



July 2021
Free Speech Union

Briefing Paper: Summary of Hate Speech Law Proposals



Background:

The proposed “hate speech” law changes have come out of the report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain. There are 6 proposals the Minister of Justice, Hon. Kris Faafoi, has put forward, and the Ministry of Justice is consulting with the public through submissions open until August 6. These proposals involve some major changes to the law that create significant issues.

However, the Labour Government expressed intention to change the laws related to hate speech during the last Parliament, and openly campaigned on this issue leading up to election 2020; and the NZ Human Rights Commission has been advocating for similar changes since at least 2017. Therefore, it is disingenuous to contend that these changes are only coming as a result of the Royal Commission or the Christchurch attack.

What do the proposals mean?

These proposals cause several major changes which, most significantly:

- Increase the number of groups specifically protected under hate speech law;
- Move the primarily law related to “hate speech” from the Human Rights Act to the Crimes Act;
- Significantly increase the penalties for “hate speech”, by allowing for fines of up to \$50,000 or up to 3 years in prison;
- Lower the bar substantially from incitement to violence to “incitement to hatred”.

Deciding which groups are protected is a fool’s errand

It is impossible to provide statutory protection for every group in society. The Government hasn’t specified which groups they think should be added to protected lists, saying they want the public to decide on that, yet they have referred to the classes of people protected against workplace discrimination - including sex, marital status, religious belief, ethical belief, race, and political opinion.

Neither Minister Faafoi nor Prime Minister Ardern would clearly exclude political opinion from protection. If included as a protected group, people could be imprisoned for insulting others’ political beliefs, and so the essence of our democracy and free and frank debate would be undermined.

While bigoted and resentful opinions are perhaps widely considered indefensible or condemnable, that does not mean they should be made illegal. Belonging to a particular group within society should not privilege individuals or remove the rights of others to hold opinions, whatever they may be, concerning that group. What does it say of certain groups, when they are given particular legal protection? What does it say of others when they are not? Who gets to decide/re-decide/re-decide again, as our country continues to change? Increasing the number of groups specifically protected under hate speech law is a fool’s errand, which will never cover enough groups but always cover too many groups, depending on who you ask.

It is entirely unclear how these laws would be applied in competing cases. For example, would a fundamentalist religious adherent’s expressed views on homosexuality, and the Rainbow Community’s response to that religion be equally “hateful”? Do those sentenced then have to share a cell for up to three years?

The “hate speech” law in the United Kingdom, on which the proposed New Zealand legislation is based, has a special section which explicitly states that “...discussion, criticism, or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents...” is exempt from the law. Troublingly, there is no such provision considered by our lawmakers at present.

“Hate Speech” will be a crime

The proposed changes seek to move the current law from the Human Rights Act into the Crimes Act. This may sound like a technicality, but it means that Police and courts will be charged with defining “hate speech” and deciding where the line is. It will see the courts recognise Parliament’s intention for this law to have a more active role in our country, despite the ambiguities related to how it should be applied.

“Hate speech” legislation has always existed outside of the Crimes Act because of the difficulties in defining hate. Both the Prime Minister and the Minister of Justice have been unable to clearly state where the line is. This is an irresponsible way to legislate, and once again reveals the fraught nature of these proposals. For a

law to be legitimate, the people it regulates must be able to clearly see what it allows and what it prohibits.

In the past, actions have been illegal. Thought has been considered relevant only to the extent that there is demonstrable, objective evidence to speak to an individual's intent. However, now sharing your thoughts with others (if they could be interpreted as 'maintaining or normalising hatred') could be illegal, absent any action. What you think may become illegal.

“Hate Speech” will be punished more severely than physical assault

The proposed increase in penalties associated with “hate speech” crime are totally disproportionate to the objective harm actually caused. They are in no way commensurate with our current legal system, and are out-of-line in comparison to other crimes which incur similar penalties, like actual physical assault.

The proposed sanction for “hate speech” is up to three years in jail, while common assault in New Zealand is currently punishable with a maximum of one year in prison. Assault with intent to injure has a maximum penalty of three years - the same as proposed ‘hate speech’. It is ridiculous to say that insulting someone in a way that could be interpreted as ‘hatred’ should be sentenced as aggressively as physically hurting someone with intent. It is absurd that offensive language

that intends to “stir up hatred” is punished more severely than 80% of the crime currently being punished. The idea insults the thousands of victims of crime far worse than “hate speech” whose offenders received lesser sentences.

Both the Royal Commission and the Minister of Justice have claimed that the current penalties for hate speech do not reflect the seriousness of inciting hatred. There was a conviction under the current law for inciting hatred in 1977. The sentence was three-months in jail and there's no way to know if that was too much or too little because there hasn't been any other conviction. How can the Royal Commission or the Minister claim the penalty is too low, as we have no substantial case history in which to consider whether the sentence was correct?

Our current law is being watered down

Finally, not only will the penalties for hate speech be considerably higher, these proposals significantly lower the bar in terms of what would constitute “hate speech”. Previously, the key criteria focused on the high standard of incitement to violence. There is a clause in the Human Rights Act which states the speech must be “likely to excite hostility or ill-will against...”. The Human Rights Commission (HRC) has interpreted this to mean the language used would clearly incite violence. Yet, the proposed criteria will lower this threshold to “incite hatred”, which could be defined as simply being threatening, abusive, or even just insulting. If the Prime Minister truly intends to have a high threshold similar to the current legislation,

then there should be wording to that effect. There is not.

Conclusion:

The parameters of the proposed hate speech reforms are dangerously vague, and while they would clearly indicate to the police and courts the intention of Parliament to see these laws more readily applied, this reform fails to clearly outline how they should be applied. Each of the 6 proposed changes further erodes our freedom of expression and presents a material threat to free speech. The Ministry of Justice has called for New Zealanders to submit on these proposals, and that is exactly what we must do. We encourage you to stand up for your right to stand up. Tell the Government we don't need them policing our speech and to abort these proposed changes.



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