

05.08.21

Human Rights  
Ministry of Justice  
**Wellington**

By email: [humanrights@justice.govt.nz](mailto:humanrights@justice.govt.nz)

**Re: Proposals against incitement of hatred and discrimination – discussion document**

**1. Introduction**

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Ministry of Justice *Proposals against incitement of hatred and discrimination* discussion document (**discussion document**).
- 1.2 The Ministry of Justice is seeking feedback on the six proposals which are aimed at making Aotearoa New Zealand “safer for everyone, by strengthening the parts of existing law that protect groups from speech that incites hatred, and by improving protections against discrimination.”<sup>1</sup> The discussion document seeks to find out if the public thinks the law should change and whether other issues should also be covered.
- 1.3 This submission has been prepared with the assistance of the Law Society’s Criminal Law Committee and Human Rights and Privacy Committee. It sets out general observations about the proposals and the implications of any changes to legislation, and responds to the questions posed for each proposal as set out in the discussion document. It also sets out five recommendations for the Ministry’s consideration.

**2. General points regarding the intent of the proposals and their implementation**

- 2.1 The Law Society acknowledges the important work undertaken by the Royal Commission of Inquiry into the terrorist attack at Christchurch masjidain on 15 March 2019. The Law Society supports the need for clear and strong protections to foster social cohesion.
- 2.2 The right to freedom of speech is an important right, protected by the New Zealand Bill of Rights Act 1990 (**BORA**). The Law Society stresses the need for vigilance in safeguarding this right and that any limitation on it must be demonstrably justified as reasonable in a free and democratic society.
- 2.3 The Law Society supports broadening the sections 61 and 131, to include other groups that experience hate speech but are currently not protected. It must be noted, however, that adding to the list of grounds in these provisions will increase the workload of the Human Rights Commission (**HRC**) mediation services, to whom complaints will be made in cases of alleged ‘hate speech’.

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<sup>1</sup> Ministry of Justice webpage: <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/proposals-against-incitement/>

- 2.4 There is a need to be very cautious about deploying the criminal law in this context, and it requires evidence of harm of sufficient magnitude to justify doing so. This means policy-makers need to consider, in relation to each of the grounds of discrimination in the Human Rights Act 1993, whether there is a basis for carrying that ground across to the hate speech provisions in section 61 (and the new Crimes Act provision to replace section 131).
- 2.5 Care must be taken when framing legislation that affects fundamental rights, and it is crucial that the legislation identifies very clearly what will, or will not be, prohibited behaviour:
- (a) It must be clear that it is not the ideas that are targeted by the legislation but the mode of their expression in public and the effect that may have on others.
  - (b) The effect should be assessed not on whether the group to which the expression is made is offended, but on whether the expression incites hatred towards the group by others outside the group.
  - (c) Definitions of ‘hatred’ and ‘hate speech’ must be provided. Case law provides guidance as to how to define these terms.<sup>2</sup> It is uncertain whether the legislation will adopt the *Wall v Fairfax* interpretation of hatred.<sup>3</sup> Clarity is necessary if there is going to be effective enforcement.
  - (d) The language used must be carefully chosen. In particular, there will be implications that arise from using ‘incitement’ or ‘stirring up’ and from the inclusion of the words ‘maintain’ and ‘normalise’.

### **3. Increasing the groups who are protected by the incitement of hatred**

*Proposal 1: Change the language in the incitement provisions so that they protect more groups that are targeted by hateful speech*

- 3.1 The Law Society agrees that more groups might be protected, reflecting more of the grounds of discrimination identified in section 21 of the Human Rights Act 1993 (**HRA**). However, further thought should be given to whether the incitement provisions regarding hate speech should include all the groups. The inclusion of any group must be justified given the implications for the limitation on the right to freedom of expression.
- 3.2 The Law Society notes that the proposals stop short of identifying which further grounds should to be included in sections 61 and 131, beyond race and ethnic or national origin. A blanket approach, that simply adds all the section 21(1) grounds into section 61 and its criminal analogue, would be problematic unless it were based on evidence of actual harm being perpetrated through expression that targets each defined group. Whether that

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<sup>2</sup> *Wall v Fairfax NZ Ltd* [2018] NZHC 104

