



**6 August 2021**

# **Proposals against incitement of hatred and discrimination**

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**Submission to the Ministry of Justice**

## Introduction

### Who we are and what we stand for

1. InternetNZ welcomes this opportunity to submit on the proposals against incitement of hate and discrimination. We support the overall direction of these proposals and broader work to support social cohesion online.
2. We think all New Zealanders should be able to fully participate online. We know that both routine and extreme online harms are serious problems which the Government has committed to understand and address.
3. We stand for an Internet for good and an Internet for all. We support policy work to understand and effectively respond to these issues, and are committed to engaging across related policy work.
4. Our goal in this submission is to highlight issues to consider for the online environment, and with the goal of enabling all New Zealanders to participate.

### Facing hate and abuse stops people from participating online

5. An online environment with extreme and targeted abuse, or routine and repeated discrimination, is one that excludes some New Zealanders from fully participating. We acknowledge the harm and abuse suffered online by New Zealanders who are too often subject to online hate and discrimination.
6. We stand with the muslim community, tāngata whenua, the trans community, who are currently facing overwhelming hatred and harassment online, and with all New Zealanders who face an online environment that causes hurt, normalises exclusion, and contributes to risks of political harms and violence.
7. We think it is vital that work on these issues begins by listening to the most affected communities. These are the people who know the most about the current environment, and how policy processes and outcomes will succeed or fail in protecting and empowering the people who most need this support.

## Context is key to understanding these proposals

8. To understand the likely scope and impact of these proposals, we think it is important to look at how they fit into the broader environment of policy problems, existing legal frameworks, and other planned policy work.
9. These proposals are presented as one part of broader work on social cohesion, in response to the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019. They come in the context of the Christchurch Call to eliminate terrorist and violent extremist content online,<sup>1</sup> and a planned broader policy review looking at content regulation.<sup>2</sup>
10. As an Internet-focused organisation, we are particularly aware of the online environment, its current impacts on people and communities, and policy work that is intended to respond to those impacts. We highlight aspects of that context below.

### Existing systems are not working well for people targeted online

11. We know that current processes for reporting online harms are not working well for people, because:
  - a. Issues fall between agency roles and gaps, and it is often unclear who to report to, with different arrangements for the Police, NetSafe, the Department of Internal Affairs, CERTNZ, and the Human Rights Commission, on top of the various media bodies;
  - b. Agencies taking reports are often not equipped to understand and support people who raise issues, particularly for people who face routine or deliberate hostility as members of a targeted social group;
  - c. Those gaps in understanding are made worse by agencies not being equipped to offer timely responses or resourced to offer ongoing support;
  - d. The reach and impact of harmful behaviour online often flows through overseas online services. Responses from those online services are highly variable and rely on informal reporting from the public or agencies like NetSafe.
12. To be effective, any legal framework must be paired with processes that work for the people it is meant to protect. This vital part of the eventual framework is not discussed in detail in the discussion document.

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<sup>1</sup> Ministry of Foreign Affairs and Trade, “Christchurch Call to eliminate terrorist and violent extremist content online”, (15 May 2019), <[christchurchcall.com](http://christchurchcall.com)>.

<sup>2</sup> Hon Jan Tinetti, “Govt acts to protect NZers from harmful content” (10 June 2021) <[beehive.govt.nz](http://beehive.govt.nz)>

13. We think it may be important to engage on systems issues at the next stage, and consider how this fits with work on joined-up reporting.<sup>3</sup>

### **There is a spectrum of helpful and harmful behaviours online**

14. The Internet reflects the full spectrum of people's offline behaviours, some wonderful, some despicable, and mostly just people living their lives. Work looking at online extremism related to New Zealand suggests that it involves diverse activity across a range of different online services.<sup>4</sup>
15. The spectrum of behaviours includes deliberate and coordinated activity in fringe platforms, which can be directly or loosely linked to a broader environment of hostile behaviours on services with more users and reach. Below we address aspects of this spectrum of online behaviours that relate to the potential scope and impact of these proposals.

