



IP55 Submission 22

## SUBMISSION OF THE FREE SPEECH UNION: LAW COMMISSION HATE CRIME CONSULTATION

### INTRODUCTION

The Free Speech Union (New Zealand) (FSU) makes this Submission in response to the Law Commission’s Hate Crime Consultation Paper (“the Consultation Paper”).

### SUMMARY OF SUBMISSION

This submission addresses the proposed changes to hate crime legislation, focusing on the risks to free speech, the vagueness of key definitions, and the potential for inconsistent enforcement. It recommends retaining the current sentence aggravation model while refining its application to better align with civil liberties and ensure greater clarity. The submission urges the Government to carefully reconsider any reactionary measures and prioritise reforms that protect fundamental rights.

### THE FSU – ABOUT US

We are a registered trade union dedicated to defending, protecting, and expanding New Zealanders’ rights to freedom of speech, conscience, and intellectual inquiry. We envision a thriving civil society where vigorous debate, dissenting ideas, and free speech are valued as cultural cornerstones.

The Free Speech Union (FSU) evolved from the Free Speech Coalition, which was founded in 2018 in response to then-Auckland Mayor Phil Goff’s decision to ban two foreign speakers from public venues. Originally a volunteer-led initiative focused on legal actions, the Coalition achieved significant victories, including *Whitmore v Palmerston North City Council*.<sup>1</sup> In May 2021, it formally unionised, and by July 2021, it employed staff to coordinate opposition to proposed hate speech laws.

Since then, we have grown from 4,000 subscribers and one employee to a grassroots movement of 100,000 supporters, and seven permanent staff. We remain nonpartisan, advocating solely for the right to speak freely without fear of undue consequence.

Freedom of speech consists of three key elements:

1. The right to speak freely
2. The right to hear others speak freely
3. The right to be free from compelled speech

Free speech is the foundation of liberal democracy, a safeguard against state and corporate overreach, and essential for intellectual and academic progress.

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<sup>1</sup> *Whitmore v Palmerston North City Council* [2021] NZHC 1551.

We work to defend, promote, and extend the right of New Zealanders to freely seek, receive, and share information. We strive to increase public understanding of free speech as:

- A fundamental human right
- Essential to all other freedoms
- The cornerstone of democracy
- A protection against power abuses
- Crucial for the development and testing of ideas

Formed in response to the rise of cancel culture, suppression of dissent, and erosion of civil discourse, we fight against the growing trend of individuals and communities facing illegitimate consequences for expressing their views.

The FSU prioritises four key workstreams:

1. **Cases** – As a registered union, we represent members in employment disputes and advocate for supporters across various sectors.
2. **Campaigns** – With a base of 100,000 Kiwis, we mobilise, engage, and protest to defend free speech.
3. **Content** – We promote public discourse through media commentary, op-eds, podcasts, events, and international speaker tours.
4. **Coaching** – We equip young people with critical thinking skills through high school debates, university lectures, competitions, and an internship program for future free speech leaders.

## SUBMISSION

### QUESTION 1: IS THERE ANYTHING YOU WOULD LIKE TO TELL US ABOUT WHAT ‘HATE’ CRIME IS OCCURRING IN NEW ZEALAND AND ITS IMPACTS?

#### *Legislating ‘Hate’ And ‘Hate’ Crime Is Fundamentally Flawed*

- 1.1 The inherent subjectivity of the term 'hate' is a significant barrier to defining hate crimes and ensuring legal clarity and consistency in hate crime legislation.
- 1.2 As the Consultation Paper acknowledges, the term ‘hate crime’ carries different meanings for different people,<sup>2</sup> largely because the concept of “*hate*” is inherently subjective. While individuals may sincerely hold their own interpretations of what constitutes ‘hate’, such interpretations are deeply influenced by personal beliefs, cultural perspectives, and societal norms, which evolve over time. This subjectivity poses a fundamental barrier to legal clarity and consistency.
- 1.3 To uphold the Rule of Law, the law must be objective, clear, and predictable, ensuring that individuals and authorities alike can understand and apply it consistently.<sup>3</sup> If legal definitions are vague or left open to shifting societal interpretations, the enforcement of hate crime laws become arbitrary, inconsistent, and susceptible to political or ideological influence. A legal

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<sup>2</sup> The Consultation Paper at [2.2].

<sup>3</sup> <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-law-committee/the-rule-of-law-in-aotearoa-new-zealand/>

framework that relies on an ever-changing and highly subjective notion of ‘hate’ undermines legal certainty, leading to unequal application of the law, selective enforcement, and infringements on fundamental rights, such as freedom of expression.

- 1.4 Although a “*relatively settled*” definition of hate crime exists for criminal law purposes,<sup>4</sup> it is a circular definition, as it relies on the term ‘hate’ to define ‘hate crime.’ This presents a fundamental issue, as it fails to provide a concrete, independent meaning for ‘hate’, leaving the definition vulnerable to ambiguity and interpretation. The Consultation Paper further exacerbates this issue by using ‘hate’ in an unusually broad sense, encompassing terms like hostility, prejudice, and intolerance.<sup>5</sup> While these terms are related to ‘hate’, they are not interchangeable, as each carries a distinct meaning in both everyday language and legal contexts.
- 1.5 From the outset, it is clear ‘hate’ lacks a formal, legal definition, forcing us to rely on everyday understandings of related concepts like hostility, prejudice, and intolerance. However, these concepts can occur independently of hate, such as when individuals or groups experience hostility or prejudice based on religion or belief. Reliance on subjective, fluctuating meanings undermines the consistency and predictability required in criminal law. Moreover, criminalising ‘hate’ itself introduces an inherently uncertain and variable concept into the legal system. This opens the door for future weaponisation of hate crime laws, potentially enabling those in power to exploit such laws in ways that may clash with current norms and democratic values, giving disproportionate control to those who dominate societal institutions.

