MAXIM INSTITUTE

SUBMISSION TO THE JUSTICE COMMITTEE ON THE HUMAN RIGHTS (INCITEMENT ON GROUND OF RELIGIOUS BELIEF) AMENDMENT BILL

Prepared by Maxim Institute Research Fellow Professor Warren Brookbanks

31 January 2023

EXECUTIVE SUMMARY

Laws criminalising religious vilification are widespread in comparable jurisdictions to New Zealand. However, we submit that we **oppose** the proposed amendment to the Human Rights Act 1993 as we do not believe that criminal penalisation of speech is the best way to tackle the problem. Further, we are concerned that the proposed criminalisation may have unintended consequences by suppressing legitimate debate and disagreement about religions and moral belief systems.

However, if the grounds of potentially criminal speech are to be extended to include religious belief, then **we submit that the additional ground be added as a separate section in the Human Rights Act 1993 and not simply tacked onto the existing s 131.**

Furthermore, we submit that an additional provision be adopted that explicitly protects legitimate forms of religious debate along the same lines as the legislation in the United Kingdom.

Finally, we submit that an alternative approach to dealing with religious vilification be explored. A fruitful avenue of exploration would be the alternative dispute resolution procedures outlined in Te Ao Mārama.

INTRODUCTION

1.1 The New Zealand Government has introduced a Bill to amend the Human Rights Act 1993. The new Bill, the Human Rights (Incitement on Ground of Religious Belief) Amendment Bill, aims to improve protections for faith-based groups under the provisions of the main Act that make speech that is likely to excite hostility unlawful. The proposed amendment is driven by the terrorist event in Christchurch on 15 March 2019, which led to the Royal Commission of Inquiry into the terrorist attack recommending that religious belief be included in the criminal provision in s 131 of the Act.

1.2 The Bill will, in effect, extend the coverage in both the civil and criminal provisions of the principal Act that cover speech that is likely to excite hostility, namely ss 61 and 131, by going beyond colour, race and ethnic and national origins. Under the Bill, religious belief would be included in those provisions. It is already a prohibited ground of discrimination in s 21 of the principal Act.

1.3 It is proposed that the changes to ss 61 and 131 would provide better protection for faith-based groups experiencing harm from inciting speech. The amendment will make available remedies to address inciting speech against an affected group, either through a complaint to the Human Rights Commission or through prosecution.

1.4 On the face of it, the amendment, it could be argued, is a logical development in the law, given that religious belief is already a prohibited ground of discrimination under s 21. However, the purpose of this report is to assess the credibility of the proposed amendment to the Human Rights Act 1993 and to identify any unforeseen consequences that might adversely affect the interests of particular faith-based groups or organisations.

APPROACH

2.1 I will analyse the current legislative structure of the two principal provisions, ss 61 and 131, in order to discern how the addition of religious belief might affect the operation and application of the sections. I will then consider how similar legislation has been drafted in the jurisdictions of the United Kingdom, Victoria and New South Wales. I will reflect on whether the experience of other jurisdictions better informs the development of New Zealand law in this domain.

LEGISLATIVE STRUCTURE

3.1 Section 61 establishes a civil offence of exciting hostility or bringing into contempt a group of people by virtue of their colour, race, nationality or country of origin. Sections 61 and 131 both have their origins in the International Convention on the Elimination of all forms of Racial Discrimination, ART 4 (a) of which prohibits “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination”. This prohibition has long been part of New Zealand’s law through the Race Relations Act 1971, the Human Rights Commission Act 1977, and its replacement by the Human Rights Act 1993.

3.2 Inciting racial disharmony was first made an offence in s 25 of the Race Relations Act 1971. As with the current version of the offence in s 131 of the Human Rights Act 1993, it was necessary to establish intent to incite hostility etc. and to obtain the consent of the Attorney-General to bring a prosecution (see s 132 Human Rights Act 1993).

The predecessor to the current s 61 was s 9A of the Human Rights Commission Act 1977, which created a civil offence of inciting racial disharmony. This allowed for the conciliation of disputes about hate speech by the Race Relations Conciliator rather than prosecution. The current version of the civil offence has removed the former reference to “exciting ill will” or bringing people into “ridicule”, substituting “exciting hostility” and bringing “into contempt”. Section 61 implements New Zealand’s international law obligations under the International Covenant for the Elimination of all Forms of Racial Discrimination. Its purpose is to assist or advance persons or groups of persons who have been disadvantaged because of

discrimination, formerly only on the grounds of colour, race, ethnic or national origins, but under the amendment now to include religious belief.