### **Incitement is at the extreme end of harmful behaviours**

16. The proposals for discussion fit into a context of existing laws, constitutional principles, and democratic norms. We think it is useful to briefly discuss some policy frameworks that put these proposals in context.
17. One useful policy framework is the model of responsive regulation, which looks at responding to behaviours on a spectrum based on the type of behaviour involved and the harms caused.<sup>5</sup> On this model, incitement of hate is at the extreme end of the spectrum often addressed by criminal offences.
18. Another vital part of the context is the constitutional right of free expression, which New Zealand law affirms under the New Zealand Bill of Rights Act 1990, meaning the right can only be restricted by reasonable limits prescribed by law "as can be demonstrably justified in a free and democratic society".<sup>6</sup>
19. Justified restrictions on freedom of expression are routine and common in New Zealand law. Existing laws routinely apply reasonable limits to free expression, for example to protect privacy and confidentiality, to make sure only real lawyers can claim to be lawyers, to uphold the integrity of elections, and to protect commercial interests through copyright and trade mark law.
20. The existing law against the incitement of racial disharmony in New Zealand is another example of a limit that is welcome and clearly justified. Incitement

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<sup>3</sup> New Zealand Government, "Government accepts all Royal Commission recommendations" (8 December 2020) <[beehive.govt.nz](http://beehive.govt.nz)>.

<sup>4</sup> Institute for Strategic Dialogue, "Understanding the New Zealand Online Extremist Ecosystem" (June 2021) <[dia.govt.nz](http://dia.govt.nz)>.

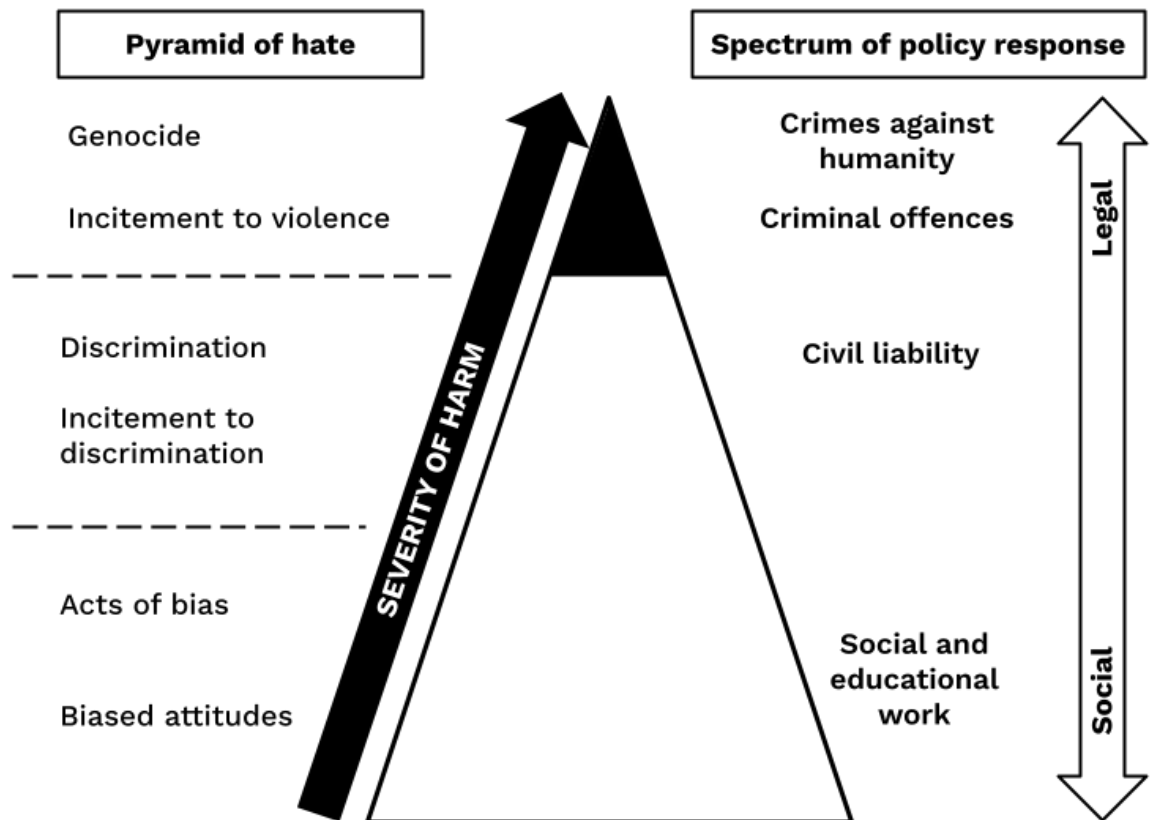
<sup>5</sup> See eg Department of Internal Affairs, "Achieving Compliance", <[dia.govt.nz](http://dia.govt.nz)> at 13.2.