#### *A Knee-Jerk Response to The Christchurch Terrorist Attack*

- 1.6 The Royal Commission of Inquiry into the Christchurch Terrorist Attack (“the Report”) identified multiple contributing factors to the tragedy, but the push for hate crime law reforms in response risks being a reactionary measure that may not effectively address the root causes of extremism.
- 1.7 The purpose of the Royal Commission of Inquiry was to investigate what happened, why, and what should be done to reduce the risk of future attacks.
- 1.8 The Royal Commission Report (“the Report”) states that the attack was driven by an extreme right-wing Islamophobic ideology and the individual who carried out the attack aimed to promote chaos and disharmony in New Zealand.<sup>6</sup>
- 1.9 Several factors were identified as contributing to the attack:<sup>7</sup>
- a. The rise of far-right ideology.
  - b. The individual’s retaliation for Islamist extremist terrorist events in Europe, influenced by the perceived inability of the far right to address immigration democratically, and driven by nostalgia for a pre-immigration past.

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<sup>4</sup> The Consultation Paper at [2.3].

<sup>5</sup> The Consultation Paper at [2.4].

<sup>6</sup> Royal Commission Report, Volume 1.

<sup>7</sup> As above.

- c. The concentration of counter-terrorism resources on the threat of Islamist extremist terrorism was not based on an informed assessment of the threats of terrorism from other ideologies.
  - d. The individual's ability to operate undetected.
  - e. Public sector agencies' failures to detect the threat.
  - f. The internet being a key platform for terrorist radicalisation and recruitment.
- 1.10 The Report lay the foundation for proposed law reforms influenced by moral panic and a knee-jerk legislative response. It highlights a variety of factors contributing to the attack, particularly the rise of far-right ideology and the individual's extreme motivations. However, while this is cause for heightened public concern, the push for new law as a reaction risks amplifying fears without addressing the root causes of radicalisation. An emotional reaction can create a distorted view of the true scope of the threat, leading to overreaction in the form of broad and imprecise legal measures that are unlikely to be effective in preventing future incidents.
- 1.11 Rather than targeting the underlying causes of extremism, such as ideology, political grievances, or institutional failures, the focus on hate crime legislation could shift attention away from more effective counter-terrorism strategies. By responding with laws that criminalise vague concepts like "hate," there will be unintended consequences, such as infringements on free speech and the over-policing of marginalised groups. This reactionary approach will not only fail to address the problem but also exacerbate social divisions and civil liberties concerns.

#### *The Police Struggle to Implement Unworkable Law*

- 1.12 The Police's approach to 'hate' training, developed in response to Recommendation 42 of the Report, has been marked by ambiguity, reliance on subjective perceptions, and concerns over its legality and impact on fundamental rights.
- 1.13 Recommendation 42 of the Royal Commission Report states as follows:

**42. Direct** New Zealand Police to revise the ways in which they record complaints of criminal conduct to capture systematically hate-motivations for offending and train frontline staff in:

- a) identifying bias indicators so that they can identify potential hate crimes when they perceive that an offence is hate-motivated;
- b) exploring perceptions of victims and witnesses so that they are in a position to record where an offence is perceived to be hate-motivated; and
- c) recording such hate-motivations in a way which facilitates the later use of section 9(1)(h) of the Sentencing Act 2002.

- 1.14 In response, the Police introduced *Te Raranga* (The Weave), a four-year programme launched in July 2021 to reform the training of frontline officers in recognising and recording hate-motivated offending. Mandated and funded by Cabinet with a total budget of \$10.4 million over four years, the initiative aimed to address the Commission's directive to improve police

recording of such offences, thereby facilitating the application of section 9(1)(h) of the Sentencing Act 2002.

- 1.15 *Te Raranga* was poorly developed and caused significant confusion among Police officers tasked with its implementation. This lack of clarity has resulted in unlawful policing practices and breaches of civil liberties. While the shortcomings of the programme and the Police’s execution of it are evident, the root issue lies in the inherent flaws and impracticality of ‘hate’ crime laws themselves. *Te Raranga* serves as clear evidence of this.
- 1.16 Around mid-2024, Police officers alerted the Free Speech Union that aspects of their ‘hate’ training and recording ‘non-criminal hate incidents’ were unlawful. The officers provided us with screenshots of cartoon examples used in the training materials to illustrate hate speech. These included a billboard displaying the phrase “*Kiwi Not Iwi*”, a slogan from the National Party’s 2005 campaign, and protestors holding signs that read “*Free Speech*” and “*There are only two genders.*” Clearly, no reasonable person would interpret these as hateful.



- 1.17 After the Free Speech Union alerted the Police Commissioner, the Police immediately removed the cartoons in question from the training and ordered an internal review of the entire programme. Despite this, a review of the *Te Raranga* training materials currently available on the Police website, stated to be the “*current training materials*”, suggests key recommendations from the Assurance Review, published in September 2024, have not been implemented.
- 1.18 The training materials continue to define hate crime as perception-based, stating: “*If someone perceives an act as being motivated by bias, it means they believe or interpret it that way— but that does not necessarily mean the act was actually motivated by bias.*” However, the Assurance Review found this definition inconsistent with the law and recommended replacing it with an objective test, requiring reasonable grounds to believe the incident poses a significant risk of harm to a person’s safety.
- 1.19 The Police’s ongoing struggle to lawfully implement Recommendation 42 underscores a more fundamental issue: the inherent flaws and unworkability of criminalising ‘hate.’ No legal

framework can coherently define and enforce laws against ‘hate’ without descending into ambiguity, subjectivity, and overreach. Attempting to police thoughts, motivations, or perceived biases inevitably leads to inconsistent application, legal uncertainty, and the erosion of fundamental rights such as freedom of expression. The confusion surrounding *Te Raranga* is not merely a failure of execution but a reflection of the impossibility of legislating against an inherently nebulous concept. The reality is that any attempt to criminalise ‘hate’ will create more problems than it solves, entangling law enforcement in subjective determinations that risk undermining public confidence in both the justice system and civil liberties.

