ORIENTALISM IN THE LAW: AUSTRALIA AND NEW ZEALAND'S APPROACH TO CHINESE IMMIGRATION

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Chinese people in Australia and New Zealand have been subject to a number of legislative instruments aimed at restricting their immigration, beginning almost as soon as they entered Australasia in the mid-1800s. The measures employed show substantial parallels across both jurisdictions. It may be tempting to dismiss these measures as being emblematic of a racist past, but critical analysis of the attitudes of past legislators forewarns society of any resurgences of discriminatory legislation. This article analyses the reasons given by politicians to justify the implementation of anti-Chinese legislation through the lens of Edward Said's orientalism. The reasoning demonstrates each of Said's four dogmas of orientalism and successfully characterises Chinese people as "other", which is inherently orientalist in nature.

Looking to similar jurisdictions can provide helpful insights into legislative solutions for policy problems, but such comparisons are not a substitute for critical analysis. The traces of orientalism that appear in modern political campaigns and in public opinion in Australia and New Zealand suggest that while orientalism has not returned to legislation, it is prudent to bear in mind the risk of orientalism when developing new immigration policy.

Les communautés chinoises en Australie et en Nouvelle-Zélande ont été assujetties dès le milieu du XIXe siècle, au respect d'un ensemble d'instruments législatifs contraignants dont le seul but était d'entraver leurs flux migratoires dans ces deux pays. On observe qu'à bien des égards, les deux systèmes juridiques australien et néo-zélandais présentent une grande similitude dans leur manière qu'ils ont eu d'aborder cette problématique. De prime analyse, il est tentant de considérer

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l'ensemble de ces mesures restrictives comme la marque d'un passé certes empreint de racisme mais qui appartient à un passé définitivement révolu.

Ceci posé, si l'on veut bien comme l'a fait l'auteur, se livrer à un examen critique et approfondi de ce qu'étaient les mentalités et des motivations des parlementaires du XIX siècle, on observe qu'elles restent encore aujourd'hui un précieux enseignements sur les précautions qui doivent être constamment prises pour éviter le retour de mesures discriminatoires des flux migratoires vers l'Australie et la Nouvelle Zélande.

Dans sa démonstration, s'appuyant sur chacun des quatre postulats de la doctrine orientaliste développée par Edward Said, l'auteur analyse avec précision le processus de rationalisation qui par le passé, a permis aux responsables politiques de légitimer l'instauration d'une politique discriminatoire contre les Chinois notamment en les catégorisant systématiquement comme des 'étrangers.

En guise de conclusion, l'auteur observant que quand bien même, les fondements de la thèse orientaliste d'Edward Said sont aujourd'hui officiellement absents dans le processus d'élaboration des textes législatifs contemporains en matière d'immigration en Australie et en Nouvelle-Zélande, il n'en reste pas moins que les discours politiques modernes comme une partie de l'opinion publique de ces deux pays sont encore perméables aux idées prônées par Edward Said.

I INTRODUCTION

In 2002, Helen Clark apologised to the Chinese community in New Zealand for the 1881 Chinese poll tax law.[1] Chinese people have been present in New Zealand since 1865, but as a group they have been discriminated against in law for much of that time. That is an experience that is shared by Chinese people in Australia. This article compares the legislation of Australia and New Zealand to see the important similarities between the two countries' regimes. It is argued that the implementation of anti-Chinese legislation in both colonies was an example of orientalism in the law.

Legislation is not created in a vacuum, and the reasons why a Bill becomes an Act are often as important as the legislation itself. In 1978, Professor Edward Said released what would become his most known work: *Orientalism.*[2] The book criticised the way the West viewed and engaged with the Orient; it looked at the relationship as one of power and, above all, of creating an "other". The theory of

1 George Hawkins "Poll tax apology marks a new beginning 2/8" (13 February 2001) Beehive.govt.nz <www.beehive.govt.nz >.

2 Edward Said *Orientalism* (1st ed, Pantheon Books, New York, 1978).

orientalism has been applied in many contexts, but of particular interest is its relationship to law. Law can be a crude but effective way to give force to orientalist viewpoints.

This article has six Parts. Part I outlines the background to anti-Chinese legislation and that legislation enacted in both Australia and New Zealand. Part II defines Edward Said's orientalism. Part III discusses the reasoning behind the anti-Chinese legislation, narrowing down the rationales to four key tenets: New Zealand and Australia being a "Britain of the South", racial superiority, a fear of harsher working conditions, and the Chinese people as sojourners. It then discusses how those reasons are inherently orientalist. Part IV investigates the reasons for the repeal of the anti-Chinese legislation. Part V examines modern examples of orientalism in Australian and New Zealand policy and considers whether either country still implicitly endorses orientalist perspectives in its law and policy.

II ANTI-CHINESE LEGISLATION IN AUSTRALIA AND NEW ZEALAND

Australia and New Zealand enacted a number of laws aimed at restricting Chinese immigration. These laws were often also backed by anti-Chinese policy. A range of strategies were employed to effect that policy.

A Background to the Legislation

As colonies of the United Kingdom,[3] Australia and New Zealand were subject to the restrictions imposed by legislation passed and treaties entered into by the "mother country's" imperial parliament. Yet the existence of treaties restricting the ability to enact anti-Chinese legislation – in particular, the Treaty of Tientsin and the Convention of Peking – did not prevent such legislation from materialising.[4]

China and the United Kingdom signed the Treaty of Tientsin in 1858, following the second Opium War. Although China at first refused to ratify the treaty, it acceded in 1860 after signing the Convention of Peking. The Treaty of Tientsin increased the rights and opportunities of the British in China: it opened 10 more ports, provided

3 The literature often uses the terms "Great Britain" and "United Kingdom" interchangeably. For consistency, this article primarily uses "United Kingdom" except as strictly required for quotations and citations.

4 Treaty of Peace, Friendship, and Commerce, between Great Britain and China [1858] UKTS 6978 (signed 26 June 1858); and Convention of Friendship, between Great Britain and China [1860] UKTS 6979 (24 October 1860).

rights to travel within China, allowed missionaries entry and legalised the opium trade.[5] This allowed the United Kingdom a greater presence in China.

The Convention of Peking reciprocally provided the Chinese with rights, enabling them to emigrate to the United Kingdom to "take service in the British Colonies or other parts beyond sea".[6] This background, at least in theory, affected attitudes to Chinese immigration. As colonies, both Australia and New Zealand relied on the Governor and/or the United Kingdom to assent to their legislation.[7] Indeed, politicians in New Zealand noted that whether a poll tax law eventuated would depend on "Home Government".[8] Any "embarrassingly xenophobic" legislation risked not becoming law.[9]

It is therefore a testament to the determination of both colonial legislatures that anti-Chinese legislation was passed. The international context hindered any attempt to restrict immigration.[10] Yet, for the respective legislatures, "the restrictions were very much a matter of degree, not of kind".[11] The United Kingdom was acutely aware of the Treaty of Tientsin and the Convention of Peking, but could not "shut [its] eyes to the exceptional nature of Chinese immigration and the vast moral evil that

5 Nigel Murphy *The poll-tax in New Zealand* (Office of Ethnic Affairs, Department of Internal Affairs, Wellington, 2002) at 10.

