

# Proposals against incitement of hatred and discrimination

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# Introduction from the Minister of Justice

Tēna koutou,

Our society is stronger because of the many different people who call Aotearoa New Zealand home.

The Human Rights Act 1993 prohibits speech that incites racial disharmony and prohibits discrimination against a person because of an aspect of their identity. Following a review by the Ministry of Justice and the recommendations of the Royal Commission of Inquiry into the terrorist attack at Christchurch masjidain on 15 March 2019, the Government is proposing changes to strengthen and clarify these protections. The Government is also proposing two further legislative changes to discrimination provisions more broadly. This document provides an opportunity for you to provide feedback on these proposals and suggestions for improvements.

The proposals target the types of communication that seek to spread and entrench feelings of intolerance, prejudice, and hatred against groups in our society. All people are equal, and our society is made up of people with many different aspects to their identities. The incitement of hatred against a group based on a shared characteristic, such as ethnicity, religion, or sexuality, is an attack on our values of inclusiveness and diversity. Such incitement is intolerable and has no place in our society.

Freedom of expression is an important value that this Government defends. It is enshrined in the New Zealand Bill of Rights Act 1990, alongside freedom from discrimination. An aim of these proposals is to better protect these rights, including the rights of people who are the targets of hate speech to express themselves freely. The Bill of Rights Act allows for justifiable limits on rights, balanced against others' rights and interests.

These proposals seek to apply the incitement provisions more broadly to other groups that experience hate speech, such as religious groups and rainbow communities. The proposals do not lower the high threshold for criminalising speech or prevent public debate on important issues.

The Government wants to foster greater social cohesion in Aotearoa so that it is a place where everyone feels that they belong. An important part of this is standing against conduct and language that harms our people. Aotearoa is made stronger because of our diversity. Communities that are empathetic to others and encourage unity continue to strengthen our society. Experiences of hatred can make people feel unsafe and unwelcome in the places that they should feel at home in. They can also lead to further discrimination and violence. I encourage you to share your views on these proposals with us.

Ngā mihi

Hon Kris Faafoi  
**Minister of Justice**

# Summary of proposals

The Government has agreed in-principle to all of the proposals listed below. In-principle agreement means a broad general agreement to the proposals but not on detailed specific changes. This means the Government thinks the changes are a good idea but wants to hear what other people think before making a final decision and proposing legislation to change the law. The proposals may be changed based on feedback received.

A detailed description of these proposals and the reasons they are being proposed is available from page 17 of this document.

These proposals are only a small part of the Government's response to the recommendations of the Royal Commission of Inquiry into the terrorist attack at Christchurch masjidain on 15 March 2019. Some of the other Government work to understand and address hate crime and hate speech more generally is listed at page 25. You can find more information about this and other work to respond to the recommendations here: <https://dpmc.govt.nz/our-programmes/national-security/royal-commission-inquiry-terrorist-attack-christchurch-masjidain>

## Proposals against the incitement of hatred/hostility

### Increasing the groups that are protected by the incitement provisions

- **Proposal One:** Change the language in the incitement provisions in the Human Rights Act 1993 so that they protect more groups that are targeted by hateful speech.
  - Currently, a group of people are protected under the Act if hatred is incited in a specific way against them because of their colour, race, or ethnic or national origins
  - Under this proposal, more groups would be protected by the law if hatred was incited against them due to a characteristic that they have. This may include some or all of the other grounds in the Human Rights Act. These grounds are listed in section 21 of the Act, which is included at Appendix One.

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

- **Proposal Two:** Replace the existing criminal provision in the Human Rights Act 1993 with a new criminal offence in the Crimes Act 1961 that is clearer and more effective.

- The law would change so that a person who intentionally incites, stirs up, maintains or normalises hatred against any specific group of people based on a characteristic listed in Proposal One, would break the law if they did so by being threatening, abusive or insulting, including by inciting violence
- The person would break the law no matter how they made the threat, abuse or insult. It would not matter if it was verbally made to another person, in writing (in a drawing or words) or online (such as on social media, in an email, or in a digital message).
- **Proposal Three:** Increase the punishment for the criminal offence to better reflect its seriousness. This would be changed from up to three months' imprisonment or a fine of up to \$7,000, to up to three years' imprisonment or a fine of up to \$50,000.
- **Proposal Four:** Change the language of the civil incitement provision to match the changes being made to the criminal provision.

## Improving the protections against wider discrimination

- **Proposal Five:** Change the civil provision so that it makes “incitement to discriminate” against the law.
  - The law would change so that a person was prohibited from inciting or stirring up other people to discriminate against any groups because of a characteristic protected by that law. A person who encourages others to treat members of a protected group worse or differently than others would be breaking the law. This would mean a person could then complain to the Human Rights Commission.
- **Proposal Six:** Add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination.
  - Currently, it is against the law to discriminate against people because of their sex. The Government considers that this protects against discrimination because of gender identity or gender expression, or people’s sex characteristics or intersex status but the law could be clearer about this. The law would change to specifically cover these aspects of gender and sex.

# How to make a submission

## The Government wants to hear from you

The Government wants to receive feedback from a wide range of groups and people on the proposals in this document. Your feedback and suggestions for improvement will inform the Government's final decisions.

