MINISTRY OF JUSTICE
Tāhū o te Ture

Proposals against incitement of hatred and discrimination

Summary of submissions

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On 25 June 2021 Hon Kris Faafoi, then Minister of Justice, released a discussion document on *Proposals against incitement of hatred and discrimination* (the discussion document). The discussion document set out six proposals to strengthen and clarify the law against incitement of hatred and discrimination and invited the public to have their say. The six proposals are detailed in Appendix 1.

The proposals form part of a wider suite of policy reforms following the Royal Commission of Inquiry into the terrorist attack at Christchurch masjidain on 15 March 2019 (the Royal Commission).

Public consultation through the submissions process closed on 6 August 2021. It attracted 19,228 submissions. This summary presents the key themes identified in submissions.

The Ministry of Justice (the Ministry) wishes to record its appreciation of all the individuals and organisations that made submissions, which have informed, and benefitted, this work.

General themes

Significant opposing feedback was received in submissions, with more submitters opposing the proposals than supporting them. In particular, many voiced strong freedom of expression concerns.

There also appeared to be wide misunderstanding about both the current law and the proposals and what they are trying to achieve. This may in part be due to the technical nature of the proposals. Some submitters did not realise that we already have incitement laws and that the proposed amendments will not fundamentally change what is defined as inciting speech. The report presents statements from submitters on the current law which we have not corrected.

There was, however, broad support for the intention behind some or all the proposals from a range of organisations with expertise in human rights (subject to caveats or suggested changes), including the Human Rights Commission, the New Zealand Law Society (NZLS), Amnesty International Aotearoa New Zealand (AIANZ), the New Zealand Council for Civil Liberties, and from groups representing affected communities. For example, Rainbow, youth, and student organisations were predominantly in favour of the proposed changes. This mirrors feedback received in face to face engagements.

Amongst submitters who supported the proposals it was felt that there have been increasing levels of hatred expressed against specific groups and that there is little understanding, support or protection for people experiencing harmful speech.

Submitters considered the rationale for the proposals

Submitters commented on the impact of hate speech and its effect on reducing social cohesion within communities. Submitters also referred to the Christchurch terrorist attacks and Royal Commission of Inquiry. While some submitters saw the proposed changes as an appropriate response to the attacks, more submitters felt that the proposals were an unjustified 'knee-jerk reaction'.

Many submitters commented that incitement to hatred is adequately prevented by the existing legislation. It was felt that a focus on education and prevention of values and ideologies that lead to these extreme acts of hate would be more effective, rather than prosecuting hateful speech.

Submitters raised concerns about the implementation of the proposals

Most submitters discussed the impact the proposals would have on the freedom of expression. Submitters suggested that the proposals would prevent free speech, have a 'chilling effect' whereby people would feel unable to express themselves both publicly and privately, and corrode New Zealand's democracy.

Submitters also commented that the impact on the media industry and journalists was unclear. Submitters said that the proposals would not be able to be implemented effectively and would place additional burdens on the police and justice system.

Many submitters were concerned about the impact the proposed changes would have on religion, for instance, feeling that the proposals would limit their ability to express traditional teachings. In contrast, some submitters said the proposals would prevent them from criticising or discussing religion and religious ideologies.

In comparison, many submitters recognised that free speech was not an absolute right. Some submitters said that while democracies needed free speech to flourish, it was understood this should not come at the expense of other people's freedom to enjoy their lives peacefully.

Given the limitations that the incitement to hatred provisions would place on freedom of expression, a high threshold of liberty was favoured.

Risks and unintended consequences of the proposals were raised by submitters

Many submitters said that it was impossible to legislate against bad speech and ideas. The proposals would cause resentment to build in underground settings, potentially worsening the level of hate present.

Some submitters suggested that the punitive measures proposed needed to change to better mitigate the causes of hate crimes. Submitters said that traditional methods of reform, such as incarceration, will not stop hate speech. Instead, alternative methods should be used, such as rehabilitative programmes and counselling.

General improvements to the proposals were recommended

Submitters recommended that a multifaceted, system-wide approach should be taken to address institutionalised and intergenerational hatred and discrimination. This includes education initiatives and changes to workplace culture to improve cultural, gender, sexuality, and religious competency.

Submitters considered that legislation is not the only mechanism through which hate speech should be addressed and recommended non-traditional methods of reform should be employed to bring about substantial change.

Submitters also discussed the Ministry's consultation process

While some submitters appreciated the direct engagement with communities who experienced discrimination, the consultation timeframes were considered too short, and the discussion document was seen as complex.

The New Zealand Bar Association recommended that the Law Commission completes the necessary research and analysis of the proposed changes before any further policy work progresses. A few other submitters recommended the proposals go to a public referendum given their wide-ranging impacts.

Impact of the proposals on Māori and te Tiriti o Waitangi

Māori disproportionally experience hate speech; it is part of their daily lives and occurs in the wider context of intergenerational racism and bias.

Submitters had mixed opinions as to whether the proposals sufficiently uphold te Tiriti o Waitangi (te Tiriti). A few submitters said the proposals would not uphold Articles Two and Three of te Tiriti. There was concern that the proposed changes did not align with the spirit of kōrero, which allowed Māori to resolve disputes by talking through issues on marae or at hui.

Tangata whenua generally supported protections against inciting speech as well as a wide group coverage. However, concerns were raised that the provisions would not result in meaningful behaviour change nor would they reduce pervasive racism. Tangata whenua emphasised the need to adopt a te ao Māori approach in the reforms, working with tangata whenua.

A few other submitters stated that the proposals would create a divisive society or would negatively impact on Māori. Concerns were raised that the proposals could disproportionately affect Māori due to entrenched bias in the enforcement systems that means Māori feel unsupported and unable to access effective justice processes.

Submitters views on the individual proposals

Proposal One: Change the language in the incitement provision so that they protect more groups that are targeted by hateful speech

Some submitters thought that more groups should be added to the incitement provision, whereas others thought the current provisions provided adequate protections.

Submitters that supported Proposal One said that the existing legislation is insufficient and the proposed changes would provide better protection against hatred, and could lead to greater social cohesion. Some of these submitters suggested that not all groups within section 21 of the Human Rights Act 1993 should be included in the incitement provision. In particular, the inclusion of religion or political opinion was questioned as they were seen as synonymous with freedom of expression. It was recommended that there should be a high threshold for complaints.

Submitters that opposed Proposal One said that it would not offer any additional protections for minority groups and would privilege those groups who were explicitly named. It was suggested that no groups deserved more protections than others. Concerns were raised that the changes went beyond the Royal Commission's recommendations. Submitters questioned how opposing groups could speak openly about one another.

Proposal Two: Replace the existing criminal provision with a new criminal offence in the Crimes Act 1961 that is clearer and more effective

Some submitters thought the proposed provision would be clearer and easier to understand than the current provisions, whereas others thought the existing terminology was more appropriate and the proposed wording was too vague.

Submitters that supported Proposal Two said that it would replace complex terms in the criminal offence with simpler words, making it easier to understand what behaviours were illegal. There was considerable support for the inclusion of hatred and discrimination via electronic communications. It was recommended, however, that the inclusion of 'hatred' be considered carefully, as it is a subjective term that can have a personal meaning. It was also recommended that there be a high threshold for liability to ensure freedom of speech was not threatened.

Submitters who opposed Proposal Two said that the suggested terms 'hatred', 'maintains or normalises', 'insult' and 'offence' were too broad and vague to be in the criminal provision. These submitters said that section 131 of the Human Rights Act provides sufficient protections, and the criminal provision could place additional burden on the police and court system. It was suggested that the proposal could be abused by those in power to stifle free speech.

Proposal Three: Increase the punishment for the criminal offence to up to three years' imprisonment or a fine of up to $50,000 to better reflect its seriousness

Some submitters thought the proposed penalty reflected the seriousness of the offence, whereas others thought that it was unnecessary and disproportionately high.

Submitters that supported Proposal Three said that the existing penalties did not reflect the seriousness of inciting hatred and discrimination. The increase was considered commensurate to the nature of the offence and well-aligned to other criminal offences. However, the effectiveness of a fine was questioned, and it was suggested that restorative methods should be utilised.

Submitters that opposed Proposal Three said that the existing penalties were appropriate, whereas the proposed penalties were disproportionately high, particularly for a crime that was considered subjective. The increased penalties could disproportionately affect minority groups, would discourage open debate, and could lead to an abuse of power. It was also suggested that the increased penalties would place additional pressure on the justice system; less punitive approaches should be considered.

Proposal Four: Change the language of the civil incitement provision to better match the changes being made to the criminal provision

Submitters that supported Proposal Four said that the updated language would align with the criminal provision and make it clearer what kinds of behaviour are illegal. Submitters supported the inclusion of all types of communication in the civil provision. It was suggested that changes to the threshold for the civil provision should be lower than the threshold for the criminal offence, but high enough to ensure comments that are unpleasant or unwanted are not included. It was also suggested that the civil provision was ineffective for tangata whenua and other targeted groups and could negatively impact the Rainbow community.

Submitters that opposed Proposal Four said that there was no justification to amend section 61 of the Human Rights Act, and the proposed wording was unclear and lacked sufficient definitions. Submitters also said that while actions should be illegal, words and thoughts should not. Concerns were raised that words such as 'stir up', 'incite hatred', 'insult' and 'maintains or normalises hatred' were hard to define and interpret. It was suggested that Proposal Four would have a 'chilling effect' on society and would limit both conversations in private settings and the news media.

Proposal Five: Change the civil provision so that it makes 'incitement to discrimination' against the law

Submitters that supported Proposal Five said that it would strengthen the laws around incitement to hatred and provide vulnerable groups with greater legal protections, which could prevent future hatred, racism and violence. Submitters also said Proposal Five would ensure the provision was better aligned with other laws. It was recommended that 'incitement to discrimination' and any additional wording included in the provision were defined more clearly so people can understand what kinds of behaviours would be illegal. However, it was said that making 'incitement to discrimination' unlawful should be equally balanced with freedom of expression and religion.

Submitters that opposed Proposal Five did so because they considered the existing provision to be sufficient, and the suggested changes to go beyond international human rights obligations. Submitters

also said that 'incitement to discrimination' should not be illegal, and that the suggested proposal was too vague and ill-defined, which could lead to misuse. It was suggested that Proposal Five would not prevent hateful messages being shared and would privilege certain groups over others.

Proposal Six: Add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination

Submitters had differing opinions: some submitters thought the inclusion of trans, gender diverse, and intersex was important, whereas others thought that there was no justification for change as these groups are already protected under section 21 of the Human Rights Act.

Submitters that supported Proposal Six did so because they considered it was a natural extension of the existing provisions, and the proposed language was appropriate to include in section 21 of the Human Rights Act. The amendment would acknowledge that trans, gender diverse and intersex individuals require protection against hatred. It was suggested that the inclusion of takatāpui would uphold te Tiriti. Submitters suggested both broader and more specific terms; submitters also said that specifically naming current identities could be exclusionary and date quickly. Further consultation with the Rainbow community was suggested.

Submitters that opposed Proposal Six did so because they considered these identities were already covered by section 21 of the Human Rights Act, and explicitly naming them would privilege certain groups over others. It was suggested Proposal Six would create more segregation and division. Concerns were also raised about the proposed terminology because there was limited consensus around the meaning of the proposed terms and who they would apply to; it was suggested there would be a never-ending list of identities to add to section 21. Submitters also said that it may not be appropriate to include culturally specific definitions in the legislation and that sex and gender were not separate concepts.

Face to face engagement

To further broaden public feedback, the Ministry also engaged directly with a wide range of community groups by holding 30 meetings with 290 people across Auckland, Hamilton, Wellington, Christchurch and online. A separate report *Making Aotearoa Safer and more Inclusive: Summary of engagement* presents the findings of that engagement. It is available at: website link.

The Ministry also met with five legal academics who provided feedback, in particular on technical aspects of the law.

There was significant support in face to face engagement with affected communities

The feedback received in those face to face engagements provided valuable insights into the experiences of affected community groups and overall supported strengthening the existing laws, in particular extending the groups protected. It emphasised that hate speech has a significant negative effect on those whom it is about, including making them feel othered, unsafe and threatened. Many participants emphasised the symbolic importance of the proposals.

However, some concerns were raised about the proposals, including:

- their technical nature which meant they were not always well understood;
- concerns about restrictions on freedom of expression;
- concerns they may cause further division in society and not make a difference to feeling safe in Aotearoa; and
- questions about how they will work and be enforced.

Some legal expert submitters stressed that due to the implications for freedom of expression, very careful drafting would be required, including changes to the Royal Commission's wording.

Next steps

The Government considered it important to consult the public on measures to strengthen our laws that prohibit inciting hate speech. These submissions will help to inform decisions on whether and how to update our legislation.

The Minister of Justice will provide information on the Government's decisions about next steps when that information is available.

Background

Proposals to strengthen and clarify the law

The Human Rights Act prohibits speech that incites racial disharmony and prohibits discrimination against a person because of an aspect of their identity. Following a review by the Ministry and the recommendations of the Royal Commission, the Government proposed six changes to strengthen and clarify the law against incitement of hatred and discrimination:

1. Change the language of the incitement provisions in the Human Rights Act so that they protect more groups that are targeted by hateful speech.
2. Replace the existing criminal provision in the Human Rights Act with a new criminal offence in the Crimes Act 1961 that is clearer and more effective.
3. Increase the punishment for the criminal offence to better reflect its seriousness.
4. Change the language of the civil incitement provision to match the changes being made to the criminal provision.
5. Change the civil provision so that it makes 'incitement to discriminate' against the law.
6. Add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination.

The proposals targeted the types of communication that seek to spread and entrench feelings of intolerance, prejudice, and hatred against groups in our society.

The consultation formed part of a wider suite of policy reform following the Royal Commission. You can find more information about this and other work to respond to the recommendations here: https://dpmc.govt.nz/our-programmes/national-security/royal-commission-inquiry-terrorist-attack-christchurch-masjidain

Consultation process

On 25 June 2021 Hon Kris Faafoi, then Minister of Justice, released *Proposals against incitement of hatred and discrimination* (the discussion document) which set out the six proposals and invited all New Zealanders to make a submission.

Consultation with the general public on the discussion document proposals ran for six weeks from 25 June to 6 August 2021. Submissions were received online through Citizen Space, by email and by post. It attracted 19,228 submissions.

The Free Speech Union provided a pre-populated submission online. About 15,000 of the submissions received used this 'form'.

In addition to the public submissions process, to understand the protection affected community groups need, the Ministry, together with the Ministry of Social Development and the Department of Internal Affairs, used an external facilitator to engage directly with a wide range of community groups. Meetings were held in Auckland, Hamilton, Wellington, Christchurch and online, totalling 30 sessions

with 294 people. Participants represented Māori, Pacific, former refugees and migrants, disability, Rainbow and faith-based communities.

A separate report, *Making Aotearoa Safer and more Inclusive: Summary of engagement,* captures the feedback raised during the face to face engagements. It is available at: website link.

Engagement with Māori

The public consultation process provided an opportunity to engage with Māori on the proposals.

The Ministry extended an invitation to a number of individual iwi and other Māori groups to engage on the proposals.

This engagement has enabled the Ministry to better understand the harm that is caused to Māori through hate speech and discrimination, and the historical context of such behaviour.

A wide range of views were expressed by Māori and about te Tiriti during the public consultation process and those relating to the proposals are outlined in detail in the following chapters. Some of the submissions went beyond the scope of the proposals and they will inform and benefit future phases of work/related work programmes such as the national action plan against racism and a wider review of the Human Rights Act. For example, some participants suggested that a full review of the Human Rights Act was necessary to imbed a te Tiriti approach and protect tangata whenua as the indigenous people.

The Ministry understands the need for ongoing engagement with Māori, including to evaluate whether Māori rights and interests are adequately protected.

Process of submissions analysis

A total of 19,228 submissions were received during the consultation period, excluding duplicates. Table 1 provides a summary of each type of submission received.

Table 1: Summary of types of submissions received

Type of submission		Number
Citizen Space	Direct Citizen Space submissions	**2,533**
	Email and post submissions added to Citizen Space	**405**
Emails to the Ministry	Free Speech Union	**15,235**
	One-line email and post submissions (not added to Citizen Space)	**1,055**
	Total	**19,228**

The Ministry commissioned Allen and Clarke to analyse a total of 2,938 submissions (from 2,817 individuals and 121 organisations), which included all Citizen Space submissions (both direct and email and post submissions added) and the principal Free Speech Union submission. This ensured that all substantive submissions were analysed.

The Ministry counted all one-line emails (submissions that usually only include a short sentence affirming support or opposition to the proposals). The Ministry also counted all form submissions (a submission often written by an organisation but sent in by several members of the public) in its total submission count. Form submissions were coded once, so that any substantive comments included could be captured, and counted as one submission for the purpose of this report.

Some submissions responded directly to the questions raised in the discussion document – others chose to use their own format. All submissions from individuals and organisations (except for one-line submissions) were analysed using qualitative coding software. Information contained in the submissions was extracted and coded against a coding framework based on themes from each of the six proposals and the sub-questions. A team of analysts used coded data to provide a summary of the range and strength of views.

Recommended changes to the proposals as suggested by submitters

The report sets out recommended changes to the proposals that were proposed by submitters. Most of these were made as part of caveated support for the proposals. A table of the recommendations is set out at the end of each proposal and is also provided at page 64.

Generally, submitters that did not support a proposal did so outright, without suggesting changes to the proposal.

Profile of submissions

Of the 19,228 submissions, 2,817 submissions were from individuals or small groups of individuals and 121 were from organisations or groups.

Organisations

One hundred and twenty-one organisations and groups commented on the proposals. These groups are listed in **Error! Reference source not found.**.