6 Convention of Friendship, above n 4, art V.

7 See New Zealand Constitution Act 1852 (UK) 15 & 16 Vict c 72, ss 56–59, and John E Martin "Refusal of Assent – A Hidden Element of Constitutional History in New Zealand" (2010) 41 VUWLR 51; and Australian Constitutions Act 1850 (UK) 13 & 14 Vict c 59, South Australia Act 1842 (UK) 5 & 6 Vict c 61, New South Wales Constitution Act 1855 (UK) 18 & 19 Vict c 54, Victoria Constitution Act 1855 (UK) 18 & 19 Vict c 55, Constitution Act 1855 (Tas) (UK) 18 Vict, Constitution Act 1867 (Qld) (UK) 31 Vict, Constitution Act 1890 (WA) (UK) 53 & 54 Vict c 26, and Commonwealth of Australia Constitution Act 1900 (UK) 63 & 64 Vict c 12. It was not until New Zealand and Australia had adopted the Statute of Westminster 1931 (Imp), in 1947 and 1942 respectively, that each began to gain legislative independence. All of the United Kingdom's power of legislation concluded fully in 1986 for both countries: see Statute of Westminster Adoption Act 1947, and Constitution Act 1986, ss 15 and 26; and Australia Act 1986, ss 1 and 3. The United Kingdom's power of disallowance and reservation concluded in New Zealand as a result of those Acts, but remains extant in Australia at a federal level: Australian Constitution, ss 58–60. It has been removed at a state level: Australia Act, ss 8 and 9. For further information, see Peter C Oliver *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (Oxford University Press, Oxford, 2005).

8 (9 August 1878) 28 NZPD 148.

9 Robert A Huttenback *Racism and Empire: white settlers and colored immigrants in the British self-governing colonies, 1830-1910* (Cornell University Press, Ithaca, 1976) at 75.

10 Treaty of Tientsin, above n 4; and Convention of Peking, above n 4.

11 Murphy, above n 5, at 12.

accompanie[d] it".[12] That being the case, the United Kingdom was amenable to a moderate level of immigration restriction. Particular pieces of legislation, such as poll taxes, could allow for the restriction on Chinese immigration without amounting to an outright ban. The implementation of anti-Chinese immigration legislation was imminent.

B Australia

Australian colonies were the first to introduce anti-Chinese legislation, beginning with An Act to Make Provision for Certain Immigrants 1855 in Victoria. The Act created a poll tax, limiting "the number of Chinese passengers on a vessel to one for every 10 tons".[13] For each Chinese person, £10 was to be paid.[14] If more Chinese passengers were aboard a vessel, the owner, charterer or master would be subject to "a penalty not exceeding [£10] for each passenger so carried in excess".[15] The Governor was also empowered to collect a sum from immigrants to pay those who had been tasked with giving the tax effect.[16] Similar legislation followed in South Australia (1857) and in New South Wales (1861).[17] The statutes were repealed by each state in 1861 and 1867 respectively,[18] due to dwindling anti-Chinese sentiment in both states.[19]

The effect of the Victorian legislation was later strengthened, with further legislation introducing requirements of residential licences,[20] residence fees,[21] and an entrance fee of £4 for Chinese people who arrived other than by ship, to

12 Charles Archibald Price *The Great White Walls are Built: Restrictive Immigration to North America and Australasia, 1836-1888* (Australian Institute of International Affairs in association with Australian National University Press, Canberra, 1974) at 87.

13 "Chinese Immigration Act 1855 (Vic)" Documenting a Democracy <www.foundingdocs.gov.au>.

14 An Act to Make Provision for Certain Immigrants 1855 (Vic), s 4.

15 Section 3.

16 Section 8. The Governor could collect up to 20 shillings per immigrant per 12 months.

17 An Act to Make Provision for Levying a Charge on Chinese Arriving in South Australia 1857 (SA); and Chinese Immigrants Regulation and Restriction Act 1861 (NSW).

18 An Act to repeal An Act, No. 3 of 1857–8, entitled "An Act to Make Provision for Levying a Charge on Chinese Arriving in South Australia" 1861 (SA); and Chinese Immigration Act Repeal Act of 1857 (NSW).

19 Murphy, above n 5, at 14; and Huttenback, above n 9, at 68–69.

20 An Act to Regulate the Residence of the Chinese Population in Victoria 1857 (Vic), s 1.

21 An Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident in Victoria 1859 (Vic), s 10.

encompass those Chinese people who entered from other colonies.[22] The Act was replaced in 1865 by the Chinese Immigrants Statute, which placed much of the power to regulate Chinese people in the hands of the Governor.[23] Queensland followed suit, enacting the Chinese Immigrants Regulation Act in 1877 which resembled Victoria's 1855 Act.

Following the Inter-colonial Conference in January 1881, it was agreed by the Australian colonies that uniform anti-Chinese legislation would be adopted in the Australian colonies.[24] Throughout 1881, this began to become a reality. This article discusses the Chinese Act 1881 (Vic) in detail, as the other colonies "passed acts very much like it", in line with the uniform approach.[25]

The Chinese Act 1881 limited the number of Chinese passengers on a vessel to one for every 100 tons, and increased the penalty to £100 for any owner, master or charterer who carried Chinese passengers in excess.[26] Further, "[£10 was] to be paid for each Chinese immigrant arriving by vessel".[27] Failure by the master to pay the tax would result in a £50 penalty for each immigrant that arrived, in addition to the tax itself.[28] This provision was backed by penalties. Any immigrant who entered or attempted to enter the colony by sea who neglected to pay the £10 poll tax would be liable for a £10 penalty and 12 months' imprisonment.[29] Although certain classes of people were exempted from the legislation,[30] it had wide ranging application to Chinese people who wished to immigrate to Victoria.

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22 Section 5; and Victoria, *Parliamentary Debates*, Legislative Council, 20 January 1859, 666 (John O'Shanassy).

23 Chinese Immigrants Statute 1865 (Vic), s 5.

24 "Intercolonial Conference held at Sydney, Minutes of Proceedings of The, With Subsequent Memoranda" [1881] I AJHR A-03 at 6.

25 Joseph Lee "Anti-Chinese Legislation in Australasia" (1889) 3 Q J Econ 218 at 219.

26 The Chinese Act 1881 (Vic), s 2.

27 Section 3.

28 Section 3.

29 Section 4.

30 Sections 5–7.

Queensland,[31] South Australia,[32] New South Wales,[33] Western Australia,[34] Tasmania[35] and New Zealand adopted similar legislation.[36] However, following the second Inter-colonial Conference in 1888, it was agreed that the poll tax should be abandoned for legislation that primarily focused on a sole tonnage restriction.[37] This was subsequently adopted by Western Australia,[38] Queensland,[39] South Australia[40] and Victoria.[41] The poll tax was increased to £100 in New South Wales, with a limit of one Chinese person for each 300 tons of tonnage on a vessel.[42]

The 1896 Inter-colonial Conference then devised a new strategy of immigration restriction, with an attempt being made by New South Wales,[43] South Australia[44] and Tasmania[45] to exclude from migration "all coloured persons, British subjects or not".[46] These Acts were not assented to by the United Kingdom.[47]

Following Australia's federation in 1901, an Immigration Restriction Act 1901 was enacted by the Commonwealth Parliament, modelled on the Natal Immigration Restriction Act 1897 of South Africa.[48] The period following this enactment became

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31 Chinese Immigrants Regulation Act 1877 (Qld); and Chinese Immigrants Regulation Act Amendment Act 1884 (Qld).

32 Chinese Immigrants Regulation Act 1881 (SA).

33 Influx of Chinese Restriction Act of 1881 (NSW).

34 Chinese Immigration Restriction Act 1886 (WA).

35 Chinese Immigration Act 1887 (Tas).

36 Chinese Immigrants Act 1881.

37 "The Chinese Question" [1888] AJHR A-06 at 11.

