Hate speech and hate crime related legislation

ROYAL COMMISSION OF INQUIRY
INTO THE TERRORIST ATTACK
ON CHRISTCHURCH MOSQUES
ON 15 MARCH 2019

TE KŌMIHANA UIUI A TE WHAKAEKE
KAIWHAKATUMA I NGĀ WHARE
KŌRANA O ŌTAUTAHI I TE
15 O POUTŪ-TE-RANGI 2019

26 November 2020

Hate speech and hate crime related legislation

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Foreword from Commissioners

Assalaam alaikum and tēnā koutou

The Government established this Royal Commission to investigate the terrorist attack at the Christchurch masjidain on 15 March 2019. The purpose has been to determine what had happened, and why, and what should be done to reduce the risk of future attacks.

At the heart of our inquiry were those who lost their lives, the whānau of the 51 shuhada and the survivors and witnesses of the 15 March 2019 terrorist attack and their whānau. Many affected whānau, survivors and witnesses raised issues with us relating to incidents they had suffered from fellow New Zealanders involving hate crime and hate speech. We also heard from many submitters and in our engagement with communities and interest groups about how some New Zealanders are regularly subject to hate speech (both online and offline) and hate crime.

We see hate speech and hate crime as being on the same spectrum of harmful behaviours as terrorism (see Part 2, chapter 5 of our report). For this reason, we decided to look at how these behaviours are dealt with under our current laws and associated New Zealand Police practice. Part 9, chapter 4 of our report explains why we consider that aspects of New Zealand's legal framework and New Zealand Police practice should be improved.

This supplementary document covers much the same ground as that chapter but in greater detail.

Hon Sir William Young KNZM
Chair

Jacqui Caine
Member

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Chapter 1: Overview

The role of this companion paper

1 This companion paper supplements Part 9, chapter 4 of *Ko tō tātou kāinga tēnei: Report of the Royal Commission into the Terrorist Attack on Christchurch Masjidain on 15 March 2019*. For ease of comparison, the paper follows generally (although not exactly) the structure of that chapter, but is more detailed, particularly in respect of hate speech. There is some repetition of information from Part 9, chapter 4 of our report to enable this companion paper to be read on a stand-alone basis.

2 We have not set out to provide a complete analysis of the practical, policy, philosophical and legal issues involved in the criminalisation of hate crime and hate speech. A very recent survey of these issues was published in September 2020 by the United Kingdom Law Commission in its consultation paper, *Hate crime laws*.[1] Although focused on the position in England and Wales, it provides a comprehensive review of the relevant literature, human rights instruments and international practice. It also provides practical examples of hate crime laws in action.

3 Given the subject matter of our inquiry, this companion paper focuses on Islamophobia. However, it could have equally addressed hate against marginalised communities, such as anti-Semitism or homophobia. As we will explain, there is a link between hate speech and hate crime, and terrorism. Islamophobic hate speech and hate crime are connected to a risk of terrorism because there are terrorist ideologies premised on Islamophobia. But even where not associated with a terrorist ideology, hate speech and hate crime are significant issues for society.[2] So, despite our focus on Islamophobia, we are not blind to the effects of hate crime and hate speech on a wide range of marginalised communities.

4 In this chapter, we introduce the concepts of hate crime and hate speech and the freedom of expression issues engaged by the creation of hate speech offences. We also discuss the adverse consequences of hate speech. As well, we review police practice in England and Wales regarding non-crime hate incidents, a practice which, for reasons we will explain, we did not discuss in our report.

5 In the other chapters of this companion paper, we:

a) discuss New Zealand's current hate crime laws and propose legislative change (chapter two);

b) explain the background to, and the operation of, sections 61 and 131 of the Human Rights Act 1993 and propose legislative change (chapter 3); and

c) review other laws addressing hate speech and propose a change to the Films, Videos, and Publications Classification Act 1993 (chapter 4).

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[1] Law Commission (United Kingdom) *Hate crime laws: A consultation paper* (23 September 2020) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2020/10/Hate-crime-final-report.pdf.

[2] Emma Webb "Finding the right balance in counter-extremism" in Ian Cram (ed) *Extremism, Free Speech and Counter-terrorism Law and Policy* (Routledge, Oxon Hill, 2019) at page 134.

What is hate crime?

6 In everyday language, a hate crime means an offence that is motivated by the offender's hostility to the victim as a member of a group that has a common characteristic, such as race, religion or sexual orientation. An example is an assault against a person wearing religious attire that was motivated by the offender's hostility towards the associated religion. In legal language, hate crime has practically the same meaning except that the law creating a hate crime will define the relevant characteristics covered by the offence. These are usually called "protected characteristics".[3] Since the conduct amounting to a hate crime (for example an assault) is already illegal, it is easy to treat a hate motivation either as a factor that can be taken into account for sentencing purposes (which is New Zealand's current approach) or as an element of a separately created hate-motivated offence.

What is hate speech?

7 Hate speech is a less precise term. In this paper we will generally refer to hate speech in a way that corresponds to the concept of hate crime that we have just outlined and therefore as speech that expresses hatred towards people who share a characteristic. Legislation that creates hate speech liability (which can be civil or criminal) specifies what types of speech are captured and the characteristics that are protected. In this paper we are mainly concerned with the circumstances in which hate speech can, and should, be criminalised.

8 Unlike hate crime (such as a hate-motivated assault), conduct criminalised by a hate speech offence – in this case, what has been said – is not usually independently illegal. The difference between legitimately criminalised hate speech and a vigorous exercise of the right to express opinions is not easy to capture – at least with any precision – in legislative language. As well, the more far reaching a law creating hate speech offences, the greater the potential for inconsistency with the right to freedom of expression.

[3] See Law Commission (United Kingdom) *Hate Crime: Background to our Review* (March 2019) at page 5 https://www.lawcom.gov.uk/project/hate-crime/.

Hate speech offences and freedom of expression

9 Section 14 of the New Zealand Bill of Rights Act 1990 provides:

> 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.

Under section 5 of the New Zealand Bill of Rights Act, the right to freedom of expression may be:

> ... subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There is considerable scope for argument and controversy as to what are "reasonable limits" when it comes to the right to freedom of expression.

10 The criminal justice system plainly does not (and could not) offer complete answers to all social issues, nor to all violations of community norms.[4] A democratic society does not seek to control what people think.[5] So there is no room for "thought-crimes". As well, the weight that democratic societies rightly give to freedom of expression leaves comparatively little room for criminalising what people say or write, although we consider that there is scope at least for prohibiting some harmful speech.

11 A decision to create hate speech offences has to balance a number of overlapping and conflicting considerations, including:

a) the promotion of social cohesion;

b) the desirability of limiting speech that encourages hostility that may result in harms, such as discrimination, abuse or actual violence or is psychologically and socially damaging for those targeted;

c) the importance of freedom of expression; and

d) ensuring that the law can be practically enforced.

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[4] See John Ip "Debating New Zealand's Hate Crime Legislation: Theory and Practice" (2005) 21 *New Zealand Universities Law Review* at page 597, where he notes that "relying on the criminal justice paradigm to deal with social problems has rarely, if ever, proved to be a complete cure".

[5] See, for example, section 13 of the New Zealand Bill of Rights Act 1990, which guarantees everyone "the right to freedom of thought".

12 Allowance must also be made for the possibility of unintended consequences. Hate speech laws are likely to be based on simple definitions, for instance, in the case of racism, along the lines of prejudice and discrimination on grounds of race, as opposed to a social science definition, which treats racism as dependent on a power imbalance. It is therefore possible that a significant proportion of complaints made under hate speech laws could be against members of marginalised communities who may have spoken of "white privilege" or "white fragility" in ways that others have found offensive. Because many complainants to the Human Rights Commission do not reveal their ethnicity, statistics are not available. It is, however, clear from some of the publications that have been the subject of complaints that a substantial proportion of complaints relate to "reverse racism" or "reverse discrimination". So, for this reason as well, care needs to be taken in the drafting of hate speech laws.

13 Language that detracts from social cohesion (such as jokes at the expense of marginalised communities) that was once not subject to much, if any, social sanction, is increasingly unacceptable in a democratic society. But it is highly debateable whether language that has a negative impact on social cohesion should, for this reason alone, be subject to legal, as well as social, sanctions. Illustrating this point is the decision of the New Zealand High Court in *Wall v Fairfax New Zealand Ltd*,[6] which involved an attempt to impose civil liability in respect of racist cartoons published in two newspapers. We discuss *Wall* later in this companion paper.

Adverse consequences and victims of hate speech

14 In deciding whether hate speech offences are a reasonable limit on the right to freedom of expression, the adverse consequences of hate speech are relevant.

15 We were provided with a draft Ministry of Justice document that sets out the evidence base it has established during its review of hate speech legislation. That document lists the impacts of hate speech as including:

a) **Psychological harm of hate speech –** It has been claimed that hate speech causes psychological harm to individuals, and that its presence in society reinforces the racist status quo.[7] This is consistent with findings that suggest individuals subjected to non-physical discrimination suffer harm to their physical and mental health.[8]

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6 *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 47.

