Ministry of Justice Proposals against incitement of hatred and discrimination

August 2021

Submission of the Human Rights Commission

NZ Human Rights.
Human Rights Commission
Te Kāhui Tika Tangata

Submission of the Human Rights Commission to the Ministry of Justice - Proposals against incitement of hatred and discrimination

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Introduction

1. The Human Rights Commission (the Commission) welcomes the opportunity to provide the Ministry of Justice with feedback on its discussion document *Proposals against incitement of hatred and discrimination* (the discussion document). The Commission notes that this discussion document constitutes one stage of a reform process. We will therefore continue to carefully consider the issues arising from these proposals. If we have any additional observations, we will provide them before or during any legislative process that may follow.

2. The discussion document proposes what is essentially two sets of reforms. The first set are in Proposals one to five, which set out potential reforms of the incitement, or so-called "hate speech" provisions in the Human Rights Act 1993 (HRA), sections 61 (the civil law provision) and 131 (the criminal law provision). The second set is found in Proposal six, which regards amending section 21 of the HRA to clarify that transgender, non-binary and intersex people are protected from discrimination.

3. The Commission has published extensive reports on these issues in recent times. These reports provide a detailed overview of the issues and we encourage the Ministry's consideration of these reports as part of the reform process. These reports are:

    - Kōrero Whakamauāhara: Hate Speech (December 2019), which assessed the law on hate speech in Aotearoa New Zealand and in other countries, and the international human rights framework;

    - Prism (June 2020), which reports and issues recommendations on human rights relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand

4. Both sets of reforms also respond to our obligations under international human rights treaties and recommendations made by the United Nations (UN) as part of the periodic review of New Zealand's human rights record.[1]

5. To date, much of the focus publicly has been on the hate speech issue, with the catalyst for these reforms being the government response to the 15 March 2019 terrorist attacks on two Christchurch masjidain and the recommendations of the Royal Commission of Inquiry that followed. While this is undoubtedly an issue of considerable public interest and significance, it will be important to ensure that the section 21 reforms, which have been a long time coming, are also given specific and distinct consideration.

6. It is also important to recognise that the so-called hate speech laws are designed to apply to harmful expression that has the effect of "exciting" hostility towards groups. Harmful expression towards individuals is currently sanctioned by a range of other laws.[2] This distinction is often lost in public debate.

7. We also acknowledge the complex balancing of rights that these proposed reforms entail. The right to freedom of expression is a cornerstone human rights principle of any modern democracy. It is protected in our domestic law under the New Zealand Bill of Rights Act 1990 and in international human rights law under the International Covenant on Civil and Political Rights. It has been described

[1] As noted in the discussion document at p 14 , in recent years this has included recommendations by the UN 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.
[2] Such as the Crimes Act 1961, the Summary Offences Act 1981 and the Harmful Digital Communications Act 2015, among others.

by our courts as being "as wide as human thought and imagination"[3] and "basic to the New Zealand democratic system."[4] The right also applies to information or ideas that "offend, shock or disturb the State or any sector of the population."[5]

8. Given the limitations that both the civil and criminal incitement provisions place on freedom of expression, the Commission favours the retention of a high threshold for liability. This ensures that any limitations are proportionate, reasonable and can be demonstrably justified in a free and democratic society. However, we consider that it is equally important that offensive, insulting, abusive but otherwise lawful expression targeted at groups is called out as being unacceptable in the diverse, inclusive society of contemporary New Zealand.[6]

The context of Te Tiriti o Waitangi

9. The Commission also considers that these reforms must be considered against the context of He Whakaputanga o te Rangatiratanga o Nu Tirene (1835), te Tiriti o Waitangi (1840) and two centuries of harms inflicted upon tangata whenua by the Crown, its actors and settler society. At the heart of this submission is a call to fulfil the commitments made under Te Tiriti o Waitangi and effectively address hatred towards tangata whenua in all its forms.

10. We acknowledge the recognition of te Tiriti in the discussion document. Tangata whenua have been the subject of racism and hateful speech in New Zealand since te Tiriti was signed, led by the Crown through repeated breaches of its duties under Te Tiriti. In the New Zealand context, incitement of racial discrimination towards tangata whenua is a feature of our history of colonisation and its presentation today.

11. The history of sustained and relentless Crown attacks on the foundations of tangata whenua society is well documented – whether through legislation; force (including for example, the atrocities committed at Parihaka and violence inflicted on children for speaking te reo at school); land confiscation; minoritisation of tangata whenua through rapid European immigration; and assimilationist policies aimed at extinguishing Māori language and culture. Examples stem back to the Crown seizing sovereignty in breach of He Whakaputanga and Te Tiriti, and extend to the ongoing exclusion, barriers to participation, discrimination and inequities experienced by tangata whenua. The weight of two centuries of harm and injustice perpetrated by the Crown against tangata whenua, in breach of its Tiriti and human rights obligations, heightens New Zealand's responsibility to get this right for the indigenous people of this land.

