



18 November 2022

Attorney-General

**Human Rights (Incitement on Ground of Religious Belief) Amendment Bill (PCO
22598/9.2) – Consistency with the New Zealand Bill of Rights Act 1990**
Our Ref: ATT395/337

1. We have considered whether the Human Rights (Religious Belief) Amendment Bill (**the Bill**) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (**the Bill of Rights Act**).
2. We have concluded the Bill engages s 14: the right to freedom of expression, but in doing so it is consistent with the Bill of Rights Act.

The Bill

3. This is a narrow Bill which, putting aside minor technical amendments, would amend sections 61 and 131 of the Human Rights Act (**the Act**).
4. Section 61 makes it unlawful (subject to civil action) to use, publish, broadcast, or distribute written matter or use words that are: (1) threatening, abusive or insulting; and (2) likely to incite hostility or bring into contempt any group on the ground of their colour, race, or ethnic or national origins. Clause 5 of the Bill would add religious belief to this list. Religious belief is an existing prohibited ground of discrimination under s 21 of the Act.
5. In the case of criminal liability, s 131 makes it a criminal offence to publish, broadcast or distribute written matter or use words that are: (1) threatening, abusive or insulting; (2) likely to excite hostility or ill-will against, or bring into contempt or ridicule a group on the ground of colour, race, or ethnic or national origins; and (3) intended to excite such hostility, ill-will, contempt or ridicule. The Act also provides that no prosecution for an offence against s 131 shall be instituted without the consent of the Attorney-General. Clause 8 of the Bill would add religious belief to the list within point (2) above.

The right to freedom of expression is engaged by clauses 5 and 8

6. Section 14 of the Bill of Rights Act provides that “everyone has the right to freedom of expression, including the freedom to seek, receive, and impart

information and opinions of any kind in any form.” This freedom is recognised as one of the essential foundations of a democratic society.¹

7. Courts go to great lengths to emphasise the breadth of this right. The Court of Appeal, for example, has confirmed the right is as “wide as human thought and imagination”,² and that the s 14 protection for “opinions of any kind” includes “those opinions that most members of society vehemently reject” or which are “utterly repugnant”.³ Indeed, the Court of Appeal has confirmed that expression which is hateful and dangerous, such as hate speech, an incitement to violence, or even violent action itself, is expression protected by s 14.⁴ There is no internal limit to the scope of s 14.⁵
8. Clauses 5 and 8 engage the right to freedom of expression because they expand the range of speech or expression which may be subject to civil and criminal sanction by virtue of ss 61 and 131. Just as utterly repugnant opinions are protected expression, so too is expression that would fall within the scope of these provisions.⁶
9. Although only certain conduct will satisfy the elements of ss 61 and 131 so as to establish liability under them, and the exact line between prohibited and non-prohibited conduct will be determined in the courts,⁷ civil and criminal sanctions on speech have the potential to generate a chilling effect on expression. Thus clauses 14 and 17 may not only impact the freedom of expression of those who are found to contravene ss 61 and 131, they may also impact the freedom of expression of those whose speech would have fallen short of contravening those provisions but who elected not to express themselves in that way so as to avoid the possible reach of civil and criminal sanction.

Is the limit on freedom of expression justified?

10. All expression is not created equal. Expression which is hateful and dangerous is “low value” in the sense that it has little connection to the rationales for the protection of expression (which include the idea that a “marketplace of ideas” will produce a better society; that the free exchange of ideas is integral to democratic government; that expression is valuable in its own right as a matter of human self-fulfilment, and that freedom of speech is a societal safety valve).⁸

¹ *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795 at [65].

² *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].

³ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [41].

⁴ *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [38].

⁵ *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [41], n 27.

⁶ We note the High Court has held that s 61 applied only to expression which inspired enmity, extreme ill-will or was likely to result in a group being despised. An expression that was simply offensive or insulting was not likely to incite disharmony.

⁷ See, for example, *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [41] and [56] in which the High Court noted the language used in s 61 is “inherently elastic and potentially gives rise to a continuum of meaning” and concluded that s 61 applied only to “relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in a group being despised.”

⁸ See *Arps v Police* [2019] NZCA 592, [2020] 2 NZLR 94 at [35] and *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [34]-[37].

The Court of Appeal has observed that constraint of such low-value speech “will seldom be difficult to justify under s 5”.⁹

11. Section 5 provides that the right to freedom of expression may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. If clauses 5 and 8 are to be justified, they must serve a sufficiently important purpose, have a rational connection to that purpose, abridge the right no more than reasonably necessary for that purpose and be proportionate in light of the importance of their objective.
12. The purpose of clauses 5 and 8, in so far as it is explained in the Bill’s explanatory note, is to improve protections for faith-based groups who are experiencing harm from inciting speech. The explanatory note refers to the well documented harmful effects of hateful speech on both faith-based groups and society as a whole. We have no doubt that is a sufficiently important purpose. That aligns with the High Court’s recognition (in respect of the current s 61) that the Government has a legitimate interest in promoting racial harmony and protecting its citizens from the harmful effects of racial speech.¹⁰ Moreover, it has a basis in the findings of the Royal Commission of Inquiry into the Terrorist Attack on the Christchurch Mosques on 15 March 2019. The Royal Commission pointed out (as the most significant factor in justifying the inclusion of religious belief in the protection offered by s 131) the “current realities of Islamophobia and the association between hate speech and terrorism.”¹¹ The Royal Commission also noted it had been told that religious communities are “regularly subject to hate speech and hate crime online and offline.”¹² Further, this purpose aligns with article 20 of the International Covenant on Civil and Political Rights, which provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”
13. Likewise, we have no doubt the clauses are rationally connected to that purpose, because imposing civil and criminal sanctions on the terms of ss 61 and 131 in respect of communities of religious belief experiencing harm from inciting speech and discrimination is likely to lead to greater protection of those communities.
14. We also consider the addition of religious belief to the existing ss 61 and 131 to be no more of an incursion on free speech than is reasonably necessary to achieve the objective and proportionate to the importance of that objective. The concept of “religious belief” is sufficiently clear so as to not generate a chilling effect on legitimate speech beyond that already inherent in the ss 61 and 131 provisions, which the courts have demonstrated will be interpreted in light

⁹ *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [38].

¹⁰ *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471 at [56], n 51.

¹¹ Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidan on 15 March 2019 (26 November 2020) Volume 4 at p 709, [48(f)].

¹² Volume 4 at p 716, [81].

of freedom of expression.¹³ Further, we consider that any remaining chilling effect (and of course the limit speech actually caught by ss 61 and 131) would be proportionate, taking into account the low value of such speech, as described above.

15. For those reasons, we consider the Bill would impose a demonstrably justified limit on the right to freedom of expression and is therefore not inconsistent with the Bill of Rights Act.

Conclusion

16. Clauses 5 and 8 of the Bill engage freedom of expression as they subject expression to civil and criminal sanctions. In our view, those clauses are not inconsistent with the right to freedom of expression in the Bill of Rights Act.

Review of this advice

17. In accordance with Crown Law's policies, this advice has been peer reviewed by Austin Powell, Senior Crown Counsel.



Matthew McMenamin
Crown Counsel

Noted / Approved / Not Approved



Hon David Parker
Attorney-General

20 / 11 / 2022

Encl.

¹³ *Wall v Fairfax New Zealand Ltd* [2018] NZHC 104, [2018] 2 NZLR 471.