38 Chinese Immigration Restriction Act 1889 (WA).

39 Chinese Immigration Restriction Act 1889 (Qld).

40 An Act for the Restriction of Chinese Immigration 1888 (SA).

41 Chinese Immigration Restriction Act 1888 (Vic).

42 Chinese Restriction and Regulation Act of 1888 (NSW), ss 5–6.

43 Coloured Races Restriction and Regulation Act 1896 (NSW).

44 Coloured Immigration Restriction Act 1896 (SA).

45 Coloured Races Immigration Act 1896 (Tas).

46 Muphy, above n 5, at 16.

47 At 16.

48 Natal Immigration Restriction Act 1897 (ZA). The aim of the Act was to restrict Indian immigration to South Africa, and under s 3 persons who could not write out and sign an application in a European language were prohibited from immigrating to Natal. For more information, see Iqbal Narain "Anti-Indian Legislation in Natal (since the imposition of the £3 tax to the close of indenture)" (1956) 17

known as the White Australia policy.[49] While nothing in the Act referenced nationality or race,[50] "there is no point in glossing over the fact that the purpose was to ensure a non-coloured or 'white' Australia",[51] given the requirement to undertake a dictation test to enter the country. Prospective immigrants had to "write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer".[52] The European language was changed to "any prescribed language" in 1905 following criticism by Japan that the former suggested "European superiority".[53] Therefore, Chinese immigration remained restricted, but the scope had widened to include all non-White immigrants.

The remaining poll tax laws were repealed by 1903, as they were "offensive and ineffectual" in light of the Immigration Restriction Act 1901.[54] The White Australia policy, however, began to be dismantled only in the late 1950s. A change in policy in 1957 meant that non-Europeans were eligible for permanent residency if they had lived in Australia for 15 years, which had been denied under the Naturalization Act 1920.[55] The Migration Act 1958 abolished the dictation test of the Immigration Restriction Act 1901.[56]

The end of the White Australia policy, however, was not to be seen until decades later. It came in the form of the Australian Citizenship Act 1973. That Act gave all migrants the ability to become citizens following three years of permanent residence, instead of prioritising those from Commonwealth countries.[57] The Racial

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IJPS 135; and Jeremy Martins "A transnational history of immigration restriction: Natal and New South Wales, 1896–97" (2007) 34 The Journal of Imperial and Commonwealth History 323.

49 James Jupp *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, New York, 2002) at 6.

50 AH Charteris "Australian Immigration Laws and their Working" in Norman MacKenzie (ed) *The Legal Status of Aliens in Pacific Countries: an international survey of law and practice concerning immigration, naturalization and deportation of aliens and their legal rights and disabilities* (Oxford University Press, Oxford, 1937) 16 at 17.

51 AP Elkin "Re-Thinking the White Australia Policy" (1945) 17 Aust Q 6 at 17.

52 Immigration Restriction Act 1901 (Aus), s 3(a).

53 Alexander T Yarwood "The Dictation Test – Historical Survey" (1958) 30 Aust Q 19 at 26.

54 Murphy, above n 5, at 17.

55 Rayner Thwaites *Report on Citizenship Law: Australia* (European University Institute, RSCAS/GLOBALCIT-CR 2017/11, May 2017) at 10.

56 Migration Act 1958 (Aus), s 3.

57 Under s 12 of the Nationality and Citizenship Act 1948 (Aus), those from Commonwealth countries could become Australian citizens by registration. This was a simpler process than applying for naturalization under s 15.

Discrimination Act 1975 made this clear, providing that no discrimination was to be made on the basis of race, colour, descent or national or ethnic origin.[58]

C New Zealand

New Zealand's anti-Chinese legislation began with the Chinese Immigrants Act 1881, again stemming from the 1881 Inter-colonial Conference. It stated that a vessel was to hold only one Chinese person for every 10 tons of tonnage, or the owner, charterer or master of a vessel could be subject to a penalty not exceeding £10 for each Chinese person "so carried in excess".[59] A poll tax of £10 was to be paid for each Chinese person arriving by vessel,[60] with a penalty of £20 for non-compliance.[61] The Governor was empowered to make regulations to give effect to the Act.[62]

These restrictions were later bolstered, following the trend of the Australian colonies. Like New South Wales, New Zealand amended the 1881 Act to alter the proportion of Chinese people allowed on a vessel to one for every 100 tons of tonnage, with the penalty for breach increasing to £100.[63] The penalty for non-compliance was also increased to £50,[64] although the poll tax remained at £10. In 1896, the poll tax was increased to £100,[65] matching that of New South Wales, and the proportion of Chinese people to tonnage on a vessel was increased to one for every 200 tons.[66] In 1898, Chinese people became ineligible for the old-age pension.[67]

New Zealand also attempted to pass an Asiatic Restriction Act in 1896, which would have extended the poll tax to all migrants of Asian descent, and outlawed the

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58 Racial Discrimination Act 1975 (Aus), s 9(1).

59 Chinese Immigrants Act 1881, s 3.

60 Section 5.

61 Section 6.

62 Section 15.

63 Chinese Immigrants Act Amendment Act 1888, s 4.

64 Section 5.

65 Chinese Immigrants Act Amendment Act 1896, s 2.

66 Section 4.

67 The Old-age Pensions Act 1898 introduced a means-tested pension for those aged 65 or over who, among other qualifications, were of "good moral character" and who had led a "sober and reputable life" for the five years preceding eligibility: ss 7 and 8. Chinese people "and other Asiatics", among others, were expressly excluded from eligibility: s 64(4).

naturalization of Chinese people.[68] This proposed Act mirrored the efforts made by New South Wales, South Australia and Tasmania in the same year. The United Kingdom withheld assent from the Bill.[69] This was due to the Imperial government's relationship with Japan. The Japanese were offended by legislation that insinuated they were "on the same level of morality and [civilisation] as the Chinese or other less-advanced populations of Asia".[70]

The Immigration Restriction Act 1899 allowed for further immigration restriction. Although the legislation was not targeted at a particular race, its terms meant that, in effect, the legislation was targeted at Asian people. It provided that any non-British person who failed "to himself write out and sign, in the presence of an officer, in any European language an application form" would be prohibited from landing in New Zealand.[71] In practice, the European language was English.[72]

Although this Act was aimed at preventing Asian immigration generally, it explicitly excluded Chinese people from its scope.[73] This meant that different categories of immigrants were subject to different restrictions, and as such established different levels of discrimination. Chinese immigrants were not subject to the written assessment, and were effectively singled out as a separate category of persons to regulate, and remained subject to the Chinese Immigrants Act 1881. Given their specifically-regulated status, Chinese people were arguably the lowest class of immigrant in law.

The Chinese Immigrants Act Amendment Act 1901 then "placed the Chinese crews of vessels in a better position and tightened the control of customs over them".[74] This was practical; it clarified that Chinese crew members were able to go

68 Asiatic Restriction Act 1896, ss 3–16 and 18.

69 Martin, above n 7, at 75.

70 PS O'Connor "Keeping New Zealand White, 1908-1920" (1968) 2 NZJH 41 at 43. Following the Meiji Restoration in 1868, Japan sought to align itself with Western nations, it being said that "[d]uring the first two decades of the Meiji era, it seemed as if the entire nation was determined to [Westernise] itself completely": see Hirakawa Sukehiro "Japan's Turn to the West" (translated by Bob Tadashi Wakabayashi) in Marius B Jansen (ed) *The Cambridge History of Japan Volume 5: The Nineteenth Century* (Cambridge University Press, Cambridge, 1989) 432 at 487.