7 Mari J Matsuda and others *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, Colorado, 1993).

8 K Gelber and L McNamara "Evidencing the harms of hate speech" (2016) 22 *Social Identities*. We note that, more broadly, this is consistent with evidence that words can have a physical effect. See Martin N Teicher and others "Hurtful words: association of exposure to peer verbal abuse with elevated psychiatric symptom scores and corpus callosum abnormalities" (2010) 16 *American Journal of Psychiatry.*

b) **Impact of hate speech on human dignity and public goods such as inclusive society** – Jeremy Waldron argues that hate speech should be regulated as part of our commitment to human dignity, inclusion and respect for members of marginalised communities.[9] Denigration of a marginalised community through hate speech undermines a public good that can and should be protected – the basic assurance of inclusion in society for all members.

c) **Impact of hate speech on behaviour of affected people** – Some commentators have argued that hate speech causes those who are subject to hatred to retract from society and remain as silent and invisible as possible.[10]

d) **Impact of hate speech on New Zealanders generally** – A Netsafe survey conducted in 2018 on the impact of online hate speech found that one in ten adults have been personally targeted by online hate speech.[11] Of those targeted, about 60 percent reported a negative impact from the experience. Most reported being affected emotionally but also exhibiting changes in their behaviour. A third of those targeted reported not being affected. Descriptions of emotional impact included anger, sadness, fear and frustration. For some, online hate also affected their social interactions, sleep and/or work.

e) **The link between hate speech on the internet and hate crimes** – A study commissioned by InternetNZ concluded that the case for the link between hate speech on the internet and hate crimes has been well made, however more research is needed to understand the details.[12]

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[9] Jeremy Waldron *The Harm in Hate Speech* (Harvard University Press, Cambridge, 2012).

[10] Mari J Matsuda and others, footnote 7 above at page 50.

[11] Netsafe *Online Hate Speech: A survey on personal experiences and exposure among adult New Zealanders* (November 2018) at page 16.

[12] InternetNZ *Online Hate and Offline Harm* (8 May 2019).

16 In respect of the last point – that there is a link between hate speech and hate-motivated crimes – a recent study investigated the relationship between hate speech online and hate crimes offline.[13] Researchers collected Twitter and Police-recorded hate crime data over an eight-month period in London and built a series of statistical models to identify whether there was a significant association. The results of the study indicated "a consistent positive association between Twitter hate speech targeting race and religion and offline racially and religiously aggravated offences in London".[14] What this demonstrates is that "online hate victimisation is part of a wider process of harm that can begin on social media and then migrate to the physical world".[15] The study notes that if "we are to explain hate crime as a process and not a discrete act, with victimisation ranging from hate speech through to violent victimisation, social media must form part of that understanding".[16] There is value therefore in seeking to reduce hate speech online and offline, not only to prevent the direct harm it causes but also to limit escalation of such speech to hate-motivated crimes.

17 It is also plausible to see a link between hate crime and terrorism. Another recent study concluded:

> *Through the use of multiple data sources, this study uncovers the positive associations between hate crime and terrorism. In the context of intergroup conflict, there appears to be a continuum between the bias-motivated actions of non-extremists to the hate crimes and terrorist acts committed by far-rightists, with the presence of one type of activity seeing an escalation in the next type. As a result, it appears that hate crime and terrorism may be more akin to close cousins than distant relatives.*[17]

18 In the 2018 Netsafe survey referred to above, it was noted that online hate speech was more prevalent among:

a) minority ethnic groups, particularly Asians, followed by those who identified themselves within the "other" ethnicity category and then Māori and Pasifika respondents;

b) males (13 percent) compared to females (8 percent);

c) younger adults, especially those between 18 and 39 years old;

d) people with disabilities (15 percent) compared to those without impairments (10 percent); and

e) non-heterosexual respondents (such as people who identify as lesbian, gay, bisexual, transgender, queer or intersex).[18]

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[13] Matthew L Williams and others "Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime" (2020) 60 *British Journal of Criminology*.

[14] Matthew L Williams and others, footnote 13 above at page 111.

[15] Matthew L Williams and others, footnote 13 above at page 114.

[16] Matthew L Williams and others, footnote 13 above at page 112.

[17] Colleen E Mills, Joshua D Freilich and Steven M Chermak "Extreme Hatred: Revisiting the Hate Crime and Terrorism Relationship to Determine Whether They Are 'Close Cousins' or 'Distant Relatives'" (2017) 63 *Crime & Delinquency*.

[18] See Netsafe, footnote 11 above.

Additionally, religion (24 percent) was the most frequent perceived reason for being personally targeted by online hate speech. This was followed by political views (20 percent), appearance (20 percent), race (20 percent) and ethnicity (18 percent).

19 In a more recent survey, the eSafety Commissioner in Australia found that, in New Zealand, 15 percent of adults said that they had personally experienced online hate speech at least once in the 12 months before June 2019.[19] Of those participants who had experienced online hate speech, over half experienced online hate speech at least twice.[20] As well, a third of participants in the study had seen or been exposed to online hate speech targeting someone else.[21] Personal experiences of online hate speech were more common among people identifying with the Hindu and Islamic religious faiths.[22]

Reporting, investigating and recording non-crime hate incidents

20 In England and Wales, Police services investigate and record reports of non-crime hate incidents. This practice has its origins in the February 1999 report of Sir William Macpherson into the Police investigation of the murder of Stephen Lawrence (the Macpherson Report).[23] His report was very critical of the Metropolitan Police Service, which he concluded was institutionally racist. He recommended that a Ministerial Priority be established for all Police services "[t]o increase trust and confidence in policing amongst minority ethnic communities".

21 Part of the package of reforms proposed by Sir William Macpherson was the recording of hate crime and hate incidents. In particular he recommended that:

a) Police services should adopt the following definition of a racist incident:

> *A racist incident is any incident which is perceived to be racist by the victim or any other person;*

b) the term "racist incident" must be understood to include crimes and non-crimes in policing terms, and that both must be reported, recorded and investigated with equal commitment;

c) the definition of racist incident should be universally adopted by Police services, local government and other relevant agencies;

d) Codes of Practice should be established by the Home Office, in consultation with Police services, local government and relevant agencies, to create a comprehensive system of reporting and recording all racist incidents and crimes;

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[19] eSafety Commissioner *Online hate speech: Findings from Australia, New Zealand and Europe* (29 January 2020) at page 16.

[20] eSafety Commissioner, footnote 19 above at page 17.

[21] eSafety Commissioner, footnote 19 above at page 20.

[22] eSafety Commissioner, footnote 19 above at page 17.

[23] Sir William Macpherson *The Stephen Lawrence Inquiry* (Cm 4262-I, February 1999).

e) all possible steps should be taken by Police services at a local level, in consultation with local government, other agencies and local communities, to encourage the reporting of racist incidents and crimes. This should include:

   i) the ability to report at locations other than Police stations; and

   ii) the ability to report 24 hours a day.

f) there should be close cooperation between Police services, local government and other agencies, in particular housing and education departments, to ensure that all information about racist incidents and crimes is shared and is readily available to all agencies.

22 Following publication of the Macpherson Report, the Association of Chief Police Officers produced its first hate crime manual in 2000 to provide guidance to police officers in England and Wales.[24] In 2014, the College of Policing issued the *Hate Crime Operational Guidance*, which is the result of twenty to thirty years of policy development concerning police responses to hate crime and non-crime hate incidents.[25] This document incorporates some of the key recommendations made in the Macpherson Report, such as perception-based recording and encouraging the reporting of non-criminal incidents.

23 Under the heading "Opposition to police policy", the *Hate Crime Operational Guidance* describes how the policy of recording, and responding to, non-crime hate incidents is not universally accepted. It records that some people use the policy "as evidence to accuse the police of becoming 'the thought police', trying to control what citizens think or believe, rather than what they do". The document emphasises the importance of not overreacting to non-crime hate incidents, because of the risk of "civil legal action or criticism in the media".

24 The risk of civil legal action identified in the *Hate Crime Operational Guidance* recently materialised in the case of *R (on the application of Miller) v The College of Policing*.[26] Mr Miller had published material on Twitter about transgender issues and this prompted a complaint by a transgender woman. No crime had been committed but the complaint was investigated. The Court found that, in doing so, a police constable had unlawfully interfered with Mr Miller's right to freedom of expression, as guaranteed by article 10 of the European Convention on Human Rights, by turning up at his place of work and by what he said to Mr Miller. However, the Court rejected Mr Miller's broader challenge to the legality of the *Hate Crime Operational Guidance* based on the right to freedom of expression guaranteed by article 10.

[24] Association of Chief Police Officers of England, Wales & Northern Ireland *The ACPO Guidance to Identifying and Combating Hate Crime* (2000).

[25] College of Policing (United Kingdom) *Hate Crime Operational Guidance* (2014) https://www.college.police.uk/What-we-do/Support/Equality/Documents/Hate-Crime-Operational-Guidance.pdf.

[26] *R (on the application of Miller) v The College of Policing* [2020] EWHC 225 (Admin).

25 We have considerable reservations whether a police policy of investigating and recording non-crime hate incidents would withstand legal scrutiny in New Zealand. These reservations are based on section 14 of the New Zealand Bill of Rights Act, which affirms the right to freedom of expression. Assessing the legality of such a policy would require weighing the rights to share and receive information under section 14 of the New Zealand Bill of Rights Act against the state interest in having accurate statistics, intelligence gathering and protecting marginalised communities. *Miller* was decided against both a legislative scheme (relating to policing)[27] and a human rights context that are appreciably different from the position in New Zealand.

