MAXIM INSTITUTE

SUBMISSION TO THE MINISTRY OF JUSTICE ON THE PROPOSALS AGAINST INCITEMENT OF HATRED AND DISCRIMINATION

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EXECUTIVE SUMMARY

Hate speech law in New Zealand is currently the subject of scrutiny and warranted conversation. This comes in response to an increased public understanding of the discrimination and hurt experienced disproportionately by minority communities.

However, **we are not persuaded that increasing penalisation** and defining new offences in the very broad terms outlined in this consultation document **is the best way to tackle the problem** of hateful speech.

These measures would certainly create new incursions into the fundamental freedom of expression for New Zealanders. Yet, **the proposals offer no evidence that any of the suggested responses have proven successful** in increasing social cohesion or reducing hatred.

The proposals outlined in the consultation document should not form the basis of legislation. This submission follows the structure of the consultation document, responding to each of the proposals in turn, affirming and opposing different elements, and offering recommendations.

While we oppose the implementation of the proposed punitive legislation, **if it is to progress we submit that an alternative justice approach such as Te Ao Mārama** is more appropriate to fulfil the ultimate goal of increased social cohesion in Aotearoa New Zealand.

Broadly we:

Affirm

- **that hateful speech and discrimination is an area of antisocial behaviour which requires an appropriate response.** Therefore, we welcome the public discussion around what can and should be done to support and encourage greater social cohesion for all people in New Zealand.
- **the proposed format of the proposed new criminal offence to make it more easily understood**, as the current wording of s131 of the Human Rights Act is unnecessarily complex
- **in principle the imposition of the much higher threshold of "hatred"** in place of the lower gradations of "hostility," "ill-will," "contempt," and "ridicule." However, we have significant concerns that while "hatred" seems a higher threshold, there is a lack of definition of what this term encompasses, which leaves it open to wide interpretation in practice.

Oppose

- **the ill-defined nature of "hatred" in these proposals** that breaches the principle of certainty. This principle requires that people are governed by clear rules that limit the prospect of the exercise of arbitrary power by officials.
- **the much broader grounds for discrimination** outlined compared with current legislation. We are concerned that expressing differing views about a matter may become capable of being construed as an attack on a group that shares that characteristic and **risk criminalising people unnecessarily.**
- the significant increase in punishments outlined in Proposal Three. In our view the **current sentences available under s131 adequately accommodate the seriousness of offending** likely to be prosecuted under the section.
- the breach of the principle of minimum criminalisation inherent in Proposal One. We argue that **criminal law should only be expanded if it is the least restrictive appropriate response**. Introducing further criminalisation should not be taken without an honest assessment of the probable effectiveness, unforeseen consequences, and an exploration of the **possibility of managing the problem by other forms of control or regulation**.
- **the introduction of a law so remote from the actual harm it is seeking to prevent**. Legislating such an inchoate (prepatory) unlawful act (incitement to discrimination) for behaviour would criminalise a risk that a risk of incitement could materialise. We believe **this type of offending is too far removed from harm to justify the proposed penalties** and criminalisation.

Recommend

- **research into methods of dealing with hateful and discriminating speech other than penalisation**; ideas that address the cultural and community roots of hatred and discrimination.
- that any legislative response should be grounded in an approach consistent with the Te Ao Mārama model of healing and rehabilitation.

INTRODUCTION

This submission is in response to the release of the document *Proposals against incitement of hatred and discrimination* inviting public submissions on the proposals.

The regulation of hate speech in its various manifestations is a matter of international concern, as governments worldwide seek to devise legislative responses appropriately targeting the phenomenon and its damaging consequences. There is little evidence that any of these responses have been effective at reducing instances of hate speech. While there is merit in some of the proposals, on balance, the risks outweigh the potential benefits.

