

Supplementary analysis report: Incitement of Hatred – amending the Human Rights Act 1993 to include ground of religious belief

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing: Cabinet’s decision to introduce the Human Rights (Incitement on Ground of Religious Belief) Amendment Bill
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	18 November 2022
Problem Definition	
<ul style="list-style-type: none"> The Human Rights Act 1993 (HRA) currently prohibits the incitement of hatred (inciting speech) on the grounds of colour, race, or ethnic or national origins. However, people are experiencing hateful speech based on other grounds such as their religious belief, disability, and gender as well. There are no remedies under the HRA for inciting speech against those groups. 	
Executive Summary	
<ul style="list-style-type: none"> In 2019, following the 15 March terrorist attack on Christchurch masjidain, the Ministry of Justice (the Ministry) and the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (the Royal Commission) reviewed provisions of the HRA, particularly the two incitement provisions. Both the Ministry and the Royal Commission suggested changes to the incitement provisions. In December 2020, Cabinet agreed to six in-principle proposals to amend these provisions to better to prevent the incitement of hatred and discrimination (CAB-20-MIN-0507 refers). In May 2021, Cabinet approved a public discussion document and consultation process seeking feedback on these proposals (CAB-21-MIN-0163 refers). The legislative change discussed in this Supplementary Analysis Report (SAR) relates to one of these proposals. At the Minister of Justice’s direction, now confirmed by Cabinet, the scope of this SAR is limited to the question of the scope of the incitement provisions (i.e., which groups they should protect). On 16 November 2022, Cabinet Social Wellbeing Committee (SWC, with power to act) agreed to add the ground of religious belief to the incitement provisions. The current provisions protect against incitement on the grounds of colour, race, or ethnic or 	

national origins. Including religious belief reflects that faith-based groups are vulnerable to the harms of inciting speech. It also responds to a core part of the Royal Commission's recommendation 40.

- SWC also agreed to refer all further issues considered in the public consultation process to the Law Commission. This will include considering whether additional groups should be included in the protections of the incitement laws. In addition, the Law Commission will consider the question of how our law should deal with hate crime more generally.

Limitations and Constraints on Analysis

Scope of analysis

- The scope of the analysis in this SAR is limited to options which relate to the group coverage of the incitement provisions. No impact analysis is required for the decision to make a reference to the Law Commission and potential regulatory changes to be assessed by the Law Commission.

Limitations on evidence

- There is a lack of data on the occurrence of inciting speech (i.e., speech that has been found to, or would, meet the legal thresholds in the current incitement provisions). This makes it difficult to assess both the extent of the problem and the specific impacts of inciting speech. It also makes the impacts of these proposals difficult to quantify.
- The evidence for this analysis has been drawn from sources such as anecdotal evidence from engagement, discrimination data from the Human Rights Commission (HRC), hate crime data from Police, and key surveys and reports. Information from other countries and international organisations was also used. This data does not relate to inciting speech directly, but shows harmful speech and other discriminatory behaviour, which we have treated as proxy measures. While less robust than evidence of inciting speech, these proxy measures cumulatively support an assessment of the likelihood of inciting speech occurring against groups.

Limitations on consultation

- A public consultation process ran from 25 June to 6 August 2021 and included public submissions on a discussion document and focused face-to-face engagements. Some concerns were raised about the engagement including:
 - the consultation period was too short, and
 - the technical nature of the proposals meant they were not always well understood.

Responsible Manager(s) (completed by relevant manager)

Kathy Brightwell
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Ministry of Justice



17 November 2022

Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment: The Ministry of Justice Regulatory Impact Analysis Quality Assurance Panel has reviewed the SAR prepared by the Ministry of Justice and associated supporting material. The Panel has concluded that the SAR meets the Quality Assurance criteria. The proposal is a fairly simple change to add in a new ground to the Human Rights Act's incitement mechanism without disturbing how it works. The RIS does a good job of articulating the problem and overcomes a lack of directly applicable data by using a range of proxies to build a qualitative picture that supports change.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Current law

The current incitement provisions in the HRA aim to prevent racial disharmony

1. The HRA is New Zealand's main anti-discrimination law. Alongside its general non-discrimination rules, it contains provisions against the incitement of hatred, sections 61 and 131 (hereafter referred to as the 'incitement provisions').
2. These provisions apply to speech that stirs up hostility towards a group of people based on four grounds in section 21 of the HRA¹, namely colour, race, or ethnic or national origins. This behaviour can be damaging to society because of the influence on broader attitudes about a group, reinforcing intolerance, prejudice, and hatred.
3. The incitement provisions refer to those particular grounds because they were primarily enacted to fulfil New Zealand's international obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
4. Section 61 makes it unlawful to publish or distribute threatening, abusive, or insulting words likely to 'excite hostility against' or 'bring into contempt' any group on the grounds of colour, race, or ethnic or national origins. Section 61 is a civil provision, where complaints are handled by the HRC in the first instance, potentially followed by proceedings in the Human Rights Review Tribunal (Tribunal) and the High Court. The Tribunal can grant any remedy it sees fit, including making a restraining order against the defendant to prevent them from continuing or repeating the breach, and awarding damages of up to \$350,000.
5. Section 131 is a criminal offence, with a maximum penalty of three months' imprisonment or a fine of up to \$7,000. Section 131 makes it a criminal offence to publish matter or use words in a public place that are threatening, abusive, or insulting and which are likely to 'excite hostility or ill will against, or bring into contempt or ridicule', any groups on the ground of colour, race, or ethnic or national origins. Section 131 requires that there be an intention by the person to incite hostility, ill will, contempt, or ridicule. Section 132 requires the Attorney-General's consent for a prosecution under section 131.
6. In the leading case of *Wall v Fairfax New Zealand Ltd*, the High Court stated that, section 61 "applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised."² This sets a high threshold before a prohibition is triggered to account for the freedom of expression considerations.

¹ Section 21 of the HRA lists the prohibited grounds of discrimination, making it illegal for government agencies, private organisations or individuals to discriminate based on those grounds. The grounds are: sex; marital status; religious belief; ethical belief; colour; race; ethnic or national origins; disability; age; political opinion; employment status; family status; and sexual orientation.

² *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 47, at paragraph 56.

7. Harmful speech falls along a spectrum, from abuse and insults at one end, to speech like incitement, at the other most serious and extreme end. The incitement provisions do not address all types of harmful speech. Other laws protect individuals against different types of harmful speech, such as verbal abuse. This includes the Summary Offences Act 1981, the Harmful Digital Communications Act 2015 (HDCA), the Harassment Act 1997 and the Films, Videos, and Publications Classifications Act 1993.
8. In this SAR, 'inciting speech' is referring to speech that would meet the legal thresholds in sections 61 or 131. Other types of hateful speech below this legal threshold are referred to as 'harmful' speech throughout this report.

The Bill of Rights Act protects other human rights, including freedom of expression

9. Certain fundamental rights are also affirmed by the New Zealand Bill of Rights Act 1990 (NZBORA). This includes freedom of thought, conscience and religion (section 13), freedom of expression (section 14) and rights of minorities (section 20). In accordance with section 5, the rights and freedoms in NZBORA may only be subject to such reasonable limits in the law as can be justified in a free and democratic society.
10. Freedom of expression includes the freedom to seek, receive and impart information and opinions of any kind, in any form. The right to freedom of expression is also affirmed in international treaties like the International Covenant on Civil and Political Rights (ICCPR).