Table 2: Types of organisations who provided submissions

Type of organisation	Number of submitters	Type of organisation	Number of submitters
Civil society and community groups	8	Professional organisations	5
Education organisations	5	Political organisations	4
Human rights organisations	13	Rainbow organisations	9
Central and local government organisations	6	Religious organisations	35
Ethnic and migrant organisations	8	Women's organisations	7
Internet, news and media outlets	7	Other organisations and groups	10
Māori organisations	4		

Quantification of submitters

The following classifications have been used throughout this report to quantify the number of submitters who commented on a given topic within the proposals. This quantification is based on the total number of submissions analysed by Allen and Clarke (2,938) as opposed to the entire number of submissions received by the Ministry.

Table 3: Quantification of submitters

Classification	Definition
Few	Fewer than 5% of submitters
Some	5 to 25% of submitters
Many	26 to 50% of submitters
Most	More than 50% of submitters
All	100% of submitters

Structure of this report

This report has been drafted and arranged thematically based on the format of the discussion document and its six proposals. This report summarises the responses made by submitters to the discussion document. The report utilises the terminology and language used by submitters in their feedback. For instance, the terms "freedom of speech" and "freedom of expression" are used interchangeably. Some submitters used the term "chilling effect" to refer to the idea that the proposals would inhibit or discourage the legitimate exercise of protected rights including freedom of expression. The first page of each section provides a summary of the key themes from submissions for each proposal.

Proposal One: Change the language in the incitement provision so that they protect more groups that are targeted by hateful speech

Submitter Data

- 480 submitters supported Proposal One.
- 2,230 submitters opposed Proposal One.
- 150 submitters were unsure about Proposal One.

Current limitations on 'colour, race or ethnic or national origins" are outdated

- The current provisions require broad and creative interpretation to protect vulnerable communities.
- The domestic and international law that applies in New Zealand has evolved considerably since the 1970s.
- Broadening the provisions would be consistent with the increased diversity in New Zealand and recognise the dignity of multicultural communities.

Political opinion should not be included

- Only immutable characteristics should be protected.
- Political opinion is synonymous with freedom of expression and including it would unduly limit free speech.
- Including political opinion would have a chilling effect on political debate, activism and public discourse.
- There is no evidence of actual harm being perpetuated against this group to justify its inclusion.

Religious belief could be included

- Mediation provisions in the Human Rights Act 1993 are the most appropriate means of addressing complaints relating to religious belief.
- Religious groups are subject to discrimination and adverse actions on the basis of their beliefs.
- Religious expression and speech would need to have additional specific protections if it were to be included.

More groups should be protected

- All individuals should be protected against discrimination.
- There are other groups not currently included in section 21 that should be included. Suggestions included gender (including gender diversity or gender orientation), sex characteristics/sexual orientation, romantic orientation, intersex status, refugees, people with obesity, cannabis users, sex workers, cyclists, white heterosexual people, and unborn children.
- The law should be flexible to enable it to adapt to developing social norms and practices. It is important not to preclude any future identity terminology from the provisions.

Current provisions are adequate

- The current provisions are broad enough to cover most groups and do not unduly restrict freedom of expression.
- Broadening the provisions would not offer additional protections to minority groups.
- There is the potential for increased targeting of some groups.
- Certain groups would be privileged and there would be less protection for those not explicitly referred to in the legislation.

Description of Proposal One

Currently, a group of people is protected under section 61 of the Human Rights Act if hatred is incited in a specific way against them because of their colour, race, or ethnic or national origins. Under this proposal, more groups would be protected if hatred was incited against them due to a characteristic that they have, which could include some or all of the grounds listed in section 21 of the Human Rights Act (prohibited grounds of discrimination). The Government has suggested sex, gender, disability, sexual orientation and religion, but are interested to know what New Zealanders think.

The Human Rights Commission said that the current incitement provisions have been in place in one form or another for nearly 50 years. They were included in the Race Relations Act 1971 to implement the Government's obligations under Article 20 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD). The groups protected in the Race Relations Act were translated to the Human Rights Act resulting in many vulnerable groups that experience hatred and discrimination not being covered by the incitement provisions. The Commission said that the current limitations on 'colour, race or ethnic or national origins' were not appropriate to protect vulnerable communities, such as religious and ethical beliefs, gender and sex, disability, age and sexual orientation. The Human Rights Commission said:

"The framework of domestic and international human rights law that applies in New Zealand has evolved considerably since the early 1970s.

Internationally, the three protected characteristics under article 20(2) of CERD – nationality, race, and religion – have come to be interpreted and understood as supporting the principle of equality on a larger scale. Article 2 of the International Covenant on Civil and Political Rights (ICCPR) guarantees rights "without distinction of any kind" and article 26 expressly provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground."

Furthermore, in 2019 the UN Special Rapporteur on freedom of expression noted that international standards ensure protections against adverse actions on grounds such as sex, language, religion, political opinion, sexual orientation, gender identity or intersex status, migrant or refugee status, and disability. He has further stated that:

"[g]iven the expansion of protection worldwide, the prohibition on incitement should be understood to apply to the broader categories now covered in international human rights law."

The Human Rights Commission said that New Zealand had fallen behind other countries, whose hate speech laws covered a much wider range of protected characteristics.

Support for Proposal One

480 submitters (424 individuals and 56 organisations) supported Proposal One.

Some submitters said the existing provisions were insufficient to protect minority groups that were the target of hatred and discrimination. It was thought that freedom of expression is often used as an excuse to discriminate against or speak in a hateful way without fear of consequences, which infringes on the victims' rights. In their view, these groups did not deserve to be attacked based on who they

are or what they believed in. They needed to be protected from unfounded, irrational, and public expressions of hate that were harmful and akin to bullying.

Some submitters said that the groups protected by this provision should be all of those listed under section 21 of the Human Rights Act. The consistency between sections 21 and 61 was seen as a positive, common-sense amendment by these submitters. The Otago University Students Association (OUSA) said there was no reason to differentiate which groups were already prohibited grounds for discrimination versus those which are protected from incitement of hatred. The proposed changes would provide a much-needed update and improvement of an ageing piece of legislation. A few submitters were particularly supportive of the provision including sexual orientation, gender identity, employment status, age, and Māori. Some submitters asked why the section 21 groups were not already included within section 61.

A few submitters said broadening the incitement provisions provides better protections and acknowledges and represents the increased diversity in New Zealand. Submitters, including Rainbow organisations such as InsideOUT, said that extending the incitement provisions to be more inclusive would better protect vulnerable groups from abuse and hateful speech that caused significant harm to their members. The National Council of Women of New Zealand (NCWNZ) said, in addition to providing better protection for groups that are the targets of hatred and discrimination, this measure would send a signal to current and future generations that abuse, violent threats, and demeaning statements are not acceptable in New Zealand, are grounds for complaint, and in their most serious forms would be the basis for criminal prosecution. Other submitters said broadening the incitement provisions would make society a better place and protect the dignity of multicultural communities that have made New Zealand their home. The Working Together Group felt this measure would "restore their self-esteem with good standing and be openly welcomed as members of a society they reside in."

Some submitters thought extending the incitement provisions may also lead to greater social cohesion. Proposal One was supported because it would encourage those who may feel marginalised or unsupported to participate more openly in society. Improving social cohesion would create a more inclusive, diverse, and tolerant society. In addition, Proposal One was identified as an opportunity to encourage positive change for those who have previously held discriminatory views.

Caveated support for Proposal One

Some submitters felt that not all the groups covered by the prohibited grounds of discrimination in section 21 should be included in section 61. NZLS raised concerns with broadening the protections to cover some of the prohibited grounds of discrimination, such as political opinion and marital status, and said that the inclusion of any group must be based on evidence of actual harm being perpetrated through expression that targets each defined group. The Human Rights Commission agreed that political opinion should not be included within the groups covered by the new incitement provisions due to the "nebulous nature of its legal definition in New Zealand, as well as its strong correlation with the right to freedom of expression." NZME shared this view and another submitter commented that this ground was not an immutable characteristic. Other submitters, such as Twitter, were concerned that the inclusion of political opinion may have a chilling effect on political debate, activism and public discourse and could result in the law being used as a weapon against political opponents. For instance, Nelson Pride said it would be paradoxical if "reforms prompted by a far-right terrorist attack ended up enabling the far-right to harass its opponents." While AIANZ supported the inclusion of political opinion, they said the proposed changes should not inhibit political discussion, criticism, and critique.

Some submitters suggested that while there was a need for the proposed changes, there should be a high threshold for complaints. Many submitters said that a high threshold would uphold the right to freedom of expression.

One submitter considered that the discussion paper had not satisfactorily explained why the provision should be extended to all the prohibited grounds of discrimination in section 21. In their view, the provision should only be extended to religious groups.

Submitters had opposing opinions about the inclusion of religion in section 61. Some submitters mentioned the need for religious groups to be protected. In comparison, a few submitters only supported the inclusion of religion if there was a qualifying statement that would protect their freedom of expression. If this was not included, it was felt there was the potential for religious views that could be considered discriminatory to be classified as inciting hatred. A few submitters also suggested 'ethical belief' be added so that non-religious individuals or former members of religious communities are also afforded the same level of protection.

Some submitters questioned whether the incitement provision should only be widened to include groups that are not a matter of choice (such as race, ethnicity, disability and sexual identity) and exclude groups that members do choose to be part of (such as those based on religion or political opinion).

Some submitters thought there were other groups not listed in section 21 that should be included in the incitement provisions. Suggestions included gender (including gender diversity or gender orientation), sex characteristics, sexual orientation, romantic orientation, intersex status, refugees, people with obesity, cannabis users, vegetarians/vegans, sex workers, cyclists, white heterosexual people, and unborn children. One submitter said gender minorities, trans and gender-fluid groups receive disproportionate discrimination due their current vulnerability under existing legislation, which is why they deserve greater protections. Some submitters thought the current legislation does not appropriately address the vulnerability of those living with disabilities and called for any new legislation to have a specific and explicit focus on this group. Those with intellectual disabilities were specifically highlighted by some submitters.

Some submitters said all individuals should be protected against discrimination so there should not be any groups explicitly named in section 61. One submitter said that specifically naming groups may prevent those who are not explicitly named from being protected. While some submitters acknowledged that protection was needed for minority groups specifically, it was suggested that the amendments should be written to cover and protect all individuals. Some other submitters said legislation that only specifically protected some people would create greater division and inequality. The Auckland Rainbow Community Church said:

> **"We support the inclusion of a wider range of groups to be protected and a fuller range of forms of incitement is recognised. We note that the aim is not to capture all offensive statements but only those that stir up hatred and violence, and we are most concerned that this is not loosely drafted."**

Submitters said it was important to incorporate all variations of protected groups within any new legislation to ensure fairness and equality and uphold human rights; one submitter said, "All people are equal, that is the only narrative needed in democratic society." Some submitters also raised concerns that the amendments to section 21 would immediately exclude future identity terminology, which would prevent the clause from being future-proofed.

A few submitters were uncertain how this proposal would impact on intersectionality of identity groups. While these submitters supported Proposal One, they were unclear whether the provision would treat people equally and ensure that no groups are given higher protections than others.

Recommended changes to Proposal One

Recommended amendments to Proposal One, as suggested by the submitters, are listed in the table below.

Table 4: Submitters' recommended changes to Proposal One

Theme	Submitters' recommended changes
Inclusions in section 21	• Consider further which groups should and should not be included in the broadened provision: – include 'gender orientation' and 'disability' but exclude 'political opinion' and 'marital status' – only include group characteristics that are not a matter of choice ('race', 'ethnicity', 'disability' and 'sexuality').
Future proofing the legislation	• Instead of naming specific groups, the provision should include protected groups that are broadly framed and a 'catch-all' category so that all personal characteristics are protected and the legislation is flexible. • Amend section 61 with broad language so "any new grounds can be automatically covered by incitement and discrimination" without future amendments to the Human Rights Act.
Freedom of expression and religion	• Only include 'religious belief' if it protects the freedom of religious expression and the provision maintains a sufficiently high threshold for prosecution.
Group coverage	• Ensure 'evidence of harm' towards the particular group is considered.

Opposition to Proposal One

2,230 submitters (2,193 individuals and 37 organisations) opposed Proposal One.

Some submitters said this proposal would not offer any additional protections for minority groups. Reasons for this view were mixed: some submitters believed that the current legislation provided enough protection for vulnerable groups as it stands, whereas others simply said that this legislation does not appear to represent any real extension of current laws.

A few submitters said the existing provisions were wide enough to cover most groups who need protection. One submitter felt that the current law was appropriate as the groups identified were afforded protection as "these characteristics can be protected without undue restrictions on freedom of expression because these characteristics do not in themselves connote any moral value, or political or ideological position."

Some submitters thought raising attention and focus on minority groups may lead to a larger target being put on these groups. A few of these submitters were also concerned that the proposal would

not result in greater levels of protection for these groups, rather it has the potential to increase the level of targeting that these groups are subject to. One submitter said the proposal would divide groups by alienating those seeking ways to communicate about difficult topics.

Many submitters said broadening the incitement provisions would privilege or discriminate against certain groups. Some of these submitters raised concerns that the process for determining who had protection was arbitrary and lacked any principled basis for inclusion. It was thought that section 61 should cover all individuals because no groups are more deserving of protection than others. Some other submitters raised concerns that those who are not named would have no protections under the Human Rights Act. As a result, the broadened incitement provision would create a "two-tier society" of differing levels of protection, which was a form of favouritism and discrimination. It was suggested that majority groups would be left unprotected. A few submitters questioned how the incitement provision would work when two protected individuals or groups spread discrimination or hatred against one another. For instance, one submitter said:

> **"By way of example, we would not have predicted that feminists would turn out to be so anti trans gender. What will you do in that case? Which group will you protect? Whose rights prevail when they cannot merge?"**

Some submitters were concerned that the extended provision may result in reduced levels of protection for those not explicitly referenced as vulnerable groups in the legislation. These submitters included several religious groups and organisations, including New Life Churches, Reformed Churches of New Zealand, Seventh-Day Adventist Church, and the Salvation Army, who were concerned that groups who may oppose religious practices will receive protection and potentially "special treatment" in a way that threatens religious freedom. In addition, a few submitters said some groups with harmful or dangerous beliefs and values could claim the need for protection as they are a legitimate minority.

Most submitters thought this proposal may create different levels of freedom of expression, **particularly for those belonging to a minority group having a 'shared characteristic' compared to those who do not.** It was thought that limitations on freedom of expression because of this change may not necessarily affect all people the same way, and some submitters were concerned this would create a hierarchy of rights or 'protected classes' that were not conducive to a modern democracy**.** They were concerned that these 'privileged' groups would have an opportunity to penalise speech directed towards them on the basis that it was harmful to that group. This would prevent groups openly opposing one another, something that one submitter said may serve to polarise our society and create tensions. Voices for Freedom also said:

> **"[b]elonging to a certain group should not remove the rights of others to hold opinions. We must defend equality and not allow some groups to be more equal than others. We should all be treated the same regardless of our different identities and characteristics."**

Some submitters were concerned that this proposal could be used to suppress political and religious opinion. The proposed inclusion of political belief in the list of protected groups was understood by some to mean that the Government (current or future) would have the ability to claim that any views contrary to their own were a form of hatred or discrimination. There was thought to be a risk that this could set a dangerous precedent for future governments. In addition, a few submitters said this proposal would silence political opinion or legitimate political discussion and discourse. One submitter said, "good citizens who hold unpopular, perhaps fringe views, will be bullied into silence for fear of arbitrary prosecution." It was also thought that religious expression could be limited because people and organisations would be unable to make religious statements that may be contradictory to the

values of some minority groups. If this speech is limited or potentially criminalised, these submitters claimed that it would significantly and unduly impinge on freedom of expression.

A few submitters opposed this proposal because in their view it was inflexible. Submitters were concerned that the legislation could not be easily updated to protect future identity groups. In addition, it was thought that naming specific groups would act as a de facto definitive list thereby excluding smaller groups that subsequently emerge or grow. This could create disparity as to who the provision does and does not include. One submitter did not support Proposal One because "specifically naming groups may date quickly. For example, many of today's terms such as intersex, pansexual, gender neutral etc. were practically unheard of just a few years ago."

A few submitters thought the proposal was more wide-reaching and went beyond the Royal Commission's recommendations. These submitters included the New Zealand Catholic Bishops' Committee for Interfaith Relations and the Salvation Army, although the latter did not provide a specific reason to support or oppose the proposal.

Some submitters were concerned that extending the incitement provision to protect more groups listed in section 21 could have unintended consequences. They said it would increase tensions and contempt towards a larger number of people, rather than offering protection. Some submitters were concerned the proposal did not accurately address the issue and cited studies that show "suppression of hatred and extreme views can lead to a more violent society." It was also suggested that if negative or harmful views cannot be discussed in public, they would be driven underground where they can become more radicalised. There was a consensus that until these consequences can be explicitly addressed, the proposal should not be enacted.

A few submitters who opposed this proposal suggested section 61 should be removed completely. The submitters said Proposal One would create further distinction and separation, and given this, there should be less provisions rather than more.

Other reasons submitters gave for opposing Proposal One are listed below.

- It may prevent the defence of truth and there would be no clear way to disagree with groups who are listed in the incitement to discrimination provision.
- Regardless of how well written or widely encompassing the legislation was, there could be the potential for minority groups to experience a form of discrimination or hatred that was not captured in the broadened provision and 'slip through the cracks'.
- It would be hard to enforce.
- A few submitters were uncertain if Proposal One would prevent discrimination because there is a lack of knowledge of all the groups that are subject to hatred.
- One submitter commented that section 61 was sufficient but was implemented and enforced inadequately; better application of the existing provision would provide the necessary protections for the minority groups who experience discrimination.
- Education would be a better method to reduce discrimination for groups who need protection as opposed to broadening the incitement provisions.