We believe that given the widespread public and official perception that New Zealand's criminal justice system is broken and over-dependent on incarceration as the primary measure of response to serious crime, radical and imaginative change is called for. This must necessarily engage New Zealand's response to hate speech, which, as proposed, is more of the same. As we will outline later in this submission, it is time to move beyond the characterisation of hate-motivated words as simply criminal offending, to a model which sees such behaviour as a product of broader societal dysfunction requiring a multi-disciplinary and multi-agency approach.

In particular, since the proposed changes go to the heart of what it means to have a system of criminal justice, this legislation provides a timely opportunity to re-examine the underlying system. If the proposed changes in relevant hate speech laws are to be credible and legitimate they must both acknowledge and accommodate existing criminal justice philosophies and practices and, to the extent they may be inconsistent with such models, be amenable to reflective change.

Furthermore, because the New Zealand Government has obligations to Māori as its partner under Te Tiriti o Waitangi, any official responses to the perceived problem of hate speech need to be crafted with its Treaty obligations clearly in mind. This may have a bearing on both the substance of any proposed law change and the way in which any changes reflect, or fail to reflect, tikanga values.

The Government should, then, consider how the philosophy underpinning proposed changes to the Crimes Act 1961 and the Human Rights Act 1993 align with the declared justice model of Te Ao Mārama ("the world of light"), recently announced by the Chief District Court Judge, Heemi Tauamaunu.[1] Here, tikanga and the best practices of the specialist and therapeutic courts are mainstreamed into the District Court system. This model "encourages a restorative approach, that creates pathways that lead to healing, rehabilitation and to enhanced wellbeing."[2]

This submission offers critical commentary on the six proposals for reform in the Proposals Document. Secondly, it offers an alternative proposal that would more appropriately address the challenges and goals of the proposed hate speech legislation, going beyond enhanced penalisation and embracing a "different approach to get a different result."[3]

ASSESSMENT OF THE PROPOSALS

1. Proposal One

This proposal invites change to the language in the incitement provisions in the Human Rights Act 1993 to better protect groups targeted by hateful speech.

1.1 Currently the incitement provision in s131 of the Human Rights Act 1993 (HRA) extends protection only to persons targeted for hostility or ill-will, contempt, or ridicule because of their colour, race or ethnic or national origins. While these are recognised grounds of discrimination under s21 HRA, they constitute only one quite narrow stream of the broad range of conditions in respect of which discrimination is prohibited. Other conditions include sex (including

pregnancy and childbirth), marital status, religious belief, ethical belief, disability, age, political opinion, employment status family status, and sexual orientation.

1.2 The purpose in Proposal One is to extend the protection against incitement to "some or all of the other grounds in the Human Rights Act."[4] While the intent of this change is laudable, it risks making the prohibition on incitement to discrimination overly broad, when the original legislative intention was simply to prohibit racial discrimination.

1.3 This raises the question whether there is sufficient justification for further police powers and a wider offence in s131. While the current wording of s131 is unnecessarily complex, the offence itself is within a reasonably narrow ambit. The proposed changes to add further grounds into the category of potential hate speech would cast the net of criminality very wide. However, replacing the four terms in s131 (hostility, ill will etc.) with "hatred" would have the counterbalancing effect of limiting the apparent breadth of the substantive restraints on free speech—an outcome we would support. We are nevertheless concerned that expressing differing views about a matter (e.g. criticising someone's political opinions) may become capable of being construed as an attack on a group that shares that characteristic and risk criminalising people unnecessarily, especially given the proposed increased punishments in Proposal Three.

1.4 The proposal also breaches the principle of minimum criminalisation—the idea that the ambit of the criminal law should be kept to a minimum.[5] We believe that the criminal law should be expanded only if it is the least restrictive appropriate response. In *Wall v Fairfax New Zealand Ltd,* the High Court—when discussing the scope of Act 19(3) of the International Covenant on Civil and Political Rights (ICCPR) right to freedom of speech— affirmed the view of the Human Rights Review Tribunal that any restrictions on the right "must conform to the strict tests of necessity and proportionality [and] must be appropriate to advance their protective function [and] must be the least intrusive available measures and must be proportionate to the interest to be protected."[6] We would argue that the same principle applies in the context of criminal law. Freedom of expression should only be curtailed under the strictest of circumstances; it is not clear this proposal meets these.