<sup>6</sup> New Zealand Bill of Rights Act 1990, s 5.

of harmful behaviours is at the extreme end of harmful expression. It also occurs alongside a broader environment of other types of harmful expression.

21. To summarise this environment, we draw on the pyramid of hate,<sup>7</sup> and work by free expression organisation Article19. Both models identify incitement of violence as the most harmful type of expression, one step below genocidal violence. Article19 and the United Nations point out that the Genocide Convention and the Rome Statute require states to regulate incitement of violence.<sup>8,9</sup>

**Figure 1: The pyramid of hate and spectrum of responsive policy**



22. We see the law on incitement of hate and discrimination responding to the very tip of this pyramid of harmful behaviours, where there is a risk of serious harms to people, communities, and broader society. Responding to these harms is clearly the type of policy objective that can justify civil and criminal liability while respecting the overall importance of free expression.
23. Because laws on incitement only address the tip of the pyramid, other work may be needed as well. We think it will be important to consider how these proposals fit alongside other types of work to address social, educational,

<sup>7</sup> See eg Holocaust Centre of Seattle, “Pyramid of hate”, <[holocaustcenterseattle.org](http://holocaustcenterseattle.org)>.

<sup>8</sup> Article19, “Hate Speech Explained: A Toolkit”, (2015) <[article19.org](http://article19.org)>.

<sup>9</sup> United Nations, “United Nations Strategy and Plan of Action on Hate Speech” (September 2020) <[un.org](http://un.org)>.

commercial and regulatory drivers of social cohesion challenges online and offline. To understand and map what problems are solved and where gaps remain, we think it will be important to work with and for the communities most affected by harmful behaviours.

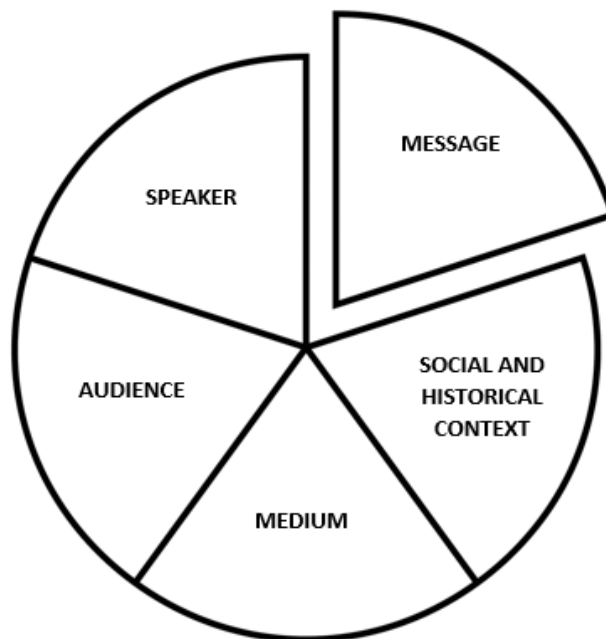
### **Dangerous speech: understanding harm in context**