Other comments for Proposal One

150 submitters were unsure about Proposal One.

Some submitters were unsure if they supported or opposed Proposal One. Some submitters were unclear if Proposal One would prevent groups speaking openly about other groups. These submitters included multiple religious groups who gave examples of conservative groups speaking about sexual orientation or gender identity. The lack of clarity in current legislation was raised by these submitters as a concern about how members of these groups could continue to operate without breaching this legislation.

A few submitters were unsure if the proposal would allow individuals who feel insulted to 'play the victim' to silence criticism and discussion. Misunderstanding the type of speech that this proposal was attempting to address was consistent across these submissions; submitters thought that any individual would be able to prosecute someone who insulted them, regardless of the type or context of the insult. Questions were also raised about how the amended provision would be implemented in practice.

Proposal Two: Replace the existing criminal provision with a new criminal offence in the Crimes Act 1961 that is clearer and more effective

Submitter Data

- 381 submitters supported Proposal Two.
- 2,279 submitters opposed Proposal Two.
- 184 submitters were unsure about Proposal Two.

The proposed provision would be clearer and easier to understand

- The current wording in the Human Rights Act 1993 is too complicated and outdated.
- The proposal would be far easier to apply and is consistent with the recommendations from the Royal Commission.
- The types of behaviour that are considered criminal would be better understood by the public.
- Moving the provision to the Crimes Act 1961 would enhance the ability to take prosecutions.

'Incite' is more appropriate than 'stir up'

- 'Incite' links to international human rights law and jurisprudence.
- 'Incite' allows discretion to limit complaints to those which would have a negative effect on the targeted group.

A high threshold must be maintained

- To establish a crime of incitement to hatred, expressions must affect public order, and threaten specific rights.
- A high threshold would ensure any limitations are proportionate and reasonable.
- It must be clear that it is not the ideas but the mode of expression that are targeted by the provision.

Existing terminology is preferred

- 'Hatred' is inappropriate and could result in less threatening or damaging incidences being captured.
- 'Maintains or normalises hatred' is too broad; their meanings have particular implications and could widen the range of behaviours beyond what is intended.
- 'Insult' and 'offend' are too subjective.
- Overall the provision is too vague.

Consent of the Attorney-General is not necessary

- Requiring consent of the Attorney-General has been problematic in giving effect to section 131 of the Human Rights Act 1993.
- Sufficient protections should be contained in the offence itself to prevent unwarranted interference with freedom of speech.
- The United Nations Committee on the Elimination of All Forms of Racial Discrimination has consistently criticised the requirement for the Attorney-General to consent to prosecution.

Description of Proposal Two

Section 131 of the Human Rights Act contains the offence of intentionally 'inciting racial disharmony'. This proposal would move the criminal offence to the Crimes Act. The provision would also be extended to include a person who intentionally incites, stirs up, maintains, or normalises hatred against any specific group of people based on a characteristic listed in Proposal One, if they did so by being threatening, abusive or insulting, including by inciting violence. The person would break the law no matter how they made the threat, abuse, or insult – including if it was made verbally, in writing or online.

The requirement to obtain the Attorney General's approval before a prosecution can proceed would be retained (section 132 of the Human Rights Act).

Support for Proposal Two

381 submitters (327 individuals and 54 organisations) supported Proposal Two.

A few submitters considered that moving the criminal offence to the Crimes Act would enhance the ability to take prosecutions. Some of these submitters considered that it was unduly cumbersome to take complaints currently, given the need to establish the necessary *mens rea* and the fact that the actual prosecution must be carried out by the Police.

Some submitters said the terminology in the provision would be easier to understand. These submitters, including the Christchurch City Council, AIANZ and Disabled Persons Assembly New Zealand, felt that the current wording in the Human Rights Act is too complicated, jargony, and outdated. As a result, it is hard for groups who may experience discrimination to understand their protections under the Human Rights Act. It was felt that the current clause is ineffective, which is why it has only resulted in only one successful prosecution. The proposed wording, such as 'hatred', 'incite' or 'stir up' were simpler, would provide more clarity and as a result, would be more effective at preventing incitement to hatred. It may also be easier for individuals who do not speak English as a first language to understand.

The Human Rights Commission said that these changes were proposed by the Royal Commission who considered that the language of this provision "would be improved if the word 'excite' was removed and replaced with a term like 'stir up', which is used in the equivalent UK legislation." The Human Rights Commission also said that the provision would be "far more straight-forward to apply" if the terms 'hostility', 'ill-will', 'contempt' and 'ridicule' were replaced by 'hatred.' The Human Rights Commission agreed with the Royal Commission's observations.

Some submitters said the proposal would ensure individuals understand what behaviour would or would not constitute hatred or discrimination, and therefore be illegal. They said it would deter misinformation that leads to discrimination. The Working Together Group said Proposal Two may also prevent targeted violence towards certain groups. A few submitters also thought the proposed wording in the criminal offence would capture behaviour that could incite extreme views of hate. For instance, one submitter said:

"We should regulate the type of speech that precedes a Kristallnacht, or which indirectly encourages attacks on gravestones in the section of a cemetery reserved for members of a minority religion. That type of speech is covered by the concept of stirring up hatred."

Some submitters considered that 'hatred' was a more straightforward and narrow term, which would achieve the right balance with freedom of expression. It was also thought to be easier for lawyers and the judiciary to interpret and enforce. One submitter said:

> **"The current section 131 criminal offence can be committed in multiple ways, including by inciting ridicule, ill-will or contempt. This sets the bar far too low. Contempt, for example, is sometimes justified, and even where it is not, it should not be for the criminal law to punish the inciting of it. Hatred is a much more restrictive description, and better reflects the type of speech we would want an incitement provision to cover."**

The Human Rights Commission and the Maxim Institute both supported the use of 'hatred' instead of 'hostility', 'ill-will', 'contempt' and 'ridicule' and said these changes would better protect freedom of expression under the New Zealand Bill of Rights Act 1990, as they would most likely apply to extreme views only. This was felt to be important as the criminal law should only be deployed when the evidence of harm is of a sufficient magnitude. The Classifications Office supported the inclusion of 'maintains or normalises hatred' as recommended by the Royal Commission.

Some submitters supported the inclusion of hate via electronic communications in the criminal provision. These submitters, including AIANZ, NZME, Te Rūnanga o Ngāti Whātua, Christchurch City Council, the Classifications Office, Disabled Persons Assembly New Zealand, and Hohou Te Rongo Kahukura – Outing Violence, supported the addition of the wording "made by any means." They said that the existing provision was limited as to how hatred could be conveyed and considered that the amendment would capture electronic communications. Christchurch City Council said that 'intentionally inciting or stirring-up hatred' against protected groups should be an offence, regardless of how it is communicated. The proposed change would fill a gap in the legislation and bring it up to speed with modern forms of communication. It would also future proof the legislation for new developments in communication methods.

Some submitters also said it was timely to clarify that the provision would apply to all methods of communication given the increasing popularity of different forms of social media.

NZLS agreed that the criminal provision should include a broad range of communication methods, as the current legislation is limited as to how hate speech can be conveyed. A few submitters suggested that more attention should be paid to hatred that occurs on social media platforms. People First New Zealand said threats should be included under the scope of the offence, regardless of whether they were made to someone verbally, in writing, drawing or online.

A few submitters commented on the need to retain the requirement for the Attorney-General's consent before a prosecution could be instituted. NZLS said this requirement was important given that increasing the penalty to three years imprisonment meant any prosecution would qualify for a jury trial. If this requirement was relaxed, NZLS recommended that some other method of controlling what behaviour amounted to inciting hatred needed to be considered. They referred to defamation law, which requires the judge to decide whether the words or conduct complained of can amount to inciting hatred.

The impact of te Tiriti on Proposal Two was discussed by very few submitters. One submitter said that replacing the existing provision in the Crimes Act with a new criminal offence would more effectively protect tangata whenua and other marginalised groups but did not explain why.

Caveated support for Proposal Two

While they supported the need for the proposed change, some submitters considered that the term 'hatred' is subjective, vague, and may be interpreted differently by different people. Two submitters said this term did not appear in any criminal offences unlike the words 'hostility', 'ill-will', 'ridicule' and

'contempt' which were familiar to those working in the criminal justice system. Another submitter agreed with this comment, stating that 'hate' was an emotional term, not a legal term, unless carefully qualified. Hohou Te Rongo Kahukura – Outing Violence said that the definition of 'hatred' was said to be contextual to population groups and current social and cultural contexts, so should be defined in a neutral way. While NZLS supported simplifying the criminal clause by using the word 'hatred', it said that the definitions of 'hatred' and 'discrimination' must be clear. They referred to case law for guidance (for example, *Wall v Fairfax New Zealand Limited*). Christchurch City Council questioned whether the term 'hatred' was too narrow compared to the existing term, because it could create opportunities for less emotive, but still highly damaging messages of incitement, to be considered legal under this proposal.

OUSA and Twitter agreed that the proposed amendments would benefit from clarity on what types of speech would constitute 'extreme hate' to avoid confusion or uncertainty about what would constitute an offence and avoid any misinterpretation, and therefore potential overreach or censorship of critical conversations around key public interest issues.

To determine whether a particular statement reaches the level of incitement to hatred or discrimination, AIANZ recommended that the proposal incorporates the Rabat Plan of Action six-part threshold test.[1] The elements of this test include: context; speaker; intent; consent and form; extent of the speech act; and likelihood, including imminence.

The Classifications Office suggested that the proposed criminal offence could be narrowed to the incitement of "violence". This would align the statutory wording with the formulation used in Article 20 of the ICCPR, which refers to "incitement to discrimination, hostility or violence".

Some submitters said that the terminology used in the proposal should be reconsidered to ensure it encompasses particularly hateful behaviours. InsideOUT thought 'hatred' may not "capture types of behaviour that should be unlawful and cause harm to groups and communities like rainbow communities." Gender Minorities Aotearoa said:

> **"Many people who incite hatred do so behind a mask of respectability. We are concerned that the wording in proposal two, which replace the current standard in the existing sections on racial disharmony, incitement, and racial harassment, of 'hostility', 'ill-will', 'contempt', and 'ridicule', may significantly weaken the bill. We are worried that the replacement of these specific terms with a general standard of 'hatred' will place more burden of proof on the victims of incitement, hatred and harassment. We recommend maintaining prohibitions against inciting hostility, ill-will, contempt and ridicule, to ensure that groups who intend to incite these against protected groups would be accountable under this change."**

The Wellington Interfaith Council said that 'hostility', 'ill-will', 'contempt', and 'ridicule' are all elements of 'hatred', so the proposed distinction between the wording is artificial and unhelpful. The Wellington Interfaith Council also suggested that narrowing the criminal offence to 'hatred' may mean continued "micro-aggressions" towards particular groups are overlooked or undetected. As a result, the targeted groups are unlikely to feel assured that that they are protected.

Submitters had mixed opinions about the terms 'incite' and 'stir up'. A few submitters, including NZLS and a joint submission from the New Zealand Union of Students' Associations, Te Mana Ākonga, Tauira Pasifika and the National Disability Students' Association, preferred the inclusion of 'incite' over 'stir up', as this term was found throughout the criminal law. The Human Rights Commission said that 'incite' links to international human rights law and jurisprudence. One submitter stated that the

[1] https://www.ohchr.org/en/issues/freedomopinion/articles19-20/pages/index.aspx

wording of the existing provision "allowed the Commission to decline complaints which, while unpleasant, nevertheless were unlikely to have a negative effect on the targeted group. To establish the crime of incitement to hatred, expressions must affect the public order, and threaten specific rights. To remove the reference to incitement could lead to a lower threshold."

Some submitters, including Christchurch City Council and Transparency International New Zealand, supported that 'intent to incite hatred' be included in the criminal offence. However, Restorative Practices Aotearoa raised concerns that 'intent to incite hatred' could affect the ability to prosecute discrimination, as certain actions could be justified inappropriately.

Some submitters considered that the inclusion of 'maintains or normalises hatred' could unintentionally encompass some behaviours. These submitters, including NZLS, had concerns about adding these terms, which they said would lower the threshold for successful prosecution. They would also widen the range of behaviours that could be caught by the provision. NZLS said:

> **"It is difficult to see why the term 'incitement' could not itself do the work of 'maintain' or 'normalise'. If the concern is that incitement would not be covered when aimed at persons already holding extreme views, then that concern appears to be met in any event by the requirement of an objective test involving a hypothetical reasonable person (albeit with the characteristics of being susceptible and persuadable as discussed in *Wall v Fairfax*).**
>
> **Maintaining and normalising may also widen the range of behaviours which can be caught by the provision. For example, would failing to condemn expressions inciting hatred of a certain group amount to 'maintaining' or 'normalising,' and therefore require prosecution?"**

These submitters recommended deleting these words and using language as close as possible to that used in international law to assist with clarity.

A few submitters said that there needed to be a high threshold for liability for the criminal offence to ensure freedom of expression is not threatened. For instance, one submitter said that the existing wording was inserted to provide greater protection to freedom of expression, in particular by requiring intent to be proved. They said that it was important that a high threshold for liability was maintained. This view was supported by the Human Rights Commission who felt that a high threshold would ensure "any limitations are proportionate, reasonable and can be demonstrably justified in a free and democratic society." NZLS stated "it must be clear that it is not the ideas that are targeted by the legislation but the mode of their expression in public and the effect that may have on others."

A few other submitters also said that because of the protections that are in place in terms of the offence, the requirement to seek the consent of the Attorney General before a prosecution can proceed was not necessary. One submitter commented that the CERD Committee had consistently criticised this aspect of the existing legislation. However, NZLS said section 132 needed to be retained to ensure that only behaviour within the definitions provided by the legislation would be brought before the Court.

Recommended changes to Proposal Two

Recommended amendments to Proposal Two, as suggested by the submitters, are listed in Table 5 below.

Table 5: Submitters' recommended changes to Proposal Two

Theme	Submitters' recommended changes
Content of provision	• Include 'deliberate or ongoing acts of exclusion and erasure.' • Consider only criminalising 'incitement to violence' and 'intent to strengthen hatred.' • Include 'conduct that maintains or normalises violence'. • Include 'conduct likely to lead to marginalisation and discrimination against groups and the end product, hatred.'
Structure of provision	• Provide clear, objective definitions for all words included in the provision. • Incorporate the Rabat Plan of Action six-part threshold test, which will enable enforcement agencies to determine whether a particular statement reaches the level of incitement to hatred or discrimination. • Ensure that examples of hate speech and hatred that are prosecuted under the proposed legislation are provided to the public, particularly for neurodiverse individuals or those within the learning disability community. • Include different levels of criminality to prevent speech that is offensive but does not incite hatred or discrimination.
Implementation of Proposal Two	• Provide additional safeguards to ensure that only 'extreme hate speech' is a criminal offence and ensure a high threshold for liability is included so that freedom of expression is protected. • Ensure that the media are exempt from the criminal offence if they report events that may include discrimination or hatred.
Leave provision in Human Rights Act	• Keep the criminal provision in the Human Rights Act because of the careful and deliberate balance of human rights and responsibilities that is required. Moving the provision to the Crimes Act would take the provision out of context.
Wider support for Proposal Two	• Include restorative justice in the legislation and supplement penalties with education, training and a broader social cohesion programme.

Opposition to Proposal Two

2,279 submitters (2,245 individuals and 34 organisations) opposed Proposal Two.

Several submitters considered that section 131 of the Human Rights Act provides sufficient protections against hatred. They said the existing provision prevents incitement of physical harm,

violence and murder but do not include hurt feelings or contradictory opinions. The language in section 131 was considered fit for purpose, particularly as there have been many years of case law to highlight what is and is not included within the limits of the terms 'hostility', 'ill-will', 'contempt' and ridicule'. Some submitters thought the offence offers uneven protections across society, and concerns were raised that the Muslim community in particular may be blamed for these changes.

Many submitters opposed the inclusion of the term 'hatred' in the criminal offence. These submitters thought the existing terminology in section 131 of the Human Rights Act was preferable, as it was familiar in both common and statutory law. In comparison, they said that 'hatred' is not used currently in any criminal offences. They said 'hatred' was inappropriate because the term was too subjective and open to interpretation and misunderstanding. This would result in less threatening or damaging incidences to be covered under the provision, unlike 'contempt' or 'ridicule'. Other submitters opposed the inclusion of 'hatred' because they thought it too ambiguous and subjective, which would lower the threshold for prosecution. For instance, the Free Speech Union said:

"[I]n truth even an accused speaker may not be aware of what they have said which has crossed the threshold into 'hate'."

'Hate' was described as an elastic feeling, whereas 'hostility, 'ill-will', 'contempt' and 'ridicule' are all behavioural. Some submitters were concerned that simple one-off remarks, kiwi humour, indirect allusions, coded denigration, or apparently casual remarks would all be considered unlawful. Some submitters said the broad terminology would also be hard for the Police and Courts to interpret and enforce.

A few submitters said that the term 'insulting' was too broad and all-encompassing to be included in the provision.[2] They commented that 'insulting' someone was a lesser degree of discriminatory behaviour and should not constitute hatred. It was felt there was a risk that if 'insult' is included in the provision, individuals would be unable to express disagreement for fear of insulting someone and being prosecuted. Some submitters, such as the Salvation Army, were concerned including 'insult' would suppress open debate. Similarly, a few submitters said 'offence' or being offended is subjective. One submitter said that Proposal Two did not require actual harm to be proven and that individuals can be threatened or insulted without being harmed.

Submitters held conflicting views on the inclusion of 'incite' and 'stir up'. It was thought that both words were not easily interpreted and could unintentionally capture benign comments. A few submitters commented that 'stir up' was too subjective.