1.5 In addition, while we accept that criminal law and the aggravation of penalties have a role in prevention of crime, other sources of regulation including morality, social convention, and peer pressure may also be effective to regulating antisocial behaviour like hate speech. We believe that any changes involving further criminalisation should not be taken without an assessment of: the probable effect of criminalisation; its likely effectiveness; its unforeseen consequences/ side effect; and the possibility of managing the problem by other forms of control or regulation. There is little evidence of this in the Proposal document.

2. Proposal Two

2.1 Proposal Two advocates the replacement of s131 HRA with a new criminal offence in the Crimes Act 1961. We have no objection to the change of location of the new provision insofar as the new offence defines a serious crime. We agree that the current wording of s131 is unnecessarily complex and given the many elements to the offence as defined, it would be difficult for a judge to direct a jury on. We approve the proposed format of the new offence and condensing the statutory language to make the offence more easily understood. This would make the law clearer and would make the task of directing a jury significantly less complicated.

2.2 The new Crimes Act offence that would replace s131 of the Human Rights Act aims to make the law clearer and more effective. It would do this by redefining the present offence of inciting racial disharmony so that the offence has four key elements. As a crime defined by an intention to incite/stir up, maintain, or normalise hatred, it will require proof of a subjective mental element implying a desire to bring about a particular state of affairs—recklessness will not be sufficient. Because of the manner in which the proposed elements are listed in the discussion document, the new offence depends only on proof of the conduct described. Successful conviction does not depend on proof of any particular consequences. However, the substitution of the word "hatred" for "hostility," "ill-will," "contempt," and "ridicule" suggests the imposition of a much higher threshold for liability under the new section. Arguably it will be a

more difficult element to prove than the existing "hostility" etc. While we approve of this change in principle, to the extent that it appears to limit the scope for prosecution under the new offence provision, we have significant concerns about the lack of definition of the term "hatred."

2.3 If the term were to be defined more openly by the courts to imply something less than extreme dislike or disgust, for example, it may unnecessarily criminalise offenders whose behaviour and attitudes are boorish and distressing, but whose emotional investment does not meet the high threshold of hate. For this reason the concept of "hate" needs to be carefully considered and defined.

2.4 In *Wall v Fairfax* the High Court agreed with the dictum in *Saskatchewan Human Rights Commission v Whatcott*[7] that the "detestation" and "vilification" inherent in a "hatred or contempt" context "goes far beyond merely discrediting, humiliating or offending the victims."[8] Although Canadian courts have held that in a human rights context the word "hatred" carries the same connotation as "looking down on or treating as inferior," we argue that this represents too low a threshold in the context of a serious crime. Accordingly, we affirm the view expressed in *Taylor v Canadian Human Rights Commission*[9] that "hatred involves detestation and extreme ill-will" and refers to "unusually strong and deep-felt emotions of detestation, calumny and vilification."[10] It is in this sense that hatred in the current proposals should be understood.

2.5 Furthermore, to the extent that "hatred" remains ill-defined, the proposal will breach the principle of certainty. The rule of law requires that people are governed by clear rules that are ascertainable and certain and which limit the prospect of the exercise of arbitrary power by officials.[11] The lack of clear focus in this proposal, given its broad ambit, means that citizens will not have fair warning that their speech or actions could create a risk of incurring a criminal sanction. The proposed extension is likely to penalise people for words or actions that ought not to be the subject of criminal sanction in a liberal democracy. A major problem is that the breadth of the prohibition will mean that many citizens would have no way of knowing with any certainty whether their words/criticisms were lawful or amounted to hate speech. How, for example, would a person be able to tell whether their speech "maintains or normalises" hatred as would be required in Proposal Two? Even judges would struggle to provide a clear definition of these terms.

