

Ministry of Justice

By email humanrights@justice.govt.nz

Tēnā koutou

Regarding Proposal Against the Incitement of Hatred and Discrimination

- 1] Thank you for the opportunity to submit on the Ministry of Justice's proposals against the incitement of hatred and discrimination. The proposal discusses a topic of substantial import for Aotearoa. I commend its purpose and support it progressing.
- 2] I trust that many wise people will submit fulsomely on this proposal, so instead of duplicating their work, I will keep my submission brief. To do so, I wish to proceed *argumento* that:
 - a. Hate Speech is an abiding issue.
 - b. Hate speech not only leads to radicalisation it reduces freedoms of people within protected classes.
 - c. Hate speech regulation itself intrinsically limits freedoms.

Submission

- 3] I am a PhD Researcher at Victoria University of Wellington.* The focus of my study is the legal implications of targeted advertising. Targeted advertising is a known vector for disinformation, media manipulation and extremist material.
- 4] Much debate about the proposals has focused on the limitation of free speech. Freedom of expression is a significant human right; it is including in our Bill of Rights Act 1990 and our international obligations.¹ Expression is as broad "as human thought and imagination" and can include symbols or physical expressions.² It's role as a fundamental value has been repeatedly affirmed in litigation.³ Our right includes to seek, receive and *impart* information *in any form*. It includes expression "however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community".⁴ Indeed, positional and dissident views are inherently more valuable.⁵
- 5] But freedom of speech is not an unbridled right. It is subject to justified limitation.⁶ Absolutely no thoughtful legal debate can argue that there is absolute freedom of speech in this country.

* **Declaration of Lobbying Activity:** This submission is provided in a personal capacity. I have not received any compensation for this submission. I am not advocating on anyone's behalf.

¹ Bill of Rights Act 1990, s 14; International Covenant on Civil and Political Rights, art 19.

² *Moonen v Film and Literature Review Board* [2000] 2 NZLR 9 (CA) per Tipping J at [15]; Paul Rishworth et al "The New Zealand Bill of Rights" (2003, Oxford University Press, Melbourne).

³ *Brooker v Police* [2007] NZSC 30; *R v Morse* [2009] NZCA 623, [2010] 2 NZLR 625 (CA)

⁴ *Solicitor-General v Radio NZ Ltd* [1994] 1NZLR 48 (HC) at [59].

⁵ For a great discussion of balancing freedom of expression and societal standards see, Claudia Geiringer and Steven Price, "Moving from Self-Justification to Demonstrable Justification — the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (2008, LexisNexis, Wellington) in particular pages 319 to 326.

⁶ Bill of Rights Act 1990, s 5.

Instead, there is no country with an absolute right to free speech.⁷ In Aotearoa, there are many proportional limitations on free speech, such as blackmail, fraud, defamation, privacy torts, and broadcasting standards. Parliament has even taken its time to regulate pretending to be a psychic for money.⁸ Legal systems are by their very nature coercive on people's freedom. The law pre-empts a person's reasons to act or forces them to act and overrides their freedom to choose. This is what law is. These freedom of speech arguments have therefore not moved the topic forward.

- 6] Similarly, there have been multiple people pursuing arguments for hate speech regulation along the 'lines of torts already limit speech harms, so why distinguish hate speech'. This argument is also misleading. Torts do not regulate harms; they balance competing rights of people in response to wrongs.⁹ There are many ways that a person can cause harm without committing a tort,¹⁰ and many ways that a tort can be committed without the plaintiff even knowing.¹¹ So, harm is neither a necessary nor a sufficient criterion for liability or the law's intervention. Much less so for criminal law. Criminal law is criminal law because Parliament says it so.
- 7] Therefore, I believe much of the public discussion has not assisted this topic. The discussion at this point should be what the Government hopes to achieve and how. Significant care is required at this stage; this is especially true given that much of the history of speech regulation regards the targeting and suppression of minority views and maintenance of unitary religious supremacy. Later we can get into the precise details of any proposed legislation; that is once there is a concrete proposal. Therefore, I wish to make just a brief comment about what I believe is lacking in the proposal.
- 8] Criminal law is a blunt tool. Realistically its primary purpose is the expression of societal retribution. There is scant evidence to show it (positively) modifies behaviour. Chronic underfunding of genuinely rehabilitative programs, and the lived experience of convicted offenders, demonstrate that the rehabilitative function is nothing but a fairy-tale. Given this, I fail to see how the proposals will achieve the purpose in the title. Whilst acknowledging that I am coming at this from a position generally sceptical of criminal law, I strongly recommend broader considerations to how the policy proposal could be met. But, here, there is even more reason to believe the criminal laws ability to modify hate speech is limited: two personas give me pause:
 - a. The first is a person who posts a video of a burning Catholic church saying, "it's the best they deserve". Contextually their post is regarding the historic actions of the Catholic Church. Their view is probably that they are speaking against the powerful on behalf of the oppressed. They believe they are criticising the institution not the people. In my opinion this is prototypical hate speech and within the scope of the