<sup>3</sup> As at n 3 [52 – 58]. Assessing the ordinary language of s 61, the Court of Appeal considered that the provision must be at the ‘serious end of the continuum of meaning’ [42] and that ‘hostility’ differs little from the word ‘hatred’ used in ‘foreign’ legislation. The Court then goes on to consider the definition of hatred and contempt adopted by the Canadian Supreme Court in *Taylor v Canadian Human Rights Commission* and *Whatcott* to equate to ‘detestation’ and ‘vilification’; and that it had resisted disconnecting ‘contempt’ from the context (‘hatred and contempt’) to capture words which aren’t ‘unusual or extreme’. The Court of Appeal goes on to interpret the meaning of section 61 to be ‘egregious examples of expression which inspire enmity, extreme ill-will, or likely result in the group being despised’. Being defined so still allow for the expression of views that may offend, shock or disturb.

evidence exists for, to take just two examples, political opinion and marital status is doubtful.

3.3 Experience in relation to the current provision suggests that there may be many complaints to the Human Rights Commission which do not meet the requisite threshold for liability, but which must nevertheless be handled by the Commission. Given that the Commission does not rule on, but seeks to mediate human rights complaints, there is the prospect of a “chilling effect” on freedom of expression if persons are required to respond to complaints that do not meet the threshold for liability.

3.4 Decisions about which groups should and should not be protected must be evidence based.

#### **4. Making clearer what behaviour the law prohibits and increasing the consequences for breaking the law**

*Proposal 2: Replace the existing criminal provision with a new criminal offence in the Crimes Act 1961 (Crimes Act) that is clearer and more effective*

4.1 The Law Society supports including a broader range of communication methods. The current legislation is limited as to how hate speech can be conveyed.

4.2 It is noted that the new provision will maintain the requirement of *intention* to incite hatred to meet the threshold of the new Crimes Act provisions. The threshold is high, and rightly so.

4.3 The Law Society supports simplifying the text of section 131 by utilising the word ‘hatred’. The High Court in *Wall v Fairfax*, drawing on international and comparative jurisprudence, held that the equivalent phrases in section 61 (hostility and bringing into contempt) denoted speech at the serious end of the spectrum that could appropriately be described as “hatred”.

4.4 The word ‘incite’ may be easier to define than ‘stir up’. There is judicial authority for this to mean ‘to induce, persuade, threaten or pressure’.<sup>4</sup> Legislation in the UK uses the term ‘stir up’ and ‘stirring up’. In Australia, the New South Wales Court of Appeal considered ‘stir up’ to fall within the definition of ‘incite’.<sup>5</sup>

4.5 It is not clear whether the term ‘stir up’ implies that there is some sentiment already present that is being ‘stirred.’ If this is implied, it would suggest that the term does not apply to the person who first voices the hate sentiment.

4.6 The Law Society does not support adding the terms ‘maintain’ and ‘normalise.’ Their inclusion (as alternatives to incitement) may unintentionally lower the threshold for successful prosecution. It is difficult to see why the term ‘incitement’ could not itself do the work of ‘maintain’ or ‘normalise.’ If the concern is that incitement would not be covered when aimed at persons already holding extreme views, then that concern appears to be met in any event by the requirement of an objective test involving a hypothetical reasonable

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<sup>4</sup> *Adams on Criminal Law* CA311.04

<sup>5</sup> *Sunol v Colloer [No 2]* (2012) 289 ALR (NSWCA): ‘Incite means to rouse, to stimulate, to urge, to spur on, to stir up or to animate and covers conduct involving commands, requests, proposals, actions or encouragement.’

person (albeit with the characteristics of being susceptible and persuadable as discussed in *Wall v Fairfax*).<sup>6</sup>

- 4.7 Maintaining and normalising may also widen the range of behaviours which can be caught by the provision. For example, would failing to condemn expressions inciting hatred of a certain group amount to ‘maintaining’ or ‘normalising,’ and therefore require prosecution?

*Proposal 3: Increase the punishment for the criminal offence to up to three years’ imprisonment of a fine up to \$50,000 to better reflect its seriousness*

- 4.8 The proposed penalty is commensurate with other offences in the Crimes Act (for example, breach of protection order).
- 4.9 The Law Society supports retaining the section 132 provision that no prosecution can be instituted without the consent of the Attorney General. This provision will continue to ensure that only behaviour within the definitions provided by the legislation will be brought before the Court; defences will remain available once a prosecution is instituted.
- 4.10 It is noted, however, that increasing the penalty to three years’ imprisonment means that a defendant can elect trial by jury. If the requirement for the Attorney General’s consent before a prosecution can be instituted is relaxed, some other method of controlling what behaviour amounts to inciting hatred may need to be considered. The legislation could draw on the law of defamation and provide that it is for a judge to decide whether the words or conduct complained of can amount to inciting hatred.