26 In *Living Word Distributors v Human Rights Action Group Inc (Wellington)* what was at issue was the classification as objectionable under the Films, Videos, and Publications Classification Act of videos that portrayed homosexuality as a factor responsible for spreading HIV and being generally immoral. The classification was upheld in the High Court but set aside in the Court of Appeal, which found the High Court had committed a "fundamental error" by treating the right of non-discrimination under section 19 of the New Zealand Bill of Rights Act[28] (which was only peripherally engaged in the case) as trumping the right to freedom of expression under section 14 of the Act (which was directly engaged).[29] The decision in *Living Word Distributors* has received support from academics[30] and was cited with approval by the High Court in *Wall*.[31] The reasoning in *Living Word Distributors* is also broadly consistent with Chief Justice Elias's reasons in *Brooker v Police,*[32] in which she expressed misgivings whether the courts should "adjust" rights protected by the New Zealand Bill of Rights Act (such as freedom of expression) to allow for values not recognised in that Act (in that case, privacy) unless the particular statute "unmistakably identifies the value as relevant".[33]

27 Given our substantial reservations about the lawfulness of such a policy, we have not explored in our report the possibility of recommending that New Zealand Police adopt a policy of investigating and recording non-crime hate incidents.

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[27] See the amendments brought about by sections 123 and 124 of the Anti-social Behaviour, Crime and Policing Act 2014 (United Kingdom).

[28] This provides that "[e]veryone has the right freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". Grounds of discrimination prohibited under section 21 of the Human Rights Act include "sexual orientation".

[29] *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 (CA) at paragraph 41.

[30] Andrew Butler and Petra Butler *New Zealand Bill of Rights Act: A commentary 2nd ed* (Wellington, LexisNexis, 2015) at paragraphs 6.6.25 and 6.6.34.

[31] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraphs 33–37.

[32] *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

[33] *Brooker v Police*, footnote 32 above at paragraph 40.

Chapter 2: Hate crime

The current law

1 Leaving aside for the moment the offence created by section 131 of the Human Rights Act 1993 (which we discuss later in this companion paper), there are no specific hate crime offences in New Zealand. In other words, other than under section 131 of the Human Rights Act, there are no offences in which a hate motivation is an element of the offence.

2 A hate motivation for an offence is, however, an aggravating factor under section 9(1)(h) of the Sentencing Act 2002 and can be taken into account by the judge who sentences the offender. Under section 9(1)(h), protected characteristics include any:

> ... enduring ... characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability ... .

We discuss the rationale and application of this provision in more detail below.

3 Much behaviour which manifests as hatred towards particular groups of people is criminal. Obviously this is so with assaults. So too are verbal abuse or threatening language in, or within view of, public places. Those behaviours can be prosecuted under section 4(1) of the Summary Offences Act 1981 as:

a) offensive behaviour (section 4(1)(a));

b) addressing words to someone intending to threaten, alarm, insult or offend that person (section 4(1)(b)); or

c) using threatening or insulting words recklessly as to whether someone is alarmed or insulted (section 4(1)(c)).

4 As well, section 21 of the Summary Offences Act creates an offence of intimidation. This encompasses various actions carried out with the intention of frightening or intimidating, including threats to injure, following, watching or loitering near a property or stopping, confronting or accosting someone in a public place.

5 Most of the acts of face-to-face criminal harassment that we have been told about by members of Muslim communities could have been prosecuted under the Summary Offences Act. It will be noted, however, that a hate motivation (as opposed to, say, an intention to frighten or insult) is not an element of the offences.

6 The Summary Offences Act has limitations. Apart from assaults, it applies only to conduct that occurs in a public place. As well, penalties are low (for example, the maximum penalty available for offensive behaviour or language is a fine of $1,000). Further, because a hate motivation is not an element of these offences, it is not recorded in charges and convictions. So convictions as recorded do not capture the full blameworthiness (culpability) of the offenders. This limits the signalling effect of prosecution and conviction and means possible needs for rehabilitative interventions are not highlighted.

7 We can illustrate the point we have just made with an assumed confrontation between an offender and a woman in hijab resulting in a conviction for offensive behaviour. If it is correct, as section 9(1)(h) of the Sentencing Act assumes, that the culpability of such behaviour includes the hate motivation, the conviction for offensive behaviour would not capture the full seriousness of the offender's conduct. In addition, it would not mark a possible need for tailored interventions following conviction.

Rationale for, and application of, section 9(1)(h) of the Sentencing Act 2002

8 Section 9(1)(h) of the Sentencing Act provides:

> **9 Aggravating and mitigating factors**
>
> (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> ...
>
> (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
>
> (i) the hostility is because of the common characteristic; and
>
> (ii) the offender believed that the victim has that characteristic:

9 Section 9(1)(h) of the Sentencing Act originated in the report on what was then the Sentencing Bill by the Justice and Electoral Committee,[34] which explained its rationale in this way:

> *Offenders who commit hate crimes need to be punished/dissuaded further, as prejudice presents a long-term threat. A focus on hate crimes has the effect of both denouncing them and encouraging awareness of their existence. It is very important that [New Zealand] Police in particular understand when an offence may have been a hate crime. Most of us recommend that [New Zealand] Police be trained and equipped to monitor, recognise and deal with hate crimes.*
>
> *Most of us agree that hate crimes represent the point at which we want the law to say "we simply will not tolerate this kind of behaviour". At this point, it is important for the court to send a real message on fundamental values. There is a different moral quality and a different risk to society which we should be reflecting.*[35]

10 The operation of section 9(1)(h) of the Sentencing Act was recently considered by the Court of Appeal in *Arps v New Zealand Police,* in relation to facts that are closely connected with the 15 March 2019 terrorist attack.[36] In that case, the appellant, Philip Arps, had distributed footage of the terrorist attack (taken on the individual's GoPro camera) to around 30 people. He also sent the same footage to another person whom he asked to modify the footage to include images of rifle "crosshairs" and a "kill-count". Philip Arps was subsequently charged with, and pleaded guilty to, two charges of supplying or distributing objectionable material contrary to section 124(1) of the Films, Videos, and Publications Classification Act 1993 and was sentenced to 21 months' imprisonment.

11 Philip Arps appealed against his sentence arguing – amongst other things – that section 9(1)(h) of the Sentencing Act was not relevant to his case and that the sentencing judge had failed to take into account his right to freedom of expression under section 14 of the New Zealand Bill of Rights Act. The Court rejected both arguments:

a) Section 9(1)(h) of the Sentencing Act clearly applied to Philip Arps. His offending was in response to terrorist attacks on people worshipping in Masjid an-Nur and the Linwood Islamic Centre who had been targeted because of their religion and he had demonstrated "profound hostility towards Muslim people".[37]

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[34] Sentencing and Parole Reform Bill (select committee report) at pages 11–13. Because section 9(1)(h) was added to the Bill at the select committee stage, the section was never the subject of a report by the Attorney-General under section 7 of the New Zealand Bill of Rights Act.

[35] Sentencing and Parole Reform Bill (select committee report) at page 12.

[36] *Arps v New Zealand Police* [2019] NZCA 592, [2020] 2 NZLR 94. See also *Solicitor-General v Milne* [2020] NZCA 134.

[37] *Arps v New Zealand Police,* footnote 36 above at paragraph 32.

b) Although Philip Arps' actions in distributing the video engaged the right to freedom of speech under section 14 of the New Zealand Bill of Rights Act, section 9(1)(h) was a justified limitation on his right to freedom of expression.[38]

An existing model for the creation of hate crime offences

12 An overseas model for legislating for hate crime is provided for by sections 29 to 32 of the Crime and Disorder Act 1998 (United Kingdom). These sections create offences of racially or religiously aggravated assaults,[39] criminal damage,[40] public order offences[41] and harassment.[42] These are fleshed out by section 28 of the Crime and Disorder Act (United Kingdom), which provides:

> **28 Meaning of "racially or religiously aggravated"**
>
> (1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—
>
> (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a [racial or religious group]; or
>
> (b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.
>
> (2) In subsection (1)(a) above—
>
> "membership", in relation to a racial or religious group, includes association with members of that group;
>
> "presumed" means presumed by the offender.
>
> (3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender's hostility is also based, to any extent, on any other factor not mentioned in that paragraph.
>
> (4) In this section "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.
>
> (5) In this section "religious group" means a group of persons defined by reference to religious belief or lack of religious belief.

[38] *Arps v New Zealand Police*, footnote 36 above at paragraph 52.

[39] Crime and Disorder Act 1998 (United Kingdom), section 29.

[40] Crime and Disorder Act (United Kingdom), section 30.

[41] Crime and Disorder Act (United Kingdom), section 31.

[42] Crime and Disorder Act (United Kingdom), section 32.

13 The maximum penalties for hate-motivated offences under the Crime and Disorder Act (United Kingdom) are as follows:[43]

a) Racially or religiously aggravated assault – seven years' imprisonment.[44]

b) Racially or religiously aggravated criminal damage – 14 years' imprisonment.[45]

c) Racially or religiously aggravated public order offences – two years' imprisonment.[46]

d) Racially or religiously aggravated harassment – two years' imprisonment.[47]

14 By way of comparison, the underlying offences (where hate motivation is not a component of the offence) carry the following maximum penalties:

a) Assault – five years' imprisonment.

b) Criminal damage – ten years' imprisonment.

c) Public order offences – six months' imprisonment.

d) Harassment – six months' imprisonment.

