

19 September 2022

Section (9) (2) (a)
Section (9) (2) (a)

Our ref: OIA 97846

Tēnā koe Section (9) (2) (a)

Official Information Act request: non-discrimination in the Human Rights Act

Thank you for your email of 23 July 2022, requesting, under the Official Information Act 1982 (the Act), documents regarding non-discrimination in the Human Rights Act. Specifically, you requested:

“...all information relating to a review of, and consultation on, the grounds of non-discrimination in the Human Rights Act 1993 being expanded to include gender identity as referred to in this article: <https://www.nzherald.co.nz/nz/labour-at-the-wheel-without-any-handbrake-how-far-have-they-come/IQEKB6MP6W4IEAF4JB JL5W67M4/>”

This request includes any consideration given to recent steps by the United States and the European Union to sign the Judgments Convention.”

On 11 August 2022, Anna Johnston, Policy Manager, Civil Law and Human Rights, contacted you to clarify your request. You responded with the following clarification:

“In relation to your response to my OIA request sent on the 23rd of July I have refined my request as follows:

Please supply

- 1)A copy of the consultation documents.*
- 2)A list of those consulted.*
- 3)Copies of all submissions received.*
- 4)All advice provided to the Minister of Justice”*

I have outlined your specific requests and my response to each below.

The proposal to change the grounds of discrimination was consulted on as part of a package of proposals aimed at strengthening the provisions that protect groups from speech that incites hatred, and improving protections against discrimination. Proposal Six was to “add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination.” Much of the information below relates to consultation generally, and advice related to the package of proposals, rather than proposal six in particular.

Copy of consultation documents

I am refusing this part of your request under section 18(d) of the Act, as the consultation documents requested are publicly available. These can be found on the Ministry of Justice's (the Ministry) website here: justice.govt.nz/assets/Documents/Publications/Proactive-release-Incitement-of-Hatred-anddiscrimination.pdf.

List of those consulted

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.

To protect the privacy of the people consulted, the identities of these people cannot be shared. Therefore, this information is withheld under section 9(2)(a) of the Act, to protect the privacy of natural persons. Please see more information about the consultation process outlined below.

Copies of all submissions received

There were 19,228 submissions on the consultation, 15,235 of which used the Free Speech Union's (FSU) pre-populated submission template that expressed agreement with the FSU's substantive submission (a link to the substantive submission is below). There were also 2,938 substantive submissions and 1,055 one-line submissions.

I am aware that the following organisations have published their submissions online:

- the FSU's substantive submission is available at:
d3n8a8pro7vhmx.cloudfront.net/freespeech/pages/179/attachments/original/1626495761/Ministry_of_Justice_Proposals_to_Reform_the_Legal_Frameworks__1-1_web.pdf?1626495761
- the Maxim Institute's submission is available at:
maxim.org.nz/content/uploads/2021/08/SUB-Hate-Speech-Consultation-2021.pdf
- the New Zealand Council for Civil Liberties' submission is available at:
nzcccl.org.nz/submission-hate-speech-discussion-document/
- the Law Society's submission is available at:
lawsociety.org.nz/news/law-reform-submissions/discussion-papers/

The Ministry has no issue in principle with releasing the submissions, but there are significant logistical issues in doing so. The Ministry's practice is to anonymise submissions received by people submitting in their personal capacity. However, due to the number of submissions received, this would take a very long time and we would charge for the time taken to redact them (our estimated charge just for the non-FSU submissions is \$10,000).

The Ministry will release a summary of the 2,938 substantive submissions once Cabinet decisions on the proposals have been made. In the meantime, we can provide you with the following information about the themes of the submissions.

Written submissions largely opposed the changes and many had strong freedom of expression concerns as noted above.

Face-to-face feedback from affected communities largely showed support. Approximately 15,000 of the 19,000 submissions were a form submission based on a template distributed by the FSU. This form submission did not support the proposals.

There also appeared to be wide misunderstanding about both the current law, 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.

There was, however, broad support for the intention behind some or all of the proposals from a range of organisations with expertise in human rights (subject to caveats or suggested changes). These included the Human Rights Commission, the New Zealand Law Society, Amnesty International Aotearoa New Zealand, 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.

All advice provided to the Minister of Justice

Attached to this letter is a table which lists the documents within scope of this part of your request. Some of the information has been withheld under the following sections of the Act:

- section 9(2)(a) to protect the privacy of natural persons
- section 9(2)(ba) to protect information that is subject to an obligation of confidence
- section 9(2)(h) to maintain legal professional privilege
- section 9(2)(f)(iv) to maintain the constitutional conventions that protect confidentiality of advice tendered by Ministers and officials and
- section 9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty.

I am satisfied there are no other public interest considerations that render it desirable to make available the information withheld under section 9 of the Act.

Some information has also been withheld under section 6(d) of the Act as making available this information would likely endanger the safety of any person.

Some of the documents released are provided as an excerpt under the provisions of section 16(1)(e) of the Act as other information in these documents is unrelated to your request.

The following documents are publicly available and therefore have been refused under section 18(d) of the Act:

- Document 26, *Cabinet paper, Proposed Changes to the Incitement Provisions in the Human Rights Act 1993*. Available at:
justice.govt.nz/assets/Documents/Publications/Proactive-release-incitement-provisions.pdf.
- Document 27, *Cabinet minute, Proposed Changes to the Incitement Provisions in the Human Rights Act 1993*. Available at:
justice.govt.nz/assets/Documents/Publications/Proactive-release-incitement-provisions.pdf.
- Document 33, *Public discussion document - Proposed changes to the incitement provisions in the Human Rights Act 1993*. Available at:
justice.govt.nz/assets/Documents/Publications/Incitement-Discussion-Document.pdf.
- Document 37, *Cabinet paper, Incitement of Hatred and Discrimination: Release of Discussion Document*. Available at:
justice.govt.nz/assets/Documents/Publications/Proactive-release-Incitement-of-Hatred-and-discrimination.pdf.
- Document 38, *Discussion document, Incitement of Hatred and Discrimination: Release of Discussion Document*. Available at:
justice.govt.nz/assets/Documents/Publications/Proactive-release-Incitement-of-Hatred-and-discrimination.pdf.
- Document 40, *Draft Cabinet paper and discussion document, Incitement of Hatred and Discrimination: Release of Discussion Document*. Final version available at:
justice.govt.nz/assets/Documents/Publications/Proactive-release-Incitement-of-Hatred-and-discrimination.pdf.
- Document 47, *HRC Submission summary*. Available at:
hrc.co.nz/files/2016/3035/7339/HRC_Submission_on_MOJ__HRA_amendment_proposal_2021.pdf.

If you are not satisfied with my response, you have the right to complain to the Ombudsman under section 28(3) of the Act. You can contact the Office of the Ombudsman by emailing: info@ombudsman.parliament.nz.

Nāku noa, nā



Kathy Brightwell
General Manager, Civil and Constitutional Policy

Advice provided to the Minister of Justice:

No.	Date	Document type	Title	Notes
1.	5/04/2019	Briefing	Process for Developing a Proposal Document about Hate Speech	Some information withheld under s9(2)(a) and s9(2)(f)(iv).
2.	8/04/2019	Aide memoire	Hate Speech Laws and Recording of Hate Crime	Released in full.
3.	17/06/2019	Aide memoire	Cabinet Social Wellbeing Committee: Progressing Inter-Agency Work on Hate Speech and Discrimination	Released in full.
4.	19/06/2019	Cabinet minute	Hate Speech and Discrimination (SWC-19-MIN-0067)	Released in full.
5.	21/06/2019	Aide memoire	Hate Speech - scope of our work	Released in full.
6.	24/06/2019	Cabinet minute	Hate Speech and Discrimination (CAB-19-MIN-0307.01)	Released in full.
7.	27/06/2019	Cabinet paper	Progressing Inter-Agency Work on Hate Speech and Discrimination	Released in full.
8.	06/08/2019	Letter	Appropriation Changes Requiring Joint Minister Approval: Transfer of funding to Human Rights Commission	Released in full.
9.	7/08/2019	Draft aide memoire	Hate speech - letter to Hon Grant Robertson, Minister of Finance	Released in full.
10.	13/09/2019	Weekly report items (excerpt)	Update about the hate speech work	Released as an excerpt under s16(1). Some information withheld under s9(2)(a).
11.	20/09/2019	Weekly report items (excerpt)	Engaging with groups on hate speech and Potential non-regulatory mechanisms to address hate speech	Released as an excerpt under s16(1). Some information withheld under s9(2)(a), s9(2)(ba) and
12.	23/09/2019	Aide memoire	Cabinet paper on Countering Violent Extremist Content Online	Released in full.
13.	27/09/2019	Weekly report item (excerpt)	Engagement with community groups on hate speech	Released as an excerpt under s16(1). Some information withheld under s9(2)(a) and s9(2)(ba).

14.	8/10/2019	Weekly report item	Engagement with community groups on hate speech 90770	Withheld in full under s9(2)(ba).
15.	18/10/2019	Weekly report item	Engagement with community groups on hate speech	Withheld in full under s9(2)(ba).
16.	18/10/2019	Fact sheet	Review of protections against hate speech	Released in full.
17.	22/10/2019	Weekly report item (excerpt)	Engagement with community groups on hate speech	Released as an excerpt under s16(1). Some information withheld under s9(2)(a) and s9(2)(ba).
18.	29/10/2019	Weekly report item (excerpt)	Engagement with community groups on hate speech	Released as an excerpt under s16(1). Some information withheld under s9(2)(a).
19.	Undated 2019	Summary report	HRC Summary report on engagement	Withheld in full under s9(2)(ba) and s6(d).
20.	13/12/2019	Briefing	Strengthening the incitement provisions and processes in the Human Rights Act 1993	Some information withheld under s9(2)(a) and s9(2)(f)(iv).
21.	20/02/2020	Aide memoire	Update on strengthening protections against hate speech	Released in full.
22.	26/02/2020	Briefing	Further Advice on Strengthening the incitement provisions in the Human Rights Act 1993	Some information withheld under s9(2)(a) and s9(2)(f)(iv).
23.	23/07/2020	Aide memoire	Information to assist discussion at your meeting with Facebook on Friday 24 July 2020	Released in full.
24.	19/11/2020	Aide memoire	Draft Cabinet paper: Proposed changes to the incitement provision in the Human Rights Act 1993	Released in full.
25.	2/12/2020	Cabinet paper	Proposed Changes to the Incitement Provisions in the Human Rights Act 1993	Refused under s18(d) as the information is publicly available.
26.	2/12/2020	Cabinet minute	Proposed Changes to the Incitement Provisions in the Human Rights Act 1993	Refused under s18(d) as the information is publicly available.
27.	29/01/2021	Briefing	Consultation on proposed changes to the incitement provisions in the Human Rights Act 1993	Some information withheld under s9(2)(a) and s9(2)(f)(iv).

28.	5/02/2021	Aide memoire	Government Response to Justice Committee Report (Petition of Laura O'Connell')	Released in full.
29.	23/02/2021	Aide memoire	Cabinet Legislation Committee: Government Response to the Justice Committee report (Petition of Laura O'Connell)	Some information withheld under s9(2)(f)(iv).
30.	9/03/2021	Briefing	Preventing Incitement of Hatred: approach to draft discussion document	Some information withheld under s9(2)(a).
31.	31/03/2021	Briefing	Draft discussion document on incitement of hatred proposals and engagement timeframes	Some information withheld under s9(2)(a) and s9(2)(f)(iv).
32.	28/04/2021	Interim Impact Summary	Public discussion document - Proposed changes to the incitement provisions in the Human Rights Act 1993	Refused under s18(d) as the information is publicly available.
33.	11/5/2021	Aide memoire	Cabinet paper and discussion document relating to proposals against the incitement of hatred	Some information withheld under s9(2)(f)(iv).
34.	14/5/2021	Aide memoire	Cabinet paper and discussion document relating to proposals against the incitement of hatred	Some information withheld under s9(2)(f)(iv) and s9(2)(g)(i).
35.	14/5/2021	Aide memoire	Proposed approach to engagement package: Incitement of hatred and Social Cohesion, and 'Objectionable' materials	Released in full.
36.	17/5/2021	Final Cabinet paper	Incitement of Hatred and Discrimination: Release of Discussion Document	Refused under s18(d) as the information is publicly.
37.	17/5/2021	Final discussion document	Incitement of Hatred and Discrimination: Release of Discussion Document	Refused under s18(d) as is publicly available at:
38.	28/5/2021	Weekly report item (excerpt)	Incitement of Hatred: Translation of discussion document	Released as an excerpt under s16(1). Some information withheld under s9(2)(a).
39.	25/6/2021	Draft Cabinet paper and discussion document	Incitement of Hatred and Discrimination: Release of Discussion Document	Refused under s18(d) as the information is publicly available.

40.	29/6/2021	Question and answers	Scenario table and factual information to support oral question preparation: Hate speech extended Q+A	Some information withheld under s9(2)(f)(iv) and s9(2)(g)(i).
41.	29/6/2021	Email advice	RE: incitement table of scenarios	Withheld in full under s9(2)(f)(iv).
42.	1/7/2021	Email advice	20210701 answer for additional PQs threshold	Withheld in full under s9(2)(f)(iv).
43.	8/7/2021	Weekly report item	Update on engagement – social cohesion work and the incitement proposals	Withheld in full under s9(2)(f)(iv).
44.	30/7/2021	Weekly report (excerpt)	Update on the Social Cohesion, Incitement and Objectionable Content consultation	Released as an excerpt under s16(1). Some information withheld under s9(2)(a).
45.	20/8/2021	Aide memoire	Preliminary themes from engagement on the incitement proposals	Withheld in full under s9(2)(f)(iv).
46.	25/8/2021	Email containing advice	Incitement - publication of Human Rights Commission submission next week (refused). Attachment: HRC Submission Summary (released).	Email withheld in full under s9(2)(f)(iv). Attachment refused under s18(d) as the information is publicly available.
47.	17/9/2021	Weekly report	Meeting with Kāpuia to discuss incitement of hatred and search and surveillance work	Some information withheld under s9(2)(a), s9(2)(f)(iv) and some information out of scope.
48.	21/9/2021	Briefing	MBIE Briefing Meeting with Amnesty International Aotearoa New Zealand	Some information withheld under s9(2)(a) and some information out of scope.
49.	23/9/2021	Email advice	AM: Update on proposals against the incitement of hatred and discrimination – this contains the AM with all proposals v status quo v RCOI	Withheld in full under s9(2)(f)(iv).

50.	25/11/2021	Briefing	Meeting with Amnesty International, 25 November 2021	Released as an excerpt under s16(1).
51.	10/12/2021	Email advice	Options for next steps on the incitement work programme	Withheld in full under s9(2)(f)(iv).
52.	10/12/2021	Email advice	Next steps on incitement - A3 and talking points for officials meeting	Withheld in full under s9(2)(f)(iv).
53.	16/12/2021	Briefing	Legislative and Policy Work Programme 2022-2023	Withheld in full under 9(2)(f)(iv).
54.	22/1/2022	Briefing	Recognising the culpability of hate-motivated offending (excerpt)	Released as an excerpt under s16(1). Some information out of scope.
55.	3/2/2022	Note	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
56.	3/2/2022	Email advice	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
57.	15/3/2022	Draft	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
58.	15/3/2022	Draft	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
59.	31/3/2022	Briefing	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
60.	7/4/2022	Aide memoire	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
61.	7/4/2022	Notes	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
62.	7/4/2022	Notes	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
63.	13/4/2022	Aide Memoire	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
64.	26/5/2022	Briefing	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).

65.	14/6/2022	Aide memoire	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).
66.	14/6/2022	Withheld under s9(2)(f)(iv)	Title withheld under s9(2)(f)(iv)	Withheld in full under s9(2)(f)(iv).



Hon Andrew Little, Minister of Justice

Process for Developing a Proposal Document about Hate Speech

Date	5 April 2019	File reference	HUM 03 01
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Action sought

Timeframe

Agree that the Ministry will work with the Human Rights Commission to develop a draft proposal document about addressing hate speech in September 2019, with Cabinet agreement to release it in October 2019.

18 April 2019

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 491 88584	s9(2)(a)	✓
Brendan Gage	General Manager, Criminal Justice	04 494 9908	s9(2)(a)	
David Crooke	Chief Advisor, Civil and Constitutional	04 494 9912	s9(2)(a)	

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office's comments

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982¹

Purpose

1. The purpose of this briefing is to:
 - a) confirm the scope of a draft proposal document about combatting hate speech; and
 - b) seek your agreement for our proposed approach to preparing that document (including engagement with you and your office throughout the drafting process).

Product and Scope

2. We understand that you wish to bring forward the part of the review of the Human Rights Act 1993 (which is scheduled to commence towards the end of the year) that relates to hate speech. This work would consider the effectiveness of the hate speech provisions in that Act as well as the relevant parts of the Harmful Digital Communications Act 2015 and the Crimes Act 1961.
3. We also understand that you would like to release a detailed proposal document on hate speech by the end of the year. That document would seek public feedback on the proposal, which would inform final policy decisions and, possibly, legislative proposals. The proposal document could look at gaps in the current regulatory regime and draw on experiences in comparable jurisdictions to help find solutions.
4. These could address the following areas:
 - the types of conduct that could be considered hate speech (e.g. what is unlawful and what is socially unacceptable behaviour);
 - the regulatory tools for preventing and responding to hate speech in the civil and criminal systems (e.g. mechanisms for removing online hate speech online quickly and providing remedies for victims); and
 - the roles and functions of relevant agencies and how they align with the range of regulatory tools (e.g. the role of the courts, Police, Human Rights Commission, Netsafe and other types of regulators).
5. You have indicated that you do not wish to bring forward a wider review of the Human Rights Act. The scope of that review has not yet been determined but it will include considering gender identity as a prohibited ground of discrimination s9(2)(f)(iv)

We note that these topics could have some bearing on the proposed responses to hate speech but they can proceed as separate work items.

Approach to developing the proposal document

Iterative approach to developing a proposal document

6. As we develop the draft proposal document, and engage with stakeholders, we expect issues to arise that will require your direction. We suggest that we take an iterative approach with you and your office so that we can operate as efficiently as possible. Essentially, we will provide you with short briefings which we can then discuss at the next available officials meeting. This will enable us to test issues with you quickly so that we can factor it into the drafting of the proposal document.

Close cooperation with the Human Rights Commission

7. We will work closely with the Human Rights Commission to develop advice about the proposal document. We have approached the Commission about how it could be involved but have yet to discuss it in any detail.

Targeted engagement with groups that experience hate speech

8. We recommend that we approach a small number of organisations that represent groups that are more likely to experience hate speech (e.g. Māori, the Islamic community, refugees and migrants, and LGBTQI communities). This would not be full consultation but the feedback we receive would inform the draft proposal document. It would help us to better understand the experience of these communities, the effect that hate speech has on them, and the issues the proposal document needs to address. We would work with your office to identify appropriate groups to approach.

Relationship to other government work

9. You will be aware of cross-government work on responding to violent extremism online, including looking at ways that harmful content can be removed. The Ministry of Justice is connected into this work, which is led for the moment by the Prime Minister directly. We understand this work specifically excludes hate speech, but we will work with the Department of the Prime Minister and Cabinet to ensure continuity of approach.
10. We also understand that the Department of Internal Affairs (DIA) has been asked by Minister for Government Digital Services to consider ways of combatting hate speech online. This includes mechanisms for quickly removing material that infringes hate speech laws. This appears to overlap to some degree with the focus of the proposal document and we have approached DIA to make sure our work is properly aligned.

Timing and Next Steps

11. To meet the goal of releasing a proposal document by the end of the year, we suggest that we provide you with a draft paper for your consideration in September 2019. This would allow sufficient time to engage with key stakeholders as we develop the draft proposal document but still leave sufficient time for Ministerial consultation and Cabinet approval of the proposal document before the end of 2019.

Recommendations

12. We recommend that you:
 1. **Note** our proposed approach to developing a proposal document about addressing hate speech by the end of the year, including early engagement with vulnerable groups; and

2. **Agree** that the Ministry will work with the Human Rights YES / NO Commission to develop a draft proposal document for your consideration in September 2019, with Cabinet agreement to release it in October 2019.



Caroline Greaney

General Manager, Civil and Constitutional

APPROVED SEEN NOT AGREED

Hon Andrew Little

Minister of Justice

Date / /

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Purpose

1. This note provides information in response to a letter, dated 21 March 2019, that you received from Golriz Ghahramen MP. That letter asks about:
 - a) Possible changes to hate speech laws; and
 - b) Recording and reporting of hate crimes.

Review of Hate Speech

2. You have directed the Ministry of Justice to bring forward that part of the review of the Human Rights Act 1993 that deals with hate speech.
3. This will include releasing a detailed proposal document that will address:
 - a) the types of conduct that could be considered hate speech;
 - b) the regulatory tools for preventing and responding to hate speech; and
 - c) the roles and functions of relevant agencies.
4. Golriz Ghahramen MP notes in her letter that the hate speech provisions in the Human Rights Act apply only to the race-based grounds of discrimination. In particular, they do not cover religiously motivated hate speech. The review could include whether hate speech laws should extend to all the grounds of discrimination in section 22 of the Human Rights Act.
5. We will work closely with the Human Rights Commission to develop advice about the proposal document. This will also include targeted engagement with groups that are more likely to experience hate speech (e.g. Māori, the Islamic community, the Jewish community, refugees and migrants, and LBGTQI communities).
6. While the consideration of this matter has been fast-tracked, the proposed approach will allow for considerable public engagement and discussion about how our hate speech laws should operate.

Recording of Hate Crime

7. Section 9(1)(h) of the Sentencing Act 2002 requires a Court, when sentencing any person for an offence committed partly or wholly because of hostility towards a group of persons who have an enduring common characteristic, must take that into account as an aggravating factor.
8. Police have looked at ways to record hate crime in a way that is reliable, meaningful and provides value to policing activities (for example, by avoiding over or under reporting based on how it is collected).
9. Police commenced work in 2018 to ensure hate crime is documented in a way that will assist courts to consider it as an aggravated factor. Police also commenced work in January this year to develop systematic reporting of hate-based crime but requires further development across reporting system.

10. The internal Police guidance notes that it is important when prosecuting hate crime offenders to ensure:
 - a) The hate crime aspect of the offence is clearly articulated to the judge;
 - b) The victim impact statement obtained fully captures the impact the offending had on the victim, particularly emotional harm; and
 - c) The prosecutor is made aware that the special sentencing consideration is specifically sought.

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Purpose

1. This note provides information about a paper you are taking to the Cabinet Social Wellbeing Committee on 19 June 2019. The Cabinet paper does two things:
 - a. advise Cabinet about work to inform our thinking on stopping the spread of hate speech; and
 - b. seek joint authorisation with the Minister of Finance to jointly approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission for its work on hate speech and discrimination.

We are looking at how we stop the spread of hate speech

2. The Christchurch terrorist attack has made us more aware that many people from minority ethnic and religious communities are often made to feel threatened, unwelcome and alienated in their own country.
3. There is a connection between hostile communication against certain groups and actual violence carried out against those groups.

This includes regulatory and non-regulatory measures like 'give nothing to racism'

4. The Ministry of Justice is working with the Human Rights Commission to consider how we stop the spread of hate speech, including whether our laws adequately protect the right to equality, freedom from discrimination and rights of minorities.
5. We also plan to look at non-regulatory measures that could help stop the spread of hate speech. These can be effective at addressing a wider range of conduct than is possible through the criminal or civil law.
6. In particular, the paper seeks agreement to extend Government support for the Human Rights Commission's *Give Nothing to Racism* campaign. The campaign was designed to counter the view that, while most New Zealanders say racism is unacceptable, they do not see it as a problem in this country.
7. A new phase of the campaign would run over 12 months using social, online and potentially traditional media channels. It would address specific issues in areas like employment, where racism can have a significant negative impact.

A fiscally neutral appropriation transfer will enable the HRC to participate

8. The Human Rights Commission will need additional funding to carry out related work about racism and other forms of discrimination, including *Give Nothing*.
9. The paper recommends that Cabinet agree to a fiscally neutral in-principle expense transfer from the Vote Courts underspend for 2018/19 into 2019/20.
10. You and the Minister of Finance would jointly determine the final amount of the transfer into the appropriation for the Commission.
11. We expect it to be about \$1.500m for hate speech and related work on discrimination and about \$1.700m for the *Give Nothing to Racism* campaign.

Other issues that could be discussed

We plan to talk to representatives of affected groups

12. The paper does not go into detail about how we will consider ways of stop the spread of hate speech, but we do intend to speak to representatives of groups that are most affected by hate speech. The Commission will assist in organising these meetings and will attend them.
13. This will not be consultation in the proper sense because the numbers will be small and the purpose is only to inform our thinking. We are still working through the details with the Commission but anticipate a small number of meetings (perhaps 10 to 15) over the next few months.

