

Interim Impact Summary: Public discussion document - Proposed changes to the incitement provisions in the Human Rights Act 1993

Section 1: General information

Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Interim Regulatory Impact Statement, except as otherwise explicitly indicated. This interim analysis and advice have been produced for the purposes of informing:

- Cabinet's decision to approve the release of a public discussion document and
- the public and stakeholders to be consulted on the discussion document.

Key Limitations or Constraints on Analysis

- The impact summary is an interim assessment to support Cabinet's decision on public consultation.

Scope and range of options considered

- The consultation focuses on in-principle proposals agreed to by Cabinet in December 2020. There was no impact analysis provided for this Cabinet decision due to time constraints.
- The proposals in the discussion document stem from recommendation 40 in the report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (Royal Commission) and the Ministry of Justice's review of the incitement provisions in the Human Rights Act 1993 (HRA) which was announced by the Minister of Justice in March 2019. Labour's 2020 Election Manifesto also committed to extending legal protections under the Human Rights Act 1993 for groups that experience hate speech, referred to as speech that incites hatred (including for reasons of religion, gender, disability, or sexual orientation).
- This policy work focuses narrowly on inciting speech, the specific type of hate speech covered in the HRA, rather than other types of harmful speech (for example, offensive conduct, abuse or intimidation). There are other protections for these types of harmful speech. The proposals also do not address wider societal issues of discrimination or racism, including hate crime more broadly.
- Where appropriate, this impact summary includes information on further changes to the incitement provisions that could be considered prior to final policy decisions being made by Cabinet.

Assumptions

- s9(2)(f)(iv)

Limitations on evidence


- The benefits of the suggested changes are difficult to quantify as they are non-tangible (such as to make New Zealand a safer, more inclusive place).

- The lack of baseline data on the occurrence of inciting speech makes it difficult to assess the impacts as well as the extent of the problem.
- Related work being carried out by various government agencies, for example, to improve social cohesion, makes it difficult to assess the full benefits of strengthening the incitement provisions in isolation.

Limitations on consultation

- The proposals are based on limited and focused consultation to date.
- The public consultation process can provide an opportunity to strengthen the policy analysis and make new information available which can enable a reassessment of impacts and assumptions. It may result in changes to the proposals
- The public consultation can also lead to better understanding of the proposals and their objectives.

Responsible Manager (signature and date):



Jenna Reid

Policy Manager, Civil Law and Human Rights
Policy Group
Ministry of Justice

28 April 2021

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

The Ministry of Justice's RIA QA panel has reviewed the *Interim Impact Summary: Public discussion document – Proposed changes to the incitement provisions in the Human Rights Act 1993* prepared by the Ministry of Justice and considers that the information and analysis summarised in the Impact Summary meets the QA criteria.

Quality Assurance Assessment:

As interim analysis to support public consultation on proposals, the panel considers the Impact Summary is as complete and thorough as it needs to be prior to that consultation. As the Impact Summary notes, the initial consultation informing the analysis was with population groups at risk of experiencing hate speech. Broader consultation with the wider public will enable more robust analysis of the balance between competing rights and interests, particularly freedom of expression. Constraints and evidence gaps are clearly identified, and mitigations prior to Cabinet's final decisions are well-signalled.

Reviewer Comments and Recommendations:

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

The current law prohibits inciting speech

There is no universally accepted legal definition of hate speech. The term does not appear in any New Zealand legislation. It is generally understood to include any kind of communication in speech, writing, or behaviour that attacks or denigrates a person or group because of who they are, for example based on their religion, ethnicity, race, colour, disability, sex or gender identity.

The review by the Ministry of Justice in 2019 was focused on sections 61 and 131 of the HRA, which prohibit speech that is likely to incite others to feel hostility, ill-will, ridicule or contempt towards a group based on their colour, race, or ethnic or national origins. In this document, these sections are referred to as the 'incitement provisions', and the type of hate speech they address is referred to as 'inciting speech'.¹

Section 61 is a civil provision, where complaints are handled by the Human Rights Commission in the first instance, potentially followed by proceedings at the Human Rights Review Tribunal (Tribunal). Section 61 makes it unlawful to publish or distribute threatening, abusive, or insulting words likely to incite hostility or bring into contempt any group on the ground of colour, race, or ethnic or national origins. Section 61(2) contains a 'privilege' for media saying that stating that an accurate report of another person's communication is not an incitement under s 61.

Section 131 is a criminal offence, with a maximum penalty of three months' imprisonment or a fine of up to \$7,000. Section 131 makes it a criminal offence to publish or use words that are threatening, abusive, or insulting and which are likely to incite hostility or ill will against, or bring into contempt or ridicule, any groups on the ground of colour, race, or ethnic or national origins. Section 131 requires that there be an intention by the person to incite hostility, ill will, contempt, or ridicule. Section 132 requires the Attorney-General's consent for a prosecution under section 131.

Hate speech causes significant harm

Hate speech seeks to divide communities, hinders social cohesion and affects communities' human rights (such as the integrity of the person, freedom to associate, religion, and freedom of expression). Literature reviewed by the Ministry shows that exposure to demeaning and derogatory comments has a cumulative negative effect,² and this impact was highlighted during the 2019 engagement with groups as part of the Ministry's review. These engagements indicated that hate speech affects many New Zealanders who belong to various population groups. Hate speech can also have significant effects on individuals, including psychological harm and impacts on how they behave within society because they feel unsafe.³ For example, they may choose to be silent and invisible in their interactions with others or in society more generally. At the extreme end, there is evidence of the spread of hate speech and inciting speech (alongside

¹ The Royal Commission's recommendations and the Government's in-principle proposals refer to 'stirring up' as opposed to 'inciting'. This impact summary uses the term incitement which is a common term used internationally (for example in the International Covenant on Civil and Political Rights).

² E.g.: Waldron, J. (2012). The harm in hate speech. Harvard University Press – defamation of a minority group through hate speech undermines the public good of an inclusive society.

