



Judges Association of New Zealand
TE HUNGA KAIWHAKAWĀ O AOTEAROA

Questions

1. Does your country protect freedom of speech and, if so, how? Please refer to legislation, including any applicable bills of rights or charter of rights or human rights codes, as examples, and/or jurisprudence (court decisions) as an overall picture.

The right to freedom of speech is not explicitly protected by common law in New Zealand but is encompassed in a wide range of doctrines aimed at protecting free speech.¹ An independent press, an effective judiciary, and a functioning democratic political system combine to ensure freedom of speech and of the press. In particular, freedom of expression is preserved in section 14 of the New Zealand Bill of Rights Act 1990 (BORA) which states that:

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

The significance of this right and its importance to democracy has been emphasised by the New Zealand courts. It has been described as the primary right without which the rule of law cannot effectively operate². The right is not only the cornerstone of democracy; it also guarantees the self-fulfilment of its members by advancing knowledge and revealing truth³ As such, the right has been given a wide interpretation. The Court of Appeal has said that section 14 is "as wide as human thought and imagination".⁴ Freedom of expression embraces free speech, a free press, transmission and receipt of ideas and information, freedom of expression in art, and the right to silence. The right to freedom of expression also extends to the right to seek access to official records. This is provided for in the [Official Information Act 1982](#).

2. Does your country criminalize hate speech and, if so, how? Please refer to legislation and/or jurisprudence as an overall picture.

There are 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.

¹ Andrew Butler and Petra Butler the New Zealand Bill of Rights Act: a commentary (LexisNexis NZ Ltd, Wellington, 2005) at 305

² R v Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115 at p125

³ A Bill of Rights for New Zealand: A White Paper (New Zealand Parliament House of Representatives) 1985. AJHR. 6, p 79.

⁴ Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 para 15

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Hate speech is prohibited in New Zealand under the Human Rights Act 1993 under sections 61 and 131. These sections give effect to article 20 ICCPR. These sections and their predecessors have rarely been used. They require the consent of the Attorney-General to prosecute. Incitement to racial disharmony has been a criminal offence since the enactment of the [Race Relations Act 1971](#). Complaints about racial disharmony often concern statements made publicly about Māori-Pākehā relations and immigration, and comments made by politicians or other public figures regarding minority communities.

All of this will soon change following The Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques public release of its report on 8 December 2020. [Download the report | Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019](#)

The progress of this law has been lamentably slow. In summary there are 6 proposals underpinning these vital amendments to existing law and new legislation:

- **Proposal One:** Increasing the groups that are protected by the incitement provisions by changing 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.

- **Proposal Two:** Making clearer what behaviour the law prohibits and increasing the consequences for breaking the law by replacing 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.

- **Proposal Five:** Improving the protections against wider discrimination by Changing 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.

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- **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. While this may protect against discrimination because of gender identity or gender expression, or people’s sex characteristics or intersex status the law could be clearer about this. The law would change to specifically cover these aspects of gender and sex.

The Government is also 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

3. Does your country have restrictions by the criminal law of the freedom of speech? And if yes, could you give an overall picture what the legislation is like? Including

- o **Are there any groups of persons who enjoy special protection of their freedom of speech due to their gender, sexual preference, religion, race or other conditions**
- o **Are there topics that enjoy special protection in terms of freedom of speech – for example topics of religion and politics.**

Subject to the pending amendments to legislation discussed above the reader will appreciate while Section 14 of the New Zealand Bill of Rights Act 1990 protects freedom of expression, 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. It would not be in society’s interests to allow freedom of expression to become a licence irresponsibly to ignore or discount other rights and freedoms⁵. Under article 19(3) ICCPR, freedom of expression can be limited in order to: respect the rights and reputations of others; and protect national security, public order, or public health and morals.

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. Jurisprudence under BORA closely follows these grounds.⁶ Freedom of expression

⁵ Tipping J in *Hosking v Runting* [2005] 1 NZLR 1

⁶ Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: a commentary* (LexisNexis NZ Ltd, Wellington, 2005) at 323

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is restricted only so far as is necessary to protect a countervailing right or interest.⁷ The Court of Appeal has held that the restriction on free speech must be proportionate to the objective sought to be achieved; the restriction must be rationally connected to the objective; and the restriction must impair the right to freedom to the least possible amount.⁸ The right to freedom of expression may also be limited by societal values which are not in BORA, such as the right to privacy and the right to reputation.

4. If there are restrictions in the criminal law of the freedom of speech, are the restrictions then absolute or must they be weighed against the consideration of free speech?

o Does this apply to all groups and if not, are the restrictions either absolute or not? Please mention which persons and groups belong to which category

o in cases where the freedom of speech and the restrictions are to be weighed against each other – o Are there then guidelines on how the balancing should be done?

o If Yes, which of the two parameters weighs the heaviest, a) the protection of free speech or b) the category that is protected by the legislation. And does this differ from category to category?

o and how much discretion is there such that the outcome of the balancing exercise may differ from judge to judge?

