



NEW ZEALAND

New Zealand

Author: Graeme Edgeler, Barrister, Blackstone Chambers

Graeme Edgeler is a Barrister at Blackstone Chambers in Wellington, New Zealand. He has appeared before the Privy Council, and multiple times before the New Zealand Supreme Court, including as one of the counsel for Make It 16 in their challenge to New Zealand's voting age. Graeme has a professional interest in election law and is a frequent commentator on constitutional issues in New Zealand, as well as being an active Twitter user, and has a love of board games.

Country Summary

Against the backdrop of terrorist attacks, New Zealand adopted the Counter-Terrorism Legislation Act in 2021, expanding the scope of organizations that can be declared to be terrorist entities as well as the scope of terrorist control orders under the Terrorism Suppression (Control Orders) Act 2019, which provides powers for the Police to apply to the Courts for orders that can restrict the rights of persons suspected or accused of involvement in terrorist acts. Between 2015 and 2022, six restrictive laws were passed: three regulating online content, one providing criminal and civil penalties for harmful online speech directed at individuals, one providing for a presumption of imprisonment for repeat offenses of banned publications involving the sexual exploitation of children, and one passed during Covid, permitting the Department of Internal Affairs to order online content hosts to remove access to banned publications. One law on misinformation provides for a ban on publishing false statements to influence voters on election day. Two laws regulating the media, one amending the rules around public descriptions of self-inflicted death, and one codifying the law of contempt of court in New Zealand, creating criminal offenses around ensuring the orderly function of Court and trial processes. A fall in prosecutions for offensive language is evident, with the number of prosecutions dropping from 659-1050 annually before 2015, to

96-200 prosecutions between 2015-2022. Defamation law remains an ongoing concern for freedom of expression in New Zealand, heavily favoring plaintiffs, with the obligation of establishing the truth of any claims remaining with the publisher, although Courts have expanded the possible defenses to defamation, especially in the political sphere.

Introduction

New Zealand remains a society whose laws have a healthy respect for freedom of expression, but one where vigilance remains necessary. New Zealand scores well in other international comparison of freedom. Freedom House scored New Zealand 99/100 points in 2021 and 2022,⁴⁹⁵ with perfect marks on freedom of expression and belief from 2017-2022.⁴⁹⁶ In the assessed period, two events have particular salience for consideration when addressing legal and regulatory changes affecting freedom of expression: First, the 2019 terror attack at two Christchurch Mosques,⁴⁹⁷ which saw 51 Muslims killed, and second, the lockdowns and other restrictions occasioned by the Covid-19 Pandemic, particularly the additional and longer lockdowns that were put in place in Auckland, New Zealand's largest city.

New Zealand laws set limits on freedom of expression in areas in common with other liberal democracies, including protection of reputation and privacy, prohibitions on inciting racial hatred and the protection of public order. The censorship regime bans images of child sexual abuse, and other material such as support for and depiction of terrorism, and encouragement of violence. Although New Zealand does not have a codified constitution, it does have statutory protection for civil and political rights in the New Zealand Bill of Rights Act 1990,⁴⁹⁸ including freedom of expression. While Courts cannot strike down laws passed by Parliament, Courts are required to take account of the Bill of Rights when interpreting other statutes, and can strike down subsidiary legislation, and government decisions for non-compliance with guaranteed rights. The restrictions imposed by defamation law, although not out of step with other liberal democracies remain an ongoing concern in New Zealand, while new issues have arisen out of the legislative and regulatory responses to the threat of terrorism, and for news media, concern about Court suppression orders, particularly in high profile cases.

Response to Terrorism

The 2019 Terrorism Suppression (Control Orders) Act 2019⁴⁹⁹ provides powers for the Police to apply to the Courts for orders that can restrict the rights of those whom the Government suspect of an intention to engage in terrorism. They can be used to impose substantial

⁴⁹⁵ <https://freedomhouse.org/country/new-zealand/freedom-world/2023>

⁴⁹⁶ During 2017-2019, New Zealand scored 98/100 overall. In 2020 New Zealand dropped a point to 97 following the terrorist attack in 2019.