Context and relevant Government decisions

The Royal Commission and the Ministry of Justice reviews

11. Following the terror attacks on 15 March 2019 against Muslim communities in Christchurch, the then Minister of Justice asked the Ministry to review the incitement provisions in the HRA. The Ministry review found that the scope of sections 61 and 131 is too narrow in their application only to colour, race, ethnic or national origins.
12. The Government also established the Royal Commission to investigate and report on what had happened and to make recommendations. The Royal Commission recommended that the criminal incitement provision be amended, including to refer to religious affiliation.³

The Government has committed to improving social cohesion, with work across various workstreams and agencies

13. The Government accepted all of the Royal Commission's recommendations in principle. There is a whole-of-government response to them, which has resulted in a suite of policy reforms being progressed across government. The response includes work aiming to address harmful expressions, racism and discrimination to make Aotearoa a safe place for everybody, namely:

³ The full Royal Commission recommendation 40: "Repeal section 131 of the Human Rights Act 1993 and insert a provision in the Crimes Act 1961 for an offence of inciting racial or religious disharmony, based on an intent to stir up, maintain or normalise hatred, through threatening, abusive or insulting communication with protected characteristics that include religious affiliation."

- 13.1. the Ministry of Social Development's work on a social cohesion strategic and measurement framework
 - 13.2. work to counter violent extremism
 - 13.3. Police-led work around recording hate motivated crimes, including the establishment of Te Raranga, a victim-centric approach to hate crime, and
 - 13.4. the Department of Internal Affairs' work on reviewing the definition of 'objectionable' in the Films, Videos, Publications and Classification Act, as well as its Content Regulatory Review, which aims to create a new flexible regulatory framework to mitigate the harmful impacts of publicly communicated content.
14. This wider work is important because only amending the HRA in response to these issues will not address the harmful behaviour and speech that communities are experiencing. The amendment to extend the groups protected is a small element of strengthening social cohesion in Aotearoa but will not be sufficient to address all the complex and problematic behaviours that occur in a wide range of contexts.
 15. Labour's 2020 Election Manifesto committed to extending legal protections under the HRA for groups that experience harmful speech (including for reasons of religion, gender, disability, or sexual orientation).

Public consultation and the Interim Impact Summary

Proposals to amend the and incitement provisions were tested via public engagement

16. In December 2020, Cabinet agreed to in-principle proposals to amend the incitement provisions and to clarify that the general discrimination provisions in the HRA protect transgender and intersex people (CAB-20-MIN-0507 refers). In May 2021, Cabinet approved a public discussion document⁴ and consultation process seeking feedback on these proposals (CAB-21-MIN-0163 refers). The six proposals consulted on were to:
 - 16.1. Proposal One: extend the incitement provisions to protect more groups listed under the prohibited grounds of discrimination in the HRA
 - 16.2. Proposal Two: replace the existing criminal provision with a criminal offence in the Crimes Act 1961 that is clearer and more effective
 - 16.3. Proposal Three: increase the punishment for the criminal offence to better reflect its seriousness
 - 16.4. Proposal Four: change the language of the civil incitement provision to match the changes being made to the criminal provision
 - 16.5. Proposal Five: extend the civil provision in line with international instruments by including prohibition of incitement to discrimination against a group, and

⁴ <https://www.justice.govt.nz/assets/Documents/Publications/Incitement-Discussion-Document.pdf>

- 16.6. Proposal Six: amend the prohibited grounds of discrimination to clarify gender, gender identity, gender expression, sex characteristics and intersex status are included in the general discrimination protections.
17. To support the consultation process, an Interim Impact Summary (IIS) was released to inform the public consultation on the proposals (CAB-21-MIN-0163 refers).⁵
18. Public consultation and focused face to face engagements took place between June and August 2021.

Feedback from engagement and referral to the Law Commission

19. The Ministry received over 19,000 written submissions, most of which were a form submission based on a template distributed by the Free Speech Union and opposed the proposed changes.
20. Feedback in face-to-face engagement with affected communities overall supported strengthening the laws, in particular extending the groups protected. However, concerns were also raised. These included concerns about the impact on freedom of expression (for example, that there was a lack of clarity in definitions or that the threshold was too low and would capture the wrong behaviour), the effectiveness of criminal law to change behaviour, and that the threshold was too high (would not cover all harmful speech). These concerns may have been partly due to the complex nature of the current laws, with misunderstandings about the laws as well as the proposed changes and the impacts of the changes.
21. Te Tiriti o Waitangi requires meaningful engagement with Māori as te Tiriti partners. The Ministry invited a number of iwi and other Māori groups to engage on the proposals. Māori who engaged on the proposals generally gave substantive feedback, including on te Tiriti implications of the proposals. Further te Tiriti analysis is included below in the problem definition and in the options.
22. Summary reports of the submissions and face-to-face engagements are proposed to be released once decisions are announced.
23. On 16 November 2022, in light of the strength of the feedback in public submissions, SWC (with power to act) agreed to take a two stage approach. SWC agreed to add religious belief to the incitement provisions and refer all other issues relating to incitement and hate crime as well as changes to section 21 regarding gender and sex to the Law Commission for consideration. This would include a range of issues such as consideration of changes to the threshold for inciting speech and adding further groups to the incitement provisions.

What is the policy problem or opportunity?

Inciting speech: the policy problem

24. As noted above, the Ministry's review of the incitement provisions in the HRA found that the scope of sections 61 and 131 is too narrow in their application only to colour,

⁵ <https://www.justice.govt.nz/assets/Documents/Publications/IIS-Incitement-Redacted.pdf>

race, ethnic or national origins. The Royal Commission also recommended that the criminal incitement provision be amended to include religious belief.

25. The referral of incitement to the Law Commission means that the existing incitement provisions would remain unchanged in the interim. The Law Commission review is expected to take several years. Its recommendations would require subsequent consideration and the development of a government response. This SAR considers what changes should be made to the group coverage of the incitement provisions as a matter of urgency, ahead of the Law Commission completing its review.
26. Table 1 (Appendix) provides some statistical information about the individual groups discussed in this SAR.

The impacts of broader harmful speech

27. Academic literature has found that harmful speech causes psychological harm to individuals via a risk of destruction to one's self-esteem, and feelings of humiliation, isolation, and self-hatred.⁶ It also causes significant harm for the broader groups experiencing it.⁷ Victims of harmful speech may experience the loss of their right to feel safe, their right to freedom of movement and their right to freedom of expression as they become fearful to go out in public.⁸
28. At the extreme end, harmful speech can be a precursor to violence.⁹ In Aotearoa New Zealand, the most salient example is the terrorist who published the 'Christchurch manifesto' immediately before the murder of 51 people and attempted murder of 40 people on March 15 2019 in Christchurch. The manifesto was described by the Chief Censor as a terrorist promotional document and has been banned under the Films, Videos and Publications Classification Act in New Zealand.¹⁰ The manifesto and the

⁶ Matsuda, M. J. (2018). *Words that wound: Critical race theory, assaultive speech, and the first amendment*. Routledge; Gelber, K., & McNamara, L. (2016). *Evidencing the harms of hate speech*. *Social Identities*, 22(3), 324-341.

