semitic publications. But those with formal roles to play also knew that in considering his doctoral research they must apply the same rules as they would to any other student. They were deeply hurt by suggestions that, simply by carrying out their academic duties, they were being in some way passively anti-semitic. Some told me that they were snubbed and pointedly disregarded, others that they were harangued in a sundering of normal courtesies between colleagues.

206. Colleagues on both sides were thus feeling very uncomfortable in the positions they found themselves. Jewish colleagues who had been content to remain in the background were making themselves publicly visible by giving expression to their concerns. Their colleagues who were dealing with Mr Kupka's case found themselves the focus of unwanted campus and public attention but were constrained by their roles from speaking out for themselves. They felt that they were being punished because the university had had the ill luck to have enrolled a student who was publishing unacceptable opinions and it had fallen to their lot to deal with the implications.

207. In the absence of accurate information about how the university was dealing with Mr Kupka's doctoral candidature, hearsay and rumour filled gaps in people's understandings. Speculation about the *Nexus* leak and a reported incident at a sharemilkers cottage, and reports of threats to the safety of colleagues, further roused partisan emotions. There was also a strong visual aspect. Posters on campus and placards carried in demonstrations displayed hard-hitting slogans. The Stars of David that were first worn by members of the vigil/demonstration at the June council meeting were a powerful symbol of identity and solidarity. For that and the August vigil/demonstration, members of the Waikato/Bay of Plenty Jewish Association told me that they were careful to ensure that their placards and posters were impersonal. Their slogans focused on their campaign for an inquiry: INVESTIGATE KUPKA-GATE; INDEPENDENT INQUIRY NOW!; NO SECRETS, NO FEAR; NO INQUIRY= NO SOLUTION; NO CLAYTON'S INQUIRY. But they were not able to censor the placards of others who joined the demonstration. A slogan that

¹³² Dr Norman Simms, submission; Waikato/Bay of Plenty Jewish Association, oral submission, 12 March 2001.

provoked angry responses was published in the *New Zealand Herald*. It said: WAIKATO UNIVERSITY; HAVEN for HATE MONGERS? SHAME. Some of those who were dealing with the Kupka case told me that it was impossible for them not to take that remark personally.

208. Members of each ‘camp’ felt under siege and looked to fellow supporters for solace and reassurance. One attempt to bridge this gulf in relationships is worth recording, however. At the suggestion of Dr Shieff, Professor Barrett of the English department, arranged an informal meeting between Professor Middleton, Dr Shieff, the Waikato/Bay of Plenty Jewish Association spokesperson, and Ms Bliss, the secretary of the association. The meeting, which was held in mid-May, illustrated difficulties in the way of any attempt to inform Jewish colleagues of what was happening. Mr Kupka was a doctoral student and Professor Middleton, bound by the requirements of privacy and confidentiality, could talk about his case only in general terms. She was not herself familiar with the detail of his research proposal and could not add much to what Dr Shieff and Ms Bliss already knew. Nevertheless, she thought the meeting was ‘positive’ and she enjoyed meeting two colleagues whom she had not met before. Ms Bliss was less positive about the meeting but thought that it had been helpful to Professor Middleton.¹³³ Nothing came from it. The important thing was that it could and did take place.

209. But perceptions were spiralling downwards and would continue to do so. Big principles were at stake but the Kupka affair had become intensely personal. Professor Gould and Professor Bing became in their different ways the focus of support from some colleagues and hostility from others. What they wrote, said, or did became part of group memories that were being continually updated. One example illustrates the process. In May 2000, Professor Bing, who was on study leave, accepted the invitation of the editor of ‘The Review’, a journal published by the Australian Jewish Council, to write an article on Holocaust denial in New Zealand. It was entitled ‘Pseudo-History: Holocaust denial in New Zealand universities.’

210. Professor Bing contrasted Waikato’s handling of Mr Kupka’s doctoral research with Canterbury’s handling of the Hayward thesis. Waikato, he wrote, had been ‘much less sensitive and forthcoming’ than Canterbury. He summarised his understanding of the way the university had dealt with Mr Kupka’s candidature. Mr Kupka’s topic, he wrote, would have been ‘unexceptional were it not for of Kupka’s neo-Nazi activities’. Professor Bing brought out the difficulties that he and Mr Franke had encountered in their attempts to get copies of Mr Kupka’s research proposal and in getting the university to face up to the cultural safety issues he believed to be inseparable from it. He noted that the ‘University – albeit at this late stage – has now agreed to deal with the core issue of “cultural safety” and academic standards.’ ‘It seems,’ Professor Bing concluded, ‘that Professor Gould and his senior academic colleagues (Knuefermann and Oettli in particular) are unwilling to admit that they have made serious errors of judgment.’ Professor Gould, he noted, had received letters from members of the staffs of German departments of three New Zealand universities advising him that Mr Kupka was not a suitable candidate for the topic he was researching. ‘The University of Waikato stands alone in its stubborn and steadfast support of the neo-Nazi Kupka.’ Only an independent inquiry could restore ‘Waikato’s tarnished reputation’.

211. Professor Bing had submitted his article a few days before Mr Kupka’s resignation, and he had no means of knowing that it was imminent. It was published in the July issue of ‘The Review,’ which has a small circulation in New Zealand and is held by some public libraries. The July issue was available in the University of Waikato library soon after publication. The editor did not invite Professor Gould to present the university’s understanding of the situation that had arisen and how it was handling it.¹³⁴ Professor Bing’s article did not become part of the campus debate during July or August 2000, when the controversy on campus was at its height. Professor

¹³³ Middleton to Gould, 23 May 2000; Middleton submission; Bliss interview, 23 May 2001.

¹³⁴ Gould to Review, 23 November 2001.

Bing gave me a copy in March 2001 as part of his evidence to the review. No one else mentioned it in submissions or interviews.

212. It was not until September 2001 that Professor Gould and some of his senior academic colleagues received email copies of Professor Bing's article. Unknown to Professor Bing, and much to his chagrin, someone had posted it on 'David Irving's Action Report On-line,' where it has taken on a life of its own. Internet postings can be searched, retrieved, stored, and sent on to other mailboxes in ways that articles in journals in public libraries cannot. The cause of this renewed interest in Professor Bing's article seems to have been an article on Mr Kupka published in a German newspaper in June 2001, which revived interest in his time at Waikato in the wider context of his political activities in Germany. The result is that colleagues in both camps have once again been forced to justify positions they had held more than a year previously.

213. Members of the university's senior management are annoyed that the email article contains assertions that they can have no way of commenting on. They have assumed, wrongly, that Professor Bing was responsible for the Internet posting of his article. Professor Bing takes the strongest exception to being published on the Internet under the imprimatur of David Irving. I am assured that no member of the academic staff prompted the article written by the German journalist that sparked this resurgence of interest in Mr Kupka. However, one member of the university later received threatening hate mail written in German, presumably from a German source.¹³⁵ Mr Kupka has gone but his case haunts the university from cyberspace.

The New Zealand Jewish Council's correspondence with the Chancellor

214. On 30 May 2000, Mr David Zwartz, President, New Zealand Jewish Council wrote to the Chancellor, Mrs Bennett. He was writing to her, he said, because his council was disturbed by some aspects of a letter that the Vice Chancellor had written to members of the Jewish staff on 28 April. It was dismayed that Professor Gould placed the possibility of legal action by a postgraduate student ahead of the cultural safety of Jewish members of staff.

215. Mr Zwartz reminded the Chancellor of the university's obligation under its charter to be 'a good employer'. He asked whether association with a Holocaust denier was consistent with its obligation to develop 'a campus environment which reflects social, cultural and spiritual values appropriate to [the] University community.' It was not satisfactory for the Vice Chancellor to defend his stance by referring to opinions from the Human Rights Commission and the Race Relations Conciliator. Those opinions were not relevant to the main issues, which were 'whether the writings were detrimental to the cultural safety of staff and students ... and whether they affect the university's reputation.' These were matters for the university to decide. The Race Relations Conciliator had himself emphasised that point. They were ethical matters and that is why he was addressing his letter to the Chancellor. He asked her to circulate his letter to all members of the university council and table it at its next meeting for discussion in the open part of the meeting.¹³⁶

216. The Chancellor replied on 2 June, acknowledging the council's concerns. They were shared by the university as a whole and by her personally. But until the university committees that were examining Mr Kupka's research proposal had completed their work it would be 'inappropriate to involve the council'. She did not think it would be 'proper' to table his letter at the June council meeting. The appropriate time would be after the council had received reports from the committees.

¹³⁵ D. Bing, 'Pseudo-History: Holocaust denial and New Zealand universities, *The Review*, July 2000, pp. 16–17; Gould to Review, 3 October and 23 November 2001; P. D. Allan to Review, 6 November 2001; Professor Gibbs to Review, 14 November 2001.

¹³⁶ David Zwartz. President, New Zealand Jewish Council, to Chancellor, 30 May 2000.

217. Mr Zwartz wrote to the Chancellor again on 4 July, immediately after Professor Gould cancelled the meeting with the Waikato/Bay of Plenty Jewish Association that he had been invited to attend (see paragraph 258). He repeated the council's request for the university council to discuss Mr Kupka's case in open meeting and consider setting up an independent inquiry. Mr Kupka was no longer a member of the university, he wrote, but issues relating to the university's breach of its charter obligations remained unresolved. When he had not received a reply (the Chancellor had been absent), he wrote again on 1 August and repeated the requests in his earlier letter. He also wrote to all members of the council and asked them to support 'an open debate and an independent inquiry' as the only way of achieving 'a proper solution'.

218. Mrs Bennett replied on 3 August. The council, she informed him, would soon receive a report from the Vice Chancellor that she expected to be helpful. Mr Zwartz wrote to the Chancellor after the August council meeting to thank her and the council for its decision to set up an independent inquiry into the Kupka case.¹³⁷

Other letters to the Chancellor

219. During April and May members of the Waikato/Bay of Plenty Jewish Association debated whether to appeal for the support of colleagues in other universities. They were for some time divided on the propriety of taking such a step. Was it proper to take their concerns to a wider public? Early in June they decided that members of the association who wished to make such an appeal could do so.¹³⁸ The Chancellor soon received more than two dozen letters and emails from people in Britain and North America, as well as from within New Zealand. Her correspondents included several eminent scholars. The letters and emails had a common theme: support for the setting up of a committee of inquiry to investigate the university's handling of Mr Kupka's enrolment and concern for Waikato University's international reputation. The Chancellor replied to them in the same terms in which she had replied to the New Zealand Jewish Council. The matters relating to Mr Kupka were being dealt in accordance with normal university procedures. She was monitoring developments. The council would consider its position when those university processes had been completed.

Requests under the Official Information Act

220. Between 17 May and the middle of November, the university received sixteen requests under the Official Information Act for documents relating to its handling of the Kupka case. One of these was made by the New Zealand Jewish Council, five by the Waikato/Bay of Plenty Jewish Association, six by Professor Bing, one by Professor Bing and Mr Franke, two by Mr David Young, and one by Mr Kupka. Those making requests were clearly well informed about the progress of Mr Kupka's case through the various university processes. Many of the requests were comprehensive in the range of documents sought. Most were precise in identifying the writers of documents, the person or persons to whom they were addressed, and dates on which they were written. All were painstakingly attended to and, with one exception, responded to in the twenty working days laid down in the Act. The only items withheld were details of Mr Kupka's academic record while a student of Massey University and one item that would have infringed a person's privacy. By mid October, as Professor Gould noted in his report to council, virtually all of the university's documents relevant to Mr Kupka were in the public domain.¹³⁹

¹³⁷ Mrs Caroline Bennett, Chancellor, to Zwartz, 2 June 2000; Zwartz to Bennett, 4 July and 1 August 2000; Zwartz to members of the University Council, 1 August 2000; Bennett to Zwartz, 3 August 2000; Zwartz to Bennett, 10 August 2000; New Zealand Jewish Council submission.

¹³⁸ Bliss and Bolstad interview, 23 May 2001.

¹³⁹ Callaghan to D. J. Taylor, 11 December 2000.

The resolution of the School of Law Board of Studies

221. At a meeting of the School of Law Board of Studies on 31 May, the following resolution was proposed by Professor Havemann, tabled, discussed, and passed:

The School of Law Board of Studies affirms its commitments to good governance, human rights and academic freedom. Consequently the Board resolves that the university should immediately institute a review or inquiry in the matter of the controversy surrounding the Kupka doctoral enrolment to ensure that all proper steps have been taken.

The purpose of this inquiry should be to ascertain the integrity of vital aspects of academic governance namely the admission requirements, the availability and suitability of supervision and the ethical clearance processes for human participant research.

In keeping with academic freedom and good governance standards, the process should be transparent and the findings of the review/inquiry should be made public so that the integrity of this University's procedures are seen as valid and proper by all the world.

The resolution was directed to the attention of the Academic Board and the Vice Chancellor.¹⁴⁰

The June council meeting

222. Members of the Waikato/Bay of Plenty Jewish Association, supported by some non-Jewish members of staff – about 40 in all – held a silent vigil at the public part of the June meeting of council.¹⁴¹ Members of the group, non-Jews as well as Jews, wore large yellow Stars of David on their breasts. The intention was clear. The Star of David symbolises the long, troubled history of the Jewish people. From September 1941, all German Jews over the age of six were compelled to wear a large yellow Star of David. By making them so visible, the aim was to drive them out of public sight and make German cities Judenrein.¹⁴² The symbolism of the yellow star was thus complex but very clear. It was a deeply emotional link with the Holocaust that had claimed the lives of many family members. It was also a visible assertion of Jewish identity. The university management was in their view treating its Jewish members as if they did not exist. They were making themselves spectacularly visible. They were asserting their place as distinctive members of the university community. The members of council I interviewed told me that they were moved by the silent, dignified demonstration.

223. The case of Hans Joachim Kupka was considered in both the open and confidential parts of the meeting. The discussion in open meeting was initiated by Dr Ryan, one of the academic members of council. The Kupka case, he said, had international implications for the university. It was a matter of concern to various communities associated with the university. There were some who did not share the Vice Chancellor's view that the university's handling of Mr Kupka's candidature had been 'exemplary'. A wider debate was needed. Sir Ross Jansen questioned the wisdom of dealing with the substance of the case in the confidential part of the meeting. The Chancellor said that it would be premature for the council to embark on a wider debate until the University Human Research Ethics Committee and the Postgraduate Studies Committee had completed their work.¹⁴³

224. The item was discussed in the confidential part of the meeting in the context of the Vice Chancellor's report. Professor Gould was overseas. Acting Vice Chancellor Selby spoke to his

¹⁴⁰ School of Law Board of Studies resolution, 31 May 2000.

¹⁴¹ *Waikato Times*, 15 June 2000.

¹⁴² Ian Kershaw, *Hitler 1936–45; Nemesis*, Allen Lane/The Penguin Press, London, 2000, p. 474. Kershaw's biography is authoritative on Hitler's role in the development of the Nazi policies that became the Holocaust.

¹⁴³ University of Waikato, the Council, minutes of meeting, 14 June 2000.

report, which summarised the official university understanding of the case. Mr Kupka had met the ‘full requirements’ for admission to Ph.D. study. Permission to submit his thesis in German ‘had been properly given on appropriate grounds’. Regular arrangements for the supervision of his research were in place but they could change in future. In the course of his research, Mr Kupka would make ‘no contact with individuals’. All ‘data collection’ would be done by ‘intermediate agencies’ that agreed to act for him. If those agencies ‘refused to participate ... the feasibility of the research would be reconsidered by the University Human Research Ethics Committee.’ The Vice Chancellor would talk to ‘concerned staff’ on his return to campus. Council received Professor de Ras’ letter on her assessment of Mr Kupka’s ideological use of language. Sir Ross Jansen suggested that the university might wish to take legal advice on whether it would be acting outside the law if it cancelled Mr Kupka’s candidature.

225. The council resolved to ask Professor Selby to report on the background, timeframes, and processes that were still being dealt with by the University Human Research Ethics Committee and the Postgraduate Studies Committee. The minutes of the meeting notes that Dr Ryan voted against the resolution. Dr Ryan informed me that he ‘strongly disagreed with the overall thrust of Professor Selby’s report’ and spoke ‘vociferously’ against it.¹⁴⁴

226. The members of the council I interviewed told me that they and other council members were becoming uneasy. Professor Gould’s absence from the meeting proved to be particularly unfortunate because it meant that he was unable to make his own assessment of their concerns and what he needed to do as Vice Chancellor to resolve or reduce them. Members of council knew that some Jewish staff and their supporters were pressing for a formal inquiry. Things seemed to be drifting and the university’s reputation was being put at risk. There was a developing sense that council would have to take an initiative once it had received the reports it had asked for from the university committees that were dealing with Mr Kupka’s research. But there was no firm view about the form that a council initiative should take. The council’s position was expressed in a press statement issued by the Chancellor. It said:

Council recognises that the issue of the PhD candidature of Hans Joachim Kupka is of considerable importance for the university and the various communities which it serves. Council is mindful of its obligations under the Education Act, the Human Rights Act and the Privacy Act and that its actions have to be consistent with such legislation. It is also mindful of the importance of following established and approved institutional processes in dealing with the continuing candidature of Mr Kupka, processes which are not yet complete. It likewise recognises the importance of transparency in these processes.

*Accordingly, Council is seeking the early advice of the relevant committees involved with Mr Kupka’s candidature. It will monitor progress in this matter very closely and looks forward to receiving reports from the Human Research Ethics Committee and the Postgraduate Studies Committee in the very near future.*¹⁴⁵

The decision of the University Human Research Ethics Committee

227. The University Human Research Ethics Committee held special meetings on 17 and 24 May to consider the recommendation of the FASS Ethics Committee. In line with his previously stated intention, the chairman of the committee, Dr Goldsmith, was asked to step aside at the first of these meetings because of his declared conflict of interest. Dr Henry Bennett, the council’s appointee on the committee, acted as chairperson. The committee agreed that Dr

¹⁴⁴ Ryan submission; the Council, minutes of meeting, 14 June 2000; Ryan to Review, 15 September 2001.

¹⁴⁵ Draft [Press Statement] 16 June 2000.

Goldsmith could make a written submission. Members of the committee had his statement among their documents for the meeting.¹⁴⁶

228. Dr Green was present at the beginning of the meeting on 24 May, spoke to her committee's letter of 11 May, and withdrew. She referred to the adverse national publicity that Mr Kupka was receiving. Her committee was concerned about the potential distress that individuals might have if asked to respond to Mr Kupka's questionnaires. The FASS Ethics Committee, she said, had serious reservations about allowing Mr Kupka to administer his questionnaires. The University Human Research Ethics Committee considered the questionnaires in relation to the committee's General Principles for Research Involving Human Beings. It also identified 'minimisation of risk' as the ethical principle to be applied. There was a risk of 'potential distress' to people asked to participate in Mr Kupka's project, even though it did not touch on his personal and political beliefs.¹⁴⁷

229. The committee asked Mr Kupka to consider alternative courses of action. One was to reconsider whether it was necessary to use questionnaire surveys to collect the information he needed. Could he not get some of it from existing records? If, however, he decided that questionnaires were 'essential to his project,' he would have to 'undertake some additional checks to ensure that possible risks to his target population, especially individuals and families, [were] minimised.' It spelt out its reasons.

The Committee understands that you have already identified and approached certain agencies asking them to distribute questionnaires to individuals and families on your behalf. As a research practice, this two-step distribution process normally helps to minimise risk because potential respondents can be confident they remain completely anonymous to the researcher, who will not know who they are or whether they have agreed or declined to participate. However, in the light of the recent publicity, and the possibly increased risk of distress, the Committee has resolved that you should write to these agencies again, explicitly acknowledging this publicity and the heightened risk, and asking them to confirm whether or not they are still willing to distribute questionnaires on your behalf.

By inviting the relevant agencies to reconsider their willingness to cooperate in your research you are ensuring that they are informed about the possible risks to participants, and that they understand how they themselves might become associated with the recent widespread publicity. They will be able to weigh up the possible advantages and disadvantages, both to themselves and to others, of taking part in your project. If they agree to remain involved, you will be in a position to assure UWHREC that their informed consent to provide assistance has been received and we can all have greater confidence that the research can proceed satisfactorily. If they choose to withdraw, this will provide an indication that the viability of the proposed surveys has indeed been significantly undermined by recent events.

Dr Bennett wrote to Mr Kupka in these terms on 1 June¹⁴⁸ (Appendix W).

¹⁴⁶ Neil Ramsay and Helen Pridmore to Review, 14 September 2001.

¹⁴⁷ Associate Professor Foster to Review (telephone conversation), 24 July 2001; Ms Collins to Review, 10 August 2001; Mr Oulton to Review, 27 August 2001; Mr Cochrane to Review, 27 August 2001; Mrs Dixon to Review, 4 September 2001; Dr Payne to Review, 5 September 2001.

¹⁴⁸ University Human Research Ethics Committee, minutes of the special meeting held on 24 May 2000; Dr Bennett to Kupka, 1 June 2000.

The Postgraduate Studies Committee involvement

230. Mr Kupka's doctoral proposal was on the agenda of the Postgraduate Committee's meeting on 9 June. The committee had before it a progress report it had requested from Associate Professor Knuefermann.

231. The committee had asked Associate Professor Knuefermann to report on the current status of the research under seven headings:

- (a) Do the ethical requirements necessitate a substantial rethinking of the research methodology of all or part of the project?
- (b) Has there been a shift in direction of any major part of the research?
- (c) In light of the ethical requirements, are the supervisors confident that the methodology and results of the research will be academically defensible?
- (d) Given the nature of the topic and methodology, what is the planned composition of the supervisory panel so that the methodology requirements of the disciplines involved are met?
- (e) Is the presentation of the thesis in the German language appropriate for this study, and can the university continue to provide supervision in the German language, in light of (b) and (d) above?
- (f) Taking into account the perception that has been created in recent publicity that the candidate is prejudiced against Jewish people, and if Jewish people are necessary participants in this research, are the supervisors confident that the research can be completed?
- (g) This status report is to be the benchmark for assessing future progress.

232. There was nothing further to add, Associate Professor Knuefermann wrote, to what he had reported to the committee in his progress report of 1 December 1999. Mr Kupka's research remained suspended. The arrangements for his supervision remained satisfactory but there might soon need to be some changes. In answer to specific questions, Associate Professor Knuefermann said that there was no need for any 'substantial rethinking of the methodology' to meet 'ethical requirements'. There had been no 'shift in direction of any major part of the research'. He was confident that Mr Kupka's methodology and the thesis when completed 'will be academically appropriate and defensible'.

233. He drew the committee's attention to some 'confusion' about Mr Kupka's research that was not being helped by misleading statements in the press. The research did not involve 'Holocaust survivors or Jewish people in particular.' Individuals, furthermore, would be free to decide whether to fill out questionnaires. He was confident that the research could be completed satisfactorily. But there was one point that he wanted placed on the record. He could not be held responsible for matters beyond his control or that of the candidate. He recorded with 'deep concern that the Vice Chancellor and co-supervisor of an overseas educational institution had been threatened by members of the university.' Various unprofessional practices had also been used by 'a number of Waikato academics'. He hoped that these would not have a 'major impact' but could give no assurances.

234. The committee had asked Associate Professor Knuefermann to consult Mr Kupka's other supervisors when preparing his report. He does not seem to have done that. He thinks he may not have consulted Associate Professor Harlow. His understanding, he informed me, was that Associate Professor Harlow was no longer a supervisor. But at the end of May he was still formally listed as a supervisor. Associate Professor Harlow, to the best of his recollection, was not consulted. Dr Knuefermann cannot recall whether he consulted Professor Nayhaus. Yet Mr Kupka, who was living in Germany, had consulted Professor Nayhaus on theoretical aspects of

his research and he was in a good position to comment on the matters on which the committee wished to be informed.¹⁴⁹

235. The chairman of the committee, Professor Selby, informed members of the committee of the outcome of the meeting of the University Human Research Ethics Committee on 24 May. That committee was awaiting responses from Mr Kupka and Associate Professor Knuefermann. The Postgraduate Studies Committee would itself await the decision of the ethics committee after it had considered those responses. It would then 'revisit' Mr Kupka's research plan as requested by the FASS Ethics Committee. Some revision might become necessary.¹⁵⁰

Mr Kupka considers his options

236. It is clear from his email messages to Ms Weir and Associate Professor Knuefermann that Mr Kupka saw the FASS Ethics Committee's ethical review as a continuation of the campaign against him by other means. On 5 December 1999, soon after receiving a letter from the committee after its initial meeting to consider his research, he wrote, 'in its wording as well as its arguments [the letter] comes close to an insult,' and he wondered if Dr Green had been 'involved in this political campaign against me'. Part of Associate Professor Knuefermann's role was to be a moderating influence on him. 'Have another look at' the FASS Ethics Committee letter, he wrote at the end of March 2000, 'and try to give them what they want.' Mr Kupka was indignant that Dr Green, in her letter of 17 May, expressed the committee's concern that questionnaires were coming to play 'only a "minor part"' in his proposal. 'Hess, Clyde and Ammon,' he wrote to Associate Professor Knuefermann, 'have published similar, even more extensive works, without basing their work on any such questionnaires.' But it was the University Human Research Ethics Committee letter of 1 June that caused him the greatest discomfort.

237. He felt affronted that the committee was asking him to ask agencies to reconsider their willingness to co-operate with him. This, however, was a problem he had created for himself. He had been in touch with various agencies before submitting his questionnaires to the FASS Ethics Committee for approval. He appealed to Associate Professor Knuefermann to do what he could to have the requirement of the committee's second option softened. Associate Professor Knuefermann asked Ms Weir to raise the matter with Professor Gould and Dr Bennett. What was needed, he thought, was a form of words to the effect that agencies be asked to re-confirm in writing that they remained willing to co-operate. Ms Weir told me that she advised Associate Professor Knuefermann that it would be unethical for her to become involved in the deliberations of the ethics committee. But Mr Kupka was being very pressing. His 'prognosis', he informed Associate Professor Knuefermann, was 'that one thing leads to another and that new spokes keep getting into my wheel.' 'Why,' he asked, 'aren't Franke, Bing and their comrades required to write to the German–New Zealand Trade Association and the German Consulate to apologise for spreading lies about me.' His patience was nearly 'used up – and believe me Volker, I can act differently!'

238. Mr Kupka, with drafting assistance from Associate Professor Knuefermann, decided to make a direct appeal to Professor Gould and wrote to him on 6 June. He was 'greatly upset' by the letter from the Human Ethics Research Committee. It confirmed his 'worst fears'. It was now clear to him that 'University processes' were being used against him 'by those who have led the prolonged campaign against me.' The letter was the latest example of what he had been experiencing for years. 'As one concern has been dealt with, another surfaces.' He asked Professor Gould to intervene on his behalf.

¹⁴⁹ Secretary, Postgraduate Studies Committee, to Knuefermann, 26 May 2000; Knuefermann to Secretary, Postgraduate Studies Committee, 30 May 2000; Harlow to Review, 7 August 2001; Knuefermann to Review, 16 August 2001.

¹⁵⁰ Postgraduate Studies Committee, minutes of meeting, June 2000.

239. The latest issue was the ‘risk of harm’. But what, exactly, was the risk? ‘Is it the risk of speaking to somebody who may be of a different opinion? Is [the committee] afraid my opinion could be contagious? Academic work is impossible under these circumstances.’ Nor did he see how recent publicity had increased the possibility of risk. He was not responsible for the publicity. Why were not those who caused the publicity ‘required to apologise to those “individuals and agencies” for lying about my project and about my beliefs.’ He was being forced to reconsider his stance. Perhaps he had been ‘too gentle for too long’. That was apparently being interpreted as a sign of ‘weakness’. Perhaps he should inform the press of his side of the story ‘instead of putting my trust in the fairness of University processes’. The conditions the University Human Research Ethics Committee imposed were unacceptable. Nevertheless, he was prepared to drop the questionnaires. They were not ‘an essential part of my thesis’. He would confine himself to ‘publicly accessible records if this would finally lead to an atmosphere in which I can continue my work.’¹⁵¹

240. In his reply, Professor Gould said he ‘thought it fair to say’ that the situation was not of the committee’s making. It could not act as if the publicity, ‘much as we deplore it’, did not exist. There were ‘real doubts about the willingness of some potential respondents to reply to your questionnaires.’ He was sure that the committee wanted to protect the ‘integrity’ of his research. Mr Kupka’s willingness to drop the questionnaires ‘certainly provides a way out of this dilemma’. He advised Mr Kupka to inform the University Human Research Ethics Committee and the Postgraduate Studies Committee of his decision ‘immediately’. He assured him that the university remained committed ‘to upholding the law,’ adhering ‘to the principle of free speech, and the integrity of its own processes’.¹⁵²

241. Associate Professor Knuefermann and Mr Kupka had hoped for more from Professor Gould than that. If, however, the committee’s alternatives were to remain unchanged, Mr Kupka had to make a difficult decision. If he dropped his questionnaires he would have to get the information he needed in other ways. He raised with Associate Professor Knuefermann the possibility of recording interviews with immigrant families and members of German clubs and of interviewing people on the street. But he came down on the side of dropping the questionnaires if, as a ‘prerequisite’, he could be given an assurance that he could get on with his research in peace. But Associate Professor Knuefermann considered that it was necessary to retain the questionnaires. Questioning every source, he advised him, was important when gathering information.

How do you think you will now be able to obtain the information which you sought to get in your questionnaire, on business organisations, immigrant families and the ‘perception of foreign languages?’ And if that is omitted, what then is left of remaining substantial results? Since that at any rate was actually defined as the main gist of the dissertation, there’s a giant hurdle remaining for it! And I’m certain the Committee itself was only too conscious of that.

242. Associate Professor Knuefermann continued to do what he could to win support for a less stringent requirement in place of the committee’s second option. Professor Gould was off campus, and Associate Professor Knuefermann talked to Professor Selby as acting Vice Chancellor. Dr Gunn, the chairman of the University Human Research Ethics Committee, had returned from leave and he was consulted, too. Associate Professor Knuefermann reported to Mr Kupka on the results of his efforts on 20 June. It was his understanding that the council ‘had now decided to set up an inquiry into the whole process and the handling of your enrolment, with a foreseeable result.’ He concluded:

¹⁵¹ Knuefermann to Kupka, 28 March 2000; Kupka to Knuefermann, 1 June 2000; Knuefermann to Weir, 1 June, 2000; Kupka to Vice Chancellor, 6 June 2000; Weir to Review, 3 July 2001.

¹⁵² Vice Chancellor to Kupka, 6 June 2000.

Joachim, in my opinion this means that the university intends in effect to put a stop to your studies. What I think of all the developments I hardly need to say. But that doesn't change anything about the situation. I'm sorry that I don't have any better news.

The only thing left to do, Mr Kupka replied, was to limit the financial damage. Was there any chance of having his fees refunded?¹⁵³

Dr Goldsmith's letter to the Vice Chancellor

243. Dr Goldsmith, as already mentioned, made his views known to the University Human Research Ethics Committee in a written statement. Those views remained among the records of the committee's confidential deliberations. But the *New Zealand Listener* in its issue of 10 June published comments by Professor Gould on what Mr Kupka would be required to do to meet the committee's ethical requirements. Dr Goldsmith disagreed with Professor Gould's reported comment and with the decision of the University Human Research Ethics Committee he was commenting on.

244. Professor Gould was quoted as being 'pleased' that 'the ethics committee has now stipulated that any contact between [Mr Kupka] and the subjects of his research will be kept to a mailed questionnaire.' People receiving questionnaires would not be 'required to deal directly with Kupka'.¹⁵⁴

245. The implication of those statements, Dr Goldsmith wrote, is that "'cultural safety'" issues have now been resolved'. The 'gist' of the committee's decision was that potential participants could be distressed because of the widespread adverse publicity surrounding Mr Kupka's views. He must therefore put a 'barrier between himself and those participants' by distributing his questionnaires only through intermediary agencies, and by asking those intermediaries to 'reconsider their involvement in the light of the publicity'.

246. Dr Goldsmith explained his interest in the issue as a long-standing member of the University Human Research Ethics Committee. He also informed Professor Gould why he had not been a party to the committee's decision. His view of the ethical implications of the research for potential participants and for the university, as set out in his submission, differed from the judgement it had made. He wrote:

The Committee confined itself to the mechanisms by which the distribution of the questionnaires could be managed so that Mr Kupka would not come into direct contact with participants ... In my view, the Committee's solution, though ingenious, merely defers and displaces the wider issues of 'risk' and 'social and cultural sensitivity.' on to agencies outside the university. For example, it seems to me that it ignores the real potential for distress among some of the individuals in those agencies who would be responsible for the distribution and collection of the questionnaires. It also fudges the question, 'from whom should informed consent be obtained – the agencies or the individuals who ultimately receive the questionnaires?' More generally, it ignores the continuing risk to the university, its reputation, and the reputations of its individual staff members, of having Mr Kupka receive our academic imprimatur.

He would have sought 'a different outcome' if he had taken part in the committee's discussion. All he could now do was 'register a "dissenting opinion"'. In his view, the committee should

¹⁵³ Knuefermann to Kupka, 8 June 2000; Kupka to Knuefermann, 12 June 2000; Knuefermann to Kupka, 20 June 2000; Knuefermann to Kupka, 21 June 2000; Knuefermann to Kupka, 22 June 2000, and his reply; Selby submission.

¹⁵⁴ *New Zealand Listener*, 10 June 2000, p. 35.

have considered ‘the wider issues’. Only if it had done that would Professor Gould ‘have a warrant to be “pleased” with the outcome of the ethical review process.’¹⁵⁵

The June meeting of Academic Board

247. The Academic Board met on June 20. On the agenda was the resolution of the School of Law Board of Studies. Because discussion could be expected to focus on Mr Kupka’s academic record, the item was taken in the confidential part of the meeting. The following account is based on notes made at the time by Professor Gendall and on a discussion I had with him.

248. As noted in paragraph 224, Professor Gould was not present. Professor Selby chaired the meeting as acting Vice Chancellor and introduced the item. The council, he reported, had discussed Mr Kupka’s Ph.D. candidature at length at its meeting six days earlier. It had considered whether it should mount an inquiry or review of its processes but had decided not to become formally involved while Mr Kupka’s research proposal remained under consideration by the university’s internal processes. It would reconsider the matter again at its August meeting.

249. Professor Selby gave a résumé of Mr Kupka’s enrolment as a Ph.D. candidate and referred to his Holocaust, pro-Nazi Internet postings. These, he said, were unrelated to his research. Mr Kupka needed to undertake questionnaire surveys, and these were being considered for ethical approval by the University Human Research Ethics Committee. The Postgraduate Studies Committee had also asked Mr Kupka’s supervisor for a progress report on his research. Professor Selby gave details of Mr Kupka’s MA record, his registration by the Higher Degrees Committee as a Ph.D. candidate, the composition of his supervisory panel, and the requirements that the University Human Research Ethics Committee had asked him to respond to.

250. No one claimed the floor after Professor Selby’s introductory remarks. Professor Gendall informed me that Professor Selby’s report left him, and presumably other members of the board as well, with the clear impression that council was already dealing with the matter and would consider it again at its August meeting. That was also Associate Professor Barton’s understanding: there was no need for a resolution by the board. Some of the deans I interviewed said that they would have expected any discussion to be initiated by someone from the school whose resolution it was and, when that did not eventuate, did not feel that it was incumbent on them to initiate it. Professor Selby declared the matter lapsed. Associate Professor Barton informed me that it is ‘quite common’ for resolutions to lapse. On some matters, he wrote, a formal board vote may be less important than the opportunity to bring them to the attention of members.¹⁵⁶

Mr Kupka resigns his candidature

251. Mr Kupka sent the Vice Chancellor his letter of resignation on 26 June. He was resigning, he told Professor Gould, because of the ‘unfortunate pressures that the university, myself and others have been exposed to’. He understood that the fees he had paid during the time he had been enrolled as a Ph.D. candidate would be fully refunded.¹⁵⁷

252. Professor Gould issued a short media statement. He did so, he said, because of widespread public interest. Mr Kupka had formally withdrawn as a candidate for the degree of Doctor of

¹⁵⁵ Goldsmith to Vice Chancellor, 7 June 2000.

¹⁵⁶ Professor Gendall’s notes of the discussion; Mrs Ward, Memorandum, To Whom It May Concern, 8 March 2001; interviews with Gendall, 2 April 2001, Koopman-Boyden, 3 April 2001, Professor Reedy, 3 April, Professor Alcorn, 4 April, Professor Graham, 4 April 2001, Professor Price, 4 April 2001, Professor Pratt, 6 April 2001; Bing submission #14; Gendall to Review, 30 August 2001.

¹⁵⁷ Kupka to Selby, 26 June 2000.

Philosophy with effect from 27 June 2000. He had ‘no continuing association with the university, other than as a former student’. The university refunded his fees.¹⁵⁸

The Vice Chancellor and the Waikato/Bay of Plenty Jewish Association

253. As already noted, Ms Bliss and thirteen other staff, students, and members of the Jewish community on campus wrote to Professor Gould on 28 April. Professor Gould’s reply of 5 May did not comment on their concerns that the university was not acting in accordance with its charter, nor on their request that a committee of inquiry be set up to investigate the university’s handling of the Kupka affair. He informed them, nevertheless, that he was ‘certainly concerned about’ the issues they had raised.

254. For him, however, the ‘real issue’ was whether Mr Kupka’s Internet postings, published in his private capacity, constituted an offence under New Zealand law. His advice was that they did not. He then conveyed to Ms Bliss, as he was doing to other correspondents, his opinion as to whether Mr Kupka denied the Holocaust in his postings.

I and others have read the material that has been put to us very carefully. I do not find that these statements constitute Holocaust denial. I do not profess any expertise in this area but I am able to make a proper and balanced judgement. I of course pay attention to the expert opinions which have been put before me to the effect that in ‘coded’ language, these opinions do amount to Holocaust denial. I think once we reach the point of interpreting codes, we are in very difficult territory. At all times, I have taken account of the fact that if the university is to deny someone freedom of speech, we may well find ourselves having to defend that issue in the courts.

Professor Gould was satisfied ‘that the university’s normal processes have been fully and properly applied’. He was ready to consider further material. Some of the information circulating was ‘misleading and wrong’.¹⁵⁹

255. Professor Gould could have drawn Ms Bliss’s attention to statements in her own correspondence that were misleading and wrong. The letter that she and others had sent to members of the Postgraduate Studies Committee assumed that, because the Bing–Franke letter had been ‘withheld’ from the committee, the university had taken no action on it. In fact, the executive group of the Postgraduate Studies Committee had considered it before sending it on to the Vice Chancellor’s Office, and the FASS Ethics Committee was about to consider the matter of cultural safety. Her letter of 28 April inferred that Mr Kupka could be interviewing German immigrants in the course of his research but Professor Gould did not take the opportunity to inform her that Mr Kupka would not be interviewing anyone.

256. During May, as already noted, the Postgraduate Studies Committee and others urged Professor Gould to have a meeting with members of the Jewish community on campus. On 1 June, he wrote to Ms Bliss proposing that one be held on 6 June. It was short notice. Queen’s Birthday would intervene, and by the time she got the letter there was not enough time for her colleagues to rearrange their commitments so that they could attend. They also wanted Mr David Zwartz, President, New Zealand Jewish Council, to be present. Professor Gould was to leave the country on 10 June, no suitable time could be arranged, and the meeting lapsed. But it remained Professor Gould’s intention, as he reported to the June council meeting, to have a meeting. His office arranged one for 4 July. Professor Gould agreed that Mr Zwartz could attend.

257. Ms Bliss wrote in her submission to the review that she and her colleagues ‘felt somewhat uplifted by the prospect of a face-to-face meeting with the Vice Chancellor, and hopeful that

¹⁵⁸ University of Waikato, Media Statement, 29 June 2000.

¹⁵⁹ Gould to Bliss, 5 May 2000.

perhaps our concerns could be taken seriously and that some genuine consultation would now occur.’ But she was also apprehensive. The Waikato/Bay of Plenty Jewish Association saw their meeting with Professor Gould as the first step on the path towards a resolution. It would, however, be necessary for Professor Gould to listen to them as well as tell them how he saw the issues. Their views had so far not been consulted. They wanted the chance to outline the issues that, as they saw them, went beyond harassment to a deep ethical concern. They hoped that a meeting would identify and clear up misunderstandings on both sides. They particularly wanted to find out who was advising Professor Gould on Holocaust matters. It was one subject on which Jewish people were themselves the experts and would have much to contribute.¹⁶⁰

258. Mr Kupka’s withdrawal from the university was announced on 29 June. On 3 July, the Vice Chancellor’s office informed Ms Bliss that the meeting for the next day was cancelled. She and her colleagues ‘were devastated’. Mr Kupka had gone: ‘but all the issues surrounding his enrolment, subsequent research topic and the university’s handling of the case, which we had been raising for months, still needed to be investigated.’ Ms Bliss, Dr Shieff, and Mr Zwartz all rang the Vice Chancellor’s office and asked that he reconsider his decision. The meeting was not held. To add further injury to the insult to the Jewish community on campus, the Vice Chancellor was quoted as saying on NewstalkZB radio on 4 July that ‘most of the hype [on Mr Kupka] was a “witch-hunt” based on false information.’ They, with members of the wider Jewish community, perceived this to be ‘an appalling innuendo’. They were left with feelings ‘of profound disgust and disappointment in the Vice Chancellor’.¹⁶¹

The August council meeting

259. Professor Gibbs said in his submission that he and others who wanted the university to initiate an inquiry knew that the August meeting of council would be crucial. They knew that Sir Ross Jansen had at the June meeting urged council members to discuss Mr Kupka’s candidature in the open part of their meeting.¹⁶²

260. Two organised groups were present for the public part of the meeting. Some members of the Waikato Students’ Union arrived to express their opposition to any increase in student fees. (They were told by the University Security Officer that some elderly people might also be present and to be very careful should they meet any of them moving up the stairs to the Council Room.)¹⁶³ The other group was much larger: estimates range from 40 to about 100. Most were Jewish, among them four elderly Holocaust survivors, Rabbi Jeremy Lawrence of the Auckland Hebrew Congregation, Mr David Zwartz, President, New Zealand Jewish Council, and Mr Michael Nathan, President of the Auckland Zionist Society. Also present were members of the Waikato/Bay of Plenty Jewish Association and Jewish academic staff, and members of the Auckland Jewish Council and the Auckland Liberal Jewish Community. Standing with them were some members of the academic staff.¹⁶⁴ Before coming up to the council room they had held a demonstration on the lawn below B Block.