This discussion document is only on the incitement provisions in the Human Rights Act. Information about other related work the Government is doing is available on page 25.

## Submissions can be made from 25 June to 6 August 2021

Submissions are open from 25 June 2021 to 6 August 2021.

If the Government agrees to progress changes to the law, you will also have the opportunity to provide feedback on an amendment bill during the select committee process.

## You can make a submission through the Ministry's Citizen Space website

You can find Citizen Space at <https://consultations.justice.govt.nz>. This site provides an easy way to provide feedback on the proposals.

## You can also submit by email or through the post

You can send your submission by email to [humanrights@justice.govt.nz](mailto:humanrights@justice.govt.nz).

You can send a written submission to Human Rights, Ministry of Justice, SX10088, Wellington.

## Confidentiality and personal information

Please note that your feedback may be subject to a request to the Ministry of Justice for information under the Official Information Act 1982. Personal details can be withheld under the Act, including your name and address. If you do not want any information you provide to be released, please indicate this clearly and explain why. For example, you may wish for some information to be kept confidential because it is sensitive personal information. The Ministry of Justice will take your views into account when responding to such requests.

The Privacy Act 2020 governs how the Ministry collects, holds, uses, and discloses personal information about you and the information you provide. You have the right to access and correct personal information.

The Ministry will proactively release a summary of submissions. The summary will not include information that could identify individuals.

## Questions and further information

If you have any questions or would like more information about the review or the process for making submissions, please visit our website: [www.justice.govt.nz/proposals-against-incitement-of-hatred-and-discrimination](http://www.justice.govt.nz/proposals-against-incitement-of-hatred-and-discrimination), or contact us by email: [humanrights@justice.govt.nz](mailto:humanrights@justice.govt.nz).

The Government wants to reduce or remove as many barriers as possible from making a submission but understands that there may still be some obstacles to sharing your views. If making a submission through Citizen Space, email or post is inaccessible to you, please contact us through any of the ways listed above and we will work with you to help you make a submission.

# Safety concerns

This discussion document seeks your views on changes to the laws relating to the incitement of hatred. While we welcome submissions about people's experiences, we advise against disclosing sensitive or personal information that you would like to keep private, and request that you do not name identifiable individuals.

## What you can do if you are experiencing hateful speech or behaviour?

Your safety is important to us. If the content in this document puts you at risk of physical or mental harm, it is important that you know where to go for information or seek help.

- If you feel that your safety is at risk, contact the Police. If it is an emergency, call 111. If you are not in danger right now, call 105.
- For information about how the Human Rights Commission can help see <https://www.hrc.co.nz/enquiries-and-complaints/how-make-complaint/>
  - o For information about racial harassment <https://www.hrc.co.nz/enquiries-and-complaints/faqs/racially-offensive-comments/>
- For abuse happening online <https://www.netsafe.org.nz/>
- If you wish to talk to someone about how you are feeling you can call or text 1737.

# Background and context

## Why is the Government doing this?

### What is hate speech?

'Hate speech' is a broad term that is not used in Aotearoa New Zealand law. It is generally defined as speech that attacks an individual or group based on a common characteristic, for example ethnicity, religion, or sexuality.

### The proposals in this document relate specifically to speech that incites hatred against a group

The proposals and the current provisions in the Human Rights Act focus on speech that 'incites hatred' in other people towards a group. Speech that 'incites hatred' is abusive or threatening speech that stirs up hostility towards a group of people (rather than being directed at one person) based on a common characteristic they share.

### Speech that incites hatred causes significant harm

The Government considers speech that incites hatred to be a threat to equality, diversity, respect and fairness. The incitement of hatred causes significant harm, having a negative impact on communities targeted with hatred and can, ultimately, lead to violence. Inciting hatred damages our society by causing animosity and hindering social inclusion, spreading distrust and division between all our communities.

### International human rights treaties require legislation against hate speech

Inciting hatred is prohibited under international human rights treaties. Aotearoa is party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which requires states to legislate against racist hate speech, which Aotearoa has done.

The International Covenant on Civil and Political Rights (ICCPR) also requires laws against advocating national, racial or religious hatred that amounts to inciting others to discrimination, hostility or violence.

## **The Government wants to improve the protections against the incitement of hatred**

Protecting people from incitement of hatred will promote safer communities and reinforce the message that the incitement of hatred is conduct that society considers blameworthy and harmful. It is already prohibited by the civil and criminal law, but the law could be improved.

The details on the proposals that the Government is considering are available on page 17.

## **The Government wants to hear your views on the proposals**

This discussion document aims to test these proposals. It provides information on the proposals and seeks feedback and suggestions for improvements.

The Government knows that there is a high level of public interest in this work and it is important that your views are heard.

## **The right to freedom of expression is protected but is subject to reasonable limits**

Section 14 of the New Zealand Bill of Rights Act 1990 protects freedom of expression. This includes the freedom to seek, receive and impart information and opinions of any kind, in any form. The right to freedom of expression is affirmed in the Universal Declaration of Human Rights of 1948 and the ICCPR.

Like all rights and freedoms in the Bill of Rights Act, the right to freedom of expression can be limited by law in such a way that can be justified in a free and democratic society. There are several laws in Aotearoa that limit freedom of expression that are justified. These laws seek to balance freedom of expression and other rights and interests. For example, the film classification regime limits the freedom of expression of creators and viewers to uphold the rights of children and other members of the public, to protect them from content they might find harmful or that breaches society's standards.