Some people are concerned about limits on freedom of expression

14. Since the announcement that we are looking at hate speech, some groups and individuals have expressed concern that the Government could place limits on freedom of expression.
15. We need to protect freedom of expression, which is vital to hold those in authority to account, challenge the socially and culturally dominant, and enable society to progress. However, we also need to protect the rights of people to be free from discrimination and feel safe in their own community.
16. When speech threatens others, or is abusively discriminatory, then it can cause harm and encroach on the freedom of others. That includes the freedom of expression of minority groups, which hate speech limits by forcing them out of public spaces (online and offline).

Links to other work

There is a link to work on countering violent extremist content online

17. The Prime Minister is leading work on countering violent extremist content online and will take a paper to Cabinet in due course. This work targets violent extremist content online, not hate speech, but the topics are related.
18. The Ministry of Justice is working closely with the Department of the Prime Minister and Cabinet, Department of Internal Affairs, and the Ministry of Culture and Heritage to ensure that these streams of work are aligned.

We will also consider the additional protocol to the Convention on Cybercrime

19. This work will also consider whether New Zealand should accede to the Additional Protocol to the Council of Europe Convention on Cybercrime, commonly known as the Budapest Convention.
20. The Department of the Prime Minister and Cabinet and the Ministry of Justice are leading work on accession to the Convention, which seeks to harmonise domestic cybercrime laws.
21. The Additional Protocol deals with acts of a racist and xenophobic nature committed through computer systems, which is closely aligned with work on hate speech.



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Hate Speech and Discrimination

Portfolio Justice

On 19 June 2019, the Cabinet Social Wellbeing Committee:

- 1 **noted** that the Ministry of Justice and the Human Rights Commission are progressing work on approaches to hate speech and discrimination;
- 2 **noted** the close relationship between work on hate speech and work on countering violent extremist content online, and the wider content regulation system, and that officials are working closely to ensure these streams of work are aligned;
- 3 **noted** that an underspend is expected for 2018/19 in the Vote Courts non-departmental other expense appropriation *District Court Part-time or Acting Judges Salaries and Allowances*;
- 4 **agreed** to an in-principle transfer up to \$3.200 million in operating expenses from 2018/19 to 2019/20 from the non-departmental other expense *District Court Parttime or Acting Judges Salaries and Allowances*;
- 5 **authorised** the Minister of Finance and the Minister of Justice jointly to approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission to engage with government agencies and carry out related work about racism, and for the second phase of the 'Give Nothing to Racism' campaign, following confirmation of the above in-principle transfer;
- 6 **authorised** the Minister of Finance and the Minister of Justice jointly to confirm the final amount of the in principle transfer and the consequent fiscally neutral adjustment into the appropriation for the Commission.

Jenny Vickers
Committee Secretary

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Present:

Rt Hon Jacinda Ardern (part of item)
Hon Kelvin Davis (part of item)
Hon Chris Hipkins
Hon Andrew Little
Hon Dr David Clark
Hon Nanaia Mahuta (part of item)
Hon Stuart Nash (part of item)
Hon Tracey Martin (Chair)
Hon Willie Jackson (part of item)
Hon Aupito William Sio
Jan Logie, MP (part of item)

Officials present from:

Office of the Prime Minister
Officials Committee for SWC
Office of the Deputy Chair of SWC

Hard-copy distribution:

Minister of Justice

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Purpose

1. This note provides information on the progress of our hate speech work to date and seeks your steer on the scope of this work. Officials will be available to discuss at the officials' meeting on 24 June.

Update on progress

2. In April you agreed to our proposed approach to reviewing the protections against hate speech. Specifically, you agreed to work towards a proposal document for public consultation which could look at:
 - types of conduct covered by hate speech restrictions
 - regulatory tools (e.g. criminal and civil)
 - roles and functions of relevant agencies (e.g. Human Rights Commission, courts)
3. On 19 June 2019, SWC noted this work and agreed to fiscal neutral funding of around \$3.2 million to the Human Rights Commission for work on hate speech and discrimination. The Cabinet decision also notes that we will assess the requirements of the Additional Protocol to the Budapest Convention (on online racist and xenophobic offences) and whether NZ should accede.
4. We have started working with the Commission and Government agencies. We intend to engage with organisations representing vulnerable groups within the next few months to better understand the effect of hate speech and issues with current protections.

Scope of the project

5. Hate speech is potentially a very big field, ranging from everyday racist remarks to terrorists' written or verbal expressions. Limitations can be found in many regulatory frameworks, some of which sit outside of Justice.
6. We would like to discuss the scope of this work with you, in particular, whether we should be considering changes to legislation other than the Human Rights Act. This could include the Harmful Digital Communications Act and the Classifications Act. Considering amendments to legislation other than the Human Rights Act would considerably widen the scope of this project.
7. An initial assessment indicates issues with the Human Rights Act's civil and criminal hate speech framework, including gaps, accessibility and operational issues, which our work can cover.
8. We consider that, irrespective of the scope of regulatory frameworks to be covered, non-regulatory measures, such as supporting the Human Rights Commission in its anti-discrimination advocacy, should be included in our work. These are regarded as effective means to fundamentally change attitudes in our society and do not restrict freedom of speech in the same way regulatory options may.



Cabinet

Minute of Decision

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Hate Speech and Discrimination

Portfolio Justice

On 24 June 2019, following reference from the Cabinet Social Wellbeing Committee, Cabinet:

- 1 **noted** that the Ministry of Justice and the Human Rights Commission are progressing work on approaches to hate speech and discrimination;
- 2 **noted** the close relationship between work on hate speech and work on countering violent extremist content online, and the wider content regulation system, and that officials are working closely to ensure these streams of work are aligned;
- 3 **noted** that an underspend is expected for 2018/19 in the Vote Courts non-departmental other expense appropriation *District Court Part-time or Acting Judges Salaries and Allowances*;
- 4 **agreed** to an in-principle transfer up to \$3.200 million in operating expenses from 2018/19 to 2019/20 from the non-departmental other expense *District Court Part-time or Acting Judges Salaries and Allowances*;
- 5 **authorised** the Minister of Finance and the Minister of Justice and Minister for Courts jointly to approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission to engage with government agencies and carry out related work about racism, and for the second phase of the 'Give Nothing to Racism' campaign, following confirmation of the above in-principle transfer;
- 6 **authorised** the Minister of Finance and the Minister of Justice and Minister for Courts jointly to confirm the final amount of the in-principle transfer and the consequent fiscally neutral adjustment into the appropriation for the Commission.

Michael Webster
Secretary of the Cabinet

Secretary's Note: This minute replaces SWC-19-MIN-0067. Cabinet amended paragraphs 5 and 6.

Hard copy distribution:

Prime Minister
Deputy Prime Minister
Minister of Finance
Minister of Justice

In Confidence

Office of the Minister of Justice

Chair, Cabinet Social Wellbeing Committee

PROGRESSING INTER-AGENCY WORK ON HATE SPEECH AND DISCRIMINATION

Proposal

1. This paper advises Cabinet about work to inform our thinking on stopping the spread of hate speech. It outlines how this work aligns with work across the public sector, in part arising from the Christchurch terrorist attack on 15 March 2019.
2. This paper also seeks authorisation for the Minister of Finance and the Minister of Justice to jointly approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission for its work on hate speech and discrimination, in particular the 'give nothing to racism' campaign.

Background

3. New Zealand has laws that cover some types of speech and conduct that can be regarded as "hate speech". For example, the Human Rights Act 1993 makes it an offence to incite racial disharmony through written or verbal expression. This is punishable by up to three months in prison or a fine up to \$7000. Material may be considered objectionable under the Films, Videos, and Publications Classification Act 1993 if it represents members of any group as inherently inferior by reason a characteristic that is a prohibited ground of discrimination in the Human Rights Act. The Harmful Digital Communications Act 2015 says that digital communications should not denigrate a person's colour, race, ethnic or national origins, religion, gender, sexual orientation or disability. It provides redress for victims, including orders to remove or cease the digital communication and restraint on the conduct of the person responsible.
4. However, following the Christchurch terrorist attack, many people from minority ethnic and religious communities have spoken publicly about opinions and statements they routinely see on public platforms that make them feel threatened, unwelcome and alienated. Others have said these types of statements allow a climate to develop that is tolerant of harmful discriminatory expression (whether that is online or other forms of expression). There is a connection between hostile communication against certain groups and actual violence carried out against those groups. Hate speech was a problem before 15 March 2019, and was likely to be part of a review of the Human Rights Act in late 2019, but I have decided it is appropriate to bring that part of the review forward.

Purpose and scope

5. I have asked the Ministry of Justice to work with the Human Rights Commission to consider how we stop the spread of hate speech, including whether our existing laws adequately protect the right to equality, freedom from discrimination

and rights of minorities. They will also look at non-regulatory options that could help reduce tolerance for racism and discrimination. This will build on existing priorities including the Child Wellbeing Strategy, which has as one of its six priorities that children are free from racism, discrimination and stigma.

6. This work will also consider whether New Zealand should accede to the Additional Protocol to the Council of Europe Convention on Cybercrime (commonly known as the Budapest Convention). The Department of the Prime Minister and Cabinet and the Ministry of Justice are leading work on accession to the Convention, which seeks to harmonise domestic cybercrime laws. The Additional Protocol deals with acts of a racist and xenophobic nature committed through computer systems, which is closely aligned with the proposed work on hate speech.

Extension of the 'give nothing to racism campaign'

7. As a related piece of work, I also propose to extend Government support for the award-winning *Give Nothing to Racism* campaign. That campaign addresses one of the themes emerging following the Christchurch terrorist attack, namely the need to challenge racist behaviour and attitudes. *Give Nothing* was implemented in 2016/2017 by the Human Rights Commission in partnership with the agency Clemenger BBDO. The campaign was designed to counter the view, shown in research, that while a clear majority of New Zealanders say racism is unacceptable, they do not see it as a problem that needs to be addressed in this country.
8. A post-implementation survey found the campaign started a national conversation about the impact of racism and prompted some New Zealanders to take action. The campaign continues to be relevant as demonstrated by the way many New Zealanders used it as a way of expressing their response to the terrorist attack.
9. One reaction to the terrorist attack was a view that, as a country, we need to do more to create an inclusive society. Research shows that, to be successful, pro-diversity campaigns directly challenge racism and include specific anti-racism interventions. A second phase of the *Give Nothing to Racism* campaign could deliver that outcome. *Give Nothing* is an established and recognised brand for which much of the research and critical thinking has already been carried out.
10. A new phase of the campaign would build on the established *Give Nothing* platform and feature a refreshed creative concept for post-Christchurch environment. It would be run over 12 months using social, online and potentially traditional media channels. The campaign website would be updated and provided with more resources that would assist more third parties to run initiatives under the *Give Nothing* banner. To deepen the reach and impact of the campaign it would look to address specific issues in areas like employment, where racism can have a significant negative impact. Such a campaign would build on the work already done and provide an effective vehicle for addressing racism on an ongoing basis and starting discussions about associated issues such as hate speech.

Relationship to work on countering violent extremist content online

11. The Prime Minister is leading work on countering violent extremist content online and will take a paper to Cabinet in due course. This work targets violent extremist

content online, not hate speech, but the topics are related. For example, the definition of objectionable content in the Films, Videos, and Publications Classification Act 1993, which underpins the work on countering violent extremism, directly references the hate speech provisions in the Human Rights Act. However, for a piece of content to be considered as violent extremist content, it must promote or support (or tend to promote or support) extreme violence or extreme cruelty, and generally must contain depictions of actual violence or instructions to commit actual violence. This is a higher threshold than current hate speech laws.

12. The first phase of this work includes immediate operational improvements and discrete legislative changes to address identified gaps in our current regulatory system that do not affect our hate speech laws. The Ministers of Internal Affairs and the Minister for Broadcasting, Communications and Digital Media also plan to develop terms of reference for a review of whether further regulatory change is needed to the wider content regulation system.
13. My officials are working closely with the Department of the Prime Minister and Cabinet, Department of Internal Affairs, and the Ministry of Culture and Heritage to ensure that these streams of work are aligned

Consultation

14. The Ministry of Justice has consulted the Human Rights Commission about its role in work on hate speech and discrimination. The Ministry has also consulted the Department of the Prime Minister and Cabinet, Department of Internal Affairs (including the Office of Ethnic Communities and the Government Chief Digital Office), Te Puni Kōkiri, Te Arawhiti, Ministry of Pacific Peoples, Ministry for Women, Ministry for Culture and Heritage, Ministry of Foreign Affairs and Trade, Ministry of Business, Innovation, and Employment, Ministry of Social Development (including the Office of Disability Issues), Crown Law, the Treasury, and New Zealand Police.

Financial Implications

15. The Ministry of Justice and other public service departments can meet the costs of this work from within baseline. The Human Rights Commission will need additional funding to engage with government agencies and carry out related work about racism and other forms of discrimination. I recommend that Cabinet agree to an in-principle expense transfer from the Vote Courts underspend for 2018/19 into 2019/20. I seek authorisation, jointly with the Minister of Finance, to determine the final amount of the transfer into the appropriation for the Commission (which I expect to be about \$1.500m for hate speech and related work on discrimination and \$1.700m for the 'give nothing to racism' campaign).

Legislative Implications

16. There are no legislative proposals arising directly out of this paper.

Regulatory Impact Analysis

17. A regulatory impact analysis will be part of any policy proposals developed as a result of this work.

Human Rights Implications

18. In considering our hate speech laws, we need to protect freedom of expression as well as the rights of people to be free from discrimination and feel safe in their own community. Freedom of expression is vital to hold those in authority to account, challenge the socially and culturally dominant, and enable society to progress. However, when it threatens others, or is abusively discriminatory, then it can cause harm and encroach on the freedom of others.
19. New Zealand maintains a reservation to Article 20 of the International Covenant on Civil and Political Rights, which requires States Parties to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In May, following the Universal Periodic Review of New Zealand by the UN Human Rights Council, the Government committed to reconsider all reservations to the core international human rights treaties. We can reconsider the reservation to Article 20 as part of the review of hate speech laws.

Gender Implications

20. Women and gender diverse people are subject to hate speech, which can be particularly acute when they are also part of a marginalised group in society. The Ministry of Justice is working with the Ministry for Women and other agencies to inform the work on hate speech and discrimination.

Disability Perspective

21. Anecdotal and research evidence shows that hate speech towards disabled people and people with mental health issues is widespread, for example, on internet sites dedicated to expressing such hate. The Ministry of Justice is working with the Office of Disability Issues to inform work on hate speech and discrimination.

Publicity

22. There has already been considerable media coverage about the decision to bring forward the part of the Human Rights Act that deals with hate speech.

Proactive Release

23. I propose to release this paper proactively within 30 working days of final decisions by Cabinet. This will be subject to some redactions, if required.

Recommendations

The Minister of Justice recommends that the Committee:

1. **Note** that the Ministry of Justice and the Human Rights Commission are progressing work on approaches to hate speech and discrimination;
2. **Note** the close relationship between work on hate speech and work on countering violent extremist content online, and the wider content regulation system, and that officials are working closely to ensure these streams of work are aligned;

3. **Note** that an underspend is expected for 2018/19 in the Vote Courts non-departmental other expense appropriation *District Court Part-time or Acting Judges Salaries and Allowances*;
4. **Agree** to an in-principle transfer up to \$3.200 million in operating expenses from 2018/19 to 2019/20 from the non-departmental other expense *District Court Part-time or Acting Judges Salaries and Allowances*;
5. **Authorise** the Minister of Finance and the Minister of Justice jointly to approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission to engage with government agencies and carry out related work about racism, and for the second phase of the 'give nothing to racism' campaign, following confirmation of the above in-principle transfer;
6. **Authorise** the Minister of Finance and the Minister of Justice jointly to confirm the final amount of the in-principle transfer and the consequent fiscally neutral adjustment into the appropriation for the Commission.

Authorised for lodgement

Hon Andrew Little
Minister of Justice

Appendix 1: Facebook's policy on hate speech

12. Hate speech

Policy rationale

We do not allow hate speech on Facebook because it creates an environment of intimidation and exclusion, and in some cases, may promote real-world violence.

We define hate speech as a direct attack on people based on what we call protected characteristics – race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity and serious disease or disability. We protect against attacks on the basis of age when age is paired with another protected characteristic, and also provide certain protections for immigration status. We define "attack" as violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation. We separate attacks into three tiers of severity, as described below.

Sometimes people share content containing someone else's hate speech for the purpose of raising awareness or educating others. In some cases, words or terms that might otherwise violate our standards are used self-referentially or in an empowering way. People sometimes express contempt in the context of a romantic break-up. Other times, they use gender-exclusive language to control membership in a health or positive support group, such as a breastfeeding group for women only. In all of these cases, we allow the content but expect people to clearly indicate their intent, which helps us better understand why they shared it. Where the intention is unclear, we may remove the content.

We allow humour and social commentary related to these topics. In addition, we believe that people are more responsible when they share this kind of commentary using their authentic identity.

[Click here to read our Hard Questions Blog⁴](#) and learn more about our approach to hate speech.

Do not post:

Tier 1

Content targeting a person or group of people (including all subsets except those described as having carried out violent crimes or sexual offences) on the basis of their aforementioned protected characteristic(s) or immigration status with:

- Violent speech or support in written or visual form
- Dehumanising speech or imagery in the form of comparisons, generalisations or unqualified behavioural statements to or about:
 - Insects

⁴ <https://about.fb.com/news/2017/06/hard-questions-hate-speech/>

- Animals that are culturally perceived as intellectually or physically inferior
- Filth, bacteria, disease and faeces
- Sexual predator
- Subhumanity
- Violent and sexual criminals
- Other criminals (including, but not limited to, "thieves", "bank robbers" or saying that "all [protected characteristic or quasi-protected characteristic] are 'criminals'")
- Statements denying existence
- Mocking the concept, events or victims of hate crimes, even if no real person is depicted in an image
- Designated dehumanising comparisons, generalisations or behavioural statements (in written or visual form) that include:
 - Black people and apes or ape-like creatures
 - Black people and farm equipment
 - Jewish people and rats
 - Muslim people and pigs
 - Muslim person and sexual relations with goats or pigs
 - Mexican people and worm-like creatures
 - Women as household objects or referring to women as property or "objects"
 - Transgender or non-binary people referred to as "it"

Tier 2

Content targeting a person or group of people on the basis of their protected characteristic(s) with:

- Generalisations that state inferiority (in written or visual form) in the following ways:
 - Physical deficiencies are defined as those about:
 - Hygiene, including, but not limited to: filthy, dirty, smelly
 - Physical appearance, including, but not limited to: ugly, hideous
 - Mental deficiencies are defined as those about:
 - Intellectual capacity, including, but not limited to: dumb, stupid, idiots
 - Education, including, but not limited to: illiterate, uneducated
 - Mental health, including, but not limited to: mentally ill, retarded, crazy, insane

- Moral deficiencies are defined as those about:
 - Culturally perceived negative character trait, including, but not limited to: coward, liar, arrogant, ignorant
 - Derogatory terms related to sexual activity, including, but not limited to: whore, slut, perverts
- Other statements of inferiority, which we define as:
 - Expressions about being less than adequate, including, but not limited to: worthless, useless
 - Expressions about being better/worse than another protected characteristic, including, but not limited to: "I believe that males are superior to females."
 - Expressions about deviating from the norm, including, but not limited to: freaks, abnormal
- Expressions of contempt or their visual equivalent, which we define as:
 - Self-admission to intolerance on the basis of protected characteristics, including, but not limited to: homophobic, islamophobic, racist
 - Expressions that a protected characteristic shouldn't exist
 - Expressions of hate, including, but not limited to: despise, hate
- Expressions of dismissal, including, but not limited to: don't respect, don't like, don't care for
- Expressions of disgust or their visual equivalent, which we define as:
 - Expressions suggesting that the target causes sickness, including, but not limited to: vomit, throw up
 - Expressions of repulsion or distaste, including, but not limited to: vile, disgusting, yuck
- Cursing, defined as:
 - Referring to the target as genitalia or anus, including, but not limited to: cunt, dick, asshole
 - Profane terms or phrases with the intent to insult, including, but not limited to: fuck, bitch, motherfucker
 - Terms or phrases calling for engagement in sexual activity, or contact with genitalia or anus, or with faeces or urine, including, but not limited to: suck my dick, kiss my ass, eat shit

Tier 3

Content targeting a person or group of people on the basis of their protected characteristic(s) with any of the following:

- Calls for segregation

- Explicit exclusion, which includes, but is not limited to, "expel" or "not allowed".
- Political exclusion defined as denial of right to political participation.
- Economic exclusion defined as denial of access to economic entitlements and limiting participation in the labour market,
- Social exclusion defined as including, but not limited to, denial of opportunity to gain access to spaces (incl. online) and social services.

We do allow criticism of immigration policies and arguments for restricting those policies.

Content that describes or negatively targets people with slurs, where slurs are defined as words commonly used as insulting labels for the above-listed characteristics.

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Hon Grant Robertson
Minister of Finance
Parliament Buildings
WELLINGTON

Appropriation Changes Requiring Joint Minister Approval: Transfer of funding to Human Rights Commission

Introduction

This letter seeks approval to make changes to appropriations following the approval of an in-principle expense transfer at Cabinet [CAB-MIN-0307.01].

Cabinet recently considered *Developing a Proposal Document for Combatting Hate Speech*. This included a financial recommendation to transfer 2018/19 underspend from Vote Courts to the Human Rights Commission to carry out specific pieces of work regarding hate speech.

Changes requiring Minister of Finance agreement

Cabinet approved an in-principle expense transfer of \$3.200 million from 2018/19 to 2019/20, within *District Court Part-time or Acting Judges Salaries and Allowances*.

Cabinet authorised that the Minister of Finance and the Minister of Justice agree the final amount of the in-principle transfer and the consequent fiscally neutral adjustment into the appropriation for the Human Rights Commission.

Your approval is now sought to agree the transfer amount. The Ministry of Justice has advised me of the interim financial results for the 2018/19 year and I am satisfied that sufficient underspend for the full \$3.200 million is available to transfer.

Human Rights Commission's work to be carried out

The Human Rights Commission will use approximately \$1.700 million on the next phase of the Give Nothing to Racism campaign.

Approximately \$0.700 million will be used for the Human Rights Commission's initial work to support the Ministry of Justice's review of hate speech laws. This includes the facilitation of community-based meetings and focus groups to help inform early policy considerations. It will also be used for research to gain wider empirical evidence around experiences of hate speech and to provide a baseline for future work.

The remaining \$0.800 million is planned to be used for subsequent work on hate speech as required in 2020.

Consultation

The Treasury has been consulted on this paper.

Recommendations

I recommend that you:

1. **note** that on 19 June 2019 Cabinet (CAB-19-MIN-0307.01 refers):
 - 1.1. agreed to an in-principle transfer of up to \$3.200 million from the Vote Courts non-departmental other expense appropriation *District Court Part-time or Acting Judges Salaries and Allowances* and;
 - 1.2. authorised the Minister of Finance, the Minister of Justice and the Minister for Courts jointly to approve a fiscally neutral adjustment between appropriations to provide funding for the Human Rights Commission to carry out work related to hate speech and discrimination; and
 - 1.3. authorised the Minister of Finance, the Minister of Justice and the Minister for Courts jointly to confirm the amount of the in-principle transfer and the consequent fiscally neutral adjustment into the appropriation for the Human Rights Commission;
2. **note** that early confirmation of the full amount of the expense transfer will enable the required work on hate speech and discrimination to commence;
3. **agree** an expense transfer of \$3.200 million from 2018/19 to 2019/20;
4. **approve** the following changes to appropriations and/or departmental capital injections to provide for the expense transfer in recommendation 3 above, with no impact on the operating balance and/or net core Crown debt across the forecast period:

	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
Vote Courts Minister for Courts					
Non-Departmental Other Expense: District Court Part-time or Acting Judges Salaries and Allowances	3.200	-	-	-	-

5. **approve** the following fiscally neutral adjustment between appropriations to enable the Human Rights Commission to undertake work on hate speech and discrimination, with no impact on the operating balance and/or net core Crown debt:

	\$m – increase/(decrease)				
	2019/20	2020/21	2021/22	2022/23	2023/24 & Outyears
Vote Courts Minister for Courts					
Non-departmental Other Expense: District Court Part-time or Acting Judges Salaries and Allowances	(3.200)	-	-	-	-
Vote Justice Minister of Justice					
Non-departmental Output Expense:					

Services from the Human Rights Commission	3.200	-	-	-	-
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6. **agree** that the proposed changes to appropriations and/or departmental capital injections for 2019/20 above be included in the 2019/20 Supplementary Estimates and that, in the interim, the increase be met from Imprest Supply.

Approved / Not Agreed

Hon Andrew Little
Minister of Justice
Minister for Courts

Date

Approved / Not Agreed

Hon Grant Robertson
Minister of Finance

Date

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Hate speech – letter to Hon Grant Robertson, Minister of Finance

Hon Andrew Little, Minister of Justice
7 August 2019

Purpose

1. This note provides information on the attached draft letter to Hon Grant Robertson, Minister of Finance. The letter seeks approval of fiscal decisions in order to provide funding for the Human Rights Commission's hate speech and anti-discrimination work.