³ E.g.: Matsuda, M. J. (2018). Words that wound: Critical race theory, assaultive speech, and the first amendment. Routledge (feelings of 'humiliation, isolation, and self-hatred').

other circumstances) being a precursor to violence and extremism.⁴ The Royal Commission echoed these harmful impacts of hate speech.⁵

Incitement provisions only cover a limited range of groups

The provisions focus only on race, ethnicity and nationality. They are narrow because they were primarily enacted to fulfil New Zealand's international obligations, specifically under the Convention on the Elimination of Racial Discrimination (CERD). However, it is clear from complaints to the Human Rights Commission and Police, and a review of media reports and literature, that other groups, for example religious groups, non-binary persons or persons with disability, do experience inciting speech and hate speech. This was reinforced by targeted engagements undertaken as part of this review. This is also an inconsistency within the Human Rights Act as the Act protects a wide range of groups against discriminatory behaviour in section 21 (such as discrimination based on religion, sex or disability of a person).

This issue was also identified by the Royal Commission as it was concerned with the lack of coverage for religious groups.

The criminal offence does not reflect the seriousness

The inclusion of a criminal provision (section 131) in the HRA is a poor regulatory fit, as the HRA framework is designed to provide civil remedies, using a complaints mechanism through the Human Rights Commission in the first instance. When in the 1970s, the predecessor of section 131 was primarily included to fulfil international obligations, enforcement of the provision may not have been fully considered. The penalties are also low compared to similar offences, such as the Films, Videos, and Publications Classification Act 1993 and the Harmful Digital Communications Act 2015.

This issue was also identified by the Royal Commission, that said its placement and penalty was about signalling and standards-setting.

The wording of the incitement provisions lacks certainty

The Royal Commission stated in its report that section 131 lacked the necessary clarity required to be a basis for criminal liability. It is unclear what exactly the different behaviours in the incitement provisions (contempt, hostility, ill-will, ridicule) are intended to cover and what the differences are.

The analysis highlighted that gender identity, gender expression, sex characteristics or intersex status are not explicitly included in the HRA

When looking at the groups that sections 61 and 131 cover, the analysis of policy options made it apparent that gender, including gender identity and gender expression, and sex characteristics, is not listed in the prohibited grounds of discrimination in section 21 of the HRA. However, since 2006 the government position has been that sex discrimination includes gender identity. This is also the Human Rights Commission's approach.

This position has not been tested by the courts. Gender and sex are different concepts, and the concept of gender has evolved beyond binary biological determinants and covers a wide range of identities and expression. This creates a degree of uncertainty as to how a court would respond if presented with questions of gender discrimination. Even in the

⁴ E.g.: United Nations Special Rapporteur on minority issues, Rita Izsák, 2015 report: "Although not all hateful messages result in actual hate crimes, hate crimes rarely occur without prior stigmatization and dehumanization of targeted groups and incitement to hate incidents fuelled by religious or racial bias."

⁵ From para 14 of the 'Companion Paper' <https://christchurchattack.royalcommission.nz/publications/comp/introduction/>.

absence of this uncertainty, including gender implicitly within the ground of sex does not respect the experience of transgender/non-binary people.

This issue has also been identified at the UN Human Rights Council at the Universal Periodic Review (UPR) of New Zealand in January 2019 and by the UN Committee on the Elimination of Discrimination against Women in July 2018. The New Zealand Human Rights Commission and groups representing transgender/non-binary communities in New Zealand have also raised concerns.

In addition, while initial analysis suggests that sex characteristics and intersex status would be covered already under the ground of sex discrimination, both international and domestic organisations recommend explicit inclusion of these concepts.

The incitement provisions are seldom used

There is a lack of data on the prevalence of hate speech and particularly inciting speech. The incitement provisions are seldom used, which does not appear to reflect the likely incidence of inciting speech.⁶

Between 1 June 2016 and 16 March 2021, the Human Rights Commission received 337 complaints regarding racial disharmony. None of these proceeded to mediation. There may be a number of reasons for this, including the willingness of parties to attend mediation. Another factor is the high threshold for section 61. This high threshold was noted by both the Human Rights Review Tribunal and the High Court in *Wall v. Fairfax*, when the Court stated in relation to offensive cartoons published by Fairfax media that:⁷

the publications, although offensive, were not likely to excite hostility or contempt at the level of abhorrence, delegitimisation and rejection that we consider could realistically threaten racial disharmony in New Zealand and which is therefore captured by the section.

Only one complaint under s 61 has been heard by the Human Rights Review Tribunal and only a small number of cases were considered by its predecessor, the Complaints Review Tribunal. There is only one criminal conviction dating back to 1979.⁸

People experiencing hate speech or inciting speech may also be unaware of the option to complain or put off if they do not see any action being taken.

The need for intervention

If the incitement laws are not amended, the negative effects of inciting speech would continue to affect New Zealand society and population groups likely to experience inciting speech. This includes effects on overall safety in New Zealand. New Zealand society is likely to become even more diverse over time, therefore, the negative impacts of ineffective incitement laws might increase.

Inciting speech could include the type of online communications that were associated with the Christchurch terror attack in March 2019. Extremism appears to have become more common in recent years, especially with the use of online tools. This trend may continue making the need to have more appropriate laws to respond more urgent.

In addition, international human rights bodies are likely to continue to discuss New Zealand's incitement laws and make recommendations. For example, the United Nations Committee on the Elimination of Racial Discrimination raised concerns about the

⁶ For example, a 2018 Netsafe survey found that 1 in 10 adult New Zealanders reported being personally targeted by online hate speech. Note that this is wider than inciting speech. <https://www.netsafe.org.nz/wp-content/uploads/2019/11/onlinehatespeechsurvey-2018.pdf>

⁷ *Wall v Fairfax* [2018] NZHC 104.

⁸ *King-Ansell v Police* [1979] 2 NZLR 531.

application of the incitement provisions and the lack of prosecutions in its 2017 Concluding Observations to New Zealand.

In any event, the problems identified with the current laws would continue. For example, the protection of transgender/non-binary and intersex people would remain ambiguous and there would continue to be an inconsistency within the HRA in relation to the protections against incitement compared with discrimination more generally.