- 1.20 The Police’s attempt to implement ‘hate’ training in response to the Royal Commission Report has highlighted significant flaws in both execution and the underlying concept of criminalising ‘hate’. The continuing ambiguity and subjectivity in defining and enforcing ‘hate’ crimes are not only impractical but also threaten fundamental rights and freedoms.

#### *Supporter Feedback on Hate Crimes*

- 1.21 At the request of the President of the Law Commission, we gathered feedback from our supporters on two key questions regarding hate crimes in New Zealand: whether hate crimes are currently a problem, and whether the introduction of new laws could effectively address this issue. The majority opposed new hate crime laws, arguing they are unnecessary, subjective, and could infringe on free speech. Many felt existing laws are sufficient, and feared new laws could lead to misuse and societal division.
- 1.22 In response to the question of whether hate crimes are a significant problem in New Zealand, most submissions expressed doubt. Many respondents emphasised that existing legal frameworks, particularly the Crimes Act, already address hate-motivated offences. One submission noted, "*All violent crime is essentially a hate crime, and it's already covered under the Crimes Act,*" reflecting the view that current laws are sufficient. Others argued that the issue of hate crimes is overstated, with one respondent stating, "*Crime is an objective matter of law while hate is an emotion,*" suggesting that hate itself cannot be regulated by law. Additionally, several respondents expressed concern that focusing on hate crimes diverts attention from more pressing national issues. As one respondent put it, "*Please stop trying to interfere with people's right to free speech and focus on what's really important to most New Zealanders.*" A common fear was that hate crime laws could be misused to stifle freedom of speech, with one submission warning, "*The law has a duty to regulate actions, not feelings.*" These responses collectively reflect a view that hate crimes are not a widespread problem in New Zealand and that existing laws are adequate for addressing offences motivated by hate.
- 1.23 Regarding whether new laws could effectively address hate crimes in New Zealand, most respondents expressed concerns about the subjectivity and potential misuse of such laws. Many argued that the concept of ‘hate’ is too fluid and difficult to define, with one respondent stating, "*Hate is a subjective emotion that is not amenable to precise definition.*" There was a strong sense that any attempt to legislate against hate could lead to inconsistent application and potential overreach, with one submission noting, "*I am concerned about how enforcement would work and what seems to me to be the very high risk of differential enforcement.*" Some

respondents feared that new laws could be used to silence dissenting opinions, with one warning, "*Hate crime legislation can be used as a political tool to silence opponents and punish individuals for holding unpopular or controversial views.*" Furthermore, many felt that existing laws already provide adequate protections, particularly by considering hate as an aggravating factor in sentencing. Overall, respondents expressed scepticism that new hate crime laws would effectively address the issue, with many believing they could do more harm than good, creating a "two-tier" justice system or eroding fundamental rights like freedom of speech.

- 1.24 The overwhelming response from our supporters makes it clear that the introduction of new hate crime laws is not the solution. Many expressed confidence in the adequacy of existing laws to address hate-motivated offences. Respondents raised serious concerns about the subjective nature of "hate" and the potential for misuse, fearing that new laws could stifle free speech and lead to unequal enforcement. There is a strong belief that such laws would do more harm than good, undermining fundamental rights and creating divisions in society. The feedback is a strong reminder that New Zealand's focus should remain on strengthening existing legal frameworks, rather than introducing potentially dangerous and unnecessary legislation.

## QUESTION 2: HOW CAN WE BEST UPHOLD THE CROWN'S OBLIGATIONS UNDER TE TIRITI O WAITANGI | TREATY OF WAITANGI IN THIS REVIEW?

- 2.1 We refer to our comments in paragraph 4.3 below.

## QUESTION 3: WHAT CHARACTERISTICS SHOULD BE PROTECTED BY HATE CRIME LAWS? WHY?

- 3.1 We oppose certain characteristics being protected by hate crime laws because expanding criminal law to cover an increasing number of subjective and evolving characteristics risks creating legal uncertainty, inconsistent enforcement, and a weakening of fundamental rights.
- 3.2 There is broad agreement that hate crime is focused on the identity (or the perceived identity) of the victim.<sup>8</sup> This identity-based approach presents is inherently problematic: it leads to the continuous fragmentation of groups, inconsistent enforcement, and deviations from fundamental legal principles of impartiality and universality. The law must apply equally to all citizens, unless objective differences justify differentiation<sup>9</sup>, however, identity and personal characteristics are objective (measurable and observable) *and* subjective (socially or personally defined).
- 3.3 Significant practical issues arise with determining what characteristics should be protected by hate crime laws, namely:
- a. Infinite fragmentation. If the guiding principle is that any marginalised or targeted identity group deserves protection, it raises critical questions about the scope and limits of such protections. Should they extend to political beliefs, subcultures, professions, or personal

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<sup>8</sup> The Consultation Paper at [2.3].

<sup>9</sup> <https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/public-law-committee/the-rule-of-law-in-aotearoa-new-zealand/>

traits such as appearance and body type? Moreover, how can a stable and consistent legal framework be maintained as new identity groups continue to emerge? Expanding hate crime laws to encompass an increasing number of identities risks rendering them overly broad and ineffective or, conversely, so selective that they appear arbitrary and unjust.

- b. Subjectivity and Inconsistent Application. Various characteristics, such as gender identity, ethnicity/cultural identity and religious beliefs are understood to be based on ever evolving personal identity, perception, or social constructs. If this is the case, legal definitions risk becoming vague and inconsistent, making enforcement unpredictable. Groups with greater political or cultural influence may secure legal recognition more swiftly than others, raising concerns about unequal protection under the law. Primarily, prioritising certain identity groups over others undermines the principle of equal treatment, a fundamental pillar of the Rule of Law.
- c. Potential for Overreach and Misuse. If hate crime laws continue to expand to encompass an increasing number of characteristics, they risk criminalising broad categories of speech or behaviour, restricting freedom of expression. As the criteria for protection become more complex and subjective, legal disputes over the definition and scope of protected classes will inevitably increase, leading to inconsistency in enforcement and challenges to legal clarity.

