Human Rights (Incitement on Ground of Religious Belief) Amendment Bill

Submission by the Free Speech Union

"Speech restrictions are like poison gas: they seem like a good idea when you've got the gas and a deserving target in sight. But then the wind shifts. You don't want the government having the power to decide whose speech to ban. Because sooner or later, it will be yours."

- Ira Glasser, former ACLU Director

Summary of Submission

- The Free Speech Union opposes this Bill as an attack on the free speech of Kiwis and their right to criticise and debate the merit of religion and religious views.
- The wording of Section 61 of the Human Rights Act is so broad that this Bill could effectively make criticism of religion and religious views a criminal offence. In a modern society no view, especially religious beliefs, are held as so true or unassailable as to be beyond reproach or criticism. Legislation making criticism of such beliefs a criminal offence is inconsistent with liberal democratic values.
- This Bill serves as an effective reintroduction of the blasphemous libel laws that were repealed in 2019. Such laws are, as noted by the then Minister of Justice, "archaic" and have "no place in a modern society which protects freedom of expression".
- Even if this Bill has noble intentions in seeking to prevent hate against religious communities, criminalising speech related to those communities will do more harm than good. Banning certain types of speech only serves to drive that speech underground, where it risks being exposed to other more dangerous ideas, extreme forms of expression, and where such ideas lose the opportunity to be earnestly countered. Such laws serve also to increase resentment against protected communities by creating a perception of special treatment, especially so when specific groups are singled out and others denied.
- Furthermore, even if such legislation is stringently applied domestically, censorious laws passed in democratic nations have a tendency to be exploited by authoritarian governments overseas and copied to suppress dissent and religious minorities.
- It is imperative that this Bill be dropped. This Bill will not give the protection for religious communities that it hopes for, but is rather more likely to incite more harm against them and other groups, and stifle the necessary debate around religion and religious views in New Zealand.

Introduction

1. The New Zealand Free Speech Union is a registered trade union with a mission to fight for, protect, and expand New Zealanders' rights to freedom of speech, conscience, and intellectual inquiry. We believe in the freedom to profess any idea without fear of being prosecuted or unduly punished for it. This fundamental human right is essential for the healthy functioning and preservation of our democracy, necessary for the preservation and exercise of our other freedoms, and indispensable for the testing and criticising of ideas in the search for truth.

2. If free speech is important for the ability to test and criticise ideas, then perhaps it is most important in the discussion of some of the longest lasting, foundational, and most influential ideas of all: that of religion and religious beliefs. At their core religious beliefs are ideas, and the religious beliefs that someone may hold are not static; they may be changed through reason and convincing. Religious views have also historically had, and continue to have, significant influence socially and politically. It is therefore imperative for the proper functioning of a democratic society that such views may be tested, criticised, and if necessary even attacked, so that such influence may not infringe on the rights of others.

3. This Bill would criminalise such imperative testing and criticism. Even if strictly applied by the courts as has occurred for Section 61 so far, it still carries an unacceptable risk of creating a "chilling effect" on perfectly legitimate speech and an unacceptable risk of abuse by less scrupulous political actors, either in the present or future, domestically or overseas.

Wording of Section 61 so broad as to criminalise criticism of religious views

4. The wording of section 61 of the Human Rights Act is already so broad as to be a legislative absurdity. To add religious views to the list of protected groups creates a situation where, on the wording of the Act, the criticism of religion and religious views may be a criminal offence. Such legislation does significant harm to the robustness of our human rights protection legislation and must not be expanded.

5. Having incitement to "hostility", "ill-will", "contempt" or simply "ridicule" would preclude any discussion whatsoever of religious beliefs. As American Supreme Court Justice Oliver Wendell Holmes Jr. wrote, "Every idea is an incitement". To disagree with an idea, or simply to propose an alternative, is by necessity to lower the esteem of an alternative idea in the minds of others. Criticism of any idea may bring it into contempt or ridicule; that's exactly what debate is. In the case of such beliefs as deeply held and ingrained in personal identity as religious views, it is not uncommon for some to see the simple expounding of opposing views as insulting, and thus within the remit of Section 61.