24. A focus on updating the drafting of current law can miss important aspects of the broader context. Criminal and civil law address extreme cases where harm can be formally proven, but the normalising of hatred against groups of people can happen slowly and insidiously, through behaviours far below legal thresholds for inciting hatred or discrimination.
25. This is particularly relevant in the online context, where users may create or share messages which accumulate to an environment which normalises and maintains hatred. These messages may also be amplified through multiple channels and by recommendation algorithms, and may be deliberately crafted to do harm while avoiding a response by online services or governments.
26. Inciting hatred or discrimination should be understood within a wider context of harmful ideas and speech that can accumulate and lead to extreme harms such as organised violence and genocide. One framework which is useful to understand this context comes from the Dangerous Speech Project.
27. Dangerous speech is defined as “any form of expression (e.g. speech, text, or images) that can increase the risk that its audience will condone or commit violence against members of another group.”<sup>10</sup>
28. There are five components of dangerous speech which can be assessed; the speaker, audience, medium, social and historical context, as well as the message (see Figure 2 below).

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<sup>10</sup> Dangerous Speech Project, “DANGEROUS SPEECH: A PRACTICAL GUIDE” (19 April 2021) <[dangerousspeech.org](http://dangerousspeech.org)>.

**Figure 2: The dangerous speech five part framework**



29. Not all dangerous speech will meet the threshold of “inciting hatred” as defined by this discussion document, but this framework can help develop other remedies, and inform social interventions such as counter messaging.
30. We have heard that engagement so far has raised questions about whether the framing of “hate speech” or “hatred” is the best way to understand the issues. We offer the dangerous speech framework as an alternative one that might help to inform engagement and policy work on these issues.

## **Addressing discussion document questions**

### **1. Changing the language so rules protect more groups targeted by hateful speech**

31. The current law covers groups of people targeted based on “colour, race, or ethnic or national origins”. The proposal is to include grounds of sex, gender (including gender identity), religious belief, disability, and sexual orientation. **We support this extension.**
32. The discussion document asks for comment on whether other groups should be covered too, referring to section 21 of the Human Rights Act 1993 which also lists marital status, ethical belief, age, political opinion, employment status, and family status.
33. While in principle it should be safe to include all of these grounds, we think it will be important to understand the potential for unintended consequences. The grounds of political opinion and ethical belief involve an element of

people exploring issues and often disagreeing. Would including those grounds lead to bad faith claims of incitement to hate or discrimination?

34. One particularly harmful example would be people who assert that contempt, ridicule, hatred for groups of people is a part of their political opinions or ethical beliefs. We are seeing a version of this online now with transphobic ideas presented as political opinions for debate. Including these grounds may create legal cover for the harms this framework is meant to prevent.
35. We think the list in the [HDCA Communication Principle 10](#) is a good starting point.<sup>11</sup> Beyond that, we see limited risk of unintended consequences from including marital status, age, employment status, and family status.
36. We think it is important to understand how a broader list of grounds will operate in practice, and in particular to ask about this from the people most likely to be targeted by both online incitement and bad faith complaints, for example Māori, gender minorities, recent migrants, ethnic communities, beneficiaries, sex workers, women, and disability groups.

## **2. A clearer and more effective criminal provision moved to the Crimes Act 1961**

37. We think the language of the incitement offence (and civil liability provisions) is the most important part of these proposals. It defines what behaviour is covered, and what evidence is needed to hold someone responsible.
38. The existing offence of intentionally inciting racial disharmony applies to threatening, abusive, or insulting words which excite hostility or ill-will against a group, or bring a group into contempt or ridicule. This current wording lists a lot of different types of problems, in language which is quite old-fashioned and potentially confusing.
39. The proposal is to reword this offence to refer to “stirring up, maintaining, or normalising hatred” against a group, and to move it into the Crimes Act 1961.
40. We summarise the proposed wording below in Figure 3.

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<sup>11</sup> Harmful Digital Communications Act, s 6.