Subject to the pending amendments to legislation discussed above, the criminal provision for inciting racial disharmony is currently found 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 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

⁷ Police v Geiringer [1990–1992] 1 NZBORR 331

⁸ Moonen v Film and Literature Board of Review [2000] 2 NZLR 9

in society. For these reasons, limiting this kind of speech through an appropriate balance of the civil and criminal law is required.

5. Do you find that the legislation is clear and comprehensible to the citizen or does it give cause for doubt?

o If it gives cause for doubt, how is it expressed? Does it deter the citizen from making statements? Or does it deter citizens from suing?

We learnt a very painful lesson in 2019. New Zealand was not an exception when it came to white supremacist-inspired hate and terrorism.

It is important to emphasise at the outset [that New Zealand currently has hate speech laws](#). In reality, speech is already constrained in a variety of ways. Apart from defamation and libel laws, there are a range of acts and bodies that either monitor what can – and cannot – be said or provide an opportunity for complaint. However, as discussed earlier, the existing legislation is out-of-date, especially the *Human Rights Act 1993* in relation to the prohibited characteristics that are grounds for a complaint or prosecution.

As the saying goes...“You don’t know , what You don’t know”... there is such a lack of understanding and civics education upon freedom of speech and proper limitations to that freedom that even the reasonably informed average citizen must look at the law and find it easier to shrug off any hurt and harm caused by hateful speech particularly when the context in which most “speech” occurs has changed.

The trouble with communication is the more we have with each other, the harder we find it to be charitable or tolerant. The internet has enormous upsides but what has also become clear is that there is more opportunity to offend and cause harm as the context, tone and reach of speech has increased so very much. This is graphically rehearsed in the Royal Commission report into the Christchurch massacre; the awful events and the Royal Commission’s findings have hurried up the need to discuss what can and should be done, including the issue of hate speech.

If you ask this question again next year, I hope much needed clarity in the law has been achieved. I hope our citizens are better informed and empowered to push back against the wrongful use of words or actions against anyone of them. I hope that the perfidious hatred spawned by the unchecked tone and reach of speech on the internet, so often anonymous, has been reigned in. I hope 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 characteristic would break that law if they did so by inciting violence or being threatening, abusive or insulting.

6. Do you find in your work as a judge that the relevant legislation in your country, as it pertains to the freedom of speech and its protection and the criminalization of hate speech, is clear and comprehensible, or do you find that it gives too much room for different outcomes in the same types of cases?

The New Zealand legislation and so case-law is still under review; therefore, there is a lack of uniform and detailed case-law to offer much more than generalised comment. It will be for the courts to interpret and clarify the legislation which is passed.

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Previous attempts at enforcing the existing HRA provisions on hate speech have seen the courts set a high threshold for speech that incites hostility and/or ill will.⁹This is likely to continue. The New Zealand High Court in 2018 held that two cartoons published in New Zealand newspapers featuring negative depictions of Māori and Pasifika did not breach hate speech provisions in the *Human Rights Act 1993* (NZ) (**Human Rights Act**). The Court balanced the publisher’s right to freedom of speech under the *New Zealand Bill of Rights Act 1990* (NZ) (**Bill of Rights**) against the government’s interest in protecting individuals from harmful speech and discrimination.

This decision displays the fine balance that must be achieved between protecting freedom of expression and prohibiting racial hate speech. Even though the High Court found that the cartoons were objectively insulting, the legislation required an additional element, being that the content would incite racial hostility or bring into contempt. This limits the operation of section 61 of the Human Rights Act to particularly egregious examples of expression which incite animosity or are likely to result in the group being despised. Implicit in the High Court’s judgment was recognition that cartoons, when read in context, may be intended to be inflammatory to spark debate that would potentially lead to positive change. Whilst there was a large amount of public backlash and debate following publication of these cartoons, this was not equivalent to causing discriminatory effects. Whether the Human Rights Act would intervene to prevent insulting comics in a less constructive context remains to be seen.

As with the criminal provision, the intention is for the civil provision be broadened to protect all of the groups listed under section 21 HRA. However, unlike the criminal provision, the complainant does not need to prove the person complained about actually intended to incite hostility or ill-will. This seems to broaden the civil provision’s scope, as speakers need not intend to stir up, normalise or maintain hatred in order to be liable, provided that their speech is likely to result in that outcome.

⁹*Wall v Fairfax New Zealand Limited* [2018] NZHC 104.