# The Human Rights Act 1993 contains two provisions prohibiting the incitement of hostility

## The incitement provisions consist of a civil and criminal provision

The civil law system covers private disputes between individuals, organisations, and in some cases, local or central government. Disputes may be about contracts, debt, or actions such as negligence. Civil actions provide for repair of harm or damage caused by one party to another, and to prevent harm from reoccurring.

The criminal law system is aimed at prohibiting conduct considered by society as blameworthy or harmful by way of punishment, deterrence, and public denouncement. Criminal cases are predominantly taken by the State, on behalf of society, against an individual.

## The civil incitement provision against racial disharmony

The civil provision in the Human Rights Act (section 61) says that it is against the law to use, publish, broadcast or distribute written matter or use words that are both:

1. threatening, abusive or insulting, and
2. likely to incite hostility or bring into contempt any group on the basis of their colour, race, or ethnic or national origins.

A person can complain to the Human Rights Commission (the Commission) when they think that someone has done something that section 61 says is against the law. A person can complain to the Commission about any speech even if they don't belong to the group it was aimed towards.

The Commission's role is to attempt to resolve the complaint. The Commission can provide information, problem-solving support and mediation. Mediation is not compulsory. If mediation is refused, or fails to resolve the complaint, the complainant can lodge an application to the Human Rights Review Tribunal (the Tribunal). The Tribunal can conduct a hearing and decide the case on the available evidence.

If the Tribunal finds that a breach of section 61 has occurred, it can grant any remedy it sees fit. This can include declaring that the defendant has committed a breach, making a restraining order against the defendant to prevent them from continuing or repeating the breach, and awarding damages of up to \$350,000.

The full text of section 61 is provided in Appendix One.

## **The criminal provision for inciting racial disharmony**

The criminal provision in the Human Rights Act (section 131) says that it is a criminal offence to incite racial disharmony by publishing, broadcasting or distributing written matter or using words that are all of the following:

1. threatening, abusive, or insulting,
2. likely to excite hostility or ill-will against, or bring into contempt or ridicule any group on the ground of colour, race, or ethnic or national origins, and
3. intended to excite such hostility, ill-will, contempt or ridicule.

This offence is punishable by up to three months' imprisonment, or a fine of \$7,000. Someone prosecuted under section 131 would have a trial at the District Court to decide if they were guilty or not.

The full text of section 131 is provided in Appendix One.

## **The incitement provisions are justifiable limits on freedom of expression**

Together, the incitement provisions form a balanced approach that considers the seriousness of the hateful speech against the severity of the punishment. The penalties reflect that intentionally attempting to encourage hostile feelings in other people (section 131) is more serious than speech without that intent (section 61).

The current incitement provisions target speech which would have others believe that a society made up of different ethnic groups cannot function and seeks to turn people against each other. The law prohibits the incitement of these attitudes because they are incompatible with human rights and Aotearoa New Zealand's democratic values. These attitudes conflict with democratic principles because they are based on the idea that because of a shared characteristic, like ethnicity, religion or sexuality, some groups of people are less than others. There could be a belief that these groups should not have the same rights, be treated differently and excluded.

Speech that incites hatred can have the effect of infringing on the human rights of targeted groups, such as the right to equality, freedom of expression, freedom of movement and freedom of association. This is because this behaviour can cause significant harm and make people feel unsafe, ultimately preventing them from participating in public life and being included in society. For these reasons, limiting this kind of speech through an appropriate balance of the civil and criminal law is required.

## **There are other laws that ban other kinds of hate speech**

There are other laws that protect individual people against different types of hate speech. For example, the Summary Offences Act 1981, the Harmful Digital Communications Act 2015, the Harassment Act 1997 and the Films, Videos, and Publications Classifications Act 1993 apply to some kinds of harmful speech.

This discussion document is only about the incitement provisions in the Human Rights Act. Information about other related work the Government is doing is available on page 25.

## **Several problems have been identified with the current law**

Several issues with the current provisions were identified by a review carried out by the Ministry of Justice, and by the Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019.

### **The current wording of the criminal provision is unclear**

The Royal Commission found that the wording of the criminal provision did not provide a clear enough standard of the type of behaviour that should be criminalised. It stated that the current wording is overly complicated and recommended a reframed wording which would mean that only extreme speech would be captured. The Royal Commission noted similar problems with the wording in the civil provision, although its recommendations focused solely on the criminal provision. The Royal Commission noted that the criminal provision is out of date, and that, unlike the civil provision, the criminal provision does not cover electronic communications.

### **Speech that incites hatred affects more groups than those currently covered by the provisions**

The Ministry's review, and the Royal Commission's Report, both found that the provisions are too narrow in terms of which groups they cover as they relate only to race, nationality, ethnicity and colour. These are only four out of thirteen "prohibited grounds of discrimination" listed in section 21 of the Human Rights Act.

A prohibited ground of discrimination means that discrimination based on the listed characteristic is unlawful unless one or more limited exceptions apply. The full text of section 21 is included in Appendix One.

This is a gap because some of the groups that are protected from discrimination are not included in the protections against speech that incites hatred. However, other groups can be subject to speech that incites hatred.