⁷ Gelber, K., & McNamara, L. (2016). *Evidencing the harms of hate speech*. *Social Identities*, 22(3), 324-341.

⁸ Gelber, K., & McNamara, L. (2016). *Evidencing the harms of hate speech*. *Social Identities*, 22(3), 324-341; Matsuda, M. J. (2018). *Words that wound: Critical race theory, assaultive speech, and the first amendment*. Routledge, p. 50.; Waldron, J. (2012). *The harm in hate speech*. Harvard University Press.

⁹ United Nations Special Rapporteur on minority issues, Rita Izsák, 2015 report: "Although not all hateful messages result in actual hate crimes, hate crimes rarely occur without prior stigmatization and dehumanization of targeted groups and incitement to hate incidents fuelled by religious or racial bias." Müller, K. & Schwarz, C. (2021). *Fanning the Flames of Hate: Social Media and Hate Crime*. *Journal of the European Economic Association*. 19(4), 2131-2167; Williams, M. L. and others. (2020) *Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime*. *British Journal of Criminology*, 60(1); Evolvi, G. (2018) *Hate in a Tweet: Exploring Internet-Based Islamophobic Discourses*. *Religions*. 9(10); Vitullo, A. (2021) *The Online Intersection among Islamophobia, Populism, and Hate Speech: An Italian Perspective*. *Journal of Religion, Media, and Digital Culture*, 10, 95-114; Benesch, S. (2014). *Defining and diminishing hate speech*; State of the World's Minorities and Indigenous Peoples 2014 Report. <https://www.minorityrights.org/wp-content/uploads/old-site-downloads/mrg-state-of-the-worlds-minorities-2014-chapter02.pdf>.

¹⁰ Smith, A. (22/08/2019) Accused Christchurch mosque shooter's manifesto printed, distributed by neo-Nazi. RNZ. <https://www.rnz.co.nz/news/national/397162/accused-christchurch-mosque-shooter-s-manifesto-printed-distributed-by-neo-nazi>; RNZ (13/08/2019) Accused shooter's manifesto 'crosses the line' - chief censor. <https://www.rnz.co.nz/news/national/396578/accused-shooter-s-manifesto-crosses-the-line-chief-censor>

terrorist's actions appear to be influential in encouraging acts of terrorism and violence by others.¹¹

29. The Royal Commission looked at the effects of harmful speech and inciting speech, and the communications by the terrorist in its analysis of the incitement provisions and recommended strengthening the criminal incitement provision.

Experiential and qualitative data indicates the likelihood of inciting speech against groups

30. There is limited quantitative data on the prevalence of or the impacts of inciting speech in New Zealand. Prosecutions under the criminal provision, or claims under the civil provision, are rare.¹²
31. However, experiential, and qualitative information from impacted communities about broader harmful speech and general discrimination is available from the 2021 engagement. There is also available data about similar behaviours, including hate crime data from New Zealand Police and discrimination data from the HRC (see Appendix), as well as international research.

Online hateful speech

32. In Netsafe's 2018 survey¹³ on the impact of online harmful speech religion was the most frequent perceived reason for being personally targeted with online harmful speech. Online hate was also directed more often towards minority ethnic groups, particularly Asians, but also Māori, and Pacific participants, disabled people, and Rainbow respondents.
33. A separate tracker of online harmful speech found that this speech mainly targets people based on their ethnicity, then nationality, and class. These factors are followed by religion, sexual orientation as well as gender and disability.¹⁴

Information from the Human Rights Commission and Police indicates the groups experiencing harmful behaviours

34. Complaints to the HRC (refer to Table 2 and 3 in the Appendix) indicate that, following race and ethnicity, disability and sex (including gender, gender expression and sex characteristics) are the grounds with the next highest number of complaints for discrimination made (as at June 2022). Complaints based on religion constituted 3% of all complaints in 2019/20 and 8% in 2018/19. While the incidents reported to the HRC would generally not meet the thresholds of inciting speech, this data indicates that more groups may be at risk of harm from inciting speech.
35. The National Intelligence Application, a database used by Police, flags 'protected characteristics' on hate crime reports (refer to Diagram 1 in the Appendix). This data shows that in the period 1 January 2021 to 21 June 2022, race/ethnicity was the

¹¹ For example, see <http://www.theguardian.com/world/2019/aug/11/norway-mosque-attack-suspect-may-have-been-inspired-by-christchurch-and-el-paso-shootings>

¹² For the period from July 2016 to March 2022, Police received 70 reports for offences under Section 131 Human Rights Act 1993 for 'Inciting Racial Disharmony'. Of these, there were 19 proceedings (which includes prosecutions and other forms of proceedings such as warnings) against offenders for such offences. Between July 2018 and May 2022, there were 10 prosecutions under section 131. Of these, 4 resulted in convictions with the most severe sentence being community work.

¹³ Netsafe, (2018) *Online Hate Speech A survey on personal experiences and exposure among adult New Zealanders*, <http://www.netsafe.org.nz/wp-content/uploads/2019/11/onlinehatespeechsurvey-2018.pdf>

¹⁴ Ibid.

characteristic that predominantly targeted (80 per cent). This is consistent with findings (of similar analysis) in other jurisdictions, such as the United Kingdom, according to the New Zealand Police.¹⁵

36. Religion is the second highest flagged protected characteristic, followed by sexual orientation, gender identity, disability and age. Race/ethnicity with religion/faith are the highest combination of characteristics, followed by race/ethnicity with sexual orientation, and race/ethnicity with gender identity. This indicates that hate crime is directed across intersecting identities. While hate crime does not constitute inciting speech, it indicates the groups who may be at risk.

Experiences expressed by Māori communities in 2021 engagement

37. The summary of engagement reported that the racist behaviour Māori experience makes them feel unsafe, negatively impacting their wellbeing, limiting their choices, and inhibiting their participation in society. Participants said that they suppress or limit the way they express themselves outside of their homes or communities, reporting that they felt unsafe in the wider community due to daily racism, discrimination and hatred. Other recent research reflects these impacts of racism for Māori.¹⁶
38. Tangata takatāpui (Māori with diverse sexualities, gender and sex characteristics) focus groups noted the exclusion of gender identity from the HRA as an issue. Some submissions from Māori also suggested that tangata whenua should be expressly protected in the HRA, to reflect that Māori are not just an ethnic group but the indigenous people of Aotearoa and that incitement or discrimination they experience has a different impact, and to better signal the Government's commitment to te Tiriti.

Experiences expressed by religious communities in 2021 engagement, and other data

39. Faith-based participants in the engagement reported that harmful speech and its impact are unlikely to be understood by people who haven't experienced it. They said they experience intimidating hate and discrimination in several different settings, including at school, work, and via social media platforms. Social media platforms were identified as the main place where discrimination and racism are happening. Threatening comments made online make recipients feel intimidated and can lead to them fearing for the safety of themselves and their family.
40. The summary of engagement noted that Christianity was introduced during colonisation and remains the dominant religion, and that Muslim people experience specific issues and discrimination. In engagements about social cohesion, Muslim people reported that being able to follow Islam without being discriminated or insulted is crucial. For example, for people to feel safe while wearing hijab, for employers to allow time to prayer during workdays, for children to not be bullied for being Muslim, and for media to normalise Islam rather than vilifying the Muslim community.
41. As noted above, religion was the most frequent perceived reason for being personally targeted with online harmful speech in the 2018 Netsafe survey. Police hate crime

¹⁵ Official statistics of hate crime in England and Wales, 2020 to 2021, show that the majority of hate crimes were racially motivated (74 per cent). These statistics also show rises in hate crime towards people on the grounds of disability, sexual orientation and transgender. See <https://www.gov.uk/government/statistics/hate-crime-england-and-wales-2020-to-2021/hate-crime-england-and-wales-2020-to-2021>.

