

*SUBMISSIONS OF THE ISLAMIC WOMEN'S COUNCIL OF
NEW ZEALAND (IWCNZ) TO THE ROYAL COMMISSION
OF INQUIRY INTO THE ATTACK ON CHRISTCHURCH
MOSQUES ON 15 MARCH 2019*

PART THREE: RECOMMENDATIONS

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IWCNZ

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INTRODUCTION : RECOMMENDATIONS OF IWCNZ

1 These recommendations follow the submissions of IWCNZ to the Commission dated 29 August 2019 and to the meeting between Commissioners and IWCNZ Council members Ms Danzeisen, Ms. Rahman and Dr Salama on 17 September 2019. They respond to Terms of Reference 2 (c) and 2 (d) of the Order of the Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019, namely:

- (c) whether there were any additional measures that relevant State sector agencies could have taken to prevent the attack; and
- (d) what additional measures should be taken by relevant State sector agencies to prevent such attacks in the future.

2 The terms of reference clarify that recommendations may concern legislation (but not firearms legislation), policy, rules, standards, or practices relevant to the terms of reference, that are consistent with the widely accepted values of a democratic society. Recommendations are made in subject areas A to H.

A Reforms to protect against future public service delivery failures

3 IWCNZ refers to its submissions of 29 August 2019 at paras 286 to 336. It says the public service failed to deliver services to address the urgent and pressing needs of the marginalised vulnerable Muslim community in the period 2015 – 2019, despite multiple requests for support made to the highest levels by members of its executive council, and despite the United Nations having developed a Plan of Action to Prevent Violent Extremism in 2015, which required governments to provide the very type of support programmes IWCNZ were seeking from it.²

4 With a couple of exceptions, there was a collective inertia within the public service, inability to understand and comprehend the issues facing the Muslim community, lack of vision, lack of know-how, and a lack of innovation or motivation to address them.³

² See para 75 – 78 Submissions of IWCNZ dated 29 August 2019. Note also the NZ government had been on notice since 2006 that it needed to develop a counter terrorism strategy. (see para 74)

³ The exceptions were NZ Corrections and MSD. See Part 2. Note also that though these submissions focus on IWCNZ there have been other significant public service delivery failures in the last 12 months alone. See Martin and Mount's report on *'The State Sector Act Inquiry into the Use of External Security Consultants by*

- 5 The failure of the crossgovernment working group, established after the March seminar, and the fact that DIA appointed a report writer (XXX XXXX) to go to Hamilton to assess opportunities in Hamilton as a solution to the calls of the community for national assistance are shining examples of the starkness of the system failure.
- 6 The public sector employees who IWCNZ liaised with over that period had (or were perceived as having) entirely inward looking lines of responsibility and accountability. They consulted inordinately with IWCNZ, WOWMA and others but, despite expenditure of public funds, achieved very little.⁴
- 7 There was no hint from anywhere that the public servants might be accountable to the Muslim community as well as their superiors for delivery of CVE. There were regular staff changes and consequently no institutional knowledge developed. IWCNZ had to continually update and upskill new staff.⁵ Those public sector employees who were Muslim and given responsibility in this area, were trying to implement a programme without the necessary engagement and co-design with the community. Agencies appeared to be competing for resources and wanting to shore up their own departments. Indeed, the day after the attacks, the only relevant fact that Ms Little felt necessary to advise Ms Danzeisen of was that OEC now had more money.
- 8 In the future, projects that have been developed for a specific vulnerable community must *involve* that community. This requires more than consultation with them without any further interactions. There should be real engagement throughout the consultation process to identify a joint plan. Where the community disagrees with a planned project or decision in relation to that community, then the public servants should pause, listen and reflect. They need to value the *lived experience* of that community. The government must be transparent in who it engages with from a community. They

Government 18/12/2018. They found several breaches of the Code of Conduct and a widespread misunderstanding as to privacy and security obligations. <https://www.scoop.co.nz/stories/PO1812/S00215/external-security-consultants-inquiry-findings.htm>. See also the Privacy Commissioner's Report of his investigation into MSD's benefit fraud investigations describing MSD practices as 'intrusive, excessive and inconsistent with legal requirements' 16.05.2019 www.privacy.co.nz

⁴ They did not report back on their intended actions. They gave Muslim community members advice they already knew. They lacked basic knowledge and competence in CVE. They were ineffective in their efforts on the ground in Hamilton.

⁵ Ms Danzeisen recalls a government employee responding to a talk she gave about the need Muslim parents had to prepare their children for harassment after an overseas terrorist attack, by saying that he had not even thought of that.

must be persons with knowledge and experience and representing the diversity of the community, even if they are perceived as being 'difficult'.

- 9 Funding for a community should, where at all possible, be *devolved* to that community so that the community is empowered to determine its own destiny. Investment should be in programmes that bring communities together. Potential pitfalls in resourcing should be identified and avoided.
- 10 Taking account of impressions drawn from overseas practices, IWCNZ contends that there is a risk in that public servants in the CVE areas often move into roles as independent contractors to the public service in the particular public sector they previously worked. The perceived risk is that this could influence solutions related to CVE that would benefit them as contractors at a later date. Recognising this potential compromise to independent advice being given, a 'restraint of trade' type clause in contracts in the CVE area is recommended. This would mean that in New Zealand, an employee could not be contracted to work in the field they were working in previously for a period of between 2 to 5 years.
- 11 An important mechanism that oversees the public sector and holds it accountable to the public is the Ombudsman. Likewise, the Inspector-General of Security holds the security agencies accountable. It is vital that there is ongoing adequate funding of these review organisations. This has not been the case in relation to the Ombudsman where there have been very long delays in complaint investigations over the past decade although these appear to have improved under the current Ombudsman.⁶ However, the Ombudsman does have a significant number of roles and responsibilities.
- 12 IWCNZ suggests there should be an 'independent ethics board' or body overseeing the entire CVE area, including security considerations. Such an agency would act of its own motion to conduct random audits of those government actors who have responsibilities in this field so as to ensure the programme is on task. It would also deal with complaints, including any in relation to surveillance of those within the Muslim community.

⁶ However it is noted in the 2018/19 annual report that large proportions are not actually investigated by the Ombudsman.