### **The penalty for breaching the criminal provision is too low**

The Ministry's review, and the Royal Commission report, both concluded that the penalty of three months' imprisonment for the criminal offence was relatively low and did not reflect the seriousness of intentionally inciting hatred.

# **The Government is seeking feedback on six proposals**

## **What is the purpose of these proposals?**

The proposals seek to address issues with the current law, as identified above. These changes aim to make the protections against speech that incites hatred clearer and more effective. Some of these changes were recommended by the Royal Commission. The Government has agreed in-principle to making all of the changes in the proposals. In-principle agreement means a broad general agreement to the proposals but not on detailed specific changes.

These changes aim to ensure that society's needs and expectations for the protection against speech that incites hatred are met. The Government considers that the new proposals could find the right balance for when hateful speech should be prohibited and, in some cases, criminalised.

The law changes will help us meet our international human rights obligations under ICCPR and are in line with recommendations made by international human rights bodies, such as the Human Rights Council at the Universal Periodic Review (UPR) of New Zealand in January 2019, by the UN Committee on the Elimination of Discrimination against Women in July 2018, and by the UN Committee on the Elimination of All Forms of Racial Discrimination in 2017.

The Government wants to hear and consider your views on these proposals before making its final decisions.

## **What engagement has there been so far?**

### **Engagement on hate speech**

In 2019, the Ministry of Justice and the Human Rights Commission met with groups that are most likely to be targeted by hate speech to better understand their experiences and views. These engagements informed the proposals in this document.

### **Engagement on Royal Commission of Inquiry report**

The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques publicly released its report on 8 December 2020. Following the release of the Report, Hon Andrew Little, Lead Coordination Minister for the Royal Commission and Hon Priyanca Radhakrishnan, Minister for Diversity, Inclusion and Ethnic Communities, alongside officials from various government agencies, held 33 public hui with Muslim communities and wider faith and ethnic communities across Aotearoa over January and February 2021.

These hui were held to help the Government understand key concerns and communities' priorities, answer questions about the report and its implementation, provide feedback about initiatives underway, and discuss how communities can continue to engage and work with the Government and government agencies in the future. Many issues were discussed at these hui. One of the themes that emerged was that hate speech, hate crime and hate incidents are experienced by many within our communities, and legislative reform is an important tool for change.

## Treaty of Waitangi considerations

The Treaty of Waitangi is relevant to the incitement provisions and protections against discrimination in the Human Rights Act and the proposals in this document. Māori are a group that experience hate speech and are currently covered by the incitement provisions under the ground of "race" or "ethnic origin". The proposals in this document seek to better protect ethnic groups, including Māori, from speech that incites hatred. In particular, protections will be strengthened where Māori would be covered by any of the other prohibited grounds of discrimination, for example in relation to takatāpui.

## Next steps

Following analysis of the submissions, the Government will consider whether to make the changes proposed as they are, or to alter them based on the feedback, or to take another course of action.

A summary of submissions will be made available and information on the Government's final decisions are expected to be made public later this year.

## This document provides questions for feedback on the proposals

The following section covers all six proposals and provides specific questions that relate to the proposals individually. Three questions that you could use as prompts for your submission on all of the proposals are:

- Do you see any risks or unintended consequences arising from the proposal and, if so, what are they?
- Are there any ways that these proposals could be improved?
- Do these proposals present any further Treaty of Waitangi issues than those mentioned in this document?

## **There is an appendix that goes into more detail on the legal changes**

The proposals are described in general terms in the document below. However, the proposals raise issues about the specific legal meaning of individual words and how the words capture certain behaviour. If you are interested in reading in more detail about the language changes that are being proposed for the Human Rights Act, these can be found in Appendix Two at the back of this document.

# Proposals that relate to the incitement of hatred

## Increasing the groups who are protected by the incitement provisions

1

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

### What is the current law?

The incitement provisions only apply to speech that targets a group because of their “colour, race, or ethnic or national origins”.

### What is the problem with the current law?

More groups than those based on “colour, race, or ethnic or national origins” are targeted by hateful speech, including groups based on their religion, gender, sexuality, and disability. The Government thinks that the incitement of hatred for these reasons is also wrong and is worthy of being subject to civil and criminal processes. The Royal Commission also considered that religion should be included in the provisions.

### What will this proposal do?

This proposal would change the wording of both incitement provisions so that they applied to more groups that are protected from discrimination by the Human Rights Act.

They would still apply to groups based on “colour, race, or ethnic or national origins”, but would also cover speech that incites hatred or hostility against other groups protected from discrimination by the Human Rights Act.

Groups experience hateful speech based on other grounds as well, including their sex, gender (including gender identity), religious belief, disability, or sexual orientation. The Government considers that other groups that experience hateful speech could also be protected by the law, and is interested in views on the groups that should be protected by this change.

In practice, this means that if someone said or wrote something that met the other requirements in the law and was targeting a group based on a characteristic included, a complaint could be made to the Human Rights Commission or the Police. The Commission or the Police would then determine what actions to take.

## Feedback on Proposal One

- Do you agree that broadening the incitement provisions in this way will better protect these groups?
  - o Why or why not?
- In your opinion, which groups should be protected by this change?
- Do you think that there are any groups that experience hateful speech that would not be protected by this change?