⁴⁹⁷ https://en.wikipedia.org/wiki/Christchurch_mosque_shootings

⁴⁹⁸ <https://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁴⁹⁹ <https://www.legislation.govt.nz/act/public/2019/0079/latest/whole.html#LMS258603>. These have been further expanded in 2023.

restrictions on people even if they have not been convicted of a terrorism offense (or indeed any offense). These control orders can limit the freedom of expression (banning people from accessing the Internet, for example) and freedom of association and movement of people whom the Government can convince a Court are at risk of engaging in terrorism. Concern around terrorism, following both the Mosque attack and a frenzied knife attack in 2021 that resulted in injuries to several victims at an Auckland Supermarket,⁵⁰⁰ saw the Government response to terrorism stepped up, including passage of both the Counter-Terrorism Legislation Act 2021,⁵⁰¹ which expanded the definition of which organizations can be declared to be terrorist entities and expanded the scope of terrorist control orders under the aforementioned 2019 Act.⁵⁰²

A recommendation from the Commission of Inquiry into the attacks⁵⁰³ that New Zealand adopt a wide-ranging reform of hate speech legislation, largely drawing on law in the Republic of Ireland, was pursued by the government but has not resulted in any legal amendment. The Inquiry's proposal would have removed the crimes involving the incitement of hatred from the Human Rights Act 1993,⁵⁰⁴ where they were little used and moved them to the Crimes Act 1961,⁵⁰⁵ expanding their scope to cover additional protected characteristics (including religious identity, sex and gender, and sexual orientation), along with increased penalties and a civil prohibition on incitement to discrimination. There was substantial public opportunity for both civil society organizations and individuals to comment on the hate speech proposals at the initial design phase, and once legislation had been proposed, with more than 19,000 submissions⁵⁰⁶ on the 2021 discussion document, "Proposals against incitement of hatred and discrimination."⁵⁰⁷ After considering the public feedback, the Government did not adopt the substantive approach proposed by the Royal Commission, instead favoring a narrower expansion to existing hate incitement provisions.⁵⁰⁸ The proposed law was abandoned in early 2023,⁵⁰⁹ with the government announcing it would refer question of reform of "Legal Responses to Hate" to the Law Commission, meaning any expansion of regulation of incitement will be delayed for some years. Work has not begun on this project.⁵¹⁰

⁵⁰⁰ https://en.wikipedia.org/wiki/2021_Auckland_supermarket_stabbing

⁵⁰¹ <https://www.legislation.govt.nz/act/public/2021/0037/latest/LMS479298.html>

⁵⁰² <https://www.legislation.govt.nz/act/public/2019/0079/latest/whole.html#LMS258603>. These have been further expanded in 2023.

⁵⁰³ <https://christchurchattack.royalcommission.nz/>

⁵⁰⁴ <https://legislation.govt.nz/act/public/1993/0082/latest/DLM304212.html>

⁵⁰⁵ <https://www.legislation.govt.nz/act/public/1961/0043/latest/DLM327382.html>

⁵⁰⁶ <https://www.justice.govt.nz/about/news-and-media/news/feedback-on-incitement-and-hate-speech-laws-released/>

⁵⁰⁷ <https://www.justice.govt.nz/assets/Documents/Publications/Incitement-Discussion-Document.pdf>

⁵⁰⁸ <https://legislation.govt.nz/bill/government/2022/0209/latest/whole.html>

⁵⁰⁹ <https://bills.parliament.nz/v/6/75c45918-9b4f-478e-a070-fdf2f467ba36?Tab=history>

⁵¹⁰ <https://www.lawcom.govt.nz/our-projects/legal-responses-hate>

The New Zealand/France-led Christchurch Call to Eliminate Terrorist and Violent Extremist Content⁵¹¹ has not resulted in legislative change in New Zealand, operating largely as a partnership between governments and tech companies on reporting tools and algorithms. Content that supports terrorism is regulated under New Zealand's censorship legislation, which has had some technical changes, but is largely unchanged.

The Committee Against Torture expressed concerns with aspects of New Zealand's counter terrorism legislation, in particular the Counter Terrorism Legislation Act 2021,⁵¹² which it considered allowed "excessive restrictions on the rights of persons suspected or accused of involvement in terrorist acts."⁵¹³

Covid State of Emergency

Restrictions made under the COVID-19 Public Health Response Act 2020⁵¹⁴ drastically limited rights of assembly and protest during periods of nationwide and local lockdowns to respond to the COVID-19 pandemic. They have now been repealed. While there was general support for firm measures at the beginning, public unease grew, and protests were held in places where protests were banned. While Police did not break up these protests, those alleged to be leading the protests have been prosecuted and imprisoned for breaching the restrictions imposed by the emergency response.⁵¹⁵ In 2022, post-lockdown rules around vaccinations led to a 24-day occupation of the grounds of the New Zealand Parliament,⁵¹⁶ ending with violent resistance to a Police action to clear the grounds and surrounding streets. There were dozens of arrests, but many of the more minor charges have been dropped. Government concern about misinformation arising during Covid has seen expanded efforts to combat this, to date, largely through engagement with tech companies, with no law changes, yet.