261. Professor Gibbs and members of the Waikato/Bay of Plenty Jewish Association emphasised that it was their intention that, as at the June meeting, their attendance at the council meeting would be in the form of a silent presence – a vigil. They left their placards outside. They were under a strict instruction not to speak or interrupt proceedings. Their entrance was quiet and orderly. They wore yellow Stars of David. In keeping with the solemnity of the occasion, Professor Gibbs wore full academics. The Chancellor acknowledged the group and assisted some of its elderly members into chairs. In the absence of the member of council who would

¹⁶⁰ Bliss submission; Bliss interview, 23 May 2001.

¹⁶¹ Ibid; Waikato/Bay of Plenty Jewish Association submission.

¹⁶² Gould interview, 16 March 2001.

¹⁶³ Mecia Stanbury, Waikato Students’ Union, oral submission, 2 April 2001.

¹⁶⁴ Bing to Review, 24 September 2001.

have welcomed them with a mihi, she stood in her place, gave a mihi, and translated it into English. She was very aware of the Stars of David. In an attempt to form a bond of sympathy with the members of the vigil, she said something to the effect that they had obviously come with a sense of concern on a matter that was close to the hearts of everyone present.¹⁶⁵

262. It was as members of the public that the vigil/demonstration stood around the council table. Some of them, however, were much more fully informed about the university's handling of Mr Kupka's doctoral candidature than were council members. In May, in separate applications under the Official Information Act, the New Zealand Jewish Council and the Waikato/Bay of Plenty Jewish Association had asked for comprehensive arrays of documents relating to Mr Kupka. These requests had been met in full up to and including the letter that the FASS Ethics Committee sent to the Postgraduate Studies Committee on 11 May.¹⁶⁶

263. For members of council, the August meeting was the third occasion on which they were required to deal with Mr Kupka's case. There had been informal discussions among them, and they approached the meeting with some fairly clear expectations. They had been concerned at the June meeting that the matter seemed to be drifting but had accepted that council could not do anything while the two university committees were still dealing with it. But it was now two months since the committees had completed their work and council had not received the report it had been promised. This lack of information concerned them and there was a resolve to consider the holding of the inquiry that had been foreshadowed at the June meeting. Members were not all of one mind about what should be done but were agreed that something needed to be done.

264. Dr Ryan expressed surprise that there was nothing on the agenda about Mr Kupka. He was told that the matter would come up when the Vice Chancellor tabled his report. The Chancellor acknowledged Professor Bing as a senior and respected member of the academic staff and invited him to speak and table a paper. He distributed copies of a letter that he had addressed to the Chancellor and spoke calmly to it (Appendix Y).

265. Professor Bing had recently returned to campus and had not until then seen Professor Gould's memorandum of 10 April to council members. His letter to the Chancellor was a critique of it. The Vice Chancellor's statements were misleading, he said. The Bing–Franke letter of 26 November 1999 and the Bing letter of 2 April 2000 had not been tabled by the FASS Ethics Committee or by the Postgraduate Studies Committee. Mr Kupka's doctoral proposal had not been submitted to the Humanities Research and Ethics Committee in June 1998. The Higher Degrees Committee had approved Mr Kupka's enrolment in July 1998 without reference to the University Human Research Ethics Committee. Despite what the Vice Chancellor had informed members of council, proper university processes had not been observed. Professor Bing listed the various people and organisations that had asked the council to set up an independent inquiry into the Kupka affair.

266. The Chancellor invited Professor Gould to read his report. He distributed copies to council members and some members of the delegation, and then read it (see Appendix R). It gave his account of the way the university had dealt with the issues associated with Mr Kupka's studentship. Paragraph 11 of the report was Professor Gould's account of Mr Kupka's statement on killings in the Holocaust.

The main charge against him was based on a statement of which his critics often gave a partial and therefore misleading account. He was asked by an Internet correspondent about his views on the numbers of people killed in the Holocaust. He replied to the effect that he had seen estimates varying from 340,000 to 6,000,000 and that even these estimates were less than precise because they failed to take

¹⁶⁵ Bennett interview, 3 April 2001; Professor Gibbs to Review, 21 March 2001.

¹⁶⁶ Zwartz to Assistant Vice Chancellor, 13 June 2000; Tobias to Gould, 23 May 2000; Callaghan to Zwartz, 13 June 2000; Callaghan to Tobias, 22 June 2000.

account of those who may have died from natural causes in the concentration camps. He went on to say however that an emphasis on the figures alone was an accountant's pre-occupation because the fact remained that many people were killed in the concentration camps. The full statement is therefore hard to reconcile with the allegation that it represented a denial of the Holocaust.

267. Some members of the vigil/demonstration had been given copies of Professor Gould's report and, reading ahead, knew what was in paragraph 11. It was in their view a radical misrepresentation of the meaning of Mr Kupka's statement. When Professor Gould reached the offending clause ('even these estimates were less than precise because they failed to take account of those who may have died from natural causes in the concentration camps'), Professor Bing, Rabbi Lawrence, Mr Zwartz, and some other members of the vigil/demonstration interjected. Some shouted 'Shame!' as Professor Gould read the paragraph. Professor Bing informed me in a submission that he and others were 'enraged' by the statement. He interrupted Professor Gould, he wrote, and said: 'This is a lie, the Kupka text reads including natural deaths, not excluding.' Some others made similar interjections. Professor Gibbs heard Professor Bing say: 'That's a lie!' and Professor Gould say: 'I must say, I find that deeply offensive.' Professor Gould, the Chancellor and some other members of council heard Professor Bing shout 'Liar! Liar!'¹⁶⁷

268. The Chancellor told me that Professor Gould remained outwardly calm and measured under an increasing number of shouts from members of the delegation. She used her gavel to bring the meeting to order. She told the delegation that the behaviour of some of its members was unacceptable. She would close the meeting if it persisted. Order was restored and the meeting proceeded.

269. The Chancellor gave Dr Ryan leave to table his Open Letter to council and invited him to distribute it to members and speak to it (Appendix X). Dr Ryan read it out. It included an apology to members of the Jewish community and others who had been 'offended or injured by the unfolding of this unpleasantness,' and ended with the following motion:

That the Chancellor, in consultation with the Council, establish a committee of inquiry comprising an appropriately qualified person or persons with no direct links to the university to investigate the circumstances surrounding the enrolment and supervision of Hans Joachim Kupka in the Masters and Doctoral degree programmes of the university, and the propriety of his receiving permission from the university to conduct research on the issue of the German Language in New Zealand, and the adequacy of the management by University administrators of complaints and inquiries about Mr Kupka's activities, and such policy and procedural changes as may seem to be warranted through the above investigations, with the report to be submitted by late November 2000.

Sir Ross Jansen seconded Dr Ryan's motion and spoke to it. There were, he said, sincerely held opposing views but the fact that they were opposing views was an important part of the issue. He favoured a public inquiry because, without one, the matter would not rest. Other members spoke in similar terms. Dr Ryan's motion was put and passed on the voices. The Vice Chancellor voted against it and asked that his vote be recorded. The Chancellor abstained.¹⁶⁸

¹⁶⁷ Bing submission #9; Bing, oral submission, 5 April 2001; Gould interview, 5 April 2001; Bennett, interview, 3 April; Gibbs oral submission, 16 March 2001; Gibbs to Review, 4 September 2001.

¹⁶⁸ Notes taken during the meeting by Callaghan, Secretary to Council; interviews with Bennett, Ryan, Gibbs, Ms Alison Annan, Dr Alan Simpson, Gould, Bing, Callaghan; Gibbs to Review, 21 March 2001; Bing to Review, 26 November 2001.

270. The decision was taken against Professor Gould's advice. His position, set out in the report he had tabled, was that the university had dealt with all aspects of the Kupka case 'properly and could not have acted in any other way'. He could see no point in setting up a further inquiry.

*The mere setting-up of such an inquiry would be seen in some quarters as a concession that the university had acted improperly in some way, which I do not believe to be the case. I have complete confidence in those members of academic staff, the University Mediator and in the relevant committees who dealt with the matter. I would be reluctant to take a step which implies some degree of reproach or censure in regard to staff who on the contrary deserve support and commendation for the way in which they have dealt with these difficult issues.*¹⁶⁹

271. Professor Gould took the council's vote as a vote of no confidence in himself. He told the Chancellor that he had no option but to resign. He left the meeting at the end of its open part. Mrs Bennett immediately arranged for one of his confidants to talk with him. Other members of council were also dismayed that Professor Gould interpreted the vote as a vote of no confidence in himself and found ways of reassuring him that he enjoyed their confidence.¹⁷⁰

272. In the confidential part of the meeting, the council set up a sub-committee of the Chancellor, Ms Annan, and Dr Simpson to 'prepare a brief for the inquiry, identify a person to conduct it, and propose a budget for it.'¹⁷¹

Support for the Vice Chancellor

273. Professor Gould's senior colleagues, the deans, and the directors soon knew that he was considering his position. There was more than one opinion among the deans about how well he was handling some aspects of the Kupka case. But at the prospect of losing him to the university, the deans, directors, and his senior colleagues were emphatically of one opinion. They wrote letters to the Chancellor informing her of their concerns. They did not inform Professor Gould of what they were doing and he was unaware that the letters had been written.

274. Professor Selby wrote two letters. The point at issue, he told her, was the 'governance and management of the university'. He drew her attention to something that council might not be aware of. Academic Board at its June meeting had been invited to consider a Law School resolution recommending the setting up of an 'inquiry into the processes relevant to Kupka's candidature' but had allowed it 'to lapse for want of a mover'. As a result, the council 'may now be in conflict with Academic Board on a matter which is about academic processes'. By initiating its inquiry despite the Vice Chancellor's warning, council had ignored the fundamental principle of academic freedom. Professor Selby informed her that if the Vice Chancellor were to resign, he could not serve as deputy or acting Vice Chancellor.¹⁷²

275. Professor Selby's second letter elaborated points made in his first. He referred again to the Academic Board's handling of the Law School resolution. He interpreted the intent behind the fact that, in the absence of any discussion, the item had lapsed for want of a mover. The board, he wrote, 'clearly could not recognise any need for an inquiry,' and was 'of the same view as the Vice Chancellor'. He then drew her attention to the High Court judgment in the matter of restructuring in *Association of University Staff of New Zealand Incorporated v. University of Waikato*. Council had acted against the Vice Chancellor's advice, despite his 'assurance that he ha[d] considered the processes of the relevant committees'. If it were to investigate those processes, council

¹⁶⁹ Vice Chancellor's report to Council, 9 August 2000.

¹⁷⁰ Bennett interview, 3 April 2000; Bennett to Review, 6 September 2001; Simpson to Review, 7 September 2001.

¹⁷¹ Minutes of Council meeting, 9 August 2000

¹⁷² Selby to Chancellor, 14 August 2000.

*should have a strong a priori case ... [But it had] accepted, at face value, papers tabled by one member of Council and one person representing uninvited visitors to the Council meeting, without consideration of their accuracy or even relevance to the matter of Kupka's field of study. To many of staff of the university, Council is acting in disregard of the report of the Vice Chancellor, acting without proper regard for the consideration of evidence, ignoring the functions of Academic Board in academic matters, not requesting information from the relevant committees, interfering in the relationship between employer and staff, and demonstrating that it will give in to pressure from well-organised factions.*¹⁷³

276. Associate Professor Turner and Associate Professor Swain wrote to the Chancellor to express their dismay at the council decision and their support for the Vice Chancellor. They drew her attention to Academic Board's lack of support for the Law School resolution. They told her that if Professor Gould resigned they would no longer serve in their respective roles of deputy and pro Vice Chancellor. Associate Professor Swain had not been present at Academic Board but he informed the Chancellor that its decision 'not to support a call for an inquiry was virtually unanimous'.¹⁷⁴

277. In separate letters, six of the seven deans and the eight directors wrote to the Chancellor in similar terms. The dean of the law school, Professor Gendall, wrote on his own behalf. He affirmed his support for the Vice Chancellor. But as the dean of the school that had supported the resolution for an inquiry, he did not wish to identify with some of the views expressed in the letter his fellow deans had written. He told the Chancellor that he fully accepted 'that Council has an obligation ... to govern the institution in a proper manner and to ensure that the university is managed in accordance with its stated objectives.'¹⁷⁵

The sub-committee reconsiders the council decision

278. The Chancellor and the other two members of the sub-committee reconsidered the council decision in the light of these letters and sought legal advice. They were advised that the council had acted outside its powers and should revoke its decision. The council had 'the power to establish a policy on the circumstances in which a committee of inquiry should be established, but the decision on whether to establish such a committee, or the particular facts on a specific case is a matter which must be decided by the Vice Chancellor.' In the Kupka case there was a question whether, in view of his statements on the matter, the Vice Chancellor was disqualified 'from deciding how the policy should apply due to lack of an open mind'. But the question of his impartiality could be made once the council had decided its policy on the holding of committees of inquiry.¹⁷⁶

279. The sub-committee considered this advice and decided that the council should rescind its resolution. Professor Gould had in the meantime reconsidered his own position. It was clear from the legal opinion that the council sub-committee had received that only the Vice Chancellor could set up an enquiry. In the interests of working relationships with the council and of a resolution of the difficulties that the Kupka case had caused, he decided on his own initiative to set up a review. The sub-committee met Professor Gould and he told them that he was willing to review the university's internal processes using an independent expert. At a meeting on 25 September it recommended:

¹⁷³ Selby to Chancellor, 17 August 2000; Bing submission #14.

¹⁷⁴ Associate Professor Turner to Chancellor, 16 August 2000; Associate Professor Swain to Chancellor, 25 August 2000.

¹⁷⁵ Professors Alcorn, Graham, Koopman-Boyden, Pratt, Price, and Reedy to Chancellor, 18 August 2000; Professor Bedford, Susan Cauchi, Wendy Craig, Carole Gunn, Bob Grant, Sue Pharo, Andrew Simpson, and Mark Topping to Chancellor, 18 August 2000; Gendall to Chancellor, 18 August 2000.

¹⁷⁶ Chen & Palmer, Barristers and Solicitors to Chancellor, University of Waikato, 27 September 2000, pp. 2–3 and p. 4; Bennett interview, 16 March 2001.

- (1) that the legal advice from Chen and Palmer be accepted;
- (2) that the council's resolution to establish a Committee of Inquiry be rescinded;
- (3) that council invite the Vice Chancellor to give serious consideration to undertaking an independent review of the matter.¹⁷⁷

The October council meeting

280. The agenda for the October council meeting included a statement from the Vice Chancellor. Professor Gould welcomed the sub-committee's recommendation not only for himself but for 'those staff who have discharged their responsibilities well and effectively in the university's interests'. Given the public controversy over the case, he acknowledged that 'some further step may be required to satisfy opinion both on and off the campus that the university had handled the matter correctly.' He had again 'fully reviewed' the record which, as a result of the university's response to requests under the Official Information Act, was now virtually entirely in the public domain. 'The University has nothing to lose and something to gain from making that record available for independent review.' He would consult, prepare terms of reference, and invite 'a suitably qualified person of independent judgment and with no connection with the university to conduct the review.'¹⁷⁸

281. Council received the sub-committee's report and adopted its recommendation. Professor Gould reported to council at its December meeting that he had engaged a reviewer. The *Official Circular* of 20 December published the terms of reference of the review and called for submissions. Another notice published in the *Official Circular* of 15 January 2001 announced procedures for the conduct of the review¹⁷⁹ (Appendix A).

¹⁷⁷ Report of the sub-committee appointed by the University Council regarding the proposed terms of reference for a Committee of Inquiry, 25 September 2000; Simpson interview, 5 April 2001; Ryan to Review, 13 September 2001; Gould to Review, 10 October 2001.

¹⁷⁸ Statement by the Vice Chancellor, 5 October 2000.

¹⁷⁹ *Official Circular*, no. 50, 20 December 2000, and no. 2, 15 January 2001.

Part 2: The General Outcome

282. The terms of reference for the review invite me to consider ‘the general outcome’ of the Kupka case. Aftermath would be a better word to characterise the situation in the university following Professor Gould’s announcement at the October council meeting that he would institute a review of the Kupka case. Mr Kupka’s resignation brought a widespread sense of relief. Professor Gould could rightly say that the relevant university processes had been applied in his case. The university had honoured its statutory duty to uphold his right to freedom of expression and academic freedom. Mr Kupka had made his own decision after assessing his options.

283. That is not how Mr Kupka interpreted his resignation. He and Associate Professor Knuefermann believed that the committees that had examined his research had proved to be devices for ensuring that it could not continue. Mr Kupka saw them as a continuation of the campaign against him by other means. He had resigned because he was convinced that, by one means or another, either the University Human Research Ethics Committee or the Postgraduate Studies Committee would have made it impossible for him to continue with his research.

284. For the university’s critics, Mr Kupka had been the cause of their concerns but was no longer their prime objective. They had strong suspicions that a string of wrong decisions had landed the university in the invidious position in which it had found itself. Mr Kupka’s departure did nothing to resolve their concerns. They were determined that, one way or another, the university would submit its handling of Mr Kupka’s enrolment and subsequent academic progress to an independent scrutiny. Until that happened, the root causes of the Kupka saga would remain undisclosed.

285. The university’s critics thus remained emotionally locked into the Kupka case. They made good use of their rights under the Official Information Act to gain access to all university documents relevant to Mr Kupka’s studentship. Individuals and organisations tested the official record against their surmises and prepared submissions for the review. Their presiding assumption was that the university had acted wrongly in various ways. All the questions that had earlier been put to the university by its critics would be relitigated in submissions to the review.

286. The aftermath was different for Professor Gould and those who had been directly involved in the university’s handling of the affair. They had also come through a torrid time. But institutional life goes on. The Kupka case raised issues about the way the university should conduct its affairs. How well it had done that remained in dispute. Important as it was, however, it was only one of many important matters that the university was dealing with at the time. Once Mr Kupka resigned and the crisis was over, university managers and committee members had other more pressing matters to attend to.

287. But for them, too, the issues remained unresolved. They knew that in the perceptions of their critics the university had made some wrong decisions and they quite understandably felt that they were personally implicated in blanket accusations. If their critics expected an independent review to endorse their allegations, they, for their part, hoped it would vindicate their part in it. That is the note that Professor Gould struck when he announced the review. He was convinced that his colleagues had acted ‘well and responsibly’. An independent review, he reported to council, would ‘satisfy opinion both on and off campus ... that the university had handled the matter correctly’. The heat of battle could be felt in that statement. Any general outcome still lay in the future.

Part 3: Issues and university processes

The subject of the review

288. From July 1995, when his Internet publications first became known in the German department, Mr Kupka was a focus of attention. Once he was publicly identified by *Nexus*, he was the central figure in what was variously referred to as the Kupka affair, the Kupka saga, the Kupka scandal, and the Kupka case. The title of this review and its terms of reference are written around Mr Kupka and the way that the university dealt with him as a postgraduate student. All but one of the submissions to the review were written on the premise that without Mr Kupka's Internet postings there would not have been a Kupka case.

289. Mr Kupka's submission is the exception (Appendix G). He accepted my invitation to make one. But he was, he wrote, puzzled by the subject of the review. It should not be him who was being 'put on trial,' he wrote, 'but those who have constantly made defamatory remarks and spread lies about me.'

290. His submission repeated points he had made in self-defence in earlier correspondence with the mediator, the *Waikato Times*, and the Vice Chancellor. 'I have never,' he wrote, 'in public or privately, in writing or verbally made comments that are anti-Semitic.'

It ought to be possible to discuss topics as difficult and loaded as the Third Reich, the Holocaust, and genocide in general, wherever it occurs, and it must be possible (even for a Ph D student) to discuss these matters publicly, openly and without threat of being labelled a Holocaust denier and an anti-Semite.

But in the prevailing international climate of 'political correctness,' he wrote, to question the 'uniqueness of Hitler's crimes against the Jews ... amounts to Holocaust denial.'

291. Mr Kupka explained his involvement in Internet public forum newsgroups and use nets. These were usually political discussions. He found it 'virtually impossible to discuss contemporary German politics without being perennially reminded of Germany's Nazi past,

whether the subject was foreigners in Germany, election results, or Germany's role in the European Union. Holders of 'conservative views' were expected to shut up immediately whenever others used the ultimate argument: the Holocaust. If one did not immediately comply, one was called a Holocaust denier.

292. He had never, he wrote, been 'an extremist'. He was 'socially engaged' in the Social Democrat Party when Willi Brandt was its leader. He and his wife are born of Jewish descent. His years at Waikato have left a bitter taste. He had been harassed by a few members of the academic staff since October 1998. Since then 'the allegations raised against me have been ever changing and have become ever more comprehensive.' Despite the efforts of several people, 'not least by Bethea Weir,' he had not been given the opportunity to try to have the matter resolved 'in face-to-face meetings of all parties concerned'. He believes his opponents deliberately avoided meeting him.¹⁸⁰

Mr Kupka's publicly expressed opinions

293. It was through a website that displays and stores statements by alleged Holocaust deniers that Mr Kupka's Internet publications became known in the university. It was as an alleged Holocaust denier that ten Jewish colleagues made out their claim against him in their letter to the mediator in October 1999. The publication of the opinions of the four Holocaust scholars further increased the emphasis on the Holocaust-denying character of Mr Kupka's postings. It was as a Holocaust denier that *Nexus* presented him, and it was against that charge that Mr

¹⁸⁰ Kupka submission.

Kupka defended himself in the *Waikato Times* in April 2000. Professor Gould concentrated on the charge of Holocaust denial in various statements in the following months. The Holocaust – dramatically recalled by the presence of Holocaust survivors in the vigil-demonstration at the August council meeting – was a main concern of Mr Kupka’s opponents on campus.

294. Mr Kupka’s submission is that he has been seriously and consistently misrepresented. He holds, he says, conservative views, but is not a Holocaust denier or an anti-semite. I took careful note of these views as well as the views of the four Holocaust scholars and of Professor de Ras, all of whom have given expert opinions on Mr Kupka’s postings in the context of discourses that have been constructed about the Nazi era.

295. Mr Kupka’s Internet postings add up to an estimated 3,000 pages. They express his opinions on various topical political issues in German politics. They can be considered as a discourse: a set of texts whose stated and implied meanings are conveyed by Mr Kupka’s choice of topics, his choice of language in articulating them, the arguments and allusions he employs to support them, and, in the context of an Internet use-group, his attitude to the opinions expressed by other correspondents. Both the ideas being expressed and the linguistic means employed to communicate them are essential components of a discourse. The nuances of language, as Professor de Ras stressed in her letter to Professor Gould, are all-important. Most German speakers and most researchers of Nazism and extreme right wing nationalism, she wrote, would ‘immediately recognise’ the language of Mr Kupka’s Internet postings. But that recognition got lost when translated into English.¹⁸¹

296. With Professor de Ras’ cautionary words in mind, I took advice from Rolf W Brednich, Professor Dr Emeritus of Anthropology, University of Gottingen. Professor Brednich is a specialist in folklore studies, including the emergence of urban myths. His report is in Appendix J. It is based on an analysis of a randomly selected sample of 700 pages of Mr Kupka’s postings; a file of postings presented in evidence by Mr Franke; and the opinions of the four Holocaust scholars who had analysed a different randomly chosen sample of his postings. The report places Mr Kupka’s postings in the context of the newsgroup in which he was participating, makes some general remarks about his postings and the style of his contributions, and summarises his political views.

297. Professor Brednich concludes that Mr Kupka’s ‘attitude is clearly *racist* and *anti-Semitic*’. The emphases are his. There can be no doubt, he says, about Mr Kupka’s ‘hatred of immigrants’. For Mr Kupka, too, ‘being Jewish is an inherited characteristic of blood, and he therefore defines Jewish people as belonging to a unique “race”.’ He ‘has a clearly defined opinion of the Holocaust’. He uses the words ‘fake’ and ‘Holocaust’ close together wherever possible. He does not deny that there were mass-killings of Jews ‘but always stresses that Gypsies, homosexuals and communists’ had been killed in the concentration camps as well. He repeatedly asserts that the gas chambers at Auschwitz were a fake and the buildings later constructions. He plays down the Nazi mass killings. He supports other prominent German Holocaust deniers. He uses three derogatory terms:

Holocaustery’ (*Holochausterei*) for the attempt to keep the memory of the events alive, ‘*Holocauster*’ for those who make a business out of it, and ‘*Holocult*’ for the ‘myth’ which surrounds the Holocaust discussions in the form of books, media reports, films, etc.

298. In a draft of his report that I sent to Mr Kupka for comment, Professor Brednich stated that Mr Kupka had ‘coined (or adopted?)’ these three terms. Mr Kupka informed me that he had not coined any of them. He was, however, prepared to employ them. In his submission to the review, Mr Kupka quoted nine statements from his postings as evidence that he is not a

¹⁸¹ de Ras to Gould, 12 June 2000.

Holocaust denier. I asked Professor Brednich to return these statements to their contexts and comment on them. He was able to locate only one of them through the search engines available to him. He concluded that the one statement he was able to contextualise was a reiteration of the Holocaust-denying nature of Mr Kupka's postings.

299. I also asked Professor Brednich if there was any evidence in the postings of a reduction of anti-semitic statements from the middle of 1998. Dr Knuefermann had told me that he had spoken to Mr Kupka about his Internet postings when his doctoral application was being considered. He had asked Mr Kupka if he was expressing anti-semitic views and he said he was not. Associate Professor Knuefermann told him that he would regard the posting of anti-semitic views as 'totally inappropriate and abhorrent' and would not supervise his research if he published such views. Dr Knuefermann told me that Mr Kupka told him that he was part-Jewish and gave 'an absolute assurance' that he would not post anti-semitic views. I asked Mr Kupka if, at the time of his doctoral application, 'he was strongly advised by someone in the university to tone down [his] Internet postings by refraining from anti-Semitic comments.' He replied that no one in the university had asked him to do that 'as I am neither an anti-Semite, nor was/am I making such comments'. Professor Brednich, on the basis of his analysis of postings made by Mr Kupka in January 1999, found no change in the nature of his postings. 'In fact,' he reported, 'I detected an increasing amount of aggressive anti-Semitic statements.'

300. Associate Professor Knuefermann's cautionary remarks, Mr Kupka's response to them, and the evidence of his subsequent postings seem to me to throw a revealing light on Mr Kupka's perceptions of himself and of his publicly expressed opinions. He appears to have had no difficulty in responding to Associate Professor Knuefermann's advice because his view of himself is that he is not an anti-semite. But Professor Brednich, with other Germans and German-speakers who have read his Internet publications, is in no doubt that they constitute a racist, anti-semitic, Holocaust-denying discourse.

301. Professor Brednich summarised his conclusions as follows:

*In regard to everything I have read from him and about him I am convinced that Hans Joachim Kupka is an ideologue of extreme right-wing views rather than a scholar; and that instead of scholarly debate his style is that of unsubstantiated assertion and at times abuse.*¹⁸²

Professor Brednich employed the definition of Holocaust denial used by Hon. Mr Justice Gray in his judgment in the Irving libel trial. Considered under that definition, Mr Kupka's statements on the Holocaust belong to the discourse of Holocaust denial. Professor Bing made his own analysis, using the analytic categories of the court judgment, and reached the same conclusion.¹⁸³

302. I invited Mr Kupka to comment on Professor Brednich's report and my draft of this section of the report. He noted Professor Brednich's finding that he did not deny that there were mass killings of Jews. He pointed out that in the posting with his one reference to Holokult he called the Holocaust an 'outrageous crime'. Where, Mr Kupka asked, is the evidence that he is a Holocaust denier, a racist, or anti-semitic? He concluded:

*As it seems to lead nowhere to defend myself and since I am the only one in this process to provide again and again evidence of my innocence, while my opponents don't even attempt to come forward with proof for their assertions, I shall stop here and now in my endeavour for a fair judgement.*¹⁸⁴

¹⁸² Knuefermann interview, 3 April 2001; Review to Kupka and his reply 27 June 2001; Brednich to Review, 10 June 2001.

¹⁸³ Bing submission #9.

¹⁸⁴ Kupka to Review, 29 September 2001

303. On the evidence available to me I have concluded that Mr Kupka's views on the Holocaust are to be seen, with his anti-semitism and racism, as related features of an ideology of extreme right-wing German nationalism. That said, however, it is not for this review to examine the exercise of this human right to freedom of expression. So far as Mr Kupka is concerned, its main focus is on the university's management of his doctoral candidature and of the ethical issues associated with it or arising from his research methodology.

Finding

1. Mr Kupka's published opinions are in my view of a racist, anti-semitic, and Holocaust-denying character.

Enrolment

304. Mr Kupka's academic record as a BA student at Massey did not become an issue until late in 1999. As part of the mediation process, the mediator, with the Vice Chancellor's agreement, informed Professor Bing and Mr Franke of his BA grade average. This she did in the interest of ensuring that all parties to mediation had access to the same information.

305. It was when they thought about Mr Kupka's enrolment in retrospect that Mr Franke, Professor Bing, and some other members of the academic staff wondered if it had been the first of what they were seeing as dubious decisions made in the German department in his favour. Why had he been admitted with only a C+ grade average? Mr Kupka's opponents were driven by a larger fear. He had been identified by the Nizkor Project as one of the 400 leading Holocaust deniers. Leaders of the Holocaust denial movement in its pseudo-intellectual guise of Historical Revisionism were trying to gain international academic respectability through spokespersons with doctoral qualifications. Was that what Mr Kupka was up to? Deborah Lipstadt's, *Denying the Holocaust*, had given a detailed account of the means by which the Historical Revisionist were attempting to infiltrate universities in Europe, North America, and Australia. Why should New Zealand be immune? Mr Franke informed me that '[d]emocratically minded Germanists' considered it their moral duty 'to be vigilant and to openly discuss, expose and criticise/reject any texts that deny historical facts and defame the victims' of Nazism.¹⁸⁵ Was Waikato, to use the words of Mr Kupka's critics, 'falling over backwards' to help Mr Kupka get a Ph.D? Was it wittingly or unwittingly involved in a conspiracy?

306. Then, in May 2000, as already noted in paragraph 178, Dr Vieregk of the Massey German department supplied more information about Mr Kupka, including his previous membership of an extreme right-wing German political party. Mr Kupka had intended to enrol for a Massey BA Hons or MA and had held discussions with members of the German department at the end of 1994 and early in 1995. His teachers knew nothing about his Internet postings. He proposed three thesis topics as possibilities: a literary study of the works of Karl May; the political tendencies of Baldur von Shirach, who had been in charge of Nazi youth organisations; and Franz Schoenhuber, the founder of Die Republikaner Partei. There was some support for the Karl May topic but no one in the German department was prepared to supervise Mr Kupka on either of the others. Massey decided not to enrol him. The decision was made on academic grounds. He had not been a particularly strong student. The usual requirement for entry to a postgraduate course in German was a B average. Dr Laurs, the head of department, discussed his application with the dean, who agreed that Mr Kupka could not be enrolled and, as far as he was aware, wrote to inform him.¹⁸⁶

307. Mr Kupka gave me a different account of what happened. Late in February 1995 he was told informally that the Karl May topic would be approved but he would have to move quickly to

¹⁸⁵ Franke to Review, 5 July 2001.

¹⁸⁶ Laurs to Review, (telephone conversation), 5 June 2001.

complete his enrolment. He, his wife, and one of his daughters drove to Massey to do this and to sort out his living arrangements. During the trip, his daughter asked him why he should not study at Auckland or Waikato, both of which were nearer Tauranga. When he found that Waikato would give full credit for his Massey BA, he decided to enrol there.¹⁸⁷

308. Four former deans stated in submissions that the academic standard for admission to BA (Hons)/MA humanities and social science courses of study was at least a B and for some departments a B+ grade average combined with prerequisites in the subject of study.¹⁸⁸ Special consideration could be given to students whose records showed that they were overcoming earlier shortcomings. There would be an expectation of consultation with the department in which the applicant wished to study and in some cases agreement to a conditional enrolment. There does not seem to have been any discussion in the German department about Mr Kupka's enrolment. Dr Laurs told me that he received no inquiry from Waikato about Mr Kupka's academic potential. He was surprised not to have been consulted on an applicant who in his opinion was in his view clearly marginal.

309. Professor Oettli informed me that there was nothing particularly unusual about the application. It was for enrolment in the BA Hons programme and there was no indication that Mr Kupka intended to proceed to MA. Professor Oettli did not regard it as a marginal application. The Academic Services Division had checked Mr Kupka's Massey qualifications and they were in order. Professor Oettli does not think he would have consulted Associate Professor Knuefermann. He had long been a member of the German department himself and still did regular teaching in it. He had previously, while chairperson, admitted a student with a C+ average for an MA programme after interviewing her and telling her that she was marginal. She had gone on to complete an MA. He had not on that occasion discussed her case with the then dean. He does not recall any occasion during his own time as dean of the faculty when a departmental chairperson consulted his opinion on a marginal BA Hons applicant. He was comfortable enrolling Mr Kupka, 'since it was for the BA Hons rather than the MA degree'. The decision whether Mr Kupka could proceed to MA would be made at the end of the year on the basis of his BA (Hons) results.¹⁸⁹

310. At my request, the university produced the BA grade point averages of the 21 internal students admitted to the BA Hons and MA in German from 1990–99. Of these, seven had A (A++, A+, A, and A-) averages, six had B+ averages, two had B averages, five had B- averages, and one had a C+ average. Not all of these students completed the BA Hons or MA.¹⁹⁰ Professor Oettli's decision was vindicated by Mr Kupka's results for his BA Hons year (assuming that the standards of the German departments at Waikato and Massey were reasonably comparable).

311. Professor Oettli's decision to enrol Mr Kupka fell within his authority as dean. It may or may not have been unusual in the humanities school (I did not examine the practice of other schools at the time of Mr Kupka's enrolment) but it was not, as has been alleged, irregular.

Finding

2. Mr Kupka's enrolment for a BA (Hons) degree in German met the university's formal requirements.

Mr Kupka's MA papers

312. Four matters of process relating to the papers Mr Kupka took for his MA were raised in submissions to the review. The first was the question why additional papers were added to the

¹⁸⁷ Kupka to Review, 8 March 2001, and 27 June 2001.

¹⁸⁸ Nieschmidt submission; Barber submission; Walker submission; Bing submission # 1.

¹⁸⁹ Oettli to review, 14 September 2001; Pamela Moss, memorandum to Review, 23 February 2001.

¹⁹⁰ Michelle Jordan-Tong, Group Manager, Academic Administration, to Review, 7 September 2001.

prescriptions for an MA in German. Why, it was asked, was Mr Kupka not able to select eight papers from the courses already available? The other three related to the three new papers, one of them taught for the first time in the first year of Mr Kupka's course, the other two in his second, all three of which he included in his study programme. Had these papers been properly authorised? Why were they double-weighted papers? Why was there no requirement for one of them – 0204.540, Report of an Investigation (two papers) – to be externally assessed?

313. Dr Knuefermann doubted, he informed me, if it would have been possible for Mr Kupka to have been able to put together four papers for his MA year from the existing MA prescriptions. Associate Professor Knuefermann had ruled out a dissertation or thesis. The options that Mr Kupka chose – the special topic and the report of an investigation, both of them double-weighted – broadened his range of choice and enabled him to complete the required eight papers. Professor Oettli and Dr Knuefermann both assured me that the introduction of non-specific papers was consistent with university academic policy. Such papers gave students and staff the scope to devise final year programmes suited to a student's strengths and interests.¹⁹¹

314. The three double-weighted papers taken by Mr Kupka raise questions of academic process. None of the papers was published in the university calendar for the year in which they were first taught. The Language, Culture and Business paper was introduced in 1995 but not published in the calendar until 1996. When published, it was designated as a one-paper course. But Mr Kupka was credited with it as a two-paper course. That raises a question: did he take it as a single or a double weighted paper? The two papers introduced in 1996 were not published in the calendar until 1997.

315. Had these papers been properly approved? The university's standard procedures for the approval of new courses are worked through during the first half of the year prior to the one in which they are to be introduced. Departments submit lists to the Academic Services Division. Compilations of new proposals are considered by the appropriate board of studies, which makes recommendations to the Academic Programmes Committee. That committee, acting under delegated authority of Academic Board, approves the university's course offerings for the following year. Approvals for 1995 were given on 2 August 1994 and, for 1996, on 13 and 14 June 1995.

316. At my request, Helen Matich, Deputy Group Manager, Academic Administration, investigated the process by which the three papers in question were approved. No records of their approvals are held in the Academic Services Division. There is no record of any of them being approved under the standard approvals procedure. Ms Matich explained what she thinks will have happened. They would probably have been approved under a procedure authorised by section 9 of the *University of Waikato Rules of Procedure* for the council and its committees. This provides for chairpersons of committees to act for their committees between meetings. Proposals for new courses not submitted in time for consideration under the standard annual process would be approved by the relevant dean, acting on behalf of the board of studies, and the chairperson of the Academic Programmes Committee. These out-of-time approvals are to be reported to the next regular meeting of the committee. There is no record in the minutes of the Academic Programmes Committee of any of the course approvals in question having been reported back to it. None of those who would have dealt with them are still in the university. Dr Carr, who chaired the Academic Programmes Committee at the time, does not recall having had anything to do with the approvals, but commented that some of the matters I raised with him seemed unusual, 'particularly the double weighting'.¹⁹² Ms Matich assured me on the basis of her own experience in administering course approvals that no new course approvals would be entered into the computer without a clear written instruction from the appropriate authority.

¹⁹¹ Oettli interview, 24 May 2001; Knuefermann to Review, 8 July 2001.

¹⁹² Dr Malcolm Carr to Review, 31 July 2001.

317. It is of course to be expected that for various reasons some new courses will be approved each year outside the standard procedure. There were 27 such courses taught for the first time in 1995 and 22 in 1996. But that does not explain why the Language, Culture and Business paper, approved as a two-paper course, was published as a one-paper course when it was first published in 1996. Ms Matich thinks that that was simply an error. The *1996 Calendar* was prepared by hand and that item may have been missed by the person compiling it.

318. The key point, however, is whether Mr Kupka and the three other students who took the paper in 1995 were credited with it as a one or a two-paper course. They were credited with completing a two-paper course. Three students were in their second MA year and Mr Kupka was in his first. The question has been raised whether he undertook the course as a one-paper course while the other three did it as a two-paper course. Mr Kupka's enrolment payment for that year includes a two-paper fee for 0204.532 Language, Culture, Business. His Graduate Results, which were sent to him on 12 February 1997, recorded his courses and grades for his completed MA. That course is recorded as a two-paper course.

319. That raised another question in some minds: Did Mr Kupka complete all requirements for the course during the 1995 academic year? There was a suspicion that some of the course work may have been completed out of time, in which case his recorded pass in the paper would be irregular. Dr Knuefermann assured me that Mr Kupka completed all requirements for the course. It was normal, he informed me, for students doing Masters projects to have until early February in the following year to complete all their course work. Their work would be assessed and the mark submitted through the dean's office to the examinations division. Some submissions to the review questioned whether one of Mr Kupka's grades was correctly recorded but Professor Nieschmidt had cleared up any misunderstanding in his open letter of 6 December 2000.¹⁹³

320. Except for the question of whether the paper should have been approved as a double-weighted paper, I received no adverse comments about the content of 0204.550 Special Topic (two papers). But 0204.540 Report of Investigation (two papers) came in for intense critical scrutiny. The questions to be answered are: Why was it necessary to introduce this paper into prescriptions that already included a one-paper dissertation? Why was it approved as a double-weighted paper; and why was there no requirement for it to be externally assessed? If the course proposals had been submitted under the standard procedures to the School of Humanities Board of Studies, these and no doubt other questions would probably have been raised. Dissertations and theses were subjected to a requirement of external assessment. Why should a one-paper dissertation have to be externally assessed but not a two-paper report on an investigation? If the department was wanting to tidy up the research options in its MA prescriptions, why not introduce a two-paper thesis, which would provide a better route for students planning to go on to do a Ph.D?¹⁹⁴

321. The answers I received to these questions described academic processes but did not explain why paper 0204.540 Report of an Investigation would have been approved as a double-weighted paper with no requirement to be externally assessed. I spoke to Associate Professor Turner, Deputy Vice Chancellor (Academic) about current policy relating to the approval of double-weighted papers. That, she informed me, is being dealt with through a credit points system recently approved by the Academic Board. The new system requires a comprehensive review of the workloads of all papers and an alignment of credit points and equivalent full time student (EFTS) values.¹⁹⁵

¹⁹³ Nieschmidt, open letter, 6 December 2000; Matich to Review, 17 May 2001; Memorandum for Examinations, Graduate Results, Hans-Joachim Kupka, 12 February 1997; Bing submission #29; Gibbs and Bing submission, 18 April 2001; Gibbs to Review 27 April 2001; Knuefermann to Review, 8 July 2001.

¹⁹⁴ Bing submission # 22

¹⁹⁵ Knuefermann to Review, 8 July 2001; Oettli interview, 24 May 2001; Turner interview, 22 May 2001; Dr Malcolm Carr to Review, 31 July 2001; Turner to Review, 9 October 2001.