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

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

#### **What is the current law?**

As described earlier in this document (on page 12), there is a crime of intentionally “inciting racial disharmony” in Aotearoa in section 131 of the Human Rights Act.

#### **What is the problem with the current law?**

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

#### **What will this proposal do?**

This proposal would create a new criminal provision in the Crimes Act that is clearer and easier to understand than section 131 of the Human Rights Act.

Under this proposal, the terms “hostility”, “ill-will”, “contempt” and “ridicule” would be replaced by “hatred”. This wording was suggested by the Royal Commission, which acknowledged that the change would narrow the meaning of the words, when compared to the current offence.

The exact wording of this provision would be determined following consultation. This includes whether to use the term “incite”, “stir up” or some other term with the same meaning.

This proposal would prohibit speech that maintains or normalises hatred, in addition, to speech that incites or stirs up hatred. This ensures that communications that may be aimed at people who may already hold extreme views would be unlawful.

The proposal would cover all methods of communicating speech (including by electronic means).

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

This new offence would be placed in the Crimes Act 1961 to signal that this is a serious offence.

The wording of this proposal includes the extension of the groups protected. For the question of which groups should be protected by the incitement provisions, see Proposal One.

## Feedback on Proposal Two

- Do you agree that changing the wording of the criminal provision in this way will make it clearer and simpler to understand?
  - o Why or why not?
- Do you think that this proposal would capture the types of behaviours that should be unlawful under the new offence?

## 3

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

### What is the current law?

The current penalty (which means punishment) if someone is found guilty of the criminal incitement is a maximum of three months in prison or a maximum fine of \$7,000.

## What is the problem with the current law?

Based on an assessment of the seriousness of the behaviour covered by the new criminal provision, and a comparison with other criminal offences, the Government considers that the current penalties are too low. The Royal Commission also said the penalties were too low and proposed an increased maximum period of imprisonment of up to three years.

## What will this proposal do?

This proposal would increase the maximum penalty for the new criminal offence to three years imprisonment, or a fine of up to \$50,000.

As this offence captures behaviour that seeks to spread hatred towards groups in society, the Government considers that the penalties should be higher than those for directing hate at an individual.

Some comparable offences and penalties are:

- the offence of disorderly behaviour in section 3 of the Summary Offences Act 1981 has a maximum penalty of three months' imprisonment and a fine of \$2,000
- the offence of posting a harmful digital communication in section 22 of the Harmful Digital Communications Act 2015 has a maximum penalty of two years' imprisonment or a fine of \$50,000
- The offence of threatening to kill or cause grievous bodily harm in section 306 of the Crimes Act 1961 has a maximum penalty of seven years' imprisonment
- The offence of making or distributing an objectionable publication in section 124 of the Films, Videos, Publications, Classification Act 1993, has a maximum penalty of 14 years' imprisonment.

## Feedback on Proposal Three

- Do you think that this penalty appropriately reflects the seriousness of the crime?
  - o Why or why not?
- If you disagree, what crimes should be used as an appropriate comparison?

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

### **What is the current law?**

As described earlier (see page 11), section 61 of the Human Rights Act is a civil provision which makes it unlawful for a person to incite hostility or contempt against a group based on their “colour, race, or ethnic or national origins”.

### **What is the problem with the current law?**

If Proposal Two is implemented, there would be inconsistency between the wording used in the criminal and the civil provisions. This would create uncertainty about what the difference is between “inciting or stirring up hatred” and “exciting hostility or bringing into contempt”. It may not be clear that a complaint could be made under the civil provision for the incitement of hatred. Making this distinction between the civil and criminal provisions is not intended.

### **What will this proposal do?**

This proposal would change the wording of the civil incitement provision to include “inciting/stirring up, maintaining or normalising hatred” alongside the existing wording.

There should be consistency between the civil and criminal provisions in the type of behaviour that is prohibited. It is desirable that “hatred” be included in the civil provision so that civil liability is also imposed for communication that is the most serious and damaging.

The current proposal does not make any other changes to the civil provision. The Royal Commission noted the wording of the civil provision raises issues of enforceability because it is also unclear.

The provision may need other changes to make it clear what behaviour it covers other than incitement of hatred.

### **Feedback on Proposal Four**

- Do you support changing this language in section 61?
  - o Why or why not?
- Do you think that any other parts of the current wording of the civil provision should be changed?

# Improving the protections against discrimination more broadly

The Government has identified that there are two issues with the law relating to discrimination in the Human Rights Act that it wishes to address. The Government wants to hear your views on these too.

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

### **What is the current law?**

Section 61 does not include any mention of “incitement to discrimination”.

### **What is the problem with the current law?**

Under the ICCPR, “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Aotearoa has signed up to the ICCPR, but the incitement to discrimination is not currently prohibited by Aotearoa law. The proposed changes would allow Aotearoa to better align our law with the ICCPR.

### **What will this proposal do?**

This would make it unlawful to incite others to discriminate against members of those groups protected from discrimination by the Human Rights Act who will be covered by the incitement of hatred provision. Discriminate means to treat someone worse than others because of something about them, like their ethnicity or gender. Like Proposal Four, this would change the wording of the civil provision.

### **Feedback on Proposal Five**

- Do you support including the prohibition of incitement to discriminate in section 61?
  - o Why or why not?