I. Legislation

The Regulation of Online Content

The Harmful Digital Communications Act 2015 was passed, providing criminal and civil penalties for harmful online speech directed at individuals. It created a criminal offense of intentionally causing serious emotional distress through electronic publication, which has been most widely applied to prosecute non-consensual publication of consensually obtained intimate images (so-called "revenge porn"), but which is not limited to this. Amendments in

⁵¹¹ <https://www.christchurchcall.com/>

⁵¹² <https://www.legislation.govt.nz/act/public/2021/0037/latest/LMS479298.html>

⁵¹³ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=4i+iDvQURHuSmCsMKg0hCJ7wU6SfXjmcPyhyA5TbH5+Ct5+5+H9Qe+OOqiBtZRk3kLC1sKE1KoARLohHoNhJAA==

⁵¹⁴ <https://www.legislation.govt.nz/act/public/2020/0012/latest/LMS344134.html>

⁵¹⁵ <https://www.nzherald.co.nz/nz/crime/covid-19-lockdown-breach-conspiracy-theorists-billy-te-kahika-vincent-eastwood-sentenced-to-prison/7OJ73C2SKJDF7FX3AWZITGBIL4/>

⁵¹⁶ https://en.wikipedia.org/wiki/2022_Wellington_protest

2022⁵¹⁷ sought to make revenge porn easier to prosecute. The Act contains very strong protections for intermediaries.⁵¹⁸ The Films, Videos, and Publications Classification (Objectionable Publications) Amendment Act 2015⁵¹⁹ amended censorship law to update it for changes in technology, and to provide for a presumption of imprisonment for repeat offenses involving banned publications involving the sexual exploitation of children.

The Films, Videos, and Publications Classification (Urgent Interim Classification of Publications and Prevention of Online Harm) Amendment Act 2021⁵²⁰ allowed the Censor to ban publications on an interim basis and permits the Department of Internal Affairs to order online content hosts to remove access to banned publications.

Misinformation

The Electoral Amendment Act 2017⁵²¹ narrowed the effect of the ban on publishing false statements to influence voters to include only information first published on election day and in the two days preceding election day, following a Court decision which said it covered information which was still online during that time. The law also expanded restrictions on advertising during the advance voting period by creating buffer zones around voting places in which campaigning is prohibited.

Regulation of the Media

The Coroners Amendment Act 2016⁵²² amended the rules around public descriptions of self-inflicted death. For the first time it permitted people to describe a death as a “suspected suicide” without needing permission from a Coroner. The ban on describing the method of a self-inflicted death was expanded to explicitly include a ban on describing any detail of a suspected self-inflicted death that suggests the method of death. The process for obtaining permission to do so was streamlined.

The Contempt of Court Act 2019⁵²³ codified the law of contempt of court in New Zealand, creating a number of criminal offenses around ensuring the orderly function of Court and trial processes. Courts may order websites, including news media, to take down information to preserve trial rights. Most controversially, it codified the prohibition on “scandalizing the Court,” providing a criminal offense of publishing false statements about judges and courts in order to undermine public confidence in the judiciary.

⁵¹⁷ <https://legislation.govt.nz/act/public/2022/0003/latest/LMS368115.html>

⁵¹⁸ <https://legislation.govt.nz/act/public/2015/0063/latest/DLM6512505.html>

⁵¹⁹ <https://www.legislation.govt.nz/act/public/2015/0042/latest/whole.html>

⁵²⁰ <https://www.legislation.govt.nz/act/public/2021/0043/latest/LMS294551.html>

⁵²¹ <https://www.legislation.govt.nz/act/public/2017/0009/latest/DLM6963343.html>

⁵²² <https://www.legislation.govt.nz/act/public/2016/0029/latest/DLM6223504.html>

⁵²³ <https://www.legislation.govt.nz/act/public/2019/0044/latest/LMS24753.html>

Censorship

In a welcome move, the Films, Videos, and Publications Classification (Interim Restriction Orders) Amendment Act 2017⁵²⁴ provided a process by which interim restrictions could be imposed on publications pending the resolution of a challenge to a decision of the Censor, after an award-winning young adult novel was temporarily banned in 2015,⁵²⁵ that being the only option then available.