2019 proposed Public Service legislative reforms

- 13 It is timely that the Minister has announced that the public service is to be restructured. Consultations have taken place and a bill is about to be introduced into Parliament. IWCNZ endorses the recognition by the government and State Services Commission of the need for reform of the public service. At the time of writing these recommendations, the promised Public Service Bill has not been introduced into the House although it was hoped this would happen before the end of 2019 and be enacted by the end of 2020⁷.
- 14 However, Cabinet papers and State Services Papers, including an ‘Impact Statement’, are available and illustrate the direction the Government is intending to take. The Impact Statement reports the results of consultation and decisions made on the content of the proposed new legislation. In this statement the SSC has recognised that the State Sector Act reforms of the 1980’s have created problems.⁸ It identifies 6 key problems arising from the current structure. These are:⁹
- 1 A narrowing of each department’s focus to its own particular outputs. Officials are incentivised to focus on their own agency rather than instilling a larger sense of the wider Public Service with a unifying common mission. They are even focused to compete with other departments.
 - 2 Closely related services are provided by different departments and people find themselves having to interact with multiple agencies to get relevant information to address a single problem.
 - 3 The government has difficulty addressing complex social issues that span agency boundaries. Dealing with the issues effectively requires agencies to work together in a coordinated manner.
 - 4 There is a high variation in employee terms and conditions which made it difficult for employees to cross departments with the result that employees identify with their own department rather than a unified public service serving the interests of all New Zealanders.

⁷ IWCNZ notes that Minister Hipkins has not consulted with it as part of its consultations prior to the drafting of a bill, despite requests to do so from Jan 2018. It queries whether the SSC consultation involved members of the public or recipients of services at all.

⁸ Impact Statement: State Sector reform. 17 June 2019. p 5 *The system incentivises separate agencies to be enterprising about their own resources, focused on the production of outputs, but not incentivised to connect with others or focused on achieving better outcomes.*

⁹ Ibid p 6-7

- 5 The culture of frequent structural changes and reorganisations has resulted in productivity dips, loss of institutional memory and consequent issues with the depth of experience available to address the problems of the day and provide government with best advice.
- 6 There was not a sufficient centre by which to coordinate effort or guarantee adherence to the values and ethics of loyalty and impartiality.

15 The impact statement records that the objectives of the reform are to deliver better outcomes and services, create a modern and agile and adaptive New Zealand Public Service and affirm the constitutional role of the Public Service in supporting New Zealand's democratic form of government. Further, that the planned interventions are intended to provide the ability to effectively join up around citizens to respond to cross-cutting issues, generate alignment and interoperability across the Public Service and to establish behavioural and cultural foundations for a unified Public Service.¹⁰ It is intended that the legislation itself makes explicit recognition of the value of diversity and of fostering inclusiveness. Chief Executives will be responsible for giving effect to these values and the Commissioner will have an oversight role. Besides the legislation, the reforms will be effected by way of a change programme driven by the new Public Services Commissioner and Chief Executives of the Public Service.

Proposed legislative principles

- 16 Five public service principles have been identified to guide a new legislative regime and will themselves be embedded in the legislation. There are:
- political neutrality
 - free and frank advice to Ministers
 - merit-based appointment
 - open government
 - stewardship

Proposed legislative purpose

¹⁰ p 12

17 It is noted that the original proposed purpose that was the subject of consultation for the Impact Statement, commenced with the words¹¹:

The NZ Public Service exists to improve the intergenerational wellbeing of New Zealanders, including by-

- *Delivering results and services for its citizens*

18 That proposed purpose was rejected as being too wordy and complicated. Instead a new post-consultation purpose has been developed and will be put in legislation. This removes the people/customer focus almost entirely. It reads:

The Purpose of the New Zealand Public Service shall be to support constitutional and democratic government; enable current and successive governments to develop and implement their policies; deliver high quality efficient Public Services; safeguard the long-term public interest; and enable active citizenship.

IWCNZ response on proposed principles and purpose

19 IWCNZ says that the principles - as they now are - omit to deal with a key failure of the public sector in the situation to which these recommendations relate. This is that it was entirely devoid of a 'member of the public' or 'customer' focus.¹² What is needed is a principle highlighting that the *focus* of the public service should be outwards, towards the 'citizen clients' or 'citizen customers'. Hence, a new principle should be added: that of *service*.

20 In a similar way, IWCNZ says that the proposed legislative purpose is not outward looking towards the people it is serving. Apart from the words 'enable active citizenship', it makes no reference to the overriding need to 'serve the public' and put their needs first. After all, the public service is fully funded by the public, through various taxes gathered for the very purpose of serving them. Hence, it is recommended that after 'to develop and implement their policies', the purpose provision should read, '*serve the people of New Zealand by delivering high quality Public Services, enabling active citizenship and safeguarding the long-term public interest.*'

¹¹ P 20/21 Impact Statement.

¹² It notes that this was in earlier papers. For example see the paper to the Chair of the Cabinet Government Administration and Expenditure Review Committee, para 2, Executive summary: *It (the legislative change) is about reconnecting with the spirit of service to the community and unifying the public service around a common purpose, principles and values. These will ensure the public service operates with integrity and earns the trust, confidence and respect of New Zealanders.*

21 The ‘merit based appointment process’ is often one that works against those community members who are marginalised. While minorities may not have had access to the quality of education, networking and connection opportunities to compete ‘on merit’, they do have other valuable and unique skills and qualities they bring to the public sector. ‘Merit based’ must be broadened to recognise those skills and qualities.¹³

Non -legislative reforms

22 Whilst the *orientation to service of the public* is needed to be explicitly provided for in the Principles and Purpose sections, other steps need to be taken to alter the working culture of the public sector. IWCNZ submits that:

- (a) guidance on the steps required to create a *service oriented* public service should be developed by the Public Service Commission and draw from the research and advice paper produced by Price Waterhouse Coopers: *The Road Ahead for Public Service Delivery. Delivering on the customer promise.*¹⁴ The paper is a global effort drawing on experiences of multiple diverse public sectors internationally. The paper concludes that the way ahead requires a new service delivery model that is entirely customer focussed.
- (b) A *human rights matrix*, as described by the Human Rights Commission, be adopted to guide how policy might best be developed.

23 Each of these is discussed in turn.¹⁵ Both are directly relevant in addressing the glaring failures in the New Zealand public service in their dealings with the Muslim community prior to the attacks.¹⁶

¹³ Hence, EEO programmes, which have had success for women, must be continued in the public service to progress and support minorities.