Evidence of the problems

The identification of the problems with the current law is to a large extent based on early focused engagements with affected communities, consultation with agencies, an assessment of the application of the existing provisions to date, national and international research.

Based on this, while it is difficult to assess how often inciting speech occurs, it is evident that the current provisions do not work well and should be improved.

A key source of information for determining whether there are issues with the current situation was the Ministry's early focused engagement with groups that are vulnerable to experiencing hate speech.⁹ The purpose of this consultation was to hear about personal experiences with inciting speech and wider hate speech. In addition, in 2019 and early 2020 the Ministry discussed options with relevant government agencies. Information from these engagements and discussions informed the Ministry's development of options. However, agency consultation immediately prior to Cabinet's December 2020 decision was limited, in particular in terms of allowing for time to engage deeply with the proposals and their implications.

There has also been limited consultation with Māori. While Māori were included in some of the focused engagements, there has been no consultation on the options or proposals.

2.2 Who is affected and how?

The proposals would potentially affect all people and communities in New Zealand.

The proposals are intended to protect all groups that are likely to experience inciting speech. This is a large percentage of New Zealanders. For example, in 2018, there were approximately 775,000 Māori, 700,000 Asian, 380,000 Pacific and 70,000 Middle Eastern/Latin American/African New Zealanders. In 2013, 24 per cent of the New Zealand population were identified as being disabled, a total of 1.1 million people. In 2018, about 220,000 people reported Hinduism, Islam or Sikhism as their religion, and overall half of the population 'had' a religion. In 2018 over 4 per cent of the population identified as not heterosexual or straight.¹⁰ An academic 2019 survey shows a significantly higher rate among high school aged adolescents.¹¹

The proposals are relevant for society as a whole as they aim to protect people from the effects of inciting speech and dissuade the making of statements that are intended to incite hatred or hostility towards a population group.

⁹ The review of the incitement provisions was informed by focused engagements with over 120 members of population groups that experience hate speech.

¹⁰ All figures from Statistics NZ website.

¹¹ 16% of participants reported they were same-or multiple-sex attracted, not sure, or not attracted to any sex
www.youth19.ac.nz/news/2021/4/16/two-new-youth19-briefs-released.

2.3 What are the objectives sought in relation to the identified problem?

The objectives are:

- to ensure that groups that are subject to inciting speech are protected by the incitement provisions in the HRA;
- to ensure that the criminal and civil provisions appropriately reflect the behaviour that should be covered while appropriately preserving the right to freedom of expression; and
- to ensure that the criminal provision for inciting speech signals the seriousness of the behaviour.

Section 3: Options identification

3.1 What options have been considered?

Options considered

Several approaches were assessed, aimed at ensuring that the incitement provisions are more effective. The options relate to:

- the specific groups protected
- the behaviours covered by the provisions and the wording used to reflect this
- the *mens rea* (mental) elements required as part of the test
- the criminal law mechanism
- including gender, gender identity, gender expression, and sex characteristics / intersex status in the HRA.

Options not considered in detail

s9(2)(f)(iv)

Removing the section 132 Attorney-General consent requirement for prosecutions is not assessed in this impact summary. Similarly, the Ministry has not assessed whether the 'media privilege' in section 61(2) should remain in place.

The Ministry also identified, but did not consider in detail, other policy options for the types of incitement behaviours that could be included in the incitement provisions:

- Whether incitement to *discrimination of a group* could be subject to the criminal provision. This option was disregarded as this would be a disproportionate response to behaviour generally addressed with civil law measures.
- Adding the incitement of *fear of a group* to the civil and criminal provisions. This option was seen to be disproportionate and too vague.
- Aligning the two provisions by adding ill-will and ridicule to the civil provision. However, there is a risk of overly limiting free speech, comedy, artistic expression or debate. Lack of clarity would also be an issue. Rather, the proposal is to remove ill-will and ridicule from the criminal provision.

Non-regulatory options

Non-regulatory options have been considered, however, they would not resolve the issues with the wording of the HRA provisions discussed in this impact summary.

The Human Rights Commission has significant functions in the framework around incitement. The Commission's complaints function can respond to complaints of incitement under section 61. The Commission's general functions (such as the inquiry, public statement or reporting functions) may also be able to be used to address instances where the threshold of section 61 may not be reached but the behaviour is nevertheless considered harmful to an individual, community or society.

The Commission has been provided with additional funding of \$5.0 million over 2 years to strengthen its capacity to respond to hate speech, racism and discrimination. This may specifically allow for those lower level harmful behaviours to be addressed. Addressing racism will also be progressed through other work programmes such as the development of a national action plan against racism and work to strengthen social cohesion in New Zealand.

Further policy work that may be required

The Royal Commission did not consider changes to the civil provision. This interim assessment highlights areas where further policy work may be required to assess the extent to which the recommendations made by the Royal Commission should affect the drafting of the civil law.

Assessment criteria

The following criteria are used to assess the options relating to the incitement provisions. No differentiated weighting has been assigned to them.

1. Adequacy of protection
 - The option should adequately protect people and groups from harm, adequately describe the behaviour that should be prohibited and provide for appropriate remedies.
2. Proportionality
 - The response should be proportionate to the behaviour covered, the behaviour's impact and the intervention's impact on the speaker (or person acting in the case of other discrimination).
 - In particular, the option must adequately manage the tension between different human rights involved, such as the freedom of expression of the person displaying the behaviour, and the freedom of expression and other rights of the group subjected to the behaviour.
3. Certainty/clarity
 - Civil and criminal law must have sufficiently clear purpose and scope. They must be clear as to what behaviour is illegal in order to provide behavioural guidance and justify a legal intervention.
4. Accessibility of processes for redress and remedies
 - Remedies must be effective and accessible, including affordable, 'easy' to obtain and timely.