6. With views as significant as religious belief it is in fact necessary that they not only be open to opposing beliefs, but also open to hostility or ridicule. Criticism of religion and religious views, even to the point of hostility and ridicule, has been instrumental in much political development such as the separation of church and state and the advancement of women's and gender diverse people's rights. Many of these debates are ongoing and the religious beliefs central to many such arguments must remain open to criticism, ridicule, and even hostility if such debates are to continue effectively.

7. We acknowledge that the courts have so far interpreted section 61 of the Human Rights Act with an appropriately high bar in recognition of the broad wording of section 61, and the importance of free expression in our society. While this strict interpretation has blunted the censorious nature and chilling effect of section 61, having legislation written in such an open-ended way retains the unacceptable risk that future courts will interpret the section closer to its actual wording, with significantly more adverse effects on Kiwis' right to free expression. We note that similarly-worded legislation is regularly used in the United Kingdom to hand out steep fines, community service, and even prison sentences for such infractions as tweets and Facebook posts, even those posted for comedic effect.[1] Passing legislation such as this would likely give an indication to the courts that Parliament wishes for an expanded view as to what speech may face prosecution, with potentially disastrous results for free expression.

[1] For some examples, see this article for several examples of social media posts that have incurred criminal prosecution.

Bill simply a reintroduction of previously repealed laws

8. What makes this Bill particularly insulting is the fact that an equivalent provision in the Crimes Act was repealed only a few years ago, to much self-congratulation by the Government proposing this Bill. Section 123 of the Crimes Act criminalised the publishing of "blasphemous libel", that is, material which exposed Christianity to ridicule or contempt. The Justice Minister at the time noted how the law was "archaic", had "no place in a modern society which protects freedom of expression", and that a repeal was necessary "to maintain public confidence in the law". We entirely agree with the Minister's assessment of such a law.

9. It is astounding then that such laws are being returned to the statute books, and in a more intolerable form than the repealed blasphemy laws. The previous blasphemy laws were, under the common law, limited to insulting remarks against Christianity, or also more generally "God". This Bill will apply to a wider range of religious views, criminalising criticism of not just Christianity but all religious views. The repealed blasphemy law also had a provision to prevent its abuse, with a caveat that expressions against religion "in good faith and decent language" were exempt from prosecution. This Bill does not have such protections. The offence in Section 131 may require the publication to be "threatening, abusive, or insulting", but even good faith arguments in decent language could easily be interpreted as insulting when regarding deeply held beliefs.

10. If the repealed blasphemy law was archaic, this Bill is even more so. If the repealed law had no place in a modern society that protects freedom of expression, this Bill has even less so. If it was necessary to repeal the old statute to maintain public confidence in the law, it is even more necessary that this proposed Bill be dropped.

Criminalising hateful speech does more harm than good

11. In her interview introducing this Bill to the public, the Minister of Justice noted how laws that restrict free expression may do more harm than good, "lifting off a scab within society that will have a counterfactual benefit for those that need protection". We agree with the Minister that such laws carry significant risks of doing more harm than good, and believe that this Bill is no different. By silencing the criticism and views of those opposed to a group of people, such laws only serve to intensify ill-feelings and affirm or seed a sense of grievance against the groups whom they have lost the ability to criticise.

12. Laws suppressing alleged hateful speech only cover a symptom of a deeper issue: it is not the speech that must be combatted but the hate itself. Forcing a façade of acceptance of certain groups fails to build the organic acceptance and societal shift necessary to secure the meaningful, long lasting protection such groups need. Rather than letting acceptance build organically for marginalised groups, hate speech legislation serves to associate affected communities with censorship and suppression, harming the efforts to meaningfully change social attitudes.

13. Similar to how criminalising criticism of a group tends to make those that resent the group more likely to resent them further, singling out specific groups for protection while denying similar protection to other groups increases the capacity for jealous resentment. By singling out religious communities for protection but declining to include any other protected categories in the Human Rights Act, this Bill has created the perception of religious communities being valued more than other marginalised communities, especially so when such communities have had to overcome religious sentiment to achieve social acceptance.