15 As will be seen, the hate-motivation component of the offences under the Crime and Disorder Act (United Kingdom) results in a substantial increase in the penalties associated with the underlying offences. This increased level of penalties reflects the additional harm caused by hate-motivated offending and the need to send a strong signal to society that hate-motivated offending is unacceptable.

Proposals for change

16 We consider there would be real merit in New Zealand following the same approach as applies in England and Wales under the Crime and Disorder Act:

a) It ensures that the criminal records of those who are convicted of such behaviour reflect the substance of their offending, a consequence that is likely to have at least some deterrent effects and, perhaps more significantly, effects on societal norms.[48]

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[43] The penalties differ depending on whether the offence in question is tried indictably or summarily. For present purposes, it is sufficient to set out that the figures represent the maximum possible penalty associated with each offence.

[44] See section 29 of the Crime and Disorder Act (United Kingdom). This figure represents a racially or religiously aggravated assault where the underlying offence is malicious wounding or grievous bodily harm or actual bodily harm and the charge is tried indictably. The penalty will differ where, for example, the assault charged is common assault and it is tried summarily.

[45] Crime and Disorder Act (United Kingdom), section 30.

[46] Crime and Disorder Act (United Kingdom), section 31.

[47] Crime and Disorder Act (United Kingdom), section 32.

[48] As noted by John Ip, footnote 4 above at page 595, in the context of section 9(1)(h) of the Sentencing Act, it is plausible to assume that hate crime legislation may deter some offenders and, additionally, the uncertainty as to whether criminals will actually be deterred does not affect the "symbolic or denunciatory value of hate crime legislation".

b) The increased seriousness of the charge is likely to promote more complaints being made to New Zealand Police and more energetic responses on the part of New Zealand Police to such reporting, including an increase in prosecutions for hate crimes.

c) It may assist in encouraging and facilitating the creation of a specifically-designed rehabilitation programme for hate crime offenders.

17 This model could be substantially replicated by creating new hate-motivated offences in the Crimes Act 1961 and Summary Offences Act that correspond to those created by sections 28 to 32 of the Crime and Disorder Act (United Kingdom), being:

a) hate-motivated offences for offensive behaviour and language, assault, wilful damage and intimidation that correspond with existing offences in the Summary Offences Act; and

b) hate-motivated offences for assaults, arson and intentional damage that correspond with existing offences in the Crimes Act.

Chapter 3: Hate speech – sections 61 and 131 of Human Rights Act 1993

New Zealand's international obligations

1 Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* requires States to:

> *[D]eclare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origins.*[49]

2 The chapeau to article 4 provides further explanation as to its purpose:

> *States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights … .*

3 Articles 19 and 20 of the *International Covenant on Civil and Political Rights* provide:[50]

> ***Article 19***
>
> *(1) Everyone shall have the right to hold opinions without interference.*
>
> *(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
>
> *(3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of the rights or reputations of others;*
>
> *(b) For the protection of national security or of public order (ordre public), or of public health or morals.*

[49] United Nations *International Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969).

[50] United Nations *International Covenant on Civil and Political Rights* 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

Article 20

(1) Any propaganda for war shall be prohibited by law.

(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

4 New Zealand ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* on 22 November 1972. When later ratifying the *International Covenant on Civil and Political Rights*, New Zealand entered a reservation to article 20:

> *The Government of New Zealand, having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or ill will against any group of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to article 20.*

Legislative history of sections 61 and 131

5 The Race Relations Act 1971 was enacted to give effect to the *International Convention on the Elimination of All Forms of Racial Discrimination*. Unsurprisingly the 1971 Act mirrored the coverage of that Convention and thus did not provide for religion as a protected characteristic. Section 25 of that Act introduced an offence of inciting racial hatred (corresponding to what is now section 131 of the Human Rights Act). And civil liability (broadly along the lines of what is now section 61 of the Human Rights Act) was introduced in section 9A of the Race Relations Act by the Human Rights Commission Act 1977. Section 9A was repealed in 1989 but was in substance re-enacted as section 61 of the Human Rights Act.

The current law

6 Sections 61 and 131 of the Human Rights Act provide:

> **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.

7 Section 61 of the Human Rights Act provides for a civil law remedy for speech which does, or is likely to, incite racial disharmony (for which there is no need to prove intent) and section 131 provides a separate criminal offence of inciting racial disharmony (of which intent is an element). Section 132 provides that a prosecution under section 131 cannot be commenced without the consent of the Attorney-General.

8 The drafting of the sections of the Human Rights Act is untidy:

a) Section 61 uses the expression "excite hostility against or bring into contempt any group of persons" whereas the corresponding language in section 131 is "excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons". The reasons for not including "ill-will" and "ridicule" in section 61 apply equally to section 131. Their inclusion in the latter section must be a drafting slip.

b) Section 61(1)(a) was amended in 2015 to add "or other electronic communication" but a corresponding change was not made to the otherwise substantially similar section 131(1)(a). Possibly this omission is picked up by the reference back to section 61 in section 131(2), but this is far from clear.

9 The protected characteristics identified in both sections do not include religious belief. This is because article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* is similarly limited and New Zealand has not fully implemented article 20 of the *International Covenant on Civil and Political Rights* (which does treat religious belief as a protected characteristic).[51]

Sections 61 and 131 in the courts

10 There are only three decisions applying sections 61 and 131 of the Human Rights Act (and equivalent provisions in earlier legislation).

[51] See Human Rights Commission *Kōrero Whakamauāhara: Hate Speech – An overview of the current legal framework* (December 2019) at page 13.

11 Section 61 of the Human Rights Act was in issue in *Proceedings Commissioner v Archer,*[52] which addressed a radio broadcast that said that Japanese people are "slanty eyed bastards" who live off "rice and shit" and that people "might not notice if we dropped another bomb on Japan".[53] There was also a suggestion that Chinese people would find it easier to pull a rickshaw in Christchurch because of the flat terrain.[54] The section 61 claim was upheld. The Complaints Review Tribunal (now called the Human Rights Review Tribunal) held that the "ordinary sensible citizen" would have found parts of the broadcast to be insulting or abusive of Japanese people because it relied "on a racial stereotype of the Japanese" and was threatening because it contained "the threat to remove them from New Zealand".[55] Additionally, it also held that the "ordinary sensible citizen" would have found the broadcast to be insulting to Chinese people as relying "on a racial stereotype of the Chinese as dependent on rickshaws".[56] As well, the broadcast was likely to excite hostility against or bring into contempt Japanese and Chinese people.

12 The ordinary sensible citizen test applied in *Archer* has been criticised on the basis that "it unjustifiably limits freedom of expression since undoubtedly challenging and offending opinions should be protected by freedom of expression".[57]

13 The other, and more significant, decision on section 61 of the Human Rights Act is the recent High Court judgment in *Wall v Fairfax New Zealand Ltd*.[58] Two newspapers owned by Fairfax New Zealand Ltd had published cartoons relating to an announcement that the government would fund the expansion of a free breakfast in schools programme initiated by two commercial organisations. The central characters were Māori or Pasifika, depicted as negligent parents preoccupied with alcohol, cigarettes and gambling at the expense of their children's welfare. It was accepted by both parties that the cartoons were insulting. The issue, therefore, was whether the cartoons were likely to bring Māori or Pasifika into contempt (or excite hostility against them). The High Court found that they were not, and dismissed the case.

14 The reasoning proceeded on the following bases:

a) Cases under section 61 of the Human Rights Act are not conflict of rights cases. In other words, the only right engaged when a case under section 61 is brought is the defendant's right to freedom of speech.[59]

[52] *Proceedings Commissioner v Archer,* (1996) 3 HRNZ 123 (CRT).

b) Liability under section 61 requires conclusions that the conduct:

   i) is "threatening, abusive, or insulting"; and

   ii) is likely to excite hostility against, or bring into contempt, a group of persons on the ground of the colour, race, or ethnic or national origins of that group.

c) A conclusion that the conduct is objectively insulting, does not, in itself, mean that it is likely to excite hostility against, or bring into contempt, a group of persons.[60]

d) "[T]he legislative mandate is to consider the effect of the words … on others outside the group depicted".[61] The focus of the provision, said the High Court, is on exposure of the protected group to hatred, not immunity from self-hatred (or, by implication, insult).

e) Liability depends on whether "a reasonable person, aware of the context and circumstances surrounding the expression, would view it as likely to expose the protected group to the identified consequences".[62]

f) Any assessment of the effects of a publication must be made by reference to context and circumstances.[63]

g) The reference to "likely" in section 61 means a "real and substantial risk that the stated consequence will happen".[64]

h) The section 61 prohibition "applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised".[65]

i) In determining whether the exciting to hostility element is established, the focus should be on those who are susceptible or persuadable.[66] This excludes those who:

   i) are not hostile and not capable of being persuaded to hostility or contempt based on protected characteristics; and

   ii) those who are obstinately committed to misinformed and bigoted views.[67]

j) The relevant inquiry is whether susceptible or persuadable people would be likely to become hostile or contemptuous (or possibly more hostile or contemptuous) as a result of the conduct in question.[68]

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[60] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 46–49.

[61] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 50.

[62] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 51.

[63] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 59.

[64] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 61.

[65] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 56.

[66] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 78.

[67] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 74.