3.2 Which of these options is the proposed approach?

Key for tables below:

- ++ much better than doing nothing/the status quo
- + better than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

1 Options for the groups that should be protected under the incitement provisions¹²

Options	Adequacy of protection	Proportionality	Certainty/clarity	Accessibility of remedies	
Option 1a <i>Status quo – protection for groups on the grounds of colour, race, or ethnic or national origins</i>	0 protects against the more extreme forms of hate speech, but groups other than race/nationality/ethnicity that experience inciting speech are not covered.	0 freedom of speech appears to outweigh protections for the full range of groups who are victims of inciting speech.	0 lack of clarity whether religious groups covered as 'ethnic' groups. Intersectionality (e.g. women / Māori) is not reflected.	0 remedies not accessible for other groups.	0
Option 1b <i>Include a non-exhaustive list of groups that are at risk of inciting speech. There would be a specific list of groups, plus a catch-all provision to cover any other potential groups</i>	++ ensures that the groups known to be victims of inciting speech are covered and there is flexibility in the wording to cover others.	+ proportionality applies consistently as coverage has no gaps, but may have a chilling effect on speech due to uncertain coverage.	-- uncertainty as to which other groups could be covered. This is problematic when establishing criminal liability.	+ all vulnerable groups could access the remedies, but the uncertainty about the catch-all provision might prevent some from doing so.	+3
Option 1c (preferred) <i>Refer to the groups covered in the prohibited grounds of discrimination in section 21. This would mean that the provisions cross-referenced the range of groups already set out in section 21</i>	+ wide coverage. However, a court might hold that gender identity is not be covered if Option 4 is not progressed.	+ proportionality applies consistently due to wide coverage and certainty of coverage. However, for gender diverse person, the option may not provide proportionality.	+ certainty for groups explicitly included in s21 but lack of clarity for non-binary persons.	+ most vulnerable groups can access the remedies, but the law would be unclear for gender diverse people.	+4

Preferred option: 1c

The Royal Commission recommended widening the groups covered to include religion. This reflected the scope of its mandate. Cabinet has agreed in-principle to a widening of the incitement provisions to cover all groups protected against discrimination, which includes religious groups.

The Ministry considers extending the legal protections to all prohibited grounds of discrimination in section 21 of the HRA (1c) is the best option for group coverage (when combined with the preferred option to amend section 21 HRA – discussed below under 'option 4'). This could provide adequate protection by clearly identifying which groups are included, protecting other groups that experience inciting speech, providing them with access to remedies, and is consistent with the focus of the HRA on discrimination. Ultimately, incitement is considered a form of discrimination.

The proportionality, and balancing of human rights involved, reflected in the incitement provisions would apply consistently across all groups that are protected against

¹² In the Discussion Document, this is covered under proposal 1.

discrimination. This would also treat groups that have significant overlaps the same, whereas currently some are covered and some are not. For example, some religious groups may also be considered ethnic groups but others are not.

If option 4 was not progressed, option 1c) remains the preferred option notwithstanding a risk that section 21 could be interpreted to not include gender identity. The lack of certainty of option 1b) is considered a barrier to this being a basis for criminal liability.

2 The criminal provision

This section does not include an assessment table as the options discussed are essentially complementary not alternative options. The sections below cover different aspects of the criminal provision.

Status quo

Section 131 is a criminal offence in the Human Rights Act, with a maximum penalty of three months' imprisonment or a fine of up to \$7,000. Section 131 makes it a criminal offence to publish or use words that are threatening, abusive, or insulting and which are likely to incite hostility or ill will against, or bring into contempt or ridicule, any groups on the ground of colour, race, or ethnic or national origins. Section 131 requires that there be an intention by the person to incite hostility, ill will, contempt, or ridicule.

*Behaviour covered*¹³

The Ministry's analysis supports the Royal Commission's recommendation to reframe section 131 to the stirring up (inciting), maintaining or normalising of hatred through any means of communication and to also include speech that explicitly or implicitly calls for violence. The Government accepted this recommendation in principle.

Reframing this provision with a focus on hatred (as opposed to hostility, contempt, ill-will and ridicule) is likely to be useful, making the application of section 131 more straightforward, and achieving better certainty about its scope. This certainty would be particularly important as the increased penalty proposed would lead to a possibility of a prosecution being considered by a jury (rather than a judge alone).

The reframing would also reflect that only extreme inciting speech should be subject to criminal responsibility, which is arguably a more proportionate approach. In particular, ill-will and ridicule are vague as a basis for criminal responsibility and could have a chilling effect, for example, by preventing artists or comedians from exercising their right to freedom of expression. The provision as suggested would likely support proportionality by making behaviour unlawful that aims to increase hatred towards groups, rather than just expressing personal opinions, and in differentiating criminal offences and civil responses primarily on the ground of intention. As such it would not prevent communications that constitute a robust debate of any topic or offensive speech, provided the speech does not aim at inciting hatred against a group. In addition, simplifying the provision may limit a potential chilling effect on freedom of expression as there is more clarity of what behaviours may be covered.

¹³ In the Discussion Document, this is covered under proposal 2.

This option could provide adequate protection. While it tightens the threshold, it would still cover messages that are on their face neutral, but implicitly call for violence. Through the inclusion of maintaining and normalising, it should clearly bring under the provision equally harmful behaviours which support negative attitudes, without the need to prove a 'radicalisation' on the part of listeners. By including any means of communication, this option has flexibility built in. For example, it would be clear that any online publication is included. The simplification and clarifications under this option should improve the accessibility of remedies as the test is more straightforward.

Element of intention

The Ministry has assessed whether the element of the person's intention in making the speech in question should be removed to simplify the application of section 131 and make remedies more accessible. However, the Ministry does not recommend this. Most criminal offences require a *mens rea* (mental) element, because a criminal sanction is the most severe action in the law against harmful behaviour. Advice on the United Nations' International Covenant on Civil and Political Rights (ICCPR) also states that only intentional behaviour should be captured by a criminal law.

Having the risk of criminalisation even where a person does not intend to incite others would also likely have a chilling effect on people's decision to discuss topics freely. As such this would be a disproportionate limitation on freedom of speech. This impact summary recommends that the civil provision remain applicable for behaviour which does not meet the intention threshold.