12. In article two of Te Tiriti the Crown made an explicit promise to protect Tino Rangatiratanga. This promise is not only included in Te Tiriti but is also reflected in international human rights standards, which affirm Indigenous peoples' rights to self-determination, culture, institutions and way of life.[7] Under article 3 of Te Tiriti, tangata whenua were also promised participation as equals and enjoyment of equitable outcomes. These promises are undermined by discriminatory and harmful speech, which fosters hostility and hatred. The Commission also notes that the United Nations Declaration on the Rights of Indigenous Peoples provides at article 8(2):

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[3] *Moonen v Film and Literature Board Review* [2000] 2 NZLR 9 at [15].

[4] *Brooker v Police* [2007] 3 NZLR 91 at [114].

[5] *Living Word Distributors ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) at [45] citing *Handyside v UK* (1976) 1 EHRR 737 at [49]. The UN Human Rights Committee General Comment No. 34 on Article 19, freedom of opinion and expression at [44] provides that the right includes ". . . even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20."

[6] For an example of such an approach, see the Commission's *Give Nothing to Racism* campaign.

[7] As provided under Articles 3, 4, 5, 11, 15 and 19 of the UN Declaration on the Rights of Indigenous Peoples.

States shall provide effective mechanisms for prevention of, and redress for: … (e) any form of propaganda designed to promote or incite racial or ethnic discrimination against them [Indigenous peoples and individuals].

13. Ineffective legislation that does not protect tangata whenua from racism and hostility consequentially diminishes their rights to rangatiratanga and the government responsibilities to help to revitalise it.

14. This reform of the HRA's incitement provisions should therefore prioritise consideration of the history of Aotearoa New Zealand and pre-existing rights of tangata whenua affirmed under Te Tiriti and the United Nations Declaration on the Rights of Indigenous Peoples as a starting point and ensure that specific te Tiriti based engagement is undertaken with whānau, hapū and iwi as a matter of priority. We reiterate a call to fulfil the commitments made under Te Tiriti o Waitangi and effectively address hatred towards tangata whenua in all its forms.

Wider reforms of the HRA are also overdue

15. While this discussion document is limited to reform of the civil and criminal incitement provisions and section 21 of the HRA, the Commission considers that the significance of this process also serves to cast a spotlight on other parts of the HRA that require updating.

16. In particular, the areas of discrimination set out in Part 2 of the Act, especially the exceptions provisions, ought to be reviewed. The review should consider whether those parts of the Act are still fit for purpose in the contemporary context and in light of developments in human rights law and policy (including the consequential effects that enactment of these proposals might bring). For example, policies aimed at improving inclusivity in the labour market for disabled people[8] might require fresh consideration of the current exceptions provisions (which set out defences) regarding disability discrimination in employment.[9] The grounds of discrimination also require a general review. For example, the definition of "sexual orientation" under section 21(1)(m) uses dated terminology.

Structure of this submission

17. This submission has been set out in alignment with the structure and questions in the discussion document.

Increasing the groups that are protected by the incitement provisions

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

Do you agree that broadening the incitement provisions in this way will better protect these groups? Why or why not?

18. The Commission supports the proposal to increase the groups protected by the incitement provisions.

Reason for broadening the number of protected groups

[8] Such as the Working Matters Action Plan 2020.
[9] See section 29 of the Human Rights Act 1993.

19. The current incitement provisions have been in place, in one form or another, for nearly 50 years. They were enacted into the Race Relations Act 1971 to implement the New Zealand Government's international obligations under Article 20 of the Convention on the Elimination of all forms of Racial Discrimination (CERD).[10]

20. While New Zealand played an important role in the development of the Universal Declaration of Human Rights (1948), the CERD was the first international human rights treaty that the New Zealand Government ratified (which meant it agreed to be bound by it), doing so in November 1972.

21. In the years that followed, New Zealand ratified other international human rights treaties, such as the International Covenant on Civil and Political Rights (ratified in 1978), the International Covenant on Economic, Social and Cultural Rights (1978) and the Convention on the Elimination of Discrimination Against Women (1985). The most recent international human rights treaty ratified by New Zealand is the Convention on the Rights of Persons with Disabilities (ratified in 2008).