[68] *Wall v Fairfax New Zealand Ltd*, footnote 6 above at paragraph 63. The judgment of the High Court in *Wall* was approved of by Paul Rishworth. He noted that the decision "provides welcome clarity that the approach which the Human Rights Commission has been taking to section 61 for some years is correct". See Paul Rishworth "Human Rights" [2018] NZLR 543 at page 570.

15 As this outline demonstrates, the reasoning in *Wall* is complex and the drift of the judgment is that liability under section 61 of the Human Rights Act is hard to establish, particularly once significant weight is afforded to the right to freedom of expression.

16 There has been only one prosecution under what is now section 131,[69] a case which resulted in the Court of Appeal decision in *King-Ansell v Police*.[70] 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!".*[71]

17 As will be apparent, the pamphlet targeted Jewish people. The primary issue for the Court of Appeal was whether the phrase "ethnic origin" included Jewish people.[72]

18 The Court of Appeal noted that the section was "not directed at discrimination based on religion"[73] and therefore the phrase ethnic origin did not apply to a group "identified solely by a common religious heritage".[74] It did, however, define the expression reasonably broadly as encompassing a group if:

> *... it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock.*[75]

Applying that interpretation, the Court concluded that "Jews in New Zealand" form a group with common ethnic origins within the meaning of the section.

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[69] The charge was laid under section 25 of the Race Relations Act 1971 which, as we noted above, was in the same terms as section 131.

[70] *King-Ansell v Police* [1979] 2 NZLR 531 (CA).

[71] See Bill Hodge "Civil Liberties in New Zealand: Defending Our Enemies" (1980) 4 *Otago Law Review* at page 464.

[72] *King-Ansell v Police*, footnote 70 above at page 533.

[73] *King-Ansell v Police*, footnote 70 above at page 541 per Richardson J.

[74] *King-Ansell v Police*, footnote 70 above at page 533 per Richmond P.

[75] *King-Ansell v Police*, footnote 70 above at page 543.

19 The approach taken by the Court of Appeal was subsequently applied by the House of Lords,[76] which, on the basis of the reasoning in *King-Ansell,* held that Sikhs are within the protection of a statutory provision[77] providing for protected characteristics in a way that is similar to section 131 of the Human Rights Act.

20 There is no authoritative decision as to whether the same reasoning could be applied to Muslim individuals so as to bring Islamophobic conduct within the scope of the section, but the predominance of opinion is that it does not.[78]

A case study

21 On 4 February 2018, the individual (that committed the terrorist attack on Christchurch masjidain on 15 March 2019) was participating in a private online discussion on the Facebook site associated with the Australian right-wing group, The Lads Society Season Two (see *Part 4: The terrorist* in *Ko tō tātou kāinga tēnei: Report of the Royal Commission into the Terrorist Attack on Christchurch Masjidain on 15 March 2019)*. The focus of the discussion was on *Mein Kampf* and, in particular, Hitler's suggestion that grievance should be the focus of propaganda, "galvanising" those who see themselves as persecuted and "drawing in new sympathisers". The individual commented:

> *Agreed, it is far better to be the oppressed than the oppressor, the defender rather than the attacker and the political victim rather than the political attacker. Though 1920's Germany was a very different time to now and we face a very different enemy. Our greatest threat is the non-violent, high [fertility], high social cohesion immigrants. They will boil the frog slowly and by the time our people have enough galvanising force to commit to the political and social change necessary for survival, the demographics in my opinion will have shifted so harshly that we would likely never recover.*
>
> ...
>
> *What I am saying is that we can't be a violent group, not now. But without violence I am not certain that there will be any victory possible at all.*

[76] *Mandla v Dowell Lee* [1983] 2 AC 548 (HL).

[77] Section 1 of the Race Relations Act 1976 (United Kingdom).

[78] For cases, see *Nyazi v Rymans* [1988] unreported EAT/6/88 (United Kingdom); *Tariq v Young* Birmingham IT, 19 April 1989 (unreported); *CRE v Precision Manufacturing Services Ltd* Case No 4106/91; *J H Walker Ltd v Hussain* [1996] IRLR 11. For academic commentary, see Ivan Hare "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" (2006) *Public Law* at page 525; Kay Goodall "Incitement to Religious Hatred: All Talk and No Substance?" (2007) 70 *Modern Law Review* at page 93; Neil Addison *Religious Discrimination and Hatred Law* (Routledge, London, 2007) at page 28; Maleiha Malik "Extreme Speech and Liberalism" in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, Oxford, 2009) at page 100. The position was also reinforced during the parliamentary process in the United Kingdom which led to the enactment of, amongst other things, stirring up hatred on religious grounds. See House of Lords *Select Committee on Religious Offences in England and Wales* (HL Paper 95–I, April 2003) at paragraph 15; Richard Kelly *The Racial and Religious Hatred Bill* (Research Paper 05/48, 16 June 2005) at pages 3, 7, 12–13 and 31. However, in K S Dobe and S S Chhokar "Muslims, ethnicity and the law" (2000) 4 *International Journal of Discrimination and the Law* it is argued that the criteria established in *Mandla v Dowell Lee,* footnote 76 above, are sufficiently broad to recognise British Muslims as a distinct "ethnic group" if interpreted in a purposive manner.

22 It would have been obvious to those participating in the discussion that the individual was referring to Muslim immigrants and that his comment was premised on the Great Replacement theory. There was thus no need for the individual to spell these points out explicitly. What would not have been obvious to those in the discussion was that the last part of the comment was disingenuous because, by February 2018, the individual was already preparing for his terrorist attack. In light of this, it is clear that the purpose of the comment was not to share what the individual was really thinking, but rather to normalise, to a reasonably receptive audience, the idea that violence was inevitable if "victory" was to be "possible".

23 This comment is not expressed in abusive or obviously hateful language. It refers to Muslim immigrants as "non-violent" and as having "high social cohesion". It is deliberately expressed so as not to be an immediate call to arms and it could, perhaps at a stretch, be construed as primarily predictive – that, without a violent response, demographic changes associated with Muslim immigration will destroy Western society as currently understood. All of that said – particularly with the benefit of hindsight – it is not difficult to read the comment as implicitly calling on its readers to prepare for violence, given the *Mein Kampf* context and what we know the individual was thinking.

24 The language of the comment is well-removed from the types of speech that to date have been subject to civil and criminal liability in New Zealand. And, leaving aside what we know the individual was thinking, a free speech justification for the comments would not be obviously unsound. Immigration policy, the desirability or otherwise of a national population policy and demographic changes are all legitimate matters for public debate. If a particular policy decision (either macro in terms of government policy, for instance a particular foreign policy stance, or micro in terms of who may use a public facility such as a town hall for a speech) may result in social disorder or violent opposition, it must be legitimate, at least for third parties, to point that out. What is unacceptable is to call for violence.

Could the individual have been prosecuted under section 131 of the Human Rights Act in respect of his comments?

25 Putting to one side possible practical difficulties in identifying the individual as the author and jurisdictional and related problems in terms of where the offence was committed and who was targeted,[79] this question raises general issues as to the reach of the section 131 offence:

a) It would be open to debate, at least, whether the post was "written matter" so as to engage section 131(1)(a) of the Human Rights Act, which was not drafted with the internet in mind.

[79] A New Zealand court probably would claim jurisdiction. See *R v Shepherd and Whittle* [2010] EWCA Crim 65, [2010] 1 WLR 2779; and *R v Burns* [2017] EWCA Crim 1466, which involved broadly comparable situations. But there would remain an issue whether the post, published as it was to a Facebook page associated with an Australian group, could be said to relate to "any group of persons in New Zealand" as required by section 131.

b) Although the language used was not "insulting" or "abusive" and not threatening in the sense of making an explicit threat to any of those likely to be exposed to the comment, it was "threatening" in the sense of being an implicit call to those reading the post to consider using violence against Muslim immigrants.

c) Although it might be thought reasonably clear that the comment was likely to "excite hostility" towards Muslim immigrants, the *Wall* approach of looking at the audience poses some difficulties as the readers of the comment (members of a private discussion board on The Lads Society Season Two Facebook page) were presumably already hostile to Muslim immigrants. On the *Wall* approach (under which making the already hostile even more hostile is seen as only "possibly" enough to trigger liability), it is open to doubt, at least, whether preaching a hateful message to the probably already converted is an offence.

d) The preponderance of legal opinion is that adherence to Islam is not within the protection of section 131 as religion is not itself a protected characteristic and Islamophobia targets followers of Islam, not those who share protected characteristics of "race, colour or ethnic or national origin".

e) Given that immigration and demographic change are legitimate subjects for public debate, substantial allowance for freedom of expression would have to be made. How that would have played out in a prosecution under section 131 is hard to predict.

Proposals for change

Sharpening the focus of the offence

26 In the words "intent to excite hostility or ill-will", the verb "excite" is used in a slightly unusual sense and suggests causation. This means that an "intent to excite" cannot be established without showing an intention to either: (a) cause "hostility or ill-will" that did not previously exist; or (b) enhance or increase pre-existing "hostility or ill-will". It logically follows that preaching hatred to the already converted would not breach section 131 of the Human Rights Act. This point, too, is discussed in the *Wall* case and we have just alluded to it in the case study.

