



New Zealand Jewish Council

Rūnanga Hūrai o Āotearoa | המועצה היהודית בניו זילנד

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Proposed Changes to Hate Speech Legislation

Background

1. The New Zealand Jewish Council (NZJC) is the representative body of New Zealand Jewry.
2. The NZJC has worked for many years with the New Zealand Police and other agencies to ensure the safety and security of Jewish Communities through the Jewish Community Security Group (CSG).
3. Wherever hate crimes have been recorded, Jews have been disproportionately represented as victims¹.
4. The Jewish community in New Zealand, compared to most other communities, is at increased risk of attack from people with hateful ideologies and is regularly targeted by expressions that could be said to “stir up or normalise hatred”.
 - a. The CSG has produced monthly reports of antisemitic incidents in New Zealand and selected incidents from overseas committed by far-right, far-left and Islamist extremists.
 - b. CSG has provided comprehensive threat assessments at a national level highlighting the threats from the far-Right, the far-Left, Islamist extremists, and acutely disaffected persons; and separately briefed Police on the specific threat of Islamist extremism (Nov 2015), and reported more than 150 incidents of far-right attacks against Jews around the world over a four year period (CSG monthly reports May 2015 - June 2019).
 - c. The New Zealand Police have produced their own comprehensive threat assessment for the Jewish community that acknowledges the unique and elevated risk from the extreme right wing, extreme Islamic groups, acutely disaffected persons, the mentally ill, and protests that target the Jewish community, often as a proxy for Israel (May 2019).
 - d. Antisemitic incidents in New Zealand reached a record level in 2020, with 33 recorded for the year; and there were 16 incidents in just the month of May this

¹ See, for example, data from the USA (<https://bit.ly/34HxD2p>), France (<https://bit.ly/3jx7irS>), and Canada (<https://bit.ly/3esV8PE>).



year (2021). These figures do not include the numerous antisemitic social media posts by New Zealanders or on New Zealand sites².

5. Despite the Jewish community being disproportionate victims of “hate speech” and at risk of attack by people with extremist ideologies, the NZJC opposes laws that would criminalise speech for anything less than incitement to violence.
 - a. This has been a long-held position. For example, we congratulated the Race Relations Commissioner in 2017 for saying there was no need for new hate crime laws and emphasised the importance of free speech³.

The proposed changes and NZJC responses to specific questions

6. The six proposed law changes and specific questions with NZJC responses are:

Proposal 1: 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.

The NZJC supports the inclusion of other protected groups

- a. *Do you agree that broadening the incitement provisions in this way will better protect these groups?*

Yes. The NZJC recognises that many different groups of people, beyond those based on ‘colour, race, or ethnicity’ are subjected to hateful rhetoric and the law should recognise that.

- b. *In your opinion, which groups should be protected by this change?*

The NZJC believes all groups should be protected from speech that incites violence. This is especially true for religious belief, sexual orientation, disability and gender. However, it could equally apply to ethical belief, age, marital status, political opinion, employment status, or family status as outlined in S21 of the Human Rights Act.

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

Yes. The current proposal does not specifically consider ethical belief, age, marital status, political opinion, employment status, or family status as outlined

² <https://www.scoop.co.nz/stories/PO2106/S00091/new-zealand-not-immune-from-rise-in-antisemitism.htm>

³ <https://www.scoop.co.nz/stories/PO1702/S00225/hate-crime-date-collection-welcomed.htm>



in S21 of the Human Rights Act. These groups may be targeted and deserve protection from incitement to violence.

Proposal 2: 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 NZJC does not support criminalising ‘hate speech’ that does not incite violence

d. Do you agree that changing the wording of the criminal provision in this way will make it clearer and simpler to understand?

No. The proposed law change is ambiguous. This was highlighted by the Minister of Justice’s⁴ and Prime Minister’s⁵ inability to clearly define what the law may or may not include when specific examples are presented.

The idea of what constitutes “hate” is subjective and impossible to define. The Human Rights Commission (HRC) has acknowledged this in their 2019 report that states “No definition of hate speech exists under international law and definitions under national laws vary...”⁶.

As an extreme example, Jewish communities around the world, at different times, have been silenced and forbidden from practicing their religion because it was deemed ‘objectionable’⁷. There is potential for the wording of the proposed law to be abused in a similar way because it is ambiguous and open to wide interpretation.

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

The NZJC believes that only “hate speech” that is incitement to violence should be criminalised. The current proposals would capture that type of behaviour. However, the ambiguity of the wording leaves open the possibility that the law would also criminalise other, lesser, forms of offensive or insulting speech. The NZJC opposes this.

The argument is not only theoretical. In the United Kingdom, an increasing culture of state-censorship has led to Police arresting a woman for using the

⁴ <https://www.newshub.co.nz/home/politics/2021/06/could-millennials-be-jailed-for-hating-on-boomers-kris-faafoi-answers-tough-questions-about-the-new-hate-speech-proposals.html>

⁵ <https://www.newshub.co.nz/home/politics/2021/06/prime-minister-jacinda-ardern-concedes-proposed-hate-speech-threshold-is-lower-than-inciting-violence.html>

⁶ https://www.hrc.co.nz/files/2915/7653/6167/Korero_Whakamauhara- Hate_Speech_FINAL_13.12.2019.pdf

⁷ <https://www.jewishvirtuallibrary.org/censorship>



wrong pronouns in an online discussion⁸ and a man was arrested for making a bad joke⁹.