322. There are two further points to note. In 1999, the university had 163 courses that were described as directed studies or reports on investigations. Of these, Course 0204.540 Report of an Investigation and 0204.550 Directed Study were the only double-weighted courses. Mr Kupka was the only student enrolled in 0204.540 in 1996. No other student enrolled in it up till 1999, when it was replaced by 0204.590 Directed Study as a one-paper course. Paper 0204.550 remains as a double-weighted paper but is now, with all other German MA papers, subjected to external assessment. The course prescriptions now include a dissertation equivalent to two papers.¹⁹⁶

323. A copy of Mr Kupka's report on his investigation was submitted to the review, together with an external assessment of it made by a teacher in a history department in a New Zealand university.¹⁹⁷ I was asked to have it externally assessed. I gave careful thought to the propriety of doing that. A question that weighed heavily with me was whether, at this late stage, an assessor could remain oblivious to the publicity that surrounded Mr Kupka's doctoral candidature. But the lack of external assessment of the report had become a central issue for Mr Kupka's critics. I had one in evidence. I decided, on balance, that it was preferable to try to have Mr Kupka's report assessed and that such an assessment should be made by someone teaching in a German department. The appropriate department to approach, in my view, was the department of Germanic Languages & Literature, University of Auckland, whose teachers had had a long-standing external assessing relationship with the department of German at Waikato. Associate Professor Bade agreed to have an assessment made. He and Associate Professor Voit undertook it and reported jointly on it (Appendix K).

324. The subject of the report was: 'Germany and the Germans as reflected in the New Zealand Press.' The external assessment concluded that the report was primarily descriptive. The news items it included were not interpreted or evaluated in any depth. But the 'main weakness' of the report was not in the way it dealt with its material but in its methodology. The research was limited to one newspaper which, though with a large circulation, was by no means national in its coverage. A better title for the investigation would have been: 'Germany and the Germans as reflected in the *New Zealand Herald*.' 'In short, the assessment noted, 'the content of Mr Kupka's report does not fulfil the expectation of the title and introduction.' Associate Professor Bade and Associate Professor Voit concluded:

The report is a moderately interesting comment on the reporting of overseas news and events in a major New Zealand newspaper. Given major weaknesses in methodology, however, we would assess it at a grade of C+/B-.

They noted that there were 'no indications of rightwing, neo-Nazi or political extremist bias' in the report.¹⁹⁸ The external assessment supports the reservations that the late Professor Nieschmidt and Dr Jones came to have about Mr Kupka's intellectual calibre and his suitability for doctoral research.

325. The absence of a documentary record makes it impossible to discover the reasons for proposing or the grounds for approving the three papers under discussion as double-weighted papers. Few, I imagine, would disagree with a policy for course prescriptions that enabled students under proper guidance to construct MA programmes that allowed them to reach acceptable standards while playing to their strengths. But the introduction of the two double-weighted papers in 1996 was a major change in the MA prescriptions for German. In the absence of evidence, there can be no way of knowing how far, if at all, the issue of fairness to students choosing single-weighted papers was considered in the department or in the faculty. Questions about the provenance of Mr Kupka's MA results were among the main reasons why

¹⁹⁶ Matich to Review, 5 June 2001; Callaghan to Review, 14 August 2001; Michelle Jordan Tong to Review, 7 September 2001; *2000 Calendar*, University of Waikato, p. 373.

¹⁹⁷ Bing submission #20.

¹⁹⁸ Associate Professor Bade and Associate Professor Voit to Review, 17 July 2001.

his critics wanted the university's handling of his case subjected to independent scrutiny. The allegation was that 'the university had leaned over backwards' to enable him to embark on a Ph.D. The documented facts are that two non-specific, double-weighted papers were taught in the German department for the first time in Mr Kupka's MA year and he took both of them.

326. Quite apart from the weight if any to be given to the external assessment of his report for 0204.540, Report of an Investigation, there is a question about the provenance of the MA Second Class, First Division awarded to Mr Kupka. I note from a memorandum written by Professor Selby that 'at the time Kupka was enrolled [as an MA student] there was not a rigorous enforcement of a particular set of conversion grades in terms of letters being the equivalent of a particular level of honours.' The marks on which the grades for Mr Kupka's papers were based are not available. They were not transmitted to the Student Administration but that, I was informed, was not unusual in the university at the time. It is, however, possible to do some notional calculations. Course grades are based on marks out of a hundred. The range of marks for the various grades awarded Mr Kupka are: 60–64 = B-; 65–69 = B; 70–74 = B+. Dr Jones told me that his mark was 'right in the middle of the B range'. Professor Nieschmidt told me that the mark for his double-weighted paper was just above the border between B and B-. If Mr Kupka's marks for each of the other five papers were one mark or more below the top of the range for the grade, his average would have fallen below 68, the lowest point on the average mark range needed to qualify for Second Class (First Division) Honours. Any revision downwards of the grade to be awarded his Report of an Investigation following consultation with external assessors would have reduced his average mark to less than 68 and he would have been awarded Second Class (Second Division) Honours.¹⁹⁹

327. This review of university processes as they applied to the consideration and approval of three papers taken by Mr Kupka in his MA year discloses a very unsatisfactory situation. Whether it was confined to the German department is not for this review to inquire into. But I note the critical comments in the Academic Audit Report of the New Zealand Universities Academic Audit Unit, which was written in 2000. The university, it reported:

*has few quality assurance requirements related to graduate study and relies on surveys of the practices at school level to inform itself of the mechanisms schools have in place. For [Waikato] to be able to make confident statements about the quality of the offerings at graduate level, the Panel believes that [it] must establish a set of guidelines, with required and recommended components.*²⁰⁰

Findings

3. Mr Kupka's course of study met the university's requirements for the award of the degree of Master of Arts in German as prescribed at the time.
4. None of the three papers of interest to this review was submitted to the university's usual processes of consultation and decision at departmental, faculty, and university level.
5. Papers 0204.532 (two papers), 0204.540 (two papers), and 0204.550 (two papers), were approved under the section 9 procedure without proper accountability.
6. It is not possible to confirm whether Mr Kupka's average marks qualified for the award of an MA Second Class Honours (First Division).

¹⁹⁹ Selby to Gould, 26 September 2000; Michael Richardson, Deputy Group Manager, Student Administration to Review, 6 August 2001; Dr Jones interview, 23 February 2001; Nieschmidt oral submission, 20 February 2001; Michael Richardson to Review, 19 September 2001; Richardson to Callaghan, 19 September 2001; Dr Temple to Review, n.d. [19 September 2001]; Knuefermann to Review, 6 October 2001.

²⁰⁰ New Zealand Universities Academic Audit Unit Te Wahanga Tatari Kaute Tohungatanga o Nga Whare Wananga o Aotearoa, The University of Waikato Te Whare Wananga o Waikato, *Academic Audit Report*, November 2000, pp. 20–21.

Dean Oettli's meeting

328. The meeting that Professor Oettli held with Mr Franke, Associate Professor Knuefermann, and Dr McKim at the end of May 1998 became a leading item in questions about the way the university had dealt with Mr Kupka's doctoral application. In their letter to the FASS Ethics Committee of 26 November 1999, Professor Bing and Mr Franke criticised the meeting as a 'new ad hoc committee' that made decisions that should have been made by the Humanities Research and Ethics Committee and the Higher Degrees Committee. Ms Weir's report to Professor Gould referred to the meeting as an 'ad hoc group' and attributed to it the 'view that there was no barrier to the enrolment proceeding'. In his letter to Professor Middleton of 2 April 2000, Professor Bing wrote:

The whole [cultural safety] issue has come about because Professor Oettli and Associate Professor Knuefermann as Chief Supervisor of the Kupka thesis, rejected the assessment of Mr Norman Franke, a Lecturer in the German Department, and Professor Bing that Mr Kupka's voluminous Internet writings (well over 3000 pages) were anti-Semitic, neo-Nazi, racist, and of a Holocaust denying nature.

329. Paragraphs 30–33 give an account of the meeting. It was, as Ms Weir described it, an 'ad hoc group' but it was not a 'new ad hoc committee'. Associate Professor Knuefermann had proposed to Professor Oettli that he set up a committee but Professor Oettli had decided not to do that. He regarded the meeting as an informal meeting. Its purpose, he informed me, 'was to ensure that the two protagonists could express their views on whether Mr Kupka should be permitted to present his proposal to the Higher Degrees Committee.' Mr Kupka's proposal was not before the meeting and was not discussed. Mr Franke's memorandum of 11 May (Appendix C) provided the agenda. It included three quotations from Mr Kupka's German-language postings on the Internet.

330. The meeting did not act as a committee. There was no deliberation, no motion was put, and no record was kept. Professor Oettli made his decision after the meeting and conveyed it in a confidential memorandum to those who had been at it. The decision was:

that Mr Kupka should be permitted to proceed with his application. The decision about the academic merit of his application rests with the Higher Degrees Committee, any other matters would now have to be considered by the Vice Chancellor on behalf of Council in the first instance.

331. It is difficult to know what other decision Professor Oettli could have made. Mr Franke had outlined concerns about Mr Kupka's academic standing and about his 'intellectual capacity and moral maturity'. But the university had awarded Mr Kupka an MA Second Class (First Division), the academic prerequisite for enrolment as a doctoral candidate. It would be in breach of its own regulations if it refused Mr Kupka the opportunity to have his application considered by the Higher Degrees Committee. The decision of that committee, Professor Oettli recorded in his decision, would be made on the 'academic merit' of his application.

332. Professor Oettli had not seen Mr Kupka's application but he knew about it in general terms from Associate Professor Knuefermann. The role he was performing as dean was to be the arbiter in a disagreement between Associate Professor Knuefermann and Mr Franke, and to remove any possibility of conflict of interest for Associate Professor Knuefermann. But the responsibility of approving Mr Kupka's application for submission to the Higher Degrees Committee was Associate Professor Knuefermann's to exercise, as departmental chairperson, and he did.

333. It was only when later events cast shadows over Professor Oettli's meeting that its purpose came to be questioned. Certainly, it cleared the way for Mr Kupka to proceed to the next stage. It also put an end to any further argument in the German department on whether Mr Kupka's

political opinions should stand in the way of his making an application to the Higher Degrees Committee. But it did not limit in any way Professor Knuefermann's responsibility, as Mr Kupka's prospective chief supervisor, to satisfy himself that the proposal would, in his own words, stand up. Nor did it trench on the responsibility of the Higher Degrees Committee. Professor Oettli had invited Dr McKim to the meeting so that, as pro dean and a member of the committee, 'she would be aware of all the issues surrounding the proposal if it were to go forward.' Professor Oettli informed me that, in his experience and that of other deans, the Higher Degrees Committee was 'fiercely independent' in exercising its collective judgement.²⁰¹

334. The Bing–Franke letter stated that Professor Oettli's meeting made a decision that should have been made by the Humanities Research and Ethics Committee. Professor Bing wrote in submissions to the review that, because of its sensitive nature, Mr Kupka's proposal should have been submitted to that committee for ethical approval before being submitted to the Higher Degrees Committee. As evidence, he drew my attention to a memorandum issued by the University Human Research Ethics Committee in December 1995.²⁰² I discuss the import of that memorandum in paragraph 389–93.

335. Professor Oettli's decision did not override any of the requirements of that memorandum that might have applied to Mr Kupka's application. It was for Associate Professor Knuefermann, as Mr Kupka's prospective chief supervisor, to decide whether the proposed research should be identified as a 'human research project' and whether it raised, or could raise, ethical issues that would require formal ethical approval.²⁰³

Finding

7. Professor Oettli considered the views of Associate Professor Knuefermann and Mr Franke and concluded that Mr Kupka met the statutory requirements of doctoral applicants and should be permitted to make an application to the Higher Degrees Committee.

Mr Kupka's research proposal assessed

336. Mr Kupka's doctoral proposal received much adverse comment when it became known in the university and was severely criticised in submissions to the review. To place it in context, I arranged for the university to let me see a sample of the proposals approved by the Higher Degrees Committee at about the same time as Mr Kupka's. There were ten in the sample: five from humanities disciplines, and five proposals selected at random from other schools. I also read Ms McGuiness-King's proposal. She was the other doctoral student from the German department. Associate Professor Knuefermann was her chief supervisor as well as Mr Kupka's. That gave a sample of twelve including Mr Kupka's proposal.²⁰⁴

337. Nine of the twelve proposals were in my opinion well thought out and well presented. They set out the context within which the research was to be conducted, discussed the relevant literature, identified the conceptual issues to be addressed, stated what the researcher intended to do, how it would be done, and the outcome to be expected. Ms McGuiness-King's proposal was one of these. Two of the remaining three seemed to me to be satisfactory as initial statements of a research project. Mr Kupka's proposal was not one of these. It was brief and bland and fared badly in comparison with all the others.

²⁰¹ Oettli to Review, 8 October 2001.

²⁰² Bing submission #18.

²⁰³ Knuefermann to Review, 7 November 2001; Bolstad to Review, 8 November 2001; Oettli to Review, 9 November 2001; McKim to Review, 13 November 2001; Bing to Review, 15 November 2001; Franke to Review, 21 November 2001.

²⁰⁴ The twelve proposals were those of: R. Holzapfel, P. M. McGovern, B. R. Kiwara, R. Dunn, A. Monsin, R. M. S. Macbeth, V. McKeogh, C. J. Piper, X. Wang, G. H. Morris, K. McGuiness-King, and H. J. Kupka; Parker to Callaghan, 23 January 2001.

338. Also illuminating was the way that ethical issues were to be dealt with in the twelve proposals. Four proposals raised no ethical issues involving human subjects. Five stated that they would be conducted under the ethical protocols of various professional associations as well as the guidelines of the University Human Research Ethics Committee. One proposal for which a questionnaire survey was to be an important part of the methodology included no discussion of ethical issues (and the Higher Degrees Committee did not comment on this omission in its minute). The short statements on ethical considerations in Mr Kupka's and Ms McGuiness-King's research proposals were identical (see paragraphs 50–51).

339. If the sample of doctoral proposals I examined is reasonably representative of those considered by the Higher Degrees Committee in 1997–98, Mr Kupka's fell well below the standards of other applicants.

340. I asked Professor Alan Kirkness, Department of Applied Language Studies and Linguistics, University of Auckland, a recognised scholar in the field in which Mr Kupka's research lay, if he would assess his proposal, and he agreed. Professor Kirkness was unaware of the controversy surrounding Mr Kupka and assumed that his proposal was still being worked up. I also asked him to assess the questionnaires that Mr Kupka proposed in the course of the research, and twenty pages of draft text he had written before he resigned his candidature. In the draft text, Mr Kupka discussed the academic context and theoretical approach of his thesis, methodological preliminaries, and there was an incomplete section on the status of the German language in New Zealand. Professor Kirkness's report is in Appendix E.

341. Professor Kirkness placed the research within the disciplines of sociology of language and applied linguistics and of German studies. There was no indication in the proposal, he reported, that it would 'contribute something original or new to theoretical or methodological issues'. It would apply a methodology and an approach derived from other studies with the aim of documenting, describing, and analysing the status of German in New Zealand. Professor Kirkness 'considered this to be a legitimate approach for a doctoral thesis'.

342. He also considered that Ammon's 1991 work supplemented by Clyne's 1981 work 'is an admirable model to follow in all respects.' But it also a 'very demanding one'. It required a thorough understanding of the theoretical model and of what, if anything would need to be done to adapt it to the particular circumstances of New Zealand. Much of the value of the study would depend on the 'hardness' of the data to be collected: the model 'imposes absolute requirements of rigorous and accurate data collection'. On that score, Professor Kirkness concluded that the proposal 'leaves a great deal to be desired'.

343. The literature survey had been 'poor' and did not provide a 'firm bibliographical foundation' for the research. Part of the German-language chapter already drafted strongly suggested that the 'reading around' phase had not sufficiently informed what was to be investigated. Stronger direction and supervision was needed. The bibliographical referencing was deficient. There was 'too little detail about the "extensive statistical data to be collected"'.

344. Nor was Professor Kirkness satisfied with the way Mr Kupka had applied Ammon's theoretical framework. 'The vast amount of Ammon's study,' he noted, 'does not seem to be reported in any way.' If the maintenance of the German language in New Zealand was to be a main emphasis of the study, it needed to be 'stated very much more clearly in the proposal'. But it formed only a small part of the thesis structure.

345. Questionnaires, Professor Kirkness noted, would be a necessary part of the research methodology and so, too, would interviews. Particularly for research into language maintenance, they provided information and opinion on attitudes to the German language in relation to English and other languages. But to serve a useful purpose, they would need to be 'more specific and demanding' than the ones he had been asked to examine.

346. A related point was also worrying. The proposal identified German as the language not only of Germans but also of Austrians and German Swiss. But the questionnaire proposed for the gathering of information on immigrants was restricted to ‘German immigrant families’ or ‘deutsche Einwandererfamilien’. ‘Surely,’ Professor Kirkness asked, ‘it should at the very least be addressed to “German-language” or “deutschsprachig(e)” immigrant families.’

347. The candidate’s decision to broaden the methodology to include questionnaires was thus, in Professor Kirkness’s view, ‘correct and necessary’. Just how informative they would prove to be was always difficult to predict. Their value to the research he was assessing would depend on how they were to be related to information gathered from the ‘extensive statistical data’ mentioned in the proposal, how they were devised, and the extent to which information gained from them could be said to be representative of the groups sampled. A ‘raft of interviews’ would also be needed. These would target different groups of informants for particular topics and chapters. Organising and carrying out such interviews would be a daunting task. Doing them, however, would, in Professor Kirkness’s view, be:

far more worthwhile than the ‘study and evaluation of critical literature’ that dominates the study timetable’ ... especially in view of my doubts as to ‘the relevance and worth of much of the literature listed. Indeed, through a raft of questionnaires and interviews, the candidate could potentially make a significant contribution to general methodological issues in (language) attitudes research in the area of sociology of language, especially attitudes towards questions of (German) language status (in New Zealand). It needs to be said, however, that the material already available to me does not suggest that the candidate is (yet?) in a position to realise this potential.²⁰⁵

348. Professor Kirkness summed up his views as follows:

I would have to say as an outsider and on the basis of the material before me that the thesis proposal does not stand up very well at this stage, neither in respect of the literature searched and reviewed, nor in respect of the data to be collected, nor in respect of just how studies such as Ammon 1991 are to provide the main theoretical framework of the investigation. I would have welcomed more hard facts and concrete detail about these essential foundations – or at least a stronger indication that the candidate knows the issues and how to tackle them – than the proposal as such reveals. Just what are the main research questions and what instruments and methods are to be used to seek an answer to them?

Finding

8. Mr Kupka’s research proposal had not been sufficiently thought through and was accordingly not ready to be considered by the Higher Degrees Committee in July 1998.

Did Mr Kupka intend to interview people?

349. The references to methodology in Mr Kupka’s doctoral proposal were brief and uninformative. The proposal itself was known only to his supervisors and members of the Higher Degrees Committee. Associate Professor Knuefermann would not let Mr Franke and Professor Bing have copies. Professor Bing, Mr Franke, and their supporters were thus forced to form their own ideas about the substance of the research and how they might expect Mr Kupka to go about it.

350. His proposal, when they were able to read it at the end of 1999, did not help them. It mentioned only the collection of ‘extensive statistical data’ held by agencies and organisations and included a one-word mention of immigration. But they were convinced that he would have

²⁰⁵ Kirkness to Review, 18 June 2001.

to do much more than analyse statistical data if he was to meet the university's requirements for doctoral research. Interviews and questionnaires were obvious tools for the sort of research he had proposed. Getting sound conclusions from questionnaires would raise substantial statistical issues, such as the construction of the sampling frame, the sampling methodology, the design and preliminary testing of questionnaires, dealing with non-responses, the response rate, and others. There was no mention of these in the proposal. Interviews, furthermore, would be the most effective way of exploring what Mr Kupka referred to as the 'specific strand of New Zealand's ever more complex and rich social, economic, and cultural texture: The German Connection'.

351. Mr Kupka's critics became aware of the questionnaire he had sent to the presidents of the Goethe societies. They knew that many German-speaking Jews are members of Goethe societies, and considered that, in approaching them through questionnaires, Mr Kupka had breached the 'informed consent' requirement for ethical research under the university's regulations. They knew, too, that sound social science practice requires the use of samples of interviews to test results obtained through written questionnaires. Since, therefore, they now knew that Mr Kupka had sought to interview German-speaking Jews by means of written questionnaires, they concluded that it could be safely inferred that he would have to conduct personal interviews with sample representatives of the same groups of respondents.²⁰⁶

352. They were profoundly disturbed at the thought of Mr Kupka interviewing German-speaking Jews. Dr Pratt understood it to be a possibility when he wrote to Ms Freudenberg and Professor Moses on the subject of translating Mr Kupka's Internet publications. Both expressed their disgust at the possibility in their replies. Ms Freudenberg's comment was quoted in the *Nexus* spread and the prospect of Mr Kupka interviewing Holocaust survivors became the focus of media attention.

353. Ironically, it was as a last-minute idea for salvaging his research that Mr Kupka thought of the possibility of conducting interviews (see paragraph 241). In June 2000, he and Associate Professor Knuefermann had to decide which of the University Human Research Ethics Committee's alternatives he should accept. Mr Kupka favoured the first, which would require him to drop the questionnaire surveys. But that would leave unresolved the question of getting the additional information he wanted. Perhaps, he suggested to Associate Professor Knuefermann, he could interview immigrant families at meetings of German clubs and 'record them on cassettes'. He also needed information on perceptions of foreign languages. That could also be done by recording interviews on the street, either by himself or by third parties. In all cases 'the interviewer and the interviewee could remain anonymous.'²⁰⁷

354. Until that late moment, however, Mr Kupka had no intention of using interviews. The first of his six-monthly reports on the progress of the research records that he was working on 'the outlines of various questionnaires' and three of these were later considered by the FASS Ethics Committee. But interviews were not in his plans.

Finding

9. Mr Kupka did not intend to interview people in the course of his research. But it was reasonable for members of the university versed in social science practice who became interested in his research to conclude that his research methodology would need to include questionnaires and interviews.

²⁰⁶ Bing, Bolstad, Franke, Gibbs, Pratt, Simms, submission; Bing submission #15; Bolstad to Review, 30 August 2001; Gibbs to Review, 4 September 2001.

²⁰⁷ Kupka to Knuefermann, 8 June 2000.

Mr Kupka's doctoral application

355. In one important respect, Mr Kupka's experience as a doctoral student in the German department was not unusual in humanities departments at the time. Except in history and English, there were few postgraduate research candidates and they were enrolled in their departments, not in a graduate school. Their department largely meant their working relationship with their chief supervisor. A student's second supervisor might also be from the same department as well. But it was also expected that a candidate's research proposal would emerge from discussion with others with relevant expertise. Prospective doctoral candidates were sharpening up their ideas and were encouraged to get as much advice as they wanted from as wide a range of advisers as they could find.

356. Over the years, German had had few doctoral students. There were three during the late Professor Nieschmidt's time. Mr Kupka was the second to be supervised by Associate Professor Knuefermann. In common with some other small and not so small departments, the German department did not handle all the preliminaries of doctoral registration itself. Psychology, by contrast, a large department with many doctoral students at any one time, had a well-developed departmental system that ensured that candidates' proposals were subjected to ethical scrutiny while they were being worked up. The departments of geography, political science, and anthropology also had their own committees. Doctoral applications from these departments were submitted to the Higher Degrees Committee for registration but the processes of ethical scrutiny were conducted within each department.

357. Research in these social science departments frequently involved human subjects. Teachers in them were well versed in the ethical codes of the relevant professional association and applied them in conjunction with the procedures of the University Human Research Ethics Committee to doctoral proposals. Except in history, where oral history projects requires the participation of human subjects, research in humanities disciplines seldom required ethical approval.

358. For candidates from the German department, as for candidates from all other humanities departments, the processes of approval were external to the department. Proposals were submitted to the Higher Degrees Committee to be approved and registered, and to the Humanities Research and Ethics Committee for ethical approval if required. The formal division of responsibility between departments and the two committees were clear-cut. All discussion about candidates and their proposals was to take place within departments or schools. In the formulation that was quoted to me many times in the course of the review, the committees dealt with proposals, not with candidates. A departmental chairperson's signature on an application to the Higher Degrees Committee was the committee's warrant that discussion had taken place at departmental or school level, any differences of opinion had been resolved, and the proposal had departmental support. 'Chairpersons,' Dr McKim remarked, 'can usually be relied on to know the research interests and expertise of their staff.' She also noted that, in her experience, proposals were 'quite frequently' returned to departments for further consideration when the committee thought that they need more work to be done.²⁰⁸

359. But the process of scrutiny, considered as a whole, was not foolproof. Professor Barratt and Associate Professor Vowles, who had both served as members of the committee, noted in submissions to the review that proposals were sometimes approved that should not have been. It was possible, Associate Professor Vowles wrote, for a proposal to reach the committee that had not received any significant 'faculty-level' discussion. Where the departmental chairperson was also the prospective chief supervisor, it was possible that there might be little or no departmental discussion of a proposal. Applications could reach the committee without receiving a rigorous examination of a candidate's methodology and intended research practice. Associate Professor

²⁰⁸ McKim to Review, 12 July 2001.

Vowles also noted that the new procedures followed by the Postgraduate Studies Committee removed some of the weaknesses he was commenting on.²⁰⁹

360. Apart from some informal discussion with Professor Nieschmidt, Associate Professor Knuefermann does not seem to have undertaken any other consultation on Mr Kupka's proposal in the German department or in the school. Mr Kupka's only contact within the department was with Associate Professor Knuefermann, who directed the studies of the department's graduate students. The first that Associate Professor Harlow, the other campus supervisor, heard of Mr Kupka's research proposal was when it was ready to go to the Higher Degrees Committee and Associate Professor Knuefermann asked him if he would be a supervisor. Mr Franke's objections had been considered in the context of Mr Kupka's personal opinions, not of his research proposal, and were not part of the Higher Degrees Committee's consideration of that proposal. Dr McKim rightly assumed that Mr Kupka would apply separately for ethical approval. But there were no administrative arrangements to ensure that he did so.

361. On the papers in front of it, the Higher Degrees Committee had no difficulty approving Mr Kupka's application. His proposal was not discussed. No one, it seems, asked about the nature of the light that the proposed research was expected to shed on New Zealand's social, economic and cultural texture, nor how his methodology was expected to shed it. Mr Kupka had not undertaken any thesis research for his MA but no one asked whether he should have been enrolled initially for an M.Phil. No one questioned whether his proposal should be returned to the German department for further consideration. The appropriateness of the arrangements for supervision was not discussed. The committee simply endorsed Associate Professor Knuefermann's recommendation.²¹⁰

Findings

10. The deliberations of the Higher Degrees Committee that resulted in Mr Kupka's registration as a doctoral candidate were insufficiently rigorous.
11. Associate Professor Knuefermann did not ensure that Mr Kupka apply to the Humanities Research and Ethics Committee for ethical approval for his research and the university had no administrative arrangement that would have ensured that he did.

Essays and theses written in German

362. Several submissions to the review argued that Associate Professor Knuefermann should not have permitted Mr Kupka to write his MA papers in German, and that the Higher Degrees Committee was wrong in permitting him to write his doctoral thesis in German. Mr Franke expressed his misgivings to Associate Professor Knuefermann in May 1998. He had Mr Kupka particularly in mind. The question he wanted clarified was this: 'Should a second class upper division grade awarded to a native speaker of the target language for a paper that involves study of that language [be] based upon the same assessment standards as those that apply to students for whom that language is not their native language?' The implication of his question was that Mr Kupka's second-class upper division MA might not meet the academic requirement for registration as a doctoral candidate. Mr Franke believed it to be very rare for students to write essays and papers in German.²¹¹

363. In October 1998, Associate Professor Knuefermann issued a statement of departmental policy on the admission and assessment of native speakers. Among other things, it stated that, in literature courses, native speakers could write essays and assignments either in English or in

²⁰⁹ Barratt submission; Vowles submission.

²¹⁰ Middleton submission; McKim submission; Dr McKim to Review, 10 October 2001; Barton submission.

²¹¹ Franke to Knuefermann, 22 May 1998; Franke oral submission, 19 February 2001; Franke to review, 20 May 2001.

their mother tongue, whether (in the reorganised department of European and Hispanic Languages) that was German, French, or Spanish. They would ‘meet the same academic standards and criteria as their English speaking counterparts in terms of content, clarity of structure and presentation.’ Dr Knuefermann told me that the choice of language should be left to students. The advantages and disadvantages ‘cut both ways’.²¹² Mr Franke’s misgivings nevertheless remained. He and others in their submissions questioned whether the Higher Degrees Committee should have allowed Mr Kupka to write his doctoral thesis in German.

364. The policies of the German departments in other New Zealand universities are the same as those set out by Associate Professor Knuefermann for Waikato. Native speakers of German may write essays, dissertations, and examination papers in German. Questions of comparisons of native German speakers writing in German with non-German-speakers writing in English do not arise. Whatever the language of choice, assessments are based on the quality of the analysis in the topic being studied and written about. Doctoral theses may be and are written in German. Published lists of all postgraduate theses and dissertations prepared for degrees of New Zealand universities from 1967–92 include 182 items of which 24 were submitted in German, five by native speakers of German.²¹³ The Higher Degrees Committee was informed that suitable arrangements would be made for Mr Kupka’s thesis to be supervised and examined in German. The committee was thus acting within its general policy in allowing Mr Kupka to write in German.

365. The reason given by Mr Kupka for wanting to write in German is, however, in my view, less than convincing (Appendix D). Much of the research in the field of his research, he wrote, had implications for what he referred to as the ‘German market’ and was published in German. He described this market as individuals and organisations with ‘a professional interest in international processes of communication’ as they affect the German language. The examples he gave were the departments of foreign affairs in Germany, Switzerland, and Austria, major German business organisations, the Goethe Institute, and universities. These were variously engaged in developing language policy for the support of German overseas and delivering language services to international partners as practical assistance to trade organisations and chambers of commerce. He did not mention the roles played in that ‘German market’ by English speaking New Zealanders in the Ministry of Education and other government agencies, and in the business sector in New Zealand. It seems to me very unlikely that any of the people in the organisations in that German market would expect to read Mr Kupka’s thesis, whether written in German or English. If they were to want to read it, native German speakers would be more likely to be able to read it in English than New Zealand English speakers would be able to read it in German. I sought Professor Kirkness’s advice on that point and he concurred.²¹⁴ My view is based on a twenty-two year experience (1974–96) of taking part in meetings of the OECD at which representatives of German, Swiss, and Austrian employer and employee organisations were also regularly present. Except for some Swiss representatives from French-speaking cantons, they were typically more competent in English than their English-speaking counterparts were in German. In the realms of government and business, the most practical way of disseminating the findings of Mr Kupka’s research would have been through journal articles and booklets written in German or English depending on the intended readership.

²¹² Knuefermann, 29 October 1998; Knuefermann interview, 3 April 2001.

²¹³ Dr Ellen Soulliere, Head of School of Language Studies, Massey University, to Review, 18 May 2001; Dr Gerrit-Jan Berendse, Head of Department, German, University of Canterbury, to Review, 27 May 2001; Alyth Grant, Head of German, School of Language Literature & Performing Arts, Otago University, to Review, 18 May 2001; Associate Professor James Bade to Review, 29 June 2001; Professor Hansgerd Delbruck to Review, 9 August 2001; *Dissertations in German*. A list of all theses and dissertations in German prepared for the degrees of Ph.D., M.Litt., MA (Hons), MA, BA (Hons), B.Phil., and P.G. Dip. in New Zealand in the years 1967–92. Compiled by August Obermayer, University of Otago, German Department, Dunedin, November 1992.

²¹⁴ Parsonson to Review, 9 September 2001; Kirkness to Review, 18 September 2001.

366. To have tested Mr Kupka's reason for wanting to write in German would have required the Higher Degrees Committee to take advice from persons and organisations outside the university world. It did not do that. Inasmuch as it was based on a general academic principle, its decision was sound. But Mr Kupka's justification had been made out on practical grounds, and the committee did not scrutinise them. Mr Kupka's critics argued that he wanted to write in German because his English was not up to it. That may or may not have weighed in his thinking. His preference for writing in German could also be interpreted as an assertion of his sense of himself as a right-wing German nationalist.

Findings

12. The decision of the Higher Degrees Committee to permit Mr Kupka to write his doctoral thesis in German was consistent with university policy and in line with the policies of other New Zealand universities.
13. Mr Kupka's application cited a practical reason for wanting his thesis in German, but the Higher Degrees Committee did not examine the validity of the reasons given in the request (paragraph 366).

Supervision

367. The supervisors of Mr Kupka's research were appointed by the Higher Degrees Committee according to the requirements of the Higher Degrees regulations. Associate Professor Knuefermann was appointed chief supervisor, with Associate Professor Harlow, Department of General and Applied Linguistics, and Professor Graf von Nayhaus, Padagogische Hochschule, Karlsruhe, as supervisors.

368. Associate Professor Knuefermann's experience as chief supervisor, supervisor, or examiner of research degrees dates from the late 1960s. He was already supervising Ms McGuiness-King's doctoral research. As chairperson of the department he had a double role. Dr McKim informed me that it was not unusual for chairpersons of small departments to be chief supervisors. Associate Professor Harlow has a strong research background with a research interest and publications on language planning and maintenance. He is an experienced supervisor and examiner of postgraduate research degrees. None of his research, however, was relevant to Mr Kupka's project. He agreed to act as second supervisor, he later informed the Higher Degrees Committee, on the understanding 'that there is no sense in which I am an expert in the area of the project'. He had had some informal experience of the project as a past member of the Goethe Society, but he was 'to act simply as a sounding board'. His involvement in Mr Kupka's research was very much less substantial than for Ms McGuiness-King, for whom he was also a supervisor. Professor von Nayhaus has devoted his professional career to intercultural German studies and is an active member of the professional Association for Intercultural German Studies.²¹⁵ Professor von Nayhaus was not named as a supervisor in the application. Dr McKim and the Higher Degrees Committee accepted these arrangements on Associate Professor Knuefermann's advice. None of Mr Kupka's supervisors had expertise in social science research practice.

369. Associate Professor Harlow's and Professor Nayhaus's appointments raised an ethical issue associated with the gaining of their informed consent. Should Associate Professor Knuefermann have drawn their attention to Mr Kupka's Internet postings? One of the principles underlying graduate research was that the university's interest was in the research proposal, not the personal opinions of prospective candidates. That distinction, as we have seen, was strictly observed when Mr Kupka's application was being considered by the Higher Degrees Committee. But should the same principle be applied to information to be made available to prospective

²¹⁵ McKim to Review, 13 July 2001; Harlow to Secretary, Postgraduate Studies Committee, 4 May 2000; Harlow to Review, 26 July 2001; Knuefermann to Review, 16 August 2001.

supervisors, particularly when, as in Mr Kupka's case, his personal views were published on the Internet and could be read by anyone who knew where to find them and could read German? I did not inquire into the practice of chief supervisors in cases reasonably analogous with Mr Kupka's. But it is not difficult to think of ones in which a sharp distinction between a candidate's proposal and his or her personal opinions breaks down. An example would be a doctoral candidate who wanted to research some aspect of a political party of which he or she was an activist. Such information about a candidate is likely to be common knowledge within a department and, without needing to be further informed, prospective supervisors from within the department can decide whether they want to be associated with the research. But prospective supervisors from other universities may not be aware of a candidate's special interests and this raises the question of what, if anything, they should know about such interests to enable them to give an informed consent. That, in my view, is one of the questions to be considered in the collegial review of academic freedom and ethical standards that I recommend in paragraph 512.

370. In seeking their agreement to act as supervisors, Associate Professor Knuefermann informed me that it was his recollection that he did mention Mr Kupka's Internet postings to Associate Professor Harlow but not to Professor Nayhaus. His view at the time, he said, was that controversy over Mr Kupka had died down, there seemed to be no problem, and nothing needed to be said. Associate Professor Harlow informed me that, to the best of his recollection, he did not know of Mr Kupka's political opinions until some months after his doctoral proposal had been registered. He heard about them first from Mr Franke and then from Professor Bing. Mr Franke informed me that his intention in speaking to Associate Professor Harlow was to have a discussion with him about a 'moral and academic problem'. Associate Professor Harlow did not consider the visits he received from Mr Franke and Professor Bing as attempts to harass him. Nor did Associate Professor Swain, who made initial investigations into a related claim. Associate Professor Knuefermann later dropped his claim.²¹⁶

371. Professor Bing emailed Professor von Nayhaus on 9 and 30 March 2000. Professor von Nayhaus was out of the country and did not reply to these messages when they were sent on to him. Professor Bing was informed by the secretary to Professor Nebel, the rektor, that Professor von Nayhaus 'would have accepted the supervision in good faith'. On not receiving a response from Professor von Nayhaus, Professor Bing complained to Professor Nebel. He did so, he wrote, reluctantly. But he wanted Professor Nebel to know that Professor von Nayhaus had not responded to his correspondence and pointed out that the Holocaust issues he had raised with him went to the heart of modern German history. He pointed out that Professor von Nayhaus was supervising a person 'who would be at risk for being convicted for Holocaust denial in Germany'. He added:

*I am asking for the cooperation of your good office and in the interest of the reputation of your institution to ensure that Professor von Nayhaus responds in a civilised manner to my correspondence. Failing that I see no alternative but to forward the information about your good professor to the press and radio stations in Karlsruhe. I trust that good sense and reason will prevail.*²¹⁷

372. Professor von Nayhaus saw this letter and informed Associate Professor Knuefermann of what he referred to as Professor Bing's attempt to force him 'under threats' to stop being one of Mr Kupka's supervisors. Associate Professor Knuefermann included the episode in the case of harassment he was making out against Mr Franke and Professor Bing. It was, he wrote in a formal letter of complaint to the Vice Chancellor, further evidence of their attempts to get Associate Professor Harlow and Professor von Nayhaus to withdraw from their roles as

²¹⁶ Knuefermann to Vice Chancellor, 5 April 2000; McGuiness-King to Vice Chancellor, 28 November 1999; Swain to McGuiness-King, 13 April 2000; Swain to Vice Chancellor, 21 June 2000; Swain to Knuefermann, 4 September 2000; Vice Chancellor to Franke, 16 October 2000.

²¹⁷ Bing to Nebel, 30 March 2000.

supervisors. He was ‘seriously concerned about these acts of unprofessional interference with university procedures.’ Professor Gould wrote a letter of apology to Professor Nebel. He did not send a copy to Professor Bing or invite him to explain the nature of his interest in the matter. Professor von Nayhaus faxed Associate Professor Knuefermann a few days later and, in expressing warm greetings, wrote: ‘*vor allem Erfolg genüber solchen Bingo und Kreaturen*’ (I especially wish you success against Bingo and other creatures). Bingo, a monkey wearing a *suavastika* – a reverse swastika – was a well-known cartoon character in children’s literature in Germany during the thirties. Some months later, Professor Bing obtained a copy of Professor von Nayhaus’s fax to Associate Professor Knuefermann through a request under the Official Information Act and read the reference to himself and those associated with him. He made the link between Bing, Bingo, and the monkey and found it ‘deeply insulting’ to himself, other members of the Jewish community and colleagues at the university.²¹⁸

373. A question arose over the continuity of Mr Kupka’s supervision on Associate Professor Knuefermann’s impending retirement. Associate Professor Harlow had also informed Associate Professor Knuefermann that he would wish to relinquish his supervisory responsibilities no later than when he went on study leave in the middle of 2000. Ms Weir drew Professor Gould’s attention to the implications in her memorandum of 8 March. She pointed out that the regulations required the chief supervisor and one other member of supervisory panels to be members of the university. She had issues of harassment very much in mind. She was concerned that Mr Kupka’s might construe any disruption of his supervision as harassment linked with his political opinions. Ms Weir knew that there was no other teacher on campus appropriately qualified to act as chief supervisor for Mr Kupka (and also for Ms McGuinness-King) if Associate Professor Knuefermann was prevented from continuing. He was willing to remain chief supervisor for both candidates.

374. The matter was raised by Dr Bolstad at the meeting of the Postgraduate Studies Committee on 12 May. In his view, Associate Professor Knuefermann should not continue as chief supervisor after his retirement and a ‘highly respected senior academic’ from the Faculty of Arts and Social Sciences should replace him.²¹⁹ At the beginning of that meeting Dr Bolstad, who had signed the petition to the mediator, was asked to retire from the committee when it considered Mr Kupka’s doctoral research on the grounds of a conflict of interest (see paragraphs 575–78). The committee allowed him to provide a written statement of his views, however, and he included in it his views on the Mr Kupka’s future supervision.

375. Professor Selby, as chairperson of the committee, approved an arrangement under which Associate Professor Foster would act as Process Supervisor with Associate Professor Knuefermann continuing to provide supervision. Process supervisors are chairpersons or senior academics who are appointed, usually on a short term basis, to ensure that university requirements of supervision are met. Mr Kupka resigned his doctoral candidature, however, before it was necessary to bring the arrangement into effect. Professor Selby informed me that it is ‘common practice’ to retain the services of senior academics as supervisors after retirement. But it is not specified in the regulations, nor is there provision for the appointment of process supervisors. In making such appointments, Professor Selby informed me that the Postgraduate Studies Committee exercises ‘a freedom of action’ under clauses 3 and 9 of its terms of reference.²²⁰ Professor H. P. Kelz, Director des Sprachlernzentrums de Universitaet Bonn was

²¹⁸ Knuefermann to Gould, 5 April 2000; von Nayhaus to Knuefermann, 10 April 2000; Gould to Nabel, 5 May 2000; Bing submission #26; Bing to Review, 10 November and 5 December 2001; Steven Heller, *The Swastika: Symbol Beyond Redemption*, Allworth Press, p. 96 and 96 and 98 for illustrations.

²¹⁹ Bolstad submission; Bolstad to Postgraduate Studies Committee [12 May 2000].

²²⁰ Selby to Review, 23 May 2001; Selby to Review, 21 November 2001; Callaghan to Review, 22 April 2002; Foster to Review, 12 May 2002; Bolstad to Review, 14 May 2002; Sara Young to Review, 12 June 2002.

also appointed to replace Associate Professor Harlow.²²¹ That left only one supervisor on campus, a fact which would presumably have given rise to criticism if Mr Kupka had not resigned his candidature soon after.