¹⁶ See, for example: Smith, C., Tinirau, R., Rattray-Te Mana, H., Tawaroa, M., Moewaka Barnes, H., Cormack, D., and Fitzgerald, E. (2021) *Whakatika: A survey of Māori experiences of racism*. Te Atawhai o Te Ao Charitable Trust: Whanganui.

reports from 1 January 2021 to 21 June 2022 show religion or faith characteristics attributed to 8 per cent of these incidents (see Appendix).

42. Research cited by the Royal Commission also found a positive association between online hate speech targeting race and religion with racially and religiously aggravated offences in London¹⁷ which further emphasises the link between online and offline harm. Other research has also explored the links between Islamophobic hate speech online and offline.¹⁸

Experiences expressed by migrant and former refugee communities in 2021 engagement

43. Migrant and former refugee communities also reported experiences of discrimination, outlining that they experience discrimination based on the colour of their skin, language, accent, religion, and ethnicity. The engagement summary report outlines their experiences of bullying, mocking, labelling, stereotyping and, in extreme cases, violence. Participants said, in recent times, there was a persistence of negative attitudes such as racism, xenophobia, prejudice, and intolerance at workplaces when engaging and accessing public services.

Experiences expressed by Rainbow communities in the 2021 engagement, and other data

44. Members of Rainbow communities expressed experiences of discrimination and hatred in several aspects of their lives in the engagement. For transgender and intersex people, in particular, participants expressed that many experience harmful speech and threats of violence.
45. Australian research has also found that 60 per cent of Rainbow participants had experienced homophobic abuse, and 1 in 5 had experienced physical abuse over a 12-month period.¹⁹ As a result of these prevalent experiences of hatred, many Australian survey respondents reported hiding their sexual orientation or gender identity, and in some cases withdrawing from public spaces, out of concerns for their personal safety.²⁰
46. The recent Human Rights Review Tribunal's decision in *Hoban v Attorney-General*²¹ also highlights that the incitement provisions do not currently protect certain characteristics from potentially inciting speech. In 2017, an Auckland newspaper published a report of a sermon delivered by a pastor in which he called for gay people to be shot if they married. The decision states Mr Hoban, a gay man, was horrified by

¹⁷ Williams, M. L., and others. (2020) *Hate in the Machine: Anti-Black and Anti-Muslim Social Media Posts as Predictors of Offline Racially and Religiously Aggravated Crime*. *British Journal of Criminology*, 60(1).

¹⁸ Evolvi, G. (2018) *Hate in a Tweet: Exploring Internet-Based Islamophobic Discourses*. *Religions*. 9(10); Vitullo, A. (2021) *The Online Intersection among Islamophobia, Populism, and Hate Speech: An Italian Perspective*. *Journal of Religion, Media, and Digital Culture*, 10, 95-114

¹⁹ Australian Human Rights Commission. (2015). *Face the facts: Lesbian, gay, bisexual, trans and intersex people*. <https://www.humanrights.gov.au/our-work/education/face-facts-lesbian-gay-bisexual-trans-and-intersex-people>

²⁰ Human Rights Law Centre. (2018). *End the hate: Responding to prejudice motivated speech and violence against the LGBTI community*. https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5b972a400e2e723077a23ad1/1536633442327/End_Hate_Report_HRLC_September_2018.pdf

²¹ [2022 NZHRRT 16], under appeal as at June 2022.

this and left feeling threatened, unprotected, undermined and unsafe when no action was taken by Police or the HRC²² because of the narrow scope of section 61 and 131.

Experiences of women in other data

47. The 2021 engagements did not explicitly report on women's experiences of harmful speech and discrimination on the basis of sex or gender, though participants in the groups included women. Literature indicates that women also experience harm in these areas, including online.²³
48. Australian research finds that gendered harmful speech against women is an everyday occurrence, and the absence of prohibition of hate speech has the impact of perpetuating gender-based violence. For example, by contributing to strict gender norms and silencing women.²⁴

Experiences expressed by disabled communities in 2021 engagement

49. The summary of engagement with disabled people reported ongoing mistreatment and stereotypes portraying them as dependent, uneducable, unemployable, and a burden to society. Participants in the engagement conveyed that this leaves people open to discrimination and harmful speech on regular basis. Examples include being reduced to their disability, being intimidated, public humiliation, slurs and insults, and physical violence. The report noted that participants expressed rarely feeling safe and secure in public, at home, or online. Disability advocates reported facing abuse and receiving death threats online from strangers but were informed by Police that nothing could be done.

Misalignment with other domestic legislation, other jurisdictions and international treaties

50. The existing provisions do not align with other related legislation in New Zealand. Other New Zealand laws that seek to protect groups from similar harms do so on broader grounds:
 - 50.1. Harmful Digital Communications Act 2015 – provides remedies for harm to an individual from harmful digital communications. It sets out communication principles that guide how to communicate online, and in case of a breach determines whether the civil remedies are available. One of these principles is that a communication should not denigrate an individual by reason of colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability.
 - 50.2. Sentencing Act 2002 – in sentencing, the court must consider as an aggravating factor if the offender committed the offence because of hostility towards a group

²² The HRC notes that Mr Hoban was represented by the Director of Human Rights Proceedings in the Tribunal, so some action was taken by HRC in this respect (the HRC also appeared as an intervener). However, HRC was unable to take action by way of dispute resolution services under the HRA because of s 61's limited scope.

²³ Amnesty International Aotearoa New Zealand (2017) *Amnesty reveals alarming impact of online abuse against women*. www.amnesty.org.nz/amnesty-reveals-alarming-impact-online-abuse-against-women; Sergio Andrés Castaño-Pulgarín, Natalia Suárez-Betancur, Luz Magnolia Tilano Vega, Harvey Mauricio Herrera López. (2021) *Internet, social media and online hate speech. Systematic review*. Aggression and Violent Behavior: Volume 58. <https://doi.org/10.1016/j.avb.2021.101608>.

²⁴ D'Souza, T., Griffin, L., Shackleton, N., & Walt, D. (2018). *Harming women with words: The failure of Australian law to prohibit gendered hate speech*. The University of New South Wales Law Journal, 41(3), 939–976. <https://search.informit.org/doi/10.3316/informit.913418274589282>

with an enduring characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability.

51. The current scope of the provisions is also out of line with other jurisdictions as demonstrated in Table 4 in the Appendix.
52. Article 20(2) of the International Covenant on Civil and Political Rights (ICCPR) states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. While New Zealand currently has a reservation in place in relation to this article, sections 61 and 131 do currently not align with the ICCPR because they do not prohibit incitement of hostility on the basis of religious belief. The United Nations Special Rapporteur on minority issues is also referenced above, linking hate crime, harmful speech and discrimination.

What objectives are sought in relation to the policy problems?