3.4 Expanding hate crime laws to cover an increasing number of subjective and evolving characteristics creates legal uncertainty, inconsistent enforcement, and a weakening of fundamental rights such as freedom of expression. The issues highlight the inherent flaws of an identity-based approach and the need for a more consistent, impartial legal framework that treats all citizens equally.

**QUESTION 4: WHAT DO YOU THINK ABOUT THE KEY REFORM CONSIDERATIONS WE HAVE IDENTIFIED FOR THIS REVIEW?**

*Crimes Motivated By ‘Hate’ Should Not Be Given Special Status*

- 4.1 Hate crimes should not be given greater legal weight than other serious offences for many reasons:
  - a. Criminal law is designed to punish actions, not thoughts. While intent is a relevant factor in sentencing, criminalising ‘hate’ risks penalising individuals for their beliefs and opinions, no matter how objectionable, rather than solely for their conduct. This sets a dangerous precedent by extending legal punishment into the realm of thought and expression.
  - b. Treating hate crimes as distinct offences suggests that some victims are more deserving of justice than others, undermining the principle of equal protection under the law. All crimes should be prosecuted and punished based on their severity and impact, rather than the perceived motivation behind them.

- c. The fear of legal consequences may deter individuals from expressing controversial opinions, stifling free expression and restricting open debate on important societal issues. Laws that punish motive risk being enforced in a way that suppresses unpopular viewpoints rather than ensuring justice.
- d. Hate crime laws carry a high risk of selective enforcement, potentially being used to silence certain voices while failing to apply consistently across different groups. This risks turning legal protections into tools of political or ideological control rather than impartial justice.
- e. Harsh penalties for hate crimes could unintentionally create martyrs or fuel resentment, deepening societal divisions rather than addressing the root causes of hostility. Overemphasising ‘hate’ as a legal category may exacerbate social tensions rather than promote cohesion.

4.2 While motive is an important factor in sentencing, hate crimes should not be treated more seriously than other offences simply due to the presence of ‘hate’. Criminal law already considers intent and aggravating factors when determining penalties. However, creating a distinct legal category for hate crimes risks undermining equal protection under the law, enabling selective enforcement, and fuelling societal divisions. Elevating ‘hate’ above other aggravating factors, such as premeditation, extreme violence, or harm to vulnerable victims, sets a concerning precedent by giving certain motives disproportionate legal weight. This approach risks restricting free expression and open debate, while failing to ensure justice is applied fairly and consistently.

*The Law Commission Should Not Prioritise One Treaty Version Over Another*

4.3 Prioritising one version inherently privileges a specific linguistic and cultural perspective potentially marginalises viewpoints grounded in the English text. The Law Commission’s view is where discrepancies exist between the English and Māori versions of Te Tiriti o Waitangi, the Māori version is more authoritative.<sup>10</sup> However, elevating one version over the other risks discouraging open discussion and critical analysis of differing interpretations. Scholars, lawyers, and the public may feel constrained in debating the meaning of Te Tiriti for fear of backlash or accusations of undermining Māori rights.

*Hate Crime Law Reform Proposals Are an Unjustified Limit on Freedom Of Expression*

4.4 The Consultation Paper cites a decision where the Court of Appeal has said the current sentencing aggravation model places justified limits on the right to freedom of expression.<sup>11</sup> In contrast, the implementation of an alternative model, either specific offences or the Scottish Hybrid Model, is not a justified limit on the right to freedom of expression.

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<sup>10</sup> The Consultation Paper at [3.30]

<sup>11</sup> At [3.50] citing *Arps v Police* [2019] NZCA 592 at [48]-[52].

- 4.5 The rights and freedoms contained in the New Zealand Bill of Rights Act (“NZBORA”) may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. This has been interpreted to mean any limits must:
- a. Serve a sufficiently important purpose.
  - b. Be rationally connected to its purpose.
  - c. Impair the right no more than is reasonably necessary for sufficient achievement of its purpose.
  - d. Proportionate to the importance of the objective.
- 4.6 Freedom of expression is not a mere procedural consideration that policymakers acknowledge before enacting new legislation (as many are treating it in recent years); it is a fundamental right that must be rigorously protected. Any restrictions on this right must be *demonstrably justified*, requiring a thorough and objective assessment:

TEST: COMPLIANCE WITH NEW ZEALAND BILL OF RIGHTS ACT (JUSTIFIED LIMITATION)

**Q.1:** *Do specific hate crime offences or the Scottish Hybrid model serve a sufficiently important purpose?*

**Answer:** No, they do not serve a sufficiently important purpose. While the goals of denouncing hate-motivated conduct, deterring offenders, and protecting vulnerable groups are valid, they do not justify creating distinct hate crime offences beyond existing laws. New Zealand’s current legal framework, including the Sentencing Act 2002, already allows courts to recognise and penalise hate-motivated crimes without elevating motive to a defining element of the offence. Introducing specific hate crime offences would risk punishing individuals for their beliefs rather than their actions, extending state control over expression and conflicting with the right to freedom of expression under the NZBORA.

**Q.2:** *Is there a rational connection between specific ‘hate’ offences or the Scottish Hybrid Model and the purpose?*

**Answer:** No, there is no clear rational connection between specific hate crime offences or the Scottish Hybrid Model and their intended purpose of reducing hate-motivated harm. The assumption that these offences act as an effective deterrent is highly questionable, as they focus on an offender’s motive rather than the criminal act itself, introducing subjectivity and inconsistency in enforcement. The vague and interpretative nature of “hate” raises legal certainty concerns, making prosecution complex and potentially arbitrary. Additionally, criminalising hate does not necessarily reduce prejudice; instead, it may drive harmful views underground or even contribute to radicalisation. Without clear, objective definitions and evidence of effectiveness, the justification for such offences remains weak.