Some submitters felt that the phrase 'maintains or normalises' hatred was too subjective and too far-reaching. These submitters said that these terms would be impossible to define, and that the line between what was acceptable versus what constituted maintaining or normalising hatred was ambiguous and was open to interpretation. For example, one submitter said:

"I think the word "maintains" in the new wording is problematic. It's one thing to incite hatred or (even worse) to stir up violence, but it's another thing entirely for someone to simply "maintain hatred" themselves. It would mean many a racist uncle (and we all have one) who "maintains" racist thinking become criminals overnight. That's not at all to defend such people, but to make them criminals for merely "maintaining" a hateful position is asking for trouble."

[2] Note 'cause offence' was not included as a suggested addition to the provision in Proposal Two, however, a few submitters opposed the inclusion of 'cause offence' in the provision because it is too broad. It is likely that these submitters may have misunderstood Proposal Two.

Submitters were uncertain if sharing one's thoughts with others would be interpreted as 'maintaining or normalising hatred', which could be particularly difficult for religious texts that conflict against one another, such as Christian or Islamic teachings. A few submitters said the inclusion of these terms in the criminal provision was a government attempt to prescribe what citizens may feel. The Free Speech Union and its supporters considered the inclusion of these terms in the criminal provision to be a "powerful weapon" for those who oppose open debate. The existing wording in the clause was preferred by a few submitters, while one submitter said that 'maintains or normalises hatred' was only appropriate for a civil provision but not a criminal offence. One submitter said:

"[T]he concern about normalising hatred conflicts with freedom of speech - the discussion document needs to watch it doesn't normalise hating those who hate others!"

Some submitters felt that this proposal, as a whole, was too vague. They were concerned there was no definition of 'hatred' or what would constitute 'hate speech' in the discussion document for submitters to react to. One submitter said that the proposals were intolerably vague. Another submitter said:

"Speech or the intent of speech to harm - or the loudness of it or the vehemence expressed in the tone of voice of the accused - as in the way an actor can take a normal sentence and imbue it with obvious hatred and contempt - and even menace - seems to be such a subjective thing - and the range of reaction from the people exposed to it would seem to be impossible to legislate for."

A few submitters commented on hate speech as a criminal offence. For instance, the New Zealand Council for Civil Liberties said the Human Rights Act was the right place for the offence because it prevents harm from prejudicial behaviour based on societal groups or shared characteristics. A few other submitters said there were other ways to regulate or punish hatred, and that criminal offences are not always deterrents.

A few other submitters felt that hate speech should not be a criminal offence. For instance, the Free Speech Union said:

"Criminal law is about action. The only 'thought' component previously included relates to quantifiably outlining intention to commit an action. This law digs deeper behind the intention into the thought, which is the point at which thought becomes criminal."

It was suggested that the discussion document should not have assumed that the Crimes Act would solve discrimination and hatred. One submitter said criminal law will not help communities of colour, and that overseas examples suggest that hate crimes will be applied disproportionately to those most marginalised. It would also disadvantage those who could not afford a good lawyer.

Some submitters were concerned about the "chilling effect" the proposal would have on society, as it was thought that sharing an unpopular opinion would become a criminal offence. Submitters, including Family First, said it would prevent people from having difficult conversations or sharing opinions (including political opinions) for fear of prosecution. One submitter said remaining silent would be a "more sensible choice than speaking" out. Voices for Freedom said the criminal provision would cause people "to Police our speech and monitor every word, thereby completely losing our freedoms to be ourselves and think and believe our own thoughts." It was suggested that Proposal Two would create a culture of fear and persecution, as "people bite their tongues for fear of breaching ambiguous provisions" and could cause more division in society. Some submitters suggested the criminal offence could also be used by the Government or others in powerful positions to restrict or stifle contrary opinions. It was thought that the criminal offence would "drive extreme speech underground into the deep web where we won't find it until its [sic] too late and it spews out in vitriolic violence as happened in Christchurch – deadly – unlike nasty words. Keep it in the real world where it

can be monitored." Some submitters thought the criminal provision would negatively affect women, comedians, entertainers, political commentators, and religious groups.

There was a concern that the proposal could be abused by those in powerful positions. Some submitters, including the Salvation Army, commented that vague provisions could lead to an abuse in power or allow prejudiced opinions to determine what does and does not constitute hate speech. Some submitters thought lawyers would be able to manipulate the legal meaning behind the terms in the provision.

Some submitters felt that the proposal would place additional burdens on the Police and Courts. These submitters raised concerns that the change would make it too hard for the Police and Courts to determine what hate speech is and enforce it consistently. One submitter said it was "undemocratic to allow them [judges] to effectively write the law when there has been such a lack of clarity around the intent of parliament." Relying on the Police and the Courts to prove 'intent' was viewed as a waste of resources. Very few submitters questioned the role of the jury:

> **"What evidence is a jury supposed to assess if the sole "evidence" is that expression of that opinion hurt the feelings of the complainant? It is almost certain that "victim groups" in cases such as this will be those favoured by elite opinion makers. The pressure on juries to arrive at the politically correct outcome will result in a travesty of justice."**

A few submitters questioned how the prohibited grounds of discrimination (section 21) of the Human Rights Act would impact the criminal offence. These submitters were concerned Proposal Two would criminalise legitimate expressions of religious belief and political opinion. They were also unclear how the criminal offence would protect conflicting beliefs (such as homosexuality in some religions) and which 'side' it would favour.

Other reasons why submitters opposed Proposal Two are listed below.

- Concerns with enforceability overall.
- Concerns that it would breach the right to freedom of expression more generally.
- Risks that it would damage New Zealand's democracy.

Other comments for Proposal Two

184 submitters (181 individuals and 3 organisations) were unsure about Proposal Two.

Some submitters were unsure if they supported Proposal Two because it was unclear how the proposed words in the clause would be defined or interpreted. As a result, it was unclear what behaviour would or would not be considered illegal.

Concern was also expressed that there was a lack of evidence as to whether hatred was best addressed by criminal laws. One submitter commented that the significance of the proposed change to remove hatred from the Human Rights Act and place it in the Crimes Act was not adequately explained. Some submitters suggested that the Ministry consider if the criminal provision would prevent discrimination that occurs online from people outside of New Zealand. Others called for the provision to be regularly reviewed as society continues to change.

Proposal Three: Increase the punishment for the criminal offence to up to three years' imprisonment or a fine of up to $50,000 to better reflect its seriousness

Submitter Data

- 358 submitters supported Proposal Three.
- 2,202 submitters opposed Proposal Three.
- 227 submitters were unsure about Proposal Three

The proposed penalty reflects the seriousness of the offence

- It is a strong signal that hatred and discrimination are not tolerated.
- The penalty more closely aligns with penalties for other offences of a similar gravitas such as posting a harmful digital communication.
- Given the possible serious impacts of inciting racial hatred, the increase proposed would not amount to an overly burdensome penalty.

There will be a spectrum of offending and penalties must allow flexible and appropriate responses to the circumstances of each case

- The proposed penalties are targeted at the highest level of offending.
- Rehabilitation, education and restorative justice programmes should form part of the response.

The proposed penalty is unnecessary and disproportionately high

- Existing provisions in the Crimes Act 1961, Human Rights Act 1993, Harmful Digital Communications Act 2015, New Zealand Bill of Rights Act 1990, Summary Offences Act 1981 and Harassment Act 1997 are adequate.
- Words should not be punished more harshly than actions.
- The crime is ambiguous and subjective and therefore should not attract such a high penalty.

The proposal would overburden the justice system

- The proposal is highly subjective and the process of interpreting it in court would be lengthy.
- There is a lack of clarity for police requiring them to make judgements they are not qualified to make.

Description of Proposal Three

The current penalty if someone is found guilty of criminal incitement is a maximum fine of $7,000 or three months in prison. Proposal Three would increase the criminal penalty to a fine of up to $50,000 or a maximum of three years in prison. The proposed penalty has been increased because of the seriousness of the offence, which captures behaviour that seeks to spread hatred towards groups in society.

Support for Proposal Three

358 submitters (316 individuals and 42 organisations) supported Proposal Three.

Several submitters felt that the current penalties did not reflect the seriousness of inciting hatred and discrimination. These submitters, including OUSA and Tohatoha Aotearoa Commons, stated that the existing penalty ($7,000 or three-months imprisonment) was inadequate, and the proposed increases would legitimise the rights of those who have been the victims of hate speech and protect society from extreme and unwarranted hatred.

Some submitters thought the increased penalty adequately reflects the seriousness of the criminal offence. These submitters included the Christchurch City Council, Disabled Persons Assembly New Zealand, NCWNZ, and Hohou Te Rongo Kahukura – Outing Violence. They said that the proposed penalties were sufficiently harsh to deter offenders. The increased penalty was seen as a signal that hatred was not acceptable in New Zealand. The Archdiocese of Wellington Commission for Ecology, Justice and Peace acknowledged that the Royal Commission recommended increasing the penalties "to better reflect the seriousness of the offending, and to signal that these matters are not trivial." A small number of submitters recommended increasing the proposed criminal penalties further than what was proposed.

Some submitters said the proposed penalty would be commensurate with other offences. These submitters, including the Human Rights Commission and Christchurch City Council, said that increasing the penalty would ensure it aligned more closely with penalties for other similar offences. The Human Rights Commission stated that the maximum proposed sentence of three years imprisonment was significant and at the high end but was not excessive. It also provided a comparison with sentences overseas:

- England and Wales: between six months and up to seven years for the most serious cases
- Canada: between two years and five years (for incitement of genocide)
- New South Wales and Western Australia, Australia: upwards of two years imprisonment
- Queensland and Victoria, Australia: six months.

Most of these submitters agreed and provided examples including the Harmful Digital Communications Act 2015, the Films, Videos, Publications Classifications Act 1993, and offences of similar seriousness in the Crimes Act (including sections 192 and 308). Given the possible outcomes of inciting racial hatred, the increase proposed was not seen as an unduly burdensome penalty.

Caveated support for Proposal Three

Some submitters questioned the effectiveness of a fine. They suggested that fines would not prevent the incitement of hatred, particularly for wealthy individuals or groups. One submitter suggested that

the fine should be removed because imprisonment has more teeth, although another submitter felt that the inclusion of a fine was appropriate for situations when imprisonment was not warranted. Te Rūnanga o Ngāti Whātua was concerned about allowing offenders the option to pay a fine instead of going to prison and how this would disproportionately impact on low-income individuals. In addition, some submitters supported higher maximum fines for organisations. One submitter said there should be a separate offence for "calls for genocide, mass violence, doxing with intent that the target be killed, etc with a similar gravity to the Crimes Act ([s] 175) Conspiracy to murder."

Some submitters considered that the proposed penalties were only appropriate for the highest level of offending. However, most of these submitters were unclear what a minor offence and the subsequent penalty would look like.

Submitters were split as to what other crimes could be used as an appropriate comparison. While many of these submitters stated that there are no comparable crimes, partly because there is no case law to determine this, some submitters stated that inciting someone to commit a violent crime was a worthy comparison. Other suggestions included disorderly behaviour, threatening to kill, and threatening to cause grievous bodily harm. Submitters suggested nearly fifty other crimes as comparisons, both less severe and more severe than Proposal Three's penalties.

Some submitters recommended non-criminalising methods should be used to change behaviour. These submitters included FIANZ, New Zealand Buddhist Council, Inclusive Aotearoa Collective Tāhono and OUSA. They suggested that rehabilitation programmes be implemented to educate offenders in cultural competency. FIANZ said "punitive measures need to be balanced with proactive education/remedial programmes [sic]." Te Rūnanga o Ngāti Whātua recommended "mandatory courses of cultural, religious, sexuality, language, ethnicity and gender competency for offenders, to educate and inform around the severity of hatred, and the importance of diversity and inclusion." Any restorative approaches should consider Tikanga Māori, Pasifika cultures, and any other relevant cultural practices of restorative justice to ensure solutions are culturally appropriate, constructive, and supportive for the victim.

One submitter discussed the implications of Proposal Three on te Tiriti commenting:

> **"However, we must be mindful of the negative effects that charges, investigation, trial and potential criminalisation can have on individuals. As with any criminal offense, certain groups tend to fall victim to arrest and prosecution more than others. They are generally poorer, hold fewer educational qualifications and, in Aotearoa, are disproportionately more likely to be Māori and Pasifika. Society must be careful not to criminalise people who lack the political nous or social education to communicate in public in a legally acceptable fashion."**

AIANZ said that discriminatory expression should only be subject to criminal punishment if it meets the definition of advocating for hatred constituting incitement. They said that any restrictions on the right to freedom of expression must meet the three-part test set out in the ICCPR.

Recommended changes to Proposal Three

Recommended amendments to Proposal Three, as suggested by the submitters, are listed in the table below.

Table 6: Submitters' recommended changes to Proposal Three

Theme	Submitters' recommended changes
Content of provision	• Provide that the penalties should only be for: – 'hate speech that incites violence'; or – 'intent to cause harm' that can be proven; or – 'incitement to commit violence'.
Penalties	• Reduce the imprisonment term to one year maximum. • Make the fine dependent on the wealth of the offender so that individuals or organisations with greater access to funds are still deterred from committing crimes of discrimination or hatred. • Reduce the fine because the increase is disproportionate compared to Consumer Price Index changes.
Additional content to support provision	• Incorporate certain cultural practices (including tikanga Māori) into the consequences for offenders. An example suggested was the use of ifoga in the Government apology for the Dawn Raids. • Allow iwi panels to have a role in addressing hate crimes and allowing other community groups to engage in restorative work that is specific to their culture and needs. • Conduct further engagement with the Department of Corrections to ensure that penal punishments are an appropriate avenue when criminalising inciting hatred and discrimination. • Fund programmes to support education initiatives to make the public aware of discrimination and hatred laws, as this would reflect the all-of-Government integrated approach that the Royal Commission suggested in their findings.

Opposition to Proposal Three

2,202 submitters (2,166 individuals and 36 organisations) opposed Proposal Three.

Many submitters felt that the existing penalties were appropriate. They said that the existing penalties provide sufficient coverage, including the Crimes Act, Human Rights Act, Harmful Communications Act, New Zealand Bill of Rights Act, and Harassment Act 1997. As a result, these submitters felt there was no justification to increase the penalties and said that the discussion document did not address this issue. NZJC said that while government officials had indicated that this proposal would not lower the existing threshold, they were concerned the proposal could in fact do this because of the high degree of uncertainty surrounding its interpretation and implementation. Submitters said that the laws that protect against defamation, libel and slander were also sufficient at preventing hatred. In addition, a few submitters stated it was not possible to assess if the proposed penalties were appropriate because there had been so few convictions under the current law.

Some submitters considered that the proposed penalties were disproportionately high. These submitters included the Free Speech Union, Salvation Army, Sanctuary Human Rights Committee, and Voices for Freedom, the latter saying the penalties were "extraordinary and absolutely out of proportion to the actual damage caused by speech alone." Concerns were also raised that the proposed penalties were higher than those for crimes with physical elements such as common assault, murder, rape, robbery and other miscellaneous physical crimes. While the Free Speech Union opposed all of the proposed changes, they stated that the incitement of hatred should not be punished "with a larger sentence than physical violence."

Some submitters thought that these harsh penalties would have a negative effect on victims of physical crimes. It was said that the penalties were also harsher than those for assault or abuse to children, which may express a lack of care for children. One submitter was particularly concerned that Proposal Three would more severely punish words than actions. In comparison, a few submitters opposed increasing the penalties because there are no comparable crimes.

Some submitters felt that the penalties were too high for a subjective crime. It was said that the definition of what would be considered a criminal offence through Proposal Two, including 'incitement to hatred', was inadequate. As a result, submitters could not support the increased penalties in Proposal Three. One submitter said, "with the definition of what constitutes hatred being ambiguous at best, a three year sentence and $50,000 fine is a hefty price for committing a crime that is difficult to define."

Concerns were raised that this proposal would perpetuate inequalities and referred specifically to the overrepresentation of Māori and Pacific peoples in the criminal justice system.

A few submitters said the increased penalties would discourage open debate. The Catholic Theological College said that Proposal Three was "overly severe and likely to shut down the very discussion needed to enhance open dialogue and a culture of encounter, which in turn leads to decreased fear of difference and deeper understanding."

There were concerns that increased penalties could lead to a misuse of power. Some submitters suggested that the proposed penalties could be subject to abuse by individuals and entities with influence and an agenda to pursue. It was felt that the penalties could be used by government officials who do not want to engage in debate. A few submitters thought that Proposal Three would cause the Police to spend more managing and punishing individuals. One submitter said the decision to arrest an individual for inciting hatred would be "based on that Police officer's personal, moral, political views about hate as influenced by the politics of the governing power of the day."

It was considered that the proposal would place additional pressure on the justice system. Some submitters said the increased penalties would overburden the Police, Courts and jail system. They said because the law was highly subjective the process of interpreting the legislation in court would be lengthy. There could be a lot of mistrust towards the Courts and Police, and the legislation would never really be clarified because it was too broad. The Courts and Police would become progressively entangled in "pathetic drama," that they would attempt to untangle but would not be able to. It was unlikely that the Courts would allow many prosecutions to occur, and therefore it was unclear how much of an impact the increased penalties would have.

Some other submitters thought relations between the Police and community could deteriorate if the Police were seen to be heavy-handed with the enforcement of the laws, as resentment would build. Lengthy court processes were the only visible outcome for many submitters. In addition, some submitters said the increase in penalties would not actually deter people from inciting hatred. Many of these submitters also questioned how the Police would weigh up which issues are worth pursuing. Overall, many submitters opposed the proposed changes as they said that they could politicise the

Police force and cause the Police to make judgements that they were not qualified to make. These judgements were better left to the Courts, but even then, the subjective nature of the language used in the legislation meant that Court processes could be costly and time-consuming.

