

Response by



to the

Ministry of Justice

on the

**Proposals against
incitement of
hatred and intimidation**

6 August 2021

Proposals against incitement of hatred and discrimination

BusinessNZ welcomes the opportunity to respond to the Ministry of Justice proposals against the incitement of hatred and discrimination. Background Information on BusinessNZ is provided in Appendix One.

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

Do you agree that broadening the incitement provisions in this way will better protect these groups (some or all groups currently covered by the Human Rights Act's anti-discrimination provisions)?

In your opinion, which groups should be protected by this change?

Do you think there are any groups that experience hateful speech that would not be protected by this change?

No. Neither promoting nor broadening existing incitement provisions is supported as doing so would not ameliorate the perceived problem and could make matters worse.

While it is not pleasant, and without doubt upsetting, to be the target of offensive speech, those who give offense will likely have their views hardened if subject to legal sanctions. Penalising individuals for expressing their thoughts is not the way to change those thoughts nor is establishing that legally punishable harm has occurred a simple matter, reactions will always vary. Would the egg-shell skull principle apply? Nothing is made better by legislation that can operate only on an 'I know it when I hear it' basis or on the perceptions of whoever heard what was said.

Court action is never a happy experience, and for those alleging harm would involve re-hearing what was found offensive in the first place, together, possibly, and even more upsettingly, with the reasons why such words were used. Further, the satisfaction of a successful prosecution would be nullified by the resentment of persons prosecuted.

Moreover, singling out specific groups for hate speech protection is nothing if not patronising. Classifying a group based on a particular characteristic is unrealistic. Persons with that characteristic will not all think and feel the same way and nor can they be expected to. Views, like reactions, vary. And naming specific groups and omitting others is fraught with difficulty.

Rather than extending the application of sections 61 and 131 to further groups it would be better to remove those sections from the Human Rights Act. In any event it is unclear whether the proposal is to replace section 131 (the criminal sanction) with a new Crimes Act provision or retain it along with the new criminal offence.

Recommendation: If there is to be a hate speech offence of any kind, it should be one of direct and intentional incitement to violence against any group in society that has the effect of provoking violence. Specific groups should not be named.

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

Do you agree that changing the wording of the criminal provision in this way will make it clearer and simpler to understand?

See response above.

Comment: Assuming the introduction of a new Crimes Act provision, whatever terminology is used will still be open to interpretation with the courts needing to establish whether the words used were damaging enough to meet the 'beyond reasonable doubt' criminal standard of proof. Hatred, after all, is an expression of what the speaker thinks and feels; it won't inevitably inspire others to think and feel the same way. Moreover, it is possible to envisage circumstances where 'hate speech' might be considered entirely justified – in respect to certain political opinions, perhaps. What was said might have given offence, but careless language often offends. (Is intentionally saying 'I hate you' when annoyed with someone hate speech?) Trying to change opinions via the criminal law is bound to fail and for that reason alone, should not be attempted.

And criminal sanctions already exist. The Harmful Digital Communications Act covers complaints about texts, emails, social media, and website content, with offenders facing up to two years in prison or fines of up to \$50,000.

Threats of physical violence or harm are covered by the Crimes Act. Section 307A stipulates those made against people or property that cause 'significant disruption of the activities of the civilian population are an offence with a penalty of up to seven years in prison. Non-criminal actions for libel and slander are also possible.

Do you think that this proposal would capture the type of behaviour that should be unlawful under the new offence?

As will be apparent from the response above, there is no need to create a new hate speech offence.

Preventing individuals from expressing their thoughts, however unpleasant, will only drive them to digital platforms where they can converse with people with the same ideas, thus confirming them in their views rather than allowing for rational responses.

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

Do you think that this penalty appropriately reflects the seriousness of the crime?

While, understandably, the Government wants to be seen to respond to the Christchurch massacre, it should be wary of the urge to criminalise what individuals might say or write. It seems self-evident that however unpleasant expressed thoughts might be, it is better to know what they are than to drive them underground. Hate speech legislation would have done nothing to prevent what happened in Christchurch but will certainly have the effect of concealing future malign intentions. The legislation proposed is more in the nature of a knee jerk (if a somewhat belated knee jerk) reaction than a cure for the ills it relates to.

Individuals do not renounce their views because told to keep quiet. Resentments will more likely grow than be mollified.

But beyond what is proposed for New Zealand, in Europe, where hate speech laws are the norm, such legislation has done nothing to prevent the rise of intolerant behaviour. Indeed, the European Commission against Racism and Intolerance no longer encourages its members to adopt such laws now recognising that hate speech can be more effectively dealt with other than by imposing criminal sanctions. The following is taken from a European Union paper published in July 2020ⁱ:

"Criminal sanction is the strongest instrument of the state. The criminal procedure requires enormous resources even to get started, moves slowly, and is very high stakes. It can result either in acquittal, and the speaker can register a victory: gain fame and regain authority; or the speaker is convicted which is damaging to their freedom, social status and through stigmatisation, further destructs their loyalty to society. In short, criminal hate speech creates a lose-lose situation for the community and contributes to maintaining hostility and yields even more conflict."