**Q.3:** *Do specific hate crime offences or the Scottish Hybrid Model breach the right in s 14 of NZBORA no more than is reasonably necessary?*

**Answer:** No, specific hate crime offences or the Scottish Hybrid Model would breach the right in section 14 of NZBORA more than is reasonably necessary. A justifiable limitation on freedom of expression must impair the right no more than required to achieve its purpose. The existing aggravating sentencing model under section 9(1)(h) of the Sentencing Act 2002 meets this standard by enhancing penalties for hate-motivated offences while focusing on conduct rather than criminalising thoughts or beliefs. In contrast, specific hate crime offences or a hybrid model would impose broader restrictions by penalising motive, creating a chilling effect on speech. A less restrictive alternative is to retain the current approach, which effectively addresses hate-motivated crimes without unnecessary and disproportionate limits on freedom of expression.

**Q.4:** *Are specific hate crime offences or the Scottish Hybrid Model proportionate responses to the importance of their purpose?*

**Answer:** No, specific hate crime offences or the Scottish Hybrid Model are not proportionate responses to their intended purpose. While protecting vulnerable groups and promoting social cohesion are valid objectives, creating separate hate crime offences goes beyond what is necessary to achieve these goals. The existing aggravating sentencing model maintains an appropriate balance by enhancing penalties for hate-motivated offences while preserving equal treatment before the law. In contrast, specific hate crime offences create legal disparities by implying that some victims are more deserving of justice based solely on an offender's intent. Additionally, selectively enforcing hate crime laws risks deepening social divisions rather than strengthening public trust. Given these concerns, expanding hate crime laws beyond sentencing aggravation is neither necessary nor proportionate under the NZBORA justification framework.

**Score:** FAIL / UNJUSTIFIED

**Feedback:** *Specific hate crime offences or the Scottish Hybrid Model are not justified under the NZBORA, as they lack a clear rational connection to their purpose, impose disproportionate restrictions on freedom of expression, and exceed what is necessary to address hate-motivated harm. The existing aggravating sentencing model already provides a more balanced and effective approach without creating legal uncertainty or deepening social divisions.*

**QUESTION 5: DO YOU THINK THERE ARE PROBLEMS WITH HOW AOTEAROA NEW ZEALAND'S CURRENT HATE CRIME LAW IS WORKING? IF SO, WHAT ARE THOSE PROBLEMS?**

5.1 The current hate crime law in New Zealand is problematic due to the absence of a clear legal definition of 'hostility', and the fact that 'hate' motivation is inferred as one of several factors considered by the judge at sentencing. This lack of clarity leads to inconsistent application, as evidenced by the broad categorisation of everyday disputes being recorded as potential hate incidents or offences in the *Te Raranga* training material. The subjective nature of 'hate' leaves room for arbitrary decisions, undermining public trust and potentially criminalising everyday tensions.

- 5.2 The current legal model under section 9(1)(h) of the Sentencing Act provides an aggravating factor at sentencing for hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
- i. the hostility is because of the common characteristic; and
  - ii. the offender believed that the victim has that characteristic:
- 5.3 This current model has flaws (like ‘hate’ crime laws):
- a. There is no clear legal definition of hostility, leading to inconsistent interpretations. The everyday understanding of the word encompasses a wide range of emotions and behaviours, including *"ill-will, spite, contempt, prejudice, unfriendliness, antagonism, resentment and dislike"*.
  - b. The vagueness of the term allows for subjective interpretation by Police, prosecutors, and judges.
  - c. The broad definition of hostility potentially criminalises a wide range of behaviours that may not necessarily constitute hate crimes, infringing on freedom of expression and other civil liberties.
- 5.4 Prosecutors rely on the investigating officer to provide evidence of ‘hate’ motivation<sup>12</sup> but this process is inherently problematic based on the lack of legal definition for ‘*hostility*’. Further, ‘hate’ motivation is not required to be proven beyond reasonable doubt at trial. Rather, it is an inference made by the judge at sentencing.

*An Argument Over an Avocado Tree: What the Police Are Really Policing*

- 5.5 The *Te Raranga* training material includes real-life case examples categorised as “*Hate Speech as a General Hate Crime*” and “*Non-Criminal Hate Speech (awful but lawful hate incidents)*”. All the offences and incidents were flagged by the Police as perceived hate.
- 5.6 Five examples are provided to illustrate what is considered hate speech as a general hate crime:
- a. A road rage incident in which one driver used the racial slur “*n\*\*\*\*r*” against another.
  - b. Someone driving past an Islamic Centre and shouting “*Don’t Bomb Us!*” out of the window.
  - c. Someone harassing and mocking two Asians at a bus stop.
  - d. A street preacher warning passersby to follow Jesus or face hell, specifically targeting a homosexual couple.

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<sup>12</sup> The Consultation Paper, at [4.29].

- e. Neighbours having a heated argument over an avocado tree, during which one said, *“Go back to your f\*cking country, this isn’t your land...people like you are the reason their houses get burned down.”*
- 5.7 The material also lists five instances of Non-Criminal Hate Speech:
- a. A mother, upset that her daughter married a Muslim man *“against the family’s wishes,”* stating that her son-in-law was a terrorist obsessed with obtaining a gun licence.
  - b. A bumper sticker on a Ute reading, *“Dead Queers Don’t Spread Aids.”*
  - c. Writing on a public wall with chalk, reading *“Woman = Adult Human Female”* and *“End the Mandates, End the Madness.”*
  - d. A parent ranting on Facebook, calling the primary school *“f\*cking disgusting cunts”* for promoting an ‘Opposites Day’ encouraging gender and sexual diversity.
  - e. A dispute between a landlord and tenant, where the landlord threatened to call immigration and have the tenant deported from New Zealand.
- 5.8 Road rage, street preaching, neighbourly disputes, family tensions, offensive bumper stickers, disgruntled parents, and landlord/tenant disagreements are commonplace in daily life. The notion that the Police are being trained to intervene, report, and prosecute such incidents is deeply concerning. It is crucial to view these examples of general hate speech and non-criminal hate speech in the context of the Royal Commission Report. While the Report aimed to prevent a recurrence of the Christchurch terrorist attack and made recommendations for the Police, the Police have instead used this as justification to move toward a Police State, where significant control is exerted over citizens at the cost of personal freedoms and civil liberties.
- 5.9 The implementation of a different model, such as specific hate crime offences or the Scottish Hybrid Model, would only exacerbate the confusion and misapplication of the law, leading to an even more inconsistent and overreaching approach by the Police. With examples ranging from road rage to family disputes, it is difficult to foresee how the Police would appropriately intervene in such situations without overstepping boundaries. The subjective nature of what constitutes ‘hate’ in these cases leaves room for arbitrary decisions, where everyday tensions and disagreements could be unnecessarily criminalised. Instead of providing clarity, these laws would only entangle law enforcement in complex, often conflicting, scenarios that undermine public trust and the protection of fundamental rights.
- 5.10 The examples from the *Te Raranga* training material reveal a troubling overreach by the Police in categorising everyday disputes and expressions as hate-related incidents or offences. This not only undermines personal freedoms but also shifts towards an authoritarian approach that risks eroding civil liberties.