Penalty and location of offence¹⁴

Cabinet also agreed with the Royal Commission's recommendations to increase the maximum penalty for inciting speech and to move this offence to the Crimes Act 1961. This aligns with the Ministry's analysis.

One of the problems with section 131 is that it is rarely used despite there being instances where it could apply, such as online communications around the March 2019 terrorist attacks or other extremists' communications. Moving the offence currently in section 131 of the HRA to the Crimes Act, and increasing the maximum penalty to better align with comparable offences, should reflect the seriousness of the behaviour criminalised and provide a better regulatory fit. It is likely to provide greater certainty because the offending behaviour would be in a commensurate statutory framework, which may have a 'signalling effect' which could assist with enforcement decision-making. In addition, better visibility and clearer intention to criminalise incitement may lead to increased consideration of taking this response.

Having an appropriate penalty should support better protection against inciting speech and be a more proportionate response. Both changes to the provision may lead to an increased use, which could mean its remedies would be more accessible and this increased use could in turn lead to more clarity about the behaviour covered.

In determining the appropriate penalties, consideration was given to where the criminal incitement provision should sit relative to comparable offences. In principle, speech that is intended to increase hostility towards population groups should attract higher penalties than expressions of hate towards individuals (such as the behaviours captured in the

¹⁴ In the Discussion Document, this is covered under proposals 1 (for the location) and 3 (for penalty).

Harassment Act 1997 or the Harmful Digital Communications Act 2015). This is because of the wider ambit of harm that may be caused. It would also be appropriate and proportionate for the maximum penalty for the criminal incitement provision to sit below offences involving serious direct physical violence.

An increase to a maximum penalty of three years imprisonment and a fine of up to \$50,000 is recommended. A comparison of related offences and their penalties is at Appendix One.

Element of 'likelihood of incitement'

Following the Royal Commission's recommendation, the in-principle proposal would remove the objective element of 'likelihood of incitement' from the criminal provision. Under the current law, the test requires that the speech is objectively likely to have the inciting effect in addition to being intended to have that effect. Due to the tight timeframes when responding to the Royal Commission recommendations, the Ministry of Justice has not provided full advice to the Government on whether to retain this element for the criminal provision.

The Ministry intends to further assess the benefits and disadvantages of this element following consultation. It could be argued that removing this objective element might limit freedom of speech, honest opinion, art and debate by criminalising intent rather than harmful effects or a risk of harm. Retaining this element also appears to align better with guidance by the United Nations under the ICCPR. On the other hand, it would simplify the test. This issue should be covered in the consultation.

3 Options for what type of communications should fall under the civil provision¹⁵

Options	Adequacy of protection	Proportionality	Certainty/clarity	Accessibility of remedies	
Option 3a <i>Status quo – current requirements for unlawful speech: threatening, abusive or insulting words that are likely to incite hostility, or bring into contempt</i>	0 meets UN requirements by targeting speech that is likely to increase hostility towards groups.	0 is proportionate in that it makes it unlawful to (likely) increase hate toward groups, rather than just expressing own views. This threshold is a high threshold. Civil provision is wider than criminal response in that it does not require intent, which is a proportionate response.	0 the wording of sections 61 and 131 is inconsistent. Inciting ill-will and ridicule is included in s131 but not s61. <i>Wall v Fairfax</i> case showed difficulty in defining hostility and contempt.	0 criminal remedies under status quo are available for a greater range of incitement than civil (ill-will and ridicule). Remedies are, therefore, not available for unintended incitement of ill-will or ridicule. Under the HRA, a wide range of civil remedies is available.	0
Option 3b (proposal/preferred) <i>Retain the high threshold which requires an effect on 'third parties'. Add incitement, maintaining or normalising of hatred. Add incitement to discrimination of a group. This would mean that speech likely to encourage others to treat members of a population group less favourably than others would be unlawful.</i>	+ adding hatred does not change protection as hostility would already include hatred. Including maintaining/normalising would ensure this potentially harmful behaviour is covered. Adding discrimination would provide protection for a greater range of speech.	+ adding hatred does not change protection as hostility would already include hatred. Including maintaining/normalising would be proportionate as it is harmful behaviour (e.g. can lead to further radicalisation). Adding discrimination is proportionate as discrimination is illegal under the HRA. Consistency suggests that incitement thereof should similarly be prohibited.	++ provides certainty that hatred, as well as maintaining /normalising are covered by the civil provision. If only s131 includes hatred, this could lead to uncertainty for the scope of s 61. Discrimination is well defined through the existing application of the HRA which would make the application of s61 easy for incitement to discrimination.	+ avoids arguments that civil provision is meant to be narrower than criminal provision if it does not include hatred. Adding discrimination increases accessibility of civil remedies for a wider range of speech.	+5
Option 3c <i>Remove the objective element of 'likelihood of incitement'. This would capture a much broader range of speech and remove the required 'third party effect' for the civil provision</i>	0 would provide protection against speech directed at individuals without (inciting) effect going beyond to other people. Would result in inconsistency with the criminal response by not requiring any incitement element and change the basic principle underpinning the incitement laws. One-on-one behaviours are covered in other laws.	- - high risk of unjustifiably limiting free speech, honest opinion, academic freedom and debate. Could result in the regulation of art and interpersonal communication.	- - would reduce clarity around what constitutes inciting speech as opposed to free speech. The line between inciting speech and comedy, art, debate etc would be less clear.	0 increases availability of remedies by extending them to individuals, but offensive language and threats are already covered in other Acts.	-4
Option 3d <i>Include requirement to show the person intended to incite others. This would make it less likely that some speech would be caught by the provision</i>	- would reduce civil protections against speech that is harmful but not deliberately intended to incite hostility.	- - the threshold for civil proceedings would be disproportionately high if it was the same as criminal. Inconsistency as intent is not a consideration for discrimination sections of HRA.	- would reduce certainty and clarity by removing the key difference between s61 and s131. It would be less clear which provision would most appropriately apply.	- would reduce access to civil remedies.	-5

¹⁵ In the Discussion Document, this is covered under proposals 4 (for inciting/normalising/maintaining hatred) and 5 (for incitement to discrimination)

Preferred option: 3 b

Cabinet agreed in principle to add 'inciting, maintaining or normalising hatred' and 'incitement to discrimination' to the existing behaviours in the civil provision (hostility and contempt), option 3 b. The Ministry's analysis supports this proposal. This would leave the civil provision less strictly defined than the criminal provision. The Ministry considers that hostility and contempt may also reflect a slightly lower threshold for intervention than 'hatred'. However, it is considered that the civil provision could cover a wider set of behaviours and set a different threshold as the response is less severe than a criminal response. This option retains the required inciting effect on third parties which means that robust debate and strong expressions of views continue to be lawful. As such this option protects freedom of speech adequately.