27 Section 131 of the Human Rights Act would be improved if the word "excite" was removed and replaced with a term like "stir up", which is used in corresponding legislation in the United Kingdom. The "preaching hatred to the already converted" issue could be resolved by adding the verbs "maintain" and "normalise". We therefore propose that the statutory language be reframed to replace "excite hostility against or bring into contempt" with "to stir up, maintain or normalise hatred".

28 As the *Wall* case illustrates, the words "excite hostility against or bring into contempt" set an apparent liability threshold that is lower than the courts are prepared to accept for the purposes of civil liability under section 61 of the Human Rights Act. This is also necessarily the case with the corresponding but broader language in section 131, "excite hostility or ill-will against, or bring into contempt or ridicule". A modified section 131 would be far more straight-forward to apply if "hostility", "ill-will", "contempt" and "ridicule" were replaced by "hatred" as it implies extreme dislike or disgust, including an emotional aversion. If the offence was reframed in this way, it would not be subject to restrictive and imprecise interpretations by the courts (such as "relatively egregious") and could be more easily relied on in appropriate cases.

29 This reframing would focus the offence on stirring up or provoking hatred of a group of persons defined by their protected characteristic. As well, we consider that explicit and implicit calls for violence should be expressly addressed in the offence. Capturing calls for violence in the section would further pre-empt reliance on a defence along the lines that the defendant was "only" preaching hatred to the converted.

30 For many, an offence reframed in this way would not go far enough. This is because hate speech produces harms in terms of impacts on targeted groups (particularly the adverse psychological impacts of being "othered") that go beyond the stirring up of hatred in the minds of an intended audience. There is thus an argument for the view that liability for hate speech should turn on its impact on those who are targeted. There is, however, difficulty reconciling such an approach with freedom of expression, which is currently conceived as encompassing an entitlement to engage in offensive expressive conduct.

31 Conversely, an attempt to reframe the section 131 offence as we propose will attract opposition on the basis that, even as reframed, the offence would unjustifiably infringe freedom of expression. There are, however, a number of countervailing considerations:

a) Reformulated as we suggest, the offence would be more narrowly expressed than the current section 131.

b) The language of hatred and calls for violence that we propose would catch only extreme speech. We do not see the reframed offence as engaged by microaggressions, and so on. Nor would it be a mechanism for criminalising the vigorous expression of opinion on controversial issues, such as gender identity or immigration. The limits of the reframed offence would be reinforced if, at the same time, amendments were made as we propose to the Films, Videos, and Publications Classification Act (see chapter 4). These amendments would be a signal as to what would not be within the scope of the reframed offence.

c) Stirring up of hatred and calls for violence are towards the most damaging end of the continuum of harmful behaviour (see Part 2, chapter 5 of *Ko tō tātou kāinga tēnei: Report of the Royal Commission into the Terrorist Attack on Christchurch Masjidain on 15 March 2019*). At this end of the continuum, freedom of expression arguments are at their weakest and criminal sanctions are most obviously warranted.

32 In a prosecution under section 131, the prosecution is currently required to prove:

a) a publication that is "threatening, abusive, or insulting";

b) an intent to "excite hostility or ill-will against, or bring into contempt or ridicule" people on the ground of the colour, race, or ethnic or national origins of that group of people; and

c) that the publication was "likely to excite hostility or ill-will against, or bring into contempt or ridicule" people on the ground of the colour, race, or ethnic or national origins of that group of people.

33 In a situation where the first two elements can be made out (a threatening, abusive or insulting publication and an intent to "excite hostility"), we see the third element as having little or no bearing on whether the conduct is sufficiently culpable to justify a charge. It also allows for the possibility of paradoxical defences along the lines that the language in issue was so extreme as to be more likely to encourage sympathy for, than excite hostility against, the targeted group.[80] It is thus unnecessary and we propose that it be removed.

Protected characteristics

34 The protected characteristics provided for in sections 61 and 131 of the Human Rights Act do not include religious belief. As we have indicated, the general drift of court decisions and academic commentary is that Jews and Sikhs can be regarded as ethnic groups (and thus protected by section 131) but this is not the case with followers of Islam or Christianity. Without seeking to challenge the reasoning of the particular court decisions, we consider that the resulting distinctions are not logical.

35 We acknowledge that there are distinct freedom of expression issues if sharing a particular religious belief system is treated as a protected characteristic. There is a strong tradition in New Zealand (as in many other countries) that religious belief systems are open to debate and that this can be vigorous. Strongly expressed challenges to a religious belief system may also amount to criticism of those who adhere to it.

[80] Law Commission (United Kingdom), footnote 1 above at paragraph 2.28.

36 We also appreciate that there are some philosophical and policy arguments for distinguishing between race and religion. Religious adherence can be a matter of choice and the law does not usually provide protection against vilification based on life choices (for instance political affiliation).[81] As well, there are a number of factors suggesting that freedom of expression in relation to religion is of particular importance:[82]

a) Religions compete with each other to convert new adherents and retain existing adherents.

b) Religions make competing and often incompatible claims about divinity, the origins of the universe, the components of a good life and the existence and nature of an after-life.

c) Religious groups make influential contributions to public debate on matters of profound controversy, including abortion and euthanasia.

37 All of that said, we see adding religion to the protected grounds as justified given that:

a) under section 9(1)(h) of the Sentencing Act, "religion" is a protected characteristic and there is similar recognition in other laws addressing hate speech which we review in the next chapter of this companion paper;

b) similar legislative provisions have been amended in other jurisdictions to include religion as a protected characteristic;[83]

c) it would bring New Zealand into compliance with article 20(2) of the *International Covenant on Civil and Political Rights*, which we have set out earlier in this companion paper;

d) it is not logical that affiliation with Judaism and Sikhism are protected characteristics but affiliation with other religions such as Islam or Christianity are not;

e) the very clear overlap between Islamophobia and racism (in that many victims of Islamophobic harassment are people of colour); and

f) most significantly, the current realities of Islamophobia and the link between hate speech and terrorism.

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[81] Ivan Hare, footnote 78 above at paragraph 534.

[82] Ivan Hare, footnote 78 above at paragraph 534.

[83] See, for example, New South Wales (Crimes Act 1900 (New South Wales), section 93Z); Victoria (Racial and Religious Tolerance Act 2001 (Victoria), sections 7–8 and 24–5); Queensland (Anti-Discrimination Act 1991 (Queensland) sections 124A and 131A); Northern Ireland (Public Order (Northern Ireland) Act 1987, section 8); and Ireland (Prohibition of Incitement to Racial Hatred Act 1989, section 1). In England and Wales there is an offence of stirring up racial hatred under section 29B of the Public Order Act (United Kingdom).

38 Concerns about protecting adherents to particular belief systems from criticism are reflected in section 29J of the Public Order Act 1986 (United Kingdom), which was enacted when "stirring up" religious hatred was introduced as an offence in England and Wales. This section provides:

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.

39 This section, along with the restrictive definition of the offence,[84] make prosecution for the offence for stirring up religious hatred extremely difficult. For this reason we do not support the introduction of an equivalent provision to New Zealand law. We consider that concerns about freedom of expression are met with a high threshold for liability, requiring the prosecution to establish an intention to stir up, maintain or normalise hatred towards members of the protected group and specifically addressing explicit and implicit calls for violence against such a group.

Types of publication covered

40 Section 131 of the Human Rights Act applies only to the publication of "written matter" or words that are broadcast "by means of radio or television" or used in or near a public place or public meeting. So, unlike section 61 of the Human Rights Act, it does not expressly apply to "electronic communications". This is a potentially significant gap in the scope of the offence that should be remedied. Indeed, we see no good reason why there should be restrictions based on how hate speech is communicated.

41 We therefore propose that the description of how hate speech is communicated by replacing the current statutory language with "says, or otherwise publishes or communicates".

The location of section 131 and the current maximum penalty

42 The low maximum penalty (three months' imprisonment) for breaching section 131 of the Human Rights Act serves to diminish the signalling and standard-setting benefits of prosecution and conviction. In contrast, offences similar to section 131 carry a maximum term of imprisonment of seven years in the United Kingdom[85] and a maximum term of imprisonment of two years in Canada.[86]

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[84] The offence of stirring up religious hatred is confined to language that is "threatening" rather than "threatening, abusive or insulting" (as is the case with section 131 of the Human Rights Act and its United Kingdom equivalent in respect of racial hatred).

[85] See sections 18–23 and sections 29B–29G of the Public Order Act 1986 (United Kingdom).

[86] See section 319.1 of the Canadian Criminal Code RSC 1985 c C-46.

43 Including the offence in the Crimes Act rather than the Human Rights Act would enhance the signalling and standard-setting effects of an increased penalty, as the Crimes Act lists offences most commonly considered as serious crimes by New Zealanders.

44 We propose that the maximum penalty for breaching the new offence should be increased to three years' imprisonment.

45 A potential penalty as high as (or more than) two years' imprisonment would result in those charged with such offences being entitled to choose trial by jury.

46 The current case law results in liability under section 131 depending on subjective conclusions on the part of the court based on the "relatively egregious" standard adopted in *Wall*. This involves an impressionistic assessment. This is not an ideal basis for imposing criminal law sanctions, as people should be able to know in advance with reasonable certainty whether something they intend to do is, or is not, against the law.