¹⁴ *The road ahead for public service delivery. Delivering on the customer promise.* Public Sector Research Centre (PSRC). PriceWaterhouseCoopers. (PWC) 18 April 2015. The PSRC is PWC’s centre for insights and research into best practice in government and the public sector, including the interface between the public and private sectors. The Centre has a particular focus on how to achieve the delivery of better public services, both nationally and internationally. While IWCNZ does not necessarily support the concept of the public being ‘customers’ the guidance is nevertheless very valuable.

¹⁵ IWCNZ also refers to *The Principles of Public Administration: Chapter 5, Service Delivery* published by Sigma (a joint initiative of the OECD and EU). Undated but most likely 2015. Again this emphasises as an essential principle the need to be oriented to delivering to the public. It is called ‘citizen oriented’ in this chapter: *Principle 1: Policy for citizen-oriented state administration is in place and applied. Sub para 1: A policy exists to design public services around the needs of the user*

¹⁶ Note also the Sigma Papers no 27. These working papers are the work of the OECD and European Union and were prepared as guideline advice for Eastern European Countries wanting to join the EU as to what would be

PWC Report : Delivering on the Customer Promise

24 The report says that *Customer focus is often challenged by public sector culture, hierarchical organisational structures and differing public sector priorities.*¹⁷ To deliver on the ‘customer promise’ requires five strategic enablers:

- 1 Understand your customer (Customer-centricity;)
- 2 Pull down the walls (Connected government)
- 3 Empower your institution (Build capacity)
- 4 Realise benefits through appropriate models (Deliver the promise)
- 5 Continuously improve (Innovate).

25 Being customer centric requires that customer insight be used to inform effective customer delivery:¹⁸ Public sectors are advised that the delivery process must be from the customer’s point of view, and using co-creation where value is co-created by the organisation and the customer.¹⁹ Services are to be delivered based on the needs and preferences of the customer and there must be multiple delivery channels.²⁰ The competence, know-how and empowerment of staff to develop new models of service delivery must be developed. Staff training and development are critical.²¹

expected of their civil service. Among the conclusions are that the civil service is one main element of public administration; but it is such a major element, public administration and civil service are often considered to be synonymous. Within member states Civil Service Values are legally binding; regulating the civil service goes beyond merely regulating the labour relationships between the state and its employees – it concerns regulating one of the state's powers in a broad sense. Administrative law principles inspire the decision-making of public managers and pattern the behaviour of the civil service as a whole. <https://dx.doi.org/10.1787/5km160zwr7h-en>

¹⁷ This is consistent with the NZ government’s experience and IWCNZ’s experience.

¹⁸ See p 17, Chapter 03 Understand your customer: *Customer is king in the public sector too:*

In the public sector, in contrast to the private sector, it is crucial to understand the nature of the policy outcomes required – as well as the customer outcomes. Unlike the private sector, where the organisation is at liberty to define its customer segments, the public sector is required to service numerous diversified customer segments. It is therefore essential to develop clear policies to meet the needs of each segment. The needs of the various segments can be quite distinct and will be driven by multiple factors, including demographic attributes such as age, education, income and more attitudinal factors such as beliefs, values and willingness/ability to engage with government. Understanding them all is critical to the development and implementation of a customer-centric service delivery strategy... The public sector is required to satisfy the rights of its entire customer base - equally and to acceptable standards. There needs to be a clear strategy for ensuring the inclusion of all the segments of society that might be served. This subject is highly topical.

¹⁹ Examples of how this is achieved include responding to customer feedback and seeking the involvement of customer segments in the development of services to achieve customer-centric outcomes.

²⁰ For example: *the delivery of services may be by post, telephone, face to face, directly through government or indirectly through intermediaries such as voluntary organisations. In designing a channel strategy, care should be taken not to force customers in any one direction. Because of the diversity of their customer base, public sector organisations need to focus on creating multiple delivery channels.*

²¹ See p 32 PWC ‘...But in the public sector senior personnel often tend to focus much of their efforts on policy making in response to political decision-making, delegating responsibility for implementing these policies and failing to take into account the end impact on ‘customer experience’ during their design.

A Human Rights Approach to policy development

26 A human rights approach is a conceptual framework based on international standards developed by the United Nations to promote and protect human rights. The approach is used principally in relation to policy development although it has been used to evaluate judicial decision making. As adapted for New Zealand by the Human Rights Commission in 2004,²² the approach involves:

- Expressly applying the principles and standards in the international human rights instruments;
- Participation & empowerment of individuals and groups, allowing them to use rights as leverage for action and to legitimise their voice in decision-making;
- Non-discrimination;
- Accountability for actions and decisions allowing individuals and groups to complain about decisions that affect them adversely;
- Transparency;
- Vulnerability – balancing rights to maximise respect for all right-holders and where there is conflict, favouring the most vulnerable.

27 Since 1 Feb 2002, the New Zealand Government has been bound by Part 1A of the Human Rights Act which requires it to comply with the rights and obligations set out in the New Zealand Bill of Rights Act. It can be held to account before the Human Rights Review Tribunal and higher courts when it breaches these. It was expected, by the then Attorney-General, Margaret Wilson, that this would create a ‘human rights compliant culture’ within the public service. As cases against various departments have illustrated since then, this has not occurred and an antagonistic approach has, instead, been created.²³

²² Human Rights Commission, *Human Rights in New Zealand Today* (2004) at 25

²³ The series of cases against the Ministry of Health are one such example. *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) ; *Spencer v Ministry of Health* [2016] 3 NZLR 513; *Chamberlain v Ministry of Health* CA 460/2017 [2018] NZCA 8. In *Atkinson* the Ministry embarked on a full scale defence of an ill-defined policy prohibiting family members from payment for caring for family members without having undertaken any economic or other analysis into whether its policy was justified under s 5 NZBORA. In *Chamberlain* the Court of Appeal concluded its decision with the postscript: Postscript [90] *We make two additional points. First, we note that this is the third occasion on which a dispute between the Ministry of Health and parents who care for disabled adult children has reached this Court. We hope that in the future parties to disputes over the nature and extent of funding eligibility are able to settle their differences without litigation. Second, we have referred to our unease, which is shared by Palmer J, about the complexity of the statutory instruments governing funding eligibility for disability support services. They verge on the impenetrable, especially for a lay person, and have not been revised or updated to take into account the significant change brought about by pt 4A. We hope that the Ministry is able to find an effective means of streamlining the regime, thereby rendering it accessible for the people who need it most and those who care for them.*

28 If a human rights approach had been adopted by the Departments with whom IWCNZ was engaging, it is likely there would have been very different outcomes in the delivery of the respective and much-needed public services to the Muslim community. Each step in the approach is discussed briefly below.