THE CRIMINALISATION OF WORDS UNDER S 131

4.1 Section 131 creates the criminal offence of inciting racial disharmony. Since the Bill intends to add religious belief to the categories of speech that can be criminalised under s 131, it is now necessary to examine this section. It is written in very similar terms to s 61, but as a criminal offence, proof of a mental element (mens rea) is required. However, the offence also originates in Article 4(a) of the ICERD. Article 4 (a) requires states to prohibit "incitement to racial discrimination" but not racial hatred. It was evidently thought that courts should not be expected to measure hatred. However, the section has been criticised as being objectionable from a constitutional perspective because of its potential incursion into freedom of speech. Two leading commentators have said:[1]

> *Criminalisation is the most extreme form of legislative response to a perceived problem, and as such demands the most stringent justification where the exercise of fundamental rights is concerned. The need for defences under this section is great. Yet apart from disputing the characterisation given to the particular words used, the only defence available to a person charged under s 131 is to raise a reasonable doubt as to the requirement of intention.*

4.2 In order to test the claim of limited defences, it is necessary to break the offence provision into its constituent elements. There are four elements in the definition of the offence:

(1) The penalty provision (3 months imprisonment or a fine not exceeding $7,000)

(2) The culpability requirement (in this case, the mens rea is intention to excite hostility or ill will or bring into contempt or ridicule any group of persons in NZ on the ground of the religious belief etc., of the group. Recklessness will not suffice.)

(3) The conduct (actus reus) element (either publishes or distributes written matter which is threatening, abusive or insulting or by means of radio or television words which are threatening etc. or using in any public place etc. words which are threatening, abusive etc.)

(4) Relevant circumstances to be proved as part of the conduct element being matter or words likely to incite hostility etc.).

4.3 These elements suggest an offence of some definitional complexity. Because it is a true crime, all elements of the offence must be proved by the prosecution beyond a reasonable doubt. New Zealand courts have held that whether material is threatening, abusive, or insulting is to be decided objectively by assessing how the material would affect a reasonable observer as opposed to the subjective perception of the alleged abuser. The circumstantial element of the offence, i.e. "being matter or words likely ...etc." establishes a high threshold of impugned behaviour before a person could be convicted of the offence. The phrase "bring into contempt", for example, requires comment or material that is threatening, abusive or insulting and has the effect of inciting hostility against a group. Conduct which is not actually insulting is unlikely to bring a group into contempt. Furthermore, because the meaning of contempt or ridicule takes its flavour from the surrounding words, contempt signifies more than just ragging or teasing. It implies belittling or denigration when the humorous element is secondary (See Neal v Sunday News Auckland Publications Ltd (1985) 5 NZAR 234).

It has been observed that comments are not capable of breaching the Act just because they are critical of a particular group or because they offend someone:[2]

> *A high level of condemnation—often with an element of malice or nastiness—is necessary for a finding that the standard has been breached.*

4.4 This very high threshold of malignant behaviour will continue to apply in the application of s 131, regardless of whether or not "religious belief" is added to the relevant wording of the section. Simply criticising a person's religion or saying that one does not believe another person's religious precepts because they think they are wrong would, in my view, be insufficient to trigger the section. There must always be an element of malice which is calculated to generate a broader negative perception of the group being criticised, that is consistent with notions of "hostility", "ill-will", "contempt", and "ridicule". Emotional responses of a lesser severity (criticism, unbelief, scepticism, doubtfulness) will not be enough, even if expressed publicly.

AUSTRALIA

5.1 In Australia, each state has its own version of anti-discrimination or hate speech laws. The Federal Government has also prohibited various forms of discrimination. Under the Racial Discrimination Act 1975, hate speech is prohibited under s 18C:

> *If the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and the act is done because of the race, colour or national or ethnic origin of the other person, or of some or all the people in the group.*

The Act is designed to give effect in Australia to the International Convention on the Elimination of all Forms of Racial Discrimination. The Act deals exclusively with racial discrimination and does not engage religious discrimination or vilification.

NEW SOUTH WALES

6.1 In 2018, the New South Wales Parliament introduced a bill under urgency to amend the Crimes Act 1900 and to create an offence of threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. A schedule to the Bill inserted a new s 93Z into the Crimes Act 1900, which would prohibit a person from intentionally or recklessly, "by a public act", threatening or inciting violence towards another person or group of persons on several grounds including "that the other person has, or one or more members of the group have a specific religious belief or affiliation." It is framed as an indictable (jury only) offence, punishable by a fine of up to $11,000 or three years imprisonment or both.

6.2 A "public act" was defined in Schedule 1 to include: (a) any form of communication (speaking, writing, displaying notices, playing recorded material, communicating through social media) to the public; (b) any conduct (actions, gestures, wearing or display of clothing, signs, flags, emblems, insignia) observable by the public; and (c) distribution or dissemination of any matter to the public.