## **6** *Proposal Six: Add to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse, and intersex people are protected from discrimination*

### **What is the current law?**

The list of prohibited grounds of discrimination in the Human Rights Act includes “sex, which includes pregnancy and childbirth” and “sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation”.

### **What is the problem with the current law?**

The Government considers that the current provisions are not clear enough that trans, gender diverse and intersex people are protected from discrimination. The Government and the Human Rights Commission consider that the existing ground of “sex” covers these groups, but “sex” and “gender” are different concepts and the law could be clearer.

### **What will this proposal do?**

This proposal would make changes to the prohibited grounds of discrimination in the Human Rights Act to clarify the protections for trans, gender diverse and intersex people. This would be done by changing the wording of the ground of “sex” to include “sex characteristics or intersex status” and adding a new ground of “gender including gender expression and gender identity”. This would clarify that it is illegal to discriminate on the grounds of gender, gender expression, gender identity, sex characteristics or intersex status. We are aware of other wording that may be used such as “variation of sex characteristics” or “non-binary” as opposed to gender diverse.

The Treaty of Waitangi is particularly relevant for this proposal. The Government wants to ensure that this change appropriately ensures that takatāpui and other culturally specific gender identities are protected from discrimination. Takatāpui is a traditional term meaning ‘intimate companion of the same sex.’ It has been reclaimed to embrace all Māori who identify with diverse genders and sexualities such as whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex and queer.

This proposal is not directly related to the incitement of hatred provisions. However, Proposal One could result in the incitement provisions being extended to protect trans, gender diverse and intersex people from speech that incites hatred.

Engagement on this proposal is primarily aimed at ensuring that appropriate language is used in section 21 of the Act, as the Government considers this to be a clarification of the status quo rather than a fundamental change in the law.

## Feedback on Proposal Six

- Do you consider that this terminology is appropriate?
- Do you think that this proposal sufficiently covers the groups that should be protected from discrimination under the Human Rights Act?
- Do you consider that this proposal appropriately protects culturally specific gender identities, including takatāpui?

# Related work not being consulted on in this document

This discussion document has been focused on a specific aspect of wider government work.

The Government is carrying out a range of related work in response to the recommendations of the Royal Commission. Some of this work started before the Royal Commission report. It includes:

- strengthening the capacity of the Human Rights Commission to respond to hate speech, racism and discrimination
- Police-led work to accurately identify, record, report and respond to hate-related crime
- Ministry of Justice work relating to hate crime
- work to counter violent extremism and terrorism
- changes to the definition of objectionable under the Films, Videos and Publications Classifications Act
- the creation of the Ministry for Ethnic Communities to improve outcomes for ethnic communities
- work on social cohesion
- developing a National Action Plan Against Racism, and
- work on strengthening resilience to mis- and disinformation.

# Appendix 1 – Relevant sections of the Human Rights Act 1993

|             | Current section in the Human Rights Act (in full)  |
|-------------|--|
| Section 61  | <p><b>Racial disharmony</b></p> <p>(1) It shall be unlawful for any person—</p> <p style="padding-left: 40px;">(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</p> <p style="padding-left: 40px;">(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</p> <p style="padding-left: 40px;">(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,—</p> <p style="padding-left: 40px;">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.</p> <p>(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.</p> <p>(3) For the purposes of this section,—</p> <p style="padding-left: 40px;"><i>newspaper</i> 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</p> <p style="padding-left: 40px;"><i>publishes</i> or <i>distributes</i> means publishes or distributes to the public at large or to any member or members of the public</p> <p style="padding-left: 40px;"><i>written matter</i> includes any writing, sign, visible representation, or sound recording.</p> |
| Section 131 | <p><b>Inciting racial disharmony</b></p> <p>(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</p>   |

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|                          | <p>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,—</p> <p>(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</p> <p>(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,—</p> <p>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.</p> <p>(2) For the purposes of this section, <i>publishes</i> or <i>distributes</i> and <i>written matter</i> have the meaning given to them in section 61.</p>  |
| <p><b>Section 21</b></p> | <p><b>Prohibited grounds of discrimination</b></p> <p>(1) For the purposes of this Act, the <i>prohibited grounds of discrimination</i> are—</p> <p>(a) sex, which includes pregnancy and childbirth:</p> <p>(b) marital status, which means being—</p> <p>(i) single; or</p> <p>(ii) married, in a civil union, or in a de facto relationship; or</p> <p>(iii) the surviving spouse of a marriage or the surviving partner of a civil union or de facto relationship; or</p> <p>(iv) separated from a spouse or civil union partner; or</p> <p>(v) a party to a marriage or civil union that is now dissolved, or to a de facto relationship that is now ended:</p> <p>(c) religious belief:</p> <p>(d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions:</p> <p>(e) colour:</p> <p>(f) race:</p> <p>(g) ethnic or national origins, which includes nationality or citizenship:</p> <p>(h) disability, which means—</p> <p>(i) physical disability or impairment:</p> <p>(ii) physical illness:</p> <p>(iii) psychiatric illness:</p> <p>(iv) intellectual or psychological disability or impairment:</p> <p>(v) any other loss or abnormality of psychological, physiological, or anatomical structure or function:</p> <p>(vi) reliance on a guide dog, wheelchair, or other remedial means:</p> |