53. The objective sought is to update the incitement provisions in the HRA to reflect the targets of this extreme speech and help reduce its harmful and detrimental effect on social cohesion in Aotearoa New Zealand.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

54. The options will be considered against the criteria of:

Effectiveness	<ul style="list-style-type: none"> How well does the option protect the people and groups who are most subjected to the incitement of hatred?
Proportionality	<ul style="list-style-type: none"> Is the option proportionate to the impacts on competing human rights, including freedom of expression?
Feasibility	<ul style="list-style-type: none"> Is the option able to be implemented easily?
Consistency	<ul style="list-style-type: none"> How well does the option align with other relevant legislation that has relevant objectives? How well does the option meet our international human rights obligations? How well does the option align with other initiatives to improve social cohesion? How well does the option uphold obligations under the Tiriti?

What scope will options be considered within?

- 55. The Law Commission will consider all aspects of hate motivated offending and behaviour, including the incitement of hatred and which groups should be covered. The intention of the current proposal is to provide an interim response to the problems identified with the incitement provisions discussed above, while the Law Commission carries out a review.
- 56. This means the scope of our analysis relates only to options to amend the HRA to extend the protected grounds in the existing incitement provisions.
- 57. This scope aligns with Proposal one consulted on in the 2021 discussion document – to extend the incitement provisions to protect more groups listed under the prohibited grounds of discrimination in the HRA. The document did not propose specific groups but asked for submitters’ views on which groups should be protected.

What options are being considered?

Option One – Status Quo / counterfactual

- 58. The status quo approach is to retain the current wording in sections 61 and section 131 of the HRA, covering inciting speech aimed at a group “on the ground of the colour, race, or ethnic or national origins of that group of persons.”
- 59. Submissions and face-to-face engagements expressed that there have been increasing levels of hatred against specific groups, including those outlined above, and there is little understanding, support or protection for people experiencing harmful speech. This situation is dynamic but could worsen if no government action is taken.

Option Two – Extending to religious belief only (Cabinet’s preferred approach)

60. Option Two is to amend sections 61 and section 131 of the Human Rights Act to include religious belief. This option was agreed by SWC on 16 November 2022.
61. This option would achieve the objective to some extent by covering one of the population groups most at risk of experiencing the harms of inciting speech (as shown above). It is likely that there is a significant overlap with the existing ethnicity based groups, however, as demonstrated by New Zealand Police’s hate crime data (see Diagram 1 in the Appendix).
62. The option would progress a core element of the Royal Commission’s recommendation 40. The amended provisions would cover inciting speech against our Muslim communities such as those on and around 15 March 2019. The Royal Commission stated that under the existing provisions affiliation with, for example Judaism and Sikhism, would be covered as these are considered to fall under ‘ethnicity’, but affiliation with other religions such as Christianity or Islam would not. The Royal Commission also said the current realities of Islamophobia and the link between hate speech and terrorism suggest the inclusion of religion to the incitement laws.
63. The change to include religious belief in the incitement provisions is a justified limit on freedom of expression. To justify encroaching on the right to freedom of expression, there must be demonstrable need for protection and the response must be a proportionate one. [REDACTED]
[REDACTED]
[REDACTED] redacted under 9(2)(h) of the OIA - maintain legal professional privilege
64. The encroachment on freedom of expression would be limited to one additional section 21 ground and there is a demonstrable case for adding this ground. Expanding the provision to cover groups based on religious belief identified as being subjected to such harmful speech therefore imposes a justifiable reasonable limit on others’ freedom of expression. At the same time, the change would support freedom of expression for those protected by ensuring they feel safe to participate in public life.
65. There was support for the inclusion of religious belief in submissions received in 2021. Even though there were some concerns about freedom of expression and freedom of religion, many religious organisations supported this change, including the Wellington Interfaith Council, the Federation of Islamic Associations of New Zealand, the New Zealand Catholic Education Council, the Islamic Women’s Council of New Zealand, the New Zealand Jewish Council and the Sikh Council of New Zealand.
66. Groups falling under the category of religious belief are easily identified making implementation of this option easy.
67. However, this option would not protect other vulnerable groups, leaving a gap in the protection of their human rights until such time that the Law Commission might recommend the inclusion of further groups and the Government progresses such recommendation. Such changes would be several years away. As a result, this option would have an uneven impact on social cohesion leaving some New Zealanders feel unprotected.

68. This option improves our alignment with the International Covenant on Civil and Political Rights, which, in its Article 20(2), requires states to prohibit 'any advocacy of national, racial *or religious* hatred that constitutes incitement to discrimination, hostility or violence' (emphasis added). However, it does not align with other international obligations, such as to provide persons with disabilities or LGBTTTQIA+ persons protection from harm.
69. Other New Zealand legislation and countries also include protections of religious groups but commonly extend such protections to further groups as well.
70. The extension would strengthen protection for Māori experiencing inciting speech when it intersects with their religion. However, persons like tangata takatāpui and tangata whaikaha (Māori with lived experience of disability) would not be protected in their intersectionality.

Option Three – Extending to religious belief, disability, sex (which includes gender) and sexual orientation (Ministry's preferred approach)

71. Option Three is to amend sections 61 and section 131 of the Human Rights Act to include religious belief, sex, disability and sexual orientation. The ground of sex is likely to be interpreted to include gender, so this would likely cover gender-based incitement such as incitement against transgender people, as well. However, this coverage is not as clear as might be desired.
72. The coverage regarding the ground of sex could be made clearer by including a separate ground of gender (including gender identity and expression) as well as expressly including variations of sex characteristics (or intersex) in the incitement provisions. These new sex and gender related concepts could also be further defined in the legislation. However, the option of expressly adding gender and amending or defining the grounds in section 21 is out of scope.
73. Option Three would achieve the objective most effectively. It prioritises the protection of those groups most at risk of experiencing the harms of inciting speech. This is clear from the data described above with the level of increasing harmful speech and hate crime on the basis of religion, sex, gender, sexual orientation and disability. This extension would also reflect that inciting speech can be targeted on multiple grounds, such as ethnicity and sex, or disability and sex.
74. This change is a justified limitation of freedom of expression for the proposed grounds of religious belief, disability and sexual orientation. From the lived experiences and anecdotal evidence of those subjected to harmful speech and hate crime, there is a demonstrable case for adding these groups to the incitement provisions. This means that the option is proportionate in the impact on others' rights and freedoms. Expanding the provision to cover groups identified as being subjected to such harmful speech imposes a justifiable limit on others' freedom of expression.
75. For the ground of sex, concerns could be raised that a lack of clarity around the notion of 'sex' could lead to a lack of clarity about what speech the provision would cover. This would raise NZBORA concerns particularly for the criminal provision in section 131 of the HRA, because any sanction under the criminal law is more serious.
76. At the same time, the changes would support the freedom of expression for more communities by ensuring they feel safe to participate in public life.
77. In the 2021 engagements, there was support in some public submissions and focused engagement for the extension of the protections for groups to a wider selection of those represented in section 21. This support included groups with expertise in human rights

(subject to caveats or suggested changes), and groups representing the affected communities.