(i) *Standards in the international human rights treaties*

29 When a country ratifies an international human rights treaty it makes a commitment to give effect to the standards in that treaty. The UN has consistently endorsed the notion that international human rights law should be understood as providing the domestic framework for - among other things - the operations of government and the interpretation exercises undertaken by the courts. However, while the courts have made significant strides in using international human rights treaties to construe legislation and the exercise of discretion for example, the public service has not followed suit. Though a report is routinely undertaken as to the compliance of proposed new legislation with the New Zealand Bill of Rights Act, and is required to accompany its introduction to the House, that is an *after the event* exercise. Human Rights obligations, values and guidance have not been used as a framework for the development of policy.²⁴

30 One example is given of the difference this may have made to the Muslim community. Had a *human rights approach* been part of the culture of the Public service when concerns about online Islamophobia and hate speech were being expressed, then the public sector agencies would have had a framework in the form of Article 19, General comment and the Rabat Plan of Action.²⁵

(ii) *Participation*

31 The UN Guiding Principles specifically refer to the need for “meaningful consultation with potentially affected groups and other relevant stakeholders.”²⁶ Participation is the

²⁴ For example the practice of no-payment to family members for the care of an adult disabled child was never put through a human rights analysis before a decision was made inhouse to maintain it; the In Work Tax Credit was developed without reference to human rights obligation though this matter was not referred to in the decision : *Child Poverty Action Group v Attorney-General* [2013] 3 NZLR 729 (CA)

²⁵ Report of the Special Rapporteur (2019) A74/48050 at [57]

²⁶ [44]

idea that those affected by a decision should be able to have a say in the outcome. It allows marginalised persons and communities who would otherwise have no means of directly influencing the public sector and policies that impact upon them and their communities, to do so.²⁷ The importance of participation to a healthy democracy is well recognised and is put well by Professor Smillie in 1978²⁸:

Providing citizens with an increased sense of involvement in the administrative process tends to allay suspicion that decisions of governmental regulatory bodies tend to unduly favour the organised entrenched interests of regulated enterprises at the expense of more diffuse and less organised interests such as those of consumers, environmentalist and recreational groups.

(iii) *Non-discrimination*

32 UN comment consistently refers to ensuring policies are not discriminatory and do not inadvertently favour or prejudice one group over another. Frank LaRue, the Special Rapporteur in 2010, on the promotion and protection of the right to freedom of expression, noted that stereotypes and prejudice against ethnic, racial, linguistic and religious groups are the result of racism and discrimination or the erroneous application of national security and anti-terrorism policies. It is essential, he goes on, that this is recognised and countered by developing a culture based on intercultural dialogue and tolerance.²⁹ The public service needs to have - as a guiding principle - this need when developing policies and projects.

33 The former narrow legalistic approach to discrimination that prevailed for many years (everyone should be treated the same) has been displaced by recognition of the socio-cultural and political-legal institutions which contribute to, and sustain, the structures of discrimination. To address them requires a commitment to treat people and groups differently where necessary to ensure equal outcomes.³⁰

(iv) *Accountability*

²⁷ Pol De Vos, Wim De Ceukelaire, Geraldine Malaise, Dennis Pérez, Pierre Lefèvre, and Patrick Van der Stuyft “Health through people’s empowerment: a rights-based approach to participation” *Health and Human Rights*, Vol. 11, no. 1 at 25

²⁸ *Locus Standi – the Report of the Public and Administrative Law Reform Committee* [1978] OtaLawRw 3; (1978) 4 Otago Law Review 141

²⁹ *Supra* fn 3 at [86]

³⁰ OHCHR *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006)

34 The need to justify government action under s.5 NZBORA is a crucial aspect of accountability. Limitation of a right in the NZBORA is only permissible if it can be justified in a “free and democratic society”. This is effectively the same as the *necessity* and *proportionality* standard referred to in the international material (see below Appendix 1 at (g)). Inherent in the concept is the implicit assumption that a government will not only take responsibility for its actions if a policy or law has the effect of infringing a right, but that it can justify doing so.

35 This “culture of justification” contributes to good governance by ensuring that citizens are entitled to seek, and receive, answers for why their rights are infringed. This can be seen in relation to freedom of speech and the prohibitions against exciting/inciting racial disharmony. It can be inferred that the legislation was considered a necessary aspect of striking the balance between appropriate protection against discriminatory conduct leading to harm to a protected group and the value of freedom of expression.

(v) *Transparency*

36 Transparency is closely linked to accountability. To be transparent, public sector decision makers must be able to give reasons for decisions, particularly those with the potential to directly or indirectly discriminate. They must be able to explain openly why a project or policy is or is not being adopted. Justice Wylie’s observations in *Smith v the Attorney-General* are apt:³¹

The giving of reasons encourages transparency of thought, which of itself is a vital protection against a precious or arbitrary decision. The very process of giving reasons is likely to mean that the decision is better thought out. When reasons are given, it can be more readily seen that the decision-maker has considered relevant matters and refused to consider irrelevant matters... The person affected may well be more inclined to accept the decision if it is reasoned.

37 If details of policy implementation, funding available for projects etc are not made public then there is no ability for public servants and the public service to be held to

³¹*Smith v Attorney-General* [2017] NZHC 463 (16 March 2017) citing *Television New Zealand Ltd v West* [2011] NZLR 825 (HC) [at 91]

account, whether it be by community groups, lawyers or academics. They are all vital players in ensuring a healthy, open, transparent public service.³²

(vi) *Vulnerability*

- 38 The need to protect those vulnerable groups (usually marginalised) in society is a thread running through all human rights treaties. To date, groups recognised as needing protection include those identifiable by race, colour, national or social origins, language, sex, gender, motherhood, religion, political or other opinion, property, birth or other status, indigenous peoples, descent-based groups, immigrants or non-citizens and other vulnerable persons.
- 39 The concept is increasingly being used to indicate a heightened susceptibility of certain individuals or groups to being harmed or wronged by others or by the State³³. It is an important consideration in situations where popular sentiment runs against recognition of the rights of groups such as prisoners³⁴. In such cases, it can be a way of imposing obligations on the State to ameliorate the harm of certain policies by tailoring the policies to meet the specific needs and concerns of vulnerable groups. Vulnerability is best understood as a “*universal, inevitable, enduring aspect of the human condition*” and the role of the State is to be responsive to this³⁵.
- 40 Recognition of group vulnerability allows society to understand how it reinforces inequalities resulting from broader societal and institutional circumstances and to address them accordingly.