|  |   |
|--|---|
|  | <p>(vii) the presence in the body of organisms capable of causing illness:</p> <p>(i) age, which means,—</p> <p style="padding-left: 40px;">(i) for the purposes of sections 22 to 41 and section 70 and in relation to any different treatment based on age that occurs in the period beginning with 1 February 1994 and ending with the close of 31 January 1999, any age commencing with the age of 16 years and ending with the date on which persons of the age of the person whose age is in issue qualify for national superannuation under section 7 of the New Zealand Superannuation and Retirement Income Act 2001 (irrespective of whether or not the particular person qualifies for national superannuation at that age or any other age):</p> <p style="padding-left: 40px;">(ii) for the purposes of sections 22 to 41 and section 70 and in relation to any different treatment based on age that occurs on or after 1 February 1999, any age commencing with the age of 16 years:</p> <p style="padding-left: 40px;">(iii) for the purposes of any other provision of Part 2, any age commencing with the age of 16 years:</p> <p>(j) political opinion, which includes the lack of a particular political opinion or any political opinion:</p> <p>(k) employment status, which means—</p> <p style="padding-left: 40px;">(i) being unemployed; or</p> <p style="padding-left: 40px;">(ii) being a recipient of a benefit as defined in Schedule 2 of the Social Security Act 2018 or an entitlement under the Accident Compensation Act 2001:</p> <p>(l) family status, which means—</p> <p style="padding-left: 40px;">(i) having the responsibility for part-time care or full-time care of children or other dependants; or</p> <p style="padding-left: 40px;">(ii) having no responsibility for the care of children or other dependants; or</p> <p style="padding-left: 40px;">(iii) being married to, or being in a civil union or de facto relationship with, a particular person; or</p> <p style="padding-left: 40px;">(iv) being a relative of a particular person:</p> <p>(m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.</p> <p>(2) Each of the grounds specified in subsection (1) is a prohibited ground of discrimination, for the purposes of this Act, if—</p> <p style="padding-left: 40px;">(a) it pertains to a person or to a relative or associate of a person; and</p> <p style="padding-left: 40px;">(b) it either—</p> <p style="padding-left: 80px;">(i) currently exists or has in the past existed; or</p> <p style="padding-left: 80px;">(ii) is suspected or assumed or believed to exist or to have existed by the person alleged to have discriminated.</p> |
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# Appendix 2 – Detail on current provisions and the proposals

This appendix focuses on the legal concepts that will be used. We note that drafting of legislation (and the use of specific words) is part of the process of law-making that occurs after the Government has decided that changes to the law are needed. This drafting is done by the Parliamentary Counsel Office.

The purpose of this appendix is to make the body of the discussion document easier to understand for a general audience, while ensuring that lawyers, academics and other interested people have access to this detail. We also note the discussion document is intended to be widely available and has been translated into several languages and that it is difficult to translate the specific legal meanings of words and the nuances of potential changes. Further information is also available in the Ministry of Justice’s interim impact analysis here: [www.justice.govt.nz/proposals-against-incitement-of-hatred-and-discrimination](http://www.justice.govt.nz/proposals-against-incitement-of-hatred-and-discrimination).

|                   | Detail of proposal   | Current wording of Human Rights Act   | Proposed change to Human Rights Act or Crimes Act   |
|-------------------|--|---|---|
| <b>Proposal 1</b> | This proposal would change the wording of the criminal (currently section 131 but see Proposal 2 below) and civil (section 61) incitement provisions in the Human Rights Act so that they applied to more groups protected from discrimination by section 21 of the Human Rights Act (see Appendix One for this section). We seek views on the groups that should be protected by this change. | Both section 61 and section 131 of the Human Rights Act apply to communications aimed at a group “on the ground of the colour, race, or ethnic or national origins of that group of persons.” | The wording of both section 61 and the proposed new section 131 (see Proposal 2 below) would be changed so that they apply to communications aimed at certain groups of persons in or coming to Aotearoa New Zealand who are protected from discrimination by section 21 of the Human Rights Act. |

|                   | Detail of proposal  | Current wording of Human Rights Act  | Proposed change to Human Rights Act or Crimes Act  |
|-------------------|---|--|--|
|                   |   |  |  |
| <b>Proposal 2</b> | <p>This proposal would create a new criminal provision in the Crimes Act that has the same purpose as section 131 of the Human Rights Act but would be clearer and simpler.</p> <p>This proposal would maintain the requirement that there be the mental element of intention. In other words, the person would need to <i>intend</i> to incite hatred. This is appropriate for a criminal provision with the level of penalty that is being proposed.</p> <p>The terms “hostility”, “ill-will”, “contempt” and “ridicule” would be replaced by “hatred”. The Royal Commission noted that this would mean that the new offence would be more narrowly expressed than the current section 131.</p> <p>This proposal would prohibit speech which “maintains or normalises” hatred, in addition, to speech which incites or stirs up hatred.</p> | <p>The section 131 offence currently requires the following elements:</p> <ol style="list-style-type: none"> <li>1. A person publishes or distributes or broadcasts speech or written matter which is threatening, abusive, or insulting</li> <li>2. With intent to excite hostility or ill-will against, or bring into contempt or ridicule</li> <li>3. Against any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons, and</li> <li>4. The words or written matter are 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.</li> </ol> | <p>A new provision would be added to the Crimes Act, which would create a new offence with four key elements. It would be a crime to:</p> <ol style="list-style-type: none"> <li>1. intentionally incite/stir up, maintain or normalise hatred</li> <li>2. against any group protected from discrimination by section 21 of the Human Rights Act</li> <li>3. through threatening, abusive or insulting communications, including inciting violence</li> <li>4. made by any means.</li> </ol> <p>The exact wording of this provision will be determined following consultation. This includes whether to use the term “incite”, “stir up” or some other term with the same meaning.</p> |