78. The option can be implemented easily because it would include characteristics already included in section 21. These are generally familiar concepts to regulators as prohibitions against discriminating against these groups have been longstanding.
79. The changes would bring the groups protected by the incitement provisions into line with comparable regimes that protect specific characteristics: the HDCA and the Sentencing Act 2002. It would also mean consistency with the International Covenant on Civil and Political Rights, and support the principles of the Convention on the Rights of Persons with Disabilities (UNCRPD), and the Yogyakarta Principles plus 10 (YP+10) related to the rights of the Rainbow community and other conventions requiring the state to protect its people from harm.
80. This option would align with other work across government to address harmful expressions, racism and discrimination and strengthen our social cohesion. For example, the Social Cohesion Government Work Programme has an outcome based on connectedness and belonging, aiming for people to feel a sense of belonging to a community which includes those based on identity, including ethnicity, disability, sexual orientation and faith.
81. The extension from these amendments would strengthen protection for Māori experiencing inciting speech on intersecting grounds, such as for tangata takatāpui and tangata whaikaha.

Option Four – Extending to all groups and characteristics protected from discrimination in section 21 of the HRA, except for political opinion

82. Option Four is to add all remaining section 21 grounds to the two incitement provisions in the HRA: sex; marital status; religious belief; ethical belief; disability, age; employment status; family status and sexual orientation.
83. Extending protection to all these groups avoids creating a so-called hierarchy of hatred, or the perception that some groups reflected in the protected grounds are more worthy of protection than others.
84. In its submission during the 2021 engagement, the HRC observed that a narrow scope is out of step with developments in human rights law domestically and internationally and recommended all section 21 grounds be included in the civil provision (except for political option – see section below on options that were excluded).²⁶
85. The option would be somewhat effective because it includes some of the groups identified as being subjected to harmful speech and hate crime. However, it may not be proportionate because there is a less demonstrable case for some additional groups to have protection from incitement of hatred. Based on the current data, there is no clear indication of sufficient levels of inciting speech based on the grounds of marital status, ethical belief, age, employment status or family status.
86. This would be inconsistent with other domestic legislation including the HDCA and the Sentencing Act. It would also make Aotearoa New Zealand legislation out of step with prohibitions against inciting speech in other jurisdictions (Table 4 in the Appendix).

²⁶ *Submission of the Human Rights Commission to the Ministry of Justice - Proposals against incitement of hatred and discrimination, August 2021. However, in March 2022, the HRC recommended the scope extension for faith groups, disabled people, women and the Rainbow community as the highest priority.*

87. Like option 3, this option would align with other work across the government to address harmful expressions, racism and discrimination and strengthen our social cohesion. It would also increase protection for Māori from an intersectionality perspective.

Options that were discounted

Referring to tangata whenua

88. Māori are protected under the grounds of race and ethnicity of the incitement and discrimination provisions. However, some submitters suggested that tangata whenua could be more expressly protected.
89. We considered whether the incitement provisions should also expressly include tangata whenua. However, we did not include this in any of the options primarily because of divergences in perspectives on this point among Māori submitters. In addition, including tangata whenua solely in the incitement provisions, which are a small component of the HRA as a whole, would be a piecemeal approach that would create a disconnect with the remainder of the HRA.
90. More broadly, integrating a te ao Māori perspective into the HRA, which is a key part of the Aotearoa New Zealand human rights regime, is beyond of the scope of these amendments. For example, Māori have specific tikanga-based approaches to restoring balance among communities or in society which are currently not reflected in the legislation. Such an integration would require reshaping the legislation in a fundamental way and require significant care and consultation.
91. However, the Law Commission would include te ao Māori and te Tiriti obligations in its review and carry out appropriate engagement with Māori. The adequate protection (Article 2) of tangata whenua may be considered as part of the Commission's review.

Including 'political opinion' as a protected ground

92. Including political opinion as a ground was not considered a feasible option. Amnesty International Aotearoa New Zealand supported the inclusion of political opinion but suggested that this should not inhibit political discussion, criticism and critique.²⁷
93. The HRC noted in its submission that 'political opinion' should be excluded due to the lack of clarity about what the term means and applies to, and because of the direct correlation between opinion and freedom of expression.²⁸
94. Including political opinion would be particularly problematic as it may risk political debate being captured and the line may be blurred between what is defined as political opinion and other grounds. Submitters did not make any strong case for this characteristic requiring protection, with most arguing against its inclusion.

²⁷ Submission of Amnesty International Aotearoa New Zealand to the Ministry of Justice on Proposals Against Incitement of Hatred and Discrimination Consultation, August 2021.

²⁸ *Submission of the Human Rights Commission to the Ministry of Justice - Proposals against incitement of hatred and discrimination*, August 2021.

How do the options compare to the status quo/counterfactual?

	Option One – Status Quo	Option Two – Extending to religious belief only (Cabinet’s preferred option)	Option Three – Extending to religious belief, disability, sex, and sexual orientation (Ministry’s preferred option)	Option Four - Extending to all groups covered by s21, except political opinion
Effectiveness	0 Race/ethnicity are the most likely grounds for inciting hatred No coverage provided for other groups who are experiencing increasing levels of harmful speech Detrimental to social cohesion	+	++	+
Proportionality	0 Rights and freedoms of the groups if subjected to significant levels of inciting speech are detrimentally impacted Countervailing freedom of expression of those inciting hatred is arguably not justified	+	+	-
Feasibility	0 Clear groups covered, as currently defined under section 21 anti-discrimination provisions	+	+	-
Consistency	0 Not consistent with the HDCA, Sentencing Act or ICCPR Consistent with 1965 version of CERD	+	++	-
Overall assessment	0	+	++	-

Key for qualitative judgements:	
++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
--	much worse than doing nothing/the status quo/counterfactual

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Option Three is the Ministry's preferred approach to extend the groups covered under the civil and criminal incitement provision in the HRA

95. Option Three is the Ministry of Justice's preferred approach because religious belief, sex (currently interpreted as including gender), sexual orientation and disability are the characteristics that have the most demonstrable need for protection from inciting speech. Data and anecdotal evidence indicate that these groups have the highest rates of discrimination and harmful speech. Option Three would therefore protect the people and groups who are likely to be most subjected to the incitement of hatred and hostility.
96. Option Two goes some way to protect more people from harms of incitement but does not cover all groups identified as needing protection. The consideration of a further extension by the Law Commission would take several years before another law change to cover more vulnerable groups could come into effect.
97. When contrasted with Option Four, Option Three is also more proportionate in the impact on freedom of expression. Any extension must include groups who are at most risk as a result of the divisive harms of inciting speech, and based on data there is currently not a demonstrable case for characteristics beyond those in Option Three to be added.
98. Both Options Two and Three engage the right to freedom of expression, however both limit this right in order to protect groups which are subject to the harmful effects of inciting speech. Option Three could raise some concerns due to a lack of clarity what 'sex' means in today's society, which could mean that it is not clear to everybody what kind of speech could be incitement. This is a concern particularly for the criminal provision because it is a more serious sanction. Addressing this issue through changes to section 21 is out of scope.
99. Option Three supports more vulnerable communities' right to freedom of expression by enabling them to feel safer and participate more in public life.
100. Option Three (as well as Option Two) is feasible to implement, reflecting current frameworks and other organisations' enforcement practices.
101. Option Three best aligns with other domestic legislation and work programmes such as work supporting social cohesion, as well as New Zealand's international obligations. Option Two does this to a lesser extent.
102. Option Three also supports obligations for the protection of Māori under Article 3 of te Tiriti with Option Two doing so to a lesser and Option Four to a larger degree.