**Figure 3: Summary of proposed changes to incitement law**

|                             | <b>Civil liability (modified)</b>   | <b>Criminal offence (Crimes Act)</b>  |
|-----------------------------|---|---|
| <b>Type of expression</b>   | threatening, abusive, or insulting  | threatening, abusive, or insulting  |
| <b>Type of harm</b>         | Likely to incite, stir up, maintain or normalise hatred against a group   | Likely to incite, stir up, maintain, or normalise hatred against a group  |
| <b>Against who</b>          | <p>...on the basis of ANY of:</p> <ul style="list-style-type: none"> <li>(a) colour, race, ethnic or national origins</li> <li>(a) sex,</li> <li>(b) gender (including gender identity),</li> <li>(c) religious belief,</li> <li>(d) disability,</li> <li>(e) sexual orientation</li> </ul> <p>The document asks about including grounds too.</p> | <p>...on the basis of ANY of:</p> <ul style="list-style-type: none"> <li>(a) colour, race, ethnic or national origins</li> <li>(a) sex,</li> <li>(b) gender (including gender identity),</li> <li>(c) religious belief,</li> <li>(d) disability,</li> <li>(e) sexual orientation</li> </ul> <p>The document asks about including other grounds too.</p> |
| <b>Intent</b>               | [No intent is required]   | Intent to incite, stir up, maintain, or normalise hatred against a group  |
| <b>Who takes the action</b> | A person can complain to the Human Rights Commission, and then take a claim in the Human Rights Review Tribunal.  | Police prosecute, with approval of the Attorney-General   |
| <b>Penalty/remedy</b>       | Damages up to \$350,000 and orders eg a restraining order   | Up to 3 years in prison or a fine of up to \$50,000   |

41. We think the current wording is old-fashioned and potentially confusing. **We support the intention to make the wording clearer.**
42. We think the proposed wording in terms of hatred is more extreme than ill-will, contempt or ridicule, so would set the bar higher and narrow the types of behaviour covered. We think it is important to ask people about this impact.
43. There may also be more work to be done in understanding how New Zealanders interpret the proposed concept of hatred. It could be interpreted in different ways, which may not give us the intended clarity.
44. In the online context, we also think the requirement for “threatening, abusive, or insulting words” is an important element that may limit the application of the law. Given the way people in online communities develop and use new

meanings of words and symbols, apparently benign phrases can be highly threatening, abusive, or insulting in ways that skirt formal definitions.

45. A key question for this legal framework is how to provide sufficient certainty of what is covered, while offering rules and processes that effectively respond to nuances of harms as they arise in the context of communications.
46. We think it will be important to have ways for that context to be understood and considered, so that this requirement can be considered and applied in ways that work for the online environment for example by:
  - a. Considering how to address coded language and symbols that in context imply a message that stirs up, normalises, or maintains hate against a group (what is informally called “dog whistles”);
  - b. Pathways for affected communities to share their perspective on relevant prosecutions or complaints (for example, though targeted at an individual, online abuse of Olympic weightlifter Laurel Hubbard also has effects on the trans and gender diverse community, as it normalises discrimination and hatred towards trans and gender diverse people);
  - c. A role and resourcing for expert support to work with communities, monitor online and offline use of language and symbols, and offer a view on their meaning in context in any Police or civil proceedings. For example, perhaps the Human Rights Commission could be resourced to support communities in this way, and to offer expert evidence on these issues.

### **3. Increasing the punishment for the criminal offence to reflect its seriousness**

47. The proposal is to increase the potential penalty from 3 months in prison and a fine of \$7000, up to 3 years in prison and a fine of \$50,000.
48. The current fine is set at a very low level and **we support an increase**. We think that if the behavioural threshold is increased by the language of “stirring up, maintaining, or normalising hate” then the jail term could potentially increase too. We think that this balance of scope and penalty is an important one to continue engaging on with communities.