Including the 'incitement to discrimination' in the civil law provision should provide for better protection and align with the general approach of the HRA to prohibit discrimination. This option would only cover discrimination that is already unlawful under Part 2 of the HRA. This change should also lead to improved compliance with our international human rights obligations (Art 20 (2) ICCPR and Art 4 CERD which include 'incitement to discrimination'). It would provide protection against a wider range of speech and increase accessibility of civil remedies for a wider range of speech. This change would particularly align with the general functions of the Human Rights Commission to deal with claims of discrimination.

The Ministry considers that it would be inappropriate to also include a criminal liability for 'incitement to discrimination' as discrimination under the Human Rights Act framework leads to a civil remedy, not a criminal one. It is noted that the Royal Commission recommended changes to the Films, Videos and Publications Classifications Act which would provide for a criminal liability for certain publications that 'incite racial discrimination'. As stated by the Royal Commission, these changes would also enhance the compliance with CERD. This work is being considered by the Department of Internal Affairs.

Following the consultation, a detailed assessment will be made of whether further changes will be required to align the wording of the civil provision with the criminal provision and to ensure the language of section 61 is up to date. This includes:

- whether to retain hostility and contempt in the civil provision considering that the criminal provision will be streamlined to 'hatred' – the Royal Commission raised concerns about this wording
- whether 'maintaining and normalising' should apply to all behaviours in section 61 (i.e. also to discrimination, contempt and hostility)
- whether to include communications that explicitly or implicitly incite violence in addition to 'threatening, abusive or insulting' ones
- aligning the 'means of communications' covered in both provisions
- the 'media privilege' in section 61(2).

4 Options to amend section 21 of the Human Rights Act 1993 to include gender identity/sex characteristics¹⁶

Options	Adequacy of protection	Proportionality	Certainty/clarity	Accessibility of remedies	
Option 4a <i>Status quo – ‘sex’ is a prohibited ground of discrimination under s21, which has been interpreted to include gender identity</i>	0 while gender identity/sex characteristics are considered to be covered, not everybody may be aware of this, and legal position could be subject to legal challenge	0 s 21 has been interpreted as covering these groups	0 while gender identity/sex characteristics are considered to be covered, not everybody may be aware of this, and position could be subject to legal challenge. The interpretation has not been tested in the courts.	0 remedies available but people may not be aware and therefore reluctant to seek remedies	0
Option 4b <i>Add gender identity and gender expression to ‘sex’ in s 21</i>	+ would ensure protection and that the group affected by discrimination is aware of the protection available to them.	0 no substantive change	+ would alleviate uncertainty. However, gender and sex are different concepts.	+ clarity that remedies are available could improve access	+3
Option 4c (preferred) <i>Add separate ground of gender to s 21, including gender identity and gender expression and add sex characteristics or intersex status to ‘sex’ in s 21</i>	++ would ensure protection and that the group affected by discrimination is aware of the protection available to them. Gender could cover a wider range of expressions than option 4b.	0 no substantive change	++ would alleviate uncertainty and clarify that gender and sex are different concepts	+ clarity that remedies are available could improve access	+5

Preferred option: 4c

The amendment of section 21 would not be a substantive legal change as it is a clarification of current practice. Amending section 21 to include gender identity, gender expression and sex characteristics/intersex status would provide clarity that protection against discrimination includes these groups. It would also ensure that these groups who are affected by discrimination are aware of the protection available to them, as well as clarifying that gender and sex are different concepts.

The concept of gender has evolved beyond binary biological determinants and covers a wide range of identities and expression. This creates a degree of uncertainty as to how a court would determine whether gender, including gender identity and gender expression is covered. Even in the absence of uncertainty, having a separate ground of gender recognises and respects the experiences of transgender/non-binary people.

Making this change alongside the amendments to sections 61 and 131 would provide certainty about the scope of protection for both general discrimination and the incitement provisions in relation to gender and sex.

The Ministry of Justice notes that further work may be required on the extent the existing exceptions to prohibited sex discrimination (e.g. for schools) should apply to the explicitly expressed sex/gender grounds.

¹⁶ In the Discussion Document, this is covered under proposal 6.

Section 4: Interim Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

This impact summary only indicates some potential impacts as it is an interim assessment to complement the public discussion document. A complete impact assessment will be provided if the Government goes on to consider final policy decisions. At that stage, there may be better insights about the impacts. For example, the Human Rights Commission might have updated information on complaints related to incitement and how complaints have progressed. Due to the ongoing work to capture better data on hate crime, Police may be able to provide information on the cost of criminal incitement investigations. Overall, the number of complaints and proceedings may increase due to the wider scope (group coverage) of both incitement provisions. However, the threshold will remain high. An initial assessment of the impacts indicates that the costs and benefits may be either low or medium.

Amendments, including clarifications, may also lead to heightened public awareness which may in turn lead to an increase in complaints or proceedings.