47 It would be particularly unsatisfactory if such a standard was required to be applied in jury trials, especially if the right to freedom of expression is in issue. It is not consistent with our system of criminal law for freedom of expression concerns to be applied as a matter of fact (and thus in trial by jury) to the circumstances of the case at hand by balancing the right to freedom of expression against the culpability of the defendant's actions.[87] It would not would not be easy for trial judges to sum up to juries as to how the "relatively egregious" standard should be applied. A new approach to the offence would be required which would be likely to emerge through a process of trial and error. The fundamental problem is that it is difficult to extract from the current wording a test for liability that, on the one hand, respects the statutory text but, on the other, is sufficiently strict to ensure that the right to freedom of expression is not infringed. This is particularly so in relation to "ridicule."

48 These concerns are best alleviated by defining the substance of a hate speech offence sufficiently narrowly to take freedom of expression issues out of play.

49 Accordingly, an increase in penalty resulting in a right to choose trial by jury makes a reframing of the offence all the more desirable.

50 We therefore propose that the offence currently created by section 131 of the Human Rights Act be repealed and replaced with a new equivalent reframed offence in the Crimes Act.

[87] See the remarks of Elias CJ in *Morse v Police* [2011] NZSC 45,[2012] 2 NZLR 1 at paragraph 13.

What a new offence might look like

51 The proposals for change we have set out in this chapter can be brought together as a new provision inserted in the Crimes Act 1961 and worded broadly as follows:

Inciting racial or religious disharmony

Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding three years who:

(a) with intent to stir up, maintain or normalise hatred against any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins or religion of that group of persons; and

(b) says or otherwise publishes or communicates, any words or material that explicitly or implicitly call for violence against or is otherwise, threatening, abusive, or insulting to such group of persons.

Chapter 4: Other laws addressing hate speech

Distressing Content

Preliminary comments

1 In this section of the companion paper we discuss other New Zealand legislation that addresses hate speech. We note that there are other ways in which the law addresses hate speech that we do not discuss, in particular hate speech that may attract sanctions imposed by disciplinary bodies in professional settings and may also have employment law consequences.

2 Under the headings that follow we discuss:

a) the Summary Offences Act 1981;

b) the Harmful Digital Communications Act 2015;

c) the Broadcasting Act 1989;

d) the Films, Videos, and Publications Classification Act 1993: the current law; and

e) the Films, Videos, and Publications Classification Act 1993: proposals for change.

Summary Offences Act 1981

3 A number of offences in the Summary Offences Act address offensive, threatening and insulting language. As we have noted, the courts allow considerable leeway for freedom of expression and this is applicable even in cases where the speech in issue targets a particular individual.[88] That said, flagrant hate-motivated abuse can be – and has been – prosecuted under this Act:

a) In 2014 a woman was found guilty (although discharged without conviction) of using offensive language after she told a taxi driver to:

> *F**k off to India. You come here and get all the Kiwi jobs - eat your f**king curry and f**k off to India. This is a Kiwi job.*[89]

[88] As was the case in *Brooker v Police*, footnote 32 above, where the appellant was of the view that he had been unlawfully treated by a constable. Knowing that she had been on night duty, he went to her home in the morning and knocked on her door for some three minutes. Eventually, she opened it and told him to leave. He then retreated to a grass verge on the road outside her house and began to protest. He displayed a sign saying, "No more bogus warrants" and, accompanied by a guitar, began to singing songs addressed to the constable and referring to her by her first name. Some fifteen minutes after he arrived at the constable's house, police officers arrived. They told him that if he did not leave he would be arrested for intimidation. He would not do so and was arrested. At the hearing, the charge was amended to one of disorderly behaviour.

[89] "Queenstown cop avoids conviction over abuse" (15 October 2014) *Otago Daily Times* https://www.odt.co.nz/regions/queenstown-lakes/queenstown-cop-avoids-conviction-over-abuse.

b) In 2015, a man was charged with offensive and threatening language after calling two men on a bus "Islam c***s" and accusing them of "shooting innocent people".[90]

c) In 2019 a man was charged with, and later pleaded guilty to, disorderly behaviour the day after the 15 March 2019 terrorist attack, shouting "f**k the Muslims" and later saying:

> *Muslims are not welcome in our country. Go home Muslims.*[91]

4 All of the offences against public order in the Summary Offences Act require the conduct to take place in (or within hearing of) a public place. The definition of public place in the Summary Offences Act has not been amended since it was introduced in 1981 and encompasses only physical locations.[92] This means that a charge of offensive language cannot be brought under the Summary Offences Act against a person who posts material online even where the post is clearly directed at another individual or group and is visible to other people who are online.

Harmful Digital Communications Act 2015

5 The Harmful Digital Communications Act creates an offence of causing harm by posting a digital communication.[93] It is an offence to post a digital communication with the intention that it cause harm to a victim, if:

a) posting the communication would cause harm to an ordinary reasonable person in the position of the victim; and

b) posting the communication causes harm to the victim.

6 "Victim" is defined as meaning "the individual who is the target of the posted digital communication"[94] and "harm" as "serious emotional distress".[95]

7 The term "posts a digital communication" is defined broadly.[96] In drafting the Bill that became the Harmful Digital Communications Act, the Law Commission noted that the term "digital communications" applies "not only to one-to-one communication but more broadly the range of digital publishing which occurs in cyberspace".[97] That said, the requirement for a "victim" that in turn requires the identification of a "target" inhibits the reach of the offence in respect of communications that denigrate groups rather than particular individuals.

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[90] "Racist rant: 'Sympathy' for abuser" (30 March 2015) New Zealand Herald https://www.nzherald.co.nz/nz/racist-rant-sympathy-for-abuser/C5PYDLW5YIWLS2NSQTDLHAY4WY/.

[91] Rob Kidd "Student sentenced for anti-Muslim slurs" (8 June 2019) *Otago Daily Times* https://www.odt.co.nz/news/dunedin/student-sentenced-anti-muslim-slurs.

[92] Summary Offences Act 1981, section 2.

[93] Harmful Digital Communications Act 2015, section 22.

[94] Harmful Digital Communications Act 2015, section 22(4).

[95] Harmful Digital Communications Act 2015, section 4.

[96] Harmful Digital Communications Act 2015, section 4 and *R v Partha Iyer* [2016] NZDC 23957.

[97] Law Commission *Harmful Digital Communications: The adequacy of the current sanctions and remedies* (NZLC MB3, 2012) at page 7.

8 The Harmful Digital Communications Act also provides for civil proceedings to be brought in the District Court which, under section 19(1), may make a variety of orders, including orders that an individual take down or disable material or cease the conduct complained of. Orders can also be made against an online content host which include taking down or disabling material and identifying the author of an anonymous or pseudonymous communication.[98] An IP address provider can be required to identify the persons responsible for such communications.[99] The criteria that the court must have regard to in making an order are provided, in reasonably general terms, in section 19(5). Particularly relevant are the content of the communication and the level of harm caused or likely to be caused.

9 Section 4 of the Harmful Digital Communications Act sets out "communications principles" that are required to be taken into account by those (including courts) performing functions and exercising powers under the Act. Principle 9 is in these terms:

> A digital communication should not denigrate an individual by reason of his or her colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.

Broadcasting Act 1989

10 Section 4 of the Broadcasting Act 1989 sets out the responsibility of broadcasters for programme standards. Broadcasters are responsible for maintaining standards that are consistent, among other things, with:

a) the observance of good taste and decency;

b) the maintenance of law and order; and

c) the principle that controversial issues of public importance are discussed in a balanced way.

11 There are four Broadcasting Codes of Practice (for radio, free-to-air television, pay television and election programmes in an election period) and they all contain standards that outline what is required of broadcasters when they broadcast programmes in New Zealand.

12 One of those standards is titled "Discrimination and Denigration". The purpose of that standard is to protect sections of the community from verbal and other attacks, and to foster a community commitment to equality. The standard only applies to recognised sections of the community, which are broadly consistent with the prohibited grounds for discrimination listed in section 21 the Human Rights Act and include, amongst many others, "religious belief" and "race".

[98] Harmful Digital Communications Act 2015, section 19(2).

[99] Harmful Digital Communications Act 2015, section 19(3).

Films, Videos, and Publications Classification Act 1993: the current law

13 The Films, Videos and Publications Classification Act is New Zealand's principal censorship legislation. Under this Act, it is an offence, punishable by a fine not exceeding $2,000, to be in possession of an objectionable publication.[100] It is an offence, punishable by imprisonment of up to 10 years, to be in possession of a publication that the person knows (or has reasonable cause to believe) is objectionable.[101] There are also distribution offences.

14 To be objectionable, a publication must describe, depict, express or otherwise deal with matters "such as sex, horror, crime, cruelty, or violence".[102] These topics are sometimes referred to as subject-matter "gateways". If the publication does not deal with one of these topics, and thus does not pass through a subject-matter gateway, it cannot be classified as objectionable.[103] Illustrating this, there is a decision of the Court of Appeal in which a publication that protested against homosexuality was not classified as objectionable as denigration, by itself, was insufficient to amount to violence or cruelty.[104]

15 If a publication passes through a subject-matter gateway, it can only be classified as objectionable if it deals with one of the topics "in such a manner that the availability of the publication is likely to be injurious to the public good". Injury to the public good can be established in a number of ways. First, section 3(2) of the Act deems a publication to be objectionable if it "promotes, supports, or tends or promote or support" a number of activities or actions. Among those are "acts of torture or the infliction of extreme violence or extreme cruelty". Second, a publication can be classified as objectionable on the basis of factors and criteria set out in section 3(3) and (4) of the Act.