3. Proposal Three

3.1 The third proposal aims to increase the penalties for the new Crimes Act offence to better reflect the Royal Commission and Minister of Justice's perspective on the seriousness of the crime. Liability to imprisonment increases from three months to three years while the available fine goes from $7000 to $50,000. This represents a significant ramping up of the penalties on the presumptive basis that the increased penalties will act as a more effective deterrent. However, although there is some attraction in the deterrent hypothesis, research suggests that "sentence severity has no effect on the level of crime in society," and further that the chances of being caught is a significantly more effective deterrent than even very severe penalties.[12]

3.2 There is also the issue of proportionality of sentence.[13] This reflects the idea that offenders should receive the punishment they deserve for the offence for which they are being sentenced. This also means that the length of any custodial sentence should, generally speaking, be commensurate with the seriousness of the offence. A major difficulty with increasing the maximum penalties as is proposed, is that the courts will be required to impose sentences accordingly that may be disproportionate to the level of seriousness of the offending conduct. In our view the current sentences available under s131 adequately accommodate the seriousness of offending likely to be prosecuted under the section.

3.3 Any changes in penalty levels should also be proportionate to the broad mischief they are aiming to address, not a reaction to a particular offence or offender. *Ad hominem* law change should never be part of a fair and rational system of criminal administration.[14] The problem with this proposal is that the proposed law change is not an evidence-based response to a pressing or emerging social problem, but to some extent an ad-hoc reaction to a devastating one-off event. Events like the Christchurch massacre are "so extreme, so loaded and so 'debate-silencing' as to demand a

singular and very specific response."[15] However, the case was not an example of the typical forms of hate communication that are occurring in New Zealand and, in our view, should not be the standard by which law reform is measured.

3.4 For these reasons we do not support the radical increase in penalty for the new offence. While we do agree that sanctioning for serious antisocial behaviour is justified on grounds of general sentencing theory, we believe that for the sorts of behaviour being targeted here a different approach to sentencing is required. We outline the detail of our proposal later in this submission: an approach that is consistent with the Te Ao Mārama model of healing and rehabilitation that also preserves the power to impose penalties to hold the offender accountable for his/her wrongdoing. We believe that a "general crime prevention strategy with publicity and attempts to change people's attitudes is likely to be more effective than deterrent sentencing or increased enforcement by police."[16]

4. Proposal Four

4.1 Proposal Four aims to change the language of the civil incitement provision to better match the changes being made in the criminal provision. While we can appreciate the sense in aiming to achieve consistency of language between the provisions, we have the same reservations about incorporating the language of "hate" in the provision for the reasons we outlined in relation to Proposal Two.

5. Proposal Five

5.1 This proposal would change the civil provision in s61 HRA to make "incitement to discrimination" unlawful within the framework of the Human Rights Act. This is a novel change in that it introduces an inchoate (preparatory) unlawful act into the legislative framework proscribing discriminatory language. The prohibited act is inciting another to an act of discrimination, but does not depend on discrimination actually occurring for the offence to be complete.

5.2 Article 20 (2) of the ICCPR prohibits any national, racial, or religious hatred that constitutes "incitement to discrimination, hostility or violence…" This expression is picked up in the commentary on Proposal Five as a matter that should now be criminalised under New Zealand law in order to better align our law with the ICCPR. We would simply observe that the obligation to prohibit incitement to discrimination deriving from Article 20 (2) existed when the Human Rights Act was enacted in 1993. Parliament did not think it appropriate to make it the subject of criminal sanction then. Where is the evidence to support the need to make it a criminal offence now?

5.3 Furthermore, the way this new proscription is framed raises the issue of remoteness.[17] If the offending conduct is speech that is *likely to cause* incitement to discriminate unlawfully against others then, in our view, the harm is too distant from the antisocial behaviour to warrant making it unlawful under Human Rights legislation. In effect, what would be criminalised is a risk that a risk of incitement would materialise. The problem with the current proposal is that since it is framed as conduct that is likely to cause incitement to discriminate in terms of the wording in s61 (1) (c) of the Human Rights Act, as a preparatory form of unlawful conduct it is much more remote from the harm of the principal conduct of racial disharmony. It is doubtful whether New Zealand needs to make unlawful such remote and pre-inchoate conduct.