Cabinet decision

2. In June, Cabinet noted the work the Ministry of Justice and the Human Rights Commission are progressing on hate speech and anti-discrimination. The Commission requires confirmation of funding for this work.
3. Cabinet approved an in-principle transfer of up to \$3.200 million from a 2018/19 underspend in Vote Courts to finance the Commission's relevant work. Cabinet authorised the Minister of Justice and the Minister of Finance to jointly approve the final amount and the necessary fiscal neutral adjustment.
4. The letter seeks the Minister of Finance's agreement to:
 - the funds transfer of \$3.200 million from 2018/19 to 2019/20; and
 - the fiscal neutral adjustment from Vote Courts to Vote Justice (Human Rights Commission Services) to enable the Commission to undertake the work on hate speech and anti-discrimination.

Human Rights Commission work to be funded

5. The Commission will use approximately \$1.700 million for the next stage of the Give Nothing to Racism campaign.
6. Approximately \$0.700 million will be used for the Commission's initial community engagement and research work supporting the Ministry's review of hate speech laws. We are working with the Commission on the details of its work to be carried out and expect a plan for the initial phase to be finalised soon.
7. Agreeing to this transfer now will provide certainty to the Human Rights Commission so that it can progress the work in a timely matter.
8. Discussions about next stages of the project, for example the Commission's involvement in public engagement on a proposal document, will be had at a later stage.
9. We will keep you updated about the progress of the hate speech work and the tasks the Commission will be carrying out.

Enclosed:

Excerpt from *Weekly Report for the Minister of Justice and Minister for Courts*

13 September 2019

[Out of scope – paragraphs 1-6]

Update about the hate speech work

Scope of the hate speech review

- 7. The hate speech review focuses on incitement of hostility towards certain population groups and the relevant provisions in the Human Rights Act (especially ss 61, 131). We are also looking at the racial harassment provision in the Human Rights Act (s 63) due to its close connection with ss 61 and 131.
- 8. The Harmful Digital Communications Act (HDCA) is out of scope for this project as the HDCA is not concerned with incitement of hostility towards groups but with causing serious emotional distress to an individual. The Criminal Law Policy Team has put a wider review of the HDCA on hold due to other priority work.

Initial advice on options

- 9. We will provide you with a briefing outlining our findings so far and the direction of our advice both in the regulatory and the non-regulatory space shortly.
- 10. In particular, we intend to seek your view on the approach to non-regulatory options. As there are other workstreams considering anti-discrimination and social inclusion work across Government, the purpose of this briefing would be to gauge the scope for additional non-regulatory options within the hate speech area.

Engagement with communities

- 11. The Human Rights Commission has been tasked with carrying out engagement, together with the Ministry, with communities who experience or are at risk of experiencing hate speech. The Commission has started liaising with groups to arrange meetings. We expect that the bulk of the engagement sessions will start in September. We will provide you with the Commission’s engagement schedule once finalised and will provide you with regular updates on the key outcomes from engagement sessions.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph ^{s9(2)(a)}
Caroline Greaney, Acting Deputy Secretary Policy. Ph ^{s9(2)(a)}

Hate speech links with proposed approach to work on countering violent extremist content online

- 12. A Cabinet paper setting out an approach to domestic work to eliminate terrorist and violent extremist content online is to be considered by the Cabinet Social Wellbeing Committee on 25 September. The paper proposes that Cabinet invite the Minister of Internal Affairs to lead a Ministerial Group on countering violent extremism, to ensure a coordinated response across Government to progress work in this area.

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13. You are proposed to be a member of the Ministerial Group as Minister of Justice. The paper also references the hate speech review. In our view, it would be helpful for the Ministerial Group to be kept informed of the hate speech work rather than set the direction of the review.
14. We will provide you with an aide memoire on the Cabinet paper.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph ^{s9(2)(a)}
Caroline Greaney, Acting Deputy Secretary Policy. Ph ^{s9(2)(a)}

[Out of scope – paragraphs 15-22]

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Enclosed:

Excerpt from *Weekly Report for the Minister of Justice and Minister for Courts*

20 September 2019

[Out of scope – paragraphs 1-3]

Engaging with groups on hate speech

4. The first of the series of engagements with groups most vulnerable to hate speech took place last week, s9(2)(ba)

5.

6.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph s9(2)(a)
Rajesh Chhana, Deputy Secretary Policy. Ph s9(2)(a)

Potential non-regulatory mechanisms to address hate speech

7. We have conducted a wide scan of mechanisms that are currently being used to address hate speech. We have looked both domestically and overseas at mechanisms outside of the main legislative interventions, such as prosecuting crimes and mediation. We have identified opportunities for further work that we would like to discuss with you.

8. The opportunities could help to better educate and raise awareness of how to deal with hate speech; provide specific support to victims; or collect information so hate speech can be better understood and addressed in the future. Some examples are:

- Data collection: there is a gap domestically and internationally for hate speech data, including data on who experiences hate speech and the often-accompanying hate crime, what harm it does to people, and what would address or mitigate the harm. The addition of data would improve knowledge of the problem and support identification of mechanisms to better address hate speech.
- Counter-speech: this is speech that does not attempt to change the mind of people posting hate or to argue directly with people. Instead it aims to balance conversations that may be skewed towards a particular point of view, or to inject discussions with facts and reasonable viewpoints, made in a respectful manner. The idea is to provide balance so that other people engaging in that conversation can see that there are alternative perspectives.
- Helplines: there are no specific helplines for people who have experienced hate speech, racism, or discrimination, to provide emotional support and information on their rights in relation to hate speech laws. Providing helplines may support people to be more comfortable using the laws and systems and could provide a way to mitigate the harm experienced from being subject to hate speech. Reporting lines can also be an effective means for people to report hate speech.

9. We would like to discuss with you whether the draft proposal document for hate speech includes potential non-regulatory mechanisms. We would particularly welcome your views on further exploration of opportunities of the type described above.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph ^{s9(2)(a)}

Rajesh Chhana, Deputy Secretary Policy. Ph ^{s9(2)(a)}

[Out of scope – paragraphs 10-24]

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Purpose

1. This note briefs you on the joint Cabinet paper being considered by the Cabinet Social Wellbeing Committee (SWC) on 25 September 2019 about countering violent extremist content online.

Summary of proposals in the paper

2. The Cabinet paper describes the approach, issues and work underway domestically to tackle extremist content. The paper proposes the Minister of Internal Affairs chair a Ministerial Group comprising you (as responsible Minister for the Justice and NZ Security Intelligence Service portfolios), the Minister for Government Digital Services, the Minister of Broadcasting, Communications and Digital Media, the Attorney General, Minister of Foreign Affairs, and the Minister of Police.
3. It is proposed the Group would ensure a coordinated and collaborative response across Government to progress an overarching goal of countering violent extremism. The Department of Internal Affairs' (DIA) work programme on countering violent extremism online (CVE) is proposed to consist of:
 - immediate operational improvements so that monitoring of violent extremism content is adequately resourced – additional DIA staff to detect and deter content, while working with industry, and more resource for the Office of Film and Literature Classification to make classification decisions;
 - legislative change to address gaps in the current regulatory system – identifying and making changes to clarify the application of the Films, Videos, and Publications Classification Act 1993 (FVPC Act) to online content; and
 - an expanded scope for the proposed media content regulatory review to include online content hosts (including social media). The review is being currently scoped by the Ministers of Internal Affairs and Broadcasting, Communications and Digital Media. The proposed terms of reference, engagement approach and timeline of this review are planned to be brought to Cabinet in early 2020.
4. New Zealand Bill of Rights Act 1990 implications will be a key issue raised by the proposals for amending the FVPC Act, and during the proposed review of media content regulation.

Connections with Justice portfolio work

5. The paper notes the cross-government work relevant to the CVE work programme. For the Justice portfolio, this relates to the hate speech review, the proposed acceding by New Zealand to the Budapest Convention, and the counter-terrorism work.

Unclear whether Ministerial Group can make decisions about the hate speech review

6. We understand the proposed Ministerial Group would be a mechanism for information sharing between relevant Ministers. The paper is silent about governance and any decision-making role over the direction of the work being discussed by the Group.
7. We consider that decision-making by the Group over work such as the hate speech review would be undesirable. You may wish to clarify this during consideration at SWC. The terms of reference for the Group could then be developed on the basis of this understanding.

Enclosed:

Excerpt from *Weekly Report for the Minister of Justice and Minister for Courts*

27 September 2019

[Out of scope – paragraphs 1-2]

Engagement with community groups on hate speech

3. As you are aware, engagement meetings with key community groups began last week. Officials from the Ministry and staff from the Human Rights Commission have attended these meetings.

s9(2)(ba)

Contact:

Jenna Reid, Policy Manager Civil Law and Human Rights.

Ph s9(2)(a)

Rajesh Chhana, Deputy Secretary Policy. Ph s9(2)(a)

[Out of scope – paragraphs 7-18]

Review of protections against hate speech

The Ministry is reviewing the protections against hate speech in the Human Rights Act 1993 (sections 61 and 131). This work will include looking at non-regulatory options. The Minister has publicly announced this work in early 2019.

A 2018 survey by NetSafe found that **11% of New Zealand adults** reported to have been personally targeted by online hate speech in the prior year.

According to this Netsafe survey, **6 out of 10** targeted persons reported a negative impact, including on their emotions or behaviours.

In 2019 Police laid **one charge** under section 131 against a person distributing material from the Christchurch attacker. The person was ultimately convicted for an offence under the Films, Videos and Publications Classifications Act 1993.

Hate speech protections are provided for in the Human Rights Act

- Hate speech is a form of discrimination under the Human Rights Act 1993.
- The Human Rights Act contains a civil and a criminal law provision prohibiting hate speech. Those provisions only cover incitement of hostility against racial, ethnic and national groups.
- These provisions are not being used much in practice.
- The objective of the project is to ensure that protections against hate speech are effective, adequate and accessible. The work will also consider the implications of freedom of speech.
- The Ministry is working closely with the Human Rights Commission, especially in the early engagement with vulnerable communities. Cabinet approved funding for the Commission's work around hate speech.

Key achievements/progress in 2018–19

- Initial Ministerial and Cabinet decision.
- Initial planning and scoping completed.
- Discussions with the Human Rights Commission to plan targeted early engagement with affected population groups.

Next steps

- Early engagement with affected population groups will be completed in October.
- The Ministry will provide advice to the Minister of Justice on legislative and non-regulatory proposals in December 2019. This may include a proposal document for public consultation in the new year.

Enclosed:

Excerpt from *Weekly Report for the Minister of Justice and Minister for Courts*

22 October 2019

Engagement with community groups on hate speech

s9(2)(ba)

17

There are no further engagements planned. We expect a final report from the HRC on the key themes that arose from these engagements. Our focus is now the development of the proposed document.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph

s9(2)(a)

Rajesh Chhana, Deputy Secretary Policy. Ph

s9(2)(a)

Remainder of document is out of scope.

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Enclosed:

Excerpt from *Weekly Report for the Minister of Justice and Minister for Courts*

29 October 2019

Engagement with community groups on hate speech

We have received the final report from the Human Rights Commission on the engagements. Key themes from that report include:

- Hate speech is difficult to define
- Many people had experienced hate speech. They had experienced that hate speech in various places including schools, university, hospitals, online, shops, and in the workplace.
- There is a cumulative effect of many demeaning and derogatory comments that was described as “death by a thousand cuts”
- All groups expressed concern about hate speech online, particularly on social media.
- Hate speech is reflected in our power structure which was seen by some as western, white, male, and cis-gendered.
- Hate speech is more than speech. It is anything that is demeaning, discriminatory, disempowering and discrediting.
- Groups requested that safety of minority group communities should be a paramount consideration in formulating plans for any potential law changes and public consultations.

Common suggested changes included:

- Collect information about the full extent of hate speech in New Zealand
- Amend the Human Rights Act 1993 to include all groups of vulnerable people
- Educate people on their rights, New Zealand history, and other languages and groups of people
- Training should be provided for police and other complaint bodies
- Hate speech in the media and online needs to be addressed

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph s9(2)(a)

Rajesh Chhana, Deputy Secretary Policy. Ph s9(2)(a)

Remainder of document out of scope.



Hon Andrew Little, Minister of Justice

Strengthening the incitement provisions and processes in the Human Rights Act 1993

Date	13 December 2019	File reference	HUM 03 01
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Action Sought

Timeframe/Deadline

Agree the proposals in this briefing.	16 December 2019
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Contacts for telephone discussion (if required)

Name	Position	Telephone		1st contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 918 8649	s9(2)(a)	✓
Kathy Brightwell	Principal Advisor, Civil Law and Human Rights			

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office comments

IN CONFIDENCE

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Purpose

1. This briefing presents proposals for strengthening the incitement provisions in the Human Rights Act 1993 (the HRA) to protect against hate speech.

Executive Summary

2. In June 2019, you informed Cabinet of work by the Ministry of Justice and the Human Rights Commission (HRC) to prevent the spread of hate speech, including consideration of whether New Zealand's existing laws adequately protect the right to equality, freedom from discrimination and rights of minorities. [CAB-19-MIN-0307.01 refers].
3. 'Hate speech' includes any kind of communication in speech, writing or behaviour that attacks a person or group on the basis of who they are, for example based on their religion, ethnicity, nationality, race, colour, sex or gender identity. Hate speech is harmful to members of population groups that are targeted and is harmful to society as a whole.

Statutory protections against hate speech

4. In accordance with international treaties, New Zealand has legislated against the incitement of racial disharmony in the HRA. Civil protections are included in section 61 and prohibit the incitement of hostility and contempt on the grounds of race, ethnicity and nationality. Section 131 makes it a criminal offence to incite hostility, ill-will, contempt or ridicule on the grounds of race, ethnicity and nationality. This review focuses on these two incitement provisions.
5. The criminal offence carries a penalty of up to three months imprisonment or a fine of \$7,000. Complaints under section 61 are made to the HRC, which provides services to facilitate a resolution. Where resolution is not achieved, a claim can be taken to the Human Rights Review Tribunal (the Tribunal) which can grant a range of remedies including damages up to \$350,000.
6. A key element of the statutory protections is the incitement to hostility and ill-feeling towards a group by others. This is in line with international law, which prohibits communications that are likely to spread hate and increase discrimination and hostility. The sections were deliberately drafted to ensure that freedom of expression is not unjustifiably limited. The expression of opinions and ideas that are not likely to incite hostility, ill-will, contempt or ridicule on the grounds of race, ethnicity or nationality are not prohibited by the incitement provisions.

Issues with current protections

7. The incitement provisions are seldom used. The scope of the provisions is narrow and many groups that are at risk of hate speech are not currently covered. These include the rainbow, disabled and faith-based communities.
8. Information on how to make a complaint of hate speech is difficult to find and the system can be hard to navigate. The HRC responds to complaints under the civil incitement provision and its primary role is dispute resolution. Current penalties for the criminal incitement offence are low compared to similar legislation.

Proposals to strengthen protections

9. We propose a range of regulatory, operational and non-regulatory approaches to improve protections against the incitement of hostility towards groups. We recommend extending the incitement provisions to cover all groups in the prohibited grounds of discrimination listed in the HRA. Currently, gender identity is not included in the prohibited grounds of discrimination. However, the proposed change to the statutory protections would provide an opportunity to also amend the HRA to explicitly include gender identity as a prohibited ground of discrimination.
10. We also propose strengthening legal protections by prohibiting the incitement of discrimination of a group in the civil incitement provision. This is in keeping with the requirements of international treaties and Part 2 of the HRA, which is about unlawful discrimination.
11. We do not consider that the function of the HRC should be extended to adjudication of civil incitement complaints as this would conflict with its role as an independent and trusted conciliator. However, there may be opportunities to make greater use of existing powers and functions available to the HRC, such as mediation and inquiry.
12. We propose that the penalties for the criminal incitement offence be increased and the provision be moved to reflect the seriousness of the crime and to ensure consistency with other related offences. These changes would send a clear signal of the types of communications that are unacceptable in New Zealand.
13. Non-regulatory initiatives are also important for preventing the spread of hate speech. Clearer and more accessible information on the complaints process would help complainants to navigate the system.
14. The proposals for strengthening the statutory protections against hate speech are likely to have cost and resource implications for the HRC, the Police, the Tribunal and the courts. We will work with these agencies to identify the potential impacts of the proposals before proposals are taken to Cabinet.

Background

15. In June 2019, you informed Cabinet of work by the Ministry of Justice and the HRC to prevent the spread of hate speech, including consideration of whether New Zealand's existing laws adequately protect the right to equality, freedom from discrimination and rights of minorities [CAB-19-MIN-0307.01 refers]. The full text of the relevant provisions of the HRA is attached as Appendix One. This work is the first part of a planned wider review of the HRA, which is due to commence later in 2020.
16. The assessment of the HRA provisions relating to hate speech is informed by a series of targeted engagements held in Auckland, Hamilton, Wellington and Christchurch with representatives of population groups who are likely to experience hate speech. The population groups included Māori, Pasifika, Asian, faith-based, rainbow, young people, disabled people, and women. A total of 14 engagement meetings were held, attended by 120 people. A summary of the findings of these engagements is attached as Appendix Two.

17. We have also discussed our recommended approach with the following agencies with an interest in the hate speech legislation: the HRC; the Police; Crown Law; the Office of Disability Issues; Te Puni Kokiri, Ministry of Social Development; Oranga Tamariki; the Ministry of Education; the Ministry of Business, Innovation and Employment; the Department of Internal Affairs; and the Department of the Prime Minister and Cabinet.

Hate speech causes significant harm

18. There is no international legal definition of 'hate speech'. The June 2019 United Nations Strategy and Plan of Action on Hate Speech describes hate speech as:

...any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity factor.

19. Through our engagements we heard that experience of hate speech and other harmful communications was common for all the participating communities. Participants noted that exposure to demeaning and derogatory comments had a cumulative effect. It caused people to become afraid of further exposure and of being part of the wider community. People also experienced low self-esteem and felt that they were not accepted in society. In some cases, harmful communications led to suicidal ideation.
20. These findings are supported by international research, which shows that hate speech is harmful, not only to the population groups targeted, but it also has a destabilising and divisive effect on society by encouraging discrimination between groups. This can potentially lead to violence and a breakdown in public order.¹
21. Hate speech weakens the inclusivity of a society as it can cause members of the groups targeted to feel threatened and unwelcome. The implicit threat of violence that may accompany some forms of hate speech can cause people to fear for their physical safety. This can lead to their isolation and withdrawal from public spaces. As a result of hate speech, people may change their behaviour, for example seeking less visibility and withdrawing from participation in community life.^{2,3,4,5} As such, hate speech encroaches on the rights of others, including the right to freedom of expression and the right to equality of population groups.

¹ Butler, A & Butler P (1990). *The New Zealand Bill of Rights Act: A commentary*. Wellington: LexisNexis. Quoted in *Wall v Fairfax* [2018] NZHC 104.

² Matsuda, M. J. (2018). *Words that wound: Critical race theory, assaultive speech, and the first amendment*. New York: Routledge.

³ Human Rights Law Centre (2018). *End the hate: Responding to prejudice motivated speech and violence against the LGBTI community*. Melbourne: Human Rights Law Centre.

⁴ Netsafe (2018). *Online Hate Speech: A survey on personal experiences and exposure among adult New Zealanders*. Retrieved from <https://www.netsafe.org.nz/wp-content/uploads/2019/11/onlinehatespeech-survey-2018.pdf>

⁵ Gelber, K. & McNamara, L. (2016). Evidencing the harms of hate speech. *Social Identities*, 22(3), 324-341.

International human rights treaties require States Parties to legislate against hate speech

22. Inciting hatred is considered a form of discrimination and is addressed through the international human rights treaties. New Zealand has ratified the International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), which requires States Parties to legislate against racist hate speech. The United Nations (UN) Committee responsible for the Convention recommended the criminalisation of the most serious forms of hate speech towards groups, with less serious cases addressed through other means.
23. The International Covenant on Civil and Political Rights 1966 (ICCPR) also requires legal prohibition against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
24. The right to freedom of expression is affirmed in the Universal Declaration of Human Rights 1948 and the ICCPR.

New Zealand has a range of legal protections against harmful communications

25. New Zealand's system of protection against harmful communications covers speech and material directed at individuals and groups. The system spans criminal laws for the most serious cases, civil proceedings for less serious cases, and non-regulatory approaches such as education and awareness campaigns aimed at reducing tolerance of racism and discrimination.
26. Physical assault, and incitement of physical assault, and offensive language directed at individuals are criminal offences under the Crimes Act 1961 and the Summary Offences Act 1981. The Harmful Digital Communications Act (HDCA) 2015 prohibits harmful digital communications including those that denigrate a person by reason of colour, race, ethnic or national origins, religion, gender, sexual orientation or disability.
27. Laws that cover harmful communications and behaviours directed towards groups include the Films, Videos, and Publications Classification Act 1993, which classes as objectionable any material that represents members of any group as inherently inferior by reason of a characteristic that is a prohibited ground of discrimination in the HRA. Under the Sentencing Act 2002, committing an offence because of hostility towards a group of persons is an aggravating factor.

Protections against hate speech are located in the HRA

28. To implement ICERD, New Zealand enacted criminal and civil law prohibitions against incitement of disharmony on the grounds of race, ethnicity and nationality in the Race Relations Act 1971. The provisions were later imported into the HRA when it superseded the Race Relations Act. Examples of hate speech laws in other countries are included in Appendix Three.
29. Under section 131 of the HRA, it is 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. Furthermore, section 131 requires that there is an

intention to incite hostility, ill-will, contempt or ridicule. This offence is punishable by up to three months imprisonment or a fine of \$7,000.

30. It is unlawful under section 61 of the HRA for anyone 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. This is the civil incitement provision.
31. This review is focussed on these two provisions of the HRA. Other sections will be considered in the wider review of the Act.
32. A key element of the provisions is the incitement to hostility and ill-feeling towards a group by others. This is in line with international law, which prohibits communications that are likely to spread hate and increase discrimination and hostility⁶.
33. Another key point of the incitement provisions is that actual harm does not need to be proven. The provisions prohibit communications that may be likely to cause harm, whether or not harm actually occurs.
34. The primary difference between the civil and criminal incitement provisions is the intent of the person delivering the inciting communications. Deliberately trying to encourage in other people hostile feelings towards a group is treated as more serious than communication that is not intended to incite others. While intent is not a consideration for the other discrimination sections of the HRA, it is an important component in determining criminality.
35. The standard of proof differs between criminal and civil law. In civil proceedings, facts must be proved on the balance of probabilities whereas the criminal standard of proof is beyond reasonable doubt.
36. The provisions also differ in the types of incitement described. Section 131 refers to the likely incitement of hostility, ill-will, contempt and ridicule, whereas the civil provision refers to the likely incitement of hostility and contempt only.

The incitement provisions do not unduly restrict freedom of expression

37. The right to freedom of expression is protected under section 14 of the New Zealand Bill of Rights Act 1990. This right includes the freedom to seek, receive and impart information and opinions of any kind in any form.
38. Like all rights and freedoms in the Bill of Rights Act, freedom of expression is subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (section 5). Along with prohibitions on hate speech, we have a range of restrictions on freedom of expression, for example, in relation to threatening to kill or cause grievous bodily harm, offensive language, defamation, copyright, fair trading, and misrepresentation.
39. Restrictions on hate speech can raise concerns about possible impacts on free speech but this needs to be balanced with the obligation to protect other rights. Through the requirement of likely incitement, sections 61 and 131 were carefully drafted to strike a reasonable balance between the obligations under ICERD to

⁶ United Nations Strategy and Plan of Action on Hate Speech, 18 June 2010, Synopsis.

legislate against incitement of racial discrimination and hostility and the need to protect freedom of expression.

40. The purpose of section 61 and section 131 is to help prevent increased discrimination and intolerance as a result of incitement of hostility towards specified groups. As such, of primary importance is the potential impact of the communication rather than the offensiveness of the content. The expression of ideas and opinions that are unlikely to promote hostility among other people would therefore not fall under the incitement provisions.

The HRC and the Police are responsible for dealing with complaints of hate speech

41. Anyone can make a complaint under the incitement provisions. The complainant does not need to be a member of the group targeted by the speech or to have been harmed by the speech. Complaints can be made by an individual or by a group of people.
42. Complaints under the section 61 civil incitement provision are made to the HRC. The HRC's role is to provide services designed to facilitate resolution of the complaint. This can be through information, expert problem-solving support and mediation.
43. Either party can refuse to participate in mediation. If mediation is refused or fails to resolve the complaint, or at any time after making the complaint, the complainant can lodge an application to the Human Rights Review Tribunal (the Tribunal). If satisfied that resolution is not possible or in the public interest, the Tribunal conducts a hearing and decides the case on the available evidence. The Tribunal may at any time dismiss a claim if it is satisfied that it is trivial, frivolous or vexatious or is not brought in good faith.
44. If the Tribunal finds that a breach of section 61 has occurred, it can grant any remedy it sees fit, such as a declaration that the defendant has committed a breach, an order restraining the defendant from continuing or repeating the breach, and/or damages of up to \$350,000.
45. In the case of online hate speech, people can complain to Netsafe who will liaise with websites, internet service providers and other content hosts (including those overseas) and request the harmful material be taken down or moderated. If this fails to reach a resolution, the complainant can make an application to the District Court, which can issue orders such as to take the material down, cease and desist, publication of a correction or apology and the release of the identity of the person behind an anonymous communication.
46. Section 131 criminal offences are generally prosecuted by the Police, although people can also take private prosecutions. Section 132 of the HRA requires all prosecutions under section 131 to be approved by the Attorney-General before they can proceed to court.