**QUESTION 6: IF THERE ARE PROBLEMS WITH HOW AOTEAROA NEW ZEALAND'S HATE CRIME LAW IS WORKING, CAN THEY BE ADDRESSED WHILE KEEPING THE CURRENT LEGAL MODEL (SENTENCE AGGRAVATION)? IF SO, HOW?**

6.1 To address the inconsistencies in the application of hate crime laws, particularly regarding the inference of 'hate' motivation at sentencing, establishing a clear evidential foundation for a judge to find hate aggravation would improve transparency and ensure consistency.

6.2 The following approaches could be used to substantiate hate motivation and guide the judge's sentencing decision:

a. Admission by the Defendant

- Proposal: A defendant's admission that the offence was motivated by hate could form the basis for a judge to apply hate aggravation at sentencing. This would provide a direct and clear evidential foundation for the judge's decision.
- Implementation: A defendant could explicitly state during their plea or in pre-sentencing reports that their actions were driven by hate or animus towards a protected group (e.g., race, religion, sexual orientation). This admission could be recorded and form part of the sentencing record.
- Consideration(s): The reliability of the admission must be carefully assessed, as it could be influenced by plea bargaining or legal strategies.

b. A Finding of Hate Motivation in the Course of a Defended Hearing:

- Proposal: If the case goes to trial, a judge can assess whether there is evidence proving hate motivation during the hearing. The judge would examine statements made by the defendant, the victim, or any third-party witnesses, as well as any other relevant evidence that suggests hate was a motivating factor.
- Implementation: The judge would be tasked with considering the evidence, such as derogatory language, prior interactions between the parties, or the context of the offence (e.g., location, timing, and nature of the incident) to determine if there is sufficient evidence to support a finding of hate motivation.
- Consideration(s): The judge would need to ensure that there is clear and convincing evidence linking the offence to hate motivation, avoiding any possibility of speculation. The defence would also have the right to challenge these findings.

c. A Special Disputed Fact Hearing Prior to Sentencing:

- Proposal: A special hearing could be held after a conviction but before sentencing to specifically address the issue of hate motivation. This would allow both parties to present evidence, witnesses, and arguments related to the alleged hate motivation.

- **Implementation:** During this hearing, the prosecution could introduce evidence of hate speech, biased behaviour, or other elements that suggest hate was a motivating factor. The defence could rebut these claims with evidence suggesting that hate was not a motivating factor or that the incident was not driven by hostility.

6.3 Further, limiting the application of hate motivation sentencing enhancements to serious crimes such as violent offences (e.g., assault, murder), threats, and targeted harassment would ensure that only those crimes with significant harm or impact are subject to hate motivation consideration, making the application of the law more focused and proportionate.

**QUESTION 7: IF SPECIFIC HATE CRIME OFFENCES ARE ADOPTED, WHAT OFFENCES SHOULD THEY COVER? WHY?**

7.1 We oppose specific hate crime offences for the reasons outlined in paragraph 8.2 below.

**QUESTION 8: SHOULD A DIFFERENT LEGAL MODEL, SUCH AS SPECIFIC HATE CRIME OFFENCES OR THE SCOTTISH HYBRID MODEL, BE INTRODUCED IN AOTEAROA NEW ZEALAND? WHY OR WHY NOT?**

*Specific Hate Crime Offences Model*

8.1 A specific offences model for hate crime involves creating distinct criminal offences that explicitly incorporate hate or bias motivation as a core element. This approach requires prosecutors to prove the hate element beyond reasonable doubt during trial, typically carries higher maximum penalties, and clearly identifies hate crimes in court records and criminal histories. While it can send a stronger message about the seriousness of hate crimes and improve monitoring, it usually covers a limited number of base offences and protected characteristics.

8.2 We oppose the creation of specific hate crime offences for 3 key reasons:

- The Threat to Free Speech and Equality.** Hate crime laws punish thoughts and opinions rather than actions, leading to self-censorship and restricting open debate. Elevating certain groups for special legal protection also undermines the fundamental principle of equality before the law.
- Subjectivity and Risk of Misuse.** Hate crime is an inherently vague and emotive concept, with no clear legal definition. This opens the door for arbitrary enforcement, biased interpretations, and the criminalisation of speech based on perceived harm rather than actual intent.
- Existing Laws Already Address Hate Crime.** Our Sentencing Act already allows for harsher penalties when hate is a motivating factor. Instead of creating unnecessary new offences, minor reforms could improve transparency and consistency in applying this aggravating factor (discussed at paragraphs 6.1 – 6.3).