The same paper notes that most EU states have criminal sanctions but as indicated above, their usefulness is, at the very least, questionable.

Further, freedom of speech and expression are important (and to some extent protected by s14 of the New Zealand Bill of Rights Actⁱⁱ) but as the EU statement fails to point out, defending a criminal claim because an offence has been alleged also has harmful effects for accused persons – and their families – whether ultimately acquitted or not. That relevant provisions of the 1993 Human Rights Act are currently not much used is no good reason for introducing even more draconian legislation and expecting it to have greater 'success' than the legislation already in place.

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

Do you support changing this language in s 61 (of the Human Rights Act?)

No. S61 itself is not supported (and particularly the reference to 'insulting'). The wording of s 61 and the attempt in s61(2) to allow some communications to escape the net demonstrate the difficulty of trying to create satisfactory hate speech legislation, a difficulty underlined by the lack of use both s61 and s131 have received.

The UK provides more than one instance of legislative good intentions that have done little more than criminalise, or (in their turn) victimise, unfortunate citizens subject to offence complaints or over-enthusiastic police action. Below is a recent example.

M was accused by Mrs B of making transphobic remarks on Twitter. The police categorised the complaint as a 'non-crime hate incident' but nevertheless a police officer visited M's workplace and later phoned, giving the impression M could face criminal prosecution by continuing to tweet.

Undeterred, M took legal action in the High Court and there his claim was upheld. Ruling that the tweets were lawful, and the police had disproportionately interfered with M's right

of freedom of expression, the High Court judge said of the UK, "*we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society.*"ⁱⁱⁱ

Hate crime law might be intended to relate only to major offending but can too readily become trivialised. Where genuine damage is done, as noted above under proposal 3, legislation to address it already exists.

Proposal 5 Change the civil provision so that it makes 'incitement to discrimination' against the law

Do you support including the prohibition on incitement to discriminate in section 61?

No. While Article 20 (2) of the International Covenant on Civil and Political Rights contains the words 'incitement to discrimination', the action referred to is incitement that equates to advocating (publicly supporting or recommending according to the Concise Oxford Dictionary) discrimination against a certain group or groups in society. Given that Article 20(1) is concerned with prohibiting propaganda for war, it seems likely that paragraph (2) is to be read as prohibiting hatred that would lead to the complete alienation of the group to which it was directed (the more so in view of the words accompanying 'discrimination', namely, 'hostility and violence').

It follows, therefore, that to reach the level of discrimination contemplated would require intent, something section 61 of the Human Rights Act does not require, another reason for continuing to exclude any reference to discrimination from the section. But further, incitement to violence (to which extreme discrimination would undoubtedly lead) is already prohibited by section 131 although there, some protection against arbitrary prosecution is provided for in that taking a case under the section requires the consent of the Attorney General. (Although the removal of both sections 61 and 131 is recommended.)

As an aside, it is noted that both sections currently permit prosecutions on the basis that the language used was 'insulting'. The sections have been little, if ever, used (another reason for questioning why more of the same would be needed) but it is of some significance that in the UK, the word 'insulting' was removed from the Public Order Act 1986 in 2013. A campaign was carried out, uniting Christian and secular groups, against the use of the word as a catch all provision where the police could charge anyone for using trivial considered irritating. High-profile arrests had included a student asking a policeman if he realised his horse was gay, to a sixteen-year-old holding up a placard stating that Scientology was a dangerous cult. The executive director of the National Secular Society said at the time: "The police did not even need to identify the victim that allegedly had been insulted. The change is likely to prevent street evangelists preaching against homosexuality being charged."

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

Do you think that this terminology is appropriate, sufficiently covers the groups that should be protected from discrimination and appropriately protects culturally specific gender identities, including takatāpui?

Under section 21 of the Human Rights Act individuals are currently protected from discrimination on the ground of sex. This term, according to the Concise Oxford Dictionary, covers the 'two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions' and is probably now inadequate to cover the categories of person to which this question refers, although it seems likely any court would by some means, find the term sex did apply. However, as that outcome is uncertain, it is suggested the words 'sexual status or gender' be added after 'sex', giving a clear indication of extended coverage and sufficiently explanatory. Whether the word takatāpui should be included will depend on the views of those to whom it relates.

The response above is independent of the view that except where incitement to criminal activity is intended, hate speech should not be subject to criminal sanctions.

It is noted that the Government has consulted with community groups and intends to hold further consultations.^{iv} Care will need to be taken that legislation is not developed on a 'nice to have' basis without proper consideration given to likely unintended consequences. The existence of hate speech legislation overseas has not led any noticeable reduction in the prevalence of unpleasant language and instead might have encouraged its use. As a South African writer, Denise Meyerson has said:

{A} final consideration is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge.

The same is equally true for any protected category.

ⁱ Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 655.135 - July 2020

ⁱⁱ 14Freedom of expression: Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

ⁱⁱⁱ *Miller v the College of Policing and the Chief Constable of Humberside* [2020] EWHC 225 (Admin)

^{iv} Answer to Chris Penk MP in response to a written parliamentary question

Appendix One - Background information on BusinessNZ



[BusinessNZ](#) is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).