Public servants from within vulnerable group

- 41 The employment of persons from vulnerable communities in the public service can create ethical issues and conflicts of interest. Where the community is small in size, the government may look to those public servants to represent the views of their

³² The UN Special Rapporteur makes the point, in relation to internet companies, that lack of transparency is a major flaw in many policies and acts as a significant barrier to external review. While the rules are public, the details of their implementation, particularly of company policies at a variety of levels, are often non-existent. (45). Where company rules, for example, deviate from international standards companies should be able to explain why this is the case. The same must go for the public sector.

³³ R Andorno, *Human Dignity of the Vulnerable in the Age of Rights*, Springer (2016)

³⁴ See Palmer, G “*What the New Zealand Bill of Rights aimed to do, why it did not succeed and how can it be repaired*” (2016) 14 NZJPIL. At 179 he notes that *the rights of unpopular people are just as real as those who live in society’s mainstream. These situations are the very ones where rights are most needed.*

³⁵ Ibid at 1060 citing Fineman, M. “The Vulnerable Subject: Anchoring Equality in the Human Condition” 20 Yale J.L. & Feminism 1,8 (2008)

community, without consulting with such a community. However, that process should never be a proxy for consultation with representatives or leaders of the public servant's community.

- 42 Furthermore, a public servant from a minority vulnerable community should not attend meetings of community advisers without also declaring they are a public servant. The fact that a person works for the public sector should always be declared when a community panel or group is working on government policy or making recommendations to government. The same issues undoubtedly arise in all groups but particularly within small and marginalised ones. In addition, appropriate and standard practices need to be established so as to shield both the information and the person with the conflict. This is so that that public servants do not use information obtained by reason of their work in government to develop community models that compete with those models already created in the community.

Conclusion

- 43 In conclusion, several of the obstacles in the way of the public service being able to provide a customer-centric service will be addressed in the new legislation with its focus on joined-up government. These include the obstacle of a disproportionate focus on keeping control of resources and defending individual territories³⁶ and the lack of data-sharing across business units and customer channels, due to various structural and technology challenges.
- 44 However, the changes fall short of what is needed. A mandatory 'service to the public and every section of it' focus must be explicitly set out in the legislation. Further, second tier guidelines must be developed that identify the 'means' by which the public sector focus can be changed, in practice. The PWC guidelines are pertinent and entirely on point and should be used as guidance. In addition, a human rights approach should be taken to policy and project development. If this had been in place from the time Part 1A was enacted, it is expected that IWCNZ would have had a different and more positive experience with the public services it approached for support.

³⁶ PWC Report P 23

Recommendations – public sector reforms

- 1 The proposed ‘purpose’ provision in the proposed public service reform legislation be amended to explicitly provide that a primary purpose of the public sector is *to serve the public as a whole and all sectors of the public of Aotearoa/New Zealand*.
- 2 The proposed public service reform legislation provides that a key principle includes ‘*service to the public*’.
- 3 The State Services Commission (or its successor) develop mandatory guidelines for the whole of the public service on the steps needed to reorient towards a public service/customer focus using the guidance of the PWC report, ‘The Road Ahead.’
- 4 The State Services Commission (or its successor) develop mandatory guidelines for the whole of the public service on how to reorient towards a human rights compliant culture in policy and project development using the human rights approach recommended by the United Nations and developed for New Zealand by the Human Rights Commission.
- 5 The State Services Commission develop a model of community engagement that requires the focus to be on self-empowerment of the communities it serves. Public servants to be trained in cultural awareness of the communities they serve.
- 6 The State Services Commission:
 - a. review and update the Code of Ethics for all public sector employees so that it is comprehensive though straightforward and contains examples of ethical conflicts employees may have.
 - b. provide an ongoing training programme to public servants on conflicts of interests and ethics.
 - c. provide guidance to public sector employees on how to identify conflicts of interest between an employee’s work and personal life and what to do when potential or actual conflicts arise.
 - d. develop a clause akin to a restraint of trade clause in certain areas where government contracts with external persons and groups so that an employee cannot contract themselves back to the government until a period of between 2 to 5 years has lapsed since employment.
 - e. develop an advice and disciplinary committee in relation to breaches of ethics so that there are consequences for a person breaching them or acting contrary to a Code of Ethics.

B Support of the Muslim Community in New Zealand

- 45 The Muslim community in New Zealand faces multiple unique challenges and has been failed by the public service. It has complex needs due to the language, culture, ethnic diversity and age distortion of its membership and the fact that it contains a high number of refugees. Cultural issues surrounding gender are different to and misunderstood by mainstream. Members experience serious problems of social isolation, marginalisation, discrimination in employment, bullying at schools and women face regular public expressions of Islamophobia directed towards them.
- 46 The public service's inability to effectively provide for this community prior to the attacks has been a serious failing. Addressing their disadvantage requires multiple steps on multiple fronts. Because of their comparatively small size, they have lacked the clout which other marginalised groups have through numbers when it comes to being able to get the attention and resources of government. Furthermore, since the Christchurch attacks, the Muslim community has experienced trauma, fear and greater levels of vulnerability.

Recommendations on support of the Muslim community

- 7 A cross-government working group be immediately reactivated to work with a Muslim Sector Advisory Group to develop an across government plan to deliver urgent services to the New Zealand Muslim Community in the areas of youth services, education, employment health and welfare.
- 8 There be an immediate injection of funding to support the health and resilience of the New Zealand Muslim communities, with decisions on allocation being made jointly by the cross government working group and the Muslim Sector Advisory Group.
- 9 That WOWMA, as proven operator of successful Muslimah programmes, be immediately provided with specific and targeted funding for a five year period to continue to support young women from across the country to be empowered to reach their full potential rather than be blighted by the serious disadvantages they face.
- 10 Specific and targeted funding be made available to IWCNZ for a period of five years, to compensate for the five years IWCNZ has engaged with government on security and community issues, often at its own time and expense, without success.