The current incitement provisions are not operating effectively

47. Participants in the targeted engagements reported that experience of harmful communications is common, either directly as an individual or as a member of the population group. Despite this self-reported experience, section 61 and section 131 of the HRA are seldom used. There has only been one criminal conviction for hate

speech, dating back to 1979. There have only been three civil cases brought under section 61, one of which, in 1996, was upheld.

48. There is a lack of data on the prevalence of hate speech. Between 1 June 2016 and 1 June 2019, the HRC received 215 complaints referencing hate or racial harmony. None of these complaints proceeded to mediation because the HRC assessed that they did not meet the section 61 threshold for incitement.
49. The leading case for s61 is *Wall v Fairfax* [2018] NZHC 104, where the High Court ruled that the material in question was not likely to incite hostility or contempt to the level that it would realistically threaten racial disharmony in New Zealand. Based on consideration of the meanings of 'hostility' and 'contempt' the Court concluded that the section 61 prohibition applies only to expression at the serious end of the spectrum which inspires enmity, extreme ill-will or is likely to result in the group being despised.
50. In its 2017 *Concluding Observations to New Zealand*, the UN Committee responsible for the Convention on the Elimination of Racial Discrimination raised concerns about the application of the incitement provisions and the lack of prosecutions. The Committee noted that the incitement provisions may be ineffective in combating racial hatred.
51. Participants in the targeted engagement felt that the HRA does not provide adequate protection from hate speech. The low use of section 61 and section 131 suggest that the law may not be fit for purpose.

Reasons for the low use of section 61 and section 131 of the HRA are regulatory and operational

52. We have identified the main issues with the incitement provisions to be related to:
 - a) the scope of the provisions
 - b) navigation of the system and responses to complaints
 - c) penalties for the criminal incitement offence.

The scope of the incitement provisions is too narrow

53. The focus on race, ethnicity and nationality reflects the fact that section 61 and section 131 originated as the response to New Zealand's obligations under ICERD. When the incitement provisions were carried over into the HRA they were not updated to include the other prohibited grounds of discrimination (listed in section 21 of the HRA). The reason given at the time was that the need to extend the protections to other grounds of prohibited discrimination had not been demonstrated.
54. In the present day, it is clear from our targeted engagements, complaints to the HRC and Police, and review of media reports and literature that other groups do experience hate speech. The inconsistency with the prohibited grounds of discrimination contained in section 21 of the HRA is a significant limitation on the effectiveness of the incitement provisions as a number of groups likely to experience hate speech are shut out of the legal protections.

It can be difficult to engage with the complaints process

55. The pathways for dealing with harmful communications and objectionable material are not clearly articulated or accessible. The targeted engagements revealed that it is difficult to find information on how and where to make a complaint.
56. People may not be aware of the difference between the criminal and civil processes nor of the outcome they can expect from a complaint. There is also a lack of clarity about the different avenues to address harmful speech (under the HRA, the HDCA, the Crimes Act) and which agency to approach.
57. The role of the HRC in section 61 complaints is dispute resolution and, while it gathers information about a complaint, it does not adjudicate the case. The primary remedy the HRC offers is voluntary mediation between the parties. Facilitation of conversations between the parties could be beneficial to increasing understanding and tolerance, however, it only works where there is a willingness to participate. Mediation cannot be compelled and the person responsible for the communication subject to a complaint can simply refuse.
58. Substantial remedies are available through the Tribunal, including declarations of the breach of the HRA and damages. However, as noted above, the bar for establishing likelihood of inciting hostility or contempt towards a group is perceived to be high and only one case has been upheld to date.

Penalties are comparatively low

59. Any review of criminal provisions requires an assessment of the associated penalties. The penalties themselves may not contribute to the low use of the criminal incitement provision but we have found that they appear to be out of step with other related legislation such as the Films, Videos, and Publications Classification Act 1993 and the HDCA. The current penalties for section 131 of the HRA of up to three months in prison or a fine of \$7,000 do not reflect the seriousness of the crime of intentionally inciting hostility and ill-will against a group.
60. By comparison, the penalty for harmful digital communication, which is directed at an individual rather than a population group, is up to two years imprisonment or a fine of up to \$50,000. The penalty for making or distributing an objectionable publication is up to 14 years imprisonment.

Proposed approaches for improving the protections against incitement

61. We propose that objectives of strengthening protections against incitement are that:
 - a) legal provisions are adequate to protect groups that are likely to be targets of hate speech
 - b) the purpose and scope of legal provisions are clear
 - c) complaints processes are accessible and appropriate remedies are available
 - d) the responses are proportional and preserve people's right to freedom of expression.
62. We have identified a number of regulatory, operational and non-regulatory responses that would improve the functioning of the system for addressing hate speech. The proposals are listed in Table 1 below.

Table 1: Proposed responses

Issue	Proposed response
Scope of the incitement provisions (Regulatory)	<ul style="list-style-type: none"> • Extend the incitement provisions to other groups that experience discrimination • Prohibit incitement of discrimination under section 61
Complaints process (Operational)	<ul style="list-style-type: none"> • Explore opportunities to make better use of functions under the HRA to address section 61 complaints
Penalties (Regulatory)	<ul style="list-style-type: none"> • Increase penalties for the section 131 criminal offence • Move the criminal offence to the Crimes Act 1961
Support statutory protections through education and awareness (Non-regulatory)	<ul style="list-style-type: none"> • Improve information about, and navigation of, the complaints process • Leverage education programmes to promote understanding of hate speech

Strengthen the incitement provisions

Extend legal protections to cover other groups that experience hate speech

63. Extending the application of the incitement provisions beyond race, ethnicity and nationality would significantly expand protections under the law against hate speech. The targeted engagements, complaints to the HRC, and media reports indicate that hate speech can be directed at a range of groups, including those based on sex, gender identity, religion, sexuality and disability.
64. Extension to other groups would make remedies available to a more comprehensive range of cases and would clarify that speech that incites hostility towards these groups is not acceptable in New Zealand. The inclusion of other groups that experience hate speech would also bring New Zealand in line with United Nations recommendations and the protections provided in other jurisdictions such as the United Kingdom, Canada, Ireland and Norway.
65. As hate speech is a form of discrimination, our preferred option is to extend the incitement provisions to all the grounds of discrimination listed in section 21 of the HRA. This would extend protection to the other groups likely to experience hate speech and improve internal consistency within the HRA.
66. The issue that arises with this approach is that gender identity is not explicitly included in section 21. Following the Universal Periodic Review (UPR) of New Zealand in January 2019, the UN Human Rights Council recommended that New Zealand amend section 21 of the HRA to add gender identity, gender expression or sex characteristics. This followed a similar recommendation from the UN Committee on the Elimination of Discrimination against Women in July 2018.
67. The Government did not accept the UPR recommendation but only because there had not yet been a formal decision about making specific law changes. Despite not accepting the recommendation, the formal response indicated that New Zealand

would consider amending the HRA to include gender identity as a prohibited ground of discrimination.

68. Our targeted engagements indicated that gender diversity is a group that reports experience of hate speech. It is unclear whether gender identity is covered under the existing ground of sex. Over time the concept of gender has become less associated with the biological determinants of sex and now covers a wider range of experience and expression.
69. The proposed change to the incitement provisions of the HRA provides an opportunity to also amend section 21 to explicitly include gender identity and sex characteristics as a prohibited ground of discrimination. This will avoid doubt as to whether gender identity is covered by the HRA. However, it should be noted that any changes to section 21 will have implications to other parts of the HRA and is likely to be of significant public interest and debate.
70. Agencies we have consulted on these proposals are supportive of including gender identity in the incitement provisions and section 21 of the HRA. More work is required to assess the impacts of adding gender identity to section 21. We propose to undertake this work in January and report back to you in February 2019 before you present your preferred options for strengthening protections against hate speech to Cabinet.
71. Another option we considered was listing the groups covered in the incitement provisions and including a catch-all category that could cover groups that may emerge in the future. The issue with this option is that the catch-all provision may not provide sufficient certainty for a criminal conviction and the courts would need to decide whether a particular group was included.

Amend the civil provision to include prohibition of incitement of discrimination against a group

72. The ICCPR requires the prohibition by law of incitement to discrimination, however it was not included in the incitement provisions of the HRA. Examples of inciting discrimination of a group include encouraging their exclusion or unfavourable treatment, such as in the provision of goods and services, rental housing, and employment. In our view, as it is unlawful to actually discriminate against population groups, it should also be unlawful to incite others to discriminate against these groups.
73. Prohibited grounds of discrimination, and the section 61 incitement provision, sit in Part 2 of the HRA and are subject to civil remedies. It is therefore appropriate that prohibition of incitement of discrimination be included in section 61 but not as a criminal offence under section 131. It is proposed that the wording of section 61 be amended to explicitly prohibit the use or distribution of words or material that are likely to incite discrimination of a group.

Explore greater use of existing powers to respond to section 61 complaints

74. The civil law incitement provision was expressly included to provide a process of conciliation for hate speech that falls below the level of criminality. It is the role of the HRC to facilitate the resolution of disputes and complaints under the civil incitement provision through voluntary mediation.

75. We do not consider that the function of the HRC should be extended to include adjudication or determination of complaints under section 61 as this would conflict with its role as an independent and trusted conciliator. It would also duplicate the adjudication function of the Tribunal. The wider review of the HRA will include the functions of the HRC and further statutory powers can be considered at that time.
76. Mediation provided by the HRC is voluntary and parties to the dispute can refuse to participate. There are also situations where mediation may not be the most appropriate or effective course of action, for example where there are multiple complaints about the same instance of hate speech.
77. We consider there is merit in exploring greater use of other functions available to the HRC. In particular, the inquiry and public statement functions may be useful in addressing hate speech, even where no complaint has been made or where the communications may not meet the section 61 incitement threshold.
78. The HRC is able to inquire into any matter that may involve the infringement of human rights. Following an inquiry, the HRC can bring proceedings to the Tribunal based on the findings or it could publish a report or issue a public statement. Public statements could be a means of drawing attention to instances of hate speech and the negative impact they have on people and communities in New Zealand. The Office of the Privacy Commissioner and the Health and Disability Commissioner also have powers of inquiry, which they use to look into specific issues within their responsibility.
79. We do not consider there is a need for further statutory powers for the HRC at this stage, but this matter can be explored more fully in the wider review of the HRA. Data on the types of complaints received would assist in determining the functions and powers needed to resolve them and address hate speech more generally.

Ensure penalties signal the seriousness of the incitement offence

Increase the penalties for section 131 to be proportional to the harm

80. The relatively light penalties for section 131 could be taken to indicate that the intentional incitement of hostility, ill-will, contempt or ridicule towards a group is considered a minor offence. As more is known and seen about the harm to groups and damage to society that can be caused by these types of communications, we consider that the penalties are not fit for purpose.
81. We propose that the penalties for the criminal incitement offence be increased so that they are proportionate to the seriousness of the crime. In determining appropriate levels, we considered where hate speech sits within the spectrum of related offences. As such communications are intended to spread and increase hostility towards population groups, it is appropriate that the penalties be higher than for expressions of hate directed at individuals. As harmful communication is not a crime of direct physical violence, the penalty should sit below that for causing injury or grievous bodily harm (set at 3-14 years).
82. The preferred option is to increase the maximum penalties for section 131 to up to three years imprisonment or a fine of up to \$50,000. This positions the offence slightly above harmful digital communication to an individual and below violent

crimes and threats to kill or cause grievous bodily harm. A comparison with other relevant penalties is included in Appendix Four.

Move the criminal incitement provision to the Crimes Act 1961

83. The location of section 131 within the HRA may reduce visibility of the offence and its availability as an option for prosecution. We therefore propose that the offence be moved to the Crimes Act 1961.
84. Locating the criminal incitement provision in the Crimes Act would clearly signal that intentional incitement of hostility, ill-will, contempt or ridicule towards a group is a serious criminal offence, particularly if supported by the proposed proportionate penalties. Another advantage is that police officers receive in-depth training on the Crimes Act and the incitement provision may be more likely to be included.
85. Section 132 of the HRA requires the consent of the Attorney-General for all prosecutions under the criminal incitement provision. This requirement was included because it was believed that a prosecution for inciting racial disharmony was likely to excite widespread public controversy. It was therefore considered important that such prosecutions only be brought where there was a proper basis for proceedings and this would be assured by requiring the Attorney-General's consent.
86. While it provides an additional check and balance on the potential limitation of free speech, the Attorney-General consent requirement also makes an additional step in the prosecution decision process. It could therefore act as a disincentive to pursuing prosecutions under the criminal incitement provision.
87. This review of the incitement provisions provides an opportunity to consider whether the requirement for Attorney-General consent is still necessary. If the clause was removed from the HRA, the Attorney-General would still have the ability to intervene in prosecutions through the power to direct a stay of proceedings under the Criminal Procedure Act 2011.

Non-regulatory approaches are also important for addressing harmful communications

88. Participants of the targeted engagements noted that non-regulatory approaches to addressing discrimination and harmful communications are key to working towards an inclusive and tolerant society. Non-regulatory mechanisms support the legal protections through raising awareness and facilitating intervention. There is a range of initiatives and programmes that could be leveraged to provide better responses to incidences of incitement.
89. Options include:
 - a) Provide clearer and more accessible information on the complaints process for harmful communications
 - b) Include information on harmful communication in existing education and awareness raising campaigns

Make information on the complaints process clearer and more accessible

90. Clear, easily accessible information on the purpose and processes of the incitement provisions would assist people who are considering making a complaint. Greater

communication and cooperation between the Police, HRC, and Netsafe could make the system more transparent and easier to access.

91. The HRC is well-placed to act as a navigator to the system, providing advice and support through the process. Information on what constitutes hate speech and incitement could be prominently displayed on the HRC website, along with details on how to make a complaint and the process for dealing with complaints. The HRC could be asked to identify ways to make information on the section 61 process easy to find and understand.

Educate and raise awareness about harmful communications

92. A key theme of the engagements was a need for training on all forms of discrimination across society as a whole and specifically for first responders (such as Police and the HRC), schools, and government officials who are in contact with communities vulnerable to experiencing hate speech. Education on recognising and responding to hate speech would also be beneficial in creating a more inclusive and tolerant society.
93. A number of programmes are already in development that could be leveraged to promote understanding of hate speech. An initiative to build the capability of the public service front-line to deliver services to our diverse community is included as a potential intervention under the social inclusion work. The racism and discrimination workstream of the Child and Youth Wellbeing Strategy (CYWS) also includes a proposal to increase the capability of front-line government workers to recognise and address discrimination and bias in their own practice.
94. A number of other proposals under the racism and discrimination workstream of the CYWS could provide useful vehicles for raising awareness of the effects of harmful communications. For example, inclusion of references to incitement in the second phase of the *Give Nothing to Racism Campaign* could be explored, as well as in the proposed further tools and resources to be developed. The CYWS proposals include options for supporting community groups to tackle racism and discrimination at the local level. The inclusion of harmful communications as part of this initiative could be explored.

Implications of proposed approaches

95. Widening the groups covered by the incitement provisions and improved accessibility of the system may lead to an increase in complaints to the HRC and the Police. More prosecutions under the criminal incitement provision may have implications for the courts. More complaints under the civil incitement provision will increase the demands on the HRC and the Tribunal to process and assess cases. We have had an initial discussion with the HRC on the proposals and we would, with your agreement, work through the implications further following decisions on the preferred approach.
96. The proposed changes to penalties and location of the criminal incitement provision may lead to an increase in prosecutions and, potentially, convictions for hate speech. This could have implications for the Police, the courts and the prison population. In our initial discussions on the proposal, Crown Law noted that, for offences carrying penalties of two years imprisonment or more, defendants can elect a trial by jury. This would increase the costs associated with prosecutions.

Treaty of Waitangi implications

97. A Treaty of Waitangi analysis of the proposals is underway. Implications of the proposals around gender identity are an important component of the analysis. We will therefore provide Treaty implications in February 2020, together with the assessment of the proposed addition of gender identity as a prohibited ground of discrimination in the HRA.

Next steps

98. Officials would like to discuss the options and proposals presented in this briefing with you. You have previously indicated that you would like to publicly consult on proposed changes to strengthen the incitement provisions and processes under the HRA early next year. You have publicly stated your intention to introduce legislation before the election.
99. The following time line would be required for legislation to be introduced in 2020:
- | | |
|---------------------------|--|
| 16 December | Discuss proposals and preferred approach with officials |
| 14 February | Officials provide a draft Cabinet paper and proposal document |
| 21 February -
13 March | Cross party consultation |
| 19 March | Lodge Cabinet paper and proposal document with Cabinet office |
| 1 April | Cabinet paper and proposal document considered at Cabinet Social Wellbeing Committee |
| 6 April | Cabinet paper and proposal document confirmed at Cabinet |
| 8 April | Public consultation opens |
| 20 May | Public consultation closes |
| 5 June | Receive report on submissions analysis, final proposals and draft Cabinet paper |
| 8-26 June | Cross party consultation |
| 2 July | Lodge Cabinet paper on legislative amendments with Cabinet office |
| 6-17 July | Recess |
| 22 July | Cabinet paper on legislative amendments considered at Cabinet Social Wellbeing Committee |
| 27 July | Cabinet |
| 28 July -
19 August | Amendment legislation drafted, Bill of Rights vet |
| 20 August | Lodge Cabinet paper and amendment Bill |
| 25 August | Cabinet Legislation Committee approves introduction of the amendment Bill |
| 31 August | Cabinet |
| 1 September | Introduce amendment Bill to the House |

100. This time line compresses some phases of work. For example, the analysis of the implications of adding gender identity to section 21 of the HRA would need to occur in January. The work will require consultation with other agencies, which may be difficult at that time of year.
101. The time line allows six weeks for public consultation, which may be considered short given the high level of public interest likely in this issue. We will need to consult with Māori within this time frame.
102. It should be noted that, in the proposed time line, consultation is scheduled to start two weeks after the anniversary of the Christchurch terror attacks. The Royal Commission of Inquiry into the Attack on Christchurch Mosques is due to report on 30 April 2020, two weeks before consultation would be due to close. These events are likely to increase public interest in the proposals and there may be calls for a longer consultation period.

Recommendations

103. We recommend that you:

1. **Note** the review of the incitement provisions of the Human Rights Act (HRA) 1993 is being carried out ahead of a wider review of the Act
2. **Note** we plan that the wider review of the HRA will commence later in 2020
3. **Agree** to discuss the proposals in this briefing with officials at the officials meeting on 16 December 2019. YES / NO
4. **Agree** to the following proposals to strengthen the incitement provisions of the HRA:
 - 4.1. extend legal protections to the groups listed under the prohibited grounds of discrimination in section 21 of the HRA YES / NO
 - 4.2. assess the impacts of amending the prohibited grounds of discrimination listed in section 21 of the HRA to include gender identity and sex characteristics YES / NO
 - 4.3. amend section 61 and section 131 of the HRA to include prohibition of incitement of discrimination against a group YES / NO
 - 4.4. explore greater use of existing powers under the HRA for responding to complaints under the civil incitement provision YES / NO
 - 4.5. increase the penalties for the section 131 criminal incitement offence in line with similar Acts YES / NO
 - 4.6. move the criminal incitement provision to the Crimes Act 1961 YES / NO

5. **Agree to either:** YES / NO
- retain the requirement for Attorney-General consent to prosecutions under the criminal incitement provision
- or
- remove the requirement for Attorney-General consent to prosecutions under the criminal incitement provision YES / NO



Jenna Reid

Manager, Civil Law and Human Rights

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

Attachments:

- Appendix One: Sections 21, 61, and 131 of the Human Rights Act 1993
- Appendix Two: Key Themes from Targeted Engagement with Communities
- Appendix Three: Examples of laws to address hate speech in other jurisdictions
- Appendix Four: Comparison of penalties for relevant legal provisions

Appendix One: Sections 21, 61, and 131 of the Human Rights Act 1993

The following sections of the Human Rights Act 1993 relate to prohibited grounds of discrimination and incitement of racial disharmony.

21 Prohibited grounds of discrimination

- (1) For the purposes of this Act, the *prohibited grounds of discrimination* are—
- (a) sex, which includes pregnancy and childbirth:
 - (b) marital status, which means being—
 - (i) single; or
 - (ii) married, in a civil union, or in a de facto relationship; or
 - (iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or
 - (iv) separated from a spouse or civil union partner; or
 - (v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:
 - (c) religious belief:
 - (d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:
 - (e) colour:
 - (f) race:
 - (g) ethnic or national origins, which includes nationality or citizenship:
 - (h) disability, which means—
 - (i) physical disability or impairment:
 - (ii) physical illness:
 - (iii) psychiatric illness:
 - (iv) intellectual or psychological disability or impairment:
 - (v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:
 - (vi) reliance on a guide dog, wheelchair, or other remedial means:
 - (vii) the presence in the body of organisms capable of causing illness:
 - (i) age, which means,—
 - (i) for the purposes of [sections 22 to 41](#) and [section 70](#) and in relation to any different treatment based on age that occurs in the period beginning with 1 February 1994 and ending with the close of 31 January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under [section 7](#) of the New Zealand Superannuation and Retirement Income Act 2001 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):

- (ii) for the purposes of [sections 22 to 41](#) and [section 70](#) and in relation to any different treatment based on age that occurs on or after 1 February 1999, any age commencing with the age of 16 years:
- (iii) for the purposes of any other provision of [Part 2](#), any age commencing with the age of 16 years:
- (j) political opinion, which includes the lack of a particular political opinion or any political opinion:
- (k) employment status, which means—
- (i) being unemployed; or
 - (ii) being a recipient of a benefit as defined in [Schedule 2](#) of the Social Security Act 2018 or an entitlement under the [Accident Compensation Act 2001](#):
- (l) family status, which means—
- (i) having the responsibility for part-time care or full-time care of children or other dependants; or
 - (ii) having no responsibility for the care of children or other dependants; or
 - (iii) being married to, or being in a civil union or de facto relationship with, a particular person; or
 - (iv) being a relative of a particular person:
- (m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.
- (2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purposes of this Act, if—
- (a) it pertains to a person or to a relative or associate of a person; and
 - (b) it either—
 - (i) currently exists or has in the past existed; or
 - (ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.

61 Racial disharmony

- (1) It shall be unlawful for any person—
- (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
 - (b) to use in any public place as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
 - (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—

being matter or words likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

- (2) It shall not be a breach of subsection (1) to publish in a newspaper, magazine, or periodical or broadcast by means of radio or television or other electronic communication a report relating to the publication or distribution of matter by any person or the broadcast or use of words by any person, if the report of the matter or words accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words.

- (3) For the purposes of this section,—

newspaper means a paper containing public news or observations on public news, or consisting wholly or mainly of advertisements, being a newspaper that is published periodically at intervals not exceeding 3 months

publishes or **distributes** means publishes or distributes to the public at large or to any member or members of the public

written matter includes any writing, sign, visible representation, or sound recording.

131 Inciting racial disharmony

- (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—
- (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
- (b) uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

- (2) For the purposes of this section, *publishes* or *distributes* and *written matter* have the meaning given to them in section 61.

Appendix Two: Key themes from targeted engagement with communities

The Ministry of Justice worked with the Human Rights Commission (HRC) to arrange some small focussed engagements with representatives of community groups who may have experienced, or may be at risk of experiencing, hate speech. In these sessions, participants used the term hate speech to refer to both abusive communications directed at individuals and communications likely to incite hostility among others.

The key themes from the sessions are summarised below.

Experiences and effects of hate speech on the groups we engaged with

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Appendix Three: Examples of laws to address hate speech in other jurisdictions

The table below provides information about criminal hate speech laws in other jurisdictions. There are variations in the details of the law (for example, whether intention is required, groups protected and the penalty). Most jurisdictions use incitement provisions and do not punish insulting or abusive language as such. This reflects freedom of expression considerations and the requirements under the Convention on the Elimination of Racial Discrimination. Several countries have civil and criminal provisions.

