



9 April 2024

Hon Paul Goldsmith  
Minister of Justice  
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President of the Law Commission  
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## Hate is subjective, whether hate crimes or hate speech

Good afternoon Minister and Dr. Kawharu,

1. The 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 that freedom of speech is not only a legal principle, but a social good that allows people in liberal democracies to peacefully, freely advocate for the causes they care about without risking unjust retribution.
2. Recently, we circulated a public letter inviting Kiwis to thank the Minister of Justice for shelving further work on hate speech laws. Thousands signed it, and we would like to also iterate our appreciation for this defense of Kiwis' free speech.

We are, however, concerned that while work on 'hate' speech laws has stopped, work continues on 'hate' crime laws. We think that the use of the quintessentially subjective term "hate" in law draws our institutions, such as law enforcement, the judiciary, and even politicians in Parliament, into trying to suppress views and even legal conduct unwelcome to established ideology.

3. The experience in the United Kingdom shows that "hate" laws steer policing and justice resources toward attempts to suppress offensive people and statements, irrespective of whether they are committing crime. Hence, they now record so-called "non-crime hate incidents"; a truly chilling Orwellian phrase. The use of these records to assist in social sanctioning (cancellation) of people who have refused to comply with changing mores is clear. You will be well aware of how that has culminated in the current mess in Scotland.
4. We consider that section 9(1)(h) of the Crimes Act contains more than enough to enable a court to take proper account of elements of motive in crime, that need particular deterrent or denunciatory sentencing, without drawing in both law enforcement and the judiciary in

picking and choosing whether certain motivations to the same crime should mean it is punished more severely or responded to more robustly.

5. The Free Speech Union led the fight against the criminalisation of speech. We remain grateful for the opportunity we had to engage repeatedly with both of you on this issue. It is clear that without our fight and contribution to this issue, New Zealand could be now in a predicament like that of Scotland, given the stated objectives of the last government, and the naivete of the Ministers it appointed to achieve them.
6. We are concerned for you that the credit you deserve for dismissing the specific focus on hate speech, could be lost as the enemies of free speech turn to manufacture a plan B out of hate crime recordings and classifications. By the time of the next election, if the proposals are not buried in this country and if official resources continue to go into the project, they could emerge to trouble you. Official information requests and leaks from our would-be-censors could result in one-sided attacks, that will skillfully try to distinguish between hate crime law, and hate speech law, but all leading to the rhetorical question – if you favour hate crime law, why are you defending people who use hate speech which leads to hate crime.
7. On the principle that explaining is losing, your distinctions will look like equivocation. The objection that ‘hate’ is dangerously subjective will not carry much weight if you have contemplated using hate to adjectivise other crime, with significant consequence.
8. The subjective nature of ‘hate’ indisputably applies to hate-motivated crimes. What one person considers to be ‘hate’ is different from what another considers to be hate. Where is the line where opposition (resistance or dissent) turns into hate? For example, the painting over a rainbow crossing, defacing a Treaty display, or vandalism associated with the Israel/Palestine conflict – are these hate-motivated crimes or simply acts of protest in which the criminal act is already punishable? If an objective criteria can be created for ‘hate’ crimes, why can’t that same standard be said to correspond to ‘hate’ speech? We insist on such criteria that eliminates the subjectivity can be established.
9. Whether a crime is hate-motivated or not will shift depending on the personal feelings and opinions which is why both hate speech and hate crime laws are unclear and unpredictable - the Rule of Law in New Zealand requires our laws to be both clear and clearly enforceable. It is worth remembering that Scotland’s new offence of behaviour that is “*threatening, abusive or insulting*” and “*intends to stir up hatred*” is not far from our existing statutory wording. It has narrow application here mainly because of conservative or orthodox judicial reading down, to avoid creating discretions that would lead into selective enforcement and interference with freedoms of thought, speech and religion.

10. If you are entertaining the creation of new hate-motivated offences, it will be almost impossible to prevent moralising judges and police from turning them into tools of discretion, where the nature of the motivation is the substance of the offence. In criminal law, the relevant question should be whether there was intent (or a purpose) in the offender's mind. The establishment of hate-motivated offences takes a different philosophical view of crime in that the specific intent of the offender is relevant i.e., some crimes are more justifiable and some less justifiable based on motivation. The danger lies in the term 'hate'. Hate is a powerful and important word but one which becomes dangerous if the Government and law enforcement authorities are empowered to define it on practice, from time to time.
11. Hate-motivated offences will soon be misused to attack New Zealanders with unpopular views, to deprive them of their rights to freedom of speech and conscience, while also undermining our Rule of Law. They will be a legal rod to beat the back of those who express dissenting views. And if authorities, including courts, decline to use them for that purpose, they will be a rod for those who do not value freedom of speech, to beat allegedly uncaring authorities.
12. It goes without saying that the Free Speech Union has no interest whatsoever in defending any kind of criminal conduct. Likewise, we readily note that 'hate' crime laws may be promoted by people with good intentions. They are nevertheless a slippery slope in a society where critical opinions are labelled as being hateful and subject to punishment. The Government should pointedly terminate work on hate crime laws for the same reasons it abandoned the hate speech laws.
13. We would appreciate an opportunity to meet with you both to discuss these matters further.

Yours faithfully,

**Free Speech Union (New Zealand) Inc.**

A handwritten signature in blue ink, appearing to be 'J. Ayling', written over a horizontal line.

**Jonathan Ayling**

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