6. Proposal Six

6.1 This proposal seeks to clarify the existing clauses which prohibit discrimination on the grounds of "sex" or "sexual orientation" in s21 HRA. The traditional binary division of genders into male and female which formed the legislative understanding of human sexuality has been largely abandoned, replaced by a range of sexual preferences which provide the modern descriptors for sexual identity. The proposal is to change the prohibited grounds of discrimination in s21 HRA to clarify that protection extends also to trans, gender diverse, and intersex people.

6.2 Because these categories are new, their claims to legal protection are matters that should be publicly debated before they are made the basis for criminal sanctioning. The assertion in the Proposal document that these changes are

to be considered "a clarification of the status quo rather than a fundamental change in the law" is a potential overreach. Also the question arises whether the proposed extension is sufficiently broad to protect other forms of sexual preference like polygamy, polyandry and polyamory, practitioners of which may also seek special protection against discrimination. While we are not advocating for the inclusion of additional categories of sexual preference into the s21 protections, our point is that if it is to be fair the law must be inclusive of all groups that might conceivably fall within its remit. We do accept, nevertheless, that addressing the proposals in this round of consultation goes some way towards public debate of these issues although further clarification is desirable on which sexual identities and preferences are to be protected by these proposed changes.

7. An alternative model

7.1 New Zealand is a highly punitive society. With an imprisonment rate of 219 per 100,000 in 2017 New Zealand has one of the highest rates of incarceration in the Western world, significantly higher than Australia (162) and England/Wales (154).[18] But there is little evidence that our extensive use of incarceration is having any impact in reducing the rate of offending. In the year ending December 2020 there had been 12.4% increase in the numbers of assault victimisations over the previous 12 months, for example. A recent Corrections Department Study found that New Zealand has the highest rate of imprisonment for violent offending (18.5%) amongst the 32 countries surveyed where the median was 6.6 %.[19]

7.2 Assaultive behaviour, often associated with family violence, is clearly a significant problem for New Zealand to manage, but there is no evidence that incarceration is instrumental in solving the problem. Similarly, with manifestations of discriminatory speech. While the most serious cases involving hate-motivated violence may well justify incarceration to protect the public, the majority of offenders using discriminatory or racially-motivated abusive speech need not be at increased risk of incarceration upon conviction. There are other options.

7.3 The Te Ao Mārama model, which we have briefly outlined earlier in this submission, adopts a solution-focussed court approach to bring a therapeutic and transformative culture into the District Court. The model is a new transformative model of criminal justice which is said to reflect the needs of a multicultural New Zealand where *everyone* can seek justice, be heard, and understood.[20]

7.4 If these proposals are to become law, we suggest that a similar approach to be taken to the process of holding offenders accountable. This would represent a major change of direction in the formulation of criminal justice policy in response to hate crime towards a model more focused on rehabilitation and relational healing than simple punishment for wrongdoing. To be effective we believe the practice and the theory need to align to achieve the best outcomes. In other words, the Te Ao Mārama philosophy needs to also influence the construction of penal policy so that, at least in relation to the regulation of hate-based offending, criminal justice theory aligns with any new approach towards the management of hate crime perpetrators. This would necessarily involve substantial input from the communities most directly affected by these forms of antisocial behaviour so that any official policy reflects the aspirations, hopes and values of those affected. Such policy could be crafted around insights derived from new and emerging legal paradigms like therapeutic jurisprudence, restorative justice and the solution-focused courts, so that a Te Ao Mārama approach becomes central to any new penal policy.

7.5 Hate speech is an area of antisocial behaviour that requires an appropriate response, but we believe a model of enhanced penalisation implicit in the proposals before us is not the solution. As we have suggested a radically different approach along the lines of Te Ao Mārama would be better able to address the range of concerns and responses to wrongdoing than existing penal models. This approach we advocate would recognise the hurt suffered by those experiencing discrimination and abuse in whatever form, but would use that vulnerability as a platform for creative confrontation, and, ultimately, reconciliation and restoration.