Country	Law and prohibitions	Penalty	Comment
United Kingdom	<p><i>Public Order Act 1986:</i></p> <p>1) using threatening, abusive or insulting words or behaviour, or displaying any written material which is threatening, abusive or insulting, if—</p> <p>(a) intention to thereby to stir up racial hatred, or</p> <p>(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.</p> <p>2) using threatening words or behaviour, or displaying any written material which is threatening, if intending thereby to stir up religious hatred.</p> <p>3) using threatening words or behaviour, or displaying any written material which is threatening, intending thereby to stir up hatred on the grounds of sexual orientation.</p>	7 years	Intention not required for 1(b)
Northern Ireland	<p><i>Public Order (Northern Ireland) Order 1987:</i></p> <p>Using threatening, abusive or insulting words or behaviour, or displaying any written material which is threatening, abusive or insulting if—</p> <p>(a) intending thereby to stir up hatred or arouse fear; or</p> <p>(b) having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.</p> <p>A person who is not shown to have intended to stir up hatred or arouse fear is not guilty of an offence under this Article if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.</p> <p>Coverage: religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins.</p>	7 years	Includes arousal of fear Intention not required
Canada	<p><i>Criminal Code:</i></p> <p>Inciting hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, or wilfully promotes hatred against any identifiable group.</p> <p>Coverage: colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, mental or physical disability.</p>	2 years	Defences and exemptions are available. A civil law provision prohibiting online communications "likely to expose a

			person or persons to hatred or contempt" on the basis of a prohibited ground of discrimination was repealed through a member's bill in 2013. It triggered a complaints process to the Canadian Human Rights Commission and Canadian Human Rights Review Tribunal.
Australian federal legislation	<p><i>Racial Discrimination Act 1975:</i></p> <p>To offend, insult, humiliate or intimidate another person or a group of people if the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.</p> <p><i>Criminal Code 1995:</i></p> <p>Using a (online) carriage service in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.</p>	Criminal Code: 3 years	Racial Discrimination Act triggers civil complaint to the Australian Human Rights Commission (exceptions are included in the legislation)
ACT	<p><i>Discrimination Act 1991:</i></p> <p>Unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following</p> <p>(a) disability;</p> <p>(b) gender identity;</p> <p>(c) HIV/AIDS status;</p> <p>(d) intersex status;</p> <p>(e) race;</p> <p>(f) religious conviction;</p> <p>(g) sexuality.</p>	Not criminal	
Ireland	<p><i>Prohibition of Incitement to Hatred Act 1989:</i></p> <p>Threatening, abusive or insulting and are intended or, having regard to all the circumstances, likely to stir up hatred.</p> <p>Coverage: race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation</p>	2 years	
Norway	<p><i>Penal Code:</i></p> <p>With intent or gross negligence publicly makes a discriminatory or hateful statement.</p>	3 years	Gross negligence is covered

	<p>Discriminatory or hateful statement means threatening or insulting a person or promoting hate of, persecution of or contempt for another person based on his or her</p> <ol style="list-style-type: none"> skin colour or national or ethnic origin, religion or life stance homosexual orientation, or reduced functional capacity 		
Germany	<p><i>Criminal Code:</i></p> <p>In a manner capable of disturbing the public peace:</p> <ol style="list-style-type: none"> incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, 	5 years	<p>Human dignity is a human right under the German Constitution.</p> <p>Offences are investigated and prosecuted actively</p>
United States	<p>Speech is protected under the Constitution unless there is as clear and present danger:</p> <ol style="list-style-type: none"> if the advocacy is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action 		<p>The United States emphasises the protection of freedom of speech</p>
Malaysia	<p><i>Sedition Act 1948:</i></p> <p>Acts with a tendency:</p> <ol style="list-style-type: none"> to bring into hatred or contempt or to excite disaffection against any Government; to raise discontent or disaffection amongst the inhabitants of Malaysia to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia 	3 years	<p>Malaysia has been criticised for having one of the broadest hate speech laws which is being used to stifle freedom of speech especially against criticism of the Government. It may be repealed.</p>

Appendix Four: Comparison of penalties for relevant legal provisions

	Offence	Provision	penalty
1	Offensive language	Summary Offences Act, s 4	\$500
2	Disorderly behaviour	Summary Offences Act, 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, s 9	6 months, \$4,000
4	Criminal harassment	Harassment Act s 8	2 years
5	Harmful digital communication	HDCA, s 22	2 years or \$50,000
<i>proposed</i>	Hate speech with intention to incite hostility, ill-will, contempt or ridicule	<i>Section 131 HRA</i>	<i>3.5 years, \$50,000</i>
6	Assault/injury/grievous bodily harm – note: incitement to attempt these carries 50% penalty	Crimes Act (ss 188, 189, 193)	3-14 years
7	Threat to kill or cause grievous bodily harm	Crimes Act, s 306	7 years
8	Making/distributing objectionable publication	Films, Videos, and Publications Classification Act, s 124	14 years

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Update on strengthening protections against hate speech

Countering Violent Extremism Ministerial Group
Thursday 20 February 2020

Purpose

1. The Countering Violent Extremism Ministerial Group is meeting on Thursday 20 February 2020.
2. The agenda for the meeting includes an update on work to strengthen hate speech protections.

Update on work to strengthen protections against hate speech

3. In 2019, the Human Rights Commission and the Ministry of Justice held a series of engagement meetings with representatives of population groups that experience hate speech. These meetings provided insights on the experience of hate speech in New Zealand.
4. Ministry of Justice officials have reviewed the hate speech provisions in the Human Rights Act (known as the incitement provisions as they focus on preventing the incitement of hostility against groups) and have provided advice on options to strengthen protections against hate speech.
5. The Minister of Justice has considered the advice and canvassed the views of his colleagues.
6. The Minister of Justice intends to bring proposals to Cabinet for agreement in due course.

Hon Andrew Little, Minister of Justice

Further advice on strengthening the incitement provisions in the Human Rights Act 1993

Date	26 February 2020	File reference	HUM-03-01
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Action Sought	Timeframe/Deadline
<p>Agree to add gender to the prohibited grounds of discrimination in s 21 of the Human Rights Act 1993.</p> <p>Agree to amend the ground of sex in s 21 of the Human Rights Act 1993 to include sex characteristics or intersex status.</p> <p>Agree to the proposal to undertake targeted engagement to inform how best to ensure the correct terminology is used in amendments.</p>	At your earliest convenience.

Contacts for telephone discussion (if required)

Name	Position	Telephone		1st contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 918 8649	s9(2)(a)	✓
Clare Tattersall	Senior Advisor	04 913 9226		

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister
Minister's office comments		

IN CONFIDENCE

Purpose

1. This briefing provides advice on the addition of gender identity and sex characteristics to s 21 of the Human Rights Act (HRA) as part of strengthening the incitement provisions to protect against hate speech, as indicated in our briefing of 13 December 2019.

Including gender identity in the HRA

2. In our briefing of 13 December 2019, we recommended extending the incitement provisions to cover all groups in the prohibited grounds of discrimination listed in s 21 of the HRA. Section 21 of the HRA currently prohibits discrimination on several grounds, including sex. Sex discrimination is not defined, other than to say that it includes pregnancy and childbirth. Gender, including gender identity and gender expression, is not listed as a prohibited ground of discrimination. However, since 2006, the government has articulated its position as being that gender identity discrimination is covered under the ground of sex.
3. The proposed change to statutory protections against the incitement of hostility towards groups, provides an opportunity to amend s 21 to explicitly include gender identity as a prohibited ground of discrimination.
4. Previous attempts to amend s 21 to include gender identity have been unsuccessful. A Member's Bill was introduced in 2004 to amend s 21 of the HRA to list gender identity as a separate prohibited ground of discrimination. A 2006 Crown Law opinion on the Bill considered "whether prohibition of discrimination on the grounds of gender identity is already provided for in the HRA" and concluded that "[t]here is currently no reason to suppose that "sex discrimination" would be construed narrowly to deprive transgender people of protection under the HRA". The Bill was withdrawn before it was debated, in part because the Crown Law opinion was seen to provide some clarity on the issue, and in part due to insufficient support in Parliament at that time to be confident the Bill would pass its first reading. In 2014 a Supplementary Order Paper was submitted to the Statutes Amendment Bill (No 4) seeking to include gender identity in the definition of sex in s 21 of the HRA on the basis that it was a technical amendment to clarify the stated Government position that sex discrimination includes gender identity. The SOP was considered outside scope and not included in the Bill.

Gender diverse communities should be explicitly protected from discrimination

5. We recommend adding gender as a prohibited ground of discrimination in s 21 of the HRA.
6. The government position that gender identity is covered by sex has not been tested by the courts. Gender and sex are generally now understood as 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 respond if presented with this question. There is a risk that the ground of sex may not be wide enough to cover all forms of discrimination that occurs based on gender identity or expression. Even if sex could be interpreted widely enough, it would rely on individual judicial discretion.

Explicit protection aligns with international and domestic recommendations

7. In 2018 the UN Committee on the Elimination of Discrimination Against Women (CEDAW) recommended that New Zealand amend section 21(1)(a) of the Human Rights Act 1993 to include specific prohibitions of discrimination on the grounds of gender identity, gender expression and sex characteristics.
8. In 2019, New Zealand underwent its third universal periodic review (UPR) by the United Nations Human Rights Council. As part of the UPR, recommendations were made for New Zealand to:
 - 8.1 add gender identity, gender expression or sex characteristics as specifically prohibited grounds of discrimination in Article 21 of the Human Rights Act of 1993; and
 - 8.2 amend the Human Rights Act of 1993 to explicitly prohibit discrimination on the basis of gender identity and intersex status.
9. In response, the Government made a commitment to consider amending the HRA to include gender identity as a prohibited ground of discrimination.
10. These recommendations echo those of the New Zealand Human Rights Commission and groups representing trans and gender diverse communities in New Zealand.
11. Explicitly prohibiting discrimination is consistent with New Zealand's International Human Rights Action Plan. New Zealand has made advocating for gender identity rights a priority internationally. It is important for the Government to consider domestic alignment with New Zealand's internationally stated position. Gender identity discrimination is already explicitly prohibited in Australia, Canada, and in several European countries and US states.

Treaty of Waitangi and gender identity and expression

12. The Treaty of Waitangi is a founding document of government in New Zealand. As with the New Zealand Bill of Rights Act 1990, all legislative proposals must be considered for consistency with the Treaty of Waitangi. All policy and legislative development should be consistent with the spirit and principles of the Treaty, both procedurally and substantively.
13. As noted, diverse gender identities and sexualities existed in Aotearoa long before colonisation. Since the 1980s, Māori who are whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex or queer have increasingly identified as 'takatāpui' – a traditional Māori term meaning 'intimate companion of the same sex'.
14. Rangatahi takatāpui in particular may face discrimination on the basis of gender identity and sexuality on top of inequities experienced by Māori generally in health, education and justice outcomes. Specific recognition of Māori gender identities and expressions could provide important acknowledgement that Māori cultural identity may be inextricably linked to gender identity or expression.

15. The Treaty principles support the acknowledgement of takatāpui Māori control over their tikanga, and positive action to address disparities experienced by takatāpui Māori.
16. If you decide to progress this amendment, we recommend that we engage with takatāpui and other gender diverse Māori communities as part of the drafting process. This would be important to make informed decisions about how best to ensure the correct terminology is used in amendments to provide appropriate protection.

Various issues will need to be considered in the drafting process

17. Recommendations made as part of the universal periodic review (UPR) of New Zealand by the United Nations Human Rights Council in 2019, and by CEDAW in concluding observations on New Zealand in 2018 support the inclusion of gender identity, gender expression, and/or sex characteristics, as well as intersex status in anti-discrimination provisions. These recommendations echo those of the New Zealand Human Rights Commission and groups representing trans and gender diverse communities in New Zealand.

Gender should be listed as a specific ground in s 21 separate to the ground of sex

18. Initial analysis suggests that gender should be listed as a specific ground. Amending the ground of sex to explicitly include gender identity would clarify the legal position but would be at odds with the now general understanding that sex and gender are separate concepts. We recommend that drafting of any amendment would reflect that gender is separate to the ground of sex.
19. The recommendations made by CEDAW and as part of the UPR support the explicit inclusion of both gender identity and gender expression. Explicit statements of both gender identity and gender expression feature prominently in the international context. Clarification of specific aspects of the ground is consistent with the approach taken to the ground of sex in the HRA (“sex, which includes pregnancy and childbirth”).
20. Diverse gender identities and sexualities existed in Aotearoa long before colonisation. Specific recognition of Māori and other cultural gender identities and expressions could provide important acknowledgement that cultural identity may be inextricably linked to gender identity or expression.
21. A broadly stated and inclusive ground would enable the law to remain relevant as understanding of gender evolves and avoid unduly limiting the application of the anti-discrimination provision. For example, depending on decisions around terminology and the importance of recognising more specific aspects of gender (to better align with recommendations and/or recognise cultural identity), this ground could be stated as:
 - a) Gender; or
 - b) Gender, which includes gender identity and gender expression; or
 - c) Gender, which includes gender identity, gender expression, and Māori and other cultural gender identities and expressions.

Sex should be amended to include sex characteristics or intersex status

22. Initial analysis suggests that sex characteristics or intersex status would be covered already under the ground of sex discrimination. However, both international and domestic organisations recommend explicit inclusion. This may provide important recognition, particularly for the intersex community.

Engagement with affected communities recommended to inform terminology

23. If you decide to progress this amendment, we recommend that we engage with takatāpui Māori, trans, gender diverse, and intersex communities as part of the drafting process. This would inform how best to ensure the correct terminology is used in amendments to provide appropriate protection for gender diverse communities.

Amendment of s 21 does not require amendment of exceptions in HRA

24. There are exceptions provided in the HRA which allow discrimination against population groups covered by s 21 in certain situations. There are several exceptions for discrimination based on sex, including for example, single-sex schools; counselling and health services; religious orders and sporting competitions.
25. We have looked at the exceptions for sex discrimination and considered whether they should also apply to gender. We think they should not. The main reasons for this include that:
- a) if the exceptions for sex were amended to say “sex and gender” there is a risk that the law would (unintentionally) provide a basis for the very discrimination the amendment to s 21 is seeking to prohibit, for example allowing discrimination in providing services based on trans or other gender identity;
 - b) many of the exceptions refer to sex where, with current understandings of the difference in concepts, a reference to gender may be more appropriate. This is a wider issue across the statute book;
 - c) many of the exceptions for sex discrimination are outdated and may no longer be seen as justified exceptions – for example, the exception provided in s 46 allowing sex discrimination “where the nature of a skill varies according to whether it is exercised in relation to men or women, a person does not commit a breach by exercising the skill in relation to one sex only, in accordance with that person’s normal practice”.
26. Consideration of the application of the sex discrimination provisions is a matter more appropriately left to the planned wider review of the HRA. ^{s9(2)(f)(iv)}
27. This review would need to include looking at how the terms sex and gender are used across the whole statute book, and related issues with the binary nature of the law in relation to sex and gender. For example, the Equal Pay Amendment Bill refers to sex discrimination rather than gender discrimination. We understand

that this is because of legal advice that referring to gender may create complexities for interpretation of other legislation, given that generally in New Zealand law gender and sex are interpreted synonymously, particularly in employment law. However, there are references to gender identity as distinct from sex in several pieces of legislation, including the Marriage Act 1955, the Sentencing Act 2002, the Legislation Act 2019, the Electronic Identity Verification Act 2012 and the Oranga Tamariki Act 1989. These references indicate that the law already distinguishes between sex and gender identity in some contexts.

Other implications

28. Given that the proposed addition of gender identity is intended to clarify the existing position that discrimination on this ground is prohibited, government agencies should already be acting in compliance with this position.

Next steps

29. If you agree with the proposals in this briefing, they will be included in the Cabinet paper on the Proposed Changes to the Incitement Provisions in the Human Rights Act 1993. We note that the Cabinet paper has been drafted on this basis. If you do not agree to the proposals in this briefing, we will provide an updated Cabinet paper.

Recommendations

We recommend that you:

1. **Agree to either**
 - 1.1. add "gender" as a prohibited ground of discrimination in s 21 of the Human Rights Act 1993 as part of strengthening the incitement provisions to protect against hate speech; YES / NO
 - OR**
 - 1.2. add "gender, which includes gender identity and gender expression" as a prohibited ground of discrimination in s 21 of the Human Rights Act 1993; YES / NO
 - OR**
 - 1.3. add "gender which includes gender identity, gender expression, and Māori and other cultural gender identities and expressions" as a prohibited ground of discrimination in s 21 of the Human Rights Act 1993. YES / NO
2. **Agree to amend the ground of sex in s 21 of the Human Rights Act to include sex characteristics or intersex status as part of strengthening the incitement provisions to protect against hate speech.** YES / NO

3. **If you agree** to recommendations 1.3 and/or 2, **then agree that** officials carry out targeted engagement with takatāpui Māori, trans, gender diverse, and intersex communities to inform how best to ensure the correct terminology is used in amendments. YES / NO



Jenna Reid

Manager, Civil Law and Human Rights

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

Purpose

1. This aide memoire provides background information about Facebook's approach to hate speech on its platform, ahead of your meeting with Facebook on Friday 24 July 2020 via the Zoom video calling service.
2. You will be meeting with Mia Garlick, Director of Policy for Australia and New Zealand, and Nick McDonnell, Public Policy Manager for New Zealand and Pacific Islands. They are both based in Sydney.
3. Jenna Reid, Policy Manager, and Harry Evans, Policy Advisor will be attending from the Ministry of Justice.

Key messages

4. The New Zealand government is of the view that international companies trading in New Zealand must abide by New Zealand law.
5. There have been issues in recent years with technology companies, including Facebook, not abiding by New Zealand law in relation to suppression orders and privacy.
6. Hate speech can be spread online through social media sites, such as Facebook. This content can harm New Zealanders who are targeted, and may increase prejudice, misinformation and division in society.

Overview of hate speech law in New Zealand

7. The hate speech laws in the Human Rights Act 1993 focus on abusive, threatening or insulting speech that incites hostility or ill will towards a group based on a common characteristic, such as ethnicity, religion or sexuality.
8. The incitement provisions in the Human Rights Act are:

8.1. Section 61 (the civil provision):

8.1.1. It is 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.

8.1.2. Complaints under this provision are made to the Human Rights Commission. The Commission's role is to facilitate resolution of the complaint. This can be through providing information, expert problem-solving support, and mediation.

8.1.3. If mediation is refused or fails, the complainant can lodge an application with the Human Rights Review Tribunal. The Tribunal can grant any remedy it sees fit, such as a declaration that the defendant has committed a breach, an order restraining the defendant from continuing or repeating the breach, and / or damages of up to \$350,000.

8.2. Section 131 (the criminal provision):

- 8.2.1. It is 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.
 - 8.2.2. Furthermore, section 131 requires that there be an intention to incite hostility, ill will, contempt, or ridicule.
 - 8.2.3. This offence is punishable by up to three months imprisonment or a fine of up to \$7,000.
9. New Zealand has a variety of other laws that prohibit online attacks and threats on an individual that could also be considered as hate speech, such as the Harmful Digital Communications Act and the Crimes Act.

Facebook has a specific hate speech policy, as part of its community standards policy

10. This policy states that Facebook prohibits hate speech because “it creates an environment of intimidation and exclusion, and in some cases, may promote real world violence”.¹ The full policy as of 23 July 2020 is attached as appendix 1.
11. Facebook uses the following definitions:
 - 11.1. hate speech is “a direct attack on people based on what we call protected characteristics – race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity and serious disease or disability”
 - 11.2. attack is “violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation”.
12. The policy defines three levels of severity of hate speech, with examples. Facebook shows the previous versions of the policy and when they were updated. Facebook appears to update its policy, sometimes in minor ways, every few months

Facebook has been criticised for not doing enough to combat hate speech on its platform

13. As Facebook has become one of the worlds most powerful communication tools, there has been debate on its role and responsibilities in relation to the content on its site. Facebook, like many other technology companies, has attempted to cast itself as a neutral host of content, rather than a publisher with some editorial responsibility for the content on its site.
14. Over time, due to its billions' strong user base and its use of algorithms, which play a significant role in what content users see, there have been increasing calls for Facebook to take greater responsibility for harmful content on its site, such as hate speech. Facebook's response to this has slowly developed over time, through updating policies and increasing its effort on moderating content.

¹ https://www.facebook.com/communitystandards/hate_speech

15. Many critics still consider that Facebook has not done enough. An example of this is a recently formed American campaign, Stop Hate for Profit², organised by the Anti-Defamation League. The campaign's website encourages companies to stop advertising on Facebook, due to what it considers to be a poor response to hate speech and misinformation. The campaign has been successful so far with hundreds of companies, including large corporates such as Unilever, Walgreens and Pfizer, taking part in the advertising boycott.

Facebook's recent statements on hate speech

16. In response to this criticism, Facebook's Chief Executive Officer, Mark Zuckerberg, Chief Operating Officer, Sheryl Sandberg, and Vice-President of Global Affairs and Communications, Nick Clegg have all made statements in posts on Facebook.
17. The key messages in all these statements are:
- 17.1. Facebook is doing more to combat hate speech and misinformation, especially in advertisements on the site.
 - 17.2. Facebook already spends a lot of money on the artificial intelligence and human effort to combat hate speech and other content that breaches its standards.
 - 17.3. Facebook is committed to protecting free speech but wants to balance this with removing content that does harm.
 - 17.4. The amount of content posted on Facebook each day makes this task very difficult.
18. These statements also follow a recent 'civil rights audit' of the company which included a focus on how it was improving its response to hate speech.³

² <https://www.stophateforprofit.org/>

³ <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>



Draft Cabinet paper: *Proposed changes to the incitement provisions in the Human Rights Act 1993*

Hon Kris Faafoi, Minister of Justice
19 November 2020

Purpose

1. This note provides background information to assist with your consideration of the attached draft Cabinet paper, *Proposed changes to the incitement provisions in the Human Rights Act 1993*.
2. The draft Cabinet paper seeks Cabinet's agreement to strengthen the protections against hate speech in the Human Rights Act 1993 (the Act).

The draft Cabinet paper reflects decisions made by the previous Minister of Justice

3. Following the terrorist attacks in Christchurch on 15 March 2019, the previous Minister of Justice directed officials to review the protections against hate speech in the Act. The proposals in the draft Cabinet paper are informed by the review and the paper has been drafted based on decisions made by the previous Minister of Justice in December 2019 and February 2020. Copies of the advice that we provided to the previous Minister and his decisions are attached.
4. You agreed to progress these proposals following a briefing on 11 November *Strengthening Human Rights and Tackling Discrimination*.

The draft Cabinet paper seeks agreement to five proposals to strengthen protections against hate speech

5. Hate speech is broadly defined as speech that attacks an individual or group based on a common characteristic, such as ethnicity, religion, or sexuality. The provisions in the Act focus on 'inciting speech'. Inciting speech is generally understood to be abusive, threatening or insulting speech that incites hostility or ill will towards a group based on a common characteristic such as ethnicity, sexuality or religion.
6. The incitement provisions in the Act prohibit speech that is likely to incite others to feel hostility or contempt towards a group based on their colour, race, or ethnic or national origins. These provisions are not operating effectively and are rarely used. The draft Cabinet paper seeks Cabinet agreement to five proposals, which aim to strengthen the incitement provisions and clarify the prohibited grounds of discrimination in the Act:
 - a. **Proposal 1:** Extend the incitement provisions to protect all groups listed under the prohibited grounds of discrimination in the Act. These grounds include sex, religious belief, age, sexual orientation, and disability.
 - b. **Proposal 2:** Extend the civil provisions to prohibit incitement to discrimination against a group. Examples of inciting discrimination of a group include encouraging their exclusion or unfavourable treatment in the provision of goods and services, rental housing, or employment.
 - c. **Proposal 3:** Shift the criminal offence for incitement to the Crimes Act 1961 to reflect the seriousness of the behaviour.

- d. **Proposal 4:** Increase the penalty for the criminal offence to align with crimes of a similar seriousness.
- e. **Proposal 5:** Amend the prohibited grounds of discrimination in the Act to include a separate ground of “gender, including gender identity and gender expression”, and to amend the ground of sex to explicitly include sex characteristics or intersex status.

Next steps

7. If you agree, the next step is for the paper to be distributed by your office for Ministerial consultation.
8. At the same time, we will share the latest version the paper with other agencies for any final comments.
9. We are available to assist with any amendments you would like to make to the paper as a result of consultation.

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Hon Kris Faafoi, Minister of Justice

Consultation on proposed changes to the incitement provisions in the Human Rights Act 1993

Date	29 January 2021	File reference	HUM-03-01
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Action Sought

Timeframe

<p>Indicate your preferred approach to consultation on proposed changes to the incitement provisions in the Human Rights Act 1993</p> <p>Indicate whether you wish to meet with officials to discuss</p> <p>Forward this briefing to Hon Andrew Little as the lead Minister in charge of co-ordinating the Government response to the Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019.</p>	12 February 2021
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Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input type="checkbox"/>
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 918 8649	s9(2)(a)	<input checked="" type="checkbox"/>
Clare Tattersall	Senior Advisor, Civil Law and Human Rights	04 913 9226		<input type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to: _____		
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister

Minister's office comments

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IN-CONFIDENCE

Purpose

1. This paper outlines options for consultation on proposed changes to the incitement provisions in the Human Rights Act 1993 (HRA) and seeks your direction on timelines for this consultation so that we can make a more detailed plan.
2. A table comparing the timelines for the options is at **Attachment A**.