A few submitters requested that the proposed changes were replaced with less punitive approaches. They thought educational and community-based approaches would be less expensive and less polarising for the offender. It could also have a better chance at shifting their opinion and reintegrating them into society. Other methods could include face to face dialogue in schools, parenting courses, youth workshops, community centres and at marae. Restorative Practices Aotearoa said it "does not believe that the prison system or a monetary fine is the best approach to help offenders to recognise and acknowledge the harm they have caused, and to prepare them to re-enter society, while also getting justice for victims."

Other reasons why submitters opposed Proposal Three are listed below.

- Many submitters raised concerns that the increased penalties would criminalise the right to freedom of expression more generally and was at odds with what is required to create harmonious relations within and between communities.
- There were concerns that the increased penalties would breach the right to religious expression.
- The defence of truth should not be captured within the proposed penalties (i.e. it should not be illegal to tell the truth).
- The New Zealand Buddhist Council said imprisonment could act as an "incubation for extreme hatred."
- Offenders who are under the age of 21 years who incite hatred via social media, text messages and/or online videos may need a reduced penalty if they cannot pay the fine or could be rehabilitated using other methods.
- The consequences of the proposed penalties are too harsh for the defendant and will also have a negative impact on their family.

Other comments for Proposal Three

227 submitters (226 individuals and 1 organisation) were unsure about Proposal Three.

Some submitters were uncertain if they supported or opposed Proposal Three. These submitters were unclear how far reaching the penalty would be and said that the discussion document did not clarify this. One submitter, for instance, said that increasing the penalty to three years imprisonment meant any prosecution would qualify for a jury trial, and as a result, they did not have a clear view on the proposal "in part because I doubt whether there will be many occasions when the law officers would allow a prosecution." In addition, submitters questioned if one-off remarks or causal passing comments would be liable for punishment under Proposal Three.

A few submitters, including the New Zealand Catholic Education Office, said that they did not have the experience to comment on appropriate penalties for inciting discrimination. One submitter also considered that it was premature to discuss Proposal Three because the Ministry had only allowed restricted public involvement in the development of the proposals.

Proposal Four: Change the language of the civil incitement provision to better match the changes being made to the criminal provision

Submitter Data

- 415 submitters supported Proposal Four.
- 2,135 submitters opposed Proposal Four.
- 223 submitters were unsure about Proposal Four.

A high threshold must be maintained

- A high threshold ensures that the right to freedom of expression is not restrained unnecessarily.
- It must be clear that the civil provision does not capture comments that are simply unpleasant or unwanted.
- Introducing a subjective element to the test allows more emphasis on target groups' experiences but must not lower the threshold.

The distinction between the two provisions is not as much of an issue as the proposal document implies

- The current wording achieves its purpose and making changes simply to ensure consistency is unnecessary.
- Existing laws should be better enforced.

The proposed wording is unclear

- 'Hatred' is too ambiguous and confusing.
- 'Normalising' is a very general term allowing subjective interpretation.
- 'Stir up' and 'insult' are broad terms and would be hard to interpret.

Social media should be explicitly included

- The rapid increase of social media has contributed to the prevalence of hate speech.
- 'Publishes or distributes to the public' should explicitly apply to chat groups and online communication to members of specific interest groups.

There will be unintended consequences

- Private conversations and communications should not be captured by the legislation.
- The media will be unable to freely report newsworthy stories.
- Censoring speech will drive people underground and radicalise groups.

Description of Proposal Four

Proposal Four would amend the wording in the civil incitement provision (section 61 of the Human Rights Act) to align with the criminal offence. It would include 'hatred' and 'inciting/stirring up, maintaining or normalising hatred' alongside the existing wording.

Support for Proposal Four

415 submitters (373 individuals and 42 organisations) supported Proposal Four.

Some submitters supported amending section 61 to adopt any new elements used in the criminal provision. Submitters, including NCWNZ and Disabled Person's Assembly New Zealand, agreed that this proposal would better align the civil and criminal provisions. One submitter also said that the language in both the civil and criminal provisions should incorporate the same principles. The Human Rights Commission supported the elements in section 61 being amended to adopt new elements like "hatred" in addition to retaining the current elements. The Human Rights Commission said, "this would continue the approach under section 61 and 131, where many of the elements ("threatening, abusive, or insulting" and "matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule") are mirrored in each provision."

One submitter suggested that having greater consistency would reduce the scope of appeals against the decisions of the Court.

Some submitters said that updating the civil provision would make it clearer what types of behaviour were prohibited. The terms 'inciting/stirring up, maintaining or normalising hatred' alongside 'excite hostility' and 'bring into contempt' were considered by a few of these submitters to be more easily understood. They thought these terms would strengthen the provision. One submitter said adding the terms 'stirring up, maintaining or normalising hatred', 'excite hostility' and 'bring into contempt' would ensure speech that incites hatred is limited. A few submitters welcomed the inclusion of the term 'incite' but said there needed to be clear evidence of incitement to cause harm. It was said that the law should not just apply to those who hold unpopular opinions – an individual must actually incite harm.

One submitter said any changes to the civil provisions must maintain a lower threshold than for the criminal provisions. They thought this was a fundamental consideration in relation to any changes to the wording of section 61 of the Human Rights Act to provide an avenue to pursue cases that cause harm but are not criminal in nature or fail to meet the high threshold for criminality. The Human Rights Commission said that this approach has been taken in other jurisdictions which have both civil and criminal provisions, noting that these criminal provisions usually had additional language that establishes a requirement of intent. They referred to Queensland where the relevant criminal provision includes that the defendant must have 'knowingly or recklessly incited hatred'. This intention element is not included in the civil provision. The Human Rights Commission said that 'intent' should only be required in the criminal provision (section 131) and not the civil provision (section 61). They said "this is also currently the case with sections 61 and 131, where "intent" is required by way of section 131(1) but is not required in section 61."

A few submitters supported the inclusion of all types of communication in the civil provision. It was felt that this would bring the legislation up to date with technology changes. However, questions were raised about the impact of Proposal Four for New Zealanders in regard to international law because a

lot of online harm comes from offshore accounts. A few submitters questioned how the Government was going to keep New Zealanders safe from international incitement to hatred.

Caveated support for Proposal Four

Given the importance of freedom of expression, some submitters felt that the threshold for the civil provision must remain high to ensure it did not catch comments that were simply unpleasant or unwanted. To support this view, the Human Rights Commission referred to *Wall v Fairfax New Zealand Limited*, New Zealand's most recent and leading case on section 61 of the Human Rights Act. It said:

> **"[T]he High Court found that section 61 requires a high threshold, targeted to racist speech at the serious end of the spectrum that "applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised." The Court also found that "excite hostility" or "bring into contempt" involves an objective test of "whether a reasonable person, aware of the context and circumstances surrounding the expression, would view it as likely to expose the protected group to the identified consequence."**

Many of these submitters including the Human Rights Commission supported the retention of a high threshold because it recognised the fundamental importance of free speech. They said while the right to freedom of expression could be limited if the expression violated the freedom of others, a high threshold would ensure the right was not restrained unnecessarily. A few submitters said the intent of the change must be made clear, and disagreement must not be deemed incitement.

The Human Rights Commission also referred to the Islamic Women's Council of New Zealand's submission to the Royal Commission and supported their recommendation to introduce a new subjective element to the test (consideration of the target group's experience). They said "in our view, it would enhance the consideration of the particular context and circumstances of the expression, an essential factor identified by the Supreme Court of Canada in *Whatcott* and affirmed by the High Court in *Wall v Fairfax."* They did not consider this would lower the threshold.

Some submitters suggested alternative wording to that contained in the proposed civil provision. AIANZ, for instance, said the wording of this provision should align as close as possible to that used in international law to assist with clarity. Other suggestions included:

- changing the language to expressly include motivation/intent as part of the test to determine what is unlawful for the purposes of section 61
- removing language that is merely insulting, but not abusive, from the civil and criminal provisions
- providing clarity around how the additional words are defined and what behaviour it covers other than incitement of hatred
- including examples of 'hatred' to fully show the scope of the provision.

One submitter said the proposed wording needs to capture social media given the prevalence of online hate speech. In addition, the phrase "publishes or distributes to the public" needs to apply to chat groups and communication to members of specific interest groups.

A few submitters stated that the current provision may be ineffective for tangata whenua and other targeted groups. The Human Rights Commission claimed that the current approach makes the provision inaccessible to groups who are affected by harmful speech. They said this has consequences for Māori and the Crown's duties under te Tiriti. The Human Rights Commission referred to *Wall v Fairfax New Zealand Limited*, noting that in that case there was little weight given by the High Court to the historical and current experiences of tangata whenua of racism and discrimination in New Zealand,

nor the context of colonisation and failures by the Crown to honour its te Tiriti commitments. As mentioned above, the Human Rights Commission supported the addition of a subjective element to the test.

A few submitters raised concerns that this proposal would negatively impact the Rainbow community. The Auckland Rainbow Community Church, for instance, was concerned that allegations of this kind may be made against the Rainbow community who seek to defend their rights. The proposal should not encourage a litigious culture between groups. They suggested approval of the Attorney General should be required for both the civil and criminal provisions.

Recommended changes to Proposal Four

Recommended amendments to Proposal Four, as suggested by the submitters, are listed in the table below. Submitters provided multiple recommendations that are relevant to Proposal One when commenting on Proposal Four (see 'Content of the provision' recommendations). However, these are included in Table 7 below to accurately reflect where submitters raised these comments.

Table 7: Submitters' recommended changes to Proposal Four

Theme	Submitters' recommended changes
Content of provision	• Change the language from mere description of legislation dealing with 'hate crime' into the legal discussion of motivation and hostility towards a group for the purpose of prosecution. • Replace 'likely to excite hostility against or bring into contempt any group of persons' with 'intentionally incite/stir up hatred against any group of persons'. • Consider including the following characteristics: – 'gender', 'age, 'political belief', 'religion' 'religious belief and non-belief', 'sex', 'sexual orientation' as protected categories, as well as historical affiliations, membership of legal or illegal organisations, 'disabled, neuro-diverse and mentally ill people' and 'regional discrimination' – include the words 'any sub-group' rather than specifying group characteristics • Remove all references to race as this causes division.
Structure of provision	• Ensure the provision includes clear definitions for all words included in the provision, excludes private conversations and religious opinions, and provides the defence of truth. • Include only violent actions (therefore excluding violent words or thoughts) and remove language that is merely insulting, but not abusive, from the civil and criminal provisions. • Address incitement spread online to future-proof the civil provision.
Implementation of Proposal Four	• Ensure the media are exempt from the civil provision when reporting hatred or discrimination. • Lower the liability threshold in the civil provision to below the criminal provision because civil proceedings offer a way to pursue cases that cause harm but do not meet the high threshold for criminal proceedings.

Opposition to Proposal Four

2,135 submitters (2,103 individuals and 32 organisations) opposed Proposal Four.

Some submitters said there was no justification to amend section 61 of the Human Rights Act. These submitters said the existing provision was fit for purpose and worked well, and the Ministry had not presented any evidence for the need for change. The proposed changes were described as an extremist response which were not needed because New Zealand did not have a substantial enough issue to warrant this level of response. It was said that there are already defamation laws that limit speech that could incite hatred in New Zealand. One submitter suggested the existing laws should be better enforced.

Some submitters stated that words and thoughts should not be illegal. A few submitters said the punishment should be restricted to actions, and words and thoughts should never be subject to punishment.

Some submitters said that overall, the proposed wording for section 61 was unclear. They said the language was vague, not well thought-out and open to be interpreted in different ways. A couple of submitters said the language was no clearer than the original. It was felt that the proposal was not future-proofed and would not provide sufficient protection.

Some submitters said the term 'hatred' lacked a clear definition. They said that the term was too ambiguous and confusing. They said the word 'hatred' needed to be clearly defined otherwise the application of this law could be quite subjective based on one's own personal interpretation of what behaviours or words constitute 'inciting hatred.' It was felt that for the law to be legitimate, people must be able to clearly see what behaviour and speech it allows and what it prohibits. It cannot be up for interpretation whether illegal behaviour has taken place or not. Some submitters shared their concerns that the language in Proposal Four would lower the threshold of what constitutes 'inciting hatred', and the proposal went too far. They also said that it could become too easy for groups to object to any opposing viewpoint which they might find offensive by claiming it is 'hateful'. The Free Speech Union stated:

"Without an objective, empirical evaluation of the definition of 'hate or 'hatred' an amendment of this kind is fraught with insufficiencies and threatens to be the tool of injustices (whether criminal or civil). The defensible limits on free speech are by nature extremely rare. A proposal of this kind would see them be far more commonplace."

A few submitters raised concerns with 'stir up', 'incite hatred' and 'insult'. They stated that 'stirring up or inciting hatred' would be hard to interpret. For instance, Business New Zealand did not support this proposal and, in particular, the inclusion of the term 'insulting.' They said the current wording demonstrates the difficulty of trying to create satisfactory discrimination and hatred legislation.

A few submitters did not support the inclusion of 'maintains or normalises hatred'. This wording was considered ambiguous and nonsensical because 'maintaining' a viewpoint was not considered illegal behaviour. One submitter said that introducing the terms 'maintaining or normalising hatred' is questionable and could lead to absurd results as speech that is political, moral, religious, or philosophical usually articulates normative ideas about what is right or wrong, appropriate or inappropriate, beneficial or non-beneficial.

One submitter said:

"I strongly disagree with the word "maintaining" in particular. Maintaining a viewpoint, however immoral, should not be a crime. Spreading dissention and slander and violence should be. I also

think phrases like "normalizing hatred" and even "hatred" itself is too ill-defined. A sensitive or easily-offended person may hear "hatred" when other people think they're giving well-argued (or even poorly-argued) criticism."

One submitter said the term 'communication' was not clearly defined and suggested that it needs to be supported by one or more other terms to cover social media. They said that it raises the issue of what, in the context of section 61, constitutes publishing or distributing written matter that is insulting. It was felt that further clarification is required on whether publishing will explicitly include uploading to social media or other online means of communication, whether distributing includes providing a platform that is closed to non-subscribers and off-shore, whether written matter includes mailing lists and other internet based textual communications and at what point does an insult become hate.

Some submitters said this proposal would have a 'chilling effect' on free speech and society. These submitters said the proposed changes would cause New Zealanders to be too scared to speak their mind for fear of being fined or imprisoned. A few of these submitters said the law changes would force people with unacceptable views underground. Censoring speech does not eliminate it; it drives it underground and potentially radicalises it. One submitter commented that stifling people's opinions and disregarding their concerns leads to people reacting with violence as history has shown multiple times. Some submitters were concerned that the law could be overused and would result in the creation of a fragile society that cannot handle differences of opinion.

There were also concerns that people would report each other to the authorities to silence certain views and that people who are easily offended would automatically presume hateful motives where none exist. Safer Future Charitable Trust said this would cause people to refrain from voicing their opinions for fear they could be viewed as inciting hatred, which would reduce public discourse.

One submitter stated that there was no evidence that this kind of suppression of rights would have any effect on the identified victim groups. Some submitters, including two religious organisations, were concerned about the chilling effect on religious expression and exercising religious freedom.

Concerns were raised that Proposal Four would limit conversations in private settings. A few submitters considered that private conversations and communications should be excluded from the civil provision as people must be free to express themselves in private without the fear of being reported or prosecuted. One submitter, for instance, stated that "the proposed changes in the law damagingly affect individual and family privacy." A few other submitters mentioned that it was not within the scope of government to control language and thought, nor was it a matter for the Courts or legislation in general.

A few submitters said the proposed amendments would be abused by people in powerful positions. These submitters, including the Reformed Congregation of Carterton, said Proposal Four was dangerous and could be used by the Government or politicians to control public debate and criminalise those who object to their views. Most of these submitters felt that the suppression of political opinion is not something that a democratic government should entertain, even if the intention is to prevent harm. They also said that many of the protected groups are the subject of political discussion, which could fall within the scope of the new legislation. One submitter stated that Proposal Four is problematic because activist groups were more likely to use civil proceedings rather than criminal proceedings to advance their agenda and suppress the speech of other protected groups. It was suggested that the deliberately vague terms in the proposals would grant unfettered law writing power on the Court.

A few submitters said that this proposal would negatively impact the media. The Media Freedom Committee was concerned that changing the language in section 61 could result in their members and other legitimate news sources being penalised for reporting newsworthy views and/or actions of individuals and groups that could be found to incite hatred and discrimination. They were concerned

that the media could face action for reporting comments made by protesters or showing signs or placards. The Media Freedom Committee also said the difficultly in defining and proving what may incite hate or discrimination in an opinion piece compared to a fact-based news report and were concerned that their members could be penalised for publishing or broadcasting an opinion piece that someone disagrees with. It was felt to be unclear whether the media and journalists would need to be more considerate of what they say and how they word articles.

One submitter opposed Proposal Four because the Human Rights Commission's processes were not effective. The submitter recommended that the Human Rights Commission be overhauled so that it provides equitable and effective protection for the rights of all New Zealanders.

Other reasons why submitters opposed Proposal Four are listed below.

- Many submitters opposed legislation that targets hatred and discrimination in general because they do not address underlying issues that lead to hateful speech in the first place. The focus should be on criminalising and prosecuting actual physical violence or threatened violence/hostility, not hurtful words.
- Many submitters raised concerns that Proposal Four would limit their freedom of expression more generally, which was not the role of the government. Submitters suggested that only hateful action was penalised, not hateful speech.
- Some submitters said that Proposal Four would not maintain the protection of religious beliefs and opinion.
- One submitter mentioned that the intention of the provisions should not be criminalising people for their words but to keep hatred from escalating into incitement as per the United Nations strategy.

Other comments for Proposal Four

223 submitters (222 individuals and 1 organisation) were unsure about Proposal Four.