22. Similarly, in New Zealand's domestic law, the Race Relations Act 1971 preceded the Human Rights Act, the first version of which was enacted in 1977; and the New Zealand Bill of Rights Act 1990. The framework of domestic and international human rights law that applies in New Zealand has evolved considerably since the early 1970s.

23. Internationally, the three protected characteristics under article 20(2) of CERD – nationality, race, and religion – have come to be interpreted and understood as supporting the principle of equality on a larger scale.[11] Article 2 of the International Covenant on Civil and Political Rights (ICCPR) guarantees rights "without distinction of any kind" and article 26 expressly provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground."

24. Furthermore, in 2019 the UN Special Rapporteur on freedom of expression noted that international standards ensure protections against adverse actions on grounds such as sex, language, religion, political opinion, sexual orientation, gender identity or intersex status, migrant or refugee status, and disability.[12] He has further stated that:[13]

    "[g]iven the expansion of protection worldwide, the prohibition on incitement should be understood to apply to the broader categories now covered in international human rights law."

25. New Zealand has fallen behind other similar countries in this respect. For example, as the Commission's Kōrero Whakamauāhara: Hate Speech report illustrates, civil hate speech laws in Canada and Australia[14] cover a much wider range of protected characteristics:

    - Australia's state and territorial civil hate speech laws cover race, transgender status, HIV/AIDs, religion, disability and gender identity.

[10] Article 20 requires States Parties to *"Declare 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 origin, and also the provision of any assistance to racist activities, including the financing thereof."*

[11] New Zealand has entered the following reservation to article 20 of the ICCPR: "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."

[12] United Nations General Assembly Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression UN Doc A/74/486 (9 October 2019) at [9].

[13] United Nations General Assembly Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression UN Doc A/74/486 (9 October 2019) at [9].

[14] The United Kingdom, Scotland and Ireland have criminal, but not civil, hate speech laws.

- Canada's provincial civil hate speech laws cover an extensive range of characteristics. For example, the British Columbia Human Rights Code prohibits hate speech covering race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age.[15]

26. It is also notable that other New Zealand laws that seek to protect groups from harm do so on broader grounds than the incitement provisions in sections 61 and 131 of the HRA.

27. For example, the Harmful Digital Communications Act 2015 provides that "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."[16] Similarly, the Sentencing Act 2002 provides that "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" is an aggravating factor when a court is sentencing a person following conviction for a criminal offence.[17]

28. In summary, the narrow scope of the current incitement provisions in sections 61 and 131 of the HRA has become out of step with developments in human rights law, both domestically and internationally.

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

29. We note that the Minister of Justice's Cabinet Paper dated 13 April 2021 recommends inclusion of all the groups covered by the prohibited grounds of discrimination under section 21 of the HRA.[18]

30. The Commission would agree, with the exception of "political opinion". We recommend that political opinion is not included as a protected ground within new incitement provisions for the reasons set out below.

31. Firstly, there is a lack of clarity as to what the term means and applies to in terms of the law. As *Brookers Human Rights Law* observes:[19]

    There is no accepted definition of political (or other) opinion in international human rights law principally because of the difficulty in defining a concept as nebulous as opinion.

32. In New Zealand, the Courts have largely limited the application of "political opinion" discrimination to "party political" opinion, or situations where a job applicant's political opinion or union activities have influenced a prospective employer's decision as to whether to employ them.[20]

33. Secondly and most importantly, there is also the direct correlation between opinion and freedom of expression. Of all the grounds in section 21 of the HRA, "political opinion" is most directly related to free expression and the least connected to an inherent personal characteristic. Its inclusion within the incitement provisions may therefore have a more tangible "chilling" effect on political debate, activism and public discourse than the other grounds.

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[15] Section 7, British Columbia Human Rights Code [RSBC 1996] Chapter 210.
[16] Section 6, Principle 10, Harmful Digital Communications Act 2015.
[17] Section 9(1)(h), Sentencing Act 2002.
[18] Minister of Justice, Cabinet Paper: Proposed Changes to the incitement provisions of the Human Rights Act 1993, 13 April 2021, para 8.4.
[19] *Brookers Human Rights Law*, HR21.16(1), WestLaw NZ, accessed 14 October 2020.
[20] At HR21.16(2) and HR21.16(3).

34. It is also notable that "political opinion" is not included within the protected grounds in the civil hate speech laws in other jurisdictions that the Commission has surveyed.[21] New Zealand would become an outlier in this respect, were it included.

35. The Commission therefore recommends that, due to the nebulous nature of its legal definition in New Zealand, as well as its strong correlation with the right to freedom of expression, "political opinion" is not included within the groups covered by new incitement provisions.