What are the marginal costs and benefits of Options Two (Cabinet’s preferred approach) and Option Three (Ministry’s preferred approach)?

Affected parties (<i>identify</i>)	Comment: nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks	Impact for Option 2	Impact for Option Three
Additional costs of proposed approach, compared to taking no action			
<p>Regulated parties: Persons charged with using inciting speech or against whom a complaint is lodged with the HRC</p>	<p>Persons charged in relation to inciting speech against the additional groups included in the criminal offence would face the legal costs associated with defending charges and appearing in court proceedings. Costs will vary from case to case depending on the length and complexity of the proceedings. Legal aid may be available.</p> <p>There would be costs associated with Human Rights Review Tribunal proceedings under the civil provision and appeals to the High Court (for example, time off work, court fees etc).</p> <p>Dispute resolution services by the Human Rights Commission (HRC) are free of charge.</p>	<p>The number of additional proceedings is likely to be low. The cost for an individual involved may be significant if a case is taken to the Tribunal. Impacts for criminal cases are likely to be low as the penalty is not changed and there will often be other, more severe, charges.</p>	<p>Same as for Option Two</p>

Affected parties (<i>identify</i>)	Comment: nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks	Impact for Option Two	Impact for Option Three
Regulators			
Human Rights Commission	<p>The number of complaints under section 61 has been low in recent years (between 35 and 78 annually for 2014-2021) which is a very small percentage of the HRC's overall complaints and inquiries received.</p> <p>The HRC might receive additional complaints due to the additional grounds covered which may lead to additional cost.</p> <p>It is difficult to estimate what these costs would be given that data available generally refers to wider harmful speech or discrimination and complaints often don't meet the threshold of incitement. Changes to the HRA were one of the areas identified to support the HRC's baseline increase in Budget 2022.</p>	The HRC has received additional cost pressure funding as part of Budget 2022. Given this additional funding, the HRC could absorb any additional costs from within baselines.	Same as for Option Two
Human Rights Review Tribunal	<p>Increased number of cases to be administered and adjudicated due to amendments to section 61. The number of cases expected to proceed to the Tribunal is low.</p> <p>The Tribunal receives approximately 50 new registrations per year. The amendments are unlikely to significantly add to the Tribunal's workload.</p>	Low	Low
Police	<p>New Zealand Police does not expect significant cost increases through prosecutions due to expected small numbers. However, Police advises that there would be associated costs for managing an overall increase in complaints around hateful behaviour and speech which are hard to quantify at this stage. It is expected that they would be covered from baselines.</p> <p>There would be no changes to the criminal threshold for prosecution in these proposals, while there were in the original proposals. The amendment might raise public expectations beyond the narrow scope of the change and there could be negative impact on trust and confidence in Police as the offence provisions remain the same.</p>	Low	Low

Affected parties (<i>identify</i>)	Comment: nature of cost or benefit (e.g., ongoing, one-off), evidence and assumption (e.g., compliance rates), risks	Impact for Option Two	Impact for Option Three
Regulators			
Ministry of Justice - judicial cost (criminal and civil courts, and Human Rights Review Tribunal) - legal aid ICT changes	<p>Costs include court proceedings and legal aid. We anticipate the number of cases per year would be very low due to the high threshold and the low penalty (unlikely to be more than 5).</p> <p>The impacts of the regulatory changes are expected to be minor as the number of cases would be a small proportion of the overall court volume. In most cases, prosecutions would be likely to be additional to charges for other offences under the current law, which means there might not be significant additional cost.</p> <p>There will not be any jury proceedings as the penalty will not be changed.</p> <p>There will be minor legal aid cost for civil and criminal proceedings.</p>	Impact for: <ul style="list-style-type: none"> • High Court: low • District Court: low • Human Rights Review Tribunal: low • Legal aid: low 	Same as for option Two
Wider Government			
Crown Law Prosecution Services	<p>There might be an increase in some activities that are funded by the Crown Law Prosecution Services with the widening of the scope of the offence to include additional groups.</p> <p>There might be increased costs associated with assessing a request for Attorney-General consent to prosecute, as well as costs associated with the number of appeals to the High Court from Judge-alone prosecutions.</p> <p>The overall impact for Crown Law Prosecution Services is expected to be low as the number of cases will continue to be small and because of the narrow ambit of these changes. This would be able to be absorbed within current Crown Law baselines.</p>	Low	Low
Department of Corrections	To date, prosecutions under section 131 have never led to an imprisonment and it is expected that this will remain the case while the current penalty remains in place. The overall impact on Corrections is expected to be low.	Low	Low
Total Monetised Cost		Low	Low
Non-monetised costs		Low	Low

Expected benefits of proposed approach, compared to taking no action			
		Option Two	Option Three
Targets of inciting speech and discrimination, wider public	<p>A larger proportion of New Zealand's population would be covered by the legal protections against inciting speech as those based on more grounds will be covered. This means they would have access to legal remedies.</p> <p>The changes should reinforce New Zealand's commitment to human rights.</p> <p>The changes could contribute to making New Zealand safer, thereby strengthening our diversity. This would be of benefit to society as a whole.</p> <p>For Option Three, the benefits will cover more groups, therefore having a bigger impact.</p>	Low-medium	Medium
Regulated parties (persons using speech)	<p>The incitement laws would apply to similar behaviour against more vulnerable groups. This would lead to more consistency and clarity about the limits on harmful expressions. For Option Three, while all vulnerable groups are covered, the lack of clarity about what is covered by the ground of sex potentially limits this benefit.</p>	Low	Low
Regulators	<p>The changes would support HRC's human rights work. The benefit is bigger for Option Three as more vulnerable groups would be protected.</p>	Low	Medium
Wider government	<p>The change to include religious belief is a core part of the response to the Royal Commission's recommendation 40. The changes in both Options would support the wider government work aimed at protection against harmful speech.</p>	Medium	Medium
Total Monetised Benefit		Nil	Nil
Non-monetised benefits		Medium	Medium

Section 3: Delivering an option

This analysis applies equally to Options Two and Three.

How will the new arrangements be implemented?

103. A Human Rights Amendment Bill will be required to give effect to the proposed legislative change. Enactment and commencement of the arrangement will depend on the Government's and Parliament's prioritisation.
104. The amended legislation will mainly impact on central government agencies. The agencies with key roles are:
 - 104.1. Police will be responsible for responding to complaints, gathering evidence and undertaking investigations and prosecutions for criminal matters.
 - 104.2. The Crown Law Office will play a role in prosecutions as they require Attorney-General approval (section 132).
 - 104.3. The Department of Corrections will be the agency responsible for managing any incarceration and/or rehabilitation and reintegration programmes, though this is unlikely.
 - 104.4. The Ministry of Justice will be responsible for running the courts, and the Human Rights Review Tribunal for proceedings or hearings, under sections 61 and 131 of the HRA.
105. The HRC will extend its complaints function for section 61. It is not expected they will require new structures to implement the regulatory changes.
106. Where possible, the provision of information related to these amendments should be in accessible formats.

How will the new arrangements be monitored, evaluated, and reviewed?

107. The Ministry will monitor the legislative changes primarily through the data collected from the HRC (complaints and inquiries) and Police crime data and prosecutions.
108. As discussed earlier, it is expected to be difficult to assess the full benefits of amending the incitement provisions in isolation. The aim of the broader social cohesion work programme supports the objectives of the proposed amendments.
109. The proposed Law Commission review will provide the opportunity to fully assess the incitement provisions in detail.