Background

3. In March 2019, the then Minister of Justice directed officials to undertake an expedited review of the provisions that protect against hate speech in the HRA, also known as the incitement provisions. The review of these provisions was informed by targeted engagement with members of groups that are most affected by hate speech, with engagement occurring in September and October 2019.
4. On 7 December 2020, Cabinet agreed in-principle to seven proposals to amend the incitement provisions in the HRA. These proposals were drawn from the Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (the Royal Commission), and the hate speech review.
5. The proposals include inserting a criminal offence for incitement into the Crimes Act 1961. They would also amend the prohibited grounds of discrimination¹ to include a separate ground of "gender, including gender identity and gender expression"; and amend the ground of sex to explicitly include sex characteristics or intersex status (CAB-20-MIN-0507 refers). A list of the proposals is at **Attachment B**.

Cabinet noted consultation to occur on in-principle proposals to amend the incitement provisions in the HRA

6. Cabinet noted that a consultation process with community groups would be initiated to test the proposed changes. Cabinet also noted that you would report back to Cabinet with the outcome of this consultation and seek approval to progress an amendment bill.

Two options for consultation on proposed changes

7. We seek your direction on the approach to consultation so that we can work on relevant considerations, such as cultural considerations, Treaty of Waitangi obligations, timing, costs for travel and consultation with groups, venue hire, and possible translation and interpretation. Whichever option we proceed with, we will need to liaise closely with the Department of Prime Minister and Cabinet to align our work with the Government's engagement following the Report of the Royal Commission, as well as other consultation being undertaken by the Ministry.
8. The Department of Prime Minister and Cabinet (National Security Group) has reviewed this paper and are comfortable with the advice.
9. This paper sets out two options for consultation:
 - 9.1. **Option 1:** targeted consultation with groups most likely to be affected by inciting hate speech; and

¹ Listed in section 21 of the Human Rights Act.

- 9.2. **Option 2** (preferred): targeted consultation with groups most likely to be affected by inciting hate speech, along with an opportunity for the wider public to give views.
10. During the review of the incitement provisions in 2019, limited targeted engagement took place with members of groups likely to be affected by hate speech, in conjunction with the Human Rights Commission. These groups included Māori, minority ethnic groups, refugees and migrants, faith-based groups, rainbow communities, disabled people and women. Both options envisage further engagement with these groups.

Option 1: targeted consultation with groups likely to be affected by inciting hate speech

11. Option 1 involves approaching groups likely to be affected by inciting hate speech and providing an opportunity to give feedback on the proposed changes. It is important that we provide an opportunity to a diverse range of groups likely to be affected by inciting hate speech to give their views on the proposed changes. To help ensure that as many of these groups can engage as possible, we will need to provide adequate advance notice, a sufficient consultation period, and some flexibility as to how to engage, taking into account relevant considerations, including cultural appropriateness.
12. The groups we will approach include:
- 12.1. the groups that took part in initial targeted engagement in 2019;
 - 12.2. other groups that are likely to be affected by inciting hate speech. These groups will be based on the prohibited grounds of discrimination listed in section 21 of the HRA (these grounds include ethnic or national origins, race, colour, religious belief, disability, sex, sexual orientation).
13. There will be a particular focus on consultation with:
- 13.1. Māori, as part of fulfilling the Crown's Treaty of Waitangi obligations;
 - 13.2. Muslim groups, in light of the terrorist attack on Christchurch masjidain on 15 March 2019 and subsequent Royal Commission report and government response; and
 - 13.3. groups that would be covered by the proposal to amend section 21 of the HRA to include of a separate ground of "gender, including gender identity and gender expression", and to amend the ground of sex to explicitly include sex characteristics or intersex status.
14. There is a significant amount of engagement underway and ongoing with Muslim groups and other groups and communities as part of the response to the Report of the Royal Commission. We are working with the Department of Prime Minister and Cabinet to help co-ordinate these engagements. In addition, Ramadan will fall in April and May. This will need to be factored into planning.
15. It will also be important to engage with groups that would be covered by the proposed change to section 21 to help inform the correct language to use for this amendment. While this change is supported publicly by affected groups, we have not yet had the opportunity to directly consult on this proposal.

We are preparing written material on the proposals

16. We will provide you with a draft of the consultation material for your consideration. This material will set out the proposals and the reasons behind them. It may be accompanied by

specific questions to test whether the proposals meet the expectations of the groups for protections against inciting hate speech.

We will provide options for how groups can engage with us

17. To help ensure that it is possible for a wide range of groups likely to be affected by inciting hate speech to give feedback, we will provide a range of options for engagement including:
 - 17.1. face to face meetings;
 - 17.2. online meetings; and
 - 17.3. through inviting written feedback.
18. Officials would travel for face to face meetings. This may involve several days in some locations, depending on the geographical spread and availability of groups. Interpreters would be engaged where required. All costs of engagement (such as venue hire and appropriate catering) would be covered from baselines.
19. s9(2)(f)(iv)

There is a chance that this process could take longer due to the timing of religious and school holidays (Ramadan, Easter and ANZAC Day), the requirements for translated and/or accessible material, and the availability of groups. We will have a better understanding of the timing once we have begun to contact groups for their availability and will work with the Department of Prime Minister and Cabinet, the Office of Ethnic Communities, the Office of Disability Issues and others to inform the planning for the engagement.

Option 2 (preferred): targeted consultation with groups most likely to be affected by inciting hate speech along with an opportunity for the wider public to give views

20. Option 2 involves providing an opportunity for the wider public to give their views on the proposed changes. This would be in addition to the targeted consultation with groups most likely to be affected by inciting hate speech, described in Option 1.
21. This is the preferred option because it would enable human rights interest groups, and other sections of the population who may not be subject to inciting hate speech under these proposals, to give their views. While the changes are aimed at providing protections to certain groups, the changes will apply to everyone in Aotearoa New Zealand. There is a high level of public interest in proposed changes to incitement of hatred laws. If this wider public consultation does not occur, there could be a perception that changes are being developed without the opportunity for the wider public and interest groups to have their say. There is also a risk of a negative association between the changes and the groups consulted if the wider public is not included in a broad discussion.
22. The wider public and interest groups would be able to give their views in writing through our website, as well as by email and post.
23. We will consider how best to ensure people are aware that there is an opportunity to provide their views on the proposed changes, as a part of our communications planning.

A discussion document would be published online in various formats with hard copies available as required

24. The discussion document would be available in accessible formats, including easy read, braille and formats that can be used with screen readers and other devices. Any translations required would also be published online. Hard copies would be made available as required.

Cabinet approval is required for public discussion documents

25. If you prefer Option 2, you will need to seek Cabinet approval for the discussion document. We anticipate this could be considered by Cabinet in April.

Time period for public consultation and impact on targeted engagement

26. Allowing 6 - 8 weeks for submissions would enable groups and individuals the usual period to co-ordinate and prepare a submission on the discussion document. We estimate public consultation could occur from May to early July, after Cabinet approval of the discussion document, and any translation and preparation of accessible materials. This would occur concurrently with the targeted consultation, which would take place as per Option 1 above. This option would also have the benefit of allowing targeted engagement to continue for an extended period compared to Option 1, giving groups more time to engage with the proposals. s9(2)(f)(iv)
27. A 6 - 8 week period of public consultation is relatively standard, and aligns with select committee submissions' time frames. If you choose to progress public consultation, you may wish to extend this to three months to allow for groups and individuals to more comprehensively prepare submissions

Political consultation on the proposed changes

28. The Government response to the Report of the Royal Commission stated that in addition to consultation with community groups, consultation would take place with parties across Parliament to test the proposals before bringing forward legislative change.
29. We will work with your office to discuss timeframes and approach and provide all necessary support to assist this process.

Next steps

30. Following your decisions on this paper, we will proceed with developing a more detailed plan for consultation, drafting material on the proposed changes, and engaging with groups to arrange consultation. We will liaise with your office on the details of our planning and provide draft material for your consideration.
31. If you prefer Option 2, we will also work to provide you with a draft Cabinet paper and draft proposal document.
32. Officials are available to discuss this briefing and proposed approaches with you. We can also work with your office on a communications plan for consultation and supporting material, including key messages, for example, about the relationship with other recommendations from the Royal Commission, such as the recommendation relating to hate crime.

Recommendations

33. It is recommended that you:

1. **Agree** to consultation on proposed changes to the incitement provisions in the Human Rights Act 1993, either:

Option 1: targeted consultation with groups likely to be affected by speech that incites hatred; **YES / NO**

OR

Option 2 (preferred): targeted consultation with groups likely to be affected by speech that incites hatred, and an opportunity for the wider public, and other interest groups, to give views. **YES / NO**

2. **Note** that we will liaise with your office regarding process and development of materials
3. **Note** that we will liaise with your office regarding any materials needed to support political consultation
4. **Indicate** whether you wish to meet with officials to discuss these options **YES / NO**
5. **Forward** this briefing to Hon Andrew Little as the lead Minister in charge of co-ordinating the Government response to the Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019. **YES / NO**



Caroline Greaney
General Manager, Civil and Constitutional Policy

APPROVED / SEEN / NOT AGREED

Hon Kris Faafoi
Minister of Justice

Date: / /

Attachments:

- **Attachment A:** table comparing timeline for consultation options
- **Attachment B:** list of proposals to amend the incitement provisions in the Human Rights Act as agreed to in-principle by Cabinet on 7 December 2020

Attachment A: Comparison of options for consultation on in-principle proposals (up to policy decisions)

	Option 1 Targeted group consultation only	Option 2 Targeted group consultation + public consultation
2021		
Jan	<p>Jan – Mar Engagement planning and meeting arrangements Development of material for engagement</p>	<p>Jan – Mar Engagement planning and meeting arrangements Development of material for engagement</p>
Feb		
Mar		
Apr	<p>Mar – May Approval of material for engagement Meetings with targeted stakeholders</p>	<p>Mar Consultation with other govt agencies/Ministers on proposal document</p>
May		<p>Cabinet – proposal document (14 Apr)</p>
Jun		<p>Apr – May Translation of proposal document and related comms material</p>
Jul	<p>Mar – Jul Approval of material for engagement Meetings with targeted stakeholders</p>	<p>May – Jul (7 weeks) Public consultation process</p>
Aug		
Sept		
Oct		
Nov		

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

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Attachment B: list of proposals to amend the incitement provisions in the Human Rights Act as agreed to in-principle by Cabinet on 7 December 2020

On 7 December 2020, Cabinet agreed in-principle that amendments be made as follows (CAB-20-MIN-0507 refers):

Proposal 1: replace the existing criminal provision with a new criminal offence for intending to stir up, maintain or normalise hatred, against all groups protected by section 21 of the Human Rights Act, through threatening, abusive or insulting communications, including inciting violence, made by any means;

Proposal 2: include the grounds of stirring up, maintaining or normalising hatred, against all groups protected by section 21 of the Human Rights Act, in the civil provision, alongside the existing grounds;

Proposal 3: insert the criminal offence for incitement in the Crimes Act 1961, rather than the Human Rights Act, to reflect the seriousness of the behaviour;

Proposal 4: increase the penalties for the criminal incitement provision to up to three years imprisonment or a fine of up to \$50,000;

Proposal 5: extend the legal protections under the civil and criminal provisions to a wider range of groups that are targeted by inciting speech. This can be achieved by extending the protections to all groups listed under the prohibited grounds of discrimination in section 21 of the Act;

Proposal 6: extend the legal protections against discrimination by amending the civil provision to include prohibition of incitement to discrimination against a group;

Proposal 7: amend the prohibited grounds of discrimination under section 21 of the Act to include a separate ground of "gender, including gender identity and gender expression"; and amend the ground of sex to explicitly include sex characteristics or intersex status.



Government Response to Justice Committee Report (Petition of Laura O'Connell)

Hon Kris Faafoi, Minister of Justice
5 February 2021

Purpose

1. This aide-memoire briefs you on the attached draft Cabinet paper on the Government response to the Justice Committee report on the petition of Laura O'Connell, and the attached draft Government response.

The Justice Committee report

2. The Justice Committee (the Committee) tabled its report on the petition of Laura O'Connell on 10 August 2020. In summary, Ms O'Connell's petition is requesting government action towards moderating online sites, social and news media platforms to reduce exposure to inaccurate information, and to prevent the harm caused by extreme views.
3. The Committee's report discussed the petitioner's views, noting the current hate speech review, and the relevant laws. These included the Human Rights Act, the Harmful Digital Communications Act, and the Broadcasting Act.
4. The Committee agreed that the public should be protected from online hate speech and harassment that incites harm against people. The Committee recommended that the Government consider including social media in its review of hate speech laws.

The approach adopted in the draft Cabinet paper

5. While the Committee's recommendation refers only to the hate speech review, the substance of the petition and the report goes well beyond the hate speech provisions, extending to issues of regulating online content and addressing concerns about mis/dis-information.
6. The attached Cabinet paper proposes a short Government response that clarifies that the matters raised by the petition and report are very broad, and that there is a range of work currently underway by the Government responding to the concerns raised.
7. This includes joint work by you as the Minister of Broadcasting and Media, and the Minister of Internal Affairs, on the review of media content. It also refers to the current classification work by the Department of Internal Affairs (DIA), as well as work by the Department of the Prime Minister and Cabinet (DPMC) on creating resilience in New Zealand to mis/disinformation online.
8. We have consulted the Ministry of Culture and Heritage, DIA and DPMC on the draft Cabinet paper and Government response.

Next steps

9. The Government response to the Justice Committee report is due on 17 February 2021. We propose the Cabinet paper seeking agreement to the Government response is considered by the Cabinet Legislation Committee on Thursday 18 February. If confirmed by Cabinet on 22 February, the response can be tabled in the House immediately.
10. We await any feedback you may have on the draft papers, or any changes that need to be made as a result of ministerial consultation, prior to the planned lodging of the papers on 11 February 2021.



Cabinet Legislation Committee: Government Response to Justice Committee Report (Petition of Laura O'Connell)

Hon Kris Faafoi, Minister of Justice
23 February 2021

Purpose

1. This aide-memoire supports you in the Cabinet Legislation Committee's (LEG) consideration of your paper seeking approval of the Government response to the Justice Committee report on the petition of Laura O'Connell.
2. The paper is being considered by LEG on Thursday 25 February.

The petition and the subsequent Justice Committee report

3. Laura O'Connell's petition was presented on 14 May 2019. In summary, Ms O'Connell's petition requests Government action towards moderating online sites social and news media platforms to reduce exposure to inaccurate information, and to prevent the harm caused by extreme views.
4. The Justice Committee (the Committee) tabled its report on Ms O'Connell's petition on 10 August 2020. The Committee's report discussed the petitioner's views, noting the current hate speech review, and the relevant laws. The Committee agreed that the public should be protected from online hate speech and harassment that incites harm against people. The Committee made one recommendation, which was that the Government consider including social media in its review of hate speech laws.
5. Although the Committee's recommendation refers only to the hate speech review, the substance of the petition and the report goes well beyond the provisions about the incitement of hatred, extending to issues of regulating online content and addressing concerns about mis/dis-information.

The Government response to the Justice Committee report

6. The Government response clarifies that the matters raised by the petition and report are very broad. The response notes that the review of the incitement provisions already covers behaviour online (such as that on social media).
7. The response also notes that regarding the review of incitement of hatred, in-principle proposals were recently agreed to by the Government as a part of the response to the report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019.
8. The response briefly describes other wider work across Government to address the impact of harmful content and inaccurate information online. This work includes the review of media content that is being jointly considered by you, as Broadcasting and Media Minister, and the Minister of Internal Affairs.

Key messages about the review of incitement of hatred, and in-principle proposals

- **Next steps** - the in-principle proposals agreed to by Cabinet in December 2020 will be subject to consultation with targeted groups and the public later this year s9(2)(f)(iv). Planning on the targeted engagement is underway and the public discussion document is being developed. Cabinet approval of the discussion document is due to be sought in early May.
- The in-principles proposals are summarised on the page below.

Proposals against the incitement of hatred/hostility

- Replace the existing criminal provision in the Human Rights Act (HRA) (s131) with a new criminal offence in the Crimes Act, for intending to stir up, maintain or normalise hatred against all groups protected by section 21 of the HRA, through threatening, abusive or insulting communications, including inciting violence, made by any means.
- Increase the penalties for the criminal incitement provision to up to three years imprisonment or a fine of up to \$50,000.
- Extend the legal protections in the criminal and civil provisions against the incitement of hatred/hostility to all groups listed under the prohibited grounds of discrimination in section 21 of the HRA.
- Include the grounds of stirring up, maintaining or normalising hatred, against all groups protected by section 21 of the HRA, in the civil provision, alongside the existing grounds.

Proposals to extend protections against discrimination

- Extend the legal protections against discrimination by amending the civil provision to include prohibition of 'incitement to discriminate' against a group.
- Amend the prohibited grounds of discrimination under section 21 of the HRA to include a separate ground of "gender, including gender identity and gender expression"; and amend the ground of sex to explicitly include sex characteristics or intersex status.

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Hon Kris Faafoi, Minister of Justice

Preventing Incitement of Hatred: approach to draft discussion document

Date	9 March 2021	File reference	HUM-03-01
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Action Sought

Timeframe

<p>Provide any feedback as required on the attached outline for the draft discussion document on the proposed changes to the incitement and discrimination provisions in the Human Rights Act 1993.</p> <p>Indicate whether you would like to meet with officials to discuss.</p> <p>Note that we will provide you with a draft Cabinet paper and discussion document on 31 March 2021</p>	12 March 2021
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Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input type="checkbox"/>
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 918 8649	s9(2)(a)	<input checked="" type="checkbox"/>
Shanice Dent	Advisor, Civil Law and Human Rights	04 494 9707		<input type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted	<input type="checkbox"/> Approved	<input type="checkbox"/> Overtaken by events
<input type="checkbox"/> Referred to:	_____	
<input type="checkbox"/> Seen	<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not seen by Minister

Minister's office comments

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IN-CONFIDENCE

Purpose

1. This paper seeks your feedback on the proposed structure and key messages for a public discussion document on the proposed changes to the incitement and discrimination provisions in the Human Rights Act 1993.
2. The paper also provides an update on the planning for public and targeted engagement.

Previous decisions

3. On 7 December 2020, Cabinet agreed in-principle to seven proposals to amend the incitement provisions in the Human Rights Act 1993. The proposals were drawn from recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (the Royal Commission), and the review undertaken by the Ministry of Justice in 2019. Cabinet noted there will be a consultation process with community groups to test the proposed changes
4. On 1 February 2021, you agreed to also undertake a public consultation process in addition to targeted consultation with groups likely to be affected by speech that incites hatred. Cabinet approval is required for the release of public discussion documents. We will provide you with a draft Cabinet paper and draft public discussion document on 31 March, for your consideration.

We seek your feedback on the structure and key messages of the discussion document

5. The purpose of the discussion document is to explain the proposals and the policy objectives behind them in an accessible and clear way. The goal is to support groups and members of the public to contribute their views. An outline of the discussion document is attached as Appendix 1 for your review. We will use your feedback to shape the draft discussion document that we will provide to you on 31 March.

An update on planning for engagement

Update on our planning for public engagement

6. Our proposed approach for consulting the public on proposals to change the law relating to incitement of hatred is to deliver a discussion document for written submission. The discussion document will be published on the Ministry's consultation hub – Citizenspace. The discussion document will also be made available in hard copy with submissions also being able to be made by post or by email.
7. Public submissions would be invited for approximately seven weeks, which is currently planned for June/July 2021.
8. We propose the discussion document be translated into the same languages as the Report of the Royal Commission. The translated languages are Arabic; Bahasa (Indonesian); Basha (Malaysian); Bengali; Dari; Hindi; Pashto; Farsi; Somali; Te Reo Māori; Turkish; and Urdu. As we are extending consultation to community groups beyond the Royal Commission engagement groups, we are considering what translation into further languages is necessary. Any translated versions of the discussion document would also be published online.

9. The discussion document will also be made available in accessible formats, including easy read, braille and appropriate file formats that can be used with screen readers and other devices.
10. You may wish to publicly release the discussion document at the beginning of the consultation period and promote the engagement opportunities throughout the seven weeks. We will liaise with your office regarding options to publicly encourage engagement with the consultation process.

Targeted engagement will engage a diverse range of communities

11. We propose to also engage directly with community groups that are likely to experience speech that incites hatred. Targeted engagement will occur at the same time as public engagement. As previously indicated, we will approach the groups that took part in the initial targeted engagement in 2019 and other groups that are likely to be affected by speech that incites hatred. These were Māori, faith-based communities, Pasifika, Asian, Disability groups, refugee and immigrant communities, and Sexual Orientation Gender Identity and Expression and Sexual Characteristics (SOGIESC) groups.
12. There will be a particular focus on engagement with:
 - 12.1 Māori, as part of fulfilling the Crown's Treaty of Waitangi obligations;
 - 12.2 Muslim groups, in light of the terrorist attack on Christchurch masjidain on 15 March 2019 and subsequent Royal Commission report and government response; and
 - 12.3 Groups that would be covered by the proposal to amend section 21 of the HRA to include a separate ground of "gender, including gender identity and expression", and to amend the ground of sex to explicitly include sex characteristics or intersex status.
13. To help ensure that as many of these groups can engage as possible, and in a meaningful way, we intend to start contacting them soon to understand their availability and needs. We will also offer a range of options for engagement including face to face meetings, online meetings, and through written feedback. We will keep your office updated with the development of any supporting material, such as PowerPoints, to assist in the targeted engagement, if required.
14. We are developing contingency plans to mitigate any potential implications caused by future changes to the alert levels in response to COVID-19. A key priority will be to ensure engagement remains accessible for groups that require interpreters.

We are coordinating our engagement plans with other agencies

15. There is a significant amount of engagement underway with Muslim and other communities as part of the response to the report of the Royal Commission. We are working with the Department of Prime Minister and Cabinet (DPMC) and other agencies to help co-ordinate our targeted engagement to minimise engagement fatigue with communities. We are discussing joining DPMC's planned engagement due to occur in May and June of this year.
16. We are also working closely with the Department of Internal Affairs (DIA) to coordinate shared targeted engagement relating its work in response to recommendation 41 of the Royal Commission report. This recommendation is to amend the definition of "objectionable" in the Films, Videos, and Publications Classification Act 1993 to include racial superiority, racial hatred and racial discrimination. Working with DIA on a shared engagement approach will allow stakeholders to attend a single meeting on closely related

subjects. This will provide a more streamlined experience and reduce the number of engagements these communities have to attend.

Proposed key dates for engagement and lodgement of Cabinet paper

17. In early February we provided you with an update on timelines for this work. They are outlined below:
 - 17.1. Planning and drafting documents (now – 22 March): this is the discussion document, a stakeholder engagement and communications plan, the Regulatory Impact Analysis, and the Cabinet paper.
 - 17.2. Agency consultation (22 - 29 March)
 - 17.3. Review of documents by you and your office (31 March – 7 April)
 - 17.4. Ministerial and caucus consultation (12 - 27 April)
 - 17.5. Cabinet processes (29 April to 10 May): Cabinet paper lodged, considered by the Cabinet Social Wellbeing Committee on 5 May, and by Cabinet on 10 May.
 - 17.6. Public and targeted consultation (approx. 14 June to 31 July)
18. We are on track to deliver on these timelines.

Next steps

19. Following your feedback on the outline of the discussion document we will shape the document taking your comments into account.
20. We are developing a communications and engagement plan for the consultation as well as supporting material including, for example, key messages about the relationship of this work with other recommendations from the Royal Commission.
21. We will provide you with a draft Cabinet paper and draft discussion document on 31 March 2021.

Recommendations

22. It is recommended that you:

1. **Provide any feedback** on the attached outline for the draft discussion document on the proposed changes to the incitement and discrimination provisions in the Human Rights Act 1993 **YES / NO**
2. **Indicate** whether you would like to meet with officials to discuss **YES / NO**
3. **Note** that we will provide you with a draft Cabinet paper and discussion document on 31 March 2021.



Jenna Reid
Policy Manager, Civil Law and Human Rights

APPROVED / SEEN / NOT AGREED

Hon Kris Faafoi
Minister of Justice
Date: / /

Attachments:

- **Appendix 1:** Outline of draft discussion document for consultation on the proposed changes to incitement and discrimination provisions in the Human Rights Act 1993

Appendix 1: Outline of draft discussion document for consultation on the proposed changes to the incitement and discrimination provisions in the Human Rights Act 1993

Introduction from the Minister of Justice

1. The purpose of this section is to:
 - Establish the context for this work and why this work matters to the Minister and to Government.
 - Highlight key messages that the Minister has already made, such as that New Zealand has strength through diversity, the importance of social cohesion and safety, and that encouraging hatred of a group is behaviour that society considers unacceptable.
 - Express that the Government wishes to test the proposals with the public and hear feedback that might improve them.

Summary of proposals

2. The section will provide a high-level overview of the proposals and will point to the pages where readers can get more detail. The key messages are:
 - 2.1. The Government has proposed changes to the incitement provisions in the Human Rights Act to make it clearer what incitement of hatred means and to strengthen the penalties for breaking the law.
 - 2.2. The changes will also clarify that discrimination on the basis of gender or sex characteristics is prohibited, and provide a more consistent approach to protecting groups that may experience discrimination.

