

19 March 2021

Hon Kris Faafoi
Minister of Justice
Parliament Buildings
WELLINGTON

Via email: k.faafoi@ministers.govt.nz

Dear Minister,

I write in response to your letter of 9 December last year. You asked for an opportunity to discuss your plans to 'Protect New Zealanders from hate speech' with ACT's Caucus and me prior to this work getting underway. We certainly welcome the opportunity and would like to meet with you whenever convenient.

I thought it would be helpful to set out some terms for discussion so that we can make the time as productive as possible.

Your letter says:

I am writing to all political parties to seek their views on proposals to strengthen and improve our laws that deal with hate speech. We know that these laws, which aim to prevent the incitement of hostility towards others, have gaps.

Speech that is abusive or threatening and incites hostility towards a group can cause significant harm.

I am intending to establish a wider community engagement programme to deal with potential legislative changes, which will include:

- *redefining the criminal offence*
- *shifting the criminal offence for incitement into the Crimes Act 1961*
- *increasing the penalty for the criminal offence*
- *extending the incitement provisions to protect all groups listed under the prohibited grounds of discrimination in the Human Rights Act*
- *extending the civil provisions in line with international obligations by including prohibition of incitement to discrimination against a group*
- *amending the prohibited grounds of discrimination to explicitly protect trans, gender diverse and intersex people*

Please allow me to begin by agreeing with you that we could all do better at being respectful in the way we deal with each other. As you are a Minister of the Crown, I thought you might appreciate some recent words from the Queen:

As we look for new answers in the modern age, I for one prefer the tried and tested recipes, like speaking well of each other and respecting different points of view; coming together to seek out the common ground; and never losing sight of the bigger picture.

Her words summarise our feelings. There is too much hateful rhetoric, and left unchecked it can incite people to do physical harm to each other. This is the first problem. However, the solution is within us, she does not call for state action but personal responsibility.

At the same time, many people we talk to feel that they are unable to express views they genuinely hold. We live at a time when many people are unable to express their views for fear of being attacked, de-platformed, cancelled, or set upon by the mob.

As someone put it to me just last week ‘this is supposed to be a time of enlightenment, but you have to walk on eggshells with everything you say.’ This is a real concern not only for the welfare of the individual but for our society’s ability to debate and work through its problems. This is the second problem.

There is clearly room for improvement, however the question when legislating is whether enactments by Parliament can improve matters. It does not automatically follow that, because there is a problem, legislation is the answer. In fact, legislation can make a situation worse, and we strongly believe that the proposals you make would worsen both problems we face.

I can only assume that your letter’s reference to ‘the criminal offence’ refers to Sections 61 and 131 of the Human Rights Act, cited by the Royal Commission of inquiry into the Terrorists Attacks on Christchurch Mosques on 15 March 2019. Those sections say:

61 Racial disharmony

- (1) It shall be unlawful for any person—
- (a) to publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or
 - (b) to use in any public place as defined in [section 2\(1\)](#) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or
 - (c) to use in any place words which are threatening, abusive, or insulting if the person using the words knew or ought to have known that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,—

131 Inciting racial disharmony

- (1) 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, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—

- (a) publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or
- (b) uses in any public place (as defined in [section 2\(1\)](#) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—
being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

I have to further assume that you are aware there have been no successful prosecutions under these sections for a very long time and wish to improve the chance of a successful prosecution (your first two bullet points), increase the penalties applicable (your third bullet point) and widen the grounds on which a prosecution might be taken (your fourth and sixth bullet points). Given these assumptions, I will set out why ACT opposes such initiatives.

At the heart of our country's constitutional traditions is a belief in the rule of law. It means that people should be able to understand what the law is, what actions might breach it, and what the penalties might be for breaching it. The law applies equally to all people and gives protection against arbitrary coercion by another or others, including the state.

These traditions go back at least as far as the Magna Carta, and our Parliament has affirmed them. The Bill of Rights Act 1990 says that every person has the "right not to be arbitrarily arrested or detained." It goes on to say that if a person is arrested or detained, then they have the right to "be informed at the time of the arrest or detention of the reason for it." It continues that a person detained has the right to a fair trial in an impartial court with the presumption of innocence.

The problem with hate speech laws is that they are incompatible with the rule of law. To use the words of the Human Rights Act, the prohibition would be on speech that is "threatening, abusive, or insulting." Or, to use your words, speech that is "abusive or threatening and incites hostility." The number of people who could be prosecuted for such speech each day greatly outnumber those who ever would be.

The result is that the decision to prosecute becomes selective and arbitrary. To some extent this is the nature of all laws, however speech has a feature that makes prosecution decisions even more problematic. Which offences are and or should be prosecuted will be subject to real and or perceived political bias. This is not a problem with other crimes, as there is broad political consensus that burglary, for instance, should be prosecuted wherever possible.

There is also a very clear sense of what burglary actually is. You have to enter a building without authority for the intention of committing an imprisonable offence in that building. There are objective tests to determine what is and is not criminal activity. This is not true of hate speech.

The nature of hate speech laws are inherently subjective and interpretations of what is and is not threatening, abusive or insulting changes depending on context, time, and prior relationships amongst many other factors. As one commentator has put it, people do not know they are guilty of hate speech until the point of conviction.

The Policy Memorandum informing the recent Scottish hate speech law made the point that there is no single accepted definition of hate crime with different definitions produced to address different purposes.

This makes the nature of any state sanction difficult to interpret and apply which, in turn, renders it more arbitrary than not when it is. The Prime Minister's statement that you 'know hate speech when you see it,' does not give confidence.

In relation to the first problem I identified above –that there is resentment between groups of New Zealanders, the perception that the state is selectively prosecuting people who have some views will only lead to greater resentment. People will perceive that the State has been enlisted to favour some groups, on behalf of whom a prosecution is made, at the expense of those who are prosecuted.

In relation to the second problem –that people are fearful of expressing their views, arbitrary and seemingly politically motivated prosecutions will lead to some groups suppressing their views.

To take a practical example, I have been approached by people who, as lesbians, resent the idea that biological men can identify as lesbians. They see this as denying the very existence of biological women who do not wish to have sex with men. Whatever may be your view of this particular issue, there is clearly a debatable point at play: Is biological sex or self-identified gender relevant to the definition of a lesbian?

They believe they might be prosecuted for expressing sincerely held beliefs under proposals like yours. People certainly have been for making similar comments in the U.K. The result is a lack of dialogue that needs to be had in New Zealand on an issue that many people feel to be important, and growing resentment to boot.

Altogether, I believe that the intention of bringing about a kinder world with more respectful public discourse is a noble one. However, the mechanism you propose will have the opposite effect because it is inconsistent with the rule of law. I would urge you to reconsider whether the plan you anticipate in your letter is the right one to implement.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "David Seymour".

David Seymour
MP for Epsom, ACT Leader