71 Immigration Restriction Act 1899, s 3(1).

72 O'Connor, above n 70, at 44.

73 Immigration Restriction Act 1899, s 21.

74 GH Scholefield and TDH Hall "Asiatic Immigration in New Zealand: Its History and Legislation" in Norman MacKenzie (ed) *The Legal Status of Aliens in Pacific Countries: an international survey of law and practice concerning immigration, naturalization and deportation of aliens and their legal rights and disabilities* (Oxford University Press, Oxford, 1937) 262 at 273.

ashore to perform their duties in relation to the ship,[75] and if they did so they would not be subject to the Chinese Immigrants Act 1881. A reading test was instituted in 1907.[76] This required Chinese people to read a printed passage of not less than 100 words in English to a Collector or principal officer of Customs.[77] The change, in some ways, echoed the Australian dictation test.

In 1908, a new Immigration Restriction Act 1908 was enacted. It replaced its 1899 predecessor and extended the written assessment requirement to include Chinese people. However, Chinese people continued to be singled out. A further amendment in 1908 instituted a system whereby Chinese people had to mark their certificate of registration with a thumbprint, to ensure they could get a re-entry permit.[78] This was grounded in the idea that all Chinese people looked the same, rendering a photograph useless to Customs authorities.[79] Chinese people were prevented from becoming naturalised in 1908.[80]

A significant amendment to anti-Chinese legislation came in 1920. The Immigration Restriction Amendment Act 1920 "brought to a successful end the long search for an instrument of policy which would both keep New Zealand white and be acceptable to the imperial government".[81] The thumbprint requirement was abandoned, but the Act effectively created a White New Zealand policy.[82] Immigrants were required to obtain a permit before they could enter New Zealand,[83] which were granted at the discretion of the Minister of Customs.[84] This meant that "annual cabinet decisions… replaced direct legislation".[85] While the legislation was no longer targeted at Chinese people, they remained in the minds of politicians; for example, Cabinet Minister Downie Stewart "got his way" and allowed only 100

75 Chinese Immigrants Act Amendment Act 1901, s 5.

76 Chinese Immigrants Amendment Act 1907.

77 Section 3.

78 Immigration Restriction Amendment Act 1908, s 2.

79 O'Connor, above n 70, at 45.

80 "Chinese – General question of naturalisation" Archives New Zealand IA1/1, 116/7.

81 O'Connor, above n 70, at 41.

82 At 41.

83 Immigration Restriction Amendment Act 1920, s 5.

84 Section 9(3).

85 Francis Arthur Ponton "Immigration Restriction in New Zealand: A Study of Policy from 1908 to 1939" (MA, Victoria University of Wellington, 1946) at 58.

permits per year for Chinese people in the early 1920s.[86] In 1926, only the wives and fiancées of New Zealand-born Chinese people were to be allowed entry.[87]

The Immigration Restriction Amendment Act 1920 brought the previous 39 years of trial and error by the New Zealand legislature to an end. Although Chinese people had been successfully restricted through the poll tax, and other immigrants through the Immigration Restriction Act 1899, the Asiatic Restriction Bill had been a failure. Neither the Chinese Immigrants Act 1881 or the Immigration Restriction Act 1899 provided the flexibility and ease of policymaking afforded by the Immigration Restriction Amendment Act 1920.[88]

The 1881 poll tax law was not repealed by the Immigration Restriction Amendment Act 1920, but it was essentially rendered ineffective from 1926 due to the decision to not grant permits to Chinese people. From 1934, the requirement to pay the poll tax was waived,[89] and it was repealed in 1944.[90] Chinese people became eligible for the old age pension in 1936,[91] and were able to become naturalised in 1952.[92]

Change really began in the 1960s. The Immigration Restriction Amendment Act 1961 meant that British and Irish migrants had to obtain permits before entering New Zealand like other non-New Zealand citizens.[93] Other measures were brought in to dismantle the discrimination in immigration law, the most significant being the Immigration Act 1987. This followed the 1986 Immigration Policy Review which stated that immigrants were to be selected based on a "criteria of personal merit without discrimination on the ground of race, national or ethnic origin".[94] Immigrants were selected for their skills or for business reasons, for family reasons, or due to humanitarian reasons, rather than their race or nationality.[95] As is discussed

86 O'Connor, above n 70, at 64.

87 At 64.

88 At 64.

89 Ponton, above n 85, at 70.

90 Finance (No 3) Act 1944, s 10.

91 Pensions Amendment Act 1936, s 34.

92 David Ng "Ninety Years of Chinese Settlement in New Zealand, 1866 to 1956" (MA and Hons Thesis, University of Canterbury, 1962) at 99.

93 Immigration Restriction Amendment Act 1961, s 2.

94 "Review of Immigration Policy (Kerry Burke, August 1986)" Archives New Zealand, R18491309 at 11.

95 New Zealand Productivity Commission *International Migration to New Zealand: Historical themes & trends* (Working paper 2021/04, November 2021) at 21.

later in this article, this reform may have come as a result of changed attitudes and/or economic conditions.

III ORIENTALISM

The concept of orientalism was advanced by Edward Said in his book, *Orientalism*. It is submitted that the legislative approach to Chinese people in Australia and New Zealand historically was a form of orientalism in the law.

Said deployed post-structuralist concepts to examine Western cultural representations of "the Orient," and the role of power in constructing these representations. He argued that the relationship between the West and the Orient is not "an inert fact of nature", nor "merely there".[96] Instead, it is "man-made": a construction, an idea that has been shaped by a "tradition of thought, imagery and vocabulary that have given it reality and presence in and for the West".[97] This allows for the recognition of the power dynamic between the West and the Orient. There is an inherent power imbalance; "the relationship between the [West] and the Orient is a relationship of power, of domination, of varying degrees of a complex hegemony".[98]

The very idea of "the Orient" can therefore be seen as the product of the knowledge that is gained and twisted to fit a particular narrative – "[it] is knowledge of the Orient that places things Oriental in class, court, prison or manual for scrutiny, study, judgment, discipline, or governing".[99] Knowledge of the Orient, or of Orientals, means that they become the subject of discussion and scrutiny, rather than being on an equal footing with the West. The result is such that it further "polarise[s] the distinction – the Oriental becomes more Oriental, the Westerner more Western – and limit[s] the human encounter between different cultures, traditions and societies".[100]

Orientalism is a way of thinking that creates and perpetuates a false idea of a certain culture, from which Orients cannot escape as they are not presented as equal to those who create the narrative. Because "this tendency is [central to] Orientalist theory, practice and values found in the West, the sense of Western power over the Orient" is seen as scientifically true.[101] Therefore, orientalism is not just the catalyst

96 Said, above n 2, at 12.

97 At 13.

98 At 13.

99 At 49.

100 At 54.

101 At 54.

for incorrect cultural understanding but also an unconscious tool for entrenching Western superiority.

Said offered four dogmas of orientalism to describe the Western view of the Orient. First, there is an "absolute and systematic difference between the West (which is rational, developed, humane and superior) and the Orient (which is aberrant, undeveloped, inferior)".[102] Secondly, generalisations and abstractions of the Orient, rather than tangible evidence of Oriental society, are to be accepted.[103] Thirdly, the Orient is "eternal, uniform, incapable of defining itself" – and therefore how the West describes it is "inevitable and even scientifically 'objective'".[104] Finally, the Orient is something to be feared or controlled.[105] These are used to examine orientalism in the reasoning behind anti-Chinese legislation.

IV REASONS FOR THE LEGISLATION

This Part examines the reasons that were given for the discriminatory legislation through the lens of orientalism, because "explaining away antipathy toward Chinese simply as racism disguises the much more problematic character of our past and the visions upon which the nation was constructed".[106]

A Britain of the South

New Zealand and Australia being colonies is relevant to why Chinese discrimination eventuated. Manying Ip posits that "for over a century they had the same vision of preserving their lands for the exclusive use of immigrants from the United Kingdom".[107] Indeed, over 90 per cent of New Zealand immigration at that time was British.[108] Similarly, 81 per cent of those who migrated to Australia between 1851 and 1860 were from the United Kingdom.[109]

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102 Edward Said "Arabs, Islam and the Dogmas of the West" *The New York Times Book Review* (New York, 31 October 1976) at 4.