36. We also note that in some other jurisdictions, the criminal and civil provisions can sometimes vary in terms of their scope. For example, in Canada, the federal criminal hate speech law protects a narrower list of groups than the civil hate speech laws at a provincial level.[22] This raises a general question as to whether the broadening of the protected characteristics under the civil provision should be replicated in the criminal provision.

37. The Commission's view is that it should. Legal commentary provides that in New Zealand there is no hierarchy among the prohibited grounds of discrimination set out in section 21.[23] However, the significant increase in the sentence that is proposed for the criminal provision requires that this issue is carefully considered. Given that context, an approach which limits the coverage of the criminal incitement provision to the more inherent characteristics, such as colour, race, religious and ethical belief, national or ethnic origin, age, sex, gender identity, sexual orientation and disability, but not political opinion, is preferred.

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

38. While the Minister of Justice's recommendation would considerably extend the scope of the incitement provisions under sections 61 and 131, any groups that fall outside section 21 would not be protected.[24]

39. The implementation of Proposal Six alongside the other proposals is therefore crucial, as currently section 21 does not provide express protection to trans, non-binary and intersex people. If Proposal Six is not implemented, this group – which experiences significant discrimination and hate speech – would risk not being guaranteed protection by the new laws.

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

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

Do you agree that changing the wording of the criminal provision in this way will make it clearer and simpler to understand? Why or why not?

[21] See Kōrero Whakamauāhara: Hate Speech, Appendix 2.
[22] See Kōrero Whakamauāhara: Hate Speech at pp 35 and 36.
[23] See Brookers Human Rights Law at HR21.08A citing *Ministry of Health v Atkinson* [2012] NZCA 184 where the Court of Appeal observed that both the HRA and the New Zealand jurisprudence indicate that there is no requirement to demonstrate historic disadvantage, a view moreover that is consistent with the approach of the Human Rights Council in interpreting the ICCPR.
[24] For example, we note that while s 104 of the Employment Relations Act 2000 expressly prohibits discrimination on the basis of union membership status or activities, s 21 of the HRA does not. In addition, the definition of "age" under s 21(1)(i) of the HRA does not include the ages of 15 years and under. This means children may potentially not receive protection under the incitement provisions, an outcome that would seem at odds with the purpose of the proposals. We would recommend the Ministry give consideration to this particular issue.

40. The Royal Commission considered that the language of the current criminal provision in section 131 would be improved if the word "excite" was removed and replaced with a term like "stir up", which is used in the equivalent UK legislation.[25] The Royal Commission observed that it would be "far more straight-forward to apply" if the terms "hostility", "ill-will", "contempt" and "ridicule" were replaced by "hatred". The Commission agrees with the Royal Commission's observations.

41. As the discussion document notes, this would have the effect of narrowing the application of the criminal provision somewhat. However, this narrowing is accompanied by an intention to significantly increase the penalties.

42. We also agree with the view in the discussion document that the use of the term "'hatred" would also protect freedom of expression as it would most likely apply to extreme views only. Further, we note the terms recommended by the Royal Commission are used in other jurisdictions. For example, the vilification laws in Australian states use "incite" and "hatred" as common terms.[26] In the UK and Ireland, "hatred" and "stir up" are used.[27] In Canada, "hatred", "incite" and "promote" are used.[28]

43. The proposed changes would therefore bring New Zealand's laws into greater alignment with the equivalent criminal laws used in similar countries. This would likely be helpful for prosecutors, defence lawyers and the judiciary when drawing upon the approaches taken in those jurisdictions to assist with their interpretation and application of the law.

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

44. The use of the term "hatred" implies a high level of enmity must be present in the types of behaviour that will be captured by the criminal provision. Given the increased penalties that are proposed, this is appropriate.

45. It also is notable that the Royal Commission considered that the amended language, "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]

46. This is evident in overseas case law. In the 2013 Canadian case of *Saskatchewan (Human Rights Commission) v Whatcott*, the Supreme Court of Canada considered the definition of "hatred" and held that:[30]

    the legislative term "hatred" or "hatred or contempt" must be interpreted as being restricted to those extreme manifestations of the emotion described by the words "detestation" and "vilification."

    …the term "hatred" contained in a legislative hate speech prohibition should be applied objectively to determine whether a reasonable person, ***aware of the context and circumstances****, would view the expression as likely to expose a person or persons to detestation and vilification on the basis of a prohibited ground of discrimination.* [emphasis added].