C Security for the protection of all communities in Aotearoa/New Zealand

47 IWCNZ refers to para 287 to 311 of its submissions. It is evident that the Christchurch mosque attacker was not on the radar of the GCSB, SIS, DPMC and NZ Police until March 15, 2019. Those branches of government that were intended to protect citizens failed in detecting his intended actions with catastrophic consequences.³⁷

48 IWCNZ submits that reasons for this are multiple. In the period 2015 to 2019, the respective agencies were not taking seriously the threat to Muslim communities in New Zealand from known expressions of Islamophobia, the Alt Right and white supremacist groups (globally and in New Zealand). Rather, they were focussed solely on the Muslim community as the population from which the risks were coming.³⁸

49 That focus was in spite of the repeated advice given by IWCNZ to the SIS, the Minister and the Police, over this period, as to what was happening on the ground and the increasing expressions of concern. The obvious conclusion and one which IWCNZ draws is that:

- (i) there was no or very little intelligence from the Five Eyes coalition partners backing up what was being said to the agencies by Muslims in New Zealand about the danger they felt under from Islamophobia. The Five Eyes were out of touch and out of date in their intelligence, without any or adequate focus on the Alt Right, despite the fact so much terrorism in the USA was coming from it.³⁹

³⁷ It is acknowledged that there is an element of speculation in this given the fact IWCNZ has not had access to any SIS material. However, it has been acknowledged publicly that the mass murderer was not on the radar of the SIS.

³⁸ This is the perception of IWCNZ supported by Nicky Hager in a 2003 article: Surveillance: Technological change, foreign pressures and over-reaction to terrorist threats at www.privacy.org.nz/assets/Files/13854584.pdf p 10:

The target of expanded SIS “counter-terrorism” surveillance.... is New Zealand Muslim people. That is specifically whom the money was approved for. The increased Auckland surveillance and the new surveillance equipment are primarily to spy on mosques and New Zealanders who happen to be Muslim in the Auckland region. They would not admit it publicly, but the SIS and other New Zealand agencies are following the FBI and other US agencies in equating terrorism with people of Middle Eastern and Muslim descent.

³⁹ See Paul Buchanan’s analysis (pre March 2019) of the delay in security agencies keeping abreast of real life security issues and dependence on Five Eyes ‘Institutional Lag and the New Zealand Intelligence Community’, Evening Report.nz 2016/03/09

- (ii) the Muslim voice was not valued by the agencies in the same way that the voices of others were and this is likely to be as a result of a deep bias (conscious or unconscious) against Muslims. The fact that, after such a focus of surveillance on the Muslim community, there was no-one from within it who was trusted sufficiently by the security agencies to have a high security clearance, is an indicator that the agencies' advice was biased.

Disproportionate reliance on Five Eyes

- 50 The inadequate and biased intelligence coming from the Five Eyes coalition, and on which New Zealand has aligned its intelligence, has caused suffering, alienation and discrimination against the Muslim community. For example, three young Muslim men were arrested, charged, convicted and imprisoned in New Zealand as a result of sharing an ISIS video. It is understood that no persons sharing white supremacist videos, or inciting white supremacist actions against Muslims in New Zealand, were even under surveillance prior to the attacks. The differential treatment is unfair and disturbing as well as negligent. It has failed the Muslim community in New Zealand and failed New Zealand.
- 51 It is time to recognise the reality that the USA has major corporates embedded into its political system and, particularly in the Trump era it has different goals and priorities. It is unsafe for New Zealand, a small nation, to be solely reliant on Five Eyes intelligence. New Zealand needs to have, and be seen to have, a degree of independence in the international arena. It needs a range of alliances; not just one in which the dominant partner is the USA. It needs intelligence alliances in the Asia Pacific region where it is based and elsewhere. It needs better and more accurate and reliable intelligence.
- 52 IWCNZ says that New Zealand needs to leverage itself as a small but competent independent human rights compliant nation. It has the capacity to inspire others by its independence and strong human rights stands and be a much larger force for good on a global scale. This potential has manifested itself already since the Christchurch attacks.

53 IWCNZ says that the step taken by the Inspector General of Intelligence in creating an external intelligence group is an excellent one and should be made permanent.⁴⁰ It is an important means by which security agencies ensure they are operating in the world of real security threats and not caught out by institutional lag.

Surveillance via social media monitoring

54 It is understood that much surveillance happens via social media. However, without a sophisticated understanding of the values, culture and language of the Muslim community and how social media operates, social media monitoring by security agencies for Muslim terrorists (or any other suspect group for that matter) is fraught with risks of catching many innocent people in its net.⁴¹

Gun ownership and hate speech

55 There is little oversight into the background of persons owning guns in New Zealand. It appears the killer had guns that he had bought lawfully. IWCNZ welcomes the legislation to outlaw semi-automatic guns with exceptions. However, further work needs to be done to develop a system where the background of applicants is checked

⁴⁰ See annual report www.igis.govt.nz/assets/Annual-Reports/Annual-Report-2019.pdf where the IG notes at [26]:

It is well recognised internationally that best practice for oversight involves ensuring there are sufficient means for the oversight body to understand the scope of community views on issues relevant to intelligence agency oversight. It is important that oversight does not speak solely with specific interest groups or communities, e.g. the intelligence community, lawyers, or politicians. All of our Five Eyes counterparts, and many of our European colleagues, have developed “outreach” programmes, which involve multiple points of connection to community representatives... The Reference Group assists to keep us in touch with legal, social and security developments in New Zealand and overseas, and provides a thoughtful view on what it is most useful for an oversight body to communicate to the New Zealand public.

⁴¹ See also New Zealand Law Commission report on *Search and Surveillance* 2012 at 11.59: *the use of social media monitoring as a predictive tool may raise concerns about discrimination against certain ethnic or religious groups. Say, for instance, that an algorithm is used to scan social media for terms that might be used by terrorists associated with the so called Islamic State of Iraq and the Levant (ISIS). Those same terms may be used by Muslims in the legitimate expression of their religious beliefs. This may result in Muslims being subject to increased monitoring and investigation to confirm whether they are a threat or not. In turn, this may raise questions of discrimination on the grounds of religious beliefs and may discourage* 11.56 11.57 11.58 11.59

for hate speech/hate crimes and membership of hate or supremacist groups before they are given a licence to own one gun or more. Once a license is issued, it should have to be renewed biennially and checks made again at each renewal. Reported instances of hate speech and hate crimes need to be checked against the gun register and a licence removed if a report is well established. There should be an appeal system to protect against arbitrary or malicious reporting.

- 56 The 2017 Intelligence and Security Act 2017 requires at s 3(c)(i) that the functions of the intelligence and security agencies are performed in accordance with ...*all human rights obligations recognised by New Zealand law*. This is compatible with a human rights approach. However, given the powers and focus on New Zealand population inherent in the Act, it is vital that security agencies listen to and act to protect the Muslim community as potential victims.