Some submitters said they were unsure if they supported Proposal Four. A few submitters did not understand Proposal Four so did not feel that they were able to provide any further comments. Some submitters said they were unsure about whether or not they supported changing the language in section 61 because Proposal Four was unclear and further clarification was required. It was suggested that the Government needed to provide clear definitions of 'hatred' and real-world examples of what hate speech is meant to be and what behaviour is allowed or prohibited. These submitters were concerned that the lack of clarity would result in its interpretation being abused, and the implications of the changes were not explained. It was said that the intricacies between the civil and criminal provisions were unclear. A few submitters said they needed examples of what behaviour would be illegal before they could speak on the proposals. It was said that more discussion was needed on the proposals and their language before submitters could adequately respond to them.

A few submitters did not understand the difference between a civil and criminal offence and felt that the discussion document did not provide enough clarity on this.

Proposal Five: Change the civil provision so that it makes 'incitement to discrimination' against the law

Submitter Data

- 438 submitters supported Proposal Five.
- 2,180 submitters opposed Proposal Five.
- 189 submitters were unsure about Proposal Five.

Will strengthen protections

- Including incitement to discriminate will better align the law with New Zealand's international obligations.
- Incitement to discrimination is just as harmful as the act.
- There will be more access to mediation processes and educative reform.

The terminology is too broad and unclear

- 'Discriminate', 'incite', 'intent', 'hate' and 'hatred' are not adequately defined.
- There is a lack of clarity about the types of behaviour that would be captured by 'incitement to discriminate'.
- The broad language inappropriately lowers the threshold for criminality.
- The broad language leaves the law open to abuse.

If freedom of speech is to be limited it must be clear and transparent.

The test is too subjective

- It places too much reliance on the interpretation of the Police and courts.
- The threshold for prosecution must be clear, transparent and at an appropriate level to balance the intrusion on other rights and freedoms.

Truth will be silenced

- Overly harsh restriction will be placed on the media.
- There is no defence of truth; facts could be classified as inciting discrimination regardless of their veracity.

Description of Proposal Five

The law would change so that a person was prohibited from inciting or stirring up other people to discriminate against any groups because of a characteristic protected by that law. A person who encourages others to treat members of a protected group worse or differently than others would be breaking the law. Victims could raise complaints of incitement to discrimination with the Human Rights Commission.

This amendment would bring the incitement provisions into greater alignment with New Zealand's obligations under international human rights treaties. Article 20(2) of the ICCPR requires the prohibition by law of incitement to national, racial or religious discrimination through either criminal or civil laws. The civil provision could involve the Human Rights Review Tribunal, however, it is worth noting that multiple submitters were unclear that Proposal Five would not involve the Police.

Support for Proposal Five

438 submitters (404 individuals and 34 organisations) supported Proposal Five.

Some submitters supported Proposal Five because it would strengthen the laws around incitement to hatred and provide greater legal protections. They said inciting people to discriminate was just as bad as committing the crime because it causes harm. Prohibiting incitement to discrimination was seen as a necessary extension and change to protect vulnerable groups. Many of these submitters felt that everyone should be equal before the law regardless of their characteristics and that this law would help to realise this change. As the Wellington Community Justice Project stated, "we agree that these groups should be protected from discrimination, and so it makes sense for it to be unlawful to incite others to discriminate against those groups." Another submitter said that discrimination was a "tangible and detrimental outcome of hatred" and as such should be banned to better protect groups. Another submitter said the proposal was long overdue.

Some submitters considered that the proposal could prevent future hatred, racism and violence. They said that by making incitement to discriminate illegal, future violence would be reduced. It was suggested that amending section 61 would prohibit potential racism and provide better protections for trans, gender diverse and inter-sex individuals. Most of these submitters saw discrimination and the ostracising of individuals as a crime, and therefore that incitement to discriminate by extension needed to be legislated against. A few submitters said that with social media and the current online climate, it was good that people would be held accountable for the hurtful comments they made online and the impact of their words.

Some submitters said the proposal would result in a stronger alignment with other laws. These submitters, including AIANZ and Netsafe, were in favour of the proposed change because it would keep the specified protected classes consistent across different laws. They said the Government needed to abide by its international obligations and it was appropriate that the law was aligned with these obligations. Many of these submitters, including the Human Rights Commission and Classifications Office, said the proposed change would bring New Zealand into line with its commitments under the International Covenant on Civil and Political Rights (ICCPR), which states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." They said the ICCPR is specific about including incitement to discriminate in law and this change would provide better protection for vulnerable groups in New Zealand. While

the ICCPR refers specifically to national, racial or religious hatred, the Human Rights Commission commented that in 2019 the UN Special Rapporteur on Freedom of Expression said: "[g]iven the expansion of protection worldwide, the prohibition on incitement should be understood to apply to the broader categories now covered in international human rights law."

Examples were given of other countries that had aligned their law to meet international obligations. In its submission, the Human Rights Commission referred to the provincial human rights laws in Canada, which contain provisions that prohibit in some form the public display, broadcast or publication of messages that announce an intention to discriminate, or that incite others to discriminate, based on certain prohibited grounds.

Some submitters said that including 'incitement to discrimination' in section 61 would make it clearer what behaviours are illegal. These submitters, including Hohou Te Rongo Kahukura – Outing Violence and the Disabled Person's Assembly New Zealand, felt the proposed change would make it clear that behaviour that incites discrimination, hostility or violence towards a person, or a group because of their race, religion, ethnicity, or another factor was illegal. They felt that it would improve the safety of New Zealanders because it would mitigate potential racism and violence. Restorative Practices Aotearoa said that this amendment would place needed focus on "actions that foster and encourage the actions of others to act in hateful" ways.

It was considered that Proposal Five would allow for greater utilisation of the Human Rights Commission. A few submitters commented that Proposal Five would allow individuals to complain about instances of discrimination to the Human Rights Commission. They supported the ability for mediation processes and educative reform to be used as remedies.

Caveated support for Proposal Five

A few submitters said that the ICCPR did not require this change. For example, NZLS said that while New Zealand as a signatory should align its law with the ICCPR, Article 20 of the ICCPR did not actually require a broad prohibition on incitement to discriminate. They were unsure if the proposal would add anything significant to the current section 61 and incitement of hatred.

Many submitters stated that any amendments to section 61 need to include clear terminology. Some of these submitters wanted each word contributing to the definition of hate to be clarified. They said the words 'discriminate', 'incite', 'intent', 'hate' and 'hatred' were not adequately defined. One submitter said they would also like the word "likely" removed from the provision so that only incitement that ended in active discrimination was punished.

Overall, many submitters said without adequately defining the language used in the proposal, floodgates could be opened and individuals and behaviour that should not be deemed illegal would be prosecuted. There was also the perception that this would lead to inconsistencies in the application of the law. Gender Minorities Aotearoa was concerned that the law may be misapplied and said the wording needed to be clear so that no unintended consequences occurred. Specifically, they were concerned that transgender youth may be criminalised for defending themselves against transphobic campaigns.

Some submitters were not clear about what types of behaviour would now be illegal. These submitters commented on the lack of definition around what types of behaviour would be captured under 'incitement to discriminate.' For instance, the New Zealand Association of Rationalists and Humanists wanted specific examples to be provided and "further consideration of legitimate and acceptable activities that could be made unlawful" if the proposed changes were enacted. NZLS stated that because there are numerous grounds of prohibited discrimination under the Human Rights Act, "the potential reach of any prohibition of incitement to discriminate is broad." This was a concern for many submitters who wanted the meaning of these words (and their denoted actions) defined. Some

submitters said there was the opportunity for unintended consequences to arise from the lack of clarity.

Some submitters said making incitement to discrimination unlawful needed to be balanced with freedom of expression. While they supported the provision, these submitters said free speech was a key concern and needed to be maintained. They said that people should still be able to express their opinions without fear of prosecution. Some of these submitters spoke of the need to retain the ability to partake in "legitimate discussion or criticism." One submitter specifically mentioned that they did not want their political opinion to be stifled.

Some submitters considered that the terms 'incitement' and 'discrimination' should be defined. Making clear what behaviour would be deemed illegal was seen as important to a few submitters, along with ensuring their freedom of expression was not encroached upon. To strengthen the proposal one submitter said the wording 'advocacy of discrimination' should be added to the provision as this would better capture online incitement.

A few submitters considered that the impact on religious expression was unclear. They were concerned about any infringement on their right to religious expression. The Catholic Archdiocese of Wellington said they did not wish to be provided with greater protections than other protected groups but stressed that "Christians do deserve the same level of respect and protection as other faith communities". Other submitters were concerned that their ability to pass on religious teachings, particularly in the area of sexuality and marriage, would be restrained. There was a general concern that if this proposal is introduced as drafted their religious freedom of expression would be constricted.

A few submitters were unclear if Proposal Five would apply to all forms of discrimination in the Human Rights Act. The Human Rights Commission commented that the discussion document did not address if the incitement to discriminate provision was meant to apply to all forms of discrimination set out in the Human Rights Act. It also said that the document did not refer to the exception provisions in the Act. This issue should be addressed because some "forms of discrimination set out in Part 2 of the Human Rights Act (such as victimisation for example) would sit rather awkwardly within an incitement provision."

One submitter said Proposal Five must uphold other international human rights treaties. A joint submission from the New Zealand Union of Students' Associations, Te Mana Ākonga, Tauira Pasifika and the National Disabled Students Association mentioned that New Zealand had also signed the United National Declaration on the Rights of Indigenous People (UNDRIP). They said that New Zealand "owed it to tangata whenua to ensure that our place in signing the ICCPR, as well as the UNDRIP, is upheld in law." They also mentioned that New Zealand has obligations under the United Nations Convention on the Rights of Persons with Disabilities and that these needed to be upheld to protect disabled people from discrimination.

A few submitters said the Government should take the opportunity to review the Human Rights Commission's processes. For instance, People First New Zealand recommended that the Human Rights Commission's complaints process be reviewed so that it was easier for disabled persons to access and understand. They also requested complaints be responded to in a timely manner. One submitter raised concerns around the ability of the Human Rights Commission or the Office of Human Rights Proceedings to bring claims on behalf of individuals.

A few submitters requested that some types of different treatment be excluded. These submitters commented that they wanted affirmative action measures to be explicitly excluded from the provision. They were concerned that, by not doing this, social campaigns and causes that were intended to help vulnerable people could be unfairly limited. Transparency International New Zealand stated that

section 61 should only prohibit incitement to unlawful discrimination, but not discrimination in general, as there was a need for positive discrimination.

One submitter supported Proposal Five if the Attorney General would give consent to the proceedings.

Recommended changes to Proposal Five

Recommended amendments to Proposal Five, as suggested by the submitters, are listed in the table below.

Table 8: Submitters' recommended changes to Proposal Five

Theme	Submitters' recommended changes
Content of provision	• Provide a clear definition for 'incitement to discrimination' so the provision is easily understandable and does not unduly impinge on free speech and religious expression or include simple disagreements. • Remove 'likely' from the clause so it is only illegal behaviour if discrimination occurs. • Change the wording to the 'incitement of violence and/or sustained harassment' not the 'incitement to discriminate' as this is too broad.
Implementation of Proposal Five	• Ensure the threshold is high so civil lawsuits are not used to shut down legitimate criticisms.

Opposition to Proposal Five

2,180 submitters (2,143 individuals and 37 organisations) opposed Proposal Five.

Some submitters said there was no need to amend the provision because the existing legislation was adequate. Many of these submitters did not see the need for this provision because there is already law in this space that prevents discrimination, such as sections 21 and 61 of the Human Rights Act. One submitter commented that there is already law in this area so that the Government needs to be mindful not to "over-reach with these provisions and criminalise speech." A few other submitters felt that because law already covered this area, expanding the law would cover too many groups. In addition, they said there was no conclusive evidence from any other jurisdictions where similar measures have been taken that discrimination and radicalisation were reduced by such laws.

Some submitters felt that Proposal Five should be weighed up against other international human rights obligations, as it currently went beyond what was required. It was suggested that this proposal was not necessary for New Zealand to fulfil the international legal obligations under the Convention on the Elimination of all forms of Racial Discrimination (CERD) because incitement to discriminate was already illegal. A few submitters said the proposal needed to be weighed up against Article 19 of the ICCPR which protects the right to hold opinions and freedom of expression. Another submitter said that the rationale presented for the proposal was weak, because:

"International treaties signed by governments are subject to domestic ratification and may, if parliament decides, be rescinded or reserved. A previous government's decision to sign the covenant is not in itself a substantive reason to change our law – that would nullify the purpose of ratification processes."

A few submitters said that the proposed wording was inconsistent with various international laws and treaties and over stepped international recommendations. Two submitters said the proposal did not align with the language in the ICCPR and did not take into account other provisions which explicitly provided for freedom of expression and privacy. It was said that while Article 20 of the ICCPR uses the term 'hatred' to signify the level of seriousness in the communication, the proposed language was not this clear and did not justify the limitations that it posed to freedom of expression.

Some submitters disagreed that 'incitement to discrimination' should be legislated against. It was felt that there was a lack of evidence that inciting discrimination exists and therefore legislating against it was unnecessary.

Concerns were raised that because the provision was too vague, it could be misused and abused. Submitters said that because of the broad nature of the language, it was likely that the provision would be misused resulting in an unnecessary restriction of individual's freedom of expression. Some submitters felt that the proposal needed to be very clear about what behaviour would be captured within it, and how. Concerns were also raised around who would decide and define what was discrimination. Many submitters, including Business New Zealand and Voices of Freedom, said the reasoning behind the proposal was too vague. They commented that the lack of factual basis for deciding what is considered discriminatory leaves the law open to be misused and impossible to Police. Other submitters felt that the vague nature of the proposal would mean the Police would become overburdened. One submitter also said that the proposal was an attack on their free speech and that there was no evidence that this kind of judicial action would even positively affect vulnerable groups. It was also said that there was a difference between critiquing others' views and discriminating against them, however, this line would become blurry and people may be fearful to speak as they wished because of this lack of clarity.

Other submitters said the wording used in the proposal was too broad and indirect. They thought that this broad language presented too low of a threshold. These submitters said that the change in language would make the law more confusing and less clear for the average person. One submitter said Proposal Five's terminology was "far too general and subjective" to be workable for the average person. New Life Churches were concerned that words were not defined because this left people "at the mercy of those left to interpret them." Some other submitters said this created a lack of certainty around one's rights and obligations in everyday life.

There was a concern that it was too hard to define what intentional 'incitement to discrimination' was. Some submitters said the nature of deciding what was incitement, as well as discrimination was too subjective. One submitter said, "I don't support including the prohibition of incitement to discriminate in section 61 because…it is capable of many interpretations and misapplications. If it cannot be measured objectively it should not be made a law." Other submitters said the 'intent to discriminate' was far too low a bar for this provision.

It was considered that Proposal Five would not prevent harmful messages being shared. A few submitters raised concerns that Proposal Five would not prevent groups spreading harmful messages from hiring public spaces to host meetings. They wanted to be able to, for example, stop groups spreading messages about conversion therapy from hiring public space for meetings, but were concerned this action to stop these groups would be seen as incitement to discriminate.

Submitters were concerned that the proposal would limit religious expression. The Christian Education Trust said that under the Education Act schools were explicitly allowed to discriminate based on religion. They were concerned that these allowances could be captured under the provision, and they would be inhibited from being able to practice their religious lifestyles and activities. Other submitters supported this view stating that the provision placed constraints on religious leaders and what they could say. It was said that Christianity's attitude towards the Rainbow community could be deemed as inciting violence. Encroaching on religious individuals' freedom to express their religion and practice their lifestyle was a concern. Conversely, a few submitters said that criticising religion should not be made illegal. They were concerned that under the new laws they would be unable to critique religious teachings.

There was a concern that Proposal Five could privilege certain groups and cause more discrimination to occur. A few submitters said the protections should focus on protecting all New Zealanders and not specific groups. It was felt that the proposal would result in some groups feeling more inferior or superior, and it was not clear who would be given protections. Submitters also thought it was unclear how intersectional claims of discrimination would be resolved. Concerns were raised about what would happen when two or more protected groups brought claims that the other was inciting discrimination.

Some submitters were concerned that Proposal Five could prevent the defence of truth. They said people would not be able to state the truth in case it caused offence. Even when evidence was provided there were concerns facts could still be classed as incitement to discriminate. Concerns were raised for New Zealand's journalism industry and the restrictions that would be placed on them. A few submitters were also concerned that the Police and the Government may be able to suppress negative information against them, which would stop the truth of their actions being exposed to the public.

Some submitters were concerned Proposal Five would restrict speech in private settings. They requested that a distinction be made between expression in the public sphere as opposed to expression in private settings. There were concerns that the provision posed a threat to the sanctity of the home. Some other submitters were concerned that their private conversations could be reported to the Police.

Additional reasons why submitters opposed Proposal Five are listed below.

- Many submitters raised concerns that making incitement to discrimination illegal could prevent individuals from expressing their opinions and restrict freedom of expression. This would prevent New Zealanders from being able to speak out against groups that spread dangerous information.
- A few submitters raised concerns around the provision's effect for individuals and counsellors dealing with gender transition issues.
- Some submitters thought the amended provision could be abused by those in power, including the Government and the Police. These submitters seemed to be unaware that the Police are not involved in a civil complaint.

Other comments for Proposal Five

189 submitters (186 individuals and 3 organisations) were unsure about Proposal Five.

A few submitters were unsure about Proposal Five. They said the proposed wording in Proposal Five was unclear and as a result, it could accordingly backfire against groups. For example, Hope Community

Church said that 'inciting hatred' and 'hateful speech' needed to be carefully defined before they could decide if they supported the proposal, especially since the word hatred has become overused and misconstrued. One submitter stated that the law in this area was described as a "very grey area, and we have all said things in that moment, that we may have regretted later" but should not be punished for such comments.