*Model Example 1: England and Wales*

8.3 The United Kingdom has been at the forefront of developing and implementing hate crime legislation, with a complex and evolving framework that has been refined over several decades. Hate crime laws in England and Wales consist of three distinct sets of provisions:

- a. **Specific hate crime offences:** Stirring up hatred under the Public Order Act 1986 - These laws criminalise the distribution of inflammatory material that incites violence or stirs fear among specific groups. For example, spreading leaflets inciting violence or posting threatening online messages could lead to prosecution for stirring up hatred or sending offensive content, even if no violence occurs.
- b. **Aggravated offences:** under the Crime and Disorder Act 1998 (CDA 1998) - These apply when a "base" offence, such as assault or criminal damage, is motivated by or accompanied by hostility toward a specified group. For example, if someone physically attacks another person while shouting racial slurs, the offence becomes an aggravated assault rather than a standard assault, leading to a harsher sentence. Currently, aggravated offences exist for crimes involving racial or religious hostility.
- c. **Enhanced Sentencing provisions:** Courts can impose increased penalties if an offence is proven to be motivated by hostility toward certain groups. For instance, if someone vandalises a place of worship by spray-painting offensive graffiti, they would normally be charged with vandalism. However, if the court finds the act was motivated by religious hostility, the judge can increase the sentence under these provisions.

8.4 The England and Wales model, specifically, the provision of specific hate crime offences, has been heavily criticised. Their Law Commission's Report published in 2021 asserts the legal framework is overly complex and difficult to understand, potentially undermining its coherence and effectiveness, leading to inconsistent application and enforcement of the laws.<sup>13</sup> There are concerns about the difficulties in prosecuting disability hate crimes, which may lead to unequal outcomes for different protected groups.<sup>14</sup> The "*demonstration pathway*" in prosecutions may lead to the label of 'hate crime' being applied inappropriately to offences that don't warrant it, resulting in disproportionate sentencing.<sup>15</sup> This method means prosecutors do not need to prove that hatred was the motivation for the crime. Instead, they only need to demonstrate that the defendant exhibited hostility towards the victim's protected characteristic during, immediately before, or after the offence.

*Model Example 2: Australia*

8.5 Australia has recently implemented some of the most stringent hate crime laws globally, with significant changes introduced in February 2025. Australia's hate crime laws are split between federal and state legislation:

<sup>13</sup> Law Com No 402 Hate Crime Laws Final Report: [https://webarchive.nationalarchives.gov.uk/ukgwa/20250109172647mp\\_/https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2021/12/Hate-crime-report-accessible.pdf](https://webarchive.nationalarchives.gov.uk/ukgwa/20250109172647mp_/https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2021/12/Hate-crime-report-accessible.pdf)

<sup>14</sup> As above.

<sup>15</sup> <https://www.theosthinktank.co.uk/comment/2020/10/29/what-are-the-hate-crime-laws-and-should-they-be-reformed>

- a. **Federal:** the Australian Government introduced specific hate crime offences through the Criminal Code Amendment (Hate Crimes) Bill 2025 which includes key changes to the Criminal Code:
  - Expanded offences now cover groups distinguished by sex, sexual orientation, gender identity, intersex status, and disability.
  - New offences include threatening force or violence against protected groups and advocating damage to places of worship or property.
  - Mandatory minimum sentences have been introduced including 12 months for less serious hate crimes (e.g., public Nazi salute).
  
- b. **State (New South Wales):** NSW has introduced its own set of hate crime offences, which include:
  - A new criminal offence for intentionally inciting racial hatred, with a maximum penalty of 2 years' imprisonment and fines up to \$11,000 for individuals or \$55,000 for corporations.
  - Specific offences targeting the display of Nazi symbols near synagogues, Jewish schools, and the Sydney Jewish Museum.
  - New offences for blocking access to places of worship or harassing people accessing these locations.
  - Expanded police powers to manage protests and demonstrations near religious sites.

8.6 While the Government argues these measures are necessary to combat hate crimes, they have faced significant criticism. The Human Rights Law Centre assert that mandatory sentencing does not effectively deter crime or address root causes of hate and racism.<sup>16</sup> Legal experts, including the Law Council of Australia, argue that mandatory sentences undermine judicial independence and lead to disproportionate impacts on vulnerable groups.<sup>17</sup> The changes were also accused of being introduced hastily without proper consideration or opportunity for scrutiny of their rationale, necessity, and proportionality.<sup>18</sup> More generally, the Australian Human Rights Commission expressed concerns that the laws may infringe on freedom of expression and the right to peaceful assembly.<sup>19</sup>

*Model Example 3: Canada*

- 8.7 Canada is considered a leader in hate crime legislation due to its strong legal framework, which includes specific hate propaganda offences, enhanced sentencing for hate-motivated crimes, and robust enforcement measures:
  - a. **Hate Propaganda Offences under the Criminal Code** – These laws criminalise specific forms of hate speech and incitement:

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<sup>16</sup> <https://www.hrlc.org.au/news/mandatory-minimum-sentences-will-not-protect-against-hate-crimes>

<sup>17</sup> <https://lawcouncil.au/media/media-releases/mandatory-sentencing-is-not-the-answer>

<sup>18</sup> <https://humanrights.gov.au/about/news/explainer-new-national-and-nsw-hate-crime-laws>

<sup>19</sup> <https://humanrights.gov.au/about/news/explainer-new-national-and-nsw-hate-crime-laws>

- Advocating Genocide – If an individual publicly calls for the genocide of an identifiable group, they can be prosecuted under this provision.
  - Public Incitement of Hatred – If a person makes public statements that encourage hatred against a protected group in a way likely to lead to a breach of the peace, they could be charged.
  - Wilful Promotion of Hatred – Criminalises the deliberate promotion of hatred against an identifiable group.
- b. **Sentencing Enhancements for Hate-Motivated Crimes** – Courts are required to consider hate motivation as an aggravating factor when sentencing any offence.
- c. **Mischief and Other Hate-Related Offences** – Additional criminal provisions address specific hate-motivated acts:
- Mischief to Religious or Cultural Property – If someone vandalises a mosque with racist graffiti, they could be charged under this section, which carries harsher penalties than standard mischief offences.
  - Non-Criminal Hate Incidents and Human Rights Laws – Some hate-related incidents that do not meet the threshold for criminal prosecution can still be recorded by police or pursued under human rights legislation. For instance, if a person repeatedly harasses a colleague with racist remarks in a workplace, they could face action under provincial human rights laws.