103 At 4.

104 At 4.

105 At 4.

106 Brian Moloughney and John Stenhouse "'Drug-besotten, sin-begotten fiends of filth': New Zealanders and the Oriental Other, 1850–1920" (1999) 33 NZJH 43 at 64.

107 Manying Ip "Chinese immigration to Australia and New Zealand: Government policies and race relations" in Chee-Beng Tan (ed) *Routledge Handbook of the Chinese Diaspora* (Taylor & Francis, United States of America and Canada, 2013) 156 at 157.

108 Murphy, above n 5, at 7.

109 Victoria Mence, Simone Gangell and Ryan Tebb *A History of the Department of Immigration: Managing Migration to Australia* (Department of Immigration and Border Protection, June 2017 (revised ed)) at 5.

As the Chinese "were the first group of non-white migrants to arrive", they "therefore bore the brunt of the prejudice".[110] Their arrival derailed the colonists' vision of a "Britain of the South", coming from the "Orient" rather than the West. Chinese immigration brought Chinese culture – one very different to British culture. Thus, their arrival was jarring to those harbouring a different vision of the futures of Australia and New Zealand, with "the presence of so many Chinese [intensifying] debate on the potential character of Australian society", as well as of New Zealand society.[111] A key reason why the legislatures therefore sought to restrict Chinese immigration was to preserve the lands for British migrants.[112]

In some respects, it may be argued that this is not an example of orientalism. Reserving resources and land for British immigrants may be discriminatory, but it is not necessarily caused by orientalism in that Chinese people are not being defined negatively through a Western lens. Perhaps the Chinese people were simply an unfortunate by-product of British expansion, or perceived as a threat to the colonial enterprise. Yet even if that were the case, the legislation still reinforces aspects of Said's first dogma through its effects on Chinese people.

The exclusion of Chinese people in favour of British immigrants implies that the innate character of the Chinese people and the culture that they brought with them was not compatible with the "Britain of the South" that the settlers intended to build. In this way, Chinese people were classed as inherently different. This reflects Said's first dogma of orientalism: that there is an absolute and systematic difference between the West and the Orient. The fact that "Australians and New Zealanders [were] proud of being the inhabitants of the outposts of the white races, but more specifically of the British race", at the very least, made it clear that being "British" was a fixed identity not to be upset by the immigration of Chinese people.[113] The decision to restrict Chinese immigration in favour of preserving the colonies for the United Kingdom, and in that way marking Chinese people as a threat, shows the beginnings of orientalist attitudes.

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110 Ip, above n 107, at 158.

111 David Walker "One hundred work as one" in *Anxious Nation: Australia and the rise of Asia 1850–1939* (UWA Publishing, Crawley, 1999) 36 at 36.

112 This is not isolated to Chinese immigration. In the context of blackbirding — slave labour in the Pacific — a newspaper article reported about the "importation of slave labour [having] commenced in a colony which proudly calls itself British of the South", finding the practice to be intolerable in part because "these savage proclivities may be tolerable in the South Sea Islands, or be readable in a book of travels, but if exhibited in New Zealand in the midst of white people of all ages and both sexes cannot be endured": see "Disgusting Results of Imported South Sea Labour" *New Zealand Herald* (New Zealand, 21 September 1870).

113 Ponton, above n 85, at 11.

Through this mechanism, the Orient is also defined as something to be feared and controlled – Said's fourth dogma of orientalism. Walker noted that Chinese immigration was characterised as tidal; "if the Chinese were a flood … the future of the British race in the Australian colonies was clearly under direct threat".[114] The connection between orientalism and the desire to preserve Australia and New Zealand for British settlers is therefore clearly articulated, because it is suggested that uncontrolled Chinese immigration was a "threat" to the original colonists' vision for the future. British immigrants were innately fearful of such a possibility, and therefore those from the Orient needed to be controlled.

Said's second and third dogmas of orientalism are not satisfied by this reasoning alone. However, the fact that the reasoning demonstrates the first and fourth dogmas works in tandem with further reasons to suggest that orientalism influenced the decision to restrict Chinese immigration.

B Superiority

A further reason why anti-Chinese immigration legislation was implemented was due to a feeling of superiority. This is tied, self-evidently, to Said's first dogma, but is also relevant to the other three. The primary belief held at that time was that those who were white were superior to other races, due to "their technological and scientific skills, their physical strength, and their supposedly superior level of civilisation".[115] This viewpoint was reflected in the New Zealand Parliament, it being said that "no doubt the Europeans had reached a higher moral level than the Chinese",[116] and Premier Richard Seddon went further to argue "the Chinaman was inferior in every way, shape, and form; and he hoped that such an inferiority would never be tolerated here".[117] This sentiment was also evident in Australia, it being noted that Chinese people were not a "desirable class of colonists" with bad moral habits.[118] Even the state of China itself was used to frame Chinese people as having little independent thought; "the Chinaman … was unfitted to take any part in the government of a free country the institutions of which rested upon the suffrages of the people".[119]

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114 Walker, above n 111, at 37.

115 Ip, above n 107, at 158–159.

116 (8 July 1880) 36 NZPD 93.

117 At 98.

118 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 October 1881, 220 (Robert Clark).

119 (8 July 1880) 36 NZPD 92.

This superiority manifested itself in stereotypes of Chinese people, regarding them as having a vile way of living, introducing "loathsome" diseases, and being "immoral barbarians" that used young girls for their "depraved sexual appetites".[120] Even those who did not think badly of Chinese people reduced them to "harmless but innately cunning dolts, who were capable only of 'jabbering' in pidgin English".[121] Indeed, 19th century Australia vilified Chinese people as they were "'the' source of various diseases of which smallpox and leprosy were the most commonly mentioned".[122] In New Zealand too, these views were represented, with politicians often being wary of the risk of leprosy and being largely against intermarriage.[123]

The reason of superiority in regards to Chinese immigrants is perhaps the most obvious way in which orientalism is demonstrated, displaying all four dogmas at once. It implies that there is an absolute and systematic difference. The evidence put forth by legislators, that "the Chinaman was inferior in every way, shape, and form",[124] shows that the law clearly represented a view that the West was rational, developed, humane and superior, while Chinese people were aberrant, underdeveloped and inferior.

Further, generalisations and abstractions of the Orient were at play when it came to the development of anti-Chinese legislation. The fears of disease, sexual depravity and lack of intelligence were widespread rumours that had no basis – and that were known to have no basis. For example, an 1871 parliamentary report conducted in New Zealand stated that Chinese people were as orderly as European citizens, that there was no special risk to the morality or security of the colony, and that they were not likely to introduce any special infectious diseases.[125] This would seem to indicate a deliberate decision to ignore the evidence given, and instead to revert to generalisations and abstractions of Chinese people.

The nature of the lawmaking itself, too, lends itself to the third dogma of orientalism – that the Orient is incapable of describing itself, and thus how the West describes it is "inevitable and even scientifically objective".[126] In parliamentary

120 James Ng *Windows on a Chinese Past* (Otago Heritage Books, Dunedin, 1993) at 105.

121 At 105.

122 Ian Welch "Alien Son: The Life and Times of Cheok Hong CHEONG, (Zhang Zhuoxiong) 1851-1928" (PhD Thesis, Australian National University, 2003) at 194.

123 (22 August 1978) 28 NZPD 417–418.