### **4. Changing the civil incitement provision to match the criminal provision**

49. The proposal is to change s 61 of the Human Rights Act 1993 to match the proposed wording of the offence. As above, we think this would make the law clearer, and also make the types of harm covered narrower, as we think hatred is a more extreme harm than for example ridicule or contempt. **We support a change in wording to make the law clearer.**
50. Such a high threshold means that the law covers only very extreme cases. Even with the current wording, we think the threshold for liability is set very

high. We are aware of one major claim under the current civil liability rules. In 2017, a civil claim was brought by Louisa Wall about two newspaper cartoons depicting Māori and Pasifika people. [The Tribunal decided](#) that the cartoons might be insulting and offensive, but were not likely to cause hostility or contempt, so there was no legal liability.

51. We think it is important to look at how incitement spreads online as well as through traditional media. There is a hard core of people who coordinate to create and share extreme, sometimes intentionally harmful materials, often on fringe or private platforms. They may seek to have this material shared more broadly on more mainstream platforms. People who share materials onward may be participating in doing harm, whether it is retweeting or sharing, or liking in a way that may inform algorithmic amplification. What would be the intended approach to liability in these situations? Should there be explicit civil remedies or responsibilities to address the impacts of spread?
52. We think it is important to carefully consider the roles and responsibilities that matter in the online environment.
53. Our preference would be for explicit responsibilities in legislation rather than leaving the Tribunal or courts to consider whether and how online services should respond and craft remedies based on particular cases. One advantage of doing this work in legislation is that it can be structured to support oversight and due process in ways that are transparent and accountable to communities. One example is the proposed take-down power in the Films, Videos and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill, which would enable legal requests that an online service remove access to objectionable content, based on a formal decision by the independent Censor's Office.<sup>12</sup>
54. We think that if there is an interest in addressing these issues, it will need more detailed engagement at a later stage of this process.

## 5. Changing the civil provision so 'incitement to discriminate' is against the law

55. Existing law makes discrimination illegal when it falls within BOTH:
  - a. **A protected area** which means decisions about employment, housing, education, access to public spaces, and access to goods and services; and
  - b. **Protected grounds** which mean sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation.

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<sup>12</sup> Films, Videos and Publications (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill, cl 119C.

56. This proposal would make incitement of discrimination illegal too. It is not clear if this would apply to all discrimination, or just discrimination in the protected areas. **We would support provisions limited to the protected areas.**
57. We think it might be important to understand how this will affect social campaigns, for example a campaign asking people to boycott an online service because of its business practices overseas. We think this sort of campaign should be allowed.
58. On the other hand, we think campaigns on the basis of protected grounds could cause harm in ways that justify a legal response, particularly to minority groups and people in historically under-served groups, and should be made illegal. This leads to distinctions that require a nuanced understanding of the context and power dynamics. For example, it might be acceptable for people to campaign against a business or a national government, but not against an ethnic or cultural group on the same set of issues. A boycott against businesses of an ethnic group should not be ok.

## **6. Adding to the grounds of discrimination in the Human Rights Act to clarify that trans, gender diverse and intersex people are protected from discrimination**

59. The current law probably already covers discrimination against people on the basis of their gender identity or gender expression. The proposal is to make this explicit, rather than relying on the interpretation of the existing law.
60. **We welcome this clarification of the law.**

## **How will this work on the Internet - some questions from us**

### **Who might have responsibilities for online incitement?**

61. We think it will be important to think about how the civil and criminal rules work online and in practice. The criminal offence focuses on a person who incites and intends to cause harm. But online, a range of other people and organisations may have a role in creating, sharing, boosting, or responding to incitement.
62. We think key questions include:
  - a. Beyond a person who says something that counts as incitement, should online services be liable for sharing? Should other individuals?
  - b. How should online liability work in practice? When might it be unfair or impractical?

- c. How should online monitoring and enforcement work? Should there be an agency in New Zealand that can work with online services? Should this be an existing agency, or something new?
- d. Should there be a legal power to request removal of content? If so, who should have this power, and what safeguards should apply?
- e. Currently there are lots of different systems for reporting online harms, which can be confusing. How should that inform work on incitement?
- f. Should there be an increased role for the Human Rights Commission? For example monitoring and advising on the context of communications where this is relevant to assessing the likely harm to people and communities.