⁷ Consider American litigation around the limitations on the first amendment. For an interesting discussion see, Grégoire Webber *Proportionality and Limitations on Freedom of Speech* in Adrienne Stone and Frederick Schauer (Eds) *The Oxford Handbook of Freedom of Speech* (2021, Oxford Union Press, Oxford).

⁸ Summary Offences Act 1981, s 16.

⁹ See Robert Stevens "Torts and Rights" (2007, Oxford Union Press, Oxford), in particular chapter 2. To be clear, I am not suggesting anyone reads it, I am just citing it to make clear that I am representing mainstream law here—this is not some minority view.

¹⁰ Even intentionally.

¹¹ For example, torts which are actionable per se. If I lock someone in the room, I have committed a tort even if the plaintiff never knows the door was locked. In this way, a wrong is not a subset of a harm.

proposal document. It is precisely the type of speech, when spread widely, is likely to lead to escalating violence and vilification of people within protected classes. But the social media poster won't see it this way. To them, they are standing up for the weak; and any threat of criminal sanction isn't going to modify their behaviour, instead it will reaffirm their belief the state protects the powerful and suppressed justified criticism. Not only is the criminal law likely to be ineffective here, it is an activity many people engage in online and consider praiseworthy. Social media campaigns against far left- or right-wing political figures may also be captured within this persona. So too, much Anti-Semitism online is posted by people apparently subjectively believing that they are pursuing a moral cause.

- b. The second persona is a person who is possessed of self-identified extreme political views. They believe society has gone in the wrong direction and are aghast at what they see. Their strong left- or right-wing views have lost friends and contact with family. They may have even lost their job. Their income is supplemented online donations and perhaps some YouTube ad revenue. Their income is thus reliant on publicity and a small community with shared views. Here, with this persona, hate speech is not just a by-product of their political views, it is a means of gaining publicity. Examples, such as Tommy Robinson, show criminal sanction being a means of getting a message across and gain support. He has weaponised mainstream disapproval to gain attention and followers. Political persons such as these are not therefore immediately prone to the criminal law's repudiation.
- 9] In both these examples, the criminal law is unlikely the remedy. Instead, I believe the proposal should be broader, considering a full range of options. This is a time to be creative. Evidence supports the need to confront extremism by building attachment to community, not breaking them down. Genuinely rehabilitative programmes should be created. Another priority must also be online platform regulation and liability.
 - 10] Online social media companies have policy settings which have enabled the spread of partisan misinformation, the harvesting of people's information for segmentation, and political advertisement designed to undermine the democracy. They have profited while building networks that are too large to enforce their Terms of Service and moderate content.¹² These have all contributed to radicalisation. They have done so passively enabled by lackadaisical regulation.
 - 11] So too, online crowdfunding and creator advertising revenue enables people to monetise extreme views. Crowdfunding and influencer marketing also channel money through illicit sources.
 - 12] In summary, this system of hate is neither accidental nor easily mitigated. We need to lean on the rule of law and the creative capacity of Aotearoa to deal with these issues. That is why I hold the seemingly inconsistent view that this proposal is defective but must progress.
 - 13] *Addendum.* For the avoidance of doubt, I support the extension of hate speech regulation to all prohibited grounds of discrimination, contained in the Human Rights Act 1993. This includes political opinion, because it is a known and significant characteristic for hate speech, terrorism and is a major element of people's lives and self-ideation.

Best wishes,
K H Newman

¹² See for example: Center for Countering Digital Hate *Failure to Protect: How tech giants fail to act on user reports of antisemitism* (2021) [<available online here>](#)