7.6 The model we propose is analogous to the alternative justice model formulated by the New Zealand Law Commission for the resolution of alleged sexual offences, where both offender and victim agree to participate.[21] The justice process in this model sits "outside the existing criminal justice system" and is independent of any court-required restorative justice processes. It aims to meet the needs of victims by allowing victims who do not want to enter the criminal justice system to have "an alternative mechanism for meeting their 'justice'" needs. In the context of hate speech, many victims may not want to go to court, perhaps fearing further confrontation in a public space and sensing their needs will not be met. Furthermore, their needs may not be related to any particular form of criminal justice outcome like imprisonment or a monetary penalty, and instead, they may simply want support to deal with the effects of the alleged abusive language. Such a model, occurring in a less public setting, would also be better able to affirm the dignity and damaged self-respect of the victim, and provide a context for the victim to begin to understand the motivation, values, and aspirations of the offender, for good or bad.

7.7 We would also draw attention to Dispute Assist, another model of dispute resolution that has proven to be highly successful in another context, namely, in assisting tax defaulters to meet their obligations beyond the need for a punitive enforcement process.[22] The Australian Taxation office trialled Dispute Assist as "a free service to help unrepresented and small businesses with the dispute process." The new model recognised that some individuals could be at a disadvantage in a dispute process because of "exceptional personal circumstances and the inability to afford representation." The essence of the success of this system is the provision of a Dispute Assist guide to assist defaulters through the dispute process and work towards resolving the dispute and to access services to help tax defaulters move forward. The model has proven highly successful in the Australian states that have adopted it and has revolutionised official responses to tax defaulters. [23]

7.8 The point with this model is the recognition that people who come into conflict with the law through failure to meet outstanding tax obligations are often dealing with challenging personal circumstances which have overshadowed their taxation responsibilities. Taking a highly personal and relational approach to helping people resolve their tax disputes has obviated the need for harsh penal consequences that might otherwise accompany tax default. There is little question that such a model, which is instrumental in helping defaulters become responsible citizens, is preferable to the penalisation that would otherwise follow. We would argue that a similar approach could be adopted in dealing with low level hate speech infractions.

7.9 These alternative models are more holistic reflections of procedural justice. The Law Commission report, in discussing the role of victims in the alternative model, discusses the work of criminology professor Kathleen Daly, who advocates looking beyond victim satisfaction, which she sees as "a subjective and isolated concept, to find ways to empirically assess the usefulness of different justice mechanisms."[24]

7.10 Daly refers to the "justice interests" or "justice needs" of victims of which there are five elements: participation; voice; validation, vindication; and offender accountability.[25] These elements reflect the core requirements of procedural justice which, in our view, are essential in any alternative justice model. It is enough to note in this context that this model aligns equally with the justice needs of victims of discrimination/hate speech and provides the essential elements of an alternative victim-oriented model, where retribution, punishment, and incapacitation are not necessarily what the victim is looking for. This is a more holistic solution.

7.11 In our view the highly emotive framework of hate-based prosecutions is ill-suited to a traditional adversarial courtroom context, and better suited to a non-adversarial, relational model of conflict resolution. For this reason we invite consideration of the alternative justice models discussed above as examples of more appropriate means of dealing with hate and discrimination that offer the prospect of true reconciliation and healing.

CONCLUSION

Hate speech law in New Zealand is in a time of transition. The current proposals depend on expanding the scope and increasing the penalties of "hate speech" laws.

We are not persuaded that increasing penalisation and defining new offences in very broad terms is the best way to tackle the perceived problem of hate speech. In any event we do not believe that the outrageous facts of one unspeakable event should be the standard by which necessary law reform is measured. If law reform in this domain is needed it should, be evidence-based and in response to clear and agreed patterns of antisocial behaviour. These proposals should not form the basis of legislation.