*Proposal 4: Change the language of the civil incitement provision to better match the changes made to the criminal provision*

- 4.11 The Law Society supports aligning the language of the Human Rights Act and the Crimes Act. The final wording needs to be carefully considered. The terms ‘maintain’ and ‘normalise’ have been addressed above, and the Law Society does not support their inclusion.

## **5. Improving the protections against discrimination more broadly**

*Proposal 5: Change the civil provision so that it makes “incitement to discrimination” against the law*

- 5.1 The Law Society has reservations about this proposal.
- 5.2 The Law Society agrees that Aotearoa New Zealand, as a signatory, needs to align our law with the ICCPR. However, Article 20 speaks of “*advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence*” (emphasis added). Article 20 does not appear to be a requirement to legislate against incitement to discrimination, or in relation to grounds other than those specified.
- 5.3 The Human Rights Committee, in General Comment 34, says of Article 20:

*It is only with regard to the specific forms of expression indicated in article 20 that States parties are obliged to have legal prohibitions. In every case in which the State restricts freedom of expression it*

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<sup>6</sup> As at n 3 [78] and associated text leading to that conclusion.

*is necessary to justify the prohibitions and their provisions in strict conformity with article 19.*

So, a broad prohibition on incitement to discriminate is not itself a requirement of Article 20.

- 5.4 As the Human Rights Committee points out, limits on expression going beyond the requirements of Article 20 are certainly possible, but those limits must be reasonable.
- 5.5 It is unclear whether the proposal for a broad prohibition on incitement would add much, if anything, to the current section 61. In most cases, expression that meets the threshold of being an '*incitement to hatred*' would likely embrace incitement to discriminate. Expression advocating that people discriminate against a group would likely be seen as advocacy of hatred against the group.
- 5.6 However, there may be cases where advocacy of a viewpoint which proposes or requires discrimination against a particular group has no element of ill will toward the members of that group. For example, the (successful) advocacy of a law preventing female genital mutilation implicitly discriminated against members of religious and cultural groups who practised that treatment but had no element of animus against the group members.
- 5.7 To that end, it would need to be made clear, if this proposal succeeds, that the discrimination spoken of is only that which is *unlawful* under the HRA and not permitted by that or any other relevant law. An '*incitement*' to different treatment that is lawful – for example by invoking statutory defences – ought not to be prohibited.
- 5.8 The Law Society considers that careful thought should be given to this proposal, as the numerous grounds of prohibited discrimination in the Human Rights Act means that the potential reach of any prohibition of incitement to discriminate is broad. For example, debates about the legitimacy of 'special measures' under section 73 (to ensure equality) could be cast as an incitement to discriminate by those opposed to them. Good faith arguments about such matters are not appropriately the subject of this kind of law.

*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.*

- 5.9 The Law Society supports the explicit inclusion of these groups in section 21 of the Human Rights Act.

## **6. Recommendations**

- 6.1 In summary, the Law Society recommends that:
  - 6.1.1 When considering which additional groups ought to be included in hate speech regulation, consideration must be given to the evidential basis for their inclusion. Some of the grounds may not justify a limitation on freedom of expression.
  - 6.1.2 The new and amended provisions must be carefully drafted. Care must be taken to clearly define terms such as '*hatred*' and '*discrimination*,' and the behaviour which will be caught by the provisions.

- 6.1.3 The words 'incite', and 'incitement' are used in preference to 'stir up'.
- 6.1.4 The words 'maintain' and 'normalise' are not included.
- 6.1.5 The implications of the foregoing are carefully considered when considering the inclusion of a prohibition on incitement to discriminate.

The Law Society is grateful for the opportunity to provide feedback on the discussion document. If further discussion would assist, the convenors of the Law Society's Criminal Law Committee (Chris Macklin) and Human Rights Committee (Paul Rishworth QC) can be contacted through the Law Society's Law Reform and Advocacy Advisor, Helen Gould ([helen.gould@lawsociety.org.nz](mailto:helen.gould@lawsociety.org.nz)).



Tiana Epati  
President