A few submitters said they did not understand Proposal Five or the civil provisions. These submitters did not support Proposal Five because not all groups in section 21 were homogenous; the Alternative Jewish Voices group said that within the protected groups there was division. For example, "spoke-people" for community agencies used their position to threaten those with dissenting views through various media. This created a "permissive environment within the community" and encouraged bullying behaviour which ostracised individuals from their own institutions and organisations. It was unclear how the legislation would impact inter-group conflicts and differences.

A few submitters were concerned Proposal Five would exclude religious leaders. It was suggested that religious leaders may not be held accountable by the law, and that it was not feasible for the Government to ensure that preaching that could contain discriminatory comments was not being done in private.

A few submitters misunderstood Proposal Five. For example, concerns were raised that the proposal would impact imports.

Proposal Six: Add to the grounds of discrimination in the Human Rights Act 1993 to clarify that trans, gender diverse, and intersex people are protected from discrimination

Submitter Data

- 524 submitters supported Proposal Six.
- 2,011 submitters opposed Proposal Six.
- 211 submitters were unsure about Proposal Six.

Inclusion of 'trans', 'gender diverse' and 'intersex' is important

- It will provide better protection to these groups and is long overdue. Well defined definitions will ensure the legislation can be appropriately interpreted.
- It recognises diversity within these groups.

Definitions need to be broader

- Terminology is constantly evolving, and a cautious approach should be taken to entrenching terms that might fall out of favour.
- It is important to balance clarity and flexibility.

Further consultation is required with the Rainbow community to ensure the correct terminology is used

- Māori and Pasifika should be specifically engaged to ensure the appropriate inclusion of culturally specific gender identities.
- Ensure a diverse range of Rainbow and queer groups and identities are represented.

No change is needed

- Section 21 already protects those identified.
- No additional protection will be provided to these groups.
- Gender diversity is too fluid to be covered in legislation and jurisprudence has developed to capture this in the existing law.

Other characteristics should be included

- Singling out 'trans', 'gender diverse' and 'intersex' promotes some groups over others.
- Everyone should be provided equal protection before the law.
- Other groups could be specifically identified including women and girls, migrants, children and the elderly, political opinion and the homeless.

Description of Proposal Six

Currently, it is against the law to discriminate against people because of their sex. The Government considers the law could be clearer about this protection applying against discriminating on the basis of a person's gender identity or gender expression, or people's sex characteristics or intersex status. Proposal Six would make amendments to the prohibited grounds of discrimination in the Human Rights Act to clarify protections for trans, gender diverse and intersex people.

Support for Proposal Six

524 submitters (478 individuals and 46 organisations) supported Proposal Six.

Many submitters considered that 'trans', 'gender diverse' and 'intersex' was appropriate language to include in section 21 of the Human Rights Act. These submitters included the Human Rights Commission, AIANZ, NZLS, Victoria University of Wellington Rainbow Law Student Society, People First New Zealand and Christchurch City Council. They supported this proposal because it was important to explicitly include these groups in the Human Rights Act, while recognising there was diversity within these groups. While they acknowledged that the catch-all term 'gender diverse' did not always fit individual identity, OUSA felt that the diversity of terminology applying to these groups could not be satisfactorily captured within legislation and commended the efforts to include culturally-specific gender identities in legal reform. Some of these submitters said that well-defined definitions would ensure that the legislation can be appropriately interpreted.

Some submitters considered that the inclusion of trans, gender diverse and intersex was a natural extension of the existing protections. These submitters, including AIANZ and Christchurch City Council, agreed that Proposal Six would provide protection to the groups that needed it. It was suggested that everyone should be protected from hate and discrimination, and this proposal would achieve this. Proposal Six would also ensure the additional groups have the right to equal treatment and were treated equally before the law, without discrimination. NCWNZ supported the proposal because trans, gender diverse and intersex people need explicit protections, and the amendment would give visibility and respect to this group of people who have often been disrespected and overlooked in the past. Auckland Action Against Poverty supported the extended protections because gender and sexual identification is an intrinsic part of who trans, gender diverse and intersex people are. A few submitters supported Proposal Six but were wary that it did not 'other' protected groups.

Many submitters said the proposal would acknowledge that 'sex' and 'gender' are different concepts. These submitters, including Lesbian Action for Visibility in Aotearoa, stated that gender and sex should be treated as separate concepts in the legislation. Another submitter agreed, noting that while the Human Rights Commission had held that the definition of sex was broad enough to include gender or the social and cultural aspects of identification with sex, at times this had been problematic. Some other submitters supported this proposal as they considered that sexual orientation and gender diversity was not a choice and therefore deserved protection.

Many submitters recognised that trans, gender diverse and intersex individuals required protection against hatred and discrimination. These submitters, including the Christchurch City Council, agreed that these groups specifically require greater protections under the Human Rights Act. The submissions highlighted the increased risk people in these groups face regarding hateful speech, hate crimes and violence more broadly.

Some submitters considered that the inclusion of 'takatāpui' in section 21 would uphold te Tiriti. These submitters, including Te Rūnanga o Ngāti Whātua said that including the term 'takatāpui' in section 21 would reflect 'us' and contribute to the Government's responsibilities to Māori under te Tiriti. It would also be inclusive for tangata whenua. InsideOUT said:

> **"We believe adding the term 'takatāpui' specifically to the Act would be a great way to protect the rights of takatāpui, send a clear message of support to this community and honour te Tiriti. The inclusion of other culturally specific terms or phrasing to encompass culturally specific experiences may also warrant consideration. However, we do believe that takatāpui rights are already covered by the language in the existing proposal as the term refers to diversity of sexual orientation, gender and variation of sex characteristics."**

One submitter said it would be helpful if the explanatory note in the eventual Bill clarified the meaning of the term takatāpui, noting that the term is used to by Māori who may identify as having a diverse gender identity, gender expression, sexual orientation and/or a variation of sex characteristics.

It was also suggested that identities such as 'whakawāhine, 'tangata ira tāne', 'wāhine', 'tāne' and 'ngā ira tāngata' could be included alongside other protected characteristics in this section. However, a few submitters were unclear if the inclusion of takatāpui would be its own named group or an example of the groups covered by terms 'trans, gender-diverse and intersex'.

Caveated support for Proposal Six

Submitters supported both broader terms and more specific terms. They suggested that umbrella terms would ensure that no groups or individuals that did not identify with the named characteristics were excluded from protection (such as "gender identity" and "gender expression"). These submitters, which included the Human Rights Commission, were mindful that terminology in this space was constantly evolving and what was appropriate a few years ago was now outdated. It was said that new groups (terminology for whom is not currently part of our cultural or legislative vernacular) may require protection in the future. The Human Rights Commission cautioned against entrenching terms that might fall out of favour. Including a specific list of identities or groups could be exclusionary and some submitters said that there should not be discrimination based on any matter of sex or gender. They said it was important to balance clarity and flexibility to ensure all identities were protected in the law from incitement to hatred.

One submitter suggested that the term "variations of sex characteristics" should be used rather than a specific list of prohibited characteristics to avoid conflating the different concepts. A few other submitters supported the protection of other culturally specific gender identities and said these identities should be referenced explicitly, either as an umbrella group or as individual identities/characteristics.

A few submitters were unclear how section 21 would protect the intersectionality of individuals who identify with more than one named characteristic. One submitter recommended:

> **"[Due to the diversity across and within rainbow and cultural groups] it would be helpful if the explanatory note in the eventual Bill and other implementation guidance clarify that culturally-specific terms may describe people whose experiences of unlawful discrimination may be protected under more than one of the grounds of sexual orientation, gender identity, gender expression, and variations of sex characteristics."**

For example, takatāpui, who could be targeted because of their gender identity and because of their race, would be protected on both grounds, not one or the other.

A few submitters were unclear how religion would be impacted by this proposal. Despite supporting this proposal, they raised concerns about the existing religious exceptions in sections 28 and 39 of the

Human Rights Act that allow for discrimination based on sex; these religious exceptions should not be extended to protect hatred against trans, gender diverse or intersex people, regardless of what any religious text, doctrine or rule may say.

A few submitters supported the protection of sex and intersex because they were biological. In comparison, they said that being trans was not biological or medical in nature, so should not be covered in the provision. There was also a view that trans and gender-diverse groups did not actually exist so they should not be included in the clause.

OUSA considered that pregnancy/menstruation should be separated from the ground of 'sex' under section 21, since this would better reflect that gender identity and the ability to be pregnant do not necessarily relate.

Some submitters requested further consultation was undertaken with the Rainbow community to ensure the correct terminology is used. This consultation would ensure that the diverse range of Rainbow and queer groups and identities are adequately represented in the terminology and subsequently protected by the provision. For example, a few submitters suggested replacing 'non-binary' with 'gender diverse', while others preferred 'gender diverse' over 'non-binary'. NCWNZ, People First New Zealand and AIANZ suggested Māori, Pasifika and others directly affected should be consulted to develop the appropriate wording that would be relevant in the New Zealand context and ensure the appropriate inclusion of culturally specific gender identities that might include (but are not limited to) 'takatāpui' and 'fa'afafine'. One submitter recommended "to be effective in clarifying and affirming existing rights, it is vital that these amendments to section 21 of the Human Rights Act are supported by education and awareness raising about legal protections for trans and intersex people."

Recommended changes to Proposal Six

Recommended amendments to Proposal Six, as suggested by the submitters, are listed in the table below.

Table 9: Submitters' recommended changes to Proposal Six

Theme	Submitters' recommended changes
Content of provision	• References to 'sexuality' should include heterosexuality, homosexuality, lesbianism, bisexuality, and asexuality because the proposed broader language would only protect against discrimination based upon sexual attraction rather than people of any gender. • Use the term 'sexual identity' instead of 'sexual orientation'. • 'Romantic identities' should be covered. • 'Gender expression' or 'non-binary' is preferable than 'gender diverse' as it provides a wider catchment area for protection, especially for gender non-conforming cisgender people, and non-European gender identities and expressions. • Include 'gender expression', 'gender identity' and 'sex characteristics' in section 21. • Include 'gender identity', 'gender expression', and 'variations of sex characteristics' (or 'gender', including gender identity and gender expression; and 'variations of sex characteristics') within the list of prohibited grounds.

Theme	Submitters' recommended changes
Undertake further consultation	• Undertake further consultation with Rainbow communities to ensure the correct terminology is used and it is broad (and flexible) enough to cover the diverse range of identities, including culturally specific gender identities like takatāpui and fa'afafine.
Additional content to support provision	• Monitor existing legislation, policies and other measures to ensure that the right not to be discriminated against on the grounds of gender identity, expression and characteristics is protected. • Include training and education around gender, sex and sexuality as part of creating a meaningful reduction in discrimination against these groups and refer to the Yogyakarta Principles.

Opposition to Proposal Six

2,011 submitters (1,980 individuals and 31 organisations) opposed Proposal Six.

Some submitters felt that the existing wording in section 21 of the Human Rights Act provided adequate protection against discrimination. They stated that section 21 did not need to be amended because it protects everyone. Submitters said that people who identify with a culturally specific gender identity would be covered under either cultural, racial, sex or gender characteristics in section 21. Most of these submitters would support removal, rather than modification, of terminology. However, some seemed to be unaware that there were already several characteristics that were protected under section 21, and thus were confused as to why only gender diverse, trans and intersex people would be specifically protected. Some submitters also said that new laws would not be able to offer any additional protections because the Human Rights Act applies to all New Zealanders. One submitter said "[t]heir rights are already covered by the Human Rights Act – unless you don't consider them human." Proposal Six was considered an overreaction and unnecessary because covert discrimination would continue whether the legislation was amended or not.

Some submitters felt that all individuals should be afforded the same level of protection. These submitters, including Voices of Freedom, opposed Proposal Six because they felt that it would provide unequal levels of protection by only including certain identities. They stated that everyone should be protected from discrimination. Concerns were also raised that the inclusion of trans, gender diverse and intersex people in section 21 could give them more rights than others. These submitters said that everyone should receive equal protection under the law, and no groups required additional protection. One submitter said they "believe the whole thing is an exercise in creating new classes of people and giving them particular rights not enjoyed by others." Some submitters were concerned that this proposal would offer additional protections to those who are named over and above everyone else.

Some submitters felt that the proposal would have unintended consequences. A few of these submitters thought the proposal would create segregation and division, worsening the cohesion in New Zealand. One submitter said that the changes could leave vulnerable groups open to legal discrimination and discriminates therefore against those who hold personal beliefs about gender identity. They also said:

"The labels for our gender-diverse whānau are constantly changing and unfortunately by putting into law a group of labels in order to be inclusive we actually end up being exclusive."

There was concern that while the proposed changes would privilege some groups, others would be disadvantaged. Some submitters were opposed to the principle of grouping people and protecting groups. They said everyone needed to be protected, not a specific list of people. Some said there were not enough groups being protected, while conversely others said there should be no specific protections for groups. Many said the proposal failed to protect all individuals as equals. By adding more people to the list of protected groups, these groups are simply open to more legal risk and criticism.

A few submitters said that other characteristics should also be explicitly named in section 21. Suggestions for inclusion in section 21 included women and girls, disability, migrants, anti-vaccinators, obese people, European New Zealanders, children and the elderly, political opinion, 'Boomers' and 'Millennials', and the homeless.

Concerns were raised about the proposed terminology. Submitters, including the Free Speech Union, opposed the proposal's draft wording because there was limited consensus around the meaning of the terms used in the proposal and who they would be applied to. It was said that adding more groups would cause more issues because there would be a never-ending list of groups to add given that gender and sex identity are issues that are consistently shifting. One submitter said that the law did not keep up to date with social dialogue and therefore the language used should be cast wider than to specific groups to include sexual preferences and identities in the future. It was said that gender is an evolving concept so the Ministry should not attempt to define it but stick with the terms 'male', 'female' and 'other'. The Free Speech Union said:

> **"Given the extensively disputed nature of gender ideology, and the strongly opposing views found in numerous communities in New Zealand related to trans, gender diverse, and intersex people, to provide these groups with more rights or protections than those that would be provided to any other New Zealander is unhelpful, divisive, and very possibly counterproductive."**

The Hope Community Church said that the "ambiguity and debated nature of gender expression may make it very difficult to clarify the grounds of discrimination." They continued by stating that the current language in the Human Rights Act is sufficiently clear when read alongside a definition of 'incitement of hatred'. It was also suggested that Proposal Six would only capture individuals who are not heterosexual or monogamous. In comparison, few submitters requested the terminology was broadened to ensure all groups that need to be protected are covered but did not provide any examples.

Some submitters opposed the suggested inclusion of culturally specific definitions. These submitters did not understand why culturally specific terminology should be included in the provision. A few of these submitters opposed the inclusion because these cultural identities are already protected elsewhere in section 21 of the Human Rights Act. It was said that the terms 'takatāpui' and 'fa'afafine' cannot necessarily be equated with the suggested terms gender diverse, intersex and trans. While there were many terms that can be used in Pasifika languages, submitters said it would be reasonable to ensure that the legislation contains appropriate terms that are commonly used in New Zealand and the Pacific regions. One submitter specifically mentioned that there were no protections for wāhine Māori. They said that "the concept of 'takatāpui' is completely abstract and not recognised across Māoridom as claimed in the document. This would force a culturally contentious term and concept into Māori culture," when it is not even clear if this term was widely accepted.

Some submitters felt that sex and gender were related, not separate, concepts. Biological sex was seen to supersede gender identity or expression, and gender diversity was not a priority area for protection under the Human Rights Act. As a result, submitters favoured the inclusion of intersex

people in section 21 over the trans and gender-diverse groups. Others said that gender was too fluid in its definition to be included in the provision. One submitter said:

"It is vital that we simply protect all groups of people, no matter their shared characteristic from freedom from discrimination (with reason). I do not mean to mimic the ideas of those behind the "All Lives Matter" movement, and recognise those who identify as gender-diverse suffer from discrimination at much higher rates than heteronormative New Zealanders. However, I believe that the above terminology fails to address the issue and merely addresses a few symptoms of the real discrimination problem."

Some submitters opposed the proposed wording because they did not consider that trans, gender diverse and intersex people should be explicitly protected. Some of these submitters said that this was because they believed gender diversity and transgenderism to be a choice and not an inherent part of someone's identity. The remaining submitters rejected the idea that sex and gender were separate concepts. They said that there were only two genders and said that intersex humans do not exist, so there is no need to include them in the provision.

Some submitters considered that broadening section 21 to include trans, gender-diverse and intersex people could reduce social cohesion and create more divisions in society. The proposal was considered separatist. Concerns were raised that women may be negatively affected as they were a group that had been historically oppressed and discriminated against. It was felt that they would lose protections because they would be encompassed within an umbrella term which would not give adequate attention to the needs of women. Moreover, it was said that there are other groups and individuals that could lose legal protections because the labelling of groups is divisive and can turn people against each other. Further, submitters said that it can turn people into victims which dehumanises them and negatively affects them.

A few submitters opposed identifying individuals by their sexuality. It was seen to be disempowering because it forces people to identify with certain labels. They said that singling out trans people could result in further persecution as they would be seen as a special entity in the eyes of the law instead of simply being a human.

Other reasons why submitters opposed Proposal Six are listed below.

- Many submitters raised concerns that Proposal Six would limit freedom of expression because it may prevent important discussions around gender and sex theory. It could also prevent people from sharing their opinion about biological sex and gender.
- There were concerns that Proposal Six would restrain religious expression.
- It was unclear how the legislation would be implemented when two protected groups spoke out about one another.
- Proposal Six did not need to be amended because section 21 aligned with New Zealand's international obligations.

Other comments for Proposal Six

211 submitters (208 individuals and 3 organisations) were unsure about Proposal Six.