Findings

14. The arrangements for the supervision of Mr Kupka's research became a focus of attention but the underlying issue, which the Higher Degrees Committee did not consider when it registered his doctoral application, was whether the supervisory panel was suitably composed to provide effective supervision.
15. The university should consider whether there are some circumstances in which prospective supervisors should be informed of some items of personal information about a doctoral candidate when they are invited to give an informed consent to become a supervisor; and provide prospective chief supervisors with appropriate guidance.

Ethical approval

376. The research proposal that Mr Kupka submitted to the Higher Degrees Committee did not on the face of it raise ethical issues that were out of the ordinary. It said that he proposed to collect 'extensive statistical data' from New Zealand agencies and organisations on the contemporary use of the German language in this country. It said that he was 'aware of the ethical considerations involved in obtaining Information of the kind sought.' He would approach agencies and organisations to inform them of the use he intended to make of the information he was seeking and would undertake to ensure confidentiality if that was required. His application to the Higher Degrees Committee stated that he would send a copy of the application to the Humanities Research and Ethics Committee for ethical approval. His failure to do so became one of the controversial features of his doctoral candidature.

377. Associate Professor Knuefermann knew from his exchanges with Mr Franke and Professor Bing that, at least in their view, Mr Kupka's proposed research raised other ethical issues that were much more serious. Mr Franke had questioned whether, because of his published political opinions, Mr Kupka could be expected to deal fairly with German-speaking Jews in the course of his research. Professor Bing, speaking as a senior member of the Jewish community, had told him that Jews would not co-operate with Mr Kupka. Potentially at least, questions of research ethics had been raised. Associate Professor Knuefermann knew, however, that German-speaking Jews would figure much less prominently in Mr Kupka's research than Mr Franke and Professor Bing were assuming. But, irrespective of the numbers who might become involved, they were to be part of the research. Mr Kupka stated in his application that his research would include '(d) minority groups speaking German'. But he did not say how he would identify minority groups and how he proposed to deal with German-speaking Jews or with any other minority group. No amount of statistical data could in Mr Franke's and Professor Bing's view provide the sort of information on minority groups speaking German that Mr Kupka would need to analyse in his thesis.

378. But neither Mr Franke nor Professor Bing had any detailed knowledge of the subject of Mr Kupka's research or how he intended go to about it. For whatever reason, Associate Professor Knuefermann would not let them have a copy of Mr Kupka's proposal. From that point onwards, Associate Professor Knuefermann on one side, and Mr Franke and Professor Bing on the other, were talking past each other.

379. Mr Franke and Professor Bing were further disquieted when they discovered in November 1999 that Mr Kupka's research had not been submitted to the Humanities Research and Ethics

²²¹ Knuefermann to Secretary, Postgraduate Studies Committee, 30 May 2000; Postgraduate Studies Committee minutes 9 June 2000.

Committee for ethical approval. Then, when they were given a copy of his research proposal, they concluded that their initial concerns had been justified and they wrote their joint letter to the FASS Ethics Committee. Mr Kupka's proposal, as they read it, made a large claim for what he intended to achieve. The aim, he wrote, was 'to shed some light on one specific strand of New Zealand's ever more complex and rich social, economic and cultural texture: Her "German Connection."' The specific thread on which light was to be shed was the German language but the proposal did not say what light was to be shed and what illumination it would produce. Mr Kupka's proposal did not explain how he intended applying his theoretical framework to his New Zealand data and his reference to his methodology did not more than mention 'collect[ing] extensive statistical data'. Readers of his proposal were left to make their own interpretations of his research intentions.

380. Mr Kupka's phrase, 'Her German Connection,' was a clear reference to *The German Connection: New Zealand and German-speaking Europe in the Nineteenth Century*, edited by James Bade, Associate Professor, Department of Germanic Languages and Literature, University of Auckland, which had been published in 1993. Given the purpose and scope of that book, Mr Franke and Professor Bing (and others) assumed that Mr Kupka's research was intended to have an affinity with it. Furthermore, Mr Franke and other members of the German department had known since September 1995 that Associate Professor Bade was editing another book of essays on New Zealand's German connection in the twentieth century. They knew from the prospectus for the book that he circulated at that time that one of its highlights would be the contribution to New Zealand's recent social, economic and cultural life of German-speaking Jews who migrated here in the late 1930s and 1940s.²²² The book was published in 1999. It confirmed Mr Franke's and Professor Bing's view that a serious study of the contribution of German speakers to New Zealand's contemporary 'social, economic and cultural texture' must place considerable emphasis on the contribution of German-speaking Jews. A large part of the Bing–Franke letter of 26 November 1999 to the FASS Ethics Committee drew on Bade's book to emphasise that point.

381. In fact, however, the research that Mr Kupka was embarking on under Associate Professor Knuefermann's supervision was very different from what Mr Franke and Professor Bing supposed that it should be. The purpose of the research, Dr Knuefermann informed me, was to establish the extent to which the German language was still being used in business, politics, societies, clubs, and other social settings. German companies were to be asked (see paragraphs 42–44), for instance, to provide information on the extent to which correspondence with their head offices was conducted in German or English. Clubs were to be asked whether films or talks were in German. Mr Kupka also intended to find out if there were German kindergartens, schools, and other organisational arrangements for the maintenance of the German language, and if native speakers of German used German or English at home.

382. Mr Kupka's aim was to record the incidence of use of German in this country. The individuals who provided information were not to be the subject of the research and no personal information would be sought from them or recorded. Nor was their ethnic background any part of the research. German speaking Jews were not to be singled out, nor were they to be excluded. Ethnic background was irrelevant to the question whether, for example, a person could understand the sound track of a German film. It is worth noting that there are differences among the six established New Zealand universities in their ethical requirements for questionnaires that do not seek, record, or use personal information about respondents. If Mr Kupka had been a

²²² Bade to Franke, 24 May 2001.

doctoral candidate at Victoria University of Wellington or at Otago University his questionnaires would have been exempt from the scrutiny of an ethics committee.²²³

383. The research was to be contemporary in the narrow sense of the word. Its findings would reflect the present and immediate past and extend no further back than ten years at most. There was no intention to stretch the meaning of contemporary to include German-speaking Jews who came to New Zealand just before or just after the war, nor would the research include the contributions of German and German-speaking immigrants.²²⁴

384. It was Associate Professor Knuefermann's view when Mr Kupka's proposal was registered by the Higher Degrees Committee in July 1998 that his research would not involve the participation of human subjects and would not need to be submitted to the Humanities Research and Ethics Committee for ethical approval. Under the *University Human Research Ethics Committee Procedures*, however, it was Associate Professor Knuefermann's responsibility as Mr Kupka's prospective chief supervisor to identify activities that came under the definition of 'human research' and 'identify any ethical issues that may arise during the course of the research'. Associate Professor Knuefermann informed me that he asked Mr Kupka to include a statement on ethical considerations in his application to the Higher Degrees Committee to show that he was aware of the university's ethical requirements. But the only ethical issues mentioned in Mr Kupka's application to the Higher Degrees Committee were those associated with the collection of statistical information. Against the background of questions that had been raised about Mr Kupka's research, that statement should, in my view, have also have referred the matter of cultural sensitivity. Such a statement would have noted, that although minority groups of German speakers would be included in the research, no personal information would be collected on participants and no ethical issues were expected to arise under the heading of cultural sensitivity. It would then have been for the Humanities Research and Ethics Committee to make its own ethical assessment of Mr Kupka's proposal. Associate Professor Knuefermann erred in not ensuring that Mr Kupka submitted his application to the committee for its consideration.

385. Soon after the research got under way (see paragraphs 59–60), Associate Professor Knuefermann and Mr Kupka decided that it would be necessary to use questionnaires to gather information. Four were drafted. They focussed on the German language and no personal information was to be sought from those asked to answer them (Appendix F). The first was addressed to the presidents of the six Goethe Societies in New Zealand and Associate Professor Knuefermann authorised it as Mr Kupka's chief supervisor. The second was approved by Dr Green as chairperson of the FASS Ethics Committee. Associate Professor Knuefermann submitted the remaining three to the committee on the advice of Dr Green and Associate Professor Foster that it would be prudent to do so (see paragraph 61).

386. As of November 1999, Mr Kupka did not plan to gather any further information by means of questionnaires or interviews. Specifically, Associate Professor Knuefermann informed me that Mr Kupka did not intend to seek personal information on any of the 'minority groups speaking German' alluded to in his research proposal. The cultural safety of German-speaking Jews who otherwise might have been asked to take part in Mr Kupka's research would thus in his view never have been at risk. In my view, however, it was most unfortunate that Associate Professor Knuefermann did not find a way in the middle of 1998 of informing Mr Franke and Professor Bing of the limited nature of Mr Kupka's intended use of questionnaires and of the fact that he would not be seeking personal information from German-speaking Jews or from anyone else. He might not have been able to remove their concerns but he would have provided them with a

²²³ Victoria University of Wellington, Human Ethics Committee Guidelines, Revised April 2000, Section 5.5.1 – 5.5.2; University of Otago Policy on Ethical Practices and Research and Teaching Involving Human Participants, 9 April 1999, pp. 1–3.

²²⁴ Knuefermann to Review, 19 November 2001.

factual basis in relation to which they could review those concerns. Associate Professor Knuefermann told me that he thought that any concerns about Mr Kupka's research had died away after its registration by the Higher Degrees Committee and that there was no need for him to do anything.

387. Associate Professor Knuefermann's understanding of his responsibility as Mr Kupka's chief supervisor revealed gaps in the university's requirements for the enrolment of humanities doctoral candidates and the ethical approval of research projects involving human participation. It was usual for candidates to apply for ethical approval after they had been enrolled by the Higher Degrees Committee. Whether a candidate's research project was deemed to be 'human research' and whether it was considered to raise matters for which ethical approval would be required were decisions to be made by a candidate's chief supervisor. These regulatory provisions did not create problems for the great bulk of humanities doctoral applicants. The ethical issues that might arise in the course of research typically fell within a predictable range that could readily be dealt with in the course of routine research methods. Mr Kupka's project was the one in a hundred – perhaps the one in a thousand – for which the ethical assessment should have been placed in the context of his research objectives, theoretical foundations, and methodology, where the ethical assessment of his chief supervisor should have been reviewed by an ethics committee, and where both of these things should have been done during the enrolment process. It was only because Mr Kupka had not thought through the methodological implications of his research topic that Associate Professor Knuefermann could conclude that his information gathering and questionnaire surveys would raise few if any ethical issues that the Humanities Research and Ethics Committee should be asked to consider. But Ammon's methodology, as Professor Kirkness explained, was an exacting model (Appendix E). Mr Kupka could not have applied that model to research into the contemporary status of the German language in New Zealand's 'social, cultural and economic texture' without making considerable use of questionnaires and interviews for the gathering of personal information. A research methodology that adequately supported his research objectives would necessarily have raised ethical issues of cultural sensitivity, informed consent, and the minimisation of risk which he, Associate Professor Knuefermann, and the Humanities Research and Ethics Committee could not have avoided considering.

388. Two further questions were raised in submissions to the review about the ethical scrutiny of Mr Kupka's research proposal: Should the application have been submitted to the Humanities Research and Ethics Committee for ethical approval *before* being submitted to the Higher Degrees Committee? And should the application have been deemed to be of a sensitive nature and have been referred by the Humanities Research and Ethics Committee to the University Human Ethics Research Committee for ethical consideration?

389. A submission by Dr Barry S. Parsonson, who has played a leading part in the development of the code of ethics of the New Zealand Psychological Society, outlined the thinking of the working party that he had chaired and whose report became the basis for the University of Waikato Human Research Ethics Committee which was established in 1994 (Appendix T). Among the matters he discussed were the timing of the ethical approval of research projects and arrangements for the approval of projects that might raise sensitive ethical issues. He stressed the importance of ensuring that ethical approval was applied for and received '*prior* to the commencement of any research endeavour' (Dr Parsonson's emphasis.) He also noted the requirement for projects that could raise sensitive ethical issues to be referred for decision to the University Human Research Ethics Committee. Professor Bing drew my attention to memoranda written soon after the University Human Research Ethics Committee was constituted which set out its requirements in these matters. One was Dr Gunn's memorandum of 10 October 1994, written as chairperson of the University Human Research Ethics Committee: the other, dated 4 December 1995, restated the committee's policy (Appendix U). Dr Gunn's

memorandum explained how faculty and departmental ethics committees were to exercise their recently approved delegated authority. It referred specifically to items of a sensitive nature and advised that all such matters ‘must be brought to the main committee for advice.’ The second memorandum stated that ethical approval for D.Phil. students must be obtained ‘prior to the application to register,’ that is, prior to being submitted to the Higher Degrees Committee. School and departmental ethics committees were asked to schedule their meetings accordingly. Professor Bing believes that if Mr Kupka’s proposal had first been submitted to the Humanities Research and Ethics Committee, its ethically sensitive nature would have become apparent and the committee would have referred it on to the University Human Research Ethics Committee. That committee, he contends, would have considered the cultural safety issues and would have prevented Mr Kupka from enrolling for the topic he was proposing. In Professor Bing’s view, the issues of cultural sensitivity, minimisation of risk, and informed consent that were to be raised by the University Human Research Ethics Committee in May 2000 would have been raised in July 1998, when the proposal was still a proposal, with the same result. If the university had followed its own rules, Professor Bing contends, Mr Kupka would have been asked to prepare a different proposal and there would never have been a Kupka affair.²²⁵

390. For whatever reason, the requirements of the two memoranda referred to by Professor Bing were not in force when Mr Kupka applied for enrolment. Candidates applied separately to the Higher Degrees Committee and to their faculty or departmental ethics committee for approval if their research involved participation by human subjects. Those whose proposals required ethical clearance stated that they would be applying separately to the relevant school or departmental ethics committee. The approval for enrolment was given by the Higher Degrees Committee. There was no suggestion in the Higher Degrees Committee’s requirements for enrolment or in the guidelines for ethical approval provided by the University Human Research Ethics Committee that prior ethical approval was a prerequisite for enrolment by the Higher Degrees Committee. The requirement set out in the Higher Degrees Information Booklet was for research involving the participation of human subjects to be approved by the relevant ethics committee ‘before any research is undertaken by the student’ (the emphasis is in the original). That, Professor Middleton informed me, meant before any fieldwork could begin. Under the procedures to be followed at the time, she wrote:

*ethical approval has never been a condition of enrolment. However, it is a condition of progress from the planning to the fieldwork phases of research, although the stage at which a student applies for ethical approval will depend on the discipline, methodology and topic.*²²⁶

Associate Professor Gunn, Chairperson, University Human Research Ethics Committee, made the same point.²²⁷

391. Most if not all of the humanities applications that I examined applied to the Higher Degrees Committee and the Humanities Research and Ethics Committee at the same time. The nature of the applications varied considerably. Most comprised a copy of the application they had made to the Higher Degrees Committee and a covering letter requesting the approval of the Humanities Research and Ethics Committee. Some enclosed the application to the Higher Degrees Committee with an additional statement based on a guideline provided by the University Human Research Ethics Committee that included relevant comment on ethical issues that were expected to arise under any of its nine general principles. Ms McGuinness-King, the other doctoral candidate in the German department, applied to the Humanities Research and Ethics Committee at the same time that she applied to the Higher Degrees Committee. Her application consisted of

²²⁵ Bing submission, #18; Bing to Review, 21 November 2001.

²²⁶ Middleton submission.

²²⁷ Gunn to Review, 25 March 2002.

a copy of her application to the Higher Degrees Committee and a brief formal letter asking for ethical approval for some questionnaires she planned to use in her research. I assume that Mr Kupka, working under the same chief supervisor, would have applied in the same way if he had done so. But there was no requirement for him to get ethical approval for his project before submitting it to the Higher Degrees Committee to be registered.²²⁸

392. Nor, given the subject of the research and his understanding of the way it would be conducted, was it realistic to expect Associate Professor Knuefermann to identify it as ethically sensitive. The relevant ethical issues for him were associated with Mr Kupka's questionnaires in the context of information gathering. He did not initially think that these needed to be brought to the attention of the Humanities Research and Ethics Committee, much less the University Human Research Ethics Committee. Furthermore, it would have been for the Humanities Research and Ethics Committee, had it received Mr Kupka's proposal, to have decided whether it should seek the advice of the University Human Research Ethics Committee. Only if some other person or persons complained to the Humanities Research and Ethics Committee could it have become aware of the proposal at that early stage.

393. The *University Human Research Ethics Committee Procedures* provides for the committee to consider 'disputes and complaints by individuals about the conduct of a project, including changes in the goal, methodology or personnel that have ethical implications' (see Appendix T). Mr Franke was unaware of what happened to Mr Kupka's proposal after the meeting that Professor Oettli convened and did not think about making a complaint to the ethics committee (see paragraph 33). Professor Bing did not lodge a complaint. We can only conjecture how the University Human Research Ethics Committee would have responded to such a complaint. We know, however, that Dr Gunn allowed Professor Bing and Mr Franke to set out their concerns in a letter to the FASS Ethics Committee when they raised their concerns again sixteen months later. It seems reasonable to assume that the University Human Research Ethics Committee would have considered a complaint if it had received one at the time of Mr Kupka's registration. That, it seems to me, is as much as can be said.

394. The FASS Ethics Committee met on 29 November 1999 to consider Mr Kupka's questionnaires. It had also received a letter of complaint from Mr Franke, President, Waikato Goethe Society, and the Bing–Franke letter of 26 November 1999 and various enclosures. Mr Kupka's personal opinions had for eighteen months been at the heart of Mr Franke's and Professor Bing's objections. Now they were for the first time brought formally to the attention of the faculty ethics committee charged with the responsibility of making an ethical appraisal of Mr Kupka's questionnaires in the light of the *University Human Research Ethics Committee Procedures*.

395. Dr Green prepared a statement for the review explaining the ethical issues that were raised and the way they were dealt with first by the FASS Ethics Committee and later by the University Human Research Ethics Committee. It said:

Mr Kupka proposed research primarily into the contemporary use of the German language in New Zealand, and sought to conduct that research by a variety of means. One of the most important required the distribution of self-completion questionnaires to speakers of the German language in New Zealand. The questionnaires did not contain any questions of religious beliefs. They did not contain any reference to the Holocaust, or any matters that were, at first sight, of obvious sensitivity to any particular group, other than one question which asked if respondents associated German or Germans with Nazism. The questionnaires were to be sent for distribution to various groups and organisations associated with

²²⁸ Bing submission #18; Bing to Review 21 November 2001; McGuinness-King to Martin Lodge, 10 February 1997; Dr Alan Riach to McGuinness-King, 17 March 1997.

German language and culture. In other words, the questionnaires' distribution required the cooperation of the German community in New Zealand.

As a result of the distribution of a questionnaire to the Goethe Society, a variety of concerns were raised by some Jewish members of the academic staff. Their complaint raised important issues about Mr Kupka's approach to those organisations, but otherwise only partly addressed the substance of the research. Most significantly, they drew attention to the political views of the researcher, evidence of which was to be found on the Internet. Because of these views, members of the Jewish community believed that Mr Kupka was likely to minimise the role of German Jews in his research, and, in addition that contact with him might harm or offend some of the research subjects.

Those appointed by the university to address these ethical issues faced a major difficulty. The committee could find no basis in the Regulations governing ethical approval of human research that required them to take direct account of a student's political views. Indeed, the university was subsequently advised that taking the student's political views into account would be a clear breach of the Human Rights Act [Human Rights Act, 1993, section 57]. The committee's main duty was to seek a balance between academic freedom and the rights of the student on the one hand, and on the other to consider the risks that:

- *the costs to the participants would outweigh the value of the research;*
- *the outcome of this research would knowingly contain falsified or distorted findings;*
- *the student might misuse information about individuals gained through the research, in a way that might harm those individuals;*
- *individuals sent a questionnaire might be offended by the questions;*
- *and, after significant publicity about Mr Kupka's alleged political views in the media, individuals sent a questionnaire by a person they believed would discriminate against their ethnicity or religion might be offended or upset, even if the questions themselves were not objectionable.*

By the end of the process of deliberation, which resulted in substantial revision of the student's research methodology, the committee were in agreement that: the value of the live human research outweighed any potential costs to the participants, and that there were no grounds to believe that the thesis would inevitably result in falsified or distorted findings. The latter, should they emerge, are addressed in the supervisory and examination processes, the outcomes of which the committee had no mandate to prejudge, Second, the questionnaires would be distributed through the German-language community, and the researcher would not have access to names and addresses, thus ruling out the prospect of harm to those persons. The questions were not to be answered by personal interview, as apparently believed by the complainants, and given wide media publicity, but instead by mail on an anonymous basis. Third, one question likely to cause offence to any person of German origin had been removed. The one issue remaining was the publicity about the research and the researcher, and the risk that persons receiving the questionnaire would be offended. The FASS Human Ethics Committee decided that this did create a risk that some people asked to fill in the questionnaire would be distressed or disturbed, and the committee agreed that the research project should be re-evaluated. It conveyed this opinion to the University Human Research Ethics Committee and asked it to make the final decision on the matter.²²⁹

²²⁹ Green to Review, [13] October 2001; Green to Review, 10 December 2001.

396. That in my view is a fair summary of the ethical issues implicit in Mr Kupka's proposed questionnaire surveys and the way that the ethics committees dealt with them. The significance of the process of ethical appraisal and its outcome seems to have passed largely unnoticed at the time of Mr Kupka's resignation. Both the process and the outcome were, however, of the greatest importance in the university's handling of his case. Professor Gould had identified Mr Kupka's rights to freedom of expression and academic freedom as 'the real issue' that the university faced in dealing with the controversy surrounding him. Mr Kupka's proposal had been subjected to the same procedures that apply to all human research proposals. The FASS Ethics Committee and the University Human Research Ethics Committee conducted their deliberations within the four corners of the University Human Research Ethics Committee's general procedures for research involving human participants. In my view, the university succeeded in safeguarding Mr Kupka's rights to freedom of expression and academic freedom throughout the process of ethical review of his research proposal. Mr Kupka was presented with two options, either of which, had he chosen it, would have satisfied the University Human Research Ethics Committee's ethical requirements. He considered the options and decided instead to resign his doctoral candidature.

397. Some aspects of the process came in for criticism at the time and in submissions to the review. Professor Bing became convinced that the FASS Ethics Committee did not table the Bing–Franke letter and did not consider it in its deliberations. For reasons given in paragraphs 100–105, I think he was mistaken on both counts. Professor Bing also disagreed with Dr Gunn's decision not to allow a deputation of Jewish staff members to meet the FASS Ethics Committee to present their views. That raises a complex of issues. The consultation between Professor Bing and Dr Gunn was about ways and means. In the light of what he knew at the time, Dr Gunn's decision to ask Professor Bing to make a written submission to the FASS Ethics Committee was understandable. Perhaps Dr Gunn should have referred Professor Bing's request to the committee for its decision. But in my view the decision resulted in the right course of action. The committee had yet to meet to consider the ethical principles that might need to be applied to Mr Kupka's research. Dr Gunn's decision was a constructive response to Professor Bing's request. It removed any possibility that, by hearing the views of colleagues who had an interest in the research before coming to terms with the research itself, the committee might lay itself open to suggestions of bias. It also left it open to the committee, should it wish, to receive a deputation at some later time or to hear the views of others as well, after considering the letter from Professor Bing and those associated with him.

398. The second question is whether, as Professor Bing proposed at the time, Mr Kupka's research project should have been considered by the University Human Research Ethics Committee and not by the FASS Ethics Committee. The scheme set out in the ethical procedures requires all proposals to be considered first by a school or departmental ethics committee. It requires those committees to raise sensitive ethical issues with University Human Research Ethics Committee, and section 3.3 of the procedures provides for that. The onus is on the school or departmental committee to identify an issue that it considers to be sensitive and, to do that, it must consider a proposal that has been submitted to it. As it happened, Dr Green also wondered, given the sensitivity of the cultural safety issues raised in the Bing–Franke letter, whether Mr Kupka's proposal should be referred to the University Human Research Ethics Committee. She discussed the possibility with Dr Gunn on 30 November and raised the question whether a reconstituted FASS Ethics Committee was the appropriate committee to deal with those issues. His view was that Dr Green's committee was the appropriate one because its members had more 'experience and knowledge of the methodological issues relevant to a decision on the ethics of the proposed research.'²³⁰ That exchange of views is further evidence that Dr Green was aware from the outset of the cultural sensitivity issues raised in the Bing–Franke letter (see paragraph

²³⁰ Green to Review, [13] October 2001.

103). Later, at its meeting of 11 May 2000, when it had formed its view on the ethical issues associated with the administration of Mr Kupka's questionnaires, the committee invoked section 3.3 and referred the matter to University Human Research Ethics Committee for consideration and decision. In my view Dr Green was right to raise the question, and Dr Gunn made the right decision to ask the FASS Ethics Committee to consider the cultural safety issue raised in the Bing–Franke letter. The FASS Ethics Committee acted in accordance with its delegated responsibility when it decided to refer the matter to the University Human Research Ethics Committee.

399. The third question concerns the length of time that Mr Kupka's questionnaires were under consideration by the FASS Ethics Committee. No one could have predicted on 29 November 1999, when it began its review, that it would take more than five months to complete. Should it have taken so long? Mr Kupka was suspended during that time. Did he suffer a detriment as a result? Dr Green told me that Mr Kupka was told that the committee regarded the work he was required to do on his questionnaires, and the technical assistance that the committee arranged for him, as a necessary addition to a research that would otherwise be deficient (see paragraph 111). It took until Christmas Eve for Associate Professor Knuefermann to accept the committee's jurisdiction. A great many technical changes to Mr Kupka's questionnaires were necessary. Mr Kupka was living in Germany from February 2000 and contact with him was by correspondence. Dr Green estimated that, of the 22 weeks that his proposal was before her committee, about 18 weeks was time awaiting responses from him.²³¹ For its part, the University Human Research Ethics Committee dealt with his case expeditiously each time it heard from Mr Kupka.

400. A question to be considered is whether Mr Kupka was discriminated against during the process of ethical review. He came to believe that he was. It is clear from his correspondence with Associate Professor Knuefermann that he came to regard the FASS Ethics Committee and the University Human Research Ethics Committee as a continuation of a campaign of harassment against him by other means (see paragraphs 236–39). Were either or both committees influenced by considerations other than those falling within their terms of reference? I do not think so. In my view, they dealt with his proposal in good faith. They could not avoid knowing that Mr Kupka had become the subject of extensive national publicity. But the fact of that publicity was relevant to their ethical review. Might there be people who would be emotionally distressed if they were to be asked to respond to a questionnaire administered for Mr Kupka by a third party? That was a proper ethical consideration in the context of 'minimising risk' to participants. Researchers are required to identify potential risks and inform participants of them before seeking their informed consent. The committees' requirements of Mr Kupka were the same as for any researcher proposing to do questionnaire surveys.

401. At its meeting on 9 June, the Postgraduate Studies Committee set down the criteria it would use and the information it would need to form a view on whether Mr Kupka's research did or did not meet its standards for postgraduate research. In the event, Mr Kupka's withdrawal made it unnecessary for it to reach a decision. But it is far from clear whether the status report that Associate Professor Knuefermann provided for the committee would have enabled it to make a decision. It was uninformative on the main points on which the committee needed to be briefed. I am left with the question of whether the University Human Research Ethics Committee and the Postgraduate Studies Committee responded in the right order to the recommendations they received from the FASS Ethics Committee.

402. It was in my view a mistake for the University Human Research Ethics Committee to form a view about the administration of Mr Kupka's questionnaires before the Postgraduate Studies Committee had considered whether his proposal measured up as doctoral research. When it

²³¹ Green to Review, 23 May 2001.

considered his proposal on 24 May it knew no more about his research plan than the FASS Ethics Committee and could not know how one of the options it put to Mr Kupka, the removal of questionnaires, might affect its overall design. Not until it could have heard from the Postgraduate Studies Committee would it have the necessary information. The first alternative that the committee put to Mr Kupka was thus not properly founded on an understanding of that research plan and placed Mr Kupka in a dilemma that could have been avoided. The decision to present him with a choice between alternatives, furthermore, raises an ethical question about the decision itself. Was it ethical to present Mr Kupka with an alternative whose merits and demerits he was unable to assess fully on the information then available to him? If he adopted the first alternative, he would avoid the embarrassment of having to explain himself to the organisations whose co-operation was necessary for the administration of his questionnaires. But that would put him at risk to the Postgraduate Studies Committee's impending review of his proposal in terms of its standards for research for higher degrees. Mr Kupka, as we have seen in paragraphs 236–39, was fully aware of the dilemma and blamed the university for placing him in it.

403. If Mr Kupka's proposal had been considered first by the Postgraduate Studies Committee instead of the University Human Research Ethics Committee, one or other of two outcomes were likely. If that committee concluded that the proposal did not measure up, Mr Kupka would have to develop a new one. If, on the other hand, the committee decided that, suitably modified no doubt, the proposal could be made to measure up as doctoral research, Mr Kupka would then have had to submit it to the University Human Research Ethics Committee for ethical approval. Would he gain the co-operation of German-speaking Jews? Could he make the sort of personal disclosure that would be necessary to get the informed consent of supervisors and participants? These would be difficult questions for Mr Kupka but they would not have placed him in the dilemma that the University Human Research Ethics Committee placed him in. If the Postgraduate Studies Committee had acted first and completed its review of his proposal, Mr Kupka would have been presented with a decision whose consequences were transparent and he would have known exactly where he stood. He would not have been presented with alternatives to choose between but a decision to make. He would have known why it was necessary for him to make it and the full implications of making it.

404. In my view, the university's formal processes for the registration and ethical approval of Mr Kupka's doctoral research were not properly integrated. This was evident both at the beginning and the end of his candidature. The processes of registration and ethical approval followed different courses. In common with other humanities candidates whose projects would involve human participation, Mr Kupka was registered as a doctoral candidate before being required to get ethical approval for his research. In common with them, too, it was for his chief supervisor to decide the nature of the ethical issues that might arise during the research. There was no requirement, as part of the registration process, for an ethics committee to assess a chief supervisor's assessment of those issues. Nor, in Mr Kupka's case, did the Higher Degrees Committee consider the theoretical foundations of his research or its methodology. The university's initial scrutiny of his proposal was inadequate.

405. When, later, the FASS Ethics Committee was required to consider Mr Kupka's research it was in the limited context of the questionnaires he proposed to administer. The committee considered the questionnaires in the light of the nine general ethical principles that governed its work. The first of the general ethical principles required it to satisfy itself that the value of the research outweighed any human costs involved. The General Principles for Research Involving Human Participants stated:

2.1.1 Every project should have clear research or teaching goals stated in a form appropriate to the discipline concerned. The researcher should be able to justify to his or her peers the goals and methodology of the research in

*terms of a weighing of its reasonably anticipated benefits against any foreseeable costs to the participants.*²³²

Applying that principle, the FASS Ethics Committee considered the costs to participants who were asked to respond to Mr Kupka's questionnaires. The only information it had before it was the abridged version of his research proposal and his questionnaires. Decisions on any other aspect of Mr Kupka's methodology would be for the Postgraduate Studies Committee to make. When, therefore, the FASS Ethics Committee decided at its meeting on 11 May that Mr Kupka's research methodology should be revisited it referred his proposal back to the Postgraduate Studies Committee for it to consider.²³³ At that meeting the FASS Ethics Committee also decided to ask the University Human Research Ethics Committee to make the final decision on the ethical matters relating to Mr Kupka's questionnaires, and the university's formal decision-making processes were subjected to an entirely unprecedented requirement. For the reasons given above, I think that the two committees went about their tasks in the wrong order. It would have been unrealistic to have expected the university to have foreseen the situation that these committees found themselves in May 2001. But if, when it registered his proposal, the Higher Degrees Committee had required Mr Kupka to spell out his methodology to show how it would give effect to the theoretical foundations on which his research was to be based, the FASS Ethics Committee would not have found itself uninformed on the methodological context in which Mr Kupka's questionnaires were to be placed. Accordingly, it would not have had to refer his proposal back to the Higher Degrees Committee's successor, the Postgraduate Studies Committee.

406. Four other matters call for comment. Dr Goldsmith made a submission to the review amplifying points he had made in his letters to Professor Gould (see paragraphs 243–46) and to the University Human Research Ethics Committee. He disagreed with the alternative put to Mr Kupka by the University Human Research Ethics Committee under which he would have dispensed with questionnaires. To carry out his research 'adequately', Dr Goldsmith wrote, Mr Kupka would have had to 'survey a wide range of individuals and organisations,' and there was no 'legitimate academic reason' why German-speaking Jews, among whom there would be Holocaust survivors and members of their families, could be omitted from his sample. Serious issues of informed consent would be raised if they were 'recruited unknowingly'.²³⁴

407. That raised, secondly, issues that Mr Kupka's methodology did not address. He did not provide an operational definition of 'contemporary' in the context of his study. Mr Franke, Professor Bing and others, and Dr Goldsmith in his submission, assumed that a contemporary study would include the German-speaking Jews who emigrated to New Zealand just before and just after the second world war and their families. For the purposes of his questionnaire surveys, however, Mr Kupka was taking contemporary to be the present day or something close to it. Nor would his questionnaire surveys have yielded information that could be said to be representative of German-speakers in New Zealand. Irrespective of whether people refused to fill out his questionnaires, there would have been no way by which he could have known if his results were representative of Jewish German-speakers or of any other sub-category of German speakers. The FASS Ethics Committee was aware of these sampling issues. Given that Mr Kupka's samples were to be small in scale and non-representative, the committee questioned whether his research plan met the requirements for doctoral research and asked the Postgraduate Studies Committee to 'revisit' it.²³⁵

408. Dr Goldsmith also submitted that the University Human Research Ethics Committee had shifted the issues of risk and social and cultural sensitivity from the university to the agencies

²³² Human Research Ethics Committee Procedures (Revised September 1994), Appendix 1.

²³³ Green to Review, 9 August 2001.

²³⁴ Goldsmith submission; oral submission 16 March 2001.

²³⁵ Green to Foster, 11 May 2000; Green to Review, [13] October 2001.

that were willing to co-operate with Mr Kupka. Dr Green noted, however, that the approach proposed to Mr Kupka is provided for in the *University Human Research Ethics Committee Procedures* and is acceptable social science practice. The discussion of informed consent in section 2 of the 'General Principles' acknowledges that it is 'not always possible to obtain informed consent in the forms considered standard in psychological or biomedical research.' Mr Kupka's questionnaires were not of a kind that required him to get the formal consent of each participant. They were self-completion questionnaires and were to be distributed anonymously. There was to be no personal contact between researcher and participants. For such questionnaires, Dr Green wrote, the committee took the view that 'true effective informed consent takes place when an individual sent a questionnaire reads the information provided in the covering letter and decides whether or not to participate.'²³⁶

409. Fourthly, it has to be said that the university's administrative procedures were found wanting in the basic courtesy of informing correspondents of the outcome of matters that they had raised with the FASS Ethics Committee. At some point in the FASS Ethics Committee's deliberations, Mr Franke's concerns about the questionnaire he had received as president of the Waikato Goethe Society seem to have been set aside. I do not find that surprising. Mr Kupka had already distributed the questionnaire to the presidents of the other five Goethe societies and it was too late for the committee to provide him with any advice that he could use. But the committee did not inform Mr Franke of what, if anything, it had done in response to the questions raised in his letter of 15 November 1999. Nor, following its letter of 1 June 2000 to Mr Kupka and his consequent resignation of his doctoral candidature, did the University Human Research Ethics Committee inform Professor Bing and Mr Franke of how it had dealt with the issues of cultural safety that they had raised in their letter of 26 November 1999.²³⁷

410. I noted in paragraphs 236–40 that Associate Professor Knuefermann and Professor Gould became personally involved in the formal processes for the ethical scrutiny of Mr Kupka's proposal. It was in my view wrong of Associate Professor Knuefermann to involve the Vice Chancellor when the matter was being dealt with by the FASS Ethics Committee. It was also in my view wrong of him to attempt to influence the chairperson of the University Human Research Ethics Committee when Mr Kupka was considering his response to the committee's confidential letter to him of 1 June. Professor Gould erred in my view in giving Mr Kupka advice on those alternatives. Everything to do with Mr Kupka was controversial and it was very important that, as Vice Chancellor, he should remain above the battle. I think that Professor Gould also erred in referring in an interview with the *New Zealand Listener* to the University Human Research Ethics Committee's proposal that Mr Kupka was at the time still considering on a confidential basis.

Findings

16. At the time of Mr Kupka's doctoral application, it was not university practice to require candidates whose topics involved the participation of human subjects to obtain ethical approval before applying to the Higher Degrees Committee for registration.
17. Mr Kupka's failure to submit his doctoral proposal to the Humanities Research and Ethics Committee, and Associate Professor Knuefermann's failure to ensure that he did, meant that his research did not receive the ethical scrutiny required for proposal involving the participation of human subjects.
18. The FASS Ethics Committee and the University Human Research Ethics Committee dealt with Mr Kupka's research proposal according to the rules and procedures that would have

²³⁶ Green to Review [13] October 2001.

²³⁷ Franke submission; Bing submission #28; Green to Review, 6 June 2002.

been applied to other proposals requiring ethical approval and his rights to freedom of expression and academic freedom were not infringed.

19. The university's formal processes for the registration and ethical approval of Mr Kupka's doctoral candidature and its later ethical review were not well integrated.

The Postgraduate Studies Committee and the Bing–Franke letter

411. The university's handling of the Bing–Franke letter of 26 November 1999 is one of the most contentious issues in the Kupka case. There were several reasons for this. The first was the letter itself. It was addressed to the FASS Ethics Committee and, apart from three pages of introduction and background comment, dealt with the contribution of German-speaking Jews to New Zealand society and culture since the late 1930s and with issues of cultural safety associated with the research they believed Mr Kupka to be doing. Professor Bing sent a copy of this letter to the Postgraduate Studies Committee on 12 December but it was not clear to Professor Selby and Professor Middleton, who dealt with it in the executive group of the committee, what the Postgraduate Studies Committee could be expected to do in relation to it. The way that Professor Bing, the chairpersons of the three committees, and the Vice Chancellor's Office communicated with each other was also an important factor contributing to continuing misunderstandings. The key exchanges of information were by email and, in the case of Professor Bing's letter of 12 December, by letter, and, in the absence of personal contact, initial misperceptions were not clarified and corrected and new misunderstandings arose. Four months after the Bing-Franke letter had been delivered to the FASS Ethics Committee, Professor Bing and Mr Franke had not received a substantive response to the concerns raised in it. In frustration, the Waikato/Bay of Plenty Jewish Association decided that, as a stakeholder organisation deeply concerned about issues of cultural safety associated with Mr Kupka's research, it must intervene.

412. In fact, the university had considered the issues raised in the Bing–Franke letter. The FASS Ethics Committee received the letter at its meeting on 29 November 1999 but, because of its protracted exchanges with Mr Kupka over his questionnaires, did not take up the issues of cultural safety surrounding his research until its meeting on 11 May 2000 (see paragraphs 166–70). The executive group of the Postgraduate Studies Committee considered the issues raised on pages 1–3 of the letter at its meeting on 22 December 1999 and referred it to the Vice Chancellor's office for any further action that the Vice Chancellor might decide to take.

413. It is clear, however, that, during the four weeks between 23 November and 22 December 1999, there were different perceptions about what was happening, what should happen, and what could happen. Professor Bing's initial intention had been to write to the Postgraduate Studies Committee. After an exchange of emails with Dr Gunn on 26 November, however, he and Mr Franke addressed their letter to the FASS Ethics Committee. A few days later Professor Bing formed the mistaken impression that the FASS Ethics Committee had not tabled the letter (see paragraphs 102–105). In another exchange of emails, Dr Gunn ruled that the University Human Research Ethics Committee would not receive a letter but suggested that the Postgraduate Studies Committee might be the appropriate committee to refer it to. This was no more than a suggestion, and I would have expected that, as his first move, Professor Bing would have taken it up with Professor Selby, the chairperson of the Postgraduate Studies Committee. But Professor Bing already had what he considered to be the information he needed to address the letter to the committee. He had exchanged emails with Ms Parker, Manager, Postgraduate Studies Office, on 24 November, and she had informed him that the next meeting of the committee was set down for 17 December and that items for the agenda were to be with her by 3 December. He had also spoken to her by telephone about the procedure for having a letter tabled for discussion by the committee. Professor Bing and Ms Parker have different recollections of their conversation. Professor Bing stated that he was advised to address his letter to Professor

Middleton, Deputy Chairperson of the committee, because she usually dealt with ‘doctoral thesis proposal issues’. Ms Parker stated that she did not give Professor Bing that advice. Professor Bing wrote to Professor Middleton as Deputy Chairperson of the Postgraduate Studies Committee on 12 December, enclosing a copy of the Bing–Franke letter. He informed me that he went to Professor Middleton’s office to hand the letter to her but she was not there and he left it with her secretary. The Postgraduate Studies Committee meeting set down for 17 December was cancelled and the committee was not scheduled to meet again until 11 February 2000. The executive group of the Postgraduate Studies Committee considered Professor Bing’s letter and the Bing–Franke letter at its weekly meeting on 22 December 1999. Professor Middleton informed me that the executive group dealt with the Bing–Franke letter with the greatest urgency and the evidence bears her out.²³⁸

414. Professor Middleton was unaware that Professor Bing’s letter, addressed to her, had been written on the basis of his understanding of advice he had received from Ms Parker, and she did not interpret his letter as a request that the Bing–Franke letter be referred to the full committee. Read, however, in the light the suggestion that Dr Gunn had made to him, the information Ms Parker had given him about the date of the December meeting of the Postgraduate Studies Committee, and his understanding of what Ms Parker had advised on the addressee of the letter, Professor Bing’s intention seems to me to have been stated clearly enough (Appendix O). He was requesting that the Bing–Franke letter be referred to the Postgraduate Studies Committee.