124 (8 July 1880) 36 NZPD 98.

125 William Jukes Steward "Final Report of the Chinese Immigration Committee, with Minutes of Proceedings" [1871] AJHR H-05B at 4.

126 Said, above n 2, at 4.

debates, no consultation was conducted with Chinese people to see if any statements were accurate. Arguments were largely based on Western experience with Chinese people. Even for those who argued against the legislation, Chinese people became the object of discussion rather than being privy to discussion; James Francis MP in Victoria noted that "many of the Chinese here were of use, particularly on the gold-fields, in the interests of health and comfort".[127] Chinese people were therefore deemed as "other", as the subject of legislation, with little say in how they were perceived or what their motives for migration were.

Finally, the Orient was something that needed to be feared and controlled. Fear was inherently part of the reason to restrict immigration, as much of the politicians and public alike feared being infected with diseases, feared being subject to sexual depravity and feared intermarriage. The reasoning of superiority is a clear example of orientalism in the law.

C Working Conditions

Early Chinese immigrants moved to Australia and New Zealand largely with one goal: to find gold. The discovery of gold in Victoria and New South Wales in the 1850s caused the first influx of Chinese immigration into Australia,[128] with New Zealand to follow in 1865.[129] Therefore, a third reason why New Zealand and Australian politicians opposed such immigration was because of the supposed threat to labour and working conditions.

Historian Nigel Murphy noted that the working class and gold miners in New Zealand largely held anti-Chinese views, due to a "fear of Chinese competition in the trades combined with a fanatical race hatred".[130] The fear was largely economic – if Chinese people were to immigrate, they would be happy to work for low wages and therefore take jobs away from those already working. The same was true in Australia, as Chinese people used complex modes of organisation, cooperated well, and were prepared to work hard, which led to high levels of success.[131] This work ethic led to resentment of Chinese people. This was reflected in Parliament, John

127 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 October 1881, 219 (James Francis).

128 Walker, above n 111, at 36.

129 Helena Huang, Joanna Fountain and Harvey Perkins "New Zealand's Chinese Gold-Mining Heritage: (Re) Telling their Stories" (speech to Dragon Tails: Re-interpreting Chinese-Australian Heritage Conference, Ballarat, 2009).

130 Murphy, above n 5, at 7.

131 Barry McGowan "The Economics and Organisation of Chinese Mining in Colonial Australia" (2005) 45 Australian Economic History Review 119 at 136.

Hall MP stating that Chinese people "caused an unfair competition with the European working classes, whose claims had a right to be considered".[132]

Chinese people were also known for their work ethic. Coming from a country with one of the lowest standards of living in the world, they were frugal and hardworking.[133] Therefore, "as a result it was… feared that they would drag the New Zealand standard down to their own level".[134] If immigration continued, European settlers were concerned that the standard of living would drop to that of China, and that they would lose their perceived higher standard of living.

The labour and living standards argument is also an example of orientalism in the law, in the way that it uses generalisations and fear to justify change. It was feared that Chinese people would bring the living standards of the colony down, because of where they came from. However, no tangible evidence was presented suggesting that this would eventuate. On the contrary, it could be argued that the work ethic of Chinese people could increase overall productivity, and thus prosperity.

Yet the parliamentary discussions largely chose to frame immigration in terms of fear: Chinese people were a group that were to be feared, as they threatened working conditions and were to be controlled. This demonstrates Said's fourth dogma.

D Chinese People as Sojourners

Miles Fairburn argued that the role of Chinese people should also be acknowledged in why they were discriminated against.[135] To focus solely on Europeans "ignores the effect of the peculiar nature of Chinese agency on relations between the Chinese and Europeans".[136] Although the British may have seen Australia and New Zealand as a potential "Britain of the South", it was not only characterised in terms of race and nationality, but also in terms of British colonists' intended permanence: they had arrived in Australia and New Zealand to stay. However:[137]

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132 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 October 1881, 222 (John Hall).

133 Ponton, above n 85, at 10.

134 At 10.

135 Miles Fairburn "What Best Explains the Discrimination against the Chinese in New Zealand, 1860s–1950s?" 2 JNZS 65 at 75.

136 At 75.

137 (8 July 1880) 36 NZPD 91.

> … the Chinese were not really settlers in any fit sense of the term, because they invariably came unaccompanied, and such immigration as that he held to be fraught with evil.

To hold the Chinese immigrants as "fraught with evil" demonstrates the sense of superiority the European settlers felt over Chinese people. In Australia, Chinese people were characterised as "useless".[138] It is correct that Chinese people, at least at the beginning of immigration, did not intend to stay; "the first Chinese who came to New Zealand were indeed sojourners".[139] Therefore, Fairburn argued that Chinese people experienced such exceptional discrimination in immigration legislation partially because they were "the most separatist and transitory of all the non-European immigrant categories".[140]

He cited factors such as the Chinese rate of out-marriage being extremely low, their massive gender imbalance, and their high return rate. While the high return rate must take account of the fact that anti-Chinese legislation was also being put in place, it was higher in New Zealand than in the United States of America, which also had anti-Chinese legislation.[141] Further, Chinese people understandably had a low rate of English literacy, and thus tended to create relationships among themselves, and less so with Europeans. These factors point to a conclusion that, at least to begin with, Chinese people were separatist and transitory immigrants.

But it fails to address the role of Chinese culture in migration. Chinese culture stresses the importance of staying connected to one's ancestral land, as exemplified in the Confucian teaching: 父母在, 不远游 (while the parents are alive, the child should not go far away). The actions of the Chinese immigrants in Australia and New Zealand reflected that culture.

The response to the sinking of the SS *Ventnor*, which carried the exhumed bones of 499 Chinese people for reburial in China in their ancestral villages and alongside their families, encapsulates the importance of ancestry and ties to land.[142] After attending a commemoration honouring those lost on the *Ventnor*, in the tradition of

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138 "The Parliament" *The Armidale Express and New England General Advertiser* (New South Wales, 23 June 1860) at 4.

139 Moloughney and Stenhouse, above n 106, at 55.

140 Fairburn, above n 135, at 76 (emphasis omitted).

141 At 77.

142 See, for instance Geoff Chapple "Ghost Ship of the Hokianga" *New Zealand Geographic* (online ed, New Zealand, September/October 2020).

清明節 (Ching Ming, or Qingming, a festival honouring one's ancestors), writer Alison Wong penned:[143]

> You were lost on the spirit highway, lost in deep blue water. You believed to be lost in water was to die a second death, to wander forever a hungry ghost. What is time? Are you now beyond time like God? Even in our long absence we honoured you. We lived and worked; we did not die out. We came that you might find rest in the land we now call home.

By ignoring this cultural context, and indeed characterising Chinese people as "fraught with evil", the policy makers revealed their ignorance, which reflects Said's third dogma of orientalism: that the Orient is incapable of defining itself and that how the West describes the Orient is inevitable. Because the legislators did not have an appreciation of this cultural context, they did not allow Chinese people to define themselves and instead decided that to not settle is to be evil. That further manifests itself as being taken as scientifically objective, because the actions of Chinese people were only evaluated through a Western understanding of what constitutes acceptable immigration.

In that sense, Chinese people did play a role anti-Chinese legislation being enacted in Australia and then New Zealand, in tandem with a lack of cultural understanding. The importance of cultural understanding cannot be overstated, and an absence thereof can result in an orientalist point of view.

E Conclusions on Orientalism in the Reasoning

While orientalism in the law is displayed through the "racial superiority" reasoning, it is less apparent, although still inherent, in the "Britain of the South" and "working conditions" arguments which were used to justify the imposition of anti-Chinese legislation, and to a certain extent in the "Chinese people as sojourners" argument. This shows how ignorance and a lack of analysis can lead to the enactment of discriminatory laws.