[25] Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Mosques on 15 March 2019, *Hate Speech – sections 61 and 131 of the Human Rights Act 1993* at para 27.
[26] Kōrero Whakamauāhara: Hate Speech, pp 26-29.
[27] Ibid pp 29-34.
[28] Ibid pp 34-37.
[29] Royal Commission of Inquiry, *Hate Speech – sections 61 and 131 of the Human Rights Act 1993* at para 28.
[30] *Sakatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467.

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

Do you think that this penalty appropriately reflects the seriousness of the crime? Why or why not?

47. The Commission notes that, in proposing to move section 131 of the HRA into the Crimes Act and increase its sentences, the Minister of Justice intended increasing alignment with the sentences available under both the Harmful Digital Communications Act (HDCA) and the Films, Videos, Publications Classifications Act. For example, the offence of *Causing harm by posting a digital communication* under section 21 of the HDCA carries a maximum penalty of 2 years imprisonment or a $50,000 fine. Section 131 carries a maximum penalty of 3 months imprisonment or maximum fine of $7,000.

48. The three-year maximum prison sentence proposed would also place it on a par with the offences of *Aggravated Assault* and *Threatening Acts* under sections 192 and 308 of the Crimes Act respectively.

49. Criminal penalties for incitement or hate speech offences in similar jurisdictions to ours vary widely.[31] For example, the "stirring up" offences that apply in England and Wales under the Public Order Act 1986 carry maximum sentences, under indictment, of seven years (for the most serious cases), and, on summary conviction, of six months.[32] In Canada, the offences of *wilful incitement of hatred* and *public incitement of hatred* carry maximum prison sentences of two years. The offence of *incitement of genocide* carries a five-year maximum sentence.[33] In Australia, sentences vary between the states. For example, in New South Wales and Western Australia maximum sentences for incitement of hatred/vilification offences are upwards of two years imprisonment,[34] whereas in Queensland and Victoria maximum sentences are six months.[35]

50. Measured against these examples, the Commission considers the proposed maximum sentence of three years imprisonment set out in Proposal Three is clearly significant, and at the high end, but not excessive.

51. However, the Commission would support the retention of Attorney-General approval for prosecution which is currently required under section 131 of the HRA. We note the discussion document omits to mention whether this current requirement is proposed to be retained.

52. In our view, such a procedural requirement is appropriate given the complex freedom of expression considerations that must be balanced and to prevent prosecution practices leading to a general chilling effect on freedom of expression. The Commission notes that the stirring up and incitement offences in England, Wales and Canada all require Attorney-General approval.[36] Development of prosecution guidelines, similar to those developed by the Crown Prosecution Service in the UK,[37] will also be essential.

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

[31] For a detailed account see Kōrero Whakamauāhara: Hate Speech.
[32] Public Order Act 1986 (UK), s 29L(3).
[33] Canadian Criminal Code, sections 318(1), 319(1), 319(2).
[34] Criminal Code 1913 (WA) ss77-80, s 93Z Crimes Act (NSW) – see Kōrero Whakamauāhara: Hate Speech at pp 27, 29.
[35] s 131A Anti-Discrimination Act 1991 (Qld), s 24-25 Racial and Religious Tolerance Act 2001 (Vic) – see Kōrero Whakamauāhara: Hate Speech at pp 27, 28.
[36] Public Order Act 1986 (UK), ss 27(1) and 29L(1); Canadian Criminal Code, s 318(3).
[37] Crown Prosecution Service, Homophobic, Biphobic and Transphobic Hate Crimes – Prosecution Guidance (15 August 2018).

Do you support changing the language in section 61? Why or why not?

53. The Commission supports the elements in section 61 being amended so that they adopt any new elements used in the criminal provision (such as "hatred"), in addition to retaining the current elements. This would continue the approach under sections 61 and 131, where many of the elements ("threatening, abusive, or insulting" and "matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule") are mirrored in each provision.

54. This approach is taken in other jurisdictions which have both civil and criminal provisions.[38] However, the criminal provision will usually have additional language that establishes a requirement of intent. For example, in Queensland the criminal provision requires that the defendant must have "knowingly or recklessly" incited hatred. This intention element is not included in the civil provision. This is also currently the case with sections 61 and 131, where "intent" is required by way of section 131(1) but is not required in section 61.

Do you think that any other parts of the current wording of the civil provision should be changed?

55. One of the important aspects of section 61 is that a high threshold must be crossed before liability can be established.