415. Regardless, however, of whether Professor Bing’s letter of 12 December was addressed correctly, the Bing–Franke letter that it enclosed raised questions of procedure and jurisdiction for the executive group. In their submissions to the review, Professor Selby and Professor Middleton both emphasised that the Postgraduate Studies Committee was scrupulously testing its procedures against its recently approved regulations during its shaking-down period. In Professor Selby’s view, neither Professor Bing nor Mr Franke had standing with the Postgraduate Studies Committee because neither was designated as a person who could have access to confidential information about Mr Kupka’s doctoral research. In his view, they should have approached the committee through Associate Professor Foster, its FASS representative and, had they done that, the matters of concern to them would have been placed on the committee’s agenda for discussion. For his part, however, Professor Bing questioned whether any such ‘rule’ or ‘tacit convention had ever been published within [the] University’. He noted further that, when he sought her advice, Ms Parker had not informed him that he would have to approach the committee through the faculty representative. Ms Parker, for her part, later informed Professor Middleton that Professor Bing had not sought her advice on that point and it was not discussed.²³⁹ In my view, the matters raised on pages 1–3 of the Bing–Franke letter referred to university processes and did not require consideration of confidential information about Mr Kupka’s research.

416. Professor Bing’s and Mr Franke’s lack of status was not the only problem for the executive group. In its view, none of the issues raised in the letter came under the jurisdiction of the Postgraduate Studies Committee. Most of the Bing–Franke letter was about cultural safety, and Professor Selby and Professor Middleton knew that the FASS Ethics Committee was dealing with that matter. The omission of Mr Kupka’s doctoral application from the records of the Humanities Research and Ethics Committee was the concern of that committee, too. Nor, in their view, was it for the Postgraduate Studies Committee to inquire into the meeting that Professor Oettli had convened as dean. That, in their understanding of the division of

²³⁸ Bing to Parker and her reply, 24 November 1999; Bing to Review, 13 November 2001; Parker to Middleton, n.d. 2002; Middleton submission; Sara Young to Review, 3 April 2002; Middleton to Review, 30 April 2002; Middleton interview, 1 May 2002.

²³⁹ Selby interview 4 April 2001; Middleton oral submission, 23 February 2001; Selby to Review, 23 May and 2 July 2001; Bing to Review, 13 November 2001; Parker to Middleton, n.d., 2002.

responsibilities between schools and the Higher Degrees Committee, did not come under the Higher Degrees Committee's jurisdiction. Furthermore, Professor Selby considered that eighteen months after Mr Kupka's enrolment was too late for Professor Bing and Mr Franke to 'challenge' the decision of the Higher Degrees Committee. If, however, Professor Selby had consulted Professor Bing, he would have learnt that they had made their challenge before Mr Kupka's proposal had been submitted to the Higher Degrees Committee in July 1998 and were taking the earliest opportunity to renew it after being given a copy of Mr Kupka's doctoral proposal and discovering that it had not been submitted the University Human Research Ethics Committee for ethical approval. But the executive group considered the assertions in the letter to be not so much a request for a review of the way that the Higher Degrees Committee had dealt with Mr Kupka's application as a complaint against Professor Oettli and Associate Professor Knuefermann. The university's rules for the handling of complaints were clear: they were to be referred to the Vice Chancellor's Office to be dealt with under the Vice Chancellor's direction.²⁴⁰

417. On the basis of Professor Selby's examination of the Higher Degrees Committee's records on Mr Kupka and of its own assessment of the matters raised on pages 1–3 of the Bing–Franke letter, the executive group concluded that the Postgraduate Studies Committee was not the appropriate committee to deal with it. It decided instead to refer the letter to the Vice Chancellor's Office for Professor Gould to consider. It did not minute its decision. It did not inform Professor Bing why it had decided not to refer the letter to the full committee but had referred it to the Vice Chancellor's Office. I have not been able to find out what happened after that. The executive group did not accompany the letter with a covering memorandum when it referred it to Mr Callaghan, the Assistant Vice Chancellor. Professor Selby informed me that he had a brief conversation with Professor Gould when he was dealing with the Bing–Franke letter.²⁴¹

418. I have considered the executive group's decision in the context of 'the integrity and efficacy of the University's processes'. There were, in my view, four possible courses of action available to it. First it could have referred the letter back to Professor Bing, informed him that he and Mr Franke had no standing with the Postgraduate Studies Committee on the matters raised in their letter and advised him that he should consult the FASS representative on the committee with a view to having her raise the matters of concern to them at the February 2000 meeting of the committee. Secondly, it could have asked the full committee to consider the issues raised on pages 1–3 of the Bing–Franke letter (but not necessarily the letter itself) and decide on a policy for dealing with them. In my view, the policy question for the committee to consider was whether it should investigate a decision of its predecessor committee, the Higher Degrees Committee, in the context of a complaint about university processes relating to the registration of a doctoral candidate. It was not within the executive group's terms of reference to make that decision itself. Its remit required it to seek a decision of the full committee on '[m]atters for which there are no policies or precedents, or other matters that the chairperson considers need discussion.'²⁴² The issues of concern to Professor Bing and Mr Franke were being raised for the first time and the Postgraduate Studies Committee had no policy for dealing with them. Professor Selby and Professor Middleton had views on what that policy should be. Other members of the committee might or might not view the issues in the same way but it was for the committee to determine the policy that the executive group was to administer. Thirdly, it could have returned the Bing–Franke letter to Professor Bing, informed him that, because the letter complained about the actions of some members of staff, he should write to the Vice Chancellor

²⁴⁰ Middleton to Review, 13 October 2001.

²⁴¹ Middleton submission; Selby to Review, 23 May 2001; Middleton to Review 13 October 2001; Middleton to Review, 30 April 2002; Middleton interview, 1 May 2002; Callaghan interview, 6 April 2001.

²⁴² 'Handbook for Research Degrees of MPhil, PhD and EdD at the University of Waikato,' p. 5.

about it if he wanted to pursue it. Fourthly, and again because of the complaints in it about the actions of individuals, it could have referred the letter to the Vice Chancellor's Office for the Vice Chancellor to consider, and advised Professor Bing what it had done and why it had decided not to have the Postgraduate Studies Committee consider it.

419. Any one of these courses of action had the potential for the further engagement of the university in the issues raised in the letter. The first or second would have placed the emphasis on the university processes for doctoral registration and enrolment. The third or fourth would have emphasised, at least initially, the element of complaint about the actions of individuals. All would have involved Professor Bing in some way and would have been a sign to him that the university was taking his concerns seriously. The executive group chose the fourth course of action but did not advise Professor Bing why it had referred the Bing–Franke letter to the Vice Chancellor's Office and not to the Postgraduate Studies Committee. That omission would not have mattered if, early in the new year, Professor Gould had set up some process that would have enabled him to decide whether he should take any action on the complaints in the Bing–Franke letter. Such a process would have involved Professor Bing and he would have known that the university was responding to some of the matters raised in the letter.

420. Professor Bing emailed Professor Middleton on 24 January 2000 and asked to be informed about what had been done about his letter. Professor Middleton replied: 'The issue falls between the cracks so far as university procedures and bodies are concerned, which is why the VC's Office is the appropriate place for the matter to be considered.' Her email informed Professor Bing that he should take up his concerns with Mr Callaghan 'since the ball [was] now in his court' and that she had copied his email to Mr Callaghan. Professor Middleton did not hear further from Professor Bing and assumed that he was satisfied with her explanation. Professor Bing emailed Mr Callaghan a few days later. Mr Callaghan informed him that he had no formal involvement in Mr Kupka's case and did not know why the Bing–Franke letter had been referred to him. He informed Professor Bing, however, that Ms Weir was investigating a complaint.²⁴³

421. It was still Professor Bing's aim to have the Bing–Franke letter tabled by the Postgraduate Studies Committee, and he turned to Ms Weir in the hope that she would be able to mediate with its executive committee to find a way. 'Mediate' was Professor Bing's word but Ms Weir informed me that she was not asked to mediate and did not attempt to. She had not received a direction from Professor Gould to inquire into the matters in the Bing–Franke letter that the executive group of the Postgraduate Studies Committee had decided not to inquire into. She saw herself, she informed me, attempting to facilitate 'the exchange of information between parties'. On 16 February 2000, Professor Bing resumed the discussions and exchanges of emails with her that he had begun the previous October. She already had a copy of the Bing–Franke letter, and she knew from Professor Middleton what the executive group had done in response to it.

422. Professor Bing asked Ms Weir if she would let him know when the Postgraduate Studies Committee would meet to consider it. To his further inquiry on 22 March, Ms Weir informed him that the Bing–Franke letter had been discussed by 'a smaller committee' of the Postgraduate Studies Committee. She had asked Professor Middleton to inform him 'of the outcome if she considers this appropriate'. Professor Middleton informed me that she was not asked to communicate with Professor Bing and did not. Two days later, Ms Weir informed him that both the 'Ethics Committee and the Postgraduate Studies Committee' had been considering the Bing–Franke letter. She agreed with him, she wrote, that 'the academic issues are the fundamental issues,' reminded him that they were not part of her brief as the university mediator, and noted that they had been referred to 'the appropriate academic committees'.

²⁴³ Bing to Callaghan and reply, 2 February 2000.

423. On 8 March, Ms Weir reported to Professor Gould on the results of her mediation of the various harassment claims that centred on Mr Kupka as an alleged Holocaust denier (see paragraphs 123–31). This included comment on the issues in the Bing–Franke letter that she had also looked into. These were academic matters, but Ms Weir informed me that her information was limited to what she had found in university records and from her discussions. Associate Professor Knuefermann was one of her sources of information. She did not consult Professor Oettli or Dr McKim. She did, however, consult Ms Juliana Smithels who, as a member of the Higher Degrees Office, had been involved in Mr Kupka’s enrolment. She concluded that Mr Kupka’s enrolment by the Higher Degrees Committee was ‘academically sound’ in so far as entry criteria and admission processes had been properly followed. She reported that the ‘ad hoc group’ convened by Professor Oettli had considered Mr Kupka’s ‘alleged political views’ but had concluded that ‘there was no barrier to his [doctoral] enrolment proceeding.’ Unresolved issues nevertheless remained. She reported to Professor Gould that Professor Bing had informed her that he had received no response from the Postgraduate Studies Committee, ‘and this,’ she commented, ‘remains one of the outstanding matters which needs to be addressed.’ Professor Middleton had advised her that ‘a sub-group of the Committee [had] considered Professor Bing’s letter and referred the matter to Jeremy Callaghan, Assistant Vice Chancellor.’ Professor Middleton had also advised her that the usual processes had been followed when the Higher Degrees Committee accepted Mr Kupka’s doctoral application and that the committee had also accepted his progress reports on his research. But the issue, as Ms Weir saw it, that now faced Professor Gould was this:

It is, however, apparent that at no stage during the submission process was the [Higher Degrees Committee] made aware of the issues now being raised. And one of the difficulties is whether the [Postgraduate Studies] Committee can or should consider the Doctoral topic some eighteen months into its progress.

424. On March 21, Ms Weir sent a summary of her report to Professor Gould to Professor Bing and others who had made complaints of harassment against Mr Kupka. She informed them that she had found no reason why Mr Kupka should not continue his research. She was ‘satisfied that [he] met the academic requirements’ for enrolment for a doctorate. ‘Allegations’ against him in that respect ‘have not been substantiated’. The university would be taking no further interest in Mr Kupka’s Internet postings.²⁴⁴

425. Ms Weir’s summary was deeply disappointing to Professor Bing and his Jewish co-signatories.²⁴⁵ As they saw it, Ms Weir’s attempts to have the Bing–Franke letter considered by the Postgraduate Studies Committee had come to nothing. Professor Bing inferred, therefore, that the university had not considered the procedural matters it raised, and that meant that he and his Jewish colleagues must start all over again. A meeting of the Waikato/Bay of Plenty Jewish Association on 29 March initiated a new round of letter-writing and drew their concerns to the attention of members of the university council (see paragraphs 132–36).

426. Professor Bing wrote again to Professor Middleton on 2 April, setting out his understanding of the issues and enclosing another copy of the Bing–Franke letter of 26 November 1999. His letter is in Appendix O. He asked the university to do three things. First, the Postgraduate

²⁴⁴ Middleton to Bing, 27 January 2000; Callaghan to Bing, 2 February 2000; Bing to Weir, 16 February 2000; Weir to Bing, 27 February, 22 and 24 March 2000; Weir to Vice Chancellor, 8 March 2000; Memorandum – Complaint, Betha Weir, Mediator, 21 March 2000; Middleton submission; Bing submission #28; Bing submission #10; Callaghan interview, 6 April 2001; Middleton to Postgraduate Studies Committee, 1 May 2000; Selby to Review, 23 May and 2 July 2001; Selby to Review, 10 October 2001; Middleton to Review, 13 October 2001; Gould interview, 17 October 2001; Callaghan interview, 17 October 2001; Oettli interview, 17 October 2001; Selby interview, 18 October 2001; Bing to Review, 14 November 2001; Weir to Review, 19 March 2002; Weir to Review, 9 April 2002.

²⁴⁵ Bing submission #10; Bing to Review, 14 November 2001.

Studies Committee, ‘in full committee,’ should consider the cultural safety issue. Secondly, he asked for two of Mr Kupka’s MA papers – his ‘Dissertation and Directed Research Project’ – to be submitted to external assessment. Thirdly, he asked the university to take note of the opinions expressed by ‘the four experts’ on Mr Kupka’s Internet postings and take appropriate action. The letter also asked that Associate Professor Knuefermann be asked to do the same. Professor Bing commented that, in his view, the ‘new system of ‘executive power’ in the way the committee was operating was creating considerable problems and there had been a ‘serious brakedown in the management of the University’. He informed Professor Middleton that he was sending copies of his correspondence to all members of the University Council.

427. Professor Bing’s letter had the endorsement of the Waikato/Bay of Plenty Jewish Association. On 4 April, the president and two office bearers of the Waikato/Bay of Plenty Jewish Association, two Jewish members of the academic staff, and a Jewish student signed a letter to Professor Gould and, separately, to individual members of the University Council and the Postgraduate Studies Committee. These letters were similar in content and tone. The letters to members of the Postgraduate Studies Committee enclosed copies of the Bing–Franke letter of 26 November and Professor Bing’s letter of 2 April to Professor Middleton. It was their understanding, they wrote, that the Bing–Franke letter had been withheld from the committee, whose members, as a result, ‘had not been adequately briefed about Mr Kupka’s Doctoral proposal and the cultural safety aspect of it’. They asked the Postgraduate Studies Committee, ‘after four months of procrastinating,’ to ‘deal with this issue fairly and squarely’. Professor Gould replied to the letter he received. The association’s letter to members of the Postgraduate Studies Committee was forwarded to the FASS Ethics Committee and it was one of the documents that that committee had when it considered questions of cultural sensitivity at its meeting on 11 May. The Postgraduate Studies Committee considered the association’s memorandum at its meeting on 12 May.

428. On receiving the association’s letter, Professor Gould sent a memorandum to members of the Postgraduate Studies Committee and the members of the University Council (see paragraphs 137–39). Without saying what they were, he noted that Professor Bing’s letter contained ‘a number of factual inaccuracies, particularly about University processes which have been applied to considering the Kupka case.’ He stressed that there was no basis to allegations against individuals. The university took all issues of ‘cultural safety’ seriously, and he outlined how the allegations against Mr Kupka had been dealt with. The ‘University’s Human Ethics Committee’ was ‘involved in establishing ... the ethical basis for his research’ (Appendix R).

429. Professor Gould’s reply to the Waikato/Bay of Plenty Jewish Association’s letter was unfortunate in its content and its effect. The association’s view of the way that the university had handled the Kupka case was based on Professor Bing’s understanding of the matter and was misinformed on important points. Professor Gould should have found a way of correcting their misunderstandings.

430. The cultural safety aspect of Mr Kupka’s research was uppermost in their minds. He would have been able to reassure them that the FASS Ethics Committee would soon deal with it in the wider context of Mr Kupka’s methodology and that his research was suspended until it received the committee’s approval. Also important to them was whether the university’s normal processes had been applied when Mr Kupka’s doctoral application was being considered. Professor Gould might well, for understandable reasons, not have wanted to comment on these issues in a letter to a stakeholder group. They would have been better opened up in discussion in which misunderstandings could be cleared up and different points of view expressed. But Professor Gould’s letter was not intended to open the way to discussion with the association.

431. On 28 April, Ms Bliss wrote again to Professor Gould on behalf of the association. The letter set out the association’s reasons for believing that the university had ‘failed to proceed in accordance with its own goals and rules of governance’ in its handling of the Kupka case. It

pointed to the university's 'stated commitment to facilitating the effective resolution of grievances'. It asked the university to 'establish an independent board of inquiry to explore and review the manner in which [it] has handled the entire process of Hans Joachim Kupka's Ph.D. proposal, and its ethical review and subsequent acceptance.' That was what the Bing–Franke letter had sought but, in the association's understanding of the matter, the university had failed to respond through its normal processes of academic management. The association was now asking for the university to subject its internal processes to an independent review. The association's request was also a manifesto. Getting the university to commit itself to that course of action became its political agenda and would be the focus of its efforts and those of others who shared its concerns during the next three and a half months.

432. The university's handling of the issues raised in the Bing–Franke letter had not been efficacious. The issues that had prompted the Bing–Franke letter of 26 November and the three letters written after the meeting of the Waikato/Bay of Plenty Association meeting on 29 March remained unresolved and the association and the university were seriously at cross-purposes. Professor Gould and others told me that from December 1999 onwards they were operating in uncharted territory. They knew that Mr Kupka had rights under the Human Rights Act that the university had a statutory duty to uphold. They knew that Mr Kupka knew that, too, and was following these developments with growing concern. He knew in December, as did Professor Bing and Mr Franke, what the Race Relations Office had advised Ms Weir about the legal status of his expressions of political opinion. What he wanted, Mr Kupka informed her, was to be left alone to get on with his research. But he was convinced that Mr Franke 'and his support team' were 'determined' to prevent him from doing a doctorate at Waikato. On 20 December he informed Ms Weir that he was prepared to take his case to court if necessary. That, for Professor Gould, was a threat that he must take very seriously. Ensuring that the university did not lay itself open to a claim that any of its actions were a detriment to Mr Kupka's freedom of expression or his academic freedom was for him what he later called 'the real issue'. Professor Gould and other members of his senior management team told me that they had formed the distinct impression that Professor Bing and his co-signatories and their supporters were determined to have the university get rid of Mr Kupka.

433. The questions that had been raised about Mr Kupka also called in question the professional integrity with which Associate Professor Knuefermann and Professor Oettli had dealt with his initial enrolment, his MA programme, and his doctoral candidature. Associate Professor Knuefermann had been feeling under siege since November 1999, when he characterised the allegations of harassment against Mr Kupka 'as a campaign with substandard techniques' (see paragraph 70). On 5 April 2000, the day after the Waikato/Bay of Plenty Jewish Association wrote to Professor Gould, the Postgraduate Studies Committee and members of the University Council, Professor Knuefermann lodged his formal complaint of harassment against Professor Bing and Mr Franke. He told me that opposition to Mr Kupka's personal views 'had become so overriding that those who objected to his D.Phil. enrolment persisted in finding new opportunities to attack it irrespective of what steps the university took.'²⁴⁶

434. Professor Bing and those associated with him saw the matter very differently. Professor Bing informed Professor Middleton in his letter of 2 April that he accepted that the university could not 'exclude Mr Kupka on the basis of his political opinions'. He informed me that those who made harassment claims against Mr Kupka assumed that the outcome of any disciplinary proceeding would have been a ruling that he be asked to apologise for his insulting Internet postings. 'To the best of my knowledge,' he wrote, 'none of us expected the university to expel

²⁴⁶ Knuefermann to Weir, 10 November 1999; Kupka to Weir, 20 December 1999; Knuefermann interview, 19 February 2001; Gould interview, 17 October 2001; Selby interview, 17 October 2001; Oettli interview, 17 October 2001; Callaghan interview, 17 October 2001; Bing to Review, 14 November 2001.

Mr Kupka from the university on the basis of our complaint ... We would not have objected if Mr Kupka would have undertaken another Doctoral topic.²⁴⁷

435. The Postgraduate Studies Committee played no part in the university's decisions on the Bing–Franke letter. In November 1999, Dr Bolstad had informed members of the committee by email that an unnamed postgraduate student at Waikato was publishing Holocaust-denying statements on the Internet but this information was not brought formally to the notice of the committee. Dr Bolstad asked questions about Mr Kupka's research as an item of general business at the meeting of the committee on 10 March and Professor Middleton, who chaired that part of the meeting, reported that the executive group had referred the matter to the 'Vice Chancellor's Office'. Mr Kupka's research took on an added significance for some members of the committee in the light of Professor Gould's comment in his memorandum to them of 10 April that 'Mr Kupka's case had been handled by the Postgraduate Studies Committee in an 'exemplary fashion'. Associate Professor Barton, a member of the committee, circulated a memorandum to members of the committee, noted Professor Gould's comment, and asked for background materials to be made available under various headings for the committee's May meeting. One of these was an 'identification of the factual inaccuracies that the Vice Chancellor refers to in the letter from Professor Dov Bing, in as much as they concern the duties of the Postgraduate Studies Committee.'

436. That meeting, held on 12 May, had before it a report from the FASS Ethics Committee requesting it to 'revisit' Mr Kupka's research proposal, a copy of Ms Weir's memorandum of 21 March to the members of staff who had made claims of harassment against Mr Kupka, and a memorandum written by Professor Middleton. Professor Selby and Associate Professor Foster gave oral reports. Professor Middleton's memorandum, which she later referred to 'as a fine-grained analysis of the misrepresentations of fact that have appeared in communications from Dov Bing, in other correspondence, and in the media', was a severe critique of the Bing–Franke letter and of Professor Bing's letter of 2 April (Appendix Q). The minutes of the meeting did not record the discussion of the item, which was taken in the confidential part of the meeting. The committee was, however, concerned that the university was being perceived to have 'a limited concern for the issues raised by the Jewish community,' and wrote to Professor Gould to ask him to consider meeting members of the Jewish community.²⁴⁸

437. Mr Kupka's research was discussed again at the 9 June meeting of the committee. To prepare itself for a discussion of the FASS Ethics Committee recommendation that it 'ensure that [Mr Kupka's] plan still [met] the requirements of higher degree research', the committee had asked Associate Professor Knuefermann to provide a status report. That report was considered at the meeting (paragraphs 230–35). The University Human Research Ethics Committee was at the same time reviewing the ethical concerns that the FASS Ethics Committee had brought to its attention, and the Postgraduate Studies Committee decided to await the outcome of that review before continuing with its own review. Mr Kupka's resignation of his doctoral candidature on 26 June made it unnecessary for the committee to give any further consideration to his research.²⁴⁹

²⁴⁷ Bing to Middleton, 2 April 2000; Bing to Review, 30 August 2001; Gould to Review, Gould interview, 17 October 2001; Selby to Review, 10 October; Oettli interview, 17 October 2001; Callaghan interview, 17 October 2001.

²⁴⁸ Bolstad submission; Middleton submission; Bing submission #11; Associate Professor Barton memorandum, 26 April 2000; Middleton to members of the Postgraduate Studies Committee and the Vice Chancellor's Office, 1 May 2002; Middleton to Gould, 23 May 2000; minutes of the meeting of the Postgraduate Studies Committee held on 12 May 2000, Middleton to Review, 13 October 2001; Bing to Review, 14 November 2001; Middleton to Review, 30 April 2002; Middleton interview, 1 May 2002; Foster to Review, 12 May 2002.

²⁴⁹ Postgraduate Studies Committee, minutes of meeting, 9 June 2000.

Findings

20. The Bing–Franke letter raised unprecedented issues of procedure and policy for the Postgraduate Studies Committee.
21. In my view, the executive group had four courses of action open to it, any one of which had the potential for further engagement between the university and Professor Bing on the matters raised in the Bing–Franke letter of 26 November 1999 that were not within the jurisdiction of the FASS Ethics Committee
22. The executive group of the Postgraduate Studies Committee referred the Bing–Franke letter to the Vice Chancellor’s Office in December 1999 but no further action seems to have been taken on it.

The mediator’s investigation

438. Ten Jewish staff members and, separately, Mr Franke, lodged complaints of harassment against Mr Kupka (see paragraphs 62–64). That, they believed, was the only way they could get the university to take notice of their concerns. They understood that Ms Weir, the university mediator, had a close working relationship with the Vice Chancellor and believed that that would be helpful in bringing their concerns to his attention.²⁵⁰ Their complaints referred specifically to the university discipline regulations. The mediator’s task was to carry out a preliminary investigation into allegations that could, depending on the outcome, result in Mr Kupka facing a charge of misconduct under the discipline regulations.

439. Once the investigation got under way, additional allegations were brought to her notice. Mr Kupka was cited as the beneficiary of special and perhaps irregular treatment from the time of his enrolment as an MA student until his registration as a Ph.D. candidate. These implicated the chairperson of the German department, and the then-dean of the School of Humanities. To the initial complaint of harassment arising from Mr Kupka’s Internet postings, were thus added matters of academic management in the German department.

440. The Race Relations Office advised that a court would probably consider Mr Kupka’s publications to ‘constitute political opinion’ and thus be within the law. This advice carried with it an important implication: Mr Kupka’s freedom of expression must in no way be hindered. The mediator informed the complainants that the university could be at risk to legal action from Mr Kupka for harassment if attempts were made to prevent him from exercising that right.

441. In the course of her investigation, Ms Weir considered whether Mr Kupka might have a case to answer under the discipline regulations. She consulted relevant colleagues, formed a view, reported to the Vice Chancellor, and discussed her findings with him. Her advice was that the university should have no further interest in Mr Kupka’s Internet postings. Nor was there in her view a basis for charging him with misconduct under the discipline regulations.

442. She also advised Professor Gould of the conclusions she had reached on the academic matters that had been brought by complainants during her investigation. She asked him if he wished her to look further into Mr Kupka’s enrolment as a Masters student, his MA grades, and his registration as a Ph.D. candidate. He did not require her to do anything more. She drew his attention to other university processes that had been brought to bear on Mr Kupka’s Ph.D. candidature while she had been carrying out her investigation.

443. In my view, the mediator’s inquiries were sufficiently thorough for the purposes of a preliminary inquiry. She had maintained the trust of all parties while she carried out her inquiries. She had informed them of her conclusions and what they implied for the university and for them. Her report to Professor Gould gave a comprehensive account of what she had discovered and clear advice on what she thought should be done. Importantly, she drew his

²⁵⁰ Franke to Review, 20 May 2001.

attention to matters that required his ‘intervention.’ She left Professor Gould in no doubt that the university faced a dilemma. A resolution for Professor Bing would require the university to discipline Mr Kupka for insulting the Jewish community and stop his doctoral research. A resolution for Mr Kupka must allow him to continue his studies without harassment.

Finding

23. The mediator’s inquiries into the harassment claims were sufficient for the purposes of a preliminary investigation and her report gave the Vice Chancellor clear advice on the matters still to be dealt with that would require his attention.

Should the Discipline Regulations have been invoked?

444. Was there a case for Mr Kupka to answer under the university disciplinary regulations? The Race Relations Conciliator, Dr Rajen Prasad, appears to have thought so. He was reported as saying that the university had ‘passed the buck.’ It should have dealt with the complaints against Mr Kupka through its own disciplinary regulations.²⁵¹ It was open to any of the complainants or anyone else to have made a charge of misconduct against Mr Kupka under section 3(I)(b) of the regulations.²⁵² The complainants decided not to do so. Professor Bing told me that, in their view, the initiation of disciplinary proceedings is something for the Vice Chancellor to decide.

445. I took legal advice on the basis on which such a case might have been made out. For the university to take disciplinary action, it would have had to be satisfied that Mr Kupka’s publications amounted to ‘misconduct’ under the then applicable Discipline Regulations, found at page 276 of the *1999 Calendar* and page 264 of the *2000 Calendar*. According to the definition of ‘misconduct’ in the regulations, there were three arguable ways Mr Kupka’s actions could have amounted to misconduct:

- First, if Mr Kupka’s actions constituted harassment against other members of the university community, in breach of the then applicable Policy Statement on Freedom from Harassment, found at page 78 of the *1999 Calendar* and page 67 of the *2000 Calendar*;
- Second, if Mr Kupka’s actions could reasonably be held to be prejudicial to the functioning or interest of the university; or
- Third, if Mr Kupka’s actions could be taken to bring the reputation of the university into disrepute.

446. Turning first to the harassment issue, I sought advice as to the point at which offensive conduct becomes harassment. New Zealand case law deals primarily with sexual and racial harassment. United States jurisprudence, though also concerned largely with these matters, has developed broader principles. The US Supreme Court has consistently held that harassment in the workplace requires conduct that is ‘severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive’.²⁵³ The judgments stress the importance of the context within which the behaviour takes place.

447. The above definition is consistent with the new University of Waikato Discipline Regulations 2000, found at page 284 of the *2001 Calendar*, and which came into force on 1 January 2001. Although the new Regulations do not apply to the events subject to this review, they are nonetheless relevant to interpreting the meaning of harassment in the Harassment Policy. These new Regulations define harassment in clause 7.4 as:

²⁵¹ *Waikato Times*, 14 April 2000.

²⁵² University of Waikato, *2000 Calendar*, p. 265.

²⁵³ *Merritor Savings Bank FSB Vincent* 477 US 57 (1986), at 67 (cited in *Harris v Forklift Systems Inc.* 510 US 17 (1993) at 21 and *Oncala v Sundowner Offshore Services* 000 US 96-558 (1998).

Serious or persistent interference in the work or study of another person, by behaviour that is uninvited or unwarranted.

448. I conclude that to make out a case that Mr Kupka's actions amounted to harassment on the university campus, it would have been necessary to establish that his views created a hostile environment for Jews and/or their supporters on campus. Such a conclusion was reached on the facts in a recent Canadian case. In that case it was held that the out of school activities of an anti-semitic high school teacher had created a 'poisoned' anti-semitic environment for Jewish students at school.²⁵⁴

449. But there are significant differences between the position of the Canadian high school teacher and that of Mr Kupka. The teacher taught teenagers and had defined responsibilities in a role of power and influence over young minds. Mr Kupka was a student with no teaching responsibilities. Furthermore, universities, unlike secondary schools, are premised on the freedom to hold and express unpopular opinions. Looking at all the facts, I conclude that Mr Kupka's private activities did not create a poisonous environment for Jews on campus. He did not express his views in the course of his university study. He did not direct his views at members of the university. He did not publicise his views on campus. The Race Relations Conciliator was reported in April as saying that Mr Kupka's postings had attracted very little attention on the Internet.²⁵⁵

450. Far from creating a hostile environment for Jews, Mr Kupka was reviled for his anti-semitic racist views, Members of the academic staff and of the university's senior management held differing views on how the university should deal with Mr Kupka but, as far as I can ascertain, everyone who was aware of his views deplored them. The Waikato Students Union, in co-operation with the Waikato/Bay of Plenty Jewish Association, organised a demonstration to protest against racism and Holocaust denial. On the facts of the matter as they stood in April and May 2000, Mr Kupka's off-campus activities could not be linked with any evidence of hostility against Jews.

451. A stronger case could perhaps be made for the argument that Mr Kupka's Internet publications were bringing the university into disrepute. In that context, the distinction between Mr Kupka's private avocations and his status as a member of the university gave him less protection. I am advised that behaviour that reflected badly on the university could be relevant irrespective of where it took place. As stated, Mr Kupka's activities took place off campus. With a couple of exceptions, Mr Kupka did not identify himself with the university. The Anti-Defamation Commission had, however, made the link as early as February 1998 and had alerted key members of the New Zealand Jewish community. University teachers in German departments in other New Zealand universities knew that Mr Kupka was a Waikato post-graduate student in their subject. In April 2000 the Vice Chancellor received the first of a number of letters from them and from other teachers in New Zealand universities expressing concern for Waikato's reputation.

452. Although I am advised that a link between the offending behaviour and the university is not required as a matter of law, I understand that the strength of the connection between Mr Kupka's views and the university is a highly relevant factual consideration. The more closely offensive behaviour is linked to the university, the more reasonable it is to conclude that the behaviour is damaging to the university's reputation. It is not easy to establish such a link on the evidence available. Mr Kupka did not hold a teaching position in the university. Mr Kupka's personal views were published in German on German websites. His doctoral research was not on the Holocaust. Would a reasonable person have associated his views with the university? Mr Kupka would have no doubt appealed to the university's core values in his defence: his right to

²⁵⁴ Chapman Tripp to Review, 7 June 2001.

²⁵⁵ *Waikato Times*, 14 April 2000.

freedom of expression, the university's role in defending academic freedom, and its role as critic and conscience of society.

453. As to whether Mr Kupka's conduct could reasonably be held to be prejudicial to the functioning or interests of the university, I consider this unlikely also. I have been advised that this provision requires conduct that materially interferes with the administration, operations or financial or other interests of the university. In other words, Mr Kupka's conduct would have had to cause some genuine detriment to the university. As Mr Kupka made his Internet postings from his own computer, at home, and in his own time, I do not think there were serious grounds for arguing that Mr Kupka's activities were a detriment to the university's functioning or interests.

454. I think it unlikely that a successful case of misconduct could have been made out against Mr Kupka. This is not to say that I consider the university's conduct to be ideal. The university is required by its charter to 'sustain and further develop a safe and healthy campus environment which reflects social, cultural and spiritual values appropriate to [the] University community.' That aspiration seems to me to encourage the university to do more than merely prevent harassment and discrimination in its campus but also to be vigilant that these principles of equality and tolerance and cultural safety are well understood and adhered to. I consider, from reading the charter, that it implies an expectation that Waikato University will follow best international practice in dealing with cultural sensitivity issues. Although I do not consider that legal action against anyone – the university, its members, or Mr Kupka could have succeeded – the university did not in my view live up to its ideals in dealing with Jewish cultural sensitivities in its handling of the Kupka affair²⁵⁶ (see paragraph 492).

Finding

24. It seems unlikely that a successful charge of misconduct could have been sustained against Mr Kupka under the University of Waikato Discipline Regulations.

The Vice Chancellor's role

455. Professor Selby observed in one of my interviews with him that once the Vice Chancellor became involved in the Kupka controversy 'he was the process.' From November 1999, Professor Gould directed Ms Weir's handling of the harassment claims. From early December he was aware that the Bing–Franke letter of 26 November was before the FASS Ethics Committee and had been referred for consideration by the Postgraduate Studies Committee.²⁵⁷ From 8 March 2000, when he received Ms Weir's report, he was, in Professor Selby's word, the process. It was abundantly clear, she told him, that 'there is no resolution to this matter.' Her report called for decisions that only he could make as Vice Chancellor.

456. That was the moment, in my view, when Professor Gould should have taken the initiative. He knew that the university was bound by law to protect Mr Kupka's freedom of expression and his right not to be harassed. He had decided that the university would not take a discipline case against him. But he also knew that Mr Kupka had so far undertaken only fourteen months of the three years he expected to take to complete of his doctoral research. He could be expected to remain an enrolled student until the early months of 2002 at least. On the other hand, Professor Gould knew that Jewish sensibilities would be assaulted for as long as Mr Kupka remained a student and gave vent to his political opinions from his home computer. The reputation of the university, they felt sure, was suffering and would continue to suffer. The university had a duty to safeguard the interests of all its members.

²⁵⁶ Chapman Tripp, 7 June 2001.

²⁵⁷ Selby interview, 20 February 2000; Vice Chancellor to Berendse, 6 April 2000; Bing submission #36.

457. Professor Gould knew that the question raised in the Bing–Franke letter about the legitimacy of the decisions surrounding Mr Kupka’s enrolment had not been dealt with. It remained, in Ms Weir’s opinion, one of the ‘outstanding matters’ still to be attended to. She spelt out the issue it posed for him:

It is, however, apparent that at no stage during the submission process was the [Higher Degrees] Committee made aware of the issues now being raised, and one of the difficulties is whether the [Postgraduate Studies] Committee can or should now consider the Doctoral topic some eighteen months into its progress.

458. Professor Gould had very little room for manoeuvre. Because of the unassailability of Mr Kupka’s rights, any arrangement he might be able to work out in consultation with his Jewish colleagues could be expected to leave them feeling aggrieved. Their attempt to get a discipline charge brought against Mr Kupka for harassment had come to nothing and he knew towards the end of March that Professor Bing, on being informed of the university’s decision, was exasperated. Professor Gould informed Professor Bing by email that, as far as he was aware, ‘the university processes were working well’ and that he had so far not been asked to intervene by any party.²⁵⁸ But Professor Gould also knew from Professor Koopman-Boyden of her frustration at not succeeding in convening a meeting with Professor Bing and other Jewish colleagues. Ms Weir’s report gave him an opportunity to intervene himself. He had discussed with Professor Koopman-Boyden the possibility of his convening a meeting with his Jewish colleagues. As well as his status as Vice Chancellor, he had one important personal asset: his own work in anti-racist activities as a politician and public affairs commentator. As a Member of the British House of Commons he had been an active member of the Labour Friends of Israel, the group in the Parliamentary Labour Party that supported Israel. He had been active in the Anti-Apartheid Movement. He had worked closely with the Anti-Nazi League when he was working in television.²⁵⁹ He could with complete conviction have told his Jewish colleagues, as he later told some of his correspondents, that he deplored Mr Kupka’s publicly expressed opinions. He should have invited them to meet him so that they could share views on the situation that the university found itself in and on what could realistically be done about it.

459. He would have explained what was implied by the university’s duty to uphold Mr Kupka’s human rights. Mr Kupka’s opponents would have told him that they also acknowledged Mr Kupka’s right to free expression and would be doing nothing to infringe them. Professor Gould would have explained why, after due consideration, he believed that disciplinary action against Mr Kupka was unlikely to succeed. He would have told them that the issue of cultural safety raised in the Bing–Franke letter was still to be considered by the FASS Ethics Committee and that Mr Kupka’s research had been suspended until the committee had completed its investigation. He would have told them that, depending on the outcome of that ethical review, Mr Kupka could be expected to be a student until mid to late 2002. He would have expected Professor Bing in reply to raise again the concerns that he and Mr Franke had raised about the processes by which the university had considered and registered Mr Kupka’s doctoral research proposal. Professor Bing would no doubt have said that the Bing–Franke letter had not been tabled by the three committees he had asked to deal with it, and Professor Gould would have cleared up that point for him.

460. Professor Gould would have assessed Professor Bing’s complaints in the light of Ms Weir’s report and considered whether there might still be matters to look into. Professor Selby’s inquiries into Mr Kupka’s doctoral registration had been confined to the documents that the Higher Degrees Committee had considered. Professor Bing would have given Professor Gould his understanding of the consequences of Professor Oettli’s meeting. Ms Weir had identified

²⁵⁸ Gould to Bing, 16 March 2000.

²⁵⁹ Gould to Review, 6 August 2001.

Professor Oettli's decision following that meeting as something that might need to be looked into. It is difficult to see how, in a spirit of conciliation, Professor Gould could have avoided setting up an investigation of some sort to look further into Professor Bing's complaints.

461. There were then, as there still are, members of the university who have the respect of the Jewish group and their sympathisers, as they do of their colleagues generally. A committee of one or two respected colleagues, selected in consultation with the Jewish group and their supporters, working to an order of reference that was also worked up in consultation, was what was required. The Vice Chancellor would have been seen to be dealing with a thorny set of issues in the spirit of the university's charter commitment to sustain an institutional environment in which 'people are understood, appreciated and consulted.'²⁶⁰ Such a committee, or some similar initiative, might or might not have produced answers to the questions of concern to Professor Bing, his Jewish colleagues, and their sympathisers. But it would have shown that Professor Gould was sensitive to their concerns, and, as one colleague among others, wanted to do what he could to settle or ameliorate them. Professor Gould did not arrange to meet his aggrieved Jewish colleagues.

462. It was one of the mischances of the Kupka affair that, during the last week in March, Professor Bing was himself thinking about finding a way of setting up a meeting with the Vice Chancellor and Deputy Vice Chancellor (see paragraph 121). He foreshadowed this in his email to Professor Koopman-Boyden of 24 March and he proposed it as a course of action at the meeting of the Waikato/Bay of Plenty Jewish Association on 29 March. But the consensus at the meeting was that there should first be a response to the letter that he had addressed to Professor Middleton as deputy chairperson of the Postgraduate Studies Committee. The letters that were written to Professor Gould and Professor Middleton were intended to elicit that response, after which the association would then ask for a meeting with Professor Gould. Professor Bing emphasised in discussion with me on this point that the university's academic processes were the appropriate means for investigating and resolving the questions he was raising.²⁶¹ As he viewed the situation at the end of March, however, those processes – the Postgraduate Studies Committee, the FASS Ethics Committee, and the University Human Research Ethics Committee – had failed to deal with them. Then, with the publication of *Nexus* on 11 April, Mr Kupka's doctoral research and his alleged Holocaust-denying publications became public knowledge and the Kupka affair entered a new phase.

Finding

25. By not opening a dialogue with Jewish colleagues and their supporters in the second half of March 2000, Professor Gould missed an important opportunity to inform them of his understanding of the issues facing the university, listen to their concerns, and consider how the university could respond to them.

Information and misinformation

463. Beginning with the *Nexus* scoop, the university became the focus of intense media interest (see paragraphs 140–44). Professor Gould, assisted by Mr Callaghan, Assistant Vice Chancellor, responded to requests from journalists. Professor Gould replied to correspondents. Professor Selby stood in for Professor Gould when he was Acting Vice Chancellor for part of June.

464. Professor Gould stated the university's position in his memorandum of 10 April to members of the Postgraduate Studies Committee and members of council (Appendix R) and in letters to various correspondents. The university, he wrote, was acting within the law and would continue to do so. No one would be prevented from expressing views within the bounds of the law simply because others did not agree with them. Mr Kupka's right to freedom of expression would be

²⁶⁰ University of Waikato, *Calendar 2001*, p. 59.