Countering Violent Extremism

- 57 Despite a clear plan of action being developed by the United Nations in 2015, (para 75-77 Submissions) identifying steps needed to be taken by government to counter violent extremism, the New Zealand government, through the public sector including its security agencies, was primarily focussed on surveillance (of the Muslim community) with little in the way of a preventive strategy. What prevention projects that were underway were ineffective and apparently poorly funded⁴².
- 58 There needs to be a coordinated and strategic national approach to prevention. A key solution to Muslim extremism in Muslim minority countries was always and still is to bring marginalized communities into mainstream; to give them opportunities to be participants in the society and to put funding into community engagement efforts. Investment must be made in bringing communities together.
- 59 There are several sources of information on how successful strategies would operate and what the key features would be. Recent examples only are set out here.

Canada

⁴² IWCNZ does not have information relating to government allocations of CVE money for prevention prior to the mosque attacks.

60 In February 2018 the Canadian House of Commons *Report on Taking Action Against Systemic Racism and Religious Discrimination including Islamophobia* was tabled. It recommended that the Standing Committee on Canadian Heritage undertake a study and report its findings to the House on how the government could develop a whole of government approach to reducing or eliminating systemic racism and religious discrimination, including Islamophobia.

61 The Committee duly undertook the study recommended.⁴³ Ultimately, the Committee reported its findings and made 30 recommendations that were presented to the House in 2019. (check).⁴⁴ All suggestions by the witnesses interviewed, and outlined in the report, have since been adopted in some way, shape or form. Some relevant findings are referred to below:

A whole of Government approach

62 A “whole of government approach” was essential.⁴⁵ A National Strategy must include direct and frequent consultation with communities affected.⁴⁶ It must take a community-based approach.⁴⁷ Key aspects of the National Strategy included that:⁴⁸

- a. The needs of the people the government seeks to serve must be appropriately addressed. Therefore, a “race equity lens” should be developed as a key element;
- b. Any projects adopted have clearly defined targets, deadlines and reporting mechanisms so as to be effective, sustainable and accountable;
- c. Every level of Government must be incorporated and have a plan to progress the National Strategy. Consequently, there needs to be a cross jurisdictional approach.
- d. Public awareness and dialogue is instigated by the Government initiating a conversation about “understanding and diversity”; and
- e. A targeted scheme is introduced into schools which includes in the curriculum “lessons on race, religion, diversity and related topics”.

⁴³ Over the course of approximately two months, it held 14 meetings and heard from 77 witnesses. It also received 34 briefs from interested parties. It focussed on a broad range of “racialised” Canadians, including Blacks, Asian, indigenous and Muslim communities.

⁴⁴ At 1-5.

⁴⁵ At 46.

⁴⁶ At 47.

⁴⁷ At 48.

⁴⁸ At 50-54 and 59, 61,

Data collection

- 63 Data collection was pivotal. The Associate Deputy Minister of the Inclusion, Diversity and Anti-Racism Division of the Government of Ontario was cited as saying that where there is “no data”, there is a perception that there is “no problem” and therefore, there is “no solution”.⁴⁹

Research

- 64 Once data is collected, more substantial research needs to be undertaken.⁵⁰ Research grants should be established. Such research could be done by Government, civil society, researchers within the community and through investment in academic experts in universities to study the issues further. Institutions of professionals, such as the Political Science Institution could also be recipients of grants to undertake the work. This would ensure that policy-makers were informed with scholarly research which could withstand “the test of peer review”.

United Kingdom – ‘Contest’ and ‘Prevent’

- 65 The United Kingdom’s strategy on countering international terrorism (CONTEST) was released to Parliament in July 2006.⁵¹ It was a response to the events of 9/11 and recognised the continuing and increasing risk of terrorist attacks in the United Kingdom. The major concern was that radicalised individuals were employing a distorted and unrepresentative version of the Islamic faith to justify violence.⁵² CONTEST acknowledged that Muslim communities as a whole did not threaten security and, in fact, contributed greatly to the United Kingdom.
- 66 One of the four principal strands of CONTEST is PREVENT. PREVENT’s primary goal is to safeguard individuals from becoming terrorists or supporting terrorism. It seeks to pre-empt radicalism at an early stage and employs similar approaches used in deterring gang-affiliation or membership. PREVENT’s objectives, the level of importance attributed to each, and the measures employed to enable its success

⁴⁹ At 25.

⁵⁰ At 34.

⁵¹ Her Majesty’s Government “Countering International Terrorism: The United Kingdom’s Strategy” (July 2006) CM6888.

⁵² Her Majesty’s Government “Countering International Terrorism: The United Kingdom’s Strategy” (July 2006) CM6888 at [3].

essentially remain equal. These include: Tackling the causes of radicalisation, including disadvantage, inequality and discrimination;

- (i) Engaging in the “*battle of ideas*”, which addresses the contributors to radicalisation, challenging, and responding to the ideological challenge that terrorism presents or is believed to justify, in particular, by assisting Muslims who wish to dispute those ideals to do so;
- (ii) Providing early intervention and offering support to those most at risk of radicalisation through specialist tailored agencies; and
- (iii) Deterring those who facilitate, and encourage others to engage in terrorism by changing the environment in which they operate, and to rehabilitate.

67 PREVENT relies heavily on leadership and partnerships,⁵³ employing a wide network across all sectors, public and private. The following figure, taken from a recent review of CONTEST, can be seen as providing encouragement for its success as a tool for reducing terrorism:⁵⁴



68 Some academics and commentators, however, have criticised PREVENT on the grounds that it results in:

⁵³ Her Majesty’s Government “CONTEST – The United Kingdom’s Strategy for Countering Terrorism” (June 2018) CM9608 at [101].

⁵⁴ Her Majesty’s Government “CONTEST – The United Kingdom’s Strategy for Countering Terrorism” (June 2018) CM9608 at figure 2.3.