56. In *Wall v Fairfax*, New Zealand's most recent and leading case on hate speech, the High Court found that section 61 requires a high threshold, targeted to racist speech at the serious end of the spectrum that "applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised."[39] The Court also found that "excite hostility" or "bring into contempt" involves an objective test of "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 consequence."[40]

57. The Commission supports the retention of a high threshold as it recognises the fundamental importance of the right to freedom of expression. However, human rights principles provide that the right to freedom of expression should not be aimed at the violation of any rights and freedoms of others, including the right to equality and non-discrimination.[41]

58. In their submissions to the Royal Commission, the Islamic Women's Council of New Zealand (IWCNZ) submitted that the current threshold under section 61, with its objective "reasonable person" test, does not allow for the experiences of the target group to be adequately factored in, when determining the likelihood of hostility or contempt being generated by the speech in question.[42] The current approach renders the provision (and its remedies and sanctions) inaccessible to groups who have borne the brunt of harmful speech in New Zealand. As noted earlier, this has particular implications for tangata whenua in light of the Crown's duties under Te Tiriti. By way of example, it is notable in *Wall v Fairfax* there was little weight given by either the High Court or the Human Rights Review Tribunal to the historical and current experiences of tangata whenua of racism and discrimination in New Zealand, nor the context of colonisation and failures by the Crown to honour its Te Tiriti commitments.

59. IWCNZ accordingly recommended that the objective test under both sections 61 and 131 is augmented with additional consideration of the target group's experience, in effect introducing a

[38] Such as in Queensland, for example.
[39] *Wall v Fairfax* [2018] NZHC 104 at [42] and [52].
[40] *Wall v Fairfax* [2018] NZHC 104 at [51].
[41] United Nations General Assembly, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/67/357 (7 September 2012) at [36].
[42] https://islamicwomenscouncilnz.co.nz/recommendations/ at [85].

new subjective element.[43] While this would not lower the current threshold, it would direct the law towards considering the experiences of groups who are vulnerable to experiencing discrimination.

60. The Commission supports consideration being given to the approach recommended by IWCNZ. We consider that such an amendment could be made within section 61.[44] In our view, it would enhance the consideration of the particular context and circumstances of the expression, an essential factor identified by the Supreme Court of Canada in *Whatcott* and affirmed by the High Court in *Wall v Fairfax.*

Improving the protections against wider discrimination

Proposal Five: Change the civil provision so that it makes "incitement to discrimination" against the law

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

61. The Commission supports including the prohibition of incitement to discriminate in section 61.

62. Such an amendment would bring the incitement provisions into greater alignment with New Zealand's obligations under international human rights treaties. Article 20(2) of the ICCPR requires the prohibition by law of incitement to discrimination through either criminal or civil laws.[45]

63. There are overseas examples of laws that prohibit the incitement of discrimination. For example, most of the provincial human rights laws in Canada contain a provision that prohibits in some form the public display, broadcast or publication of messages that announce an intention to discriminate, or that incite others to discriminate, based on certain prohibited grounds.[46] The original purpose of these provisions was to prohibit the types of signs that had been used in Canada by some stores and businesses indicating that the members of certain racial or ethnic groups would not be served.[47]

64. For example, the Ontario Human Rights Code prohibits the publication or display of any notice, sign, symbol, emblem that intends to incite infringement of one of the prohibited grounds of discrimination in the Code.[48] The protected groups include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

65. It should be noted that section 67 of the HRA prohibits advertisements that indicate an intention to breach any of the HRA's provisions. However, it does not extend to covering notices that attempt to incite others to breach the Act.

66. It is notable that the HRA also divides its discrimination provisions into two parts. Part 1A of the HRA applies to government, public entities and persons who exercise public functions, and it uses the legal tests under the New Zealand Bill of Rights Act in doing so. Part 2 of the HRA applies (mostly) to

[43] At [86].

[44] This approach is broadly consistent with the offence of offensive behaviour under s 4 of the Summary Offences Act 1981 and related jurisprudence. This provides that a Court shall have regard to all the circumstances pertaining at the material time (s 4(3)). Further, in respect of "'threatening, abusive or insulting" language under s 4(1)(b), the question is not what the effect might be on a reasonable person, but rather what effect the defendant intended the recipient to feel – Westlaw NZ, Summary Offences Act commentary, SO4.10, citing *Ceramalus v Police* (1991) 7 CRNZ 678 (HC).

[45] The United Nations Human Rights Committee has confirmed that article 20 does not necessarily require that incitement be made a criminal offence, rather a civil remedy is also sufficient. See United Nations General Assembly Report of the Special Rapporteur on the promotion and protection of the freedom of opinion and expression UN Doc A/74/486 (9 October 2019) at [9].

[46] See British Columbia, *Human Rights Code*, section 7; *Alberta Human Rights Act*, section 3; *The Saskatchewan Human Rights Code*, s. 14; and Northwest Territories, *Human Rights Act*, section 13.