²⁶¹ Bing, oral submission, 5 April 2001.

protected. The university would ensure that its own processes did not discriminate against him. Professor Gould was satisfied that the university had acted properly and even-handedly in its dealings with Mr Kupka. Various allegations made against him were without foundation. There were factual errors in some of the material that was circulating. The university took all issues of cultural safety seriously. An ethical review of Mr Kupka's research proposal was under way. There was no acknowledgement in his memorandum of the hurt to Jewish members of the university caused by Mr Kupka's published opinions.

465. Professor Gould's statement was released to the media and parts of it were included in some newspaper reports. He was readily available to journalists and was regularly reported in short explanatory statements. He hoped, he told me, that by keeping statements of the university's position brief and general, media interest in Mr Kupka would die down. That assessment seems to have been largely correct. Media interest tailed off after a week or ten days but some damaging bits of misinformation had in the meantime become firmly lodged in journalists' accounts and in other published comments, and the university did not challenge them.

466. Professor Gould's reference to false information was a recurring theme in his public statements during the public phase of the Kupka affair. But the university made no effort to identify the false information or to correct it. Professor Gould noted in his memo of 10 April, for instance, that a letter written by Professor Bing contained a number of 'factual inaccuracies, particularly about university processes'.

467. But Professor Bing was not informed what these were. Moreover, Professor Gould's memo was itself the source of misinformation. He wrote that the mediator had investigated issues of cultural safety but she had not. Those issues were not part of her inquiries into harassment claims. They related to Mr Kupka's research and were being dealt with by the FASS Ethics Committee. Nor was it correct to say that the Postgraduate Studies Committee had played an exemplary role. It had not played any role. The executive group, acting on behalf of the committee, had dealt with the matters in the Bing–Franke letter that came within its purview but had not informed the committee or Professor Bing of the result. There was also an important omission from Professor Gould's statement. The FASS Ethics Committee had suspended Mr Kupka's research on 30 November 1999 and he was thus not permitted to administer his questionnaires until the committee gave them its ethical approval. It was very much in the public interest that the university publicise that information, and it would have done so by invoking its powers under section 5 of the Official Information Act. For German-speaking members of the Jewish community it was the one piece of information they needed to allay their fears, at least temporarily. The university did not attempt to clarify the matter.

468. Of the items of misinformation that circulated on campus and in the media during the public phase of the Kupka controversy, the most damaging to the university was the statement that Mr Kupka would be interviewing Holocaust survivors. Associate Professor Knuefermann knew that members of the Jewish community held this misconception at the end of March when he received a letter from the editor of the *New Zealand Jewish Chronicle* asking him to respond to some questions about Mr Kupka. It was his understanding, the editor informed Associate Professor Knuefermann, that Mr Kupka's research would 'deal with German and Austrian immigrants to contemporary New Zealand society. I'm somewhat concerned,' he wrote, 'for the sensitivities of the people likely to be interviewed knowing a little about Mr Kupka's convictions and background.'²⁶² Associate Professor Knuefermann did not detect the significance of the reference to interviews. He was responding to a request from a Jewish newspaper. His letter in reply should have stated simply and clearly that interviews were not part of Mr Kupka's research plan and he would not be interviewing anyone. Associate Professor Knuefermann's letter is in Appendix S.

²⁶² Mr Regan to Knuefermann, 28 March 2000.

469. The *New Zealand Jewish Chronicle* did not publish Associate Professor Knuefermann's letter but the April issue of *Nexus* included it in its spread on Mr Kupka. The editor of *Nexus* had asked Associate Professor Knuefermann for comment on his part in Mr Kupka's doctoral research and he had provided a copy of his letter to the *New Zealand Jewish Chronicle*. In a letter published in the May issue of *Nexus*, Mr Franke contradicted Associate Professor Knuefermann's account but Associate Professor Knuefermann did not respond (Appendix S). *Nexus* also published excerpts from the opinions of the four Holocaust scholars on Mr Kupka's Internet publications, including Ms Freudenberg's surmise that Mr Kupka might interview German-speaking Jewish refugees and members of their families, and that possibility was highlighted in other media reports. Associate Professor Knuefermann did not take the opportunity to have Ms Freudenberg's misconception corrected in the next number of *Nexus*. It was not until September, in a letter written by Professor Selby to the *New Zealand Education Review*, that the university attempted to clear up the misunderstanding.²⁶³ Dr Knuefermann told me that he did not want to get drawn into public debate about Mr Kupka's Internet postings.²⁶⁴

470. Associate Professor Knuefermann kept out of the limelight but Professor Gould could not. He had a very difficult part to play. The Kupka case, when it broke in the media, lent itself to sensational reporting. Moreover, newspaper readers, radio listeners, and television viewers had no means of knowing the extent to which his media releases and interviews had been tailored to an editorial line. Initially, too, media interest focused on Mr Kupka more than the university. References to his freedom of speech and his academic freedom were in general terms, and the university's published responses were similarly general.

471. By deciding not to take disciplinary action against Mr Kupka, the university's official position was that it had no further interest in whether he was or was not a Holocaust denier. It was for Mr Kupka to defend himself publicly if he wanted to, and he asserted in the *Waikato Times* that he did not deny the Holocaust. It was in my view unnecessary for Professor Gould to express a public view on Mr Kupka's personal opinions and a mistake to commit the university publicly to the view that Mr Kupka was not a Holocaust denier. There was a strong public interest in whether or not Mr Kupka was a Holocaust denier. That interest was strongly represented on campus, too. What the university had to try to explain to the public, however, was that, in line with its duty to uphold academic freedom and the highest ethical standards of research, it was subjecting Mr Kupka's research to the same process of ethical scrutiny that it applied to any other piece of research involving human subjects.

472. The people on campus and in the wider community who scrutinised Professor Gould's public statements were looking for different kinds of reassurance. Was he standing firm on the university's duty to uphold Mr Kupka's academic freedom? How could the university do that and meet the concerns of Jewish and other members of the university community? From the moment that the Kupka affair became a media spectacle, he had a battle on his hands with some of his critics on and off campus. He knew that his public statements would be analysed minutely and could be used by probing journalists to keep the issues alive. His most important public comprised members of the Jewish community, the most prominent of whom were also members of the university, and other members of the university community. Most of them had no direct involvement in Mr Kupka's academic progress but needed to be informed about the way the university was dealing with his case.

473. Professor Gould's stance on the university's duty to uphold freedom of expression and academic freedom was widely commended. Even Mr Kupka's opponents, some of them publicly, acknowledged his right to freedom of expression. But the Jewish colleagues and their supporters who had taken up the cause were dismayed when, in their view, their Vice

²⁶³ *New Zealand Education Review*, 8 September 2000.

²⁶⁴ *Waikato Times*, 18 April 2000; Knuefermann interview, 19 February 2001.

Chancellor defended Mr Kupka's opinions. He was not, as he acknowledged, an expert on Holocaust studies. What right, they asked, did he have to pronounce on Holocaust denial? Surely he should heed the views of his Jewish colleagues if he wanted to know whether or in what sense Mr Kupka's opinions were those of a Holocaust denier?

474. The remark that caused the deepest offence was a comment that Professor Gould made during a radio interview a few days after Mr Kupka resigned. He was making the point that the university had applied its 'normal processes' to his case but Mr Kupka had 'himself decided to withdraw.' He said 'in passing ... that some of the material that got into the public domain was quite misleading, and a great witch hunt was mounted on the basis of false information in many cases.' Professor Gould told me that he knew he had made serious mistake, regretted it as soon as he said it, and still regrets it.²⁶⁵

475. It galvanised his Jewish critics. They interpreted it as a remark directed against themselves. Dr Simms explained the nature of the hurt in his submission to the review. To accuse Jews of being 'witch-hunters', he wrote, touches off 'deep painful historical memories' of anti-communist campaigns and McCarthy investigations that members of some of their families and some of them had lived through in other countries. Those experiences had 'shaped our sense of what is just and what is not, [and] what must be done to stop evil in its tracks.' That is why the Vice Chancellor's remarks were so wounding.

*Particularly because we have dedicated our careers to preventing and challenging precisely these kinds of political demagogues and fighting against the ignorance and stupidity they arise from, we cannot but feel that such statements that accuse us of leading a campaign of smear, character-assassination, and witch-hunting was meant otherwise than to deny the whole meaning of our lives.*²⁶⁶

476. Professor Gould's response brought out a significant difference in cultural perceptions. To him and, I imagine, most non-Jewish New Zealanders, the word witch-hunt has long since ceased to have demonic or even gender implications. It has become a predictable metaphor of media reporting of some aspects of public life. A number of reviews into government agencies have been made while this review has been under way. All have been referred to publicly at various times as witch hunts without the label coming in for adverse comment. In the Kupka affair, however, it was the associative meanings of Jew, witch, and witch-hunt that touched a sensitive cultural nerve-end in a situation in which emotions were already running high.

477. There is nothing to be gained from providing further examples. The impression I formed from interviews and oral submissions was that, irrespective of their stance during the public phase of the Kupka affair, many people inside the university and closely associated with it thought that the university had not handled its public relations well.

478. The most serious shortcomings were at the personal level. Professor Gould did not talk to his campus critics or comment or discuss the points they had raised with him in replies to their letters. He was in my view mistaken in not finding opportunities to talk to Dr Bolstad and Dr Pratt, both of whom had written to him in early April (see paragraphs 183–85). Dr Bolstad had told him that he was getting the wrong advice. Professor Gould's advice was coming primarily from Associate Professor Knuefermann, Professor Selby, and Professor Middleton. A conversation with him would have enabled Professor Gould to assess the advice he was receiving in the light of understandings that Dr Bolstad and others had of the case. Dr Pratt's letter, though critical, was conciliatory. He had taken his stance, he wrote in his submission to the review after much soul searching and after taking care to hear Associate Professor Knuefermann's and Professor Bing's understandings of the issues. He had formed the view that

²⁶⁵ Professor Bryan Gould on 'A Tertiary World' NewstalkZB, 4 July 2000; Gould interview, 22 May 2001.

²⁶⁶ Simms submission.

the university was in danger of being passively anti-semitic in the way it was dealing with the case.²⁶⁷ Professor Gould should also have made an opportunity to probe that interpretation of the situation with Dr Pratt.

479. Members of the university who had dealt with the Kupka affair as part of their responsibility told me of the deep sense of hurt they felt when they were by implication accused of being passively anti-semitic. By the end of March, however, that is exactly how members of the Waikato/Bay of Plenty Jewish Association felt that the university was treating them. In the absence of dialogue, a gulf in perceptions was opening up.

Finding

26. The university's statements of its position on Mr Kupka's studentship were insufficiently informative, did not identify or correct important items of misinformation, and included some misinformation in correspondence and responses to the media.

Cultural sensitivity

480. Four interlocking issues were at the centre of Mr Kupka's doctoral research: the maintenance of his human rights while a member of the university; his academic freedom as a doctoral student; the university's sensitivity to the cultural concerns of Jewish academics, Jewish stakeholders, and Jews who might have been asked to take part in Mr Kupka's research; and the university's ethical requirements for the conduct of the research. Some Jewish academics and members of the wider Jewish community became fearful when they became aware that a Holocaust denier, as they saw him, was engaged in a research which, so they understood, could bring him into contact with Holocaust survivors. Mr Kupka was expressing views that were utterly abhorrent to them. They were views, furthermore, with which they were already painfully familiar from their knowledge of anti-Jewish propaganda generated by Historical Revisionists. When, as it seemed to them, the university was not taking their concerns seriously, they decided that they must make their own stand. For some Jews on campus that stand began in October 1999; for the Waikato/Bay of Plenty Jewish Association at the end of March 2000; for the New Zealand Jewish Council in May; and for some elderly Holocaust survivors with their appearance at the August council meeting.

481. Jews are members of a small community in New Zealand society. They have had a continuous presence here since the late 1830s and have contributed significantly to our national life in many ways in many fields. But they are not, as the Waikato/Bay of Plenty Jewish Association noted in its submission, very 'visible' as Jews.

*Perhaps [the Association wrote] it is because we are so integrated into "mainstream" New Zealand society and not so clearly identifiable by skin colour, physical features, and so on. This can lead people to assume that we are 'just like everyone else' or worse yet, that we do not even exist as a distinct cultural group. Whatever the reason, Jewish people in New Zealand have come to accept that we cannot take for granted that our concerns and issues will be understood by the mainstream of New Zealand society.*²⁶⁸

That situation brings disadvantages for other New Zealanders as well. Many will be less well informed than they should be of the ineradicable impact of the Holocaust for Jews, their sense of their cultural identity, and their awareness of the perilous nature of their long history as a people.

482. The re-emergence during the last twenty years of extreme, right wing nationalist movements in European countries and others, not excluding New Zealand, is anathema to Jews throughout

²⁶⁷ Pratt interview.

²⁶⁸ Waikato/Bay of Plenty Jewish Association submission.

the world. Most New Zealanders are inclined to regard the Holocaust as history and Holocaust deniers as members of a manic fringe. For Jews, Holocaust deniers are distorters of the clearly established historical record, fabricators of a myth and, through their international organisations and networks, propagators of views that seek to rehabilitate the Nazi regime in the interest of their neo-Nazi political agenda. Members of New Zealand's Jewish community have thus found themselves engaged in an international battle for hearts and minds. They must defend the truth of the historical record and their own cultural safety as a people. They have an obligation to themselves and to other vulnerable minorities to take a public stand against fascist ways of thinking and acting.

483. That, I believe, was the spirit in which four Holocaust survivors met me to make submissions to the review. They came to bear witness. Copies of the statements made by Mrs Ruth Filler, Mr Rob Narev, Mr Fred Silberstein, and Mrs Maru Bing-Kulka are in Appendix Z. The meeting was heart-rending and sombre, and it was clearly painful for those who spoke and the members of their families and friends who supported them. It also gave stark point to a recurring pattern of Jewish history: marginalisation and periodic victimisation. Jews are acutely aware of that history and know that they can never assume that their safety as a community group will be assured from one generation to the next. As part of their survival skills, they have developed highly sensitive cultural antennae. Seemingly small matters that non-Jews might read as being insignificant may be identifiable to Jews as evidence of anti-semitism which, if not challenged, can place Jewish communities at risk. Mr Kupka's Internet postings were a virulent form of anti-semitism.

484. Many Holocaust survivors suffer from post-traumatic stress disorder. 'Some of us,' Mr Narev told me, 'are not able to cope with the trauma of the reality of the Holocaust as well as others.' A protective concern for fellow survivors and their families was in itself an important reason why the Holocaust survivors had sought a meeting with me. They affirmed through their personal testimonies that a commitment to cultural safety is a commitment to all the cultural and ethnic communities that are part of the university community. It is also a commitment to a duty of care towards the individuals who are part of those communities. Neglectful attitudes over the Holocaust demean Jews collectively and create very real risks for the mental safety of Holocaust survivors. 'We are talking here,' Mrs Bing-Kulka wrote in her submission, 'about the need to be pre-emptive on behalf of other people. To recognise when something bad is about to happen, and to act in such a way as to make the situation less likely.'²⁶⁹

485. The Jewish people who met me told me that they had not at first thought they would need to become involved in something they saw as the university's responsibility. They became active because of the way the university seemed to be handling Mr Kupka's doctoral research. It was the first time that they had taken a stand on an issue that was specifically Jewish. Those who attended the vigil-demonstration at the August council meeting felt demeaned when they later read that Professor Selby had referred to them as 'uninvited guests.' Rightly or wrongly, they told me, circumlocutions bring their antennae into play. Jews have been caricatured for centuries and they resent it. They felt insulted when Professor Gould, acknowledging that he did not read German and was not a Holocaust historian, nevertheless determined on the basis of a literal reading of one item that Mr Kupka's Internet statements were not the statements of a Holocaust denier. The Holocaust survivors who met me speak German. They know that the nuances of Mr Kupka's language get lost when translated into English. Instead of telling them how they should think about their personal history, they said, Professor Gould should have come to them and others for guidance. They found his assumption of authority Kafkaesque.²⁷⁰

²⁶⁹ Mrs Bing-Kulka, submission; Bing-Kulka to Review, 3 September 2001.

²⁷⁰ Meeting with Holocaust survivors and members of Waikato/Bay of Plenty Jewish Association, 12 March 2001.

486. The people at the meeting had been dedicated to liberal causes all their lives. They knew from history that the defences of human rights, including the rights of minorities, depend on a strong, continuing commitment to processes of open discussion, equitable treatment, and tolerance. The issues they raised were matters of principle and were raised not only on their own behalf but on behalf of other minorities as well. It was deeply affronting to them that a reputable university should support a student whose published statements are based on lies that are designed to incite racial hatred.

487. They and the other Jewish groups that made submissions placed great emphasis on the principle of cultural safety. The Waikato/Bay of Plenty Jewish Association discussed its implications in its submission. It pointed to the precedent of Maori New Zealanders. Maori, they wrote, had long experienced frustration and alienation in their own land. Through distortions of history they had been disadvantaged and discriminated against. They had suffered from forms of institutional racism that failed to recognise differences between Maori and non-Maori values and cultural precepts. Their situation began to improve when members of the dominant non-Maori culture entered into processes of consultation with them with the aim of bringing about better bi-cultural understanding. That was the climate from which the phrase ‘cultural safety’ emerged. Over the years it has become a concept to be recognised and promoted by organisations, workplaces, and agencies throughout the country.

488. The university’s lack of understanding of the cultural sensitivities of Jews was for the association the central issue of the Kupka affair. With Waikato University in mind, it wrote:

Our expectation, nonetheless, is that the country’s institutions of learning are places where people are well-informed, thinking, and attuned to the deeper cultural sensitivities inherent in the different groups in our society. If, indeed, the institutions are not well informed then at least they should be prepared to listen when concerns are raised and articulated! Until this happens they cannot act in the role of guardians and watchdogs of freedom and justice.

489. University campuses, the association submitted, should be places where people of all ethnic and cultural communities should expect to be culturally safe. But in their handling of the Kupka case, Waikato’s university administrators had limited their role as guardians of freedom and justice to the protection of freedom of speech. Teachers on campus and others who had insisted on holding the university to its ‘ethical responsibilities to the light of public scrutiny and accountability’ had been disregarded. The association contended that in its handling of the case of Hans Joachim Kupka the university was in breach of the following purposes and goals specified in its charter:

- to sustain and develop a safe and healthy campus environment which reflects social, cultural and spiritual values appropriate to this University community (1.2);
- to create and sustain an institutional environment in which people are understood, appreciated and consulted (1.2);
- to work towards the enhancement of a learning environment which is characterised by processes of consultation with students and staff on academic, cultural, social and other issues (1.3);
- to ensure that research carried out by the university is conducted in accordance with appropriate ethical considerations (1.3);
- to establish and maintain effective public relations by maintaining ongoing consultative relationships with the community (1.3);
- to continue to develop as a ‘good employer’ through enlightened employment policies and actions and through provisions generally accepted as necessary for the fair and proper treatment of employers in all aspects of their employment (1.3)

490. The New Zealand Jewish Council in its submission also drew attention to these purposes and goals. It underlined, too, that, as legislated for in section 161 of the Education Act 1989, the New Zealand universities are expected to ‘exercise academic freedom to the highest ethical standards [and] permit public scrutiny to ensure the maintenance of those standards.’²⁷¹

491. At least for the present, the Waikato/Bay of Plenty Jewish Association wrote, the Jewish community ‘has lost faith in Waikato University and its administrators.’ It felt let down by a process that professed to take issues of cultural safety seriously but had ‘done nothing to acknowledge that we even exist as a distinct group [and had made] no attempt to reach out to us.’

492. The test I applied to the situation that the university’s Jewish stakeholders found themselves in was to ask the question: If comparable matters of concern had affronted the cultural sensitivities of Maori stakeholders, how would I have expected the university to respond? Members of the university would know the answer to that question before it was formulated. Maori have a special status as tangata whenua and Treaty partners. But the university’s charter is intentionally inclusive. The University of Waikato is required to ‘sustain and further develop a safe and healthy campus environment which reflects social, cultural and spiritual values appropriate to [the] University community.’ That, on my reading, implies an expectation that the university will follow best international practice in dealing with cultural sensitivity issues. In my view, it did not live up to its ideals in its dealings with Jewish stakeholders during the Kupka affair. Nor was it properly attentive to its statutory duty under the Education Act to ‘permit public scrutiny’ of the ethical standards it applies in its ‘exercise of academic freedom.’ The university should make a public apology to the Jewish community for its lack of sensitivity to their legitimate cultural concerns.

Finding

27. The university did not live up to its obligations under the university charter in the way it dealt with Jewish cultural concerns and was not properly attentive to its statutory duty to permit public scrutiny of the ethical standards it was applying to Mr Kupka’s doctoral research.

Academic freedom and ethical standards

493. Academic freedom, as it applies to research and publication by university teachers and students, is defined under section 161 of the Education Act as follows:

- (a) *the freedom of academic staff and students, within the law, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions;*
- (b) *the freedom of academic staff and students to engage in research;*

That freedom is qualified in important ways:

In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with

- (a) *the need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and*
- (b) *the need for accountability by institutions and the proper use by institutions of resources allocated to them.*

²⁷¹ Waikato/Bay of Plenty Jewish Association submission; New Zealand Jewish Association submission.

- (c) *The Education Act also states in Section 162(4)(a)(v) that universities ‘accept a role as critic and conscience of society.’*

494. The university *Code of Ethics for Academic Staff* includes a section on ‘academic freedom and responsibility.’ The *University Human Research Ethics Committee Procedures*, 1994, which applied to Mr Kupka’s research at the time of his enrolment, set out the general ethical principles in relation to which all university research involving human subjects is to be conducted. The university does not have a statement of policy for giving expression to its statutory duties under section 161 of the Education Act, how these are translated into the duties of the Postgraduate Studies Committee and the University Human Research Ethics Committee, and its procedures for public scrutiny of its ethical standards and for public accountability. The submissions from members of the university that included some discussion of these matters fell broadly into three groups. Some affirmed freedom of expression and academic freedom as central university values and treated them as if they were synonymous. Those in the second group affirmed these values but acknowledged that there will be occasions where there will be tension between a researcher’s right to freedom of expression and the ethical requirements of academic freedom. There were, thirdly, submissions that considered the rights of researchers to academic freedom in relation to the ethical standards that the university has committed itself to apply to research that involves human subjects.

495. Professor Gould wrote about freedom of expression and academic freedom as if they were interchangeable. He wrote

*... the University had a responsibility to remain true to the principles of academic freedom which have guided universities over the centuries. To deny admission to a student, or to cancel his enrolment, on account of his political views would be a serious step for any university and one which, while one could not say it should never be contemplated, should be considered only in the most extreme case. It was in my view worrying that so many people of whom one might have expected something different were prepared to abandon any commitment to freedom of speech on the ground that the views expressed in this case were abhorrent to them. The principles of academic freedom and freedom of speech more generally count for little if they are not maintained in situations where the views at issue are strongly condemned by a significant number of people. The loudness of the voices raised against those views should not be the criterion applied to decide whether or not those views should be silenced.*²⁷²

496. But Mr Kupka’s freedom of expression was not an issue for those who opposed his doctoral research. Mr Franke told me that, much as he deplored his opinions, it was through Mr Kupka’s exercise of his freedom of expression that he and others became aware of those opinions. Had Mr Kupka not been free to publish, his critics might never have known him for what he was. The New Zealand Jewish Council made it clear that it was not challenging Mr Kupka’s freedom of speech. The Waikato/Bay of Plenty Jewish Association in its submission ‘supported freedom of speech in principle’ but noted that it must be exercised ‘responsibly.’²⁷³

497. Some submissions mentioned the role of university teachers and researchers as ‘critic and conscience’ of society. Here, too, the phrase was used as if it was unproblematic. The notions of critic and conscience were discussed as if they were a single idea: to be a critic of society is to express its conscience. Some wrote that there should be no restriction on the role of critic within the law. None discussed circumstances in which section 161 of the Education Act might place curbs on academic freedom. Some insisted on a sharp distinction between a researcher’s

²⁷² Gould submission.

²⁷³ Franke oral submission, 19 February 2001; New Zealand Jewish Council submission, Waikato/Bay of Plenty Jewish Association submission,

academic freedom and his or her personal opinions: academic freedom for them is inviolable. Such statements were expressed in very general terms and I have treated them as affirmations of conviction. Few of those who spoke in these terms mentioned the ethical standards that are to be applied in research involving humans and whether there might be occasions when they could place limits on the exercise of a university researcher's academic freedom.

498. In varying degrees, however, those whose discussion of academic freedom went beyond generalities acknowledged the academic responsibilities that should go with its exercise. Associate Professor Barton affirmed the ideal of universities as liberal institutions with an important qualification. One of the aims of a liberal education, he wrote is to encourage people to

think rationally about their views, and to confront their preoccupations...I hold that any [research] subject is fit for academic inquiry, no matter how extraordinary or distasteful its nature... While it is hard to compare one type of political view with another, many disciplines, including law, are faced with the challenge of supervising graduate students whose views we find extraordinary or even downright unpalatable ... We must be prepared to see any hypothesis put to the test.

However, in any such case where extraordinary views are being made the subject of academic inquiry, the care with which the university must provide proper supervision and ethics monitoring increases greatly. If the student was to propose to prove that the Holocaust never happened, then the responsibility of the university would be to ensure that inquiry was carried out with the most thoroughgoing methodological oversight possible, to eliminate all risks that proper academic inquiry could be thwarted by prejudice. Indeed, one would hope that in such a case a student compelled to follow the path of meticulous scholarship would be obliged to acknowledge that he or she had to change his or her initial view. And this surely would be a vindication of systematic scholarly inquiry and its power to promote personal growth and understanding.²⁷⁴

499. Associate Professor Barton noted that Mr Kupka's unpalatable views were not to be the subject of his research. But there were indications that his research could be infected by them and they fell into Professor Barton's category of researches for which 'proper supervision and ethics monitoring' was necessary. Associate Professor Harlow also ended his endorsement of academic freedom with a proviso. A person's views were irrelevant to him so long as they did not 'infect' the research.²⁷⁵

500. For Dr Shieff, an opponent of Mr Kupka's research project, the consequences of research infected by a candidate's personal views were the central issue. She had no difficulty over Mr Kupka's right to a free expression of his personal opinions, no matter how repulsive they were to her. His 'off-campus' views would have been of no interest to her had he been planning research into 'pond life or possums'. It was the connection between his beliefs and his research topic that raised serious ethical questions of informed consent and cultural safety. Of course, she wrote, academic freedom entails the right to challenge widely accepted views. But it is 'distinct' from freedom of expression in placing an obligation on academics to 'speak the truth.' To be worthy of the name, researchers must respect the evidential basis and the norms of argument and inference inherent in their disciplines. Geographers, for example, are not free to assert that the earth is flat. The cases of David Irving and Joel Hayward showed that historians are not free as historians 'to recklessly challenge the historical fact of the Holocaust.' Academic freedom is inseparable from academic rigour. It is the same with Mr Kupka. 'Ethical and academic questions necessarily arise when a person seeking an advanced degree in German is known to

²⁷⁴ Barton submission.

²⁷⁵ Harlow to Review, 24 February 2001.

have published anti-semitic and Holocaust-denying statements on the Internet. This means he is not free to undertake research that potentially endangers or exploits his German-speaking Jewish subjects.'

501. Dr Shieff argued that there would have been profound ethical implications even if Mr Kupka's research did not involve 'live human subjects' – if for example, he had proposed a study of Goethe's poetry. University ethics might well argue 'No humans, no animals, no ethics.' But Mr Kupka's association with the university German department would lend academic credibility to his claim to be a Germanist. She wrote:

*It is a contradiction in terms for a Germanist to hold the beliefs he does: a scholar of the German language and culture must acknowledge the significance of the Holocaust in German history, or risk the kind of public humiliation suffered by David Irving. A university that would consider awarding a Holocaust denier a degree that enhanced his claim to be a Germanist cannot be taken seriously as an academic institution.*²⁷⁶

502. Ms Jones and Mr Franke in their submission on behalf of the Waikato Goethe Society, and Ms Welle in her submission, took this line of argument a step further. The German language was the field of Mr Kupka's research. Language is not a disembodied entity, something that exists independently of and uninfluenced by the people who speak and write it. Professor de Ras had made that point in her letter to Professor Gould and to members of the university council when she wrote: 'Most German speakers and researchers of Nazism and of extreme right wing nationalism [would] would immediately recognise' Mr Kupka's use of German.

503. 'No-one,' Ms Welle wrote, would now:

question the proposition that there is a close correlation between language and ideology. Ideology is first expressed in language, it then forms language and instrumentalises it for manipulation and propaganda purposes. Ideological language corrupts the thinking of those who use it deliberately or intuitively. It is precisely the German language that has been instrumentalised in the 20th c. for oppression, exclusion and indoctrination and has been used by ideologues of National Socialism and Communism systematically and unsystematically as a vehicle for propaganda.

Even with the best will in the world, people have difficulty freeing themselves from an 'ideologically deformed language' and concepts that inhere in it. Then, with Mr Kupka clearly in mind, she concluded:

*If someone shows through numerous utterances that his thinking beyond any doubt adheres to a particular ideology and uses an ideological form of German habitually he must be regarded as having at the least a considerably restricted capacity to make this language – and that through the medium of this language itself – the object of an academic investigation.*²⁷⁷

The ethical question for her was whether Mr Kupka's use of language was so much an expression of his ideology that he might not be able to deal fairly and even-handedly with German-speaking Jews who would be included in his research.

504. There may have been signs of infection in the way Mr Kupka formulated his proposal and conducted it until he resigned his candidature. German as the mother tongue of German-speaking minorities must be a major theme of any research into the place of German in contemporary New Zealand. Following Ammon, he listed 'minority groups speaking German'

²⁷⁶ Dr Sarah Shieff submission; Shieff to Review, 22 March 2001.

²⁷⁷ Waikato Goethe Society submission; Anja Welle to Review 15 March 2001.

as one of the areas to be included in his study. He listed ‘immigration’ as one of the matters he would be investigating ‘in the main body’ of the research. But that is the sum total of his discussion of them: two items in lists of criteria and categories. Is this silence merely an illustration of an inadequately prepared proposal? Or did Mr Kupka not want to mention German-speaking Jews even though he knew that they were an important part of his research? Professor Kirkness noted a similar omission in the construction of the questionnaire Mr Kupka planned to use with immigrants (Appendix E). The heading was ‘German immigrant families’, not ‘German-language immigrants.’ Again, German speakers who are not ethnic Germans appear not to have been in Mr Kupka’s mind.

505. What Mr Kupka wrote in a draft chapter of his thesis once his research got under way could not of course have been available to an ethics committee considering his initial doctoral proposal. But it is relevant nevertheless because it illustrates Ms Welle’s point that ideology consciously or unconsciously influences the perceptions expressed through language. What is excluded can be as important as what is included. There is an important omission in the section on the historical background of Germans in New Zealand that Mr Kupka had drafted. It is a little more than three pages in length. The first two and a half pages sketches the history of German immigration until the early 1930s and mentions fifteen Germans by name. Then follows a one-sentence paragraph:

Until the admission of refugees from Nazi Germany between 1933 and 1945 there was no significant immigration of German speakers during or between the time of the two world wars.

No names were mentioned, nor were any in the final paragraph on post-war developments. But an estimated 1900 German-speaking Jews came to New Zealand as refugees between 1938 and 1945. Their contribution to New Zealand national life was important on any measure. Several had biographical chapters devoted to them in *Out of the Shadow of War: The German Connection with New Zealand in the Twentieth Century*, edited by James Bade and published in 1998. Mr Kupka acknowledged Bade’s book in his footnote reference to the only twentieth century German mentioned in his text: Count Felix von Lucknow.²⁷⁸

506. Had Mr Kupka been writing on ‘German in New Zealand’ as a private citizen, his emphases and omissions would have implicated no one but himself and his publisher. But as a doctoral student researching under the aegis of the University of Waikato he was subject to its requirements for enrolment, ethical approval, supervision, and examination. The issue that Mr Kupka’s candidature posed for the university was whether its processes of enrolment, ethical approval, and supervision were working well enough to ensure the maintenance of its academic standards for doctoral research. By the time that his candidature became controversial within the university the focus of attention was on ethical implications of his research arising from the participation of human subjects. To his critics, Mr Kupka’s personal views and beliefs were a factor that should not be ignored.

507. Teachers and researchers in social science disciplines have long been familiar with an approach that acknowledges that, in human research settings, researchers are themselves an important research variable. Dr Robertson, writing as a psychologist, put it this way:

One of the things which is widely agreed among methodologists and which is borne out in my own experience, is that the relationship between researcher and ‘researched is a vital ingredient in assessing both the methodological and ethical soundness of a study. That is, social research is a transactional process in which the researcher usually wields considerable power. This power partly derives from the researcher’s role in determining the questions asked, in deciding what information

²⁷⁸ H. J. Kupka, draft, 4.3.2.1, Historical Survey.

is most salient to the purposes of the study, in collating and categorising material, in interpreting the data and in writing up the results. In contrast, research participants are relatively powerless.

Because of this power imbalance, taking part in research has the potential to place participants in a vulnerable position. They may feel bullied, manipulated or unheard by the researcher. They may fear that their privacy is at risk. They may be upset by having to talk about sensitive issues. (Indeed, they may feel re-victimised if the topic of the research relates to experiences of abuse, violence or other harms.) They may feel the researcher has distorted what they have said. They may fear that the published research will present them and any group to which they belong in a negative light. It seems safe to assume that such fears would be exacerbated in the case of Jewish participants being interviewed by Mr Kupka.²⁷⁹

508. Dr Goldsmith, writing as an anthropologist, said that he ‘would be prepared to concede’ that there ‘were some instances’ where ‘the identity of the researcher is irrelevant to the methodological and ethical soundness’ of a research. ‘There *are* times, however, when the personal identity, cultural values, and political stance of the researcher are fundamental pieces of information. [Mr Kupka’s research] has been one of those times.²⁸⁰

509. These discussions on academic freedom and ethical standards reflect wide divergences in the views among the members of the university community. What was missing was any statement of the university’s position on the contending matters of principle that came to the fore in the course of the Kupka affair. That omission is understandable. The Kupka affair forced members of the university community to consider fundamental issues that they had previously been able to take for granted. Some members of the university have given a great deal of thought to the ethical principles that should govern human research by students and the procedures of ethical approval associated that are intended to give effect to them. The *University Human Research Ethics Committee Procedures 1994* and the *Human Research Ethics Regulations 2000* are testimony to their effort and commitment. What was missing when Mr Franke and Professor Bing first expressed their misgivings about Mr Kupka’s research proposal was a statement of the academic, ethical, and human rights issues that provide the context within which the university’s regulations for the registration and ethical approval of research are to be interpreted and applied. At the heart of the debate about ethical standards sparked by Mr Kupka’s doctoral research was whether his known personal views should have been included or excluded from the ethical scrutiny of his proposal. Some of those who argued that they should pointed to what they considered to be deficiencies in the regulations or in the procedures through which they were applied. Others questioned whether the regulations were in principle soundly based. The university has yet to work out its institutional answer to these concerns.

510. The nature of the task to be undertaken is outlined in a draft statement on ‘Academic Freedom and Ethics’ written by Associate Professor Gunn. That statement ends where the university should now begin. The last sentence of Associate Professor Gunn’s statement reads:

In conclusion, what is usually referred to as the right to academic freedom is best understood as a professional duty to advance our understanding of the world. A necessary condition of the successful discharge of this duty is that academics be free to choose their own approach to the pursuit and transmission of understanding, subject to the requirements of respect for the standards of the discipline, and the legal, contractual and ethical obligations of academics.²⁸¹

²⁷⁹ Dr Neville Robertson submission; oral submission 14 March 2001.

²⁸⁰ Goldsmith submission; oral submission, 16 March 2001.

²⁸¹ Academic Freedom and Ethics, Alistair S. Gunn, Department of Philosophy, University of Waikato, [Draft].

511. The core of the project would be the elucidation of the requirements and obligations mentioned at the end of that sentence. These provide the context and set the limits for the exercise of academic freedom. Individual researchers have statutory rights to academic freedom and freedom of expression. The university has statutory duties to safeguard those rights. But it also has statutory duties to maintain the highest ethical standards in its research and permit public scrutiny of those standards. For the sake, too, of its reputation among universities it must ensure that its research meets acceptable standards in the disciplines and fields in which its teachers and students are researching. The Kupka affair brought all of these matters into sharp, contentious focus. The university now has the collegial task of reviewing the various issues of principle that must be kept constantly in mind in the conduct of its research. The task is essentially one of clarifying the academic and ethical principles that the university upholds, identifying, by way of examples, circumstances in which some of these principles may sometimes be in tension, explaining the role of university ethics committees in ruling on the ethical principles to be applied in such circumstances, and reconsidering the university's provision for public scrutiny of the ethical standards it applies to research involving human subjects. I discuss the matter of public scrutiny in paragraphs 526–28.

512. I recommend that the council invite the Academic Board to undertake a process of consultation for the purpose of producing a statement that it could consider adopting as a statement of university policy on academic freedom and ethical standards in research involving human subjects. A review of the principles governing the University's best practice in the application of ethical standards would be enlightening for those who took part in it. More importantly, the resulting policy statement would be an important source of guidance for everyone with an interest in the university's conduct of its research: postgraduate students, research supervisors, members of the university's ethics committees and other members of the academic staff, members of council, and stakeholder organisations.

Finding

28. A wide range of views was expressed on freedom of expression and academic freedom and on ethical standards in research involving human subjects. The university should, as a collegial task, prepare a statement of policy on academic freedom and ethical standards in research involving human subjects.

Postgraduate research under the new regulations

513. Since the time of Mr Kupka's enrolment as a doctoral candidate, the university's formal requirements for registration for postgraduate research have been comprehensively revised. . The new regulations came into effect towards the end of 1999. They were not a response to the Kupka case but a result of a reappraisal of the regulations for the enrolment, supervision, and examination conducted over a number of years by members of the Higher Degrees Committee and others. Their requirements and administrative implications are set out in the *Handbook for Research Degrees of M.Phil, Ph.D. and EdD at the University of Waikato*. The University Human Research Ethics Committee has also reviewed the ethical requirements for the conduct of projects classified as human research. The University Human Research Ethics Regulations 2000 came into force in 2001. Its requirements are published in the *Handbook on Ethical Conduct of Research 2001*, which has replaced the *1994 Human Research Ethics Procedures*.

514. The new regulations for registration are a vast improvement on the ones they replaced. The requirements of candidates, departments, and supervisors are more closely detailed in the tasks to be performed during a process that leads through several steps to enrolment, continues under arrangements for supervision that are monitored, and ends with the presentation of a thesis for examination. Arrangements for assuring the quality of what candidates and supervisors will each bring to a research project are clearly stated and the Postgraduate Studies Committee has instituted systems intended to ensure that the regulatory requirements will be met.

515. The preliminary requirements for students who are thinking about becoming candidates for a research degree are carefully spelt out, and deans or deans nominees, departmental chairpersons, and prospective supervisors are from the beginning required to take actions and make decisions that will have an important bearing on students' decisions. An important consideration for prospective doctoral applicants is their prior experience of thesis research. Mr Kupka's MA papers would not now be an acceptable prerequisite for conditional enrolment as a doctoral candidate. To be enrolled for a doctoral research a candidate must have had previous successful experience of thesis research. Mr Kupka's MA did not include a thesis. He would now be required to enrol first for an M Phil degree and complete a research project to 'demonstrate knowledge of particular research skills ... or to improve knowledge of the proposed research area.'²⁸² The requirements of supervisors have also been made much more stringent. Only persons who meet the university's requirements in the role of supervisor may act as chief supervisor or supervisor of a doctoral candidate.

516. Enrolment for a research degree is now a two-stage process. Applicants who have met the pre-requisites and been cleared by their faculty or school, prepare a brief research plan which is considered for 'conditional enrolment' by the Postgraduate Studies Committee. Under the guidance of their supervisors, candidates who have been conditionally enrolled then take six months or more to convert their initial proposal into a firm research proposal which, together with a report from their chief supervisor, is then considered by the committee for confirmation of enrolment. The *Handbook for Research Degrees* provides applicants with a useful statement of the university's requirements for doctoral theses. It also sets out the eleven 'minimum components' of a research plan, including 'an ethics approval statement (if relevant).' The reports of chief supervisors follow a standard form and include, among other things, comment on the applicant's 'conceptual or theoretical knowledge of the field of study' and 'ability to design appropriate methods of investigation.' It is a duty of chief supervisors to apply to the relevant ethics committee for ethical approval for the candidate's project.

517. The new requirements are much more demanding of candidates and prospective supervisors than those administered by the Higher Degrees Committee. The proposal that the Higher Degrees Committee approved when it registered Mr Kupka's doctoral application was in effect his initial proposal. Under the new requirements, it would have been accorded conditional approval, which would have been followed by at least six months of further development in discussion with his supervisors. It would have been part of his chief supervisor's duty to be satisfied that Mr Kupka's proposal had been sufficiently well conceptualised and that he had devised a methodology that would give reasonable assurance that it would contribute significantly 'to the advancement of knowledge in a specialised field.'

518. The revision of the Human Research Ethics Regulations has also resulted in a tightening up of the requirements of what the 1994 regulations described as the 'nine primary principles' to be applied to research involving human subjects. These principles remain at the heart of the regulations but their wording has been sharpened up. The most notable change has been the substitution of 'must' for 'should' in the operative language. Referring to the requirement of informed consent, for example, the 1994 procedures stated: 'The principle of informed consent requires that where practicable, people should not be involved in research without understanding and fully agreeing to such involvement.' The 2000 regulation is prescriptive and places the onus on the researcher. 'A researcher must not involve a person in research unless the person has understood the nature of his or her involvement and fully agreed to it in accordance with the principles outlined in this section.'