Details on submissions process and disclosures

3. The section will:
 - Explain that the Government wishes to receive feedback from a wide variety of groups and members of the public to inform its consideration of these changes. Suggestions may lead to improvements to the proposals.
 - Describe the process for making submission — such as the Citizenspace online portal, an email inbox, and a physical address for written submissions.
 - Describe the Government's obligations around information and how submissions will be handled from a confidentiality, official information, and privacy perspective.
 - Provide information and resources for people who are currently experiencing abuse or hate speech.

Background and context

4. This section will:

- Explain why this work matters and why the Government is engaging with the public:
 - Speech that incites hatred causes significant harm. It is a form of discrimination. It seeks to divide communities and hinders social cohesion. This type of conduct is a threat to our diversity, which is a source of strength for New Zealand. The incitement of hatred can, ultimately, also lead to violence. Inciting hatred damages society.
 - The proposals seek to promote safe communities, and to reinforce that the incitement of hatred is conduct that society considers wrong and harmful.
 - The goal of public engagement is to test to what extent the proposals meet society's expectations for the protections against inciting hatred and other discrimination and to hear suggestions for their improvement.
 - There is a high level of public interest in this work and freedom of expression is an important right in New Zealand.
- Briefly explain how the incitement provisions in the Human Rights Act work now — the section 61 civil provision and the section 131 criminal provision.
- Describe the legal position of freedom of expression in New Zealand — it is protected but is subject to reasonable limitations in law under the New Zealand Bill of Rights Act 1990.
- Describe the issues with the status quo as identified by the Inquiry and the review undertaken by the Ministry of Justice.
- Note the origins of the proposals that have been agreed in principle by Cabinet — a review by the Ministry of Justice and the recommendations of the Inquiry.

The proposals in detail

5. This section will describe the proposals that the Government has agreed in-principle. They are:
 - 5.1. **Proposals against the incitement of hatred/hostility**
 - 5.1.1. *Both criminal and civil provisions*
 - 5.1.1.1. Amend the criminal and civil incitement provisions to cover all groups listed under the prohibited grounds of discrimination in section 21 of the Human Rights Act 1993.
 - 5.1.2. *Criminal provision*
 - 5.1.2.1. Replace the existing criminal provision with a new criminal offence in the Crimes Act, for intending to stir up, maintain or normalise hatred against all section 21 groups, through threatening, abusive or insulting communications, including inciting violence, made by any means.

5.1.2.2. Increase the penalties to up to three years imprisonment or a fine of up to \$50,000.

5.1.3. *Civil provision*

5.1.3.1. Include the same behaviour of stirring up, maintaining or normalising hatred (as proposed for the criminal provision) in the civil provision, alongside the existing grounds.

5.2. Proposals to extend protections against wider discrimination

5.2.1.1. Include a new prohibition against 'incitement to discriminate' against all section 21 groups, in the civil provision (speech that encourages others to treat members of a section 21 group less favourably than others would be unlawful).

5.2.1.2. Amend section 21 of the HRA to clarify the existing grounds by introducing a separate ground of "gender, including gender identity and gender expression"; and amend the existing ground of sex to explicitly include sex characteristics or intersex status.

Questions for submitters

6. To be confirmed — we are currently designing our strategy for questions that will draw out the most useful responses on the proposals. These may be integrated into the proposals section.

Next steps following the consultation

7. Following analysis of the submissions provided, the Government will consider which next steps to take.

Related work not being consulted on in this document

8. The section will detail other related workstreams across government that are not part of this engagement and how readers could contribute to those.



Hon Kris Faafoi, Minister of Justice

Draft discussion document on incitement of hatred proposals and engagement timeframes

Date	31 March 2021	File reference	
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Action sought	Timeframe
<p>Provide any feedback on the attached draft Cabinet paper and draft discussion document.</p> <p>Indicate your preferred option for the period of public submissions and focussed engagement with groups.</p>	7 April 2021

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Caroline Greaney	General Manager, Civil and Constitutional	04 918 8584	s9(2)(a)	<input type="checkbox"/>
Jenna Reid	Policy Manager, Civil Law and Human Rights	04 918 8649	s9(2)(a)	<input checked="" type="checkbox"/>
Justine Dearsley	Principal Advisor	04 918 8510		<input type="checkbox"/>

Minister's office to complete

Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office's comments

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IN CONFIDENCE

Purpose

1. This briefing provides you with the attached draft Cabinet paper and draft discussion document on proposals to change the laws against the incitement of hatred and discrimination against groups, for your review.
2. We also seek your decision on the timeframes for the public consultation and focussed engagement with groups.

Previous decisions

3. On 9 March 2021, we provided you with an outline of the draft discussion document. We noted that we would provide you with a draft Cabinet paper and draft public discussion document on 31 March, for your consideration.
4. In March we also briefed you on our approach to engagement and the public consultation process. This is to engage with a diverse range of communities, and to coordinate our engagement plans with other agencies to minimise the risk of communities experiencing engagement fatigue.
5. We noted that public submissions would be invited for about seven weeks during June until the end of July 2021, with focussed engagement occurring at the same time.

Draft Cabinet paper and discussion document are ready for your further review

6. The attached draft discussion document has been developed from the outline we provided to you earlier this month. We sought feedback from interested government agencies and the Human Rights Commission on the draft, and incorporated this where possible. We also consulted agencies on the draft Cabinet paper.
7. The next steps are for you to provide any feedback on the draft documents by Wednesday 7 April. We will make any subsequent changes and provide you with updated documents for ministerial consultation and caucus consultation, planned for Monday 12 April until Tuesday 27 April.
8. We will prepare the final papers for you to take to the Cabinet Social Wellbeing Committee on 5 May 2021.

Timeframe options for the focussed engagement with groups

9. We have been discussing coordinating the focussed engagement with other government agencies' engagement relating to the recommendation of the Royal Commission's recommendations. The Department of Prime Minister and Cabinet is planning for engagement in May, and the Office for Ethnic Communities (OEC) during June and August. The Department of Internal Affairs is also looking to join our focussed engagement sessions where our relevant stakeholder groups overlap.
10. It has become clear that there would be advantages in continuing our focussed engagement through to August because of the discussions that OEC will be having at that time. We understand from OEC that it foresees the proposals about the incitement proposals are likely to be raised by groups as a key topic.

11. s9(2)(f)(iv)

12. s9(2)(f)(iv)

Recommendations

13. We recommend that you:

1. **Provide** any feedback on the attached draft Cabinet paper and draft discussion document

2. **Indicate** your preferred option for public and engagement timeframes:

EITHER

2.1. A public and focused engagement period from June to July YES / NO

OR

2.2. A public and focused engagement period from June to August. YES / NO



Jenna Reid
Policy Manager, Civil Law and Human Rights

APPROVED SEEN NOT AGREED

Hon Kris Faafoi
Minister of Justice

Date / /



Aide Memoire: Cabinet paper and discussion document relating to proposals against the incitement of hatred

Hon Kris Faafoi, Minister of Justice

11 May 2021

Purpose

1. This aide memoire provides information about a paper you are taking to the Cabinet Social Wellbeing Committee (SWC) on 12 May 2021.

Key features of the Cabinet paper

2. The Cabinet paper:
 - seeks Cabinet's agreement to the release of the discussion document: *Proposals against the incitement of hatred and discrimination*;
 - sets out the approach to public and focussed engagement; and
 - proposes reporting back to Cabinet in November 2021 to seek policy approvals.

The discussion document aims to test the in-principle proposals Cabinet agreed to

3. On 7 December 2020, Cabinet agreed to six in-principle proposals to amend the incitement provisions in the Human Rights Act 1993.
4. The proposals were drawn from recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (in particular recommendation 40), and the review of the provisions against incitement of hostility or hatred towards groups undertaken by the Ministry of Justice in 2019.
5. The discussion document explains the current law and the issues with it, outlines the six in-principle proposals, and asks questions to elicit feedback on the proposals to identify how they could be improved.
6. The public are invited to share their thoughts on the proposals, which may change in light of the submissions received.
7. The in-principle proposals are set out at Appendix 1. In summary, the proposals are to:
 - increase the groups of people that are protected by the incitement provisions to include all groups listed under the prohibited grounds of discrimination in the Act. These grounds include sex, religious belief, political opinion, age, sexual orientation, and disability.
 - make clearer what behaviour the law prohibits and increase the consequences for breaking the law
 - improve the protections for groups against wider discrimination.

Key issues:

Freedom of expression and the proposals

8. Media coverage of the in-principle proposals has included concerns regarding potential limits on freedom of expression and the inclusion of other grounds of discrimination
9. Freedom of expression is a cornerstone of our society, but it is not an absolute right to say anything at all. Both freedom of expression and freedom from discrimination are enshrined in the Bill of Rights Act 1990. This allows for justifiable limits on rights, balanced against others' rights and interests. The proposals aim to better protect these rights, including the rights of people who are the targets of inciting speech to express themselves freely.
10. Inciting speech is already unlawful under the civil and criminal provisions in the Human Rights Act. The proposals do not lower the threshold for criminalising speech or prevent public debate on important issues. They seek to make it clearer what is covered by the criminal provision.
11. The proposals also seek to apply the incitement provisions more broadly to other groups that experience hate speech, such as religious groups and rainbow communities.
12. We need a robust public discussion from all quarters about the proposals. This will test whether the balance is right regarding incitement of hatred in the proposals.

Addition of 'gender' to prohibited grounds of discrimination

13. Proposal six would add 'gender including gender expression and gender identity' as a prohibited ground of discrimination in the Act and amend the definition of 'sex' to include 'sex characteristics or intersex status'. This would clarify that trans, gender diverse and intersex people are protected from discrimination and speech that incites hatred.
14. The Government and Human Rights Commission consider that the existing ground of 'sex' covers these groups. However, 'sex' and 'gender' are different concepts and the law could be clearer. This is a clarification of the status quo rather than a fundamental change in the law.

The inclusion of political opinion as a potential issue?

15. We anticipate that some feedback may focus on the inclusion of political opinion in the incitement provisions, particularly in relation to freedom of expression.
16. Behaviour that would be unlawful under the in-principle proposals would go beyond simply expressing political opinions and disagreements with the opinions of others. In particular, the proposed criminal offence requires intention to incite hatred towards a group. Robust political debate, or general insulting language about a group that holds a particular political opinion is unlikely to meet this threshold. Language directed towards individuals' rather than groups' political opinions would also not fall within the proposed changes.
17. However, there may be ways to improve the proposals. The purpose of public and focussed engagement is to understand whether the proposals could be improved and

how. This may well result in changes to the proposals in response to the feedback we receive.

Approach to engagement on the discussion document

18. Public engagement is planned for seven weeks from mid-June 2021. You have a separate aide memoire with more detail on the approach to the engagement programme.

Report back following engagement

19. s9(2)(f)(iv)

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Appendix 1 – Proposals for amending the incitement provisions

The discussion document outlines the following six in-principle proposals:

1. **Proposal 1:** Change the language in the incitement provisions in the Human Rights Act 1993 so that they protect more groups that are targeted by hateful speech.
 - a. This would apply the provisions to incitement of hatred against all groups listed under the prohibited grounds of discrimination in the Act (e.g. sex, religious belief, political opinion, age, sexual orientation, and disability).
2. **Proposal 2:** Replace the existing criminal provision in the Human Rights Act 1993 with a new criminal offence in the Crimes Act 1961 that is clearer and more effective.
3. **Proposal 3:** Increase the penalty for the criminal offence to align with crimes of a similar seriousness.
4. **Proposal 4:** Change the language of the civil incitement provision to match the changes being made to the criminal provision.
5. **Proposal 5:** Change the civil provision so that it makes “incitement to discriminate” against the law.
 - a. This would extend the civil provisions in line with international obligations.
6. **Proposal 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.
 - a. This would involve amending the prohibited grounds of discrimination in the Act to include a separate ground of “gender, including gender identity and gender expression”, and to amend the ground of sex to explicitly include sex characteristics or intersex status.

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Aide Memoire: Cabinet paper and discussion document relating to proposals against the incitement of hatred

Hon Kris Faafoi, Minister of Justice

14 May 2021

Purpose

1. This aide memoire provides information about your paper on the incitement of hatred for Cabinet on 17 May 2021. It provides talking points regarding cross party engagement on the proposals.

Taking points on key issues:

The inclusion of political opinion as a potential issue?

2. I have drafted the paper so that it is clear that we recognise that groups experience hateful speech based on a range of characteristics, including their sex, gender (including gender identity), religious belief, disability, or sexual orientation.
3. The document also recognises that other groups experience hateful speech and could also be protected by the law, and we are interested in views on the groups that should be protected by this change.
4. This approach invites feedback from the public on the groups that could be protected, without making a firm proposal about a comprehensive list of groups (such as political opinion, employment status or family status).
5. The purpose of public and focussed engagement is to understand whether the proposals could be improved and how, including whether the balance is right about which groups should be protected under the incitement provisions. This may well result in changes to the proposals in response to the feedback we receive.

Addition of 'gender' to prohibited grounds of discrimination

6. Proposal six would add 'gender including gender expression and gender identity' as a prohibited ground of discrimination in the Act and amend the definition of 'sex' to include 'sex characteristics or intersex status'. This would clarify that trans, gender diverse and intersex people are protected from discrimination.
7. The Government and Human Rights Commission consider that the existing ground of 'sex' covers these groups. However, 'sex' and 'gender' are different concepts and the law could be clearer. This is a clarification of the status quo rather than a fundamental change in the law.

Freedom of expression and the proposals

8. Media coverage of the in-principle proposals has included concerns regarding potential limits on freedom of expression and the inclusion of other grounds of discrimination.

9. Freedom of expression is a cornerstone of our society, but it is not an absolute right to say anything at all. Both freedom of expression and freedom from discrimination are enshrined in the Bill of Rights Act 1990. This allows for justifiable limits on rights, balanced against others' rights and interests. The proposals aim to better protect these rights, including the rights of people who are the targets of inciting speech to express themselves freely.
10. Inciting speech is already unlawful under the civil and criminal provisions in the Human Rights Act. The proposals do not lower the threshold for criminalising speech or prevent public debate on important issues. They seek to make it clearer what is covered by the criminal provision.
11. The proposals also seek to apply the incitement provisions more broadly to other groups that experience hate speech, such as religious groups and rainbow communities.
12. We need a robust public discussion from all quarters about the proposals. This will test whether the balance is right regarding incitement of hatred in the proposals.

Addition of text from NZ Police

13. Minister Williams asked me to consider adding text to the discussion document from NZ Police. I have added text on page 4 of the discussion document to address the comments from Police. It signals that these proposals are only a small part of the Government's response to the recommendations of the Royal Commission of Inquiry into the terrorist attack at Christchurch masjidain on 15 March 2019.

Talking points for cross-party engagement on the proposals

14. I intend to write to the leaders of the parties represented in Parliament:
 - 14.1. setting out the Government's intention to extend legal protections against incitement of hatred and discrimination, drawing on the Royal Commission's recommendations
 - 14.2. indicating that public consultation on the proposals will occur across June and July, and
 - 14.3. inviting them to discuss their views on the proposals with me over the same period.
15. There are strongly held views on this topic, held by a broad range of organisations and individuals. Such views are also reflected amongst the parties in Parliament, several of whom have made their views on this matter known publicly.
16. s9(2)(g)(i)
17. Nevertheless, I consider that risk outweighed by the importance of demonstrating we are seeking a variety of voices on this topic – and want to hear the diverse viewpoints represented by parties.

Approach to engagement on the discussion document

18. Public engagement is planned for seven weeks from mid-June 2021. You have a separate aide memoire with more detail on the approach to the engagement programme.

Report back following engagement

19. s9(2)(f)(iv)

Background

The discussion document aims to test the in-principle proposals Cabinet agreed to

20. On 7 December 2020, Cabinet agreed to six in-principle proposals to amend the incitement provisions in the Human Rights Act 1993.
21. The proposals were drawn from recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (in particular recommendation 40), and the review of the provisions against incitement of hostility or hatred towards groups undertaken by the Ministry of Justice in 2019.
22. The discussion document explains the current law and the issues with it, outlines the six in-principle proposals, and asks questions to elicit feedback on the proposals to identify how they could be improved.
23. The public are invited to share their thoughts on the proposals, which may change in light of the submissions received.
24. The in-principle proposals are set out at Appendix 1. In summary, the proposals are to:
 - 24.1. increase the groups of people that are protected by the incitement provisions to include more groups listed under the prohibited grounds of discrimination in the Act.
 - 24.2. make clearer what behaviour the law prohibits and increase the consequences for breaking the law
 - 24.3. improve the protections for groups against wider discrimination.

Appendix 1 – Proposals for amending the incitement provisions

The discussion document outlines the following six in-principle proposals:

1. **Proposal 1:** Change the language in the incitement provisions in the Human Rights Act 1993 so that they protect more groups that are targeted by hateful speech.
 - a. This would apply the provisions to incitement of hatred against more groups. This may include some or all of the other prohibited grounds of discrimination in the Act. These are: gender (including gender identity or expression), sex (including sex characteristics or intersex status), sexual orientation, religious belief, ethical belief, disability, age, political opinion, employment status (such as being unemployed or on a benefit), marital status or family status (such as being a parent).
2. **Proposal 2:** Replace the existing criminal provision in the Human Rights Act 1993 with a new criminal offence in the Crimes Act 1961 that is clearer and more effective.
3. **Proposal 3:** Increase the penalty for the criminal offence to align with crimes of a similar seriousness.
4. **Proposal 4:** Change the language of the civil incitement provision to match the changes being made to the criminal provision.
5. **Proposal 5:** Change the civil provision so that it makes “incitement to discriminate” against the law.
 - a. This would extend the civil provisions in line with international obligations.
6. **Proposal 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.
 - a. This would involve amending the prohibited grounds of discrimination in the Act to include a separate ground of “gender, including gender identity and gender expression”, and to amend the ground of sex to explicitly include sex characteristics or intersex status.

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Proposed approach to engagement package: Incitement of hatred and Social Cohesion, and 'Objectionable' materials

Hon Kris Faafoi, Minister of Justice
14 May 2021

Purpose

1. This note describes the proposed approach to deliver a programme of engagement relating to the incitement provisions and the wider social cohesion work programme.

Purpose of the engagement package

2. MoJ and MSD are working together to produce a shared engagement process, with the Department of Internal Affairs (DIA) joining where appropriate on amending the definition of 'objectionable' to include racial superiority, racial hatred, and racial discrimination. This approach to engagement will support communities to engage in these interrelated topics and will minimise consultation fatigue frequently raised by some communities.

Approach to public and focussed engagement

Public engagement will be through submissions on the discussion documents

3. We propose that the public engagement process commences with the release of both the respective MoJ and MSD discussion documents (the MSD paper on social cohesion will be at SWC on 19 May). Public engagement is planned to start in June 2021 with a duration of seven weeks. The Department of Internal Affairs is not engaging with a discussion document.
4. MoJ, MSD, and DIA are discussing an approach to cross-link websites, and information about the work being engaged on. This will aim to make the process for providing feedback as clear and simple as possible for those interacting with the material.
5. We are also discussing how feedback received will be shared so that it is considered by the relevant agency. The public will be able to submit on the discussion documents via the online platforms, by post, or by email. Both discussion documents will each be translated into a number of languages and made available in alternate accessibility formats.
6. MoJ will translate its discussion document into seventeen languages, which are: Pashto, Samoan, Farsi, Hindi, Chinese Simplified, Chinese Traditional, Dari, Korean, Malay, Urdu, Turkish, Bengali, Indonesian, Arabic, Somali, Māori, and Tongan. A shorter summary of the discussion document will be translated into the following additional languages: Tuvaluan, Niuean, Tagalog, Cook Island Maori, Gujarati, Japanese, Fijian, and Tokelauan. Some languages make take longer to translate and may need a staggered release date to the public, once ready.

The single programme of focussed engagement will be on similar themes of work

7. Focussed engagement meetings will occur concurrently with public engagement. Officials will invite a wide range of community groups to engage directly on the in-principle proposals on incitement and the wider social cohesion work. DIA will attend engagement with key overlapping stakeholders with the highest level of interest in their work.

8. As part of the engagement, officials will engage with Māori, Pacific peoples, faith-based groups disabled people, ethnic communities, (former) refugee, and immigrant communities. Officials will also engage with those diverse in sexual orientation, gender identity and expression, and sexual characteristics. Diversity in age and gender will be sought within the groups.
9. Officials will also invite engagement from organisations such as Federated Farmers, Retail New Zealand, Rotary, Lions, and other community networks.
10. Example groups officials may be approaching for engagement include:
 - 10.1 Māori Women's Welfare League, Te Rūnanga o Ngāti Whātua, Te Rūnanga o Ngāi Tahu, Tīwhanawhana, Kāpō Māori Aotearoa New Zealand inc. (this list is not exhaustive and Māori engagement is being further developed)
 - 10.2 NZ Multicultural Society, K'aute Pasifika, New Zealand Chinese Association, culturally based student's associations
 - 10.3 Disabled People's Organisation, Yes Disability, i.Lead (youth)
 - 10.4 Islamic Women's Council, Federation of Islamic Associations NZ (FIANZ), Auckland Interfaith Council, Religious Diversity Centre in Aotearoa NZ Trust, New Zealand Jewish Council
 - 10.5 Gender Minorities Aotearoa, Intersex Trust Aotearoa New Zealand, RainbowYOUTH.
11. MoJ has contracted an engagement specialist team to help co-ordinate and facilitate the engagement hui. They will carry out pre engagement with community leaders to help determine community needs for participating in the engagement, for example, if interpreters will be needed.
12. It is anticipated there will be approximately 15-20 focussed engagement sessions held across the country. There will be a mix of both face to face and online (e.g. Teams/Zoom) engagements where appropriate. Approximately four larger engagement sessions with about 80-100 people attending will be held in Auckland, Wellington, Christchurch, and Hamilton. 10-15 sessions will be smaller engagement sessions of approximately 10-20 people and may extend to communities outside of the main geographical centres. MSD is also exploring options on what other engagement models will best benefit social cohesion outcomes.
13. The focussed engagement sessions will be made as accessible as possible for participants. We will look to have interpreters onsite (including New Zealand Sign Language where needed), consider the accessibility of venues, on-site childcare where possible with timing of engagements sessions prioritising community/participant needs. Printed materials will be translated and made into accessible formats for all agencies.
14. We are considering safety and security for the focussed engagement sessions as there is a risk of potential protests or that the subject matter and history of some of this work may re-traumatise participants.

Excerpt from Weekly Report for the Minister of Justice 28 May 2021

Weekly report

21 May 2021

[Page 2 out of scope]

Incitement of Hatred: Translation of Discussion Document

1. Cabinet has agreed to the release of the discussion document: Proposals Against the Incitement of Hatred and Discrimination. Public engagement will revolve around the discussion document, which will also be available in translated and accessible formats. The document has been sent for translation into the following languages ahead of consultation starting in late June: Te Reo Māori, Chinese – simplified, Chinese – traditional, Tongan, Samoan, Korean, Hindi, Arabic, Bahasa – Indonesian, Bahasa – Malaysian, Bengali, Dari, Pashto, Farsi, Somali, Turkish and Urdu.
2. The Ministry has also prepared a short summary document to assist public engagement, which will be translated into the above languages together with Bengali, Gujarati, Fijian, Japanese, Niuean, Tagalog, Tokelauan and Tuvaluan. The additional languages have been chosen to ensure that the public consultation is accessible to all communities the Ministry is seeking to engage with via focused engagement.
3. We are in the process of organising engagements (together with the Ministry of Social Development and Department of Internal Affairs) including with Māori, Pacific People, disability communities, rainbow communities, ethnic and former refugee communities and religious communities.
4. We are also liaising with your office on a potential launch of the consultation and what support you may need in relation to this. We are happy to discuss this at the officials meeting on Monday if that is helpful.

[Remainder of report out of scope]

Hate speech extended Q+A

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PRIMARY LINES

This is part of our work to implement the recommendations of the Royal Commission of Inquiry into March 15, where it has called for our laws to be stronger and clearer about thresholds with regards to incitement to hate and those affected by it.

As we have seen from the events of the March 15 terrorist attack on the Christchurch masjidain, extreme speech, which incites hatred, is very real and can be very harmful for those people who experience it.

For the purposes of this round of engagement, we want to pose the question about what groups people think should be in and out of new legislation around incitement to hatred and what people think of the proposals to be clearer and take incitement of hatred more seriously.

What we have put forward for discussion is speech that reaches a threshold of intent to incite or normalise hatred against groups protected under the Human Rights Act. For example, protected groups could be expanded to include religion, gender and sexual orientation, and those with disabilities.

Public consultation will feed into further feedback on what the parameters of the legislation will be when the proposed legislation goes to select committee.

The changes proposed will provide access to criminal prosecution, where appropriate, while also maintaining access to civil redress in cases that do not meet the threshold for criminal prosecution.

What we are proposing does not remove the right to freedom of expression but does target expressions of hate that intend to incite or normalise hatred against groups based on such things as their race, religious beliefs, sexual orientation, ethnicity or disability.

EXISTING CIVIL AND CRIMINAL PROVISIONS

The current incitement provisions consist of both civil and criminal prohibitions. They are intended to form a balanced approach that considers the seriousness of inciting speech against the severity of the punishment.