[47] See https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E#a4.1.

[48] Section 13(1).

private persons and entities. The approach to discrimination under Part 1A and Part 2 is also different. Whereas Part 1A does not prescribe specific actions or areas of activity that it applies to, Part 2 does. Part 2 applies to:[49]

- employment matters
- partnerships
- industrial and professional associations, qualifying bodies and vocational training bodies
- access to places, vehicles and facilities
- provision of goods and services
- provision in provision of land, housing, and other accommodation
- access to educational establishments.

67. Each of the above areas also comes with various prescribed exceptions provisions. These provide statutory defences to discrimination. Part 2 also sets out "other forms of discrimination" prohibited by the HRA.[50] These include:

- sexual harassment
- racial harassment
- indirect discrimination (broadly speaking, where a measure appears neutral on its face but has the effect of discriminating against a group under the prohibited grounds of discrimination)
- victimisation (which covers detrimental treatment of persons who intend to exercise their "whistleblower" rights under the Protected Disclosures Act, or who decline to breach the HRA).

68. The discussion document does not address whether the inclusion of "incitement to discriminate" is intended to apply to all the areas and forms of discrimination set out above. Nor does it address the exceptions provisions in the HRA. The Commission recommends that this issue is given careful consideration, as some of the forms of discrimination set out in Part 2 of the HRA (such as victimisation for example) sit rather awkwardly within an incitement provision.

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

Do you consider that this terminology is appropriate?

69. The Commission strongly supports Proposal Six to clarify protections in section 21 of the Human Rights Act for transgender, non-binary and intersex people, although at a general level, we would recommend the use of the term "non-binary" in preference to the term "gender diverse," as this is a term more commonly used by the community.[51]

70. However, terminology in this space is constantly evolving; what was appropriate only a few years ago is now outdated. In order to avoid entrenching terms in legislation that may fall out of favour, the Commission recommends describing broad characteristics rather than the individual identities as described in Proposal Six.

[49] Human Rights Act 1993 ss 22-60.
[50] Human Rights Act 1993, ss 61-69.
[51] In a 2018 University of Waikato survey on the health and wellbeing of 1,178 trans and non-binary people in Aotearoa New Zealand, 40% of respondents used the term non-binary to describe their gender, compared with only 13% who used the term gender diverse. See Veale J, Byrne J, Tan K, Guy S, Yee A, Nopera T & Bentham R (2019) *Counting Ourselves: The health and wellbeing of trans and non-binary people in Aotearoa New Zealand.* Transgender Health Research Lab, University of Waikato: Hamilton NZ.

71. This would entail including **gender identity**, **gender expression**, and **variations of sex characteristics** (or **gender**, including gender identity and gender expression; and **variations of sex characteristics**) in the list of prohibited grounds. The Commission made this recommendation in its 2020 Prism report, the findings of which were based on five national community consultations.[52]

72. The Commission has been seeking changes to this effect since the enactment of the HRA in 1993. During the passage of the Human Rights Bill that led to the HRA, the Commission submitted that transgender people ought to be included in the definition of discrimination based on 'gender,' later enacted as discrimination based on 'sex.' The legislature, however, decided against explicit inclusion of transgender people.

73. In its submission on the Human Rights Amendment Bill 2001, the Commission also recommended such changes to section 21 were desirable, citing overseas jurisprudence defining 'sex' to include trans people and strongly recommending that "legislative amendment to explicitly include transgender people would clarify the issue and acknowledge a uniquely misunderstood and stigmatised group." A number of other submitters called for the inclusion of gender identity and intersex status in the prohibited grounds of discrimination.[53]

74. In 2008, the Commission published To Be Who I Am, an inquiry into discrimination experienced by transgender people in Aotearoa New Zealand. The inquiry recommended amending section 21 of the HRA to clarify that it includes gender identity.[54]

75. The issue has also been addressed in reviews of New Zealand's human rights record at the UN. In 2019, as part of the UN Human Rights Council's third periodic review of New Zealand under the Universal Periodic Review, New Zealand received two recommendations from Member States to "add gender identity, gender expression or sex characteristics as specifically prohibited grounds of discrimination" and "to explicitly prohibit discrimination on the basis of gender identity and intersex status" in section 21 of the HRA.[55]

Do you think that this proposal sufficiently covers the groups that should be protected from discrimination under the Human Rights Act?

76. The alternative wording we suggest above should enable sufficient coverage. All people have a gender identity, gender expression, and sex characteristics, and no one should be discriminated against on the basis of these characteristics, whether actual or perceived.