|  | <b>Detail of proposal</b>   | <b>Current wording of Human Rights Act</b> | <b>Proposed change to Human Rights Act or Crimes Act</b> |
|--|---|--|--|
|  | <p>The proposal would also include incitement through 'explicit or implicit calls for violence'. The Royal Commission stated 'that this would further pre-empt reliance on a defence along the lines that the defendant was only "only" preaching to the converted'.</p> <p>This proposal does not include the requirement that the communication must be "likely to" incite, maintain or normalise hatred. This exists in the both section 61 and 131 currently (and is not proposed to be removed from section 61). The Royal Commission did not think it was a necessary element of a new offence. We are interested in feedback on this.</p> <p>The proposal would cover all methods of communicating speech. The current provision does not clearly cover communication by electronic means (unlike section 61).</p> <p>This new offence would be placed in the Crimes Act 1961.</p> |  |  |

|                   | <b>Detail of proposal</b>  | <b>Current wording of Human Rights Act</b>   | <b>Proposed change to Human Rights Act or Crimes Act</b>   |
|-------------------|--|--|--|
|                   | The current requirement in section 132 that the Attorney-General consent to any prosecution for the criminal incitement provision is intended to be retained.  |  |  |
| <b>Proposal 3</b> | <p>This proposal would increase the maximum penalty for the new criminal offence to three years' imprisonment, or a fine of up to \$50,000.</p> <p>Comparable offences are provided in the main text of the discussion document.</p>   | Section 131 states that a person who commits the criminal offence is" liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000"   | The new criminal provision in the Crimes Act would state that a person who commits the offence is liable on conviction to imprisonment for a term not exceeding three years' imprisonment or to a fine not exceeding \$50,000.   |
| <b>Proposal 4</b> | <p>This proposal would change the wording of section 61 of the Human Rights Act to include "inciting/stirring up, maintaining or normalising hatred" alongside the existing wording.</p> <p>Unlike the proposal for the criminal provision, the Government has not yet agreed to rewrite the remaining parts of the civil law provision, for example, to make the existing wording clearer.</p> <p>However, we would be interested in feedback about what wording in section 61 could be improved.</p> | Section 61 is focused on speech that is "likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons." | <p>Under this proposal "stirring up, maintaining or normalising hatred" would be added to section 61 alongside "excite hostility" and "bring into contempt".</p> <p>Any other changes to the provision have not been agreed and this would be looked at further after consultation. The current provision dates back to 1979 and if changes are agreed the new provision would be revised according to a modern drafting style. Like the criminal provision, it is expected that terms like 'publish',</p> |

|                   | <b>Detail of proposal</b>   | <b>Current wording of Human Rights Act</b>  | <b>Proposed change to Human Rights Act or Crimes Act</b>   |
|-------------------|---|---|--|
|                   |   |   | 'distribute' and 'written matter' are likely to require updating.  |
| <b>Proposal 5</b> | <p>This proposal would add “incite others to discriminate against” certain groups protected by section 21 of the Human Rights Act to the behaviour of exciting hostility or bringing into contempt in section 61 of the Human Rights Act.</p> <p>This would make it unlawful to incite others to discriminate against members of a group based on grounds such as their sex, gender, religious belief, colour, race, ethnic or national origins, disability, or sexual orientation.</p> <p>We seek views on the groups that should be protected by this change.</p> <p>Section 21 already protects these groups from discrimination. This change would further align the incitement provisions with the protections against discrimination in the Human Rights Act.</p> | <p>As above, section 61 is focused on speech that is “likely to excite hostility against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.”</p> | <p>Under this proposal, section 61 would also make speech that is likely to cause incitement to discrimination unlawful, alongside:</p> <ol style="list-style-type: none"> <li>1. the excitement of hostility</li> <li>2. bringing into contempt, and</li> <li>3. the stirring up, normalising or maintaining hatred.</li> </ol> |
| <b>Proposal 6</b> | <p>This proposal would make changes to the prohibited grounds of discrimination in</p>  | <p>Section 21(1)(a) of the Human Rights Act states that “sex, which includes</p>  | <p>Under this proposal, the ground of “sex” would be amended to also include, “sex</p>   |

|  | <b>Detail of proposal</b>   | <b>Current wording of Human Rights Act</b>                          | <b>Proposed change to Human Rights Act or Crimes Act</b>  |
|--|---|---|---|
|  | section 21 of the Human Rights Act to clarify the protections for trans, gender diverse, and intersex people. | pregnancy and childbirth” is a prohibited ground of discrimination. | characteristics and intersex status”. There would also be a new ground of “gender including gender expression and gender identity”. |