The penalties reflect that intentionally attempting to encourage hostile feelings in other people (criminal offence) is more serious than speech without that intent (civil prohibition).

The current incitement provisions target speech which would have others believe that a society made up of different ethnic groups cannot function and seeks to turn people against each other. The law prohibits the incitement of these attitudes because they are incompatible with human rights and democratic values.

Existing civil provision

Section 61 of the Human Rights Act says that it is against the law to:

- use, publish, broadcast or distribute written matter or use words
- that are both:
 - threatening, abusive or insulting, and
 - likely to incite hostility or bring into contempt any group on the basis of their colour, race, or ethnic or national origins

A person can complain to the Human Rights Commission when they think that someone has done something that section 61 says is against the law.

The Commission can provide information, problem-solving support and mediation.

If mediation is refused, or fails to resolve the complaint, the complainant can lodge an application to the Human Rights Review Tribunal.

The Tribunal has a range of powers that it can use if it decides section 61 has been breached, including:

- declaring that the defendant has committed a breach
- making a restraining order against the defendant to prevent them from continuing or repeating the breach, and
- awarding damages of up to \$350,000.

Existing criminal offence

Section 131 of the Human Rights Act says that it is a criminal offence:

- to incite racial disharmony
- by publishing, broadcasting or distributing written matter or using words
- that are all of the following:
 - threatening, abusive, or insulting,
 - likely to excite hostility or ill-will against, or bring into contempt or ridicule any group on the ground of colour, race, or ethnic or national origins, and
 - intended to excite such hostility, ill-will, contempt or ridicule.

This offence is punishable by up to three months' imprisonment, or a fine of \$7,000.

Details of the single prosecution

There has only been one prosecution convicted under s131.

Technically it was under s.25 of the Race Relations Act 1971 (same as s.131 though and its predecessor) – King-Ansell v the Police in 1979.

The following is from the Royal Commission report on hate speech and hate crime:

“The appellant was the leader of the National Socialist Party of New Zealand and in that role, he had printed 9,000 copies of a pamphlet that was described in this way:

“One side of the page portrayed Jesus Christ flanked by Adolph Hitler and featured a quote from chapter 8, verse 44 of St John (an alleged condemnation by Jesus of the Jews: “Ye are of your father the devil ...”), a quote from Mein Kampf Part 1 chapter 2 (“...by defending myself against the Jew, I am fighting for the work of the Lord”), and the words “National Socialist Movement” and “For Race and Nation”.

“On the obverse side was a photo of a dozen or more Nazis with helmets and swastika armbands and language which urged interested people to support the movement: “Study Our Alternative! Help Build A New Order! Our Fight Is Your Fight! Join Us! Write today!” As will be apparent, the pamphlet targeted Jewish people.”

The individual was convicted but on appeal to the Supreme Court the sentence of three months imprisonment was substituted for a \$400 fine.

s9(2)(f)(iv)

s9(2)(f)(iv)

s9(2)(f)(iv)

Proposal for criminal offence

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

This is a complex provision. It uses four terms, “hostility”, “ill-will”, “contempt”, and “ridicule” which have broad meanings and could also potentially overlap. It also uses the word “excite” in a way that is not often used in day-to-day language. The Royal Commission also noted that, unlike the civil provision, it does not cover electronic communications.

- Under this proposal, the terms “hostility”, “ill-will”, “contempt” and “ridicule” would be replaced by “hatred” – as recommended by the Royal Commission.
- The exact wording of this provision would be determined following consultation. This includes whether to use the term “incite”, “stir up” or some other term with the same meaning.
- This proposal would prohibit speech that maintains or normalises hatred, in addition, to speech that incites or stirs up hatred. This ensures that communications that may be aimed at people who may already hold extreme views would be unlawful.
- The proposal would cover all methods of communicating speech (including by electronic means).

This proposal would protect freedom of expression by ensuring that only extreme hate speech is criminalised, and that there must be an intention to cause others to develop and strengthen hatred towards a group.

Why move the offence to the Crimes Act from the Human Rights Act?

Having incitement as an offence in the Crimes Act, sends an important signal about how seriously we are about addressing hate speech at the extreme end of the spectrum

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Side by side comparison of the current laws vs the proposed changes

Changes	Current wording of the Act	Proposed change to the Act	RCOI recommendations and other notes
<p>Proposal 1: Expand the groups who are covered by incitement provisions in the Humans Rights Act</p>	<p>Both section 61 and section 131 of the Human Rights Act apply to communications aimed at a group “on the ground of the colour, race, or ethnic or national origins of that group of persons.”</p>	<p>s9(2)(f)(iv)</p> <ul style="list-style-type: none"> • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) <ul style="list-style-type: none"> • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) <ul style="list-style-type: none"> • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) 	<p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p>

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<p>Proposal 2: Create a new clearer criminal provision in the Crimes Act to reflect the existing intent behind section 131 of the Human Rights Act.</p> <p>s9(2)(f)(iv)</p>	<p>Section 131 outlines the criminal offence in the Human Rights Act which states that is an offence for a person “with intent” to “excite hostility or ill-will against, or bring into contempt or ridicule”, “any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins” of that group of persons who:</p> <ul style="list-style-type: none"> • “publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or • uses in any public place or within the hearing of persons, or at any public meeting of words which are threatening, abusive, or insulting”The speech must be objectively likely to have the inciting (exciting) effect. 	<p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p> <ul style="list-style-type: none"> • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) • s9(2)(f)(iv) 	<p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p> <p>s9(2)(f)(iv)</p>
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Changes	Current wording of the Act	Proposed change to the Act	RCOI recommendations and other notes
<p>Proposal 3: Increase maximum penalty for incitement speech</p>	<p>Under Section 131 of the Human Rights Act: The person who commits the offence is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000.</p>	<p>s9(2)(f)(iv)</p>	<p>s9(2)(f)(iv)</p>
<p>Proposal 4: Change the wording of the civil provision for hate speech to include “maintaining or normalising”</p>	<p>Section 61 which is the civil provision in the Humans Rights Act is focused on speech that is “likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons through speech that is insulting, abusive or threatening.”</p>	<p>s9(2)(f)(iv)</p>	<p>s9(2)(f)(iv) s9(2)(f)(iv)</p>
<p>Proposal 5: Change the wording of the civil provision for hate speech to include speech that is likely to incite discrimination</p>	<p>Section 61 which is the civil provision in the Humans Rights Act is focused on speech that is “likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons through speech that is insulting, abusive or threatening.”</p>	<p>s9(2)(f)(iv)</p>	<p>s9(2)(f)(iv)</p>

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Changes	Current wording of the Act	Proposed change to the Act	RCOI recommendations and other notes
<p>Proposal 6: Clarify that groups who are protected from discrimination under section 21 includes trans, gender diverse and intersex people</p>	<p>The wording of section 21 currently prevents discrimination based on “sex, which includes pregnancy and childbirth” and “sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation”</p>	<p>s9(2)(f)(iv)</p>	<p>s9(2)(f)(iv)</p>

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Detail of hate speech laws in other jurisdictions

Most jurisdictions use incitement provisions and do not punish insulting or abusive language as such. This reflects freedom of expression considerations and the requirements under the Convention on the Elimination of Racial Discrimination. Several countries have civil and criminal provisions. The United States and Malaysia sit at the extreme ends of the spectrum.

Country	Law	Penalty	comment
United Kingdom	<p><i>Public Order Act 1986:</i></p> <p>1) using threatening, abusive or insulting words or behaviour, or displaying any written material which is threatening, abusive or insulting, if—</p> <p>(a) intention to thereby to stir up racial hatred, or</p> <p>(b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.</p> <p>2) using threatening words or behaviour, or displaying any written material which is threatening, if intending thereby to stir up religious hatred."</p> <p>3) using threatening words or behaviour, or displaying any written material which is threatening, intending thereby to stir up hatred on the grounds of sexual orientation.</p>	7 years	Intention not required for 1b)
Canada	<p><i>Criminal Code:</i> ...incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, or wilfully promotes hatred against any identifiable group</p> <p>Coverage: colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, mental or physical disability</p>	2 years	<p>Defences/exemptions available.</p> <p>A civil law provision prohibiting online communications "likely to expose a person or persons to hatred or contempt" on the basis of a prohibited ground of discrimination was repealed through a member's bill in 2013. It triggered a complaints process to the Canadian Human Rights Commission and Canadian Human Rights Review Tribunal.</p>

Country	Law	Penalty	comment
Northern Ireland	<p><i>Public Order (Northern Ireland) Order 1987:</i> using threatening, abusive or insulting words or behaviour, or displaying any written material which is threatening, abusive or insulting if— (a)intending thereby to stir up hatred or arouse fear; or (b)having regard to all the circumstances hatred is likely to be stirred up or fear is likely to be aroused thereby.</p> <p>A person who is not shown to have intended to stir up hatred or arouse fear is not guilty of an offence under this Article if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting.</p> <p>Coverage: religious belief, sexual orientation, disability, colour, race, nationality (including citizenship) or ethnic or national origins</p>	7 years	Includes arousal of fear Intention not required
Australian federal legislation	<p><i>Racial Discrimination Act 1975</i> prohibits to offend, insult, humiliate or intimidate another person or a group of people if the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.</p> <p><i>Criminal Code 1995:</i> using a (online) carriage service in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.</p>	Criminal Code: 3 years	Racial Discrimination Act triggers civil complaint to the Australian Human Rights Commission (exception are included in the legislation)

Country	Law	Penalty	comment
ACT	<p><i>Discrimination Act 1991</i>: unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following</p> <ul style="list-style-type: none"> (a) disability; (b) gender identity; (c) HIV/AIDS status; (d) intersex status; (e) race; (f) religious conviction; (g) sexuality. 	Not criminal	
Ireland	<p><i>Prohibition of Incitement to Hatred Act 1989</i>: threatening, abusive or insulting and are intended or, having regard to all the circumstances, likely to stir up hatred.</p> <p>Coverage: race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation</p>	2 years	
United States	<p>Speech is protected under the Constitution unless there is as clear and present danger:</p> <ul style="list-style-type: none"> • if the advocacy is directed to inciting or producing imminent lawless action, and • is likely to incite or produce such action 		s9(2)(g)(i)
Malaysia	<p><i>Sedition Act 1948</i>: acts with a tendency:</p> <ul style="list-style-type: none"> • to bring into hatred or contempt or to excite disaffection against any Government; • to raise discontent or disaffection amongst the inhabitants of Malaysia • to promote feelings of ill-will and hostility between different races or classes of the population of Malaysia 	3 years	Malaysia has been criticised for having one of the broadest hate speech laws which is being used to stifle freedom of speech especially against criticism of the Government. It may be repealed.

Country	Law	Penalty	comment
Norway	<p><i>Penal Code (Lov om straff)</i>: with intent or gross negligence publicly makes a discriminatory or hateful statement.</p> <p>Discriminatory or hateful statement means threatening or insulting a person or promoting hate of, persecution of or contempt for another person based on his or her</p> <ul style="list-style-type: none"> a skin colour or national or ethnic origin, b) religion or life stance, c) homosexual orientation, or d) reduced functional capacity. 	3 years	Gross negligence is covered
Germany	<p><i>Criminal Code (Strafgesetzbuch)</i>: in a manner capable of disturbing the public peace:</p> <ol style="list-style-type: none"> 1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or 2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population, 	5 years	<p>Human dignity is a human right under the German Constitution.</p> <p>Offences are investigated and prosecuted pro-actively</p>

Other jurisdictions' protected groups

Most countries have hate speech legislation in one form or other. Almost all countries are parties to the International Convention on the Elimination of all Forms of Racial Discrimination, CERD, and International Covenant on Civil and Political Rights (ICCPR). Both Conventions require states to have legal protections against inciting speech for the groups of race/ethnicity/nationality and religion.

Many other jurisdictions have criminal hate speech laws that cover a wider range of groups than NZ's current laws, for example:

Jurisdiction	Groups covered
New South Wales	<ul style="list-style-type: none"> • race • religion • sexual orientation • gender identity • intersex • HIV status
Victoria	<ul style="list-style-type: none"> • race • religion
Queensland	<ul style="list-style-type: none"> • race • religion • sexual orientation • gender identity
ACT	<ul style="list-style-type: none"> • race • religion • sexual orientation • gender identity • intersex • HIV status • Disability
Canada	<ul style="list-style-type: none"> • Race • National origin • Ethnic origin • Colour • Religion • Sex • Sexual orientation • Gender Expression • Gender identity • Age • Disability
England & Wales	<ul style="list-style-type: none"> • Race • National origin • Ethnic origin • Colour • Religion

	<ul style="list-style-type: none"> • Sexual orientation
Ireland	<ul style="list-style-type: none"> • Race • National origin • Ethnic origin • Colour • Religion • Sexual orientation • Member of travelling community
Northern Ireland	<ul style="list-style-type: none"> • Race • National origin • Ethnic origin • Colour • Religion • Sexual orientation • Disability

International case law on inciting speech

Australia

It appears there have been limited number of prosecutions for hate crimes in Australia.

News reports from 2019 following the Christchurch attacks indicate that only 21 people have ever been convicted of state-based hate crime laws ([Why are so few hate crimes prosecuted in Australia? - ABC News](#))

One example of a successful prosecution of serious vilification: *Cottrell v. Smith* 2017 where far-right extremist Blair Cottrell was convicted of inciting hatred, contempt and ridicule of Muslims after making a video beheading a dummy in protest of a Bendigo mosque. ([Racial and religious vilification on the rise in Victoria — but only one successful prosecution in 20 years - ABC News](#))

United Kingdom

Thirteen prosecutions in 2018-19 for “stirring up hatred” cases, eleven of which resulted in convictions under the Public Order Act 1986.

One example from 2019: Worrell sentenced to two years, six months imprisonment for intending to stir up racial hatred having previously served a prison sentence for racially aggravated harassment and possessing terrorist material.

Worrell was found guilty of four offences of possessing material likely to stir up racial hatred to sections 23(1) and 27(3) Public Order Act 1986 and four offences of stirring up racial hatred contrary to sections 19(1) and 27(3) Public Order Act 1986. ([Grimsby Man Sentenced for Stirring Up Racial Hatred | Counter Terrorism Policing](#)).

Germany

Numerous examples from German case law - in 2019 there were 259 convictions alone for Bavaria and almost 1,000 for Germany as a whole.

One example in 2020 involving an extreme right-wing party president internet article on party website: comments insulting a leader of a Jewish community who had criticized a publisher who published right wing books (such as books praising Nazi soldiers).

The post said: “my party will reduce the influence of Jewish lobby organisations on German politics to zero very soon.” Communication held to incite hatred against Jewish people, particularly through an implied reference to genocide/holocaust. 6 months prison (included a conviction for criminal defamation). Confirmed by constitutional court.

Another example was a conviction for incitement of hatred for an online comment on a photo of an asylum seeker who tried to commit suicide by burning himself: ‘I would have let him die, he costs us money every month’. 4 months prison sentence (on probation) plus payment of Euros 3,000. ([Verurteilung wegen Volksverhetzung - Grenzen der Meinungsfreiheit - Dachau - SZ.de \(sueddeutsche.de\)](#))

A 2017 example: Constitutional court didn’t accept a criminal court’s conviction of a right wing publicist. He said: “there is a Government conspiracy to fight undesired opinions. No Jews have been taken to Auschwitz since 1944” (followed by more anti-semitic expressions). Constitutional court referred case back to the criminal court to appropriately interpret what was said in the light of the human right of freedom of expression. ([Verurteilung wegen Volksverhetzung verfassungswidrig \(lto.de\)](#))

Canada

R v Sears [2019] ONCJ 104 – Ontario court finds editor and publisher of newsletter guilty of wilful promotion of hatred against women and Jewish. Free publication was distributed over three years to more than 300,000 homes and businesses in the Toronto area as well as online. The publication consistently portrayed women as inferior and as inviting rape. It also promoted tropes of Jews drinking the blood of Christian children and denied the Holocaust occurred. Those themes continued even after the trial started (12 months conditional sentence through house arrest, 12 months’ imprisonment for the other) confirmed by CApp in 2021. (<https://www.cbc.ca/news/canada/toronto/your-ward-news-lose-appeal-1.6064999>)

[Citron v. Zündel TD 1/02 \(2002/01/18\)](#): Canadian Human Rights Review Tribunal decision (civil decision). Zündel, had a homepage on the internet that provided antisemitic publications and pamphlets that with “unrelenting questioning of the “truth” related to the extent of the persecution of Jews by Nazi Germany during the second World War”.

Court finds that publications likely to expose a person or group of persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of a prohibited ground of discrimination. Order to cease such publication

Based on s. 13(1) of the Canadian Human Rights Act which has been repealed since

This law prohibited repeated publication of any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

In December 2008, the Canadian Human Rights Commission declined to investigate under this provision a complaint against Imam Abou Hammad Sulaiman al-Hayiti, a Montreal Salafist Muslim who was accused of inciting hatred against homosexuals, Western women, and Jews, in a book he published on the Internet.

<https://www.lapresse.ca/debats/200812/18/01-811464-les-mecreants.php> (French)

CONSULTATION SO FAR

Positive feedback from minority groups

It is still very early days in the public engagement process, and we expect more feedback to flow in in the coming weeks.

In September and October 2019, the Ministry of Justice, working with the Human Rights Commission undertook early engagement with groups who may have experienced, or may be at risk of experiencing harmful speech. This was before the current proposals were developed.

Communities engaged with included:

- Māori
- Pasifika
- Asian
- Diverse SOGIESC (sexual, orientation, gender identity and expression, and sex characteristics)
- Faith/religious communities
- Women
- Youth, and
- Disabled people

During these engagements, a key concern was that the current laws on hate speech did not mirror the prohibited grounds of discrimination under the Human Rights Act. The current laws were focused on racial disharmony. Disharmony on the grounds of sex, sexual orientation, religious belief, and disability are not covered. These groups felt vulnerable and believed that the law did not adequately protect them.

All groups expressed the view that this was a very important topic and needed to be discussed. People were eager to attend, and there were a number of requests for further meetings from those who could not attend the scheduled meetings. People provided written comments and emails with further information. Participants expressed enthusiasm to be involved in any future consultation the government carries out on the topic.

Excerpt from: *Weekly report for the Minister of Justice 30 July 2021*

30 July 2021

(Paragraphs 1-3 out of scope)

Update on the Social Cohesion, Incitement and Objectionable Content consultation

4. The consultation is seeking views on three recommendations from the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019.
5. Consultation with targeted groups commenced on 13 July in Auckland as a joint project between the Ministry of Social Development, Ministry of Justice and the Department of Internal Affairs.
6. Attendees from the following targeted groups have participated so far: Māori, Interfaith, Muslim, LGBTQI, Pacific, Migrants, Refugees and the disability sector.
7. 16 focus groups and three larger hui have been held as at 28 July. 9 additional focus groups are scheduled. Additional engagement with Treaty Partners is being undertaken in collaboration with the Māori Electoral Option and Adoption projects and is in addition to those hui.
8. To date, the smaller focus groups have allowed for more nuanced discussions than the larger hui and have generated more qualitative insights.
9. 1350 submissions have been received by the Ministry of Justice on Incitement (via Citizen Space and Email). In addition to the 1350 submissions, 2500 emails have been received to date in support of the Free Speech Union's submission.
10. The consultation period closes on Friday 6 August.

Contact: Jenna Reid, Policy Manager, Civil Law and Human Rights. Ph
Rajesh Chhana, Deputy Secretary, Policy. Ph

[Remainder of report out of scope]



MINISTRY OF
JUSTICE
Tāhū a te Tui

Weekly Report

Hon Kris Faafoi
Minister of Justice
17 September 2021

IN CONFIDENCE

Out of scope

1. Out of scope

2. Out of scope

3. Out of scope

Out of scope

Meeting with Kāpuia to discuss incitement of hatred Out of scope

4. Officials met with Kāpuia via videoconference on 9 September 2021. We were invited to discuss Kāpuia's feedback on the recent consultation on the proposals against incitement of hatred and discrimination, Out of scope

Feedback on consultation on the proposals against incitement of hatred and discrimination

5. Kāpuia provided thoughtful and constructive feedback on the recent consultation on the proposals against incitement of hatred and discrimination. They expressed their disappointment that the consultation period was not extended in line with the social cohesion consultation. They provided useful advice on how to approach communities to encourage engagement and noted that the bundling of several consultations together was effective in terms of time. As noted in their letter to the Responsible Minister, Kāpuia has a strong interest in working closely with Government on issues within their area of interest.

Contact: Kathy Brightwell, Acting General Manager, Civil and Constitutional Policy. Ph s9(2)(a)

Rajesh Chhana, Deputy Secretary Policy. Ph s9(2)(a)

Out of scope

6. Out of scope

7. Out of scope

(Remainder of document out of scope)

Meeting with Amnesty International Aotearoa New Zealand

Aide memoire

21 September 2021

(Page 1-5 out of scope)

Incitement of hatred and discrimination

1. Consultation on the discussion document proposals ran from 25 June to 6 August 2021. Submissions were received online through the Ministry of Justice's website, via email and by post. Approximately 20,000 submissions were received. MoJ note that you have separately been provided an aide memoire with initial findings from consultation [AM 20210820]. However, MoJ does not recommend sharing detail from this at this stage.
2. You may wish to discuss Amnesty International Aotearoa New Zealand's submission on the proposals. They are broadly supportive of the proposals, subject to final drafting. They recommend that the Government is guided by international law and principles. They also note that regulating inciting speech in isolation does not address the root causes of racism, prejudice and intolerance, and that the Government should consider its obligations under Te Tiriti o Waitangi in finalising proposals, including how it is working with Māori in this process. MoJ considers these are all valid points.

(Pages 7-9 out of scope)

Incitement to hatred and discrimination reforms

- Thank you for your submission on the proposals against incitement of hatred and discrimination

[You may wish to invite Amnesty International to speak to their submission]

[Remainder of report out of scope]



Meeting with Amnesty International, 25 November 2021

Hon Kris Faafoi

Purpose

1. This aide memoire provides you with background information and talking points for your meeting with Amnesty International on Thursday 25 November from 4:00-4:30pm

Context

2. You previously met with Amnesty International on 23 September for one of your bi-annual meetings to discuss both Immigration and Justice matters. Topics of discussion in your Justice portfolio included the treatment of human rights defenders in Aotearoa, incitement reforms, and criminal justice reform. Given the breadth of issues to discuss in your portfolios, you suggested setting up a separate meeting to specifically discuss Justice matters.
3. Amnesty International has indicated that it wishes to discuss the following topics at your upcoming meeting:
 - incitement of hatred and responses to issues of online hate
 - Out of scope
 - Out of scope
4. Out of scope

Incitement of hatred and responses to issues of online hate

5. In their written submission on the incitement proposals, Amnesty International were broadly supportive of the incitement proposals, subject to final drafting. They recommended that the Government is guided by international law and principles. They also noted that regulating inciting speech in isolation does not address the root causes of racism, prejudice and intolerance. They recommended that the Government should consider its obligations under Te Tiriti o Waitangi in finalising proposals, including how it is working with Māori in this process.
6. Out of scope
7. Out of scope
8. Out of scope

9. Out of scope

Transparency and engagement with civil society

10. The Ministry of Justice has undertaken a number of engagements this year and has several more underway.
11. Consultation on the incitement proposals ran from 25 June to 6 August 2021. More than 19,000 submissions were received online, via email, and post. 30 focus groups and larger hui were held across the consultation period, in Auckland, Hamilton, Wellington and online. Participants included Māori, Pasifika, former refugees and migrants, disability communities, rainbow communities and faith-based communities.
12. Some organisations, including the Federation of Islamic Associations of New Zealand and Kāpuia, publicly raised concerns regarding the consultation process. These included that the duration of the consultation period was too short, and that meetings were not held at convenient times or locations for attendees.
13. Out of scope

Out of scope

14. Out of scope

15. Out of scope

Out of scope

16. Out of scope

17. Out of scope

Talking points

Incitement of hatred and responses to issues of online hate

- Final policy decisions on legislative changes to the incitement provisions have not yet been made.

- Out of scope

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Enclosed:

Excerpt from Recognising the culpability of hate-motivated offending, 22 January 2022

[Out of scope – pages 1 - 9]

Proposals against the incitement of hatred and discrimination (Ministry of Justice)

Paragraphs from page 10. Rest of the page is out of scope.

36. Recommendation 40 of the RCOI Report is to repeal section 131 of the Human Rights Act 1993 and insert a provision in the Crimes Act 1961 for an offence of inciting racial or religious disharmony, based on an intent to stir up, maintain or normalise hatred, through threatening, abusive or insulting communications with protected characteristics that include religion affiliation.
37. On 25 June 2021, the Government released a discussion document setting out six in-principle proposals to strengthen and clarify the law against incitement of hatred and discrimination and invited the public to have their say. Public consultation closed on 6 August 2021 and attracted more than 19,000 submissions. The Ministry of Justice also engaged with a wide range of community groups, holding 30 meetings across New Zealand. In March, officials will provide you with a summary report of the public submissions and a summary report of the feedback received during the community engagement process.

[Out of scope – Pages 11-17]

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