²⁸² 'Handbook for Research Degrees of M.Phil., Ph.D. and EdD at the University of Waikato, [1999], sections 3.4 and 4.1.

519. In one important respect, however, the 2001 regulations take a step backward. Under the heading ‘Social and cultural sensitivity,’ they state:

- (1) *A researcher must respect the cultural, social and language preferences and sensitivities of the participant.*
- (2) *Where the research is aimed at individuals or groups who are significantly different in culture from the researcher, the researcher must consult a qualified person before the research begins about appropriate procedures and approaches to the research and about informing the participant or community concerned of the research findings.*

Apart from the use of ‘must’ in place of ‘should’, the new regulation has a significant omission. The old regulations required researchers, ‘where possible, to consult qualified persons beforehand and establish contact with (sub)culturally different groups through culturally appropriate or recognised channels of access.’ The new regulations reduce this requirement to consultation with one suitably qualified person. It will be for ethics committees, acting under section 20 of the regulations, to ensure that researchers comply with this ethical requirement where it is relevant to their research. But is that all that should be required of ethics committees? One of the lessons of Mr Kupka’s research project is that members of a cultural group can themselves have views about a research proposal affecting their people that they may wish to make known to an ethics committee when the proposal is being considered for ethical approval. Whether in response to such an approach or in considering how the university’s ethical principles are to be applied in particular cases, ethics committees have a duty to ensure that their own deliberations and decisions are properly informed.

520. Dr Goldsmith opened up that question when, in the context of Mr Kupka’s research, he asked whether the University Human Research Ethics Committee had shifted the ethical risk from itself to the organisations that had agreed to act as intermediary agents for Mr Kupka (see paragraph 246). Dr Parsonson raised the same question in general terms when he emphasised that ethics committees have

a duty of care to protect the rights and interests of intended participants. If the community of intended participants raises ethical concerns about the proposed research or the researcher’s competence safely to conduct the proposed study, the University of Waikato Human Research Ethics Committee has a responsibility fully to investigate this in concert with that community of interest. No ethics committee can on its own establish the degree of risk because it is not qualified to do so by virtue of its not being adequately informed or in a position to define, evaluate, or determine the impact on members of other cultural or religious groups. Again, in this circumstance, an ethics committee would be bound to work jointly with representatives of the community to determine whether the research should proceed and, if so, under what conditions, and to share the decision-making process with that community of interest.²⁸³

521. The new regulations, on my reading of them, do not spell out a requirement of ethics committees to exercise a duty of care to protect the rights and interests of intended participants. But it should also be noted that, under the operation of the old regulations, the university was unsure how it should respond to the request that Professor Bing and the nine Jewish members of the academic staff when they asked to meet the FASS Ethics Committee in November 1999. Dr Gunn, as we saw in paragraph 96, interpreted the request as one for members of the academic staff to attend a committee meeting and turned it down. But the defining characteristic for Professor Bing was not that they were members of the academic staff but that they were Jews

²⁸³ Parsonson submission.

who were concerned about the cultural sensitivity of a research proposal and wanted to convey their concerns to the committee. In making his decision, Dr Gunn does not appear to have considered Professor Bing's request in relation to the then regulatory requirement for the committee to 'consult qualified persons beforehand and establish contact with (sub)culturally different groups' before giving ethical approval to a research proposal that raised sensitive cultural issues.

522. In Dr Parsonson's submission, and in the language of the old regulations, more is required of ethics committee than to be prepared to consult members of cultural minorities when they ask to be heard. The ethical context of some research proposals places an ethical requirement on ethics committees to take their own initiatives to ensure that they are informed about relevant cultural sensitivities through consultation with people who can speak for cultural groups who may be at risk. The important thing is for the university to learn from the Kupka case but the new regulations sidestep the issue. This is a matter that the university should consider further.

523. There are four matters of articulation between the Ph.D. regulations and the Human Research Ethics Regulations that require further consideration within the university community. First, there is a discrepancy in the responsibility assigned to supervisors in relation to the ethical approval for research to be undertaken by students. The Postgraduate Studies handbook requires chief supervisors to apply for ethical approval on behalf of their research students. But the *Handbook on Ethical Conduct in Research 2001* identifies research students as the researchers and requires them to apply for ethical approval. It requires their supervisors to 'take all reasonable care' to ensure that they do this before the students they are supervising commence their research. The two sets of requirements should be made consistent. I note that the New Zealand Universities Academic Audit Unit in a report published in November 2000 also recommended that the university 'clarify the respective responsibilities of student and supervisor in seeking ethical approval of student research projects.'²⁸⁴

524. The second matter concerns the interpretation to be given to the requirement in both sets of regulations that research involving human subjects is not to commence before it has ethical approval. In practice, this means that ethical approval is to be sought any time before researchers have their first contact with the human subjects of their research. In my view, the requirement of ethical approval should be administered as an integral part of the process of application and registration. I am aware of the view, put to me by some people in interviews, that candidates for research degrees cannot be expected to foresee all possible empirical and ethical implications at the time of their confirmed enrolment. But that is not the point that should be uppermost in people's minds during the process of enrolment. The time between a candidate's conditional enrolment by the Postgraduate Studies Committee and his or her confirmed enrolment is essentially a time of conceptualisation. Ethical aspects of proposals that will involve human subjects are an integral part of that conceptualisation. The relevant ethics committee should contribute to that process either by endorsing the ethical assessments of students and their supervisors or by drawing their attention to ethical implications that they may not have considered. Every time that the university approves a research project that involves human subjects it places its reputation at risk. That risk may be negligible or non-existent in the vast majority of cases. But the policy question is how to ensure that all sources of possible ethical risk are assessed before the university commits itself to research projects to be conducted by its students. By requiring applicants to include an ethics approval statement in their application for confirmed enrolment, the Postgraduate Studies Committee seems to me to have gone as far as it can in the exercise of its responsibilities towards making ethical approval a requirement of registration for a postgraduate research degree. What is needed is a parallel provision in the

²⁸⁴ New Zealand Universities Academic Audit Unit Te Wahanga Tatari Kaute Tohungatanga o Nga Whare Wananga o Aotearoa, The University of Waikato Te Whare Wananga o Waikato, *Academic Audit Report*, November 2000, pp. 8–9 and Recommendation 10.

Human Research Ethics Regulations requiring candidates to obtain ethical approval for research projects involving human subjects as part of the university's requirement for confirmed enrolment. Applicants, I repeat, would not be expected to foresee every possible ethical implication of their research any more than they would be expected to foretell what their research inquiry was likely to produce as evidence. In some cases, ethical approval at the time of confirmed enrolment would be an approval in principle and students would be required to re-apply for ethical approval if they made changes in their methodology in the course of the research that had ethical implications for its human subjects. The Human Research Ethics Regulations provide for researchers to make more than one application for ethical approval should they need to.

525. The third matter is another reason why the requirements for ethical approval should be made part of the process of confirmed enrolment. The first of the general ethical principles set out in the *Handbook on Ethical Conduct in Research 2001* states:

Value of research and public interest

- (1) *A researcher must be able to justify to his or her peers the goals and methodologies of the research in terms of its reasonably anticipated benefits balanced against any foreseeable risk to the participants.*

In its consideration of Mr Kupka's questionnaires, the FASS Ethics Committee interpreted that requirement to apply specifically in relation to the goals and methodologies of his research that could have risks for human participants. But it seems to me that the requirement is ambiguous. It is not clear whether the consideration of the risks and benefits to be balanced is to be restricted to risks and benefits to human participants or whether reasonably anticipated benefits of the research other than to its human participants can in some circumstances also be balanced against foreseeable risks to its human participants in Mr Kupka's case. Regardless, however, of how the value of a research and its public interest are interpreted, researchers should be able to justify the goals and methodologies of the research they are proposing. I would expect their supervisors to require them to have the value and public interest of their research very much in mind as they prepared their statement for ethical approval for confirmed enrolment by the Postgraduate Studies Committee. A parallel provision in the Human Ethics Research Regulations requiring doctoral candidates to get ethical approval for their research as part of the requirement of confirmed enrolment would ensure that they did. Surprisingly, the 'Recommended Format for Applications for Approval' issued under the authority of the Human Research Ethics Regulations 2000 (section 21(3)) omits any reference to the 'Value of research and public interest' from the paragraph that requires applicants to 'outline' ethical and legal issues that could apply to the research they were proposing and their intended solutions.²⁸⁵ That omission should be repaired. But my essential point is that ethical approval for doctoral research proposals should be administered as a requirement for confirmed enrolment.

526. Fourthly, the university should also consider the extent to which its Human Research Ethics Regulations permit or should permit public scrutiny of the ethical standards it applies to research activity conducted under its authority. Section 161 of the Education Act states:

In exercising their academic freedom and autonomy institutions shall act in a manner consistent with

- (a) *the need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and*

²⁸⁵ *Handbook on Ethical Conduct in Research 2001*, Appendix 2, pp. 14–15.

- (b) *the need for accountability by institutions and the proper use by institutions of resources allocated to them.*

I reviewed the regulations and guidelines of the six established New Zealand universities to see how Waikato compared in its provision for public scrutiny of its ethical standards. The ethical requirements for research activity in all six universities have a strong family resemblance and, as would be expected, concentrate on the obligations of researchers and the formal process for approving research to be undertaken by university staff and students. Where they differ is in the provision they make for public participation in their ethics committees, in their reporting requirements, and in the provision they make for their ethics committees to be monitored by outside ethics committees of standing. It can only be from some knowledge of how various arrangements work in practice that conclusions can be drawn about the effectiveness of these various arrangements for some public scrutiny of a university's ethical standards.. But on these three points of difference, however, Waikato's arrangements for public scrutiny and external review are less open than those of some other universities.

527. Members of the academic staff predominate on Waikato's Human Research Ethics Committee. Of its nine members, four are members of the academic staff, one is to be a member of the technical staff, one a student, one a person appointed by the University Council who is not a staff member, and one a representative of the Maori community. The representative of the Maori community is made on the nomination of the Deputy Vice Chancellor (Maori) and is a member of the academic staff. Effectively, then, the only member of the committee not a member of the staff or a student is the person appointed by council. The committee may, 'from time to time, co-opt people with relevant expertise to help deal with specific matters' but appears not to have done so.²⁸⁶ That may of course mean the committee seldom has to deal with issues for which expertise not included among its members might be thought to be helpful. But it may also mean that its members regard it as an 'in-house' committee.

528. There is no formal requirement for the University Human Research Ethics Committee to report on its activities. The university convention, however, is that committees report annually to the body that sets them up. The University Human Research Ethics Committee reports to Academic Board and the school faculty and departmental ethics committees report to the University Human Research Ethics Committee. Some other universities require their principal ethics committee to report annually to their council as well as to Academic Board. Some universities also submit their ethics committees to monitoring by outside ethics committees. These arrangements were initiated to meet the requirements for research projects funded by the Health Funding Agency. But all universities should in my view have settled arrangements intended to assure the quality of the work of its ethics committees. In paragraph 511 I recommend that the university review its policies and procedures for the academic and ethical approval of doctoral research. As part of that review the university should reconsider the provision it makes for public scrutiny of the ethical standards it applies to research involving human subjects.

529. The university should also review its policy on the status to be given under the Privacy Act and the Official Information Act to the research proposal that candidates include in applications to the Postgraduate Studies Committee. A range of policies and practices are administered at present. The Postgraduate Studies Committee regards the proposals of postgraduate research candidates as personal information. Completed theses are placed in the university library and are public documents, subject to any limitations that may be placed on them. Summaries of candidates' research projects are published in graduation programmes. Departments and schools publicise information on candidates' projects in various ways while they are in progress. Some departments circulate abstracts of doctoral proposals once they have been registered. Some

²⁸⁶ Gunn to Review, 25 March 2002.

display them on departmental noticeboards. Some publish them on departmental web sites. Some involve doctoral students in departmental research seminars.²⁸⁷

530. There will always be cases where for reasons of commercial sensitivity and security some research proposals should remain personal information while the research is in progress and sometimes for longer. But there is a wider academic purpose to be served by making information about projects publicly available from the moment that a candidate's enrolment is confirmed. The general policy should in my view express the greatest openness consistent with the protection of information personal to candidates.

531. The university should also review its published statements on privacy with the aim of achieving a consistently worded policy. Policy is at present expressed in different ways in different documents. The *Staff Code of Conduct* states that staff have an obligation to the university to 'respect the privacy of individuals and use confidential information only for the purposes for which it is intended.' The *Code of Ethics for Academic Staff* states that staff

should refrain from seeking or revealing confidential information about students without the permission of the student concerned except in a recognised official capacity and in appropriate circumstances such as a clear risk to the student or another person, in an emergency, or where required by law.

Clause 10 of the *University Human Research Ethics Regulations* states that

Where the research is conducted in New Zealand, the researcher must comply with the Privacy Act 1993 and the Official Information Act 1982, and must adhere to the following principles consistent with that legislation:

(c) *except in circumstances specified in the relevant legislation, personal information may be used only for the purpose for which it is collected.*

532. My legal advisers comment on these statements as follows:

[O]f the three, cl. 10 is the most closely referenced to the legislation. The Code of Ethics is more vague but at least still acknowledges that confidential information may be disclosed where 'required by law.' The Staff Code of Conduct states that confidential information can only be used for the purposes 'for which it is intended.' To the extent that this implies the university cannot disclose the information in accordance with the Official Information Act, it is misleading. Certainly, an accurate, consistently worded privacy policy would be desirable.²⁸⁸

Findings

29. The present requirements of the Postgraduate Studies Regulations for postgraduate research candidates and their supervisors are much more rigorous than the regulations they replace.
30. The present requirements of the University Human Research Ethics Regulations are more demanding than the regulations they replace but ethical approval for research proposals involving humans should be a requirement for confirmed enrolment for postgraduate research degrees and the university should reconsider its policy for consulting the preferences and sensitivities of social and cultural minority groups.
31. The university should review the way it deals with information contained in the research proposals presented by postgraduate research candidates.

²⁸⁷ Simpson to Review, 12 June; Taylor to Review, 12 June 2001; Mr Cubitt to Review, 12 June 2001; Dr Hart to Review, 13 June 2001; Goldsmith to Review, 13 June 2001; Mr McKeogh to Review, 14 June 2001; Vowles submission.

²⁸⁸ Loc. cit.

32. There are inconsistencies in the university's statements of its obligations under the Privacy Act which should be tidied up.

Governance and management

533. The August meeting of council was extraordinary in itself and in its consequences. It caused what Professor Selby characterised as a schism in relations between the council and the Vice Chancellor.

534. There was a general expectation that there would be a vigil or, depending on the point of view, a demonstration during the public part of the meeting. But members of council were not at all well prepared in advance for any decisions they might be called on to make concerning Mr Kupka, who was by then no longer a student. Council at its June meeting had asked Professor Selby, as Acting Vice Chancellor, to report on the outcomes of the deliberations on Mr Kupka's research proposal that were then still in progress in the University Human Research Ethics Committee and the Postgraduate Studies Committee (see paragraphs 225–26). There was no report in their papers for the meeting. Nor were there any other papers on Mr Kupka. Whether the report of the June Academic Board meeting should have mentioned the lapsed discussion of the Law School Board of Studies resolution at the June Academic Board meeting became a matter for debate after the council meeting. But the reporting convention is that reports for the Academic Board and other committees refer only to items that require a council decision or to report some action taken under delegated authority.²⁸⁹ The three papers that became the focus of debate – Dr Ryan's open letter, Professor Gould's report, and Professor Bing's letter to the Chancellor – were distributed at the meeting, tabled, and read out to members. Dr Ryan's motion was accepted by the Chancellor for consideration, seconded, debated, and passed in open meeting, with Professor Gould dissenting.

535. Professor Gibbs and Professor Bing told me that they did not consider that the presence of the members of the vigil/demonstration brought undue pressure on the council. That is not how the members I spoke to recollected what had happened. They told me that it was an extremely tense meeting. Councillors, they said, were nervous and uncertain. From the mihi onwards, the Chancellor recalled, there was one unexpected event after another and, in her view, members were making decisions under duress. Dr Simpson told me that it was not a meeting where sound decisions could be made after due deliberation.²⁹⁰ Quite apart from the emotional atmosphere, members of council had not been provided with the information they needed for sound decision-making.

536. A matter that became important after the meeting was whether council should have sought and considered advice from Academic Board before committing itself to a decision to hold an inquiry. No one asked that question during the meeting. The university had been taken to court on a matter of governance seventeen months earlier. But no one asked during the meeting whether the council was acting within its powers. The Chancellor, Vice Chancellor and some other members of council told me that it did not enter their minds at the time. When, a few days later, Professor Selby and other senior university managers brought the lapsed Academic Board discussion to the Chancellor's attention it was to warn her that, by deciding to set up its inquiry, the council might be 'in conflict with Academic Board on a matter that is about academic processes.'

537. It is not obvious what difference prior knowledge would have made to the council decision. It seems clear that members of council felt at their June meeting that things were drifting and they were uncomfortable about it. The reports they asked the Vice Chancellor's Office to provide had not eventuated. The references to the work of the University Human Research

²⁸⁹ Callaghan to Review, 11 October 2001.

²⁹⁰ Bennett interview, 3 April 2001; Annan interview, 5 April 2001; Simpson interview, 5 April 2001.

Ethics Committee and the Postgraduate Studies Committee in Professor Gould's report were brief and very general. They were not what Dr Ryan, for one, expected to receive, and he proceeded to move his motion. It seems to me that, in adopting Dr Ryan's motion, council was indicating that the university management had not been properly accountable and, as an act of governance, would seek answers for itself through a public inquiry.

538. On the evidence of what happened at the June council meeting, at the June meeting of the Academic Board, and before, during, and after the August council meeting, it seems to me that the processes of management and governance were not well integrated and the result was inefficacious. Whether this was a temporary fall in standards or a sign of processes that were not working as well as they should raises questions that fall outside the scope of this review. The seven-week gap between the June Academic Board meeting and the August council meeting was not conducive to effective communication. I was informed that, over the years, there has been a falling away from a reporting cycle under which the Academic Board would have met a fortnight before council.²⁹¹ Effective reporting relationships between the council, the Academic Board, and the Vice Chancellor's Office are essential to the proper conduct of the university's statutory duties. I think that council, having regard to its responsibilities for governance, should consider what might need to be done to assure itself that these relationships and associated processes are in good order.

539. Two very different means for influencing a council decision were used at the August meeting of council and in the days following. The mounting of the vigil/demonstration was seen by some as an attempt to intimidate the council. Those who supported the call for an independent inquiry believed equally that concerted letter-writing by senior managers was an exercise of bureaucratic power intended to intimidate the Chancellor.

540. I wondered whether the letters (see paragraphs 273–77) might have amounted to undue interference in the council's discharge of its responsibilities by members of the staff who were not council members. I took legal advice on that point. That advice considered the possibility of undue interference but emphasised the right of members of the university community to free expression under the general law and the university's own policies. The council, as the governing body, is 'the natural focus for expressions of dissatisfaction, especially after it has just made a controversial decision.' There could be no legal objection to staff members communicating 'their genuinely held views' on a university matter about which they were 'feeling strongly'. My legal advice pointed out the similarity with the vigil/demonstration. 'Although at times noisy and distracting, [its members] had not acted improperly in making their views known to the Council.'²⁹²

541. The letters from senior members of staff had the intended effect. They caused the Chancellor to wonder if the council had indeed taken a false step. She and the other two members of the sub-committee deliberated, sought legal advice on whether council might have exceeded its powers, and were advised that it had (see paragraph 278). Professor Gould, as mentioned in paragraph 279, had in the meantime decided that he would institute his own review. Council rescinded its motion at its October meeting and invited the Vice Chancellor to consider setting up his own review.

542. I asked my legal advisers to review the opinion on the basis of which the sub-committee of council changed its stance. In summary it is as follows:

although the question is not free from doubt, it appears that the incorrect conclusion was reached. We consider that the decision to establish the committee of inquiry fell within the domain of the University Council. The Council is entitled to be properly

²⁹¹ Callaghan interview, 6 April 2001; Callaghan to Review, 11 October 2001.

²⁹² Chapman Tripp to Review, 29 June 2001.

informed on major matters in order to identify the best interests of the University, and to exercise its oversight role and powers of management. The Kupka affair became a University crisis. A decision to gather further information was primarily a governance issue. We therefore do not consider that the decision was an academic matter which had to be considered by the Academic Board.

Even if the matter did contain academic content, and therefore had to be considered by the Academic Board, we advise that s 182(5) of the Education Act 1989 (“the Education Act”) makes it clear that a failure of the Council to consult with the Academic Board does not render the Council’s decision invalid.

The result is that the procedure for establishing the Review recommended by Chen & Palmer and followed by the University, was probably unnecessary. This conclusion does not cast any doubt on the validity of the Review.²⁹³

543. One of the things recalled for me by people who were at the August council meeting – and by others who were not – was Professor Bing’s interjection while Professor Gould was reading his report to council. The incident and the paragraph in Professor Gould’s report that provoked interjections from Professor Bing, Rabbi Lawrence, Mr Zwartz, and others, is in paragraphs 265–7. I also received several submissions that parsed Professor Gould’s account and argued that he had misrepresented Mr Kupka’s meaning and misled council.²⁹⁴

544. Paragraph 11 of Professor Gould’s report and the reactions to it exposed the gulf in understanding that separated him from his Jewish critics. The paragraph gave Professor Gould’s account of one of Mr Kupka’s Internet postings in which he quoted a range of estimates of the number of Jews killed in the Holocaust. Professor Gould’s point of view was already known to Rabbi Lawrence and other members of the vigil/demonstration from earlier correspondence. Rabbi Lawrence, Mr Zwartz, Professor Bing, and others were given copies of Professor Gould’s report before he read it to council and, reading ahead, they knew what the paragraph contained. Mr Kupka’s account of the Holocaust killings was objectionable to them. But their interjections were directed at Professor Gould’s interpretation of it. Mr Kupka’s ‘less than precise’ estimates, Professor Gould wrote, ‘failed to take account of those who may have died from natural causes in the concentration camps.’ But there is, as they knew, no mention of concentration camps in Mr Kupka’s statement and, more to the point, Mr Kupka had on other occasions asserted that gas chambers and crematoria were fabrications. They believed, too, that Professor Gould’s account was misleading in the way it dealt with deaths from natural causes. Mr Kupka included them in his estimates but Professor Gould’s account, on their reading, excluded them.

545. I invited Professor Gould to comment on what he was intending to convey when he wrote the paragraph. Professor Gould informed me as follows:

My recollection is (and was) that, when asked for his view as to the number of Jews who had been killed in the concentration camps. [Mr Kupka] replied to the effect that he had seen estimates, ranging from 6 million to 340,000 but these estimates did not take account of the fact that, within those estimates, some of the deaths could be attributed to causes other than mass killings. I was, in other words, trying to convey the full sense of what I understood Mr Kupka to be saying which was that even the estimates which he had seen, widely varying as they were, did not take account (in

²⁹³ Chapman Tripp to Review, 7 June 2001.

²⁹⁴ Bing submission #35; Nieschmidt’s translations of some of the Freudenberg Collection of Kupka’s Internet postings; Gibbs, Simms, Walker to Review, 26 April 2000; Simms submission, Vice Chancellor to Rabbi Lawrence, 30 May 2000; Bing to Review, 26 November 2000; Bing to Review, 26 November 2000.

*the sense that they included or did not distinguish) those within the estimates who might have died of other causes.*²⁹⁵

546. Professor Gould's account, as I read it, is indeterminate on the point of concern to his Jewish critics. The clause 'failed to take account' could be read to imply either that natural deaths were included as a distinct group or that they were not included. Professor Gould's reason for referring to Mr Kupka's statement is clearly brought out in the last sentence of paragraph 11 of his report. The point he wanted to make was that Mr Kupka's statement, taken as a whole even on the least favourable interpretation, 'was hard to reconcile with the allegation that it represented a denial of the Holocaust.' Jewish people in the room profoundly disagreed with the point Professor Gould was making and with his interpretation of Mr Kupka's statement. . The question for the university and for this review was whether Professor Gould should have offered a public explanation of Mr Kupka's views. I discuss Professor Gould's handling of Mr Kupka's published views on the Holocaust in paragraphs 557–60. Here I record that it was in my view a mistake for him to become involved in public debate about the substance of Mr Kupka's opinions. His duty as Vice Chancellor was to do what was necessary to ensure that the university did nothing to infringe Mr Kupka's right to freedom of expression while he was one of its members.

547. Few members of the university council will have known enough about the historiography of the Holocaust to understand why Rabbi Lawrence, Mr Zwartz, Professor Bing and others interjected when they did. What was remembered by those who brought it to my attention was what was considered to be Professor Bing's offensive behaviour toward the Vice Chancellor. No one mentioned the content of the paragraph in Professor Gould's report that provoked the interjections. Some of those present at the meeting recalled that Professor Bing used the word 'lie,' others 'liar'.

548. Without in any way questioning the submissions of those who have different memories of what was said, I accept Professor Bing's statement that he interjected: 'This is a lie, the Kupka text reads including natural deaths, not excluding.' That form of words fits the context in which it was made. But his interjection was directed at Professor Gould. If it had been made in the context of the normal range of disputes in university life I would have considered it to be unacceptably offensive to a colleague. A statement whose meaning is not transparently clear is not a lie unless there is an intention to deceive. There is no reason to believe that Professor Gould had such an intent. A very large allowance should, however, be made for the circumstances in which Professor Bing made his remarks. Everyone attending the August council meeting was party to an extraordinary event in the university's history. Those in the room who knew of the tragedy of Professor Bing's father and other members of his family in the Holocaust would have understood the depth of his feelings. Only Holocaust survivors and their families can know the pain and feelings of outrage they experience when, despite the attested historical record, the estimate of 340,000 killings continues to be publicised.

549. Professor Bing and his supporters had another reason for drawing attention to what they considered to be misinformation. 'Misinformation' had by the time of the August council meeting become one of the key words in the Kupka controversy. Professor Gould had introduced it in the memorandum he addressed to council members on 10 April when he alluded to misinformation that was, he wrote, included in the package of documents that Professor Bing and others had distributed to them. But the university management had not informed Professor Bing what that misinformation was thought to consist of. Professor Gould's memorandum and statements that he and Professor Selby made during the following months became subjects of close scrutiny by critics for evidence of what they considered to be items of misinformation..

²⁹⁵ Gould to Review, 22 August 2001.

Among other things, the interjections at the August council highlighted one more alleged example.

550. Professor Selby later referred to the members of the vigil/demonstration as ‘uninvited visitors.’ In fact, they included some of the leading members of the New Zealand Jewish community and were attending the public part of the council meeting as stakeholders of the university. They were there because they were convinced that the university in its handling of the Kupka affair had not dealt with their legitimate concerns with care or cultural sensitivity. They were reminding the university’s governing body that they were part of the public to whom the university must be accountable.

Findings

33. The council concluded that the university’s handling of the Kupka affair raised issues of governance on which it needed to be better informed and set up an independent inquiry to that end.
34. I am advised that the council acted within its statutory powers in making that decision.
35. Reporting relationships between council, the Vice Chancellor’s Office, and Academic Board on matters relating to Mr Kupka’s case were not working effectively between the June and August 2000 council meetings. Whether this was a temporary lapse or a sign of a longer-term problem is a matter for the council to consider.

Managerial prerogative and collegiality

551. Several submissions were critical of the use of what they referred to as managerial prerogative in the course of the Kupka case. The criticisms arise from perceived tensions between collegial and managerial approaches to the making of decisions. Managerial prerogative, in the submissions, means decisions made by departmental chairpersons, deans, committee chairpersons, and the Vice Chancellor without appropriate consultation or ratification. The argument is that decisions about Mr Kupka that should have been made by academic committees after due deliberation or by other academic processes were made by office-bearers exercising executive authority.

552. The approvals for the three double-weighted papers that Mr Kupka included in his MA programme were cited as examples. None was considered by the Humanities Board of Studies or the Academic Programmes Committees. None of the decisions of the chair of the Academic Programmes Committee, exercising a delegated authority, was reported back to the committee. None was open to academic scrutiny after the event (see paragraphs 314–21). Associate Professor Knuefermann’s failure to consult colleagues on Mr Kupka’s doctoral proposal when it was being shaped up was strongly criticised. He discussed it informally with Professor Nieschmidt but not within the department nor with colleagues outside it. The decision that Professor Oettli made as dean to allow Mr Kupka’s doctoral proposal to proceed to the Higher Degrees Committee was represented to me as an executive intervention. But in my view, as I comment in paragraph 331, it was not an example of executive prerogative as defined above.

553. Professor Bing criticised decisions made by Dr Gunn, chairperson of the University Human Research Ethics Committee, and by the executive group of the Postgraduate Studies Committee on the Bing–Franke letter of 26 November 1999. Professor Bing argued that, instead of making a decision as chairperson, Dr Gunn should have referred the Bing–Franke letter to the University Human Research Ethics Committee for its consideration. When Dr Gunn made that decision, however, the letter had yet to be written, although he probably had some idea of what would be in it from conversation with Professor Bing.

554. Dr Gunn, it seems to me, exercised his authority properly as chairperson of the University Human Research Ethics Committee in making his decision. The incident in question took place

between meetings of the committee. As committee chairperson, he acted under section 9.4 of the *Rules of Procedure* for the council and its committees. That authorises chairpersons in exceptional circumstances to act on behalf of their committee and requires them to report what they did at the next meeting of the committee. Dr Gunn told me that he reported his decision.²⁹⁶

555. Professor Bing also argued that Dr Gunn exceeded his powers when, after the initial meeting of the FASS Ethics Committee on 29 November, he ruled that Dr Goldsmith should stand aside when that committee considered Mr Kupka's research. I agree with Professor Bing on that point. Whether Dr Goldsmith, having told the committee that he had signed the letter to the mediator, should have been allowed to take part in the committee's deliberations on Mr Kupka's doctoral research was for the committee to determine. Section 5 of the *Rules of Procedure for Council and its Committees* is clear on that point (see paragraph 576).

556. Professor Bing argued that the executive group of the Postgraduate Studies Committee also exceeded its powers of decision. Instead of referring the Bing–Franke letter to the committee, as he had asked in his letter to Professor Middleton, it referred it to the Vice Chancellor's Office for further action. I have discussed that matter in paragraph 419. It was in the context of setting the agenda for the next meeting of the full committee that the executive group considered the letter and it decided that the matters raised in it did not fall within the committee's terms of reference. The setting of agendas was a normal function of the executive group.

557. Professor Gould was criticised both for the views he expressed publicly on Mr Kupka on the subject of Holocaust denial and for the way he reached them. Mr Kupka's Internet postings raised different questions for the university at different times. In November 1999, when they were the focus of harassment claims, they posed initial questions of meaning and interpretation. They also raised a practical question of arranging for translations to be made. Professor Bing believed that the university should commission someone from outside the university with no personal involvement in the issues. Professor Gould agreed that outside translations could be sought (see paragraph 86) but the idea foundered on grounds of cost. For the purposes of the mediator's investigation, however, translations became unnecessary when the Race Relations Office offered to make its own translations.

558. But the underlying academic question remained: Did the nature of Mr Kupka's publications have serious implications for his exercise of academic freedom for doctoral research on the German language in contemporary New Zealand? That, for Mr Kupka's opponents, was a central ethical issue in the Kupka affair. But that raised another question that was also of central importance: Was it for a university ethics committee acting under the University Human Research Ethics Committee Procedures to consider Mr Kupka's personal opinions? Some Holocaust experts had expressed views on Mr Kupka's opinions and they were published in the April number *Nexus*. Their conclusions could have been tested by consulting the views of others. Professor de Ras could claim such expertise and had made her views known to Professor Gould and members of council. The court judgment in the Irving case, handed down in London in April, was a rich source of relevant information, argument, and counterargument about Holocaust denial. There was thus a great deal of relevant information, analysis, and commentary that could have been considered. An answer in the very specific case of Mr Kupka and his research topic would have to draw on expertise in the German language, linguistics, social science research methods, the present-day ethnic composition of the German-speaking population in this country, and the ethical standards to be applied to research undertaken in the University of Waikato that involved human participation. But the university did not attempt to find an answer.

559. Professor Gould made his own inquiries as Vice Chancellor but his sources of advice remained anonymous, and the advice was not open to critical scrutiny. Then, again as Vice

²⁹⁶ Rules of Procedure for the Council and its Committees, section 9; Gunn to Bing, 26 November 1999.

Chancellor, he committed himself and the university to a public explanation of Mr Kupka's opinions. Professor Gould acknowledged that he was not an expert in Holocaust studies. The matter on which he formed a view was whether Mr Kupka's offence was so grave as to warrant a limitation of his freedom of expression. He based his assessment of that issue, he informed me, on what Mr Kupka's complainants presumably believed to be the strongest evidence that he was a Holocaust denier.²⁹⁷ From among Mr Kupka's numerous statements on the subject he placed most weight on the paragraph that is quoted in paragraph 266. A New Zealand court might reach the same conclusion if that was the only item of evidence before it. But those familiar with Mr Kupka's publications on the Holocaust knew that there was much more to it than that. There were, for Professor Gould's critics, two related issues: the interpretation of Mr Kupka's statements, and the process by which Professor Gould had formed his view on them. They criticised him on both scores for taking a managerial route to find answers to questions that in their view called for a collegial approach.

560. But Professor Gould was acting in his dual capacity as Vice Chancellor and chief executive. He was dealing with an unprecedented crisis that required quick decisions to be made. His responsibility, he informed me, was both academic and managerial: to uphold principles of academic freedom; and ensure that any action taken by the university did not produce undesirable consequences. Once he made his views public, however, his colleagues who disagreed with his position were constrained. They could remain silent and give the wrong impression that the Vice Chancellor spoke for them too. Or they could express their views and invite the criticism of disloyalty to the Vice Chancellor and the university in a time of crisis.

561. I have set out these complaints in some detail because of their importance to those who have made them. They were made by long-standing members of staff who placed their concerns in the context of changes in the management of the university during the last decade. My terms of reference do not permit me to pursue inquiries unrelated to Mr Kupka's studentship. It will be for readers of this report to form their own views on whether the Kupka case was a singular episode or whether it provides an illustration of a trend in the way the university is managed.

562. Two matters do, however, call for comment in this report. One is the distinction between what Professor Havemann of the School of Law referred to as two different forms of authority in the collegial life of universities: the authority vested in university managers because of their position, and the authority that individual colleagues can claim by virtue of specialised knowledge or expertise. His general point was that managerial authority and 'sapiential authority' do not always coincide in universities. In the Kupka case, he wrote, it appears that a junior member of staff had insights that were unrecognised or not shared by his more senior colleagues whose managerial decisions screened them out of later consideration. Professor Havemann is in my view correct in his surmise. It was a junior member of the academic staff who concluded that some serious ethical issues lay at the heart of Mr Kupka's doctoral proposal. It required moral courage of Mr Franke to take a stand and persistence to bring the issues to the attention of his departmental chairperson and, later, of the university. He felt that he was putting himself, his family, and his career at risk, and others saw it that way as well. He was joined from May–June 1998 by Professor Bing, a senior professor, and, later, by others, in efforts aimed at getting the university to respond to the concerns they were expressing. One of the lessons of the Kupka case is that the ethical issues that resulted in Mr Kupka's decision to resign his candidature in June 2000 were the same ethical issues that Mr Franke and Professor Bing raised two years earlier. A question that the university should consider is whether its handling of the Kupka case was an isolated event or one that is part of a pattern in which academic issues become redefined as matters for managerial decision

²⁹⁷ Gould to Review, 7 August 2002.

563. Professor Havemann suggested that the university may be in need of an ‘academic ombudsman/person’ to consider complaints arising from a perceived maladministration of academic decision-making processes. The role would be different from existing mediation processes. In Professor Havemann’s view, it should be undertaken by an academic of standing from outside the university who would provide informal, confidential advice with the aim of resolving academic differences that colleagues had been unable to resolve by themselves.²⁹⁸ Such a person could have been expected to play a constructive part during May and June 1998 when Mr Kupka’s research proposal was ready to be submitted to the Higher Degrees Committee. Others with whom I discussed the idea of an academic ombudsman/person considered that boards of studies and the Academic Board provide well-established forums for considering academic issues. The point was made that the Humanities Board of Studies was open to Mr Franke and Professor Bing in mid-1998 had they wished to raise matters of principle or policy of concern to them. Perceptions, however, particularly the perceptions of junior staff members, are of central importance in such situations. Junior staff may well believe that, by taking up their concerns outside their department, they will incur a black mark in the minds of colleagues with the positional power to influence career prospects. Hence the suggestion of an avenue for seeking advice on a confidential basis from a person with standing in the university whose timely intervention might defuse an academic disagreement.

564. The second point to be noted is an extension of the first. Some of those who made submissions to the review made it clear that they thought long and hard before doing so. Some made confidential submissions and asked that they be returned to them after the completion of the review. It was their perception that submissions critical of the university’s handling of the Kupka case could place careers at risk. Again, these fears point to the issue of positional power in a managerial hierarchy and its exercise. Those making these submissions believe that there is a perceived ‘chill’ in their relationships with what they refer to as ‘university management’. It is for the university management, they believe, to assure all members of the academic staff that the career prospects of those who in good faith criticised the university’s handling of the Kupka case will not be penalised.

565. But there is also something that must be recorded on behalf of the colleagues whose duty it was to deliberate and make decisions on Mr Kupka’s doctoral research as members of duly constituted academic committees. Some referred in submissions to the review to the undue pressure they clearly felt themselves to be under when carrying out those duties. Some senior managers made similar comments. Some drew my attention to the obligations staff members to ensure that their actions conform to requirements of the *Staff Code of Conduct* and the *Code of Ethics for Academic Staff*. I note, however, that Professor Gould informed the October meeting of council that he had decided not to take disciplinary action against any member of staff for alleged behaviour in the course of the Kupka case. He referred specifically to staff who had made ‘misleading statements to the media and to other staff’ but did not mention concerns about personal harassment.²⁹⁹ I have discussed the legal meaning of harassment in paragraphs 444–50. Conduct will have reached the point of harassment if it is ‘severe or pervasive enough to create an objectively hostile or abusive work environment.’

Findings

36. Some submissions gave examples from the handling of the Kupka case as evidence of what was considered to be encroachment of managerial prerogative on the university’s formal academic decision-making processes.
37. A proposal made to the review for the appointment of an academic ombudsman/person who would consider and give confidential advice in cases where there is a perception of

²⁹⁸ Professor Paul Havemann submission.

²⁹⁹ Vice Chancellor, Report to Council. 2 October 2000.

maladministration in the university's academic decision-making processes merits further consideration within the university community.

38. Some members of the academic staff are concerned about what they perceive to be a 'chill' in relationships between 'university management' and themselves. Some members of the university who participated in the making of decisions about Mr Kupka are concerned that they are being dealt with disfavouredly by some colleagues who are critical of the university's handling of the Kupka case.

Natural justice and procedural fairness

566. In submissions to the review, Professor Bing and Mr Franke stated that they had been denied natural justice and procedural fairness by Professor Gould and Associate Professor Swain because of the way the university conducted a preliminary investigation of claims of harassment against them. Professor Bing also submitted that Professor Gould had denied him natural justice and procedural fairness by the way he dealt with an item of correspondence that he appended to his report to the October meeting of the university council.

567. The key facts in the handling of the harassment claims against Professor Bing and Mr Franke are as follows. Professor Gould received formal complaints against Professor Bing and Mr Franke from Ms McGuiness-King in November 1999 and from Associate Professor Knuefermann in April 2000. In each case he asked Associate Professor Swain, Pro Vice Chancellor (Staff and Students) to conduct a 'preliminary investigation' and prepare a report for his further consideration. Professor Gould would then decide whether to direct that a formal investigation be undertaken in respect of either claim. Associate Professor Swain discussed the background of each claim with the complainant and, in one of the cases, with a person mentioned in the claim, and produced reports for Professor Gould. Neither complainant decided to proceed with their claim. Associate Professor Swain informed Ms McGuiness-King in effect that there was no case to answer, and she replied that she was 'generally satisfied' with his 'overall assessment'. Associate Professor Knuefermann decided to drop his complaint.³⁰⁰

568. Professor Bing and Mr Franke were not informed that claims of harassment had been made against them. Associate Professor Swain did not interview either of them in the course of his preliminary investigations. The purpose of the preliminary investigations was to find out if there was a prima facie case for subjecting the claims to a formal investigation. Professor Gould would have informed Professor Bing and Mr Franke if, after considering Associate Professor Swain's reports, he decided that either claim should be investigated further.

569. Professor Bing and Mr Franke became aware of the claims by making requests under the Official Information Act and receiving a copy of Associate Professor Swain's letter of 13 April to Ms McGuiness-King. They wrote jointly to Associate Professor Swain on 2 October to inform him that he had denied them 'a process of natural justice,' and asked for a written apology for conducting an investigation that they considered to be partial, unfair, and unprofessional.³⁰¹

570. My legal advice is that the extent to which the principles of procedural fairness apply to preliminary investigations conducted for the purpose of deciding whether to commence formal proceedings is a troublesome and murky area. Paragraph 5.3 of the university's Sexual Harassment and Harassment Policy states:

³⁰⁰ Swain to McGuiness-King, 13 April 2000; McGuiness-King to Swain, 2 May 2000; Swain to Knuefermann, 4 September 2000; Bing submission #12; Franke submission.

³⁰¹ Bing and Franke to Swain, 2 October 2000.

The university will observe the principles of natural justice/procedural fairness by ensuring that anyone whose interests may be adversely affected by a complaint is aware of the allegations against them and has the opportunity to respond ...