8.8 Canada's hate crime provisions face similar criticisms to those in other jurisdictions, particularly regarding their vague definitions and inconsistent enforcement. Terms like "*hatred*" and "*contempt*" lack clear legal boundaries, leading to uncertainty in application and a chilling effect on free expression.<sup>20</sup> Enforcement is inconsistent, with police and prosecutors often failing to pursue cases, leaving victims without meaningful recourse and undermining public confidence in the law.<sup>21</sup> Prosecutions remain rare, limiting case law that could clarify interpretation.<sup>22</sup> Additionally, proving hate as a primary motive is legally complex, as such offences often stem from multiple factors, making convictions difficult to secure.<sup>23</sup>

#### *Specific Hate Crime Offences Should be Avoided*

8.9 Given the significant challenges observed in England and Wales, Australia, and Canada, New Zealand should not adopt specific hate crime offences. These models have been criticised for their legal complexity, inconsistent enforcement, and risks to free expression, which undermine their effectiveness. The broad and vague definitions of hate crime can lead to arbitrary application, while the "*demonstration pathway*" in England and Wales allows for convictions without proving intent, raising concerns about disproportionate sentencing. Australia's mandatory sentencing provisions weaken judicial discretion and disproportionately impact vulnerable groups, while Canada's inconsistent enforcement leaves victims without meaningful legal recourse. Rather than introducing a flawed system, New Zealand should

<sup>20</sup> Freiman, Mark J. "*Hate Speech and the Reasonable Supreme Court of Canada.*" The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 63. (2013).

<sup>21</sup> Victims of Crime Research Digest No. 16.

<sup>22</sup> *Hate Speech and Freedom of Expression: Legal Boundaries in Canada* (Background Paper).

<sup>23</sup> *Hate/Bias Crime: A Review of Policies, Practices, and Challenges.* (2024) rep. Available at: [https://www.oacp.ca/en/current-issues/resources/Hate%20Crime%20Report\\_June%2013%202024.pdf](https://www.oacp.ca/en/current-issues/resources/Hate%20Crime%20Report_June%2013%202024.pdf)

focus on improving existing laws, ensuring clarity, fairness, and proportionality in addressing hate-motivated offences.

### *Scottish Hybrid Model*

- 8.10 The Scottish Hybrid Model integrates both specific hate crime offences and sentence aggravation. Under this framework, any offence can be classified as "*hate-aggravated*", requiring prosecutors to specify this aggravation at the time of charging. It must then be proven at trial unless the defendant pleads guilty. A conviction explicitly reflects the hate element, ensuring it is recognised in the judicial process. While hate motivation is considered during sentencing, it does not increase the maximum penalty of the offence, differing from models where hate crimes carry harsher penalties than their underlying offences.
- 8.11 A key criticism of the Scottish hybrid model is its broad scope, allowing any offence, regardless of severity, to be classified as "*hate-aggravated*" if prejudice is involved. This means even minor crimes, such as shoplifting, could be treated as hate crimes if there is evidence of hate motivation. Including minor offences in hate crime laws shifts focus away from more serious cases, undermining public confidence. This concern is similarly evident in New Zealand, as outlined in the Police training material (paragraphs 5.5 – 5.10). Applying hate aggravation to a broad range of offences risks infringing on civil liberties, particularly freedom of expression. While the sentence aggravation model carries similar risks, motive is only a factor to consider at sentencing, not integral to the conviction itself.
- 8.12 New Zealand should not adopt the Scottish Hybrid model, as its broad application allows any offence to be classified as "*hate-aggravated*" based on prejudice, including minor crimes. This dilutes focus from more serious hate crimes and undermines public confidence, as highlighted in the Police training material. Furthermore, it risks infringing on civil liberties, particularly freedom of expression. In contrast, the sentence aggravation model only considers motive during sentencing, not as a factor for conviction.

### *The Sentence Aggravation Model Should be Kept*

- 8.13 The Royal Commission asserts that the current sentence aggravation model fails to fully capture the blameworthiness or culpability of an offence. While criminal law primarily addresses actions rather than thoughts, an offender's mindset is relevant in certain cases. For instance, the distinction between manslaughter and murder often hinges on intent, whether the offender intended to cause death. However, intent differs from motivation. Intent refers to an offender's deliberate actions and awareness of their consequences, whereas motivation concerns the underlying reasons behind the crime. Intent is essential for proving guilt, while motivation is typically irrelevant to conviction. Even in offences like bribery and treason, motivation is not a legal requirement for culpability in New Zealand.
- 8.14 Although the current model has its issues, it is preferable as it:

- a. Upholds freedom of thought and expression by focusing on criminal acts rather than beliefs or motivations, ensuring prosecution targets unlawful conduct, not personal opinions.
- b. Distinguishes criminal conduct from motivation by treating hate as an aggravating factor at sentencing, only after the offence is proven beyond reasonable doubt.
- c. Avoids punishing thought rather than action by addressing ‘hate’ within the existing legal framework, rather than introducing separate ‘hate’ crime offences.
- d. Provides judicial flexibility by allowing judges and juries to assess case-specific circumstances and apply sentencing enhancements without rigid hate crime laws.

8.15 The proposed amendments to the Sentence Aggravation Model, outlined in paragraphs 6.1 – 6.3 above, will effectively address the issues with the current system. Adopting an alternative model, such as specific hate crime offences or the Scottish Hybrid model, will only create greater confusion, undermine public trust in the Police and judiciary, and infringe upon civil liberties.

**QUESTION 9: IF SPECIFIC HATE CRIME OFFENCES OR THE SCOTTISH HYBRID MODEL ARE INTRODUCED, SHOULD THE SENTENCE AGGRAVATION MODEL BE KEPT AS WELL?**

9.1 The sentence aggravation model should be retained, as it would still apply to offences that are not specifically classified as “hate” offences. The proposed reforms to the current model, which aim to improve clarity, transparency, and consistency, would better align it with civil liberties and ensure it serves its intended purpose. However, there is no compelling need for specific hate crime offences or the Scottish hybrid model, as they introduce unnecessary complexity and potential risks to fundamental rights without addressing the root causes of hate-motivated behaviour.