VICTORIA

7.1 The Victorian Government enacted the Racial and Religious Tolerance Act 2001. Section 8 makes unlawful religious vilification on the ground of the religious belief or activity of another person or class of persons, where the offender "engage[s] in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons."

7.2 The offence of serious religious vilification is defined in s 25, which prohibits a person, on the ground of the religious belief or activity of another person etc., from intentionally engaging in conduct that the offender knows is likely:

(a) To incite hatred against that other person or class of persons.

(b) To threaten or incite others to threaten physical harm towards that other person or class of persons or the property of that other person or class of persons.

(c) "Engage in conduct" is defined to include the use of the internet or email to publish or transmit other material.

The penalty is 6 months imprisonment or 60 "penalty units"(the equivalent of a fine).

THE UNITED KINGDOM

8.1 In the United Kingdom, hate crime is covered by various statutes. These include the Public Order Act 1986, the Crime and Disorder Act 1998, The Racial and Religious Hatred Act 2000, the Criminal Justice and Immigration Act 2008 and s 66 of the Sentencing Act 2020. UK law recognises five species of hate crime, including race, religion, disability, sexual orientation and transgender identity. For the purposes of this discussion, we are only concerned with religion.

8.2 The principal hate speech provisions appear to be contained in the Public Order Act 1986 and the Racial and Religious Hatred Act. Like the current version of s 131 of the Human Rights Act 1993 (NZ), Part 3 of the Public Order Act 1986 was confined to prohibiting expressions of racial hatred, being hatred against a group of persons by virtue of the group's race, colour nationality (including citizenship) or ethnic or national origins. The offence was defined as follows:

> *A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if—*
>
> *(a) he intends thereby to stir up racial hatred, or*
>
> *(b) having regard to all the circumstances, racial hatred is likely to be stirred up thereby.*
>
> *Offences under Part 3 carry a maximum sentence of seven years imprisonment, a fine, or both.*

8.3 As with the New Zealand provision, there was no reference to religious belief as a basis for stirring up hatred. However, this position changed with an amendment to the Public Order Act contained in the Racial and Religious Hatred Act 2006.

A new Part 3A was added, which included section 29A:

> *A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.*

"Religious hatred" was defined to mean hatred against a group of persons defined by reference to religious belief or lack of religious belief.

8.4 The offence defined in s 29 B stated:

> *A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.*

This provision established a new and separate offence from the offence of stirring up racial hatred, which was previously contained in the same section. The rationale for this change was that having a separate offence provision for religious hatred made the provision more comprehensible and readily understood by experts and lay people alike. However, the passage of the English offence through Parliament was the subject of a great deal of debate. Of note was the decision to remove the words "abusive or insulting" from the definition of the new offence, thereby significantly narrowing the scope of the offence to behaviour or displays that were "threatening". Arguments against the removal of "abusive" and "insulting" included that campaigns to stir up hatred use a range of words, some of which could be threatening but not necessarily so. In debate, it was pointed out that abusive and insulting words can also be used, which can have a devastating effect on the communities affected. Another argument was that limiting the offence to threatening words and behaviour made it too difficult to access

the sort of material used to incite hatred and so would severely limit the ability of prosecution authorities to bring to justice the people responsible.

FREEDOM OF EXPRESSION DEFENCE

9.1 Another significant feature of the comparable English legislation is the enactment of a specific defence protecting freedom of expression. The defence is defined in s29J of the Public Order Act 1986 and reads:

> *Protection of freedom of expression*
>
> *Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*

9.2 Of interest is the fact that the defence allows the expression of "antipathy, dislike, ridicule, insult or abuse" of particular religions where that behaviour is not actually threatening and is done with the intent of stirring up racial hatred. The New Zealand reform proposals do not have a similar defence. It should also be noted that the prohibited grounds of discrimination in s 21 of the Human Rights Act 1993 (NZ) include:

> *(d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions*

9.3 It, therefore, seems likely that any Court seeking to define the meaning of "religious belief" in the amended s 131 would include within the definition ethical belief in order to capture the lack of a religious belief as in the English provision. Such an interpretive approach could have a chilling effect on religious debate and discussion.

ANALYSIS

10.1 This survey demonstrates that different jurisdictions have chosen different ways of dealing with the crime of hate speech or religious vilification, often driven by events occurring within their racial and religious communities. There is no obvious answer as to which is the optimum approach. It is an area of law and practice which is, it seems, constantly under examination and subject to change, and New Zealand is no exception.

10.2 The current New Zealand approach is to amend provisions of the Human Rights Act 1993 to add a clause including religious belief as a prohibited ground for inciting disharmony. This will occur within the generic offence of inciting racial disharmony in s 131 of the Human Rights Act 1993.