This rule makes it clear that the object of a complaint must be notified of the complaint but does not say when this must occur. At what point may it be said of the person who is the object of a complaint that his or her ‘interests may be adversely affected by a complaint’? Is it when the complaint is made, when a decision is made to conduct a preliminary investigation, or when a decision is made to conduct a formal investigation? On the basis of the documentary record, it is not easy to say whether the general principles of procedural fairness, or paragraph 5.3, would be held to apply or not. Two things are, however, clear. Associate Professor Swain’s preliminary investigations did not result in any views adverse to Professor Bing and Mr Franke. If there had been adverse preliminary views, Professor Bing and Mr Franke would have been able to defend themselves in the course of the formal process.

571. In these circumstances, I do not think that there is any real weight in Professor Bing’s and Mr Franke’s objections. I am advised that it is likely that a court would conclude either that the principles of procedural fairness (and paragraph 5.3) did not apply to the preliminary investigations at all; or that, if they did, their breach was technical and resulted in no damage and judicial review would not be granted.

572. Professor Bing also submitted that Professor Gould did not observe the requirement of procedural fairness towards him in the way he dealt with a letter written by Mr David Young on 27 September 2000. I record in paragraphs 585–86 my decision not to review matters associated with the April issue of *Nexus*. Some general comments can, however, be made. Universities are, in principle, obliged to act with procedural fairness, whether through judicial review, through implied contractual terms, or through their own policies and obligations under their charters. The legal authority was established in: *The Association of University Staff of NZ Inc v the University of Waikato* (HC Hamilton, CP 12/99, 31 March 1999); and *Grant v VUW* (HC Wellington, CP 312/96, 13 November 1997).

573. Not every decision by every university member is, however, reviewable. The power to grant relief under judicial review is discretionary. In practice, the courts operate a sliding scale of review under which the nature and importance of the decision being made, the decision-maker at issue, and the relevant statutory power are relevant to a decision whether, and on what grounds, to exercise judicial review. I am advised that decisions of a university vice chancellor will rarely be reviewable. A high threshold has to be breached. It was breached in the *University Staff* case, which involved the exercise of major restructuring powers that were not in compliance with the express terms of the Act. But it is highly unlikely to be breached by decisions of a more routine nature.³⁰²

574. As far as I am aware, the university has not issued a statement of rules of procedure for the investigation of complaints made under its Sexual Harassment and Harassment Policy. I note that, in her handling of the claims of harassment that she dealt with (see paragraphs 63–65), Ms Weir used a process that accorded with Mr Franke’s and Professor Bing’s expectations. I think that the university council should initiate the preparation of a statement that would cover the matters discussed here among others.

Finding

39. The university council should initiate the preparation of a statement of rules of procedure for the investigation of complaints by members of the university community about university processes that have been applied to them.

³⁰² Chapman Tripp to Review, 10 October 2001.

Conflicts of interest

575. Paragraphs 101 and 374 recount the decisions that required Dr Goldsmith and Dr Bolstad to stand aside from the university committees of which they were members when items relating to Kr Kupka were to be considered. In their submissions to the review Dr Goldsmith and Dr Bolstad wondered whether it had been strictly necessary for them to do so. Professor Havemann posed a policy question in his submission. He asked:

Have Chairs of Ethics and other University committees confused the natural justice process requirements of quasi-judicial bodies required to make unbiased decisions (which consequently require interested parties to stand down) with the ethical and substantive knowledge requirements of bodies engaged in making expert judgments in the context of academic governance (which consequently require informed parties to participate)?³⁰³

576. The relevant university regulations are in clause 5 of the *Rules of Procedure for the Council and its Committees*. Under the heading ‘Withdrawal of Members’ it states:

- 5.1 *Any member of the Council, and any observer or member of staff in attendance, who has a conflict of interest in regard to a matter which falls to be considered by the Council shall as soon as possible disclose the nature of the interest at a meeting of the Council.*
- 5.2 *The Council shall have the sole right to decide what constitutes business falling under this Rule and to require anyone present to withdraw from deliberations or to take no part in any decision with respect to the matter. The Council’s decision shall be final.*
- 5.3 *Where the Council requires a person to withdraw under the provision of Rule 5.2, it shall pass a resolution to this effect which shall be recorded in the minutes of the meeting.³⁰⁴*

These rules apply to the council, the Academic Board, and committees set up by either body. They applied to the Higher Degrees Committee and its successor, the Postgraduate Studies Committee, and to the University Human Research Ethics Committee. The university also applies them to the FASS Ethics Committee, which is a faculty committee exercising powers delegated to it by the University Human Research Ethics Committee and answerable to that committee. Members of staff who are members of these and other committees have an obligation under the *Staff Code of Conduct* to avoid conflicts of interest.

577. The decision to have Dr Goldsmith withdraw from the FASS Ethics Committee did not follow the procedure. It was not made by the committee with Dr Goldsmith present but by Dr Gunn, Chairperson, University Human Research Ethics Committee after consultation with Dr Green, Chairperson, FASS Ethics Committee, and Associate Professor Foster, the pro dean research in the faculty. The decisions made by the Postgraduate Studies Committee in regard to Dr Bolstad and by the University Human Research Ethics Committee in regard to Dr Goldsmith were partly in accordance with the procedures. Both committees discussed the matter with their colleague present and decided that they should stand down when Mr Kupka’s research was an agenda item. Dr Bolstad and Dr Goldsmith were, however, given the option of letting the committee have a written statement of their views, and they did. That option is neither provided for nor prohibited by rule 5.2. The decisions of both committees were minuted.³⁰⁵

³⁰³ Havemann submission.

³⁰⁴ *2000 Directory of Committee and Rules and Procedures*, p. 111.

³⁰⁵ Minutes of the meeting of the Postgraduate Studies Committee, 12 May 2000; minutes of the meeting of the University Human Research Ethics Committee, 17 May 2000.

578. I am advised that the common law rules of natural justice also apply to university committees. Committee decisions must not be infected by bias, and members of committees are not to adjudicate where there is a real danger of bias. In *Hannan v Bradford Corporation*, the English Court of Appeal noted that members of a collegial committee might be thought to have a built-in tendency to support their colleagues.³⁰⁶ Once Dr Goldsmith and Dr Bolstad withdrew from the committees, however, they were merely interested members of the public. The question for each committee was whether they opened their decisions to the danger of bias by considering written submissions from their colleagues. In neither case, in my view, would they have placed themselves at risk. Dr Goldsmith's statement was a cogent assessment of the issues that the University Human Research Ethics Committee must consider and the ethical principles that he believed it should apply to Mr Kupka's doctoral research. Dr Bolstad's assessment of the issues that the Postgraduate Studies Committee should consider was balanced and relevant. There was irony in the temporary removal of Dr Goldsmith and Dr Bolstad from the committees. They had signed a petition affirming the university's core intellectual and ethical principles and urging its academic managers to ensure that they were applied in their handling of Mr Kupka's doctoral research (Appendix M).

579. I conclude that the university should reconsider its rules for the withdrawal of members of academic committees from the consideration of matters upon which their prior involvement could amount to a conflict of interest. The rules should apply to all formally constituted academic committees. The practice of inviting written submissions from members of committees asked to stand down from discussion provides committees with an additional option and should be considered for inclusion in new rules. The overriding concern must be to ensure that committee decisions are free of bias. Committees should be given a range of options that provide the means, on a case by case basis, for determining how that bias can be avoided, the extent to which a declared conflict of a member might prejudice its deliberations, and the nature of the contribution, if any, that that member could be permitted to make.

580. The university should also take the opportunity to clarify the status of faculty committees that exercise powers delegated by university committees. Clause 5 of the Council Rules apply to the council, the Academic Board, and committees established by either body. The University Human Research Ethics Committee was established by the Academic Board and is covered by the rule. But the FASS Ethics Committee was established by the School of Humanities and exercises powers delegated to it by the University Human Research Ethics Committee acting under its regulations. My legal advice is that it is not entirely clear that it is covered by the council rules.

581. The university acts on an assumption that, because the University Human Research Ethics Committee is covered by rule 5 and has delegated powers from itself to the FASS Ethics Committee, the latter committee is equally covered by rule 5. This line of reasoning is not entirely free of doubt. Regardless of the legal construction of the matter, however, the rules of natural justice apply to all university committees. Any legal uncertainty would be resolved by a university enactment specifying that the council rules applied to faculty committees.³⁰⁷

Finding

40. The rules for the withdrawal of members of academic committees should be reviewed with the aim of bringing them into line with current practice; and any uncertainty about the application of council rules of procedure to faculty committees should be resolved.

³⁰⁶ *Hannan v Bradford Corporation* [1970] 1 WLR 937.

³⁰⁷ Chapman Tripp to Review, 13 November 2001.

The *Nexus* leak and the sharemilker's cottage

582. Two matters claimed a great deal of attention from members of the university community during the public phase of the Kupka affair. One was the source of the private information that featured prominently in the *Nexus* exposé of Mr Kupka in its April issue. The other was a report of an incident in which unidentified intruders were said to have daubed swastikas on a sharemilker's cottage. Both matters had become the subject of a university investigation before the review of the Kupka case was announced. Several submissions commented on matters in the university investigation and some urged me to inquire into them.

583. I was guided in this and in other decisions about what to include in the report of the review by two considerations. The terms of reference for the review called for 'a full review of the university's handling of the case of Hans Joachim Kupka,' but left me 'free to report on any aspects of the case' I chose. I decided on the criteria I would use for the inclusion of matters to be considered in my report. Mr Kupka was the focus of the review and I decided that my report should concentrate on matters that were directly relevant to the formal university processes that were applied in the handling of his case. I decided that the reported incident at the sharemilker's cottage had no bearing on the university's handling of Mr Kupka's case and I did not inquire into it.

584. I could see that there might be a stronger case of inquiring into the *Nexus* leak. Against that, however, were two facts: the university's investigation, which continued while the review was in progress, had already taken evidence from those primarily involved or who might have been involved; and the evidence presented in submissions to the review did not add to the documentary record. I was aware, too, that my powers as reviewer of the Kupka case were no greater than those of the university in the conduct of its investigation.

585. When, however, I received a late submission from Mr David Young, the editor of the *Nexus* issue in question, I decided that I should accede to his request to make an oral submission. My meeting with Mr Young took place sixteen months after he published the *Nexus* account. In common with several others who made oral submissions, his recollection of events was not clear on some important matters of detail. I ascertained from Mr Young and from other inquiries that the 'package' of documents that has been assumed to be a key item of evidence is no longer available.³⁰⁸ I decided that I could not add anything to what the university already knew or might be able to find out through its own processes. I had not previously discussed the matter with anyone else who had made a submission on the *Nexus* issue or with anyone who was conducting the university's investigation and decided that I would not consider it further. I do not consider that my review of Mr Kupka's case has been adversely affected as a result.

³⁰⁸ David Young submission; oral submission 27 July 2001; Stanbury to Review, 31 July; Young to Review, 18 September 2001.

Part 4: The Balance of Issues

586. The terms of reference for the review refer to ‘the balance of issues which were or should have been taken into consideration ...’ The clause implies that, in its handling of the Kupka case, the university may not have succeeded in finding a balance among the issues it considered or should have considered, and that a balancing of issues might have been achieved if it had responded differently. The underlying assumption is that the university’s performance should be assessed in relation to norms that it could have been expected to meet. The main issues confronting it can be summed up as four questions: Did the university ensure that Mr Kupka suffered no detriment that could be attributed to his political opinions? Did it ensure that he was able to exercise his academic freedom on the same basis as any other student? Did it take appropriate steps to ensure the cultural safety of German-speaking Jews who might have become participants in Mr Kupka’s research? Did it, as part of its obligation under the university charter to provide a safe, healthy campus environment, respond constructively to the cultural sensitivities of Jewish staff, students, and members of the Jewish community.

587. These questions formed the underlying agenda of the controversies that surrounded Mr Kupka, his political opinions, and his doctoral research from May 1998 until October 2000. That period can be divided into three phases. The first encompassed the preliminary consideration of Mr Kupka’s doctoral proposal in the German department and his enrolment by the Higher Degrees Committee in July 1998. The second phase began at the end of November 1999 with the ethical scrutiny of his research by the FASS Ethics Committee and ended with Mr Kupka’s resignation at the end of June 2000. The third phase overlapped the second. It began with the claims of harassment made out by ten Jewish members of the academic staff on 12 October 1999 and broadened by means of the Bing–Franke letter of 26 November to include issues of cultural sensitivity and to raise questions about Mr Kupka and the way that the university had dealt with him from the time of his enrolment in 1994. It became the focus of public controversy in April 2000 and ended with Professor Gould’s announcement at the October meeting of council that he would set up an independent review of Mr Kupka’s case.

588. The overriding issue during the first phase was whether Mr Kupka should be allowed to undertake doctoral research on the topic of ‘German in New Zealand’ in the light of his published political views. Mr Franke also questioned Mr Kupka’s academic competence for doctoral research but that was ruled out of further consideration on the ground that his MA grades met the academic prerequisite for application. Professor Oettli’s decision that there was no impediment to Mr Kupka’s application for enrolment as a doctoral student ensured that there was no detriment to his human rights at that stage. But the questions raised by Mr Franke and Professor Bing that bore on the ethical principle of cultural sensitivity were not dealt with in Mr Kupka’s doctoral proposal nor in discussions about it. Among its other deficiencies, Mr Kupka’s research proposal did not discuss his proposed methodology and did not explain how he proposed to get information on what his proposal referred to as ‘minority groups speaking German’. The Higher Degrees Committee was not informed that there was an unresolved dispute which bore on that issue and approved Mr Kupka’s application after inadequate consideration. Not enough attention, in my view, was paid to the range of expertise that members of his panel of supervisors should have been able to call on for the effective supervision of the topic of the research. Associate Professor Knuefermann did not identify cultural sensitivity as an ethical issue that might arise in the course of the research. Mr Kupka informed the Higher Degrees Committee that he would apply to the Humanities Research and Ethics Committee for ethical approval for his research but did not do so. The central issue of the first phase was thus left unresolved and the controversies that later surrounded Mr Kupka had their origin in that lack of resolution. The result, in my view, was a serious lack of balance in the way the issues in phase one were dealt with.

589. Professor Bing contended in submissions to the review that if, as he believes it should have been, Mr Kupka's application had been submitted to the Humanities Research and Ethics Committee for ethical approval before being considered by the Higher Degrees Committee, it would have been rejected and there would have been no Kupka affair. In Professor Bing's opinion, Mr Kupka's proposal would not have received ethical approval because of the topic, the Holocaust-denying nature of his Internet postings, and the large part he believed that German-speaking Jews would have to have in any research into the German language in contemporary New Zealand. But the prior referral to an ethics committee was not a requirement for enrolment when Mr Kupka was a doctoral candidate.

590. What, however, might have been the outcome if, like Ms McGuinness, the other doctoral candidate in the German department at the time, Mr Kupka had submitted his research proposal to the Humanities Research and Ethics Committee at the time of his enrolment or soon after? If the Humanities Research and Ethics Committee had taken the same view of its role as the FASS Ethics Committee did when, later, it considered Mr Kupka's questionnaires, it would have confined its interest to the ethical implications of his methodology for the human subjects who might be expected to become involved in the research. On broader methodological matters, as noted in paragraph 405, the FASS Ethics Committee deferred to the Postgraduate Studies Committee as the committee with the responsibility of satisfying itself on research methodology, and it is reasonable to assume that the Humanities Research and Ethics Committee would have done the same in relation to the Higher Degrees Committee. As the Higher Degrees Committee had already approved Mr Kupka's research application, the Humanities Research and Ethics Committee might well have decided that there was nothing for it to comment on under that heading. On ethical matters, however, the two ethics committees that later examined Mr Kupka's questionnaires saw it as part of their responsibility to help him find methodological solutions to the ethical concerns they identified. The FASS Ethics Committee arranged for a social scientist to give Mr Kupka advice on sampling and the construction of questionnaires. The University Human Research Ethics Committee gave him a choice of alternative courses of action in an attempt to help him find a way of resolving its ethical concerns about the administration of his questionnaires. It seems reasonable to assume that the Humanities Research and Ethics Committee would have tried to be similarly helpful. I am inclined to think that, if it had considered Mr Kupka's methodology at the time of Mr Kupka's enrolment or soon after, the Humanities Research and Ethics Committee would have been less likely to withhold ethical approval than defer it pending consultation with Mr Kupka and Associate Professor Knuefermann with the aim of finding an acceptable solution to any ethical concerns it may have had with his research. But it would have had the opportunity of subjecting the proposal to ethical scrutiny under the nine primary principles governing research involving human participants.

591. But all this is conjecture. The facts of the matter are that, at the time of Mr Kupka's doctoral enrolment, prior ethical approval was not a requirement of registration, his chief supervisor was responsible for identifying ethical issues that might arise in the course of the research, and there was no monitoring procedure that would have ensured that Mr Kupka applied for ethical approval of his project. That combination of circumstances exposed deficiencies in the university's procedures for registration and ethical approval of research proposals involving human participation. I have concluded that the university should change its procedures and make ethical approval a requirement for confirmed enrolment under the Postgraduate Studies Regulations.

592. The risk of damage to the university's reputation was an issue of continuing concern to everyone involved in the Kupka affair. It was raised in the first memorandum that Mr Franke wrote on Mr Kupka's research proposal and it was regularly invoked thereafter by persons on both sides of the burgeoning controversy. On one side there were fears that the university was somehow involved in a conspiracy to award a Mr Kupka a Ph.D. that would lend credibility to

his activities as a Holocaust-denying propagandist. I found no evidence of such a conspiracy. On the other side there were concerns about what was perceived to be a campaign to have the university disenrol Mr Kupka. A campaign did get underway following the meeting of the Waikato/Bay of Plenty Jewish Association on 29 March 2000 but it focused on the way that the university had managed Mr Kupka's doctoral application and was managing his research. It was also seeking assurances that Jewish cultural sensitivities would be recognised and respected in a situation that its proponents considered to be damaging to the university's reputation.

593. The second phase was taken up with the ethical reviews of Mr Kupka's research which were initiated by the FASS Ethics Committee in November 1999 and completed by the University Human Research Ethics Committee in May 2000. The committee was aware of Mr Kupka's political opinions and of his right to hold them but its duty was to be satisfied that research done under university auspices was methodologically and ethically well founded. The central issues were whether the university subjected Mr Kupka's research proposal to the same academic processes that it would have applied to any researcher seeking ethical clearance for questionnaires to be used in the course of a research; and whether it did all that could reasonably be expected of it to minimise any risks to the people who might be invited to respond to his questionnaires, German-speaking Jews in particular. My conclusion is that it did. The minimising of risk to participants was the focus of consideration in the deliberations of both the faculty and the university ethics committees and the alternative courses of action that Mr Kupka was asked to consider were intended to remove them. The proposal put to him by the University Human Research Ethics Committee was in accord with its primary ethical principles. Mr Kupka considered the alternatives that were put to him and made his own decision. In my view, the university struck an appropriate balance among the issues considered during phase two.

594. The second and third phases overlapped by several months. Phase three began with the claim of harassment against Mr Kupka taken by ten Jewish members of the academic staff in a letter to the mediator on 12 October 2000. The issue it raised was unprecedented in a New Zealand university: how to deal with a student alleged to be a Holocaust denier? Professor Gould knew, too, that Mr Kupka would consider taking legal action against the university for any alleged detriment that could be linked to his political opinions. That had to be a central issue for him and his senior colleagues for as long as Mr Kupka was a member of the university. Inevitably, the nature of his opinions became the focus of intense interest in the context of the harassment claims against him. That interest increased and extended to members of the Jewish community outside the university when they became imbued with the mistaken perception that Mr Kupka might interview Holocaust survivors in the course of his research. In my view, the university succeeded in safeguarding Mr Kupka's human rights but failed to assure Jews that their cultural safety would not be at risk.

595. One of the criticisms of the university over its handling of the Kupka affair was that it did not seek expert advice on the nature of Mr Kupka's opinions. In my view, that was a relevant issue until 8 March 2000 when Professor Gould received the university mediator's report on the harassment claims she had investigated. Once, however, Professor Gould decided that the university would not be taking disciplinary action against Mr Kupka, it ceased to have any further interest in his political opinions. That decision was not acceptable to those who believed that Mr Kupka should be disciplined. They drew a distinction between his general legal rights, such as to freedom of expression, and his obligations as a member of the university. By not subjecting him to its own disciplinary regulations, they believed that the university passed the buck, and the Race Relations Conciliator was quoted as being in agreement with them. My legal advice, set out in paragraphs 444–54, is that a successful case probably could not have been made out against Mr Kupka.

596. The issue that in my view should have been considered at the time was whether, once the university decided that it was no longer interested in Mr Kupka's political opinions, the Vice

Chancellor should comment on them publicly. In my view he should not have done so. It was very important for the university to help the public to understand that its central concern was not with the way Mr Kupka chose to express his right to freedom of expression or with the content of his views. Its central concern as a university was to ensure that his academic freedom was being properly exercised in the context of the ethical standards it applied to all research involving human participants.

597. Whether the university had in fact dealt with Mr Kupka and was dealing with him according to its normal academic processes was a central issue in phase three. Some of the concerns highlighted in the Bing–Franke letter of 26 November 1999 referred to decisions made at the time of Mr Kupka’s doctoral enrolment and earlier, others to fears for the cultural safety of German-speaking Jews in the course of his research. The executive group of the Postgraduate Studies Committee and the university mediator inquired into some of the retrospective concerns. Apart, however, from two very general sentences in a letter from the mediator, Professor Bing and Mr Franke did not get answers to their questions as to whether the university had followed its normal processes when Mr Kupka’s doctoral application was considered and approved (see paragraph 424). The FASS Ethics Committee had decided to deal with the concerns about cultural safety but had not done so by the end of March 2000. Professor Bing and Mr Franke had not been informed that the committee had received their letter and was dealing with the cultural sensitivity issues it raised. For Professor Bing and his Jewish colleagues who had endorsed the Bing–Franke letter this lack of effective communication was by then an issue that overshadowed all others. They felt that the university was treating them as if they were invisible.

598. That raises as an issue whether Professor Gould should have taken an initiative towards Professor Bing and his Jewish colleagues and the non-Jewish colleagues who were also concerned at the way the university was dealing with the Kupka affair. In my view, as I explain in paragraphs 455–60, I think that he should have invited them to meet him soon after he received Ms Weir’s report on 8 March. What were to become the closing months of Mr Kupka’s doctoral candidature (though no one could have known in March that Mr Kupka’s doctoral candidature would end the way it did) could have been less confrontational if, as Vice Chancellor, he had opened up a dialogue with them. The Kupka affair underwent a dramatic transformation during the first half of April. Until then the university had dealt with it on a private, confidential basis within the academic community. The *Nexus* exposure of an alleged Holocaust denier on campus, coinciding as it did with the announcement in London of the judgment in the Irving libel trial, catapulted the Kupka affair into an international context of Holocaust denial and Historical Revisionism. For the Waikato/Bay of Plenty Jewish Association and, before long, the New Zealand Jewish Council, the central issue was whether the university was acting from a proper concern for the cultural sensitivities of its Jewish members and was therefore fulfilling its obligations under the Education Act and its own charter. In my view, the university management did not respond constructively to their concerns (see paragraph 492).

599. The Waikato/Bay of Plenty Jewish Association received replies to letters but not answers to the questions that were troubling them. The gap in perceptions that opened up was dramatically illustrated by reactions to Mr Kupka’s resignation. Professor Gould considered that, with his departure, the Kupka affair was over and cancelled a meeting he was to have had with the Waikato/Bay of Plenty Jewish Association and the president of the New Zealand Jewish Council. But Mr Kupka’s departure did nothing to resolve the issues that were by then at the heart of the Kupka affair for the Waikato/Bay of Plenty Jewish Association, the New Zealand Jewish Council, and other critics of the way the university had handled it. They redoubled their efforts to persuade the university council to initiate an independent inquiry into the Kupka affair.

600. Members of the university council had been alerted to the controversy surrounding Mr Kupka at their April meeting and the matter was on the agenda for their June and August meetings. The council decided at its August meeting that, although Mr Kupka had left the

university, several matters arising from the way that his case had been managed remained in dispute. It decided, as an act of governance, to institute an independent inquiry into the university's management of Mr Kupka's studentship. The fact that a review was later undertaken under the vice chancellor's authority did not negate the council's intention. The university had decided to subject its internal processes to an independent review. All the issues that had been raised in the controversy surrounding Mr Kupka could be considered under its broad terms of reference.

601. The metaphor of balance in the terms of reference is thus problematic. It is conceivable that a balancing of issues could have been achieved in different circumstances in the first phase and that Mr Kupka's doctoral research might have taken a less controversial direction. A balance of the relevant academic and ethical issues was in my view achieved in the second phase. Overall, however, the image of a balance of issues does not accord with the way that the main participants in the Kupka affair thought and felt about what was at stake. Unresolved matters raised concerns which, when not resolved, produced tensions which then generated further issues and additional tensions. Metaphors of removing misperceptions, reducing tensions, and resolving conflicts would have characterised more accurately what should have been achieved from May 1998 onwards but was not. The council's decision to subject the Kupka case to independent examination acknowledged that the university had been unable through its own internal processes to find a workable balance among the various issues.

Findings

41. I found no evidence of a conspiracy for the award of a Ph.D. of the University of Waikato to Mr Kupka.
42. In my view, the university ensured that Mr Kupka suffered no detriment that could be attributed to his political opinions, allowed him to exercise his academic freedom on the same basis as any other student, and took appropriate steps to ensure the cultural safety of German-speaking Jews who might have become participants in his doctoral research. But it did not respond constructively to the cultural sensitivities of Jewish staff, students, and the Jewish community.

Part 5: Findings

1. Mr Kupka's published opinions are in my view of a racist, anti-semitic, and Holocaust-denying character (paragraph 303).
2. Mr Kupka's enrolment for a BA (Hons) degree in German met the university's formal requirements (paragraph 311).
3. Mr Kupka's course of study met the university's requirements for the award of the degree of Master of Arts in German as prescribed at the time (paragraph 327).
4. None of the three papers of interest to this review was submitted to the university's usual processes of consultation and decision at departmental, faculty, and university level (paragraph 327).
5. Papers 0204.532 (two papers), 0204.540 (two papers), and 0204.550 (two papers), were approved under the section 9 procedure without proper accountability (paragraph 327).
6. It is not possible to confirm whether Mr Kupka's average marks qualified for the award of an MA Second Class Honours (First Division) (paragraph 327).
7. Professor Oettli considered the views of Associate Professor Knuefermann and Mr Franke and concluded that Mr Kupka met the statutory requirements of doctoral applicants and should be permitted to make an application to the Higher Degrees Committee (paragraph 335).
8. Mr Kupka's research proposal had not been sufficiently thought through and was accordingly not ready to be considered by the Higher Degrees Committee in July 1998 (paragraph 348).
9. Mr Kupka did not intend to interview people in the course of his research. But it was reasonable for members of the university versed in social science practice who became interested in his research to conclude that his research methodology would need to include questionnaires and interviews (paragraph 354).
10. The deliberations of the Higher Degrees Committee that resulted in Mr Kupka's registration as a doctoral candidate were insufficiently rigorous (paragraph 361).
11. Associate Professor Knuefermann did not ensure that Mr Kupka apply to the Humanities Research and Ethics Committee for ethical approval for his research and the university had no administrative arrangement that would have ensured that he did (paragraph 361).
12. The decision of the Higher Degrees Committee to permit Mr Kupka to write his doctoral thesis in German was consistent with university policy and in line with the policies of other New Zealand universities (paragraph 366).
13. Mr Kupka's application cited a practical reason for wanting his thesis in German, but the Higher Degrees Committee did not examine the validity of the reasons given in the request (paragraph 366).
14. The arrangements for the supervision of Mr Kupka's research became a focus of attention but the underlying issue, which the Higher Degrees Committee did not consider when it registered his doctoral application, was whether the supervisory panel was suitably composed to provide effective supervision (paragraph 375).
15. The university should consider whether there are some circumstances in which prospective supervisors should be informed of some items of personal information about a doctoral

- candidate when they are invited to give an informed consent to become a supervisor; and provide prospective chief supervisors with appropriate guidance (paragraph 375).
16. At the time of Mr Kupka's doctoral application, it was not university practice to require candidates whose topics involved the participation of human subjects to obtain ethical approval before applying to the Higher Degrees Committee for registration (paragraph 410).
 17. Mr Kupka's failure to submit his doctoral proposal to the Humanities Research and Ethics Committee, and Associate Professor Knuefermann's failure to ensure that he did, meant that his research did not receive the ethical scrutiny required for proposals involving the participation of human subjects (paragraph 410).
 18. The FASS Ethics Committee and the University Human Research Ethics Committee dealt with Mr Kupka's research proposal according to the rules and procedures that would have been applied to other proposals requiring ethical approval and his rights to freedom of expression and academic freedom were not infringed (paragraph 410).
 19. The university's formal processes for the registration and ethical approval of Mr Kupka's doctoral candidature and its later ethical review were not well integrated (paragraph 410).
 20. The Bing–Franke letter raised unprecedented issues of procedure and policy for the Postgraduate Studies Committee (paragraph 437).
 21. In my view, the executive group of the Postgraduate Studies Committee had four courses of action open to it, any one of which had the potential for further engagement between the university and Professor Bing on the matters raised in the Bing–Franke letter of 26 November 1999 that were not within the jurisdiction of the FASS Ethics Committee (paragraph 437).
 22. The executive group of the Postgraduate Studies Committee referred the Bing-Franke letter to the Vice Chancellor's Office in December 1999 but no further action seems to have been taken on it (paragraph 437).
 23. The mediator's inquiries into the harassment claims were sufficient for the purposes of a preliminary investigation and her report gave the Vice Chancellor clear advice on the matters still to be dealt with that would require his attention (paragraph 443).
 24. It seems unlikely that a successful charge of misconduct could have been sustained against Mr Kupka under the University of Waikato Discipline Regulations (paragraph 454).
 25. By not opening a dialogue with Jewish colleagues and their supporters in the second half of March 2000, Professor Gould missed an important opportunity to inform them of his understanding of the issues facing the university, listen to their concerns, and consider how the university could respond to them (paragraph 462).
 26. The university's statements of its position on Mr Kupka's studentship were insufficiently informative, did not identify or correct important items of misinformation, and included some misinformation in correspondence and responses to the media (paragraph 479).
 27. The university did not live up to its obligations under the university charter in the way it dealt with Jewish cultural concerns and was not properly attentive to its statutory duty to permit public scrutiny of the ethical standards it was applying to Mr Kupka's doctoral research (paragraph 492).
 28. A wide range of views was expressed on freedom of expression and academic freedom and on ethical standards in research involving human subjects. The university should, as a collegial task, prepare a statement of policy on academic freedom and ethical standards in research involving human subjects (paragraph 512).

29. The present requirements of the Postgraduate Studies Regulations for postgraduate research candidates and their supervisors are much more rigorous than the regulations they replace (paragraph 532).
30. The present requirements of the University Human Research Ethics Regulations are more demanding than the regulations they replace but ethical approval for research proposals involving humans should be a requirement for confirmed enrolment for postgraduate research degrees and the university should reconsider its policy for consulting the preferences and sensitivities of social and cultural minority groups (paragraph 532).
31. The university should review the way it deals with information contained in the research proposals presented by postgraduate research candidates (paragraph 532).
32. There are inconsistencies in the university's statements of its obligations under the Privacy Act which should be tidied up (paragraph 532).
33. The council concluded that the university's handling of the Kupka affair raised issues of governance on which it needed to be better informed and set up an independent inquiry to that end (paragraph 550).
34. I am advised that the council acted within its statutory powers in making that decision (paragraph 550).
35. Reporting relationships between council, the Vice Chancellor's Office, and Academic Board on matters relating to Mr Kupka's case were not working effectively between the June and August 2000 council meetings. Whether this was a temporary lapse or a sign of a longer-term problem is a matter for the council to consider (paragraph 550).
36. Some submissions gave examples from the handling of the Kupka case as evidence of what was considered to be encroachment of managerial prerogative on the university's formal academic decision-making processes (paragraph 565).
37. A proposal made to the review for the appointment of an academic ombudsman/person who would consider and give confidential advice in cases where there is a perception of maladministration in the university's academic decision-making processes merits further consideration within the university community (paragraph 565).
38. Some members of the academic staff are concerned about what they perceive to be a 'chill' in relationships between 'university management' and themselves. Some members of the university who participated in the making of decisions about Mr Kupka are concerned that they are being dealt with disfavourably by some colleagues who are critical of the university's handling of the Kupka case (paragraph 565).
39. The university council should initiate the preparation of a statement of rules of procedure for the investigation of complaints by members of the university community about university processes that have been applied to them (paragraph 574).
40. The rules for the withdrawal of members of academic committees should be reviewed with the aim of bringing them into line with current practice; and any uncertainty about the application of council rules of procedure to faculty committees should be resolved (paragraph 581).
41. I found no evidence of a conspiracy for the award of a PhD. of the University of Waikato to Mr Kupka (paragraph 601).
42. In my view, the university ensured that Mr Kupka suffered no detriment that could be attributed to his political opinions, allowed him to exercise his academic freedom on the same basis as any other student, and took appropriate steps to ensure the cultural safety of German-speaking Jews who might have become participants in his doctoral research. But it

did not respond constructively to the cultural sensitivities of Jewish staff, students, and the Jewish community (paragraph 601).

Part 6: Conclusion and Recommendations

Conclusion

602. The Kupka affair was entirely unprecedented and would have tested any New Zealand university at the time. It raised very difficult questions about allowing an alleged Holocaust denier to undertake doctoral research on a topic with the potential for some participation by German-speaking Jews. Mr Kupka's right to academic freedom had to be assessed in the light of the university's ethical standards which apply to research conducted by its members and include taking appropriate steps to respect the cultural sensitivities of ethnic groups. Discussion of these matters within the university community became clouded in misperceptions about the nature and scope of Mr Kupka's research and by failures by those who at various times made decisions on his research to inform his critics of the decisions they had made and why they had made them. The strong emotions that from the beginning surrounded Mr Kupka's opinions and his research topic hardened into adversarial stances as his research proceeded.

603. Mr Kupka was a focus of controversy from July 1994, but knowledge of his Internet postings was at first confined to members of the German department within the university and, outside it, to members of the Waikato Goethe Society and some members of the New Zealand Jewish community. It was not until toward the end of 1999 that his personal views, linked to the subject of his doctoral research, became a matter of concern within the faculty of arts and social sciences and in some other faculties. It then started to become apparent that the university had a problem on its hands. The members of the university who were called on to make decisions about Mr Kupka's research did so in a context of growing collegial concern and, from April 2000, widespread media and public interest. In my view, they carried out their various duties responsibly during a very trying time.

604. In my view, however, their difficulties stemmed from the fact that Mr Kupka's research proposal had not been properly thought through before being submitted to the Higher Degrees Committee in July 1998 and should not have been approved as it then stood. Ethical issues associated with the expected participation of German-speaking Jews had been brought to the attention of the prospective chief supervisor but had not been addressed in the context of Mr Kupka's research objectives, the theoretical context within which it was to be conducted, and his methodology. The university's procedures for the preparation of doctoral research proposals and their consideration and approval by the Higher Degrees Committee and the Humanities Research and Ethics Committee were not properly integrated and were ineffectual in Mr Kupka's case.

605. Once the university had enrolled Mr Kupka as a doctoral candidate it incurred obligations toward him that it was bound to honour. These had to be managed within the context of its broad statutory and charter obligations to its members and to the wider New Zealand public, and from a concern for its reputation within the international community of university institutions. Four interrelated issues required its continuing attention. First, it had to ensure that Mr Kupka suffered no detriment to his freedom of expression, and it managed that effectively. Secondly, it had to uphold its institutional commitment to the principles of academic freedom. That it did successfully through its formal processes for the ethical scrutiny of Mr Kupka's research project. The two ethics committees that considered Mr Kupka's questionnaires did so in the light of the same ethical standards that would have been applied to any other member of the university who was undertaking research that involved the participation of human subjects. Thirdly, and as the central aspect of that ethical scrutiny, the University Human Research Ethics Committee took appropriate steps to protect the cultural safety of German-speaking Jews who might become involved as participants in Mr Kupka's questionnaire surveys, had they proceeded. There was, fourthly, the issue of cultural sensitivity. In my view, the university did

not live up to its charter obligations in its handling of that issue which, for Jewish stakeholders, became the overriding issue of the final, public phase of the Kupka affair. The university has set itself high standards in its efforts to foster cultural respect and understanding between its Maori and non-Maori members and strengthen working relationships with Maori stakeholders. But it did not apply these standards in its handling of the concerns brought to its attention by Jewish members of its staff and Jewish stakeholder groups.

606. Until the public irruption of the Kupka affair, no one in the university or within the Jewish community had felt a need to identify Jewish stakeholder groups with which the university should develop consultative relationships. Had such consultative relationships existed, it is hard to believe that the university management would have misread the feelings of estrangement which were building up among some of its Jewish members, which were expressed in the letters written by members of the Waikato/Bay of Plenty Jewish Association at the beginning of April 2000, and which motivated the association's later actions. The result is that the university has lost the confidence of the Waikato/Bay of Plenty Jewish Association and the New Zealand Jewish Council. Everyone with the university's best interests at heart will surely hope that this is a temporary consequence of an unwelcome and unprecedented episode in its collegial life. It will be for the university and Jewish stakeholder groups to find the resolve and the goodwill to build a constructive, mutually beneficial relationship for the future.

607. Unquestionably, the university was unlucky to find that one of its doctoral candidates was an alleged Holocaust denier whose research had the potential to cause offence and suffering to Jews who might take part in it. I have kept that misfortune in mind when considering the way the university dealt with its dilemma and when considering what, if anything, it should do to make amends to the elderly Holocaust survivors, the members of their families, Jewish members of its staff and students, and members of the Jewish community who felt impelled to challenge it over its handling of the Kupka affair. I have considered whether there were mitigating factors which, in all the circumstances, could lead to the conclusion that an expression of profound regret to the Jewish people involved would be the appropriate way for the university to bring an unhappy matter to a close. It seems to me, however, that more than that is needed. The controversy that came to surround Mr Kupka did not happen of its own accord. It took on its very particular character through the decisions of individuals, university committees, and administrators.

608. What I take to be the key decisions are recorded in findings 8, 10, 11, 14, 17, 19, 22, 25, 26, 27, and 35. If the university's procedures had been applied more rigorously when Mr Kupka's research proposal was being worked up, when he was enrolled as a doctoral candidate, and when he should have applied for ethical approval, it is in my view reasonable to assume that his research would have taken a less problematic course. The issues and complaints that the FASS Ethics Committee, the executive group of the Postgraduate Studies Committee, and the Vice Chancellor were required to deal with in November and December 1999 either would not have been raised or, if they had been, would have been raised within a known context of previous decision-making and it is reasonable to assume that there would have been a different outcome. In my view, the university should collectively accept responsibility for the decisions made under its authority and in its name. I have concluded that it did not act with appropriate sensitivity to the concerns that some of its Jewish members and members of the wider Jewish community brought to its attention and that an apology along the lines of the first recommendation below is the appropriate response.

609. All the people I have talked to in the course of the review regret the disruptions in relationships that have come about through the Kupka affair. There has also been a widely expressed hope that the report of the review will enable all who have become caught up in it to embark on a process of reconciliation. More, however, than the restoration of personal relationships, important as that is, is needed. Important matters of principle were at the heart of

the affair throughout. Irrespective of whether they found themselves on one side of the controversy or the other, or on no side, those who took their stand on matters of principle will need to be assured that the university's processes for the academic and ethical scrutiny of research proposals will be able to deal effectively with any similarly difficult case in future. It will be for the university to provide that assurance as part of a process of reconciliation. I concluded in paragraphs 512 and 528 that the university should draw on its collective wisdom and undertake a review of its procedures for applying what the Education Act refers to as 'the highest ethical standards' to research by its teachers and students that requires human participation. That proposal presupposes a commitment to an open sharing of ideas among colleagues. The Kupka affair has been deeply divisive for some colleagues and disturbing for many others but it is clear from submissions to the review that there is within the university a wide range of relevant experience and opinion to be drawn on.

610. There are also personal fears and apprehensions to be acknowledged and dealt with. Some members of the university have the perception that they may suffer some detriment for their part in the Kupka affair. It will be essential for the university to find ways of ensuring that their concerns are groundless.

Recommendations

1. That the Chancellor of the University of Waikato make a public apology on behalf of the university to the New Zealand Jewish community for the pain and anguish that Jews suffered in the course of Mr Kupka's doctoral candidature; and that letters of apology be sent to the Holocaust survivors and members of the families of Holocaust survivors who took a public stance as members of the vigil/demonstration at the council meeting on 9 August 2000; and to the New Zealand Jewish Council, and the Waikato/Bay of Plenty Jewish Association.
2. That the University Council initiate consultations with Jewish members of the university community and Jewish stakeholder organisations to identify ways by which the university can recognise and respect Jewish cultural interests and concerns, the purpose of the consultations being to produce appropriate policy advice for the council to consider.
3. That the University Council invite the Academic Board to initiate a consultative process and prepare a statement which it could consider adopting as a statement of university policy on academic freedom and ethical standards in research involving human subjects. The statement would explain the academic and ethical principles that the university upholds, identify by way of examples some of the principles that can sometimes be in tension, explain the duties of university ethics committees when considering the ethical principles to be applied in such circumstances, and reconsider the university's provision for public scrutiny of the ethical standards it applies to research involving human subjects.
4. That the University of Waikato Human Research Ethics Regulations be revised to make ethical approval for research involving human subjects a requirement for the confirmed enrolment of doctoral applicants.
5. That the university review the way it deals with information contained in research proposals presented by postgraduate research candidates; and consider whether there are some circumstances in which prospective supervisors should be informed of some items of personal information about a candidate when they are invited to give an informed consent to become a supervisor.
6. That University Council and the Vice Chancellor review reporting relationships between Academic Board and itself.
7. That University Council initiate a review of its rules for the withdrawal of members of academic committees with a view to bringing them into line with current practice.

8. That University Council initiate the preparation of a statement of procedures for the investigation of complaints by members of the university community about university processes that have been applied to them.

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