Proposal 3: Increasing the punishment for the criminal offence to better reflect its seriousness.

The NZJC does not support criminal punishment for ‘hate speech’ that does not incite violence

f. *Do you think that this penalty appropriately reflects the seriousness of the crime?*

No. The penalty is far too severe. Indeed, the NZJC does not believe in criminalisation for “hate speech” that does not reach the threshold of incitement to violence.

g. *If you disagree, what crimes should be used as an appropriate comparison?*

Incitement to a crime (S66 of the Crimes Act) or threatening language (S306, S307, and S307A of the Crimes Act) are provisions that should be compared to threatening to harm a group of people.

Proposal 4: Changing the language of the civil incitement provision to match the changes being made to the criminal provision;

The NZJC does not support ambiguously worded laws

h. *Do you support changing this language in section 61?*

No. The wording of “inciting/stirring up, maintaining or normalising hatred” is too ambiguous (see above).

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

Yes. The current S61 and S131 of the Human Rights Act should include an explicit statement about the language inciting violence - this is the threshold that seems to exist already and is where the NZJC is comfortable with the bar being set.

Proposal 5: Changing the civil provision so that it makes ‘incitement to discriminate’ against the law.

The NZJC does not support the prohibition of ‘incitement to discriminate’

⁸ <https://www.dailymail.co.uk/news/article-6687123/Mother-arrested-children-calling-transgender-woman-man.html>

⁹ <https://www.telegraph.co.uk/tv/0/arrested-telling-bad-joke-count-dankula-story/>



- j. *Do you support including the prohibition of incitement to discriminate in section 61?*

No. People should be free and able to advocate for controversial causes that may be considered discriminatory. For example, activists¹⁰ and even MPs¹¹ have called for a boycott of Israel. While the NZJC disagrees strongly with the discriminatory nature of the campaign, we would not want to see those activists criminalised for their advocacy.

Should these laws be enacted in this way there is a probability of a backlash and an entrenching of hateful views that will further harm the Jewish Community in New Zealand - Anjum Rahman has acknowledged the probability that “debate about the (hate speech) proposal will see the Muslim community subject to further abuse. There is a danger that people will be unhappy with the law and then they will blame the Muslim community for it,”¹². The NZJC envisages a similar backlash on the new proposed laws if they are enacted and, in particular, proposal 5.

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

The NZJC supports the inclusion of gender as an unlawful ground for discrimination

- k. *Do you consider that this terminology is appropriate?*

Yes. The NZJC recognises that people are subjected to discrimination based on their gender and the law should recognise that.

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

Yes. The NZJC believes all groups should be protected from discrimination. The inclusion of gender to the Act seems to fill a lacuna.

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

Unsure. The NZJC does not have a good enough understanding of the various cultural specific identities to comment on this.

¹⁰ <https://www.haaretz.com/protest-in-n-z-for-and-against-israel-1.5325445>

¹¹ <https://aijac.org.au/featured/nz-government-should-stand-up-to-mp-bringing-them-down/>

¹² <https://thespinoff.co.nz/politics/30-06-2021/everyones-confused-about-the-new-hate-speech-law-heres-what-it-actually-says/>



Other comments

7. "Hate speech" laws have not worked anywhere they have been implemented. They have backfired or been abused.
 - a. A 2018 study found that more open, liberal democracies have fewer terror attacks than countries with an "intermediate" level of political freedom¹³. Part of the reason for this was given as "political openness and the protection of civil liberties and the rule of law as assets that facilitate the minimization of terrorism through the airing and redress of grievances".
 - b. According to research conducted by Oxford Professor, Timothy Garton Ash, the introduction of "hate speech" laws in democratic countries have not been shown to reduce racism, discrimination, or attacks¹⁴.
 - c. There were hate speech laws in the Weimar Republic, including against "insulting religious communities"¹⁵. Hundreds of Nazi affiliates were prosecuted under these laws. Police also cited possible disruption to order as a reason to shut down meetings where Hitler was to speak. The National Socialist German Workers' (Nazi) Party was banned from speaking in all German states before it rose to power.

Some have made a case that the laws and prosecutions actually helped the Nazis. The gag of Hitler was accompanied with posters of him and the caption "One alone of 2000 million people of the world is forbidden to speak in Germany"; presenting him as a political martyr arguably helped rally more public support, in much the same way that cancelling speakers in New Zealand gave them publicity.

Just as the Nazis were persecuted by hate speech laws in the Weimar Republic, they went on to implement their own censorship laws. The Third Reich organised a massive propaganda campaign and excluded opposing views in the media, forced boycotts on Jewish businesses, and burnt books they disapproved of. In the words of Holocaust survivor, Aryeh Neier, "Those who call for censorship in the name of the oppressed ought to recognise it is never the oppressed who determine the bounds of censorship".