This analysis is being made with the benefit of hindsight. Those in the 1800s and 1900s did not have the benefit of Said's theory to use as a lens by which to examine their laws and legislative processes. Such an analysis must be conducted in the present day to ensure that unconscious biases which may mask orientalist assumptions are brought to the surface and examined.

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143 Alison Wong *Pure brightness: Conversations with ghosts* (2014) 43 Griffith Review 164 at 167.

V REASONS FOR THE REPEAL

The anti-Chinese legislation was eventually repealed in both New Zealand and Australia.

In New Zealand, the Finance (No 3) Act 1944 repealed the Chinese Immigrants Act 1881.[144] This was perhaps due to a desire to avoid discriminating against Chinese people, it being stated that "we have no more right to ask the Chinese to pay a poll tax than we have to ask the Japanese, the Germans, the Spaniards, or the Norwegians".[145] This was emphasised by enunciating that the "Chinese are as good as any other race", and that the repeal was to remove "a blot on our legislation".[146]

To see this as a complete attitude change would be overly optimistic. Although the law was repealed, Chinese people remained subject to other laws like the Immigration Restriction Act 1899 which restricted non-white immigration. It would be more accurate to see the repeal as a changing of attitudes towards Chinese people, but not that the legislators saw Chinese people as equal to themselves; it simply saw them as to be discriminated against as equally as other non-white groups, likely as a result of growing multiculturalism in New Zealand.

A 1953 Department of External Affairs memorandum confirmed this:[147]

> Our immigration is based firmly on the principle that we are and intend to remain a country of European development. It is inevitably discriminatory against Asians – indeed against all persons who are not wholly of European race and colour. Whereas we have done much to encourage immigration from Europe, we do everything to discourage it from Asia.

Change really began after the 1986 Immigration Policy Review implemented a non-discriminatory approach to immigration. The Immigration Act 1987 was then passed. At the First Reading, it was made clear that the reform aimed to move away from race-based discrimination. It was described as "an enlightened and modern immigration policy that sets aside the discrimination inherent in the previous Government's policy, and develops equal opportunity for all".[148] This Act was not specifically aimed at Chinese people, and shows that attitudes towards non-white

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144 Finance (No 3) Act, s 10.

145 (13 December 1944) 267 NZPD 724.

146 At 725.

147 Tom Brooking and Roberto Rabel "Neither British nor Polynesian: a brief history of New Zealand's other immigrants" in Stuart William Greif (ed) *Immigration and national identity in New Zealand: one people, two peoples, many peoples?* (Dunmore Press, Palmerston North, 1995) at 39.

148 (14 August 1986) 473 NZPD 3942.

immigrants, including Chinese people, had changed and were no longer grounded in an orientalist point of view.

In Australia, an end was brought to the White Australia policy over a decade before New Zealand reformed its immigration laws, through the enactment of the Australian Citizenship Act 1973. As with New Zealand, the focus in the debates was on eliminating discrimination:[149]

> After [three years] in Australia substantial numbers of fine migrants have come to know Australia, feel settled here, want to identify themselves as members of our community and are in fact living as such without friction or problems. They should not have to wait for a longer time.

An attitude shift was apparent; it was identified that non-white migrants not only came to know Australia and deserved to stay, but also that they were "fine" and enhanced Australia as a country. This, in turn, showed a shift from orientalist attitudes: migrants were accepted as members of the community, rather than being othered. These changes were aimed at all non-white migrants, rather than specifically targeting Chinese people, but still demonstrate that there had been a change in attitude and an arguable reduction in orientalism.

The caveat is that these repeals were affected by the need for economic growth. Palat stated that the "eventual removal of the more discriminatory provisions … can be traced to the gradual undermining of the privileged position New Zealand had occupied under the political and economic arrangements of the British Empire".[150] Likewise, Ang argued that the Australian change was made as it was "simply more likely to enhance Australia's economic wellbeing than xenophobia".[151] These propositions question whether the comments made during parliamentary debates represented all existing motivations. Even if the changes were, in part, brought on by economic needs, they nonetheless represented a change in attitudes and a decline in orientalism. This is supported by the fact that the International Covenant on Civil and Political Rights (ICCPR) entered into force at around the same time as the amendments.[152]

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149 Commonwealth, Parliamentary Debates, House of Representatives, 11 April 1973, 1312 (Al Grassby).

150 Ravi Arvind Palat "Curries, Chopsticks and Kiwis: Asian Migration to Aotearoa/New Zealand" in Paul Spoonley, David Pearson and Cluny Macpherson (eds) *Nga Patai: Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press, Palmerston North, 1996) 35 at 46.

151 Ien Ang "Asians in Australia: A Contradiction in Terms?" in Gerhard Fischer and John Docker (eds) *Race, Colour and Identity in Australia and New Zealand* (UNSW Press, Sydney, 2000) at 120.

152 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR]. Australia signed the ICCPR on 18

VI ORIENTALISM IN MODERN IMMIGRATION LAW

Despite the obvious issues with orientalism in the law, both New Zealand and Australia have, arguably, seen some of the same attitudes arise in the late 20th century.

A New Zealand

The liberalisation of New Zealand's immigration policies in the 1980s led to a period of high Asian migration; "the largest-ever Asian immigration to New Zealand".[153] This was supported by the introduction of the Immigration Amendment Act 1991, which created a merit-based points system in place of the former priority list. These changes sought migrants, including Asians, to help business in New Zealand.

This influx brought a mixture of attitudes. While some supported the migration, negative responses from those who feared an "Asian Invasion" were more common.[154] For example, Ip and Murphy discussed a feature article titled "The Inv-Asian", part of which discussed the behaviour of a "typical" Asian, reducing Asian people to a list of stereotypes – that they are absentee parents, spoil their children, buy property and drive up house prices, and bring relatives who behave in "un-Kiwi-like" ways.[155] As such, just as in the 1800s, "stigma and stereotypes [were] generated in the media in response to the large number of Chinese migrants arriving in New Zealand". [156] This "othering" of Asians represents Said's second dogma of orientalism. Asian people were reduced to a generalisation, rather than tangible evidence being offered about modern Asian society.

This attitude also extended to politics. A New Zealand politician campaigned in 1996 on an anti-immigration platform, "attacking rows of ostentatious homes" whose owners have "no ties to New Zealand".[157] It was clear they were talking about

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December 1972 and ratified it on 13 August 1980. New Zealand signed the ICCPR on 12 November 1968 and ratified it on 28 December 1978.

153 Wardlow Friesen "New Asian Migrants in Auckland: Issues of Employment and Status" (1992) Labour, Employment and Work in New Zealand 148 at 148.

154 Shee-Jeong Park "Political Participation of 'Asian' New Zealanders: A Case Study of Ethnic Chinese and Korean New Zealanders" (PhD Thesis, University of Auckland, 2006).

155 Manying Ip and Nigel Murphy *Aliens at my Table: Asians as New Zealanders See Them* (Penguin Books, Auckland, 2005) at 31; and Pat Booth and Yvonne Martin "The Inv-Asian" *Auckland City Harbour News* (New Zealand, 16 April 1993) at 8–9.

156 Raymond CF Chui *Transnationalism and Migration: Chinese Migrants in New Zealand* (Centre for Qualitative Social Research and Center for East Asian Studies, Occasional Paper No 4, July 2008) at 32.