Affected parties	Comment: nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks	Impact
Additional costs of proposed approach, compared to taking no action		
Regulated parties: the public (persons using speech, victims, complainants)	Cost related to criminal court proceedings, Tribunal cost and potential appeals to the High Court (for example, time off work, court fees etc.). Legal aid is available. Dispute resolution services by the Human Rights Commission (HRC) are free of charge.	The number of proceedings is unlikely to be high. However, the cost for an individual involved may be significant.
Regulators: Human Rights Commission	Possibility of increased costs to triage and administer a larger number of complaints/inquiries and resolution processes due to the addition of more groups under the incitement provisions and section 21 amendments. The number of additional complaints requiring full dispute resolution services is unlikely to be high. There may be an increase in the number of cases proceeding to the Tribunal which the HRC might also participate in. Proactive awareness raising campaigns would be an additional cost to the Commission.	The Commission has already received additional funding of \$5.0 million over two years to June 2022 'to strengthen its capacity to respond to hate speech, racism and discrimination [CAB-20-MIN-0513 refers]. The first tranche (\$2.5 million) was paid on 1 March 2021. Cost to be monetised where possible prior to any final policy decisions
Human Rights Review Tribunal	Potentially increased number of cases to be administered and adjudicated due to amendments to sections 61 and 21.	Cost to be monetised where possible prior to

	Effects on the Tribunal workload will be assessed prior to any final policy decisions.	any final policy decisions
Police	Increased costs of criminal investigations and prosecutions as a result of the widening of the scope of the provisions.	Cost to be monetised where possible prior to any final policy decisions
Ministry of Justice <ul style="list-style-type: none"> - judicial cost (criminal and civil courts) - legal aid - ICT changes 	<p>The cost of court proceedings could increase because there may be more court proceedings related to incitement. Criminal cases are likely to be adjudicated by the District Court. Due to the proposed increased penalty, trials may involve juries which increases the cost of a trial.</p> <p>The cost of the additional workload on the Judiciary is unlikely to be quantifiable.</p> <p>In many cases, section 131 prosecutions would be likely to be additional to charges for other offences under the current law, which means there might not be significant additional cost.</p> <p>There may be increased legal aid cost for civil and criminal proceedings.</p> <p>There will be an ICT cost associated with shifting the offence from the HRA to the Crimes Act. This is yet to be determined.</p>	Cost to be monetised where possible prior to any final policy decisions
Wider government: Department of Corrections Crown Law Prosecution Services	<p>There may be costs associated with imprisonment under section 131. Any inciting speech leading to imprisonment would be expected to be at the severe end of the spectrum and likely to include other offences (such as 'threat to kill'). This may affect the extent of the impact on Corrections.</p> <p>There may be an impact on Crown Law Prosecution Services due to the widening of the criminal provision and the increased penalty potentially leading to jury trials. This may lead to increased cost. Crown Law cost for decisions under section 132 HRA may also increase.</p> <p>Following changes to s21, agencies, including the Ministry of Justice, may need to review their statutes to ensure consistency of terminology across the statute book, as a part of their regulatory stewardship responsibilities.</p>	Cost to be monetised where possible prior to any final policy decisions
Total Monetised Cost		TBD

Non-monetised costs		TBD
Expected benefits of proposed approach, compared to taking no action		
Regulated parties: public, individuals, communities	<p>A bigger proportion of New Zealand's population should be covered by the legal protections against inciting speech as more groups will be covered. This also means they would have access to legal remedies.</p> <p>The changes should reinforce New Zealand's commitment to human rights, including equal participation and freedom from discrimination.</p> <p>The changes could contribute to making New Zealand safer for everyone, thereby strengthening our diversity and inclusive approach. This would be a benefit to society as a whole.</p> <p>The amendments should provide more clarity for anyone using speech. This could support the exercise of the right to freedom of expression by removing the chilling effect of a risk of acting unlawfully.</p>	Impacts will be assessed in more detail prior to any final policy decisions
Regulators	The changes should support Police's hate crime work and the HRC's human rights work.	Impacts will be assessed in more detail prior to any final policy decisions
Wider government	<p>The changes could support the wider government work aimed at protection against harmful speech, for example, under the Films, Videos and Publications Classifications Act 1995. There should be more consistency and clarity in relation to gender and sex characteristics as prohibited grounds of discrimination. For example, this would align with the Department of Internal Affairs' proposals relating to gender self-identification.</p> <p>The changes are part of the response to the Royal Commission and can contribute to making New Zealand safer for everyone, thereby strengthening our diversity and inclusive approach.</p>	Impacts will be assessed in more detail prior to any final policy decisions
Total Monetised Benefit		TBD
Non-monetised benefits		TBD

4.2 What other impacts is this approach likely to have?

New Zealand Bill of Rights Act 1990 (NZBORA) implications

The proposals directly concern provisions in the Human Rights Act 1993 and therefore have implications for New Zealand's human rights obligations. The proposals seek to better protect the right to be free from discrimination (section 19), and the rights of minorities (section 20) enshrined in the New Zealand Bill of Rights Act 1990. The aim of the proposals is to better protect people in New Zealand from inciting speech, including by extending the protections to more groups that cannot currently rely on them.

The proposals aim to make New Zealand safer for everyone by strengthening the protections against discrimination, in particular through inciting speech. The proposals might prohibit speech that may currently be lawful, therefore engaging the right to freedom of expression under section 14 of Bill of Rights Act. This may affect how people choose to exercise this right and there could be a perception that this might have a chilling effect. The incitement provisions in the HRA, particularly the criminal provision, are targeted only at the severe end of the hate speech spectrum and are, therefore, considered to limit freedom of expression no more than is reasonably necessary. For the people subject to inciting speech, the proposals would support their freedom of expression and other civil rights, such as freedom of association, because this behaviour can make people feel unsafe, ultimately preventing them from participating in public life and being included in society.

Te Tiriti o Waitangi implications

Māori experience hate speech. Māori are already covered by protections in the provisions against incitement, based on race or ethnicity. The most important legal case in the incitement context (*Wall v Fairfax*) included judicial consideration of negative statements that had been made about Māori and resulted in a dismissal of the claim. This case highlighted some of the issues with the incitement provisions, such as the lack of clarity leading to an extensive discussion of the legal test in section 61. The proposals aim to better protect Māori from hateful speech and discrimination, for example by providing clarity about what is covered. However, the high threshold of incitement will remain in place. It is also important to ensure better protection from discrimination based on gender, including Māori gender identities and expressions.