- d. Anjum Rahman has acknowledged the probability that "debate about the (hate speech) proposal will see the Muslim community subject to further abuse. There is a danger that people will be unhappy with the law and then they will blame

¹³ Magen, A: Fighting Terrorism: The Democracy Advantage. *The Journal of Democracy* 2018

¹⁴ <https://www.amazon.com/Free-Speech-Principles-Connected-World/dp/0300226942/>

¹⁵ <https://humanrights.gov.au/sites/default/files/document/publication/free-speech-report2014.pdf>



the Muslim community for it,”¹⁶

The NZJC shares this view and any prosecution that arises is likely to inflame tensions. Ideological supporters of the accused will see them as a martyr and - much like the case of Hitler in the Weimar Republic - it will likely fuel support.

8. “Hate speech” should be combated with better speech, not laws.

- a. Antisemitism in New Zealand reached record levels in 2020 and 2021 is set to be another record year for incidents. The NZJC has also seen a rise in the number and intensity of antisemitism expressed online that are not recorded as incidents by CSG.

Rather than seeking to punish those people who “stir up hate” online, for example, we would prefer to see their hateful ideas combatted and for leaders to show solidarity with the Jewish Community when antisemitism is expressed. This would include, for example:

- i. condemning an MP for engaging in a group that frequently posts Holocaust denial material and glorification of terror¹⁷;
- ii. condemning MPs who called for the end of the Jewish nation using a slogan of a terror group¹⁸;
- iii. stopping government funding of schools that demonise Jews and teach children to aspire to terror¹⁹;
- iv. become a member of the International Holocaust Remembrance Alliance (IHRA) and promote education about the Holocaust in New Zealand²⁰; and
- v. we made a number of other suggestions in our 16 Nov 2020 report to the New Zealand Police following their “Responding to Hate Crime” workshops.

9. The current threshold is high and should not be lowered.

- a. In 2014, the NZJC laid a complaint to the HRC about a man who yelled “bash the Jews; cut their f***n heads off” at an anti-Israel protest in Auckland, where there were also swastikas on placards and the burning of the Israeli flag.

¹⁶ <https://thespinoff.co.nz/politics/30-06-2021/everyones-confused-about-the-new-hate-speech-law-heres-what-it-actually-says/>

¹⁷ <https://israelinstitute.nz/2021/01/labour-mp-active-member-of-online-hate-group/>

¹⁸ <https://www.scoop.co.nz/stories/PO2105/S00169/green-party-mps-use-amas-slogan.htm>

¹⁹ <https://israelinstitute.nz/2021/06/mfat-has-decided-to-continue-funding-antisemitism-and-incitement-to-violence/>

²⁰ <https://www.holocaustremembrance.com/about-us/our-approach>



The HRC response was that the hateful words did not reach the threshold of S61 or S131 of the Human Rights Act because “The Commission does not consider that there is enough evidence to satisfy the second limb of section 61...” that requires the act(s) to be “likely to excite hostility against or bring into contempt any group of persons”.

The HRC further explained that “In reaching this conclusion the Commission has taken into account the importance of freedom of expression and the New Zealand Court’s endorsement of a high threshold for offences which challenge freedom expression and opinion”.

The NZJC has accepted this high threshold and agree that freedom of expression is a vital component of a well-functioning democracy. The NZJC also accepts that “bash the Jews; cut their f***n heads off”, in its context, was not immediately going to result in violence and that should be the threshold for incitement to violence.

In a discussion the NZJC had with Minister Little on 05 March 2021, he made a comment that he does not believe the threshold for any new “hate speech” law should be below threatening or inciting violence. We agree. However, the proposed laws appear to water down the high threshold that has been established in the current law and the NZJC does not agree that is productive for our society.

10. The currently high threshold should be articulated better.

- a. As above, the high threshold for an existing breach of the Human Rights Act is clearly incitement to violence. This should be made explicit, rather than the more vague wording of “likely to excite hostility against or bring into contempt any group of persons”.

If there are law changes to be made, the NZJC would advocate for an explicit strengthening of the current legislation to include “incite violence against”.

11. If there must be a law change, it should be explicit about the high threshold or at least caveat the restrictions.

- a. Given the existing threshold for S131 of the Human Rights Act is very high (see above), this should be made explicit with the words “inciting violence” inserted rather than a very ambiguous “stirring up hatred” clause as proposed.
- b. The NZJC considers that the repeal of S131 of the HRA may be sensible, especially given there have been no cases brought in decades. However, inserting provision for ‘insulting religion’ in the Crimes Act is a direct threat to



civil liberties and has a clear potential to be misused. Other jurisdictions have anticipated this to some degree and the NZJC would advocate for similar safeguards to be inserted into any new legislation if there is to be any. For example.

- i. Part 3 of the Public Order Act in the UK, which is referred to in the RCI report, has a separate section - Part 3A - that deals with Racial and Religious Hatred and does not include "abusive or insulting".
- ii. Section 29J of the same UK Act is explicit that "Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system;..."