### **How will online aspects of incitement law sit alongside other areas of law?**

63. Rules addressing incitement will sit alongside existing laws. The Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Bill (see our explainer) proposes the Chief Censor and the Department of Internal Affairs get new online enforcement powers.
  - a. How should incitement provisions fit alongside the classification framework, including the proposed takedown power for online enforcement?
  - b. How should incitement provisions fit alongside the Harmful Digital Communications Act 2015, particularly liability rules?
  - c. If online liability is considered, is there a need to review and unify the approach to online liability for third parties?

### **For better outcomes, we need better operational support**

64. We see a need for process improvements to meet the needs of people targeted by harmful expression, which we think includes incitement as well as a broader spectrum of other harms and concerns online. The current process can be harmful, for example the offer of mediation may be worse than no response in a situation of potential incitement to hate.
65. We think it will be important to pair any law changes with operational improvements to:
  - a. Reporting of online harms that currently fall across multiple agencies and online services, or fall into gaps;
  - b. Escalating reported issues for responses by Police and others.
  - c. Support for people experiencing harm online;

- d. Improvements in how the whole of government understands the perspectives and meets the needs of people and communities most targeted by hostile behaviour online and offline;
  - e. Consider whether the Human Rights Commission can do more to support this work and affected communities.
66. We think it will be particularly important to consult the most targeted communities on these changes.

## Next steps

### Gather perspectives on the issues and people's experiences

67. We think public discussion of these proposals has been complicated by people having different understandings of what might be in scope.
68. We think it would be helpful to inform that public discussion with some more concrete guidance on the intended scope and impacts of these proposals. One way to do this would be by offering some scenarios for the types of behaviour that this policy work responds to. This could potentially include guidance on behaviours that are unlikely to be in scope, are on the borderline, and are most clearly in scope.
69. We think this type of guidance would help people better understand the impact of what is being proposed and whether they support it, as well as identifying gaps to address in further policy work.
70. We recognise that the idea of offering scenarios could create a concern about risking harm to people. We think that rather than dealing with hypotheticals, the best approach would be to work with the most affected people and communities, to assess their comfort levels and to consider whether to present scenarios based on people's actual experiences. Other agencies who deal with real situations of people facing harm, such as the Censor's Office, NetSafe, and the Police, may be able to help inform a sensitive approach.
71. We see a risk that failing to offer concrete guidance on the scope of these proposals leads to a public discussion based primarily on hypotheticals, rather than responding to the experiences of people who the law is meant to empower and protect. The rule of law requires that people who will be subject to the law, either by making complaints or facing them, should know what the scope will be. It is very hard for anyone to make an informed submission without knowing this.
72. **If the people and communities most affected feel comfortable with the idea of sharing scenarios, we think it would be a very useful contribution to the next stages of this work.**

## Summary

73. We think understanding these proposals in context and working with targeted groups is vital for this and other work on social cohesion to address the challenges facing us in a way that will work for all New Zealanders.
74. Overall we support the direction of these proposals. We welcome moves to **cover more groups** under proposal 1, and **to make the law clearer** under proposals 2, 4, and 6.
75. We raise some questions about the potential for unintended impacts from a broader list of grounds under proposal 1.
76. We think it is important to consider how offences, civil liability and operational matters should work in the online environment, and encourage an approach that engages with communities on these issues at the next stage.

## Conclusion


77. We agree that people are facing serious harms online, and we welcome effective policy work to understand and address those issues.
78. Overall, we support the direction of these proposals, as one part of broader work on social cohesion and making the Internet safe for all New Zealanders.
79. Our key concern is to encourage an approach to this work which reflects its place in that broader context, and to emphasise the vital importance of working with and for the people and communities most affected by hate and abuse online and offline. They are the people who most need effective policy responses to incitement to the broader issues of online harm and exclusion.
80. We have appreciated the chance to engage with officials on this work. We look forward to the next stage of this process, and would welcome the chance to talk further.



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