I. Enforcement

Fall in Prosecutions for Offensive Language

One promising feature of New Zealand's approach to freedom of expression is the approach its courts and police take to the enforcement of expansive criminal laws. New Zealand has offensive language laws⁵²⁶ similar to those in England and Wales,⁵²⁷ but the Courts have substantially narrowed the application of the New Zealand offenses, and Police are less likely to pursue charges. Following a 2010 decision of the New Zealand Supreme Court limiting the scope of the offensive behavior charge,⁵²⁸ prosecutions for offensive language dropped markedly. In the 10 years before the decision, the number of prosecutions ranged from 659-1050 annually, during the 2015-2022 period there were between 96-200 prosecutions.

Enforcement of Censorship Laws

New Zealand's Chief Censor took an active role in banning terrorist related content, leading to numerous prosecutions⁵²⁹ for those sharing the livestream of the Christchurch Terror attacks. The terrorist's written "manifesto" was also banned in New Zealand but was not the subject of as many prosecutions.⁵³⁰ A major concern with New Zealand's censorship legislation arises not from the role of the censor themselves, but in the exercise of prosecutorial discretion by Police and other prosecutors. Many people are not prosecuted who theoretically could be, while some people face major consequences that most others would not. An example of concern is prosecution of the individual described above as committing the terrorist knife attack in Auckland.⁵³¹ The individual had come to the attention of authorities well in advance of the attack, and he was under substantial surveillance at times. He was prosecuted for sharing

⁵²⁴ <https://www.legislation.govt.nz/act/public/2017/0043/latest/DLM7029804.html>

⁵²⁵ <https://www.nzherald.co.nz/entertainment/will-i-be-burnt-next-into-the-river-author-ted-dawe-on-book-banning/JVZ5AJFAHX6T7MMOWY72GWU6OI/>

⁵²⁶ <https://legislation.govt.nz/act/public/1981/0113/latest/DLM53500.html>

⁵²⁷ <https://www.legislation.gov.uk/ukpga/1986/64/section/5>

⁵²⁸ *Morse v The Queen* SC 10/2010. (<https://www.courtsofnz.govt.nz/cases/valerie-morse-v-the-queen-1>)

⁵²⁹ <https://www.rnz.co.nz/news/national/397953/charges-laid-in-35-cases-over-sharing-of-video-of-christchurch-terror-attacks>

⁵³⁰ <https://www.classificationoffice.govt.nz/news/news-items/response-to-the-march-2019-christchurch-terrorist-attack/>

⁵³¹ https://en.wikipedia.org/wiki/2021_Auckland_supermarket_stabbing

material on Facebook said by Police to support violence or terrorism. The Chief Censor ruled that it did not support terrorism (some of the items included footage of atrocities, including material that had aired on al Jazeera, and had been posted online by the Daily Mail) and instead imposed an age restriction, forbidding the items from being shown to those under 18. He was then prosecuted for sharing R18 material with people under 18 because of the Facebook posts, although there was no evidence anyone under 18 had visited his Facebook page, and even though the age-restriction had not existed at the time of the posting. It was not previously clear that the offenses around showing age-restricted material to people under the age restriction operated retrospectively, but the High Court was prepared to sentence him on this basis. While prosecutions from possession of objectional material are common, prosecutions around restricted material are rare, and would be highly restrictive if applied more generally.

Court Decisions

As a common law jurisdiction, New Zealand's courts also play a substantial role in developing the law, including in areas around freedom of expression. There have been several major Supreme Court decisions touching on freedom of expression. In 2021 and 2022, there was a Court challenge to a decision taken by the Auckland City Council to cancel the booking of a public space for a meeting to be held by a pair of alt-right provocateurs. The case reached the New Zealand Supreme Court,⁵³² and although those who challenged the cancellation ultimately lost because of the particular facts of their case, the general principle that Councils must respect freedom of expression in these decisions was established, and some Councils have subsequently been more careful in response to similar events.⁵³³

Over the course of several years, the Supreme Court ruled⁵³⁴ that engaging in political advocacy did not preclude Greenpeace from being a registered charity, but that Family First, a socially conservative advocacy organization that "seeks to promote strong families, marriage, and the value of life," could not. Family First continues to operate as a non-profit without the benefits of registration as a charity.