14. Furthermore, such laws intended to protect minority groups often harm the diversity within themselves. Minority groups, especially those that are faith based, are far from monolithic in their thinking and often have intense debate and disagreement within themselves. Laws such as this Bill that criminalise hostility towards and ridicule of religious beliefs would stifle such important debates, and may likely force the courts into the undesirable state of having to decide which members "truly represent" a specified faith. Islamic reformers such as Salman Rushdie could be seen as falling under this law for his alleged Islamophobia, and so too could anti-Zionist members of the Jewish community for their advocacy regularly facing accusations of anti-semitism.[2]

15. This Bill would not only pit the diverse groups within minority communities against one another, but would also prevent the crucial debates between communities. Members of the LGBT community continue to face opposition to their identities by religious groups and must have the ability to freely criticise, even to the point of hostility and ridicule, those that incite hostility against them. Members of the Palestinian community must overcome accusations of antisemitism to advance their causes, and overseas have faced prosecution for promoting the "Boycott, Divest, Sanction" movement.[3] Again, laws passed to protect minority communities all too often put such communities in the firing line themselves.

Bill likely to be abused by authoritarian governments

16. It is also important for legislators in liberal, democratic nations such as New Zealand to look overseas at the dangerous precedents speech-restrictive laws set internationally. When liberal democracies pass censorious legislation, even with the best of intentions, such laws are often copied and abused by authoritarian nations to suppress dissent and persecute minorities, often the very same groups the original laws were intended to protect. A salient example of such abusing copycatting arose out of the German "NetzDG" regime, obliging social media companies to remove "illegal content" promptly or face large fines. Since its passing in 2017, it has been copied, usually with explicit reference, by numerous authoritarian nations, such as Pakistan, Ethiopia, and Turkey, the latter of which is one of the world's largest jailers of journalists and whose NetzDG copycat law has turned social media platforms effectively into an arm of President Erdogan's notoriously thin-skinned censorship regime.

17. New Zealand has long been considered a "social laboratory" of the world, and in recent years has garnered even more international recognition as a nation whose public policies are to be respected and emulated. It should be expected then that a speech-repressive bill such as this neo-blasphemy law will be copied by other less scrupulous nations looking for excuses to persecute critics of state religions. When nations such as Turkey have described acts of protest such as the burning of religious books as "hate speech", it should be expected that copycat laws would be enacted to persecute religious minorities and dissidents. As a "social laboratory", New Zealand has a responsibility to protect free speech and expression, setting the example that censorship is not acceptable in modern, democratic societies.

[2] Such interpretation is not without precedent: Melbourne University has recently adopted a definition of antisemitism in its speech codes that includes criticism of the state of Israel.
[3] Refer to the French activists sentenced to a collective fine of $14,500, whose conviction was later overturned by the ECHR for violating their freedom of expression.

Conclusion

18. It is imperative that this Bill be dropped as a dangerous attack on the free speech rights of New Zealanders. Section 61 of the Human Rights Act is so broadly worded that to add religion as a protected category raises the possibility of criminalising the simple criticism of religious views and carries real risk of doing more harm than good, even to the communities it seeks to serve. Laws criminalising hate are only facades. They don't combat the hate, only the speech, and risk more harm by driving hate underground, rather than being beaten in the open by better speech and strong community responses.

19. Section 61 has so far been applied stringently by the courts, but the passing of this bill may signal for the courts to interpret it more broadly, limiting free expression. Even if such a law remains strictly interpreted, international authoritarian regimes may themselves see it as an excuse to suppress religious criticism and dissent in their own nations, as other speech-suppressive laws originating from liberal democracies have done.

20. This Bill is little more than a reintroduction of the blasphemy laws repealed in 2019. The old blasphemy laws were correctly seen as archaic and without place in a modern, democratic, liberal society that values free speech and expression. This bill should be seen the same way, and promptly dropped.

21. We request the opportunity to give an oral submission to speak on this Bill.