To the extent that the proposed response depends on the well-worn yet ineffective path of increased penalisation and the threat of criminal sanction we believe it represents a lost opportunity. In particular, it fails to consider other non-adversarial alternatives which are more closely aligned with tikanga values and a focus on healing and restoration.

Accordingly, we strongly support the Te Ao Mārama model of criminal justice which should also extend to the substance of criminal law and the process of penalisation, not simply the therapeutic practice of the District Court. This proposal would be truly transformative, and a good step towards a more socially cohesive Aotearoa New Zealand.

ENDNOTES

1 Jenni McManus, Law News, 28 May 2021, "Chief DC Judge reveals next steps for reform," 2021.

2 McManus, "Chief DC Judge reveals next steps for reform."

3 McManus, "Chief DC Judge reveals next steps for reform," 2.

4 Ministry of Justice, "Proposals against incitement of hatred and discrimination," 2021, 4.

5 AP Simester & GR Sullivan, *Criminal Law:Theory and Doctrine (2nd edn)* (Hart Publishing, Oxford, 2003), 7; See also Andrew Ashworth, *Sentencing and Criminal Justice (4th edn)* (Cambridge University Press, Cambridge, 2005), 97.

6 *Wall v Fairfax New Zealand Ltd (2018) NZHC 104; (2018) 2 NZLR 471, 26.*

7 2013 SCC11, (2013) 1 SCR 467, 41.

8 See *Wall v Fairfax New Zealand Limited* (2018) NZHC 104; (2018) 2 NZLR 471 (12 February 2018), 54.

9 (1990) 3 SCR 892, 928.

10 *Taylor and Canadian Human Rights Commission* (1009) 3 SCR 892 at 928, per Dickson CJ cited in *Wall v Fairfax* (2018) NZHC 104; (2018) 2 NZLR 471 at 53)

11 A. P. Simester and W. J. Brookbanks, *Principles of Criminal Law* (5th edn) (Thomson Reuters, Wellington, 2019) at 34

12 See Andrew Ashworth, *Sentencing and Criminal Justice* (4th edn) (Cambridge University Press, Cambridge, 2005) 79.

13 Ashworth, Sentencing and Criminal Justice, 84-87.

14 TRS Allan, "*Ad hominem Legislation in Australia*" *Cambridge Law Journal*, 56, no. 1, 1997, 4.

15 See K Brownlee, "Punishment and Precious Emotions: A Hope Standard for Punishment," *Oxford Journal of Legal Studies* No. 1, 21, 2021.

16 See Ashworth, *Sentencing and Criminal Justice,* 76-7.

17 The idea that the criminalised behaviour is too distant from the prospective harm to warrant the intervention of the criminal law. See R. A. Duff and S.P. Green eds., *Philosophical Foundations of Criminal Law* (Oxford University Press, Oxford, 2011), 303.

18 Marcus Boomen, "Where New Zealand stands internationally: A comparison of offence profiles and recidivism rates" (2018) 6 (1) Practice: The New Zealand Corrections Journal. July 2018.

19 Marcus Boomen, "Where New Zealand stands internationally: A comparison of offence profiles and recidivism rates" (2018) 6 (1) Practice: The New Zealand Corrections Journal. July 2018.

20 District Court of New Zealand, "Press Release: "Transformative Te Ao Mārama model announced for District Court", 11 November 2020.

21 See Law Commission, *The Justice Response to Victims of Sexual Violence -Criminal Trials and Alternative Processes (*Report 136), December 2015.

22 https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision/Options-for-resolving-disputes/Dispute-Assist/

23 Interview with ATO Dispute Assist Worker, June 2017.

24 Kathleen Daly, "Reconceptualising sexual victimisation and justice" in Inge Vanfraechem, Anthony Pemberton and Felix Mukwiza Ndahinda eds. *Justice for Victims* (Routledge, Abingdon, 2014) .

25 Daly, "Reconceptualising sexual victimisation and justice."