Some submitters were uncertain if they supported or opposed proposal six. A few of these submitters were undecided because the discussion document did not provide sufficient definitions for the identity groups, or they felt unable to comment on this issue. A few other submitters said the language used

in the proposal requires more nuance and stronger definitions. In particular, they would have liked to have seen clearer definitions of discrimination, and were concerned about the impacts of misgendering trans or non-binary people or using incorrect pronouns. Other submitters wanted clarity to ensure they operated within the confines of the law, and to ensure others do so also.

Some submitters did not feel able to comment on the inclusion of 'takatāpui'. These submitters did not understand what 'takatāpui' meant, or commented more broadly about their lack of understanding around culturally specific needs and terminology. A few of these submitters deferred to the cultural knowledge and competency of others, and thus did not want to comment on whether the proposal appropriately protects culturally specific gender identities.

Some submitters said that the impact that this proposal would have on women's rights was unclear. These submitters said more clarification was needed to ensure that trans' rights did not impose on women's rights, freedom and safety. The Free Speech Union stated that Proposal Six would blur the lines around freedom of expression: "the claims of the trans-community, under the proposed changes, could be easily interpreted as 'hateful' of women; the claims of some women regarding the nature of previously biological men who identify as women also 'hateful'." It was also suggested consideration be given to trans integrations in areas such as sport to provide the necessary support for both the trans community and affected cisgender communities.

One submitter felt that there was insufficient time to consult on Proposal Six. FIANZ commented that they had not had a chance to consult with their community about the appropriateness of proposal six.

A few submitters misunderstood Proposal Six and raised concerns it would create a 'slippery slope.' It was suggested that if protections are added for the specified groups that soon all forms of sexual deviancy could be protected in the law, including paedophilia.

Other issues raised by submitters

Out of scope issues

Some submitters raised matters that were outside the scope of the proposed changes, many of which were unrelated to the incitement of hatred and discrimination.

To ensure consistency with the proposed hatred and discrimination laws, some submitters said amendments should be made to other pieces of existing legislation. This included the Education and Training Act 2020 and proposed legislation including the Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill. One submitter suggested that the laws regulating objectionable material be updated to protect people from harmful depictions. Submitters also said the Police and Human Rights Commission should be provided with extra resources to locate, respond to, and prosecute hate related crime.

OUSA recommended adding visa status or immigration status to section 21(1) of the Human Rights Act, as this would ensure that immigrants were better protected from discrimination. The Human Rights Commission also identified other areas in the Human Rights Act that required updating. They said:

> **"In particular, the areas of discrimination set out in Part 2 of the Act, especially the exceptions provisions, ought to be reviewed. The review should consider whether those parts of the Act are still fit for purpose in the contemporary context and in light of developments in human rights law and policy (including the consequential effects that enactment of these proposals might bring). For example, policies aimed at improving inclusivity in the labour market for disabled people might require fresh consideration of the current exceptions provisions (which set out defences) regarding disability discrimination in employment. The grounds of discrimination also require a general review. For example, the definition of "sexual orientation" under Section 21(m) uses dated terminology."**

Some submitters said the Government needed to work alongside marginalised communities to ensure the proposed changes were not progressed in a silo, and would adequately reduce discrimination, stigma and exclusion. It was suggested that the Government should work with communities to build up trust that had been destroyed in the past. There was also a view that Government should seek to implement policies and other initiatives instead of legislation. This would promote a greater understanding of people from every stratum of society. This could be done, for instance, by involving communities in the re-settlement of new arrivals, and, through education. AIANZ said:

> **"While we welcome work in this area, we note that, in isolation, regulation of speech that incites hatred does not address the root causes of racism, prejudice and intolerance. While such regulation is a key part of the jigsaw and can help prevent the conditions that give rise to harassment, threats, discrimination and violence, the effective protection and social inclusion of all people requires broader interventions."**

Many submitters took the opportunity to comment on other government policy initiatives. Some submitters commented negatively about changes being made in the Conversion Practices Prohibition Legislation Bill, as well as restrictions to fundamental rights and freedoms under recent laws such as

the End of Life Choice Act 2019, and the COVID-19 Public Health Response Act 2020. Other submitters said the Government should be focused on more pressing human rights issues such as poverty, health including mental health, and social welfare.

A few submitters also mentioned that the Government should focus on better investigating existing crimes occurring in New Zealand. They also used the consultation process to raise human rights violations occurring overseas, including the persecution of minority populations in China, Iran and some African countries. Human trafficking and incidences of modern-day slavery in New Zealand were raised.

Some submitters commented generally about the justice system and the criminalisation of other communities. The Aotearoa Legalise Cannabis Party mentioned, for example, prosecution and hate that was directed towards the cannabis community. Other submitters were concerned about incarceration being used as a method of punishment. They said that Māori and Pasifika were already unfairly represented in the penal system, and it was not helpful to use an already over-worked system as the primary measure of response to the crime.

As noted earlier in the report, several submitters opposed the use of the word Aotearoa in the discussion document. They said this term was hateful towards the majority of New Zealand who were English speaking.

Summary of changes proposed by submitters

This section provides a summary of the changes to the proposals that were suggested by submitters.

Table 9: Summary of all changes proposed by submitters for Proposals One to Six

Theme	Submitters' recommended changes
Proposal One: Change the language in the incitement provision so that they protect more groups that are targeted by hateful speech	
Inclusions in section 21	• Consider further which groups should and should not be included in the broadened provision: – include 'gender orientation' and 'disability' but exclude 'political opinion' and 'marital status' – only include group characteristics that are not a matter of choice ('race', 'ethnicity', 'disability' and 'sexuality').
Future proofing the legislation	• Instead of naming specific groups, the provision should include protected groups that are broadly framed and a 'catch-all' category so that all personal characteristics are protected and the legislation is flexible. • Amend section 61 with broad language so "any new grounds can be automatically covered by incitement and discrimination" without future amendments to the Human Rights Act.
Freedom of expression and religion	• Only include 'religious belief' if it protects the freedom of religious expression and the provision maintains a sufficiently high threshold for prosecution.
Group coverage	• Ensure 'evidence of harm' towards the particular group is considered.
Proposal Two: Replace the existing criminal provision with a new criminal offence in the Crimes Act that is clearer and more effective	
Content of provision	• Include 'deliberate or ongoing acts of exclusion and erasure.' • Consider only criminalising 'incitement to violence' and 'intent to strengthen hatred.' • Include 'conduct that maintains or normalises violence'. • Include 'conduct likely to lead to marginalisation and discrimination against groups and the end product, hatred.'
Structure of provision	• Provide clear, objective definitions for all words included in the provision. • Incorporate the Rabat Plan of Action six-part threshold test, which will enable enforcement agencies to determine whether a particular statement reaches the level of incitement to hatred or discrimination.

Theme	Submitters' recommended changes
	• Ensure that examples of hate speech and hatred that are prosecuted under the proposed legislation are provided to the public, particularly for neurodiverse individuals or those within the learning disability community. • Include different levels of criminality to prevent speech that is offensive but does not incite hatred or discrimination.
Implementation of Proposal Two	• Provide additional safeguards to ensure that only 'extreme hate speech' is a criminal offence and ensure a high threshold for liability is included so that freedom of expression is protected. • Ensure that the media are exempt from the criminal offence if they report events that may include discrimination or hatred.
Leave provision in Human Rights Act	• Keep the criminal provision in the Human Rights Act because of the careful and deliberate balance of human rights and responsibilities that is required. Moving the provision to the Crimes Act would take the provision out of context.
Wider support for Proposal Two	• Include restorative justice in the legislation and supplement penalties with education, training and a broader social cohesion programme.
Proposal Three: Increase the punishment for the criminal offence to up to three years' imprisonment or a fine of up to $50,000 to better reflect its seriousness	
Content of provision	• Provide that the penalties should only be for: – 'hate speech that incites violence'; or – 'intent to cause harm' that can be proven; or – 'incitement to commit violence'.
Penalties	• Reduce the imprisonment term to one year maximum. • Make the fine dependent on the wealth of the offender so that individuals or organisations with greater access to funds are still deterred from committing crimes of discrimination or hatred. • Reduce the fine because the increase is disproportionate compared to Consumer Price Index changes.
Additional content to support provision	• Incorporate certain cultural practices (including tikanga Māori) into the consequences for offenders. An example suggested was the use of ifoga in the Government apology for the Dawn Raids. • Allow iwi panels to have a role in addressing hate crimes and allowing other community groups to engage in restorative work that is specific to their culture and needs. • Conduct further engagement with the Department of Corrections to ensure that penal punishments are an appropriate avenue when criminalising inciting hatred and discrimination. • Fund programmes to support education initiatives to make the public aware of discrimination and hatred laws, as this would reflect the all-of-Government integrated approach that the Royal Commission suggested in their findings.

Theme	Submitters' recommended changes
Proposal Four: Change the language of the civil incitement provision to better match the changes being made to the criminal provision	
Content of provision[3]	• Change the language from mere description of legislation dealing with 'hate crime' into the legal discussion of motivation and hostility towards a group for the purpose of prosecution. • Replace 'likely to excite hostility against or bring into contempt any group of persons' with 'intentionally incite/stir up hatred against any group of persons'. • Consider including the following characteristics: – 'gender', 'age, 'political belief', 'religion' 'religious belief and non-belief', 'sex', 'sexual orientation' as protected categories, as well as historical affiliations, membership of legal or illegal organisations, 'disabled, neuro-diverse and mentally ill people' and 'regional discrimination' – include the words 'any sub-group' rather than specifying group characteristics • Remove all references to race as this causes division.
Structure of provision	• Ensure the provision includes clear definitions for all words included in the provision, excludes private conversations and religious opinions, and provides the defence of truth. • Include only violent actions (therefore excluding violent words or thoughts) and remove language that is merely insulting, but not abusive, from the civil and criminal provisions. • Address incitement spread online to future-proof the civil provision.
Implementation of Proposal Four	• Ensure the media are exempt from the civil provision when reporting hatred or discrimination. • Lower the liability threshold in the civil provision to below the criminal provision because civil proceedings offer a way to pursue cases that cause harm but do not meet the high threshold for criminal proceedings.
Proposal Five: Change the civil provision so that it makes 'incitement to discrimination' against the law	
Content of provision	• Provide a clear definition for 'incitement to discrimination' so the provision is easily understandable and does not unduly impinge on free speech and religious expression or include simple disagreements. • Remove 'likely' from the clause so it is only illegal behaviour if discrimination occurs. • Change the wording to the 'incitement of violence and/or sustained harassment' not the 'incitement to discriminate' as this is too broad.

[3] It is worth noting that submitters provided multiple recommendations that are relevant to Proposal One when commenting on Proposal Four (see 'Content of the provision' recommendations). These are included in both places to accurately reflect where submitters raised these comments.

Theme	Submitters' recommended changes
Implementation of Proposal Five	• Ensure the threshold is high so civil lawsuits are not used to shut down legitimate criticisms.
Proposal Six: Add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination	
Content of provision	• References to 'sexuality' should include heterosexuality, homosexuality, lesbianism, bisexuality, and asexuality because the proposed broader language would only protect against discrimination based upon sexual attraction rather than people of any gender. • Use the term 'sexual identity' instead of 'sexual orientation'. • 'Romantic identities' should be covered. • 'Gender expression' or 'non-binary' is preferable than 'gender diverse' as it provides a wider catchment area for protection, especially for gender non-conforming cisgender people, and non-European gender identities and expressions. • Include 'gender expression', 'gender identity' and 'sex characteristics' in section 21. • Include 'gender identity', 'gender expression', and 'variations of sex characteristics' (or 'gender', including gender identity and gender expression; and 'variations of sex characteristics') within the list of prohibited grounds.
Undertake further consultation	• Undertake further consultation with Rainbow communities to ensure the correct terminology is used and it is broad (and flexible) enough to cover the diverse range of identities, including culturally specific gender identities like takatāpui and fa'afafine.
Additional content to support provision	• Monitor existing legislation, policies and other measures to ensure that the right not to be discriminated against on the grounds of gender identity, expression and characteristics is protected. • Include training and education around gender, sex and sexuality as part of creating a meaningful reduction in discrimination against these groups and refer to the Yogyakarta Principles.

Appendix 1: Discussion document questions

Proposal 1

Do you agree that broadening the incitement provisions in this way will better protect these groups? Why or why not?
In your opinion, which groups should be protected by this change?
Do you think that there are any groups that experience hateful speech that would not be protected by this change?

Proposal 2

Do you agree that changing the wording of the criminal provision in this way will make it clearer and simpler to understand? Why or why not?
Do you think that this proposal would capture the types of behaviours that should be unlawful under the new offence?

Proposal 3

Do you think that this penalty appropriately reflects the seriousness of the crime? Why or why not?
If you disagree, what crimes should be used as an appropriate comparison?

Proposal 4

Do you support changing this language in section 61? Why or why not?
Do you think that any other parts of the current wording of the civil provision should be changed?

Proposal 5

Do you support including the prohibition of incitement to discriminate in section 61? Why or why not?

Proposal 6

Do you consider that this terminology is appropriate?
Do you think that this proposal sufficiently covers the groups that should be protected from discrimination under the Human Rights Act?
Do you consider that this proposal appropriately protects culturally specific gender identities, including takatāpui?

Appendix 2: Organsations that made submissions

This is the list of organisations or groups that made submissions.

Civil Society and Community Groups

- Auckland Action Against Poverty
- Family First
- Merge NZ
- Outing Violence
- Porirua Kapiti Community Law Centre Trust
- Restorative Practices Aotearoa
- Sticks ‘n Stones
- Tohatoha Aotearoa Commons

Education Organisations

- Massey University Center for Culture-Centered Approach to Research and Evaluation
- New Zealand Union of Students’ Associations, Te Mana Ākonga, Tauira Pasifika and the National Disability Students’ Association
- Otago University Students’ Association (OUSA)
- University of Otago Centre for Theology and Public Issues
- Victoria University of Wellington Students’ Association

Human Rights Organisations

- Amnesty International Aotearoa New Zealand (AIANZ)
- Disabled Persons Assembly New Zealand
- Equal Justice Project
- Families for Justice
- Free Speech Union
- Human Rights Team of the Wellington Community Justice Project
- Maxim Institute
- New Zealand Council for Civil Liberties
- People First New Zealand
- Safer Future Charitable Trust
- Sanctuary Human Rights Committee
- Transparency International New Zealand
- Voices for Freedom

Central and Local Government Organisations

- Classifications Office
- Creative New Zealand
- Christchurch City Council
- Human Rights Commission
- NetSafe
- Te Rūnanga o Ngā Toa Āwhina (Public Service Association)

Ethnic and Migrant Organisations

- Belong Aotearoa
- Diversity Works New Zealand
- Federation of Islamic Associations of New Zealand
- Inclusive Aotearoa Collective Tāhono
- Islamic Women’s Council of New Zealand
- New Zealand ex-Muslims
- Pacific Youth Leadership and Transformation Trust
- United Sri Lanka Association

Internet, News and Media Outlets

- Business Media Services
- InternetNZ
- Media Freedom Committee
- NZME publishing
- Rhema Media

- Stuff
- Twitter

Māori

- Hāpai te Hauora Tāpui
- Hohou Te Rongo Kahukura
- Nga Roera Kaitiaki o Te Ture Kooti
- Te Rūnanga o Ngāti Whātua

Professional Organisations

- Business New Zealand
- New Zealand Bar Association
- New Zealand College of Midwives
- New Zealand Law Society (NZLS)
- The New Zealand Society of Authors, Te Puni Kaituhi o Aotearoa (PEN NZ) Inc

Political Organisations

- Act Party
- Aotearoa Legalise Cannabis Party
- Attica
- Outdoors Party

Rainbow Groups

- Gender Minorities Aotearoa
- InsideOut
- Lesbian Action for Viability in Aotearoa
- Nelson Pride
- Rainbow Law University of Auckland
- Rainbow Law Students at Victoria University of Wellington
- Hohou Te Rongo Kahukura – Outing Violence
- Rainbow Wellington
- Safer Spaces

Religious Organisations

- Alternative Jewish Voices
- Archdiocese of Wellington
- Association of Catholic Women
- Auckland Rainbow Community Church
- Avalon Assembly of God
- Avonhead Baptist Church
- C3 Church Wellington
- Calvary Chapel NZ
- Catholic Archdiocese of Wellington
- Catholic Education Office
- Catholic Theological College
- Christian Education Trust
- Cornerstone Church Trust Christchurch
- Destiny Church
- Hope Community Church
- Life Church Otara
- Lincoln Chinese Church
- Kawerau Presbyterian Church
- New Life Churches
- New Zealand Buddhist Council
- New Zealand Catholic Bishops' Committee for Interfaith Relations
- New Zealand Council of Christian Social Services
- New Zealand Christian Network
- New Zealand Jewish Council (NZJC)
- Palmerston North Interfaith Group
- Reformed Churches of New Zealand
- Reformed Congregation of Carterton
- Religious Communities Leadership Forum
- Salvation Army
- Seventh Day Adventist Church
- Social & Ecumenical Action Committee of the Parish Council of St Andrew's Presbyterian Church Hamilton
- St Andrew's Presbyterian Church
- St Stephen's Presbyterian Church Invercargill
- Wellington Interfaith Council
- Working Together Group

Women's Groups

- Business & Professional Women New Zealand
- Me Too NZ
- National Council of Women New Zealand (NCWNZ)
- New Zealand Federation of Business and Professional Women
- Save Women's Sport Australasia
- Speak Up for Women

- Women's International League for Peace and Freedom

Other groups

- Auckland Property Investors' Association Incorporated
- Business Protection Brokers
- Direct Action Everywhere New Zealand
- Humanist Society of New Zealand
- Instrumental Engineering
- New Zealand Association of Rationalists and Humanists
- NZ Skeptics Society
- Psychiatric Survivors Advocacy Aotearoa New Zealand
- Progress New Zealand Incorporated
- Relationship Solution