There is a risk of further disparities in accessing the protections against inciting speech if systemic racism and access to justice issues are not addressed. This goes beyond the scope of the current proposals. However, there is a clear sense that access to timely and culturally responsive enforcement and complaints mechanisms needs improvement.

Te Tiriti o Waitangi and its principles require consultation with Māori as te Tiriti partners. All policy and legislative development should be consistent with the spirit and principles of te Tiriti, both procedurally and substantively. While there has been only limited engagement with Māori to date, the targeted and public consultation should help provide an adequate opportunity for Māori to engage with the proposals. A wide variety of views may be expressed by Māori during engagement, some of which may raise themes beyond the scope of this work. Māori may be concerned that the incitement provisions may be applied against Māori, such as when they engage in activism.

Implications for New Zealand's international human rights obligations

These proposals would give effect to our international human rights obligations and recommendations made by international human rights bodies. Strengthening the incitement provisions would mean that our laws would better align with our international human rights obligations.

The United Nations Committee on the Elimination of Racial Discrimination raised concerns in 2017 about the ineffectiveness of the current system. Following the 2019 Universal Periodic Review (UPR) at the United Nations Human Rights Council, the Government also accepted a recommendation to 'continue efforts to combat racial discrimination and hate speech and promote diversity and tolerance'.

Extending the scope of sections 61 and 131 to other groups and including incitement to discrimination would lead to better alignment with Article 20(2) of the International Covenant on Civil and Political Rights under which 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. New Zealand might be able to remove its reservation currently in place in relation to this provision.

The widening of the scope could also bring us closer to being able to sign up to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (Budapest Convention).

The proposed changes to section 21 of the HRA are consistent with recommendations made under the Convention on the Elimination of all forms of Discrimination against Women and recommendations made at the 2019 UPR.

Risks and uncertainties

There is no baseline data on the occurrence of inciting speech, which will make it difficult to identify the impacts of the regulatory changes. Equally the benefits to society are difficult to assess as they are intangible, and impacts may depend on how individuals change their social behaviour.

There is a risk that public consultation about these proposals will increase animosity and incitement of hostility towards certain groups. There is also risk people may misunderstand or deliberately misconstrue the proposals, including the potential of misinformation campaigns. To mitigate these risks, the discussion document clearly articulates the rationale for proposals, including existing gaps and inconsistencies. Communications processes around the engagement should help ensure New Zealanders understand why these proposals are made and how they can submit on the proposals.

If the proposals are adopted, there may be a risk of complaints being made that go beyond the scope of the incitement provisions as some elements defining the scope of would be extended. The Ministry considers this risk to be low as the threshold for the provisions to be engaged remains high (particularly requiring incitement). Complainants to the Human Rights Commission or the Police would need to demonstrate how the provisions' thresholds are met. The section 132 requirement is an additional safeguard.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

The Ministry's review and analysis were informed by focused engagement with population groups at risk of experiencing hate speech. Groups represented were ethnically diverse, faith-based, young, Māori, female, rainbow communities and disabled persons. Engagement with Māori was limited, and a more in-depth consultation may enable better understanding of Māori viewpoints and enable a more te Tiriti-consistent process in the remaining stages of the policy development.

The engagement and consultation conducted to date confirmed that hate speech is a common issue for many population groups and that it affects them significantly. There was general support for strengthening the incitement protections.

The planned focused and public consultation is expected to provide better insights and allow the Government to test the proposals and amend them where appropriate. In particular, more population groups, including the general public, should be able to make their views heard.

There is high public and media interest in this work. A robust debate about issues of freedom from discrimination, equality, social inclusion and freedom of expression is expected during the consultation process. Some people may oppose any extension of protections against incitement, and the clarification of gender identity and sex characteristics as prohibited grounds of discrimination, on the basis that this impacts on freedom of expression.

The Ministry also consulted with relevant agencies in the early stages of the policy development as well as on the draft public discussion document. In 2019 and early 2020, the policy issues were discussed with the Human Rights Commission and New Zealand Police. Both agencies were positive about the review of the incitement provisions of the HRA and generally supportive of the proposals. All agencies recognise the benefit of further discussion and analysis before final policy decisions are made.

There was also wide agency support for expressly including gender identity in section 21.

The Government's in-principle decisions on these proposals were to a significant extent influenced by the Royal Commission's recommendations. This impact summary overall supports these recommendations being further tested with the public and population groups that may experience inciting speech.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

Implementation implications would be provided as part of a full impact assessment if the Government goes on to consider final policy decisions.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

Monitoring plans would be provided as part of a full impact assessment if the Government goes on to consider final policy decisions.

7.2 When and how will the new arrangements be reviewed?

Reviewing plans would be provided as part of a full assessment if the Government goes on to consider final policy decisions

APPENDIX one

Comparison of penalties for related offences

	Offence	Provision	Penalty
1	Offensive language	Summary Offences Act 1981, s 4	\$500
2	Disorderly behaviour	Summary Offences Act 1981, s. 3	3 months, \$2,000
current	Hate speech with intention to incite hostility, ill-will, contempt or ridicule	Section 131 HRA	3 months, \$7,000
3	Common assault	Summary Offences Act 1981, s 9	6 months, \$4,000
4	Criminal harassment	Harassment Act 1997, s 8	2 years
5	Harmful digital communication	Harmful Digital Communications Act 2015, s 22	2 years or \$50,000
proposed	Hate speech with intention to incite hostility, ill-will, contempt or ridicule	Section 131 HRA	3 years, \$50,000
6	Assault/injury/grievous bodily harm	Crimes Act 1961, ss 188, 189, 193	3-14 years (note: incitement to attempt these carries 50% penalty)
7	Threat to kill or cause grievous bodily harm	Crimes Act 1961, s 306	7 years
8	Making/distributing objectionable publication	Films, Videos, and Publications Classification Act 1993, s 124	14 years