Name suppression remains an ongoing concern for news media, with Courts prohibiting the publication of important case details in respect of 6,437 charges (8% of cases) in the 2021/2022⁵³⁵ financial year, this included 766 people who received name suppression despite being convicted.⁵³⁶

⁵³² <https://www.courtsofnz.govt.nz/cases/malcolm-bruce-moncrief-spittle-and-david-cumin-v-regional-facilities-auckland-ltd-and-auckland-council>

⁵³³ e.g. *Whitmore v Palmerston North City Council* [2021] NZHC 1551, a successful injunction requiring a Council-owned public library to permit a booking for a public meeting on a proposed law change to go ahead.

⁵³⁴ <https://www.courtsofnz.govt.nz/cases/attorney-general-v-family-first-new-zealand>

⁵³⁵ <https://www.justice.govt.nz/assets/UgEda1-Justice-Statistics-data-tables-notes-and-trends-jun2022-v1.0.pdf>

⁵³⁶ Automatic suppression of the names of offenders appearing in the Youth Court is excluded from these data.

Defamation law remains an ongoing concern for freedom of expression in New Zealand, heavily favoring those complaining of defamation, with the obligation of establishing the truth of any claims remaining with the publisher. Court rulings have expanded the possible defenses to defamation, especially in the political sphere, but the prohibitive cost of defending complex defamation proceedings means that even mainstream news media can be reluctant to publish important information in the public interest in respect of wealthy individuals. New Zealand's largely plaintiff-friendly defamation laws lack basic processes like anti-SLAPP (Strategic Lawsuit against Public Participation) laws to quickly weed out unmeritorious claims, and the cost burdens civil justice can impose upon others mean New Zealand's civil justice system remains at risk of libel tourism.⁵³⁷ In a 2017 defamation proceeding brought against a member of Parliament for statements made while he was leader of the opposition, the Courts extended the defense of qualified privilege to include public statements on matters of public interest.⁵³⁸ The new defense is in its infancy but follows other expansions to qualified privilege defenses.⁵³⁹

Conclusion

New Zealand is not routinely questioned over its record on freedom of expression. No questions or comments about freedom of expression were raised in New Zealand's most recent Universal Periodic Review before the UN Human Rights Council, nor in the most recent periodic report of the Human Rights Committee. The most recent Reporters Without Borders reporting notes that "New Zealand is a model for public interest journalism. With market regulation, favorable legal precedents and respect for diversity, the population of 5 million benefits from a high degree of press freedom."⁵⁴⁰ Nevertheless, there remain ongoing concerns. The cost of defending civil litigation, and plaintiff-friendly defamation laws, mean that concern about facing legal action is a threat to investigative journalism. Strong Court precedent when dealing with speech restrictive criminal offenses, limit the use of the criminal law as a response to political speech, although prosecutions related to protest remain, albeit usually under other laws (for example, trespass). Expanding counter-terrorism powers remain a concern as well, with the Censor's office expanding its role in Countering Violent Extremism. New Zealand's laws tend to provide strong protections for online intermediaries across all areas, including copyright, harmful communications and banned content. Despite New Zealand experiencing disruptive protests, like the Covid occupation at Parliament, and anti-fossil fuel protests blocking public roads, to date there have been no moves to respond with additional police powers or expanded criminal offenses in this area. Several important matters have arisen in 2023, outside the time covered by this report, including the Government's

⁵³⁷<https://www.rnz.co.nz/national/programmes/mediawatch/audio/2018735209/jones-vs-maihi-case-prompts-calls-for-defamation-law-reform>

⁵³⁸ *Hagaman v Little* [2017] NZHC 813.

⁵³⁹<https://www.equaljusticeproject.co.nz/articles/2017/07/cross-examination-andrew-little-new-zealands-defamation-laws>

⁵⁴⁰ <https://rsf.org/en/country/new-zealand>

referral of hate speech regulation to the Law Commission⁵⁴¹ and a government discussion document proposing to regulate online content under a new media regulator⁵⁴² aiming to achieve “Safer Online Services and Media Platforms.”

⁵⁴¹ <https://www.lawcom.govt.nz/our-projects/legal-responses-hate>

⁵⁴² <https://www.dia.govt.nz/safer-online-services-media-platforms-consultation>