10.3 Section 131 is a complex offence provision with several elements that must be proved by the prosecution for a successful conviction. Because of the way it is strictly framed, the section has only been used once (See *King-Ansell v Police* [1979] 2 NZLR 531 (CA)).

10.4 It is also questionable whether it is appropriate for religious belief to be included within a generic provision dealing with racial disharmony. The practice now in a number of jurisdictions is to craft a separate offence defining religious vilification or hate speech. Separating the racial and religious hatred provisions has been undertaken in the UK, with religious hatred now being limited to threatening behaviour. Insulting or abusive behaviour has been deleted as relevant expressions of religious antipathy. The rationale for separating racial and religious incitement is that there is a morally relevant difference between the two. Some have argued that religion, unlike race, is a question of personal choice and therefore, a suitable subject for open debate. The argument proceeds that where race warrants special protection because a person is powerless to change that

element which is the object of hatred or antipathy, religion is something people choose; therefore, others should be able to challenge or debate that choice.[3] While the argument for separation has its weaknesses, ultimately, arguments that favour freedom of expression which is very much in the balance in the case of religion, simply do not arise in the case of race. For this reason, we support the case for separating the two offences.

10.5 Assuming that a provision protecting religious belief from threatening or abusive language is to be adopted, we submit that the new law should also include a provision protecting freedom of speech. This would preserve the right to freedom of expression as far as possible, with only the most egregious and threatening speech being targeted for prosecution.

10.6 For these reasons, we would argue that rather than amending s131 of the Human Rights Act 1993 to add "religious belief' as a ground for inciting disharmony, a separate offence provision be drafted to prohibit religious abuse. The offence would be defined as intentionally using threatening language or behaviour to intimidate and stir up religious abuse, whether or not this also amounted to religious hatred. However, because the expression "lack of a religious belief" is an extremely vague and amorphous idea, we would advocate that the new offence be limited to religious belief only, which could be defined in terms of known religious belief systems currently present in New Zealand. The core offence would be a significantly simplified version of s 131, inserted as s 131 A. It might be defined as:

> ***S131 A Incitement or religious disharmony***
>
> *Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, intending to stir up religious hostility, uses any threatening words or behaviour or displays any threatening written material in circumstances likely to incite hostility or evoke revulsion or enmity against any person or persons holding a particular religious belief.*

A separate provision protecting freedom of expression should also be included in any amendment, ensuring that language that was merely insulting or expressing ridicule would be insufficient to trigger the threatening offence. Such a defence should broadly follow the wording of the UK provision but amended to reflect New Zealand's unique cultural circumstances:

> *Nothing in s 131A shall be read so as to prohibit or restrict discussion, criticism or expressions of antipathy or dislike towards particular religions or the religious beliefs and practices of particular cultures, or of any other belief system or the beliefs or practices of its adherents, or proselytising, evangelising or urging adherents of a different religion or belief system to cease practising their religion or belief system.*

10.7 In addition to a new s131 A, we would strongly recommend investigating an alternative approach to prosecuting incitement of religious disharmony. This alternative approach would draw, amongst other considerations, on the policy expectations outlined in Te Ao Mārama. In particular, Te Ao Mārama aspires to create a judicial environment that inaugurates "transformative change" where all people can come to seek justice "regardless of their culture or ethnicity".[4] We submit that this would facilitate different approaches to resolving criminal conflict in ways which include looking at the causes of offending. Since religious hostility often has very deep roots, which prosecution alone may not be apt to address, an alternative approach which allows a context for such causes to be explored and addressed seems appropriate, perhaps within a procedural framework analogous to the role of the Race Relations Conciliator in the conciliation of disputes. Where parties are willing, and consent, a procedure similar to a restorative justice conference or 'good faith' judicial hearing could be initiated.[5] Provided the offender has acknowledged the offence caused by his or her behaviour, the non-adversarial proceedings would be aimed at accountability, acknowledgement of wrongdoing, apology and restoration. Where there is an unwillingness on the part of the offender to participate in a meeting, prosecution under s 131A could proceed.

ENDNOTES

[1] P Rishworth & G Huscroft, Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (1995, Wellington, Brookers), 209.

[2] Thomson Reuters Online Commentary on s 131 of the HRA Act, HR131.04.

[3] For a full discussion see A Brown, "The Racial; and Religious Hatred Act 2006: a Millian Response" (2008) 11(1) Critical Review of International Social and Political Philosophy 1, 19 onwards.

[4] District Court of New Zealand, "Transformative Te Ao Mārama model announced for District Court", 11 November 2020, https://www.districtcourts.govt.nz/media-information/media-releases/11-november-2020-transformative-te-ao-marama-model-announced-for-district-court/.

[5] See William G Schma, "Judging for the New Millenium" (2000) 37 (1) Court Review 4.