77. We also note that there are several international examples of including gender identity, gender expression, and sex characteristics in anti-discrimination provisions.[56] Within New Zealand domestic law the term "gender identity" is already used in several statutes.[57]

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[52] New Zealand Human Rights Commission (2020) *Prism: Human rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand - A report with recommendations.* Wellington: New Zealand.

[53] These included submissions of Agender New Zealand; the New Zealand Labour Party, Auckland Central Rainbow Branch; the Human Rights Commission; the Association of University Staff of New Zealand; PSA; the Council of Trade Unions; and the New Zealand Labour Party Rainbow Sector Council.

[54] Human Rights Commission, *To Be Who I Am*, at p 5.

[55] Recommendations of Australia and Iceland, *Report of the Working Group of the Universal Periodic Review,* 23 January 2019, A/HRC/WG.6/32/L.1, at 6.51 and 6.52

[56] Including the Australia's Sex Discrimination Act 1984 which was amended in 2013 to include 'sexual orientation, gender identity, and intersex status;' Tasmania's Anti-Discrimination Act 1988 which includes 'gender expression, gender identity, sex characteristics, transgender, and transsexual;' and ACT's Discrimination Act 1991 which includes the protected attributes of gender identity and sex characteristics.

[57] Such as s 2 of the Marriage Act 1955; s 29 of the Births, Deaths, Marriages, and Relationships Registration Act 1995; s 30(1)(c) of the Electronic Identity Verification Act 2012; and s 9(1)(h) of the Sentencing Act 2002. However, we note that there is no single definition of "sex" or "gender" that applies across New Zealand law.

78. The Commission would recommend that the term "gender expression" is included alongside "gender identity" within any amended terminology, either as separate grounds or by way of a sub-ground or interpretative provision. In the Commission's view, this would provide the broadest protection for the greatest number of people. It would also align with the definition of "gender identity" provided in the Yogyakarta Principles[58], the definitive statement of international human rights law on sexual orientation and gender identity:

    gender identity' [refers to] *to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms;*

79. The term 'sex characteristics' is also used in the Yogyakarta Principles and will apply regardless of whether a person uses the term *intersex* to describe themselves or not. However, intersex people in New Zealand have clarified, in meetings the Commission has attended, that 'variations of' is a crucial prefix to the term. All people have sex characteristics, but people with innate variations, whose bodies are seen as different, experience stigmatisation, discrimination, bullying, body shaming, and other forms of harm which violate their rights and limit their participation in society.

80. In addition to clarifying protections in section 21, it is vital that the government provide comprehensive resources and training to employers, educational institutions, government agencies and other service providers outlining how transgender, non-binary, and intersex people are fully protected from discrimination under the Act.

Do you consider that this proposal appropriately protects culturally specific gender identities, including takatāpui?

81. We consider that the terms we have recommended would *technically* provide protection for culturally specific gender identities, including takatāpui.

82. However, we recommend that consideration is given to whether interpretative provisions are developed that affirm the inclusion of culturally-specific gender identities within the general definition of gender identity, gender expression and sex characteristics, particularly those that are of resonance in New Zealand and the Pacific, such as takatāpui or fa'afafine. These could sit in section 2 of the HRA, which currently sets out the definition of terms used in the HRA or within section 21 itself.

83. This also would reflect New Zealand's particular history, including that of colonisation. As the Commission's *Prism* report notes:[59]

    Indigenous peoples with diverse sexual orientations, gender identities and expressions, and sex characteristics have existed throughout history in all cultures, populations, and regions, including in the Pacific. Prior to the arrival of European settlers, diverse identities, expressions, and practices were accepted as a normal part of Te Ao Māori. Like other indigenous peoples, Māori were colonised and suffered historic injustices. This included loss of lands, territories and resources, customs, language, and traditional lifestyles within Aotearoa. The negative and intergenerational impacts of colonisation

[58] See The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity (Geneva, 2007) and The Yogyakarta Principles plus ten: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles (Geneva, 2017).

[59] New Zealand Human Rights Commission (2020) *Prism: Human rights issues relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand - A report with recommendations.* Wellington: New Zealand p 7.

on sexual and gender fluidity accepted in traditional Māori society have had, and continue to have, dramatic consequences, including loss of acceptance within their own societies and communities.

84. Principle 26 of the Yogyakarta Principles also provides for "the right to participate freely in cultural life, regardless of sexual orientation or gender identity, and to express, through cultural participation, the diversity of sexual orientation and gender identity." Principle 26 goes on to provide that States should take "all necessary legislative, administrative and other measures to ensure opportunities for the participation in cultural life of all persons, regardless of, and with full respect for, their sexual orientations and gender identities."