16 Section 3(3) and (4) provide:

> (3) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, particular weight shall be given to the extent and degree to which, and the manner in which, the publication—
>
> (a) describes, depicts, or otherwise deals with—
>
> (i) acts of torture, the infliction of serious physical harm, or acts of significant cruelty:

[100] Films, Videos, and Publications Classification Act 1993, section 131.

[101] Films, Videos, and Publications Classification Act 1993, section 131A.

[102] Films, Videos, and Publications Classification Act 1993, section 3(1).

[103] *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) at paragraphs 4–5; *Living Word Distributors v Human Rights Action Group (Wellington)*, footnote 29 above at paragraphs 24–34.

[104] *Living Word Distributors v Human Rights Action Group (Wellington)*, footnote 29 above.

(ii) sexual violence or sexual coercion, or violence or coercion in association with sexual conduct:

(iii) other sexual or physical conduct of a degrading or dehumanising or demeaning nature:

(iv) sexual conduct with or by children, or young persons, or both:

(v) physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain:

(b) exploits the nudity of children, or young persons, or both:

(c) degrades or dehumanises or demeans any person:

(d) promotes or encourages criminal acts or acts of terrorism:

(e) represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

(4) In determining, for the purposes of this Act, whether or not any publication (other than a publication to which subsection (2) applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, the following matters shall also be considered:

(a) the dominant effect of the publication as a whole:

(b) the impact of the medium in which the publication is presented:

(c) the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters:

(d) the persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available:

(e) the purpose for which the publication is intended to be used:

(f) any other relevant circumstances relating to the intended or likely use of the publication.

17 The Act has been used by the Office of Film and Literature Classification to censor Al Qaeda and Dā'ish-inspired propaganda[105] and, shortly after the 15 March 2019 terrorist attack, the individual's "manifesto" and the livestream of his terrorist attack were classified as objectionable.[106]

Films, Videos, and Publications Classification Act 1993: proposals for change

18 By ratifying article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, New Zealand has agreed to condemn "all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form". In doing so, New Zealand has promised to "adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination". We think attempts at compliance involving the creation of offences that incorporate wording similar to, or based on, article 4 may give rise to legitimate freedom of expression arguments. We do, however, see some scope for compliance to be achieved, at least substantially, with amendments to the Films, Videos, and Publications Classification Act.

19 As we noted earlier, a publication can only be classified as objectionable if it passes through a subject-matter gateway. This means that racist propaganda cannot be classified as objectionable unless it also deals with matters such as sex, horror, crime, cruelty or violence.

20 We propose that section 3(1) of the Films, Videos, and Publications Classification Act is amended by adding "racial superiority, racial hatred and racial discrimination" to "sex, horror, crime, cruelty, or violence". As noted, this would achieve substantial compliance with article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

21 Amending section 3(1) in this way would not otherwise change the general scheme of the definition of objectionable. In order to be classified as objectionable, the publication would still need to be "likely to be injurious to the public good" after a consideration of the factors in section 3(2)–(4). Section 3(4) provides for, amongst other things, consideration of the "merit, value, or importance" of the publication. Part 4 of the Act provides for extensive rights of review. Importantly, classification decisions must reflect the right to freedom of expression guaranteed under the New Zealand Bill of Rights Act along with the reasonable limits exception.[107]

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[105] See, for example, *Patel v R* [2017] NZCA 234 at paragraph 9; *R v Nawarajan* [2016] NZDC 11469 at paragraph 10.

[106] See Office of Film and Literature Classification *Christchurch shooting video officially objectionable* (20 March 2019) https://www.classificationoffice.govt.nz/news/latest-news/christchurch-attacks-press-releases/#christchurch-shooting-video-officially-objectionable; Decision of Film and Literature Board of Review *In the matter of an application under section 47(2)(e) by the Kiwi Party (Incorporated) for a review of the publication titled: The Great Replacement* (12 August 2019).

[107] See *Living Word Distributors v Human Rights Action Group (Wellington)* footnote 29 above; *Wall v Fairfax New Zealand Ltd*, footnote 6 above.

Chapter 5: Concluding comments

1 In this companion paper to Part 9, chapter 4 of *Ko tō tātou kainga tēnei: Report of the Royal Commission into the Terrorist Attack on Christchurch Masjidain on 15 March 2019,* we have explained why we consider that New Zealand's current laws in relation to hate crime and hate speech neither appropriately capture the culpability of hate-motivated offending, nor provide workable mechanisms to deal with hate speech. We have set out our proposals for legislative change to address these issues.

2 We propose the creation of the following new hate-motivated offences in the Summary Offences Act 1981 and the Crimes Act 1961:

a) hate-motivated offences for offensive behaviour and language, assault, wilful damage and intimidation that correspond with existing offences in the Summary Offences Act; and

b) hate-motivated offences for assault, arson and intentional damage that correspond with existing offences in the Crimes Act.

3 We propose the following changes to the current hate speech laws:

a) sharpening the focus of the statutory language;

b) adding religion to the list of protected characteristics;

c) including electronic communications in the types of publication covered;

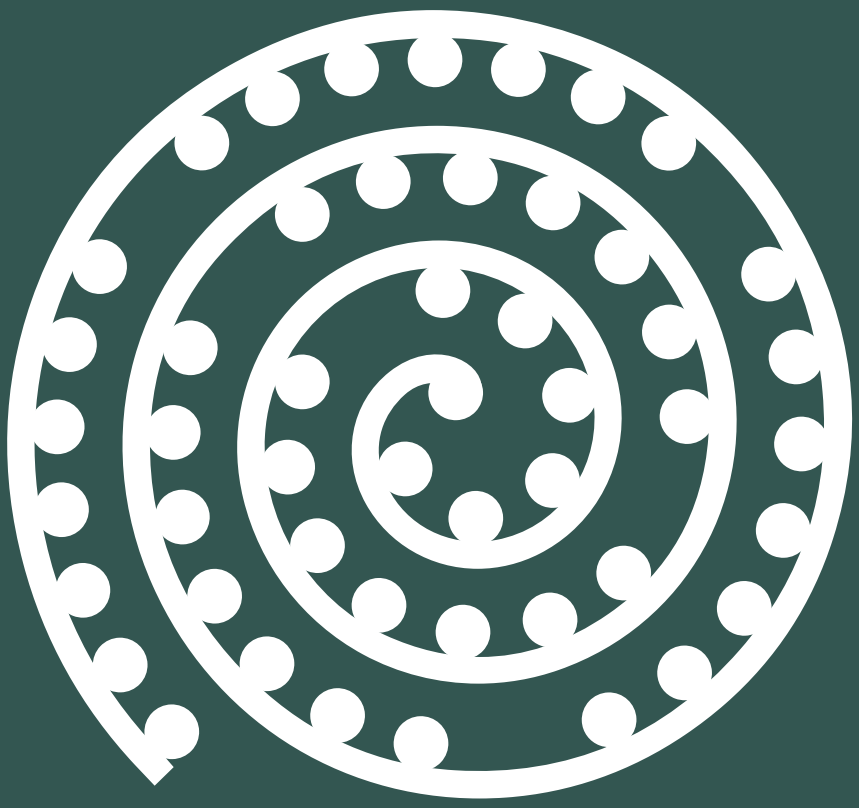
d) including the offence in the Crimes Act rather than the Human Rights Act 1993;

e) increasing the maximum penalty from three months' imprisonment to up to three years' imprisonment; and

f) adding "racial superiority, racial hatred and racial discrimination" to the list of grounds for classifying a publication as objectionable under the Films, Videos, and Publications Classification Act 1993.

Glossary

Term	Definition
Al Qaeda	An Islamist extremist terrorist organisation, which was responsible for the 11 September 2001 terrorist attacks on the United States of America.
civil liability	Legal responsibility for breaching an obligation recognised by law.
criminal liability	Legal responsibility for committing an offence prohibited by law.
Dā'ish	The Arabic acronym for the Islamic State of Iraq and the Levant (ISIL), also known as the Islamic State of Iraq and Syria (ISIS). An Islamist extremist terrorist organisation.
hijab	A head covering worn in public by some Muslim women.
Internet Protocol address (IP address)	A unique number linked to each device connected to a computer network that uses the Internet Protocol for communication.
Māori	The indigenous population of New Zealand.
masjid	An Arabic term for a mosque, the Muslim place of worship. In Arabic, masjid literally translates to "place of prostration (in prayer)".
Masjid an-Nur	An Arabic term for the an-Nur Mosque.
Pasifika	A collective term for people of Pacific Island descent.
social cohesion	A socially cohesive society is one in which all individuals and groups have a sense of belonging, social inclusion, participation, recognition and legitimacy.



Our symbol is inspired by an enduring and perpetual Aotearoa New Zealand icon, the koru.

The unfurling fern frond is representative of peace, tranquillity, growth, positive change and awakening. This dimension of peace is also inherent in the meaning of the living faith of Islam. We draw parallels between this taonga and the journey that New Zealanders have ahead of them to become a safer and more inclusive society.

The koru design with seven groups of seven unfurling fronds also acknowledges that 15 March 2019 was, according to the Islamic lunar calendar, 7 Rajab 1440, that is, the 7th day of the 7th Islamic month.