Appendix data

Table 1: Population groups information

Population group	Key statistics/information
Māori	In the 2018 census, approximately 775,000 participants (16.5 percent of the population) identified as Māori.
Ethnic communities and migrants, Pacific people and resettled people	<p>Between the 2013 and 2018 Censuses, after European and Māori, people identified as Chinese (4.9 percent), Indian (4.7 percent), and Samoan (3.9 percent).</p> <p>Around 700,00 Asian, 380,000 Pacific and 70,000 Middle Eastern/Latin American/African New Zealanders registered their ethnicity in the 2018 census.</p> <p>Around 20% of the population are a part of an ethnic community (according to the 2018 census).</p>
People with religious belief	In 2018, about 45 percent of the population in the census reported a religious affiliation, from a very diverse population representing 157 religious affiliation categories. ²⁹
Disabled people	In 2013, 24 per cent of the New Zealand population were identified as being disabled, a total of 1.1 million people. ³⁰
Rainbow communities (LGBTQIA+/SOGIESC)	<p>In 2018, over 4 per cent of the population identified as not heterosexual or straight.</p> <p>An academic 2019 survey shows a significantly higher rate (16%) among high school aged adolescents.</p> <p>Ministry for Social Development estimates that in 2021, people with diverse sex characteristics (including intersex) make up 1-2% of the population</p> <p>In a 2019 Auckland university Youth study, one out of every 100 participants identified as transgender or non-binary (1.0%). A further 0.6% reported that they were not sure of their gender.³¹</p>
Women	At 31 March 2022, New Zealand's estimated resident population was provisionally 5,127,100, of which 2,582,400 were females (about 50 percent). ³²

²⁹ <https://www.stats.govt.nz/information-releases/2018-census-totals-by-topic-national-highlights-updated/>

³⁰ Disability survey: 2013. <https://www.stats.govt.nz/information-releases/disability-survey-2013>

³¹ Fenaughty, J., Sutcliffe, K., Fleming, T., Ker, A., Lucassen, M., Greaves, L., and Clark, T. (2021) *A Youth 19 Brief: Transgender and diverse gender students*. https://static1.squarespace.com/static/5bdbb75cccf37259122e59aa/t/607cb8431453ca0b05c53bb8/1618786373138/Youth19+Brief_Transgender+and+diverse+gender+students+April2021.pdf

³² <http://www.stats.govt.nz/information-releases/national-population-estimates-at-31-march-2022/>

Table 2: Racial disharmony, and racial harassment complaints made to the Human Rights Commission

Year	Racial harassment	Racial disharmony
2016/17	71	38
2017/18	78	64
2018/19	79	59
2019/20	43	78
2020/21	39	72

Table 3: The four grounds of unlawful discrimination that have consistently been the most cited over the last five years to the Human Rights Commission

Year	Disability	Race-related	Sex	Age
2016/17	419	354	195	135
2017/18	425	426	244	150
2018/19	411	369	183	135
2019/20	249	383	110	93
2020/21	198	389	95	72

Diagram 1: New Zealand Police Hate Crime data

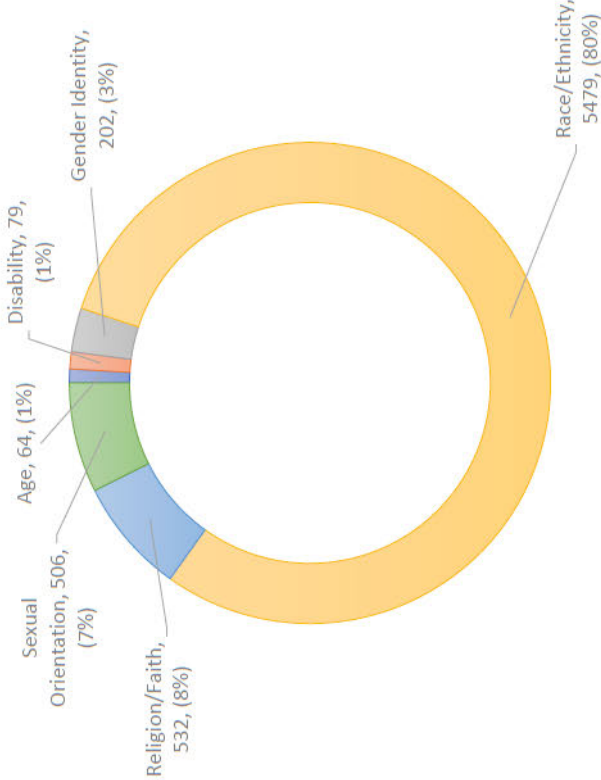
Hate Crime Protected Characteristics

1 January 2021 to 21 June 2022

Please read:

- The counts shown are the number of times a 'protected characteristic' has been added to a hate flagged offence, since 1 January 2021.
- All flagged Hate Crime reports since 1 January 2021 have been checked for accuracy. This provides Police with confidence the characteristic(s) have been applied correctly.
- Each offence flagged as Hate Crime can have multiple protected characteristics added e.g., race/ethnicity and religion/faith etc.. Therefore a count of protected characteristics is NOT a count of individual Hate Crime reports, or hate flagged offences.

Hate Crime Protected Characteristics



Top five combinations - where multiple protected characteristics recorded in an offence record

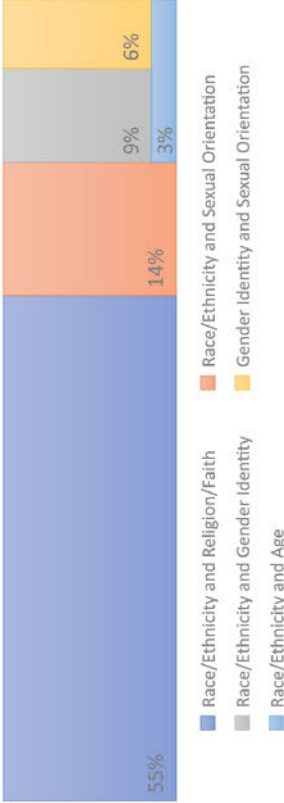


Table 4: Comparison of ground with domestic legislation and other jurisdictions

Grounds	Demonstrable need for protection³³	Included in the Harmful Digital Communications Act (Principle 10)	Included in the Sentencing Act s 9(1)(h) (not exhaustive)	Other jurisdictions (noting these are a mixture of civil and criminal protections)
Sex, gender, and sexual orientation	✓	✓	✓	England, Wales, Scotland, Northern Ireland, Canada, NSW, QLD, TAS, ACT
Disability	✓	✓	✓	Canada, Netherlands, Scotland, Northern Ireland, TAS, ACT
Age	~	x ³⁴	✓	Canada, Scotland
Marital status	x	x	x	Canada
Family status	x	x	x	Canada
Employment status	x	x	x	
Religious belief	✓	✓	✓	England, Wales, Scotland, Northern Ireland, Canada, NSW, VIC, QLD, TAS, ACT
Ethical belief	x	x	x	
Political opinion	x	x	x	

³³ Note limitations of this given the data that is available – much of this is inferred from discrimination data and anecdotal evidence.

³⁴ Section 22(2) In determining whether a post would cause harm, the court may take into account any factors it considers relevant, including—(b) the age and characteristics of the victim.