157 Ip and Murphy, above n 155, at 35.

Asians; the language was not "racially or ethnically specific", but it employed "well-rehearsed boundary-marking exercises that drew upon specific exclusionary [Pākehā] discourses of 'community' and the abstract spaces that they inhabit".[158] They questioned their commitment to New Zealand and suggested that they would bring their families to New Zealand, enjoy benefits at the expense of New Zealanders, and return to Asia.[159] In doing so, the politician demonstrated two dogmas of orientalism: generalisations about Asian people, and depictions of Asians as a group that was in need of control. It can be assumed that they were attempting to make political gains by appealing to voters who also reason by generalisation.

The rhetoric focused on Asians. One reason for this may have been fear due to the high rate of immigration, with 52.3 per cent of the total net gain of non-New Zealand citizens between April 1986 and March 1998 being persons from Asian countries, although it would be difficult to characterise this as an invasion.[160] It is also important to note that the discrimination was against Asians, rather than Chinese people. Although "this was by far the largest influx of people from countries on the Asia-Pacific rim in New Zealand's history",[161] it was coupled with immigration from several Asian countries, unlike that of the 19th century. The comments may have been widened to encompass that fact. There is also the common stereotype that all Asians "are alike".[162]

There is clear evidence of discrimination, and potential orientalism, in public opinion and politics. It is less obvious whether those attitudes were those of the lawmakers. 1995 saw a tightening of immigration policy, in particular the introduction of English language test requirements that could result in the forfeiture of a $20,000 bond if failed within 12 months.[163] These measures were dropped in

158 Paul Spoonley and Lawrence D Berg "Refashioning Racism: Immigration, Multiculturalism and an Election Year" (1997) 53 New Zealand Geographer 46 at 47. See also Ip and Murphy, above n 155, at 35.

159 Ip and Murphy, above n 155, at 35. See also Brian Rudman "Asian arrivals are uniting against racism" *Sunday Star Times* (Wellington, 6 October 1996); Jim Kayes "ANC representative warns NZ of dangers of 'racist beast'" *Evening Post* (Wellington, 11 April 1996); and "Racism votes despicable" *Dominion* (Wellington, 15 March 1996).

160 Richard Bedford, Elsie Ho and Jacqueline Lidgard *International Migration in New Zealand: Context, Components and Policy Issues* (Migration Research Group and Population Studies Centre, Discussion Papers No 37, October 2000) at 23.

161 At 23.

162 For further information on Asian stereotypes and microaggressions, see Derald Wing Sue *Microaggressions and Marginality: Manifestation, Dynamics and Impact* (Wiley, Hoboken (NJ), 2010) at 90.

163 New Zealand Immigration Service *New Zealand's Targeted Immigration Policies: Summary of October 1995 Policy Changes* (1995) at 10.

1998, but in 2002 the English test requirement for skilled migrants was raised, requiring an IELT score of at least 6.5.[164] Both changes have been discussed as being derived from the public reaction to Asian immigration, and a desire to stem the flow of immigration.[165] The English language requirements were discriminatory in that they made immigration more difficult for non-English speakers. However, it should also be acknowledged that other factors would have played into any decision made. Business did not flourish as had been hoped due to the New Zealand business environment, and many Asians were unemployed despite being highly skilled.[166] A lack of clear statements from the Government as to why the language requirements were introduced means that it is not possible to discern whether they were a result of orientalism.

B Australia

Australia, like New Zealand, operates a skills-based immigration regime. It was first rolled out in 1979 creating the Numerical Multi-factor Assessment System for migrant selection, "which gave weight to factors such as family ties, occupation and language skills".[167]

Those reforms were not unopposed. Australia experienced a political reaction through Pauline Hanson's One Nation party. The party's 1998 immigration policy sought the return to a more restrictive regime, specifically singling out Asian migration as an issue and stating that "most of the media and government concern has been for the migrant, not for the other side of the equation".[168] That reasoning echoed that of the gold rush era, and had orientalist undertones. It enunciated the importance of British culture in Australia, and argued that increased Asian immigration would negatively change the Australian identity.[169]

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164 Immigration New Zealand *Operational Manual (Archived)* (24 March 2003) at G6.5.

165 Ip and Murphy, above n 155, at 163; Anne Henderson "Untapped Talents: The Employment and Settlement Experiences of Skilled Chinese in New Zealand" in Manying Ip (ed) *Unfolding History, Evolving Identity: The Chinese in New Zealand* (Auckland University Press, Wellington, 2003) 141 at 145; and Liangni Sally Liu "New Chinese Immigration to New Zealand: Policies, Immigration Patterns, Mobility and Perception" in Min Zhou (ed) *Contemporary Chinese Diasporas* (Palgrave, Singapore, 2017) 233 at 239.

166 Ip and Murphy, above n 155, at 33.

167 Mence, Gangell and Tebb, above n 109, at 66.

168 Australianpolitics.com "One Nation Immigration, Population and Social Cohesion Policy" (1 July 1998) <www.australianpolitics.com>.

169 Australianpolitics.com, above n 168; and Michael Millet "A poor vision of the future" *Sydney Morning Herald* (Sydney, 3 July 1998).

The support that the party garnered in the 1998 Queensland state election, as well as in the federal election indicated a segment of the public shared its opinion.[170] However, unlike New Zealand, no legislative changes were made that correlated to the attitudes expressed. It is therefore arguable that orientalism was absent from the law in Australia.

C Implications

It is not clear whether orientalism influenced modern immigration law and policy in New Zealand, and it seems that orientalism is not evident in Australian law and policy. This is better than the situation of the late-19th and early-20th centuries, however, orientalist attitudes still exist in politics and in some public opinion. It is important to stay aware of these attitudes to prevent orientalism from influencing future legislation.

The fact that New Zealand and Australia enacted similar legislation, and used similar reasoning, shows the danger of looking to other jurisdictions for policy reasoning. Both countries have a history of settler-colonialism from the United Kingdom, historically had a formal legal system dominated by those of British descent, and use the common law system. In the modern context, New Zealand and Australia are often seen as "natural allies",[171] and the two countries enjoy the ability to move freely across the Tasman with minimal restrictions under the trans-Tasman travel arrangement.[172] The reasoning of the one can seem readily applicable for the other. This reliance could result in good lawmaking; conversely it could reduce the amount of critical analysis that is required for developing legislation.

Future lawmakers should bear in mind the advantages of engaging with academic research. If legislators can point to evidence that supports proposed immigration reforms, the risk of making amendments based on generalisations and orientalist thought is greatly reduced. It is also apparent that orientalism in the law now emerges in implicit rather than overt forms. Legislators should therefore consider not only the content, but the effect, of any reform.

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170 Antony Green "Historic vote with bitter seed of Coalition disaster; One Nation: What Lies Ahead" *Sydney Morning Herald* (Sydney, 15 June 1998); and "Winning Isn't Everything" *The Canberra Times* (Canberra, 17 October 1998).

171 Department of Foreign Affairs and Trade "New Zealand country brief" <https://www.dfat.gov.au>.

172 The trans-Tasman travel arrangement is an informal arrangement between Australia and New Zealand. See, for instance Andrew MC Smith "The fiscal impact of the trans-Tasman travel arrangement: have the costs become too high?" (2018) 33 ATF 249.

VII CONCLUSION

Orientalism has had a clear presence in the anti-Chinese immigration laws of both New Zealand and Australia; obvious in the historic legislation, but less so in modern immigration policy. The reasoning used to justify such anti-Chinese legislation, namely the desire for a "Britain of the South", racial superiority, poorer working conditions and the Chinese people as sojourners, show unmistakeable orientalism.

It is not possible to erase the discrimination that has been faced by Chinese people in New Zealand and Australia, but both countries can recognise those errors and bear them in mind in the way that immigration law develops in the future to avoid the re-emergence of orientalism.