- (i) Over-surveillance of the Muslim community, which has increased Islamophobia, seen as the core of the PREVENT strand;⁵⁵
- (ii) Encouragement to look for threats where they do not exist;
- (iii) Increasing time spent with already radicalised individuals is giving them unwarranted professional respect;
- (iv) Targeting of young members of a family rather than the elders as they are seen as easier to co-opt than the adults;
- (v) Labelling of the strand as “toxic” due to opposition from Muslim groups;⁵⁶
- (v) That pre-empting criminal extremism is “fundamentally flawed” and presents a “serious risk” of human rights violations;⁵⁷

69 The programme has seen two comprehensive reviews since 2003. First in 2011⁵⁸ and again in 2018 following the 2017 terrorist attacks in Manchester and London.⁵⁹ It continues as it is said to be important to maintain “coherent and sincere preventative efforts”.⁶⁰ The alternative is a reactive approach which carries potentially greater risks.

70 The Missing Muslims Report recommended consideration of the appointment of a ‘Prevent Ombudsman’, to develop definitions of nonviolent extremism and how to incorporate emerging evidence / best practice from overseas programmes that tackled extremism.

*The Casey Review*⁶¹

71 In 2015 the then Prime Minister and Home Secretary instructed Dame Louise Casey to undertake a review into integration and opportunity in isolated and deprived communities.⁶² The findings were that discrimination and disadvantage were feeding a

⁵⁵ Fahid Qurashi “*The Prevent strategy and the UK ‘war on terror’: embedding infrastructures of surveillance in Muslim communities*” (2018) 4 Palgrave Communications 17 at 22-23, 27 and 46; see also Joana Cook *Avoiding the Pitfalls of Prevent* (Georgetown Institute for Women, Peace and Security, 2017) at 4.

⁵⁶ Helen Warrell “*Inside Prevent, the UK’s controversial anti-terrorism programme*” (24 January 2019) Financial Times <www.ft.com> at 11.

⁵⁷ Open Society Justice Initiative *The UK’s Prevent Counter-Extremism Strategy in Health and Education* (Open Society Foundations, 2016) at 15 and 34.

⁵⁸ Her Majesty’s Government “Prevent Strategy” (June 2011) CM8092.

⁵⁹ Her Majesty’s Government “*CONTEST – The United Kingdom’s Strategy for Countering Terrorism*” (June 2018) CM9608.

⁶⁰ Joana Cook *Avoiding the Pitfalls of Prevent* (Georgetown Institute for Women, Peace and Security, 2017) at 14.

⁶¹ *The Casey Review: A review into Opportunity and Integration*. Dame Louise Casey DBE CB December 2016.

⁶² Her review was based on over 800 conversations with community groups, officials, academics, teachers, peoples and faith leaders and over 200 written submissions. Everyone recognised there was a problem to solve. The report

sense of grievance and unfairness. In some places there were high levels of social and economic isolation.⁶³ The solution to all the problems was to promote integration and tackle social exclusion.⁶⁴*Missing Muslims Report*

72 In July 2017 a group called ‘Citizens UK,’ the largest and most diverse community organisation in the United Kingdom, released a report from ‘The Citizen’s Commission on Islam, Participation and Public Life’ which it had set up to inquire into ‘...how to unlock British Muslim Potential for the Benefit of All.’ It was chaired by the Rt Hon, Dominic Grieve QC, former Attorney General. The report was entitled ‘The Missing Muslims’, report by the Citizens Commission on Islam, Participation and Public Life.

73 The Commission found that in areas of high deprivation, lack of integration was at its greatest. It identified structural barriers including a lack of economic opportunities and discrimination, which were particularly acute for Muslim women. Employers were already making headway on addressing issues around unconscious bias – affecting both British Muslims and other groups – within their organisations. However, more needed to be done, not just to provide more equitable access to opportunities for British Muslims but to allow the British economy to harness their potential for the benefit of the country. Recommendations centred around integration strategies and included steps employers needed to take to counter unconscious bias.

was published in December 2016.

⁶³ Dame Casey said that the failure to talk left the ground open for the far right on one side and Islamists extremists on the other. Though the groups were ideologically opposed they were united in wanting to show that diversity and modern Britain or Islam and modern Britain were somehow incompatible. The nation was at its strongest when united as an open and inclusive society. She also criticised some cultural practices, particularly in relation to the role of girls and women and described them as contributing to the problems of integration.

⁶⁴ The consequences of economic exclusion and poverty were wide ranging and long-lasting with children from low income families less likely to do well in school, suffer ill health and face pressures in their lives associated with unemployment and criminality.⁶⁴ Recommendations included: 1 *Build local communities’ resilience and the towns and cities where the greatest challenges existed by providing additional funding for area based plans and projects that would address the key priorities, such as including the promotion of English language skills, empowering marginalised women, promoting more social mixing, particularly among young people and tackling barriers to employment.* 2 *Developing a set of local indicators of integration and requiring regular collection of data supporting these indicators.* 3. *Identifying and promoting successful approaches to integration.* 4. *Working with school providers and local communities to promote more integrated skills and opportunities for people to mix with others from different backgrounds, developing approaches to help overcome cultural barriers to employment, improving English language provision through community based classes, improving understanding how housing and regeneration policies could improve integration and introducing stronger safeguards for children who were not in mainstream education including those being home schooled.* 5. *Increasing the standards of leadership and integrity and public office by ensuring that British values such as respect for the law, equality and tolerance are enshrined in the principles of public life and developing a new oath for holders of public office.* 6 *Improve the integration of communities in Britain and establish a set of values around which people from all different backgrounds can unite by*

IWCNZ views

- 74 The government strategic emphasis should be on Preventing Violent Extremism rather than Countering Violent Extremism. The emphasis must be on steps supporting integration of the Muslim community into mainstream rather than engaging in surveillance of it. This requires a many pronged approach, as set out in the nine point plan IWCNZ has already provided to the public service.
- 75 Funding of youth initiatives, mentoring programmes, equal employment opportunity initiatives are all critical. The Muslim community in New Zealand is, in many parts, marginalised, and has been for a sustained period.
- 76 Work must also be done in New Zealand to prevent violent extremism in the Alt Right communities from which white supremacist terrorists and killers arise.

Recommendations on security reforms for New Zealand

- 11 The GCSB, NZ SIS and Police intelligence to:
 - (a) - continue to rapidly upskill and extend their surveillance and intelligence gathering activity to cover the Alt Right and white supremacist communities internationally and in New Zealand.
 - (b) - immediately establish a Muslim Reference Advisory Group with diverse membership connected to grassroots community members in which to consult on intelligence, in addition to its external reference group.
 - (c) - receive training in the Muslim culture and values and the community in New Zealand.
- 12 New Zealand intelligence agencies develop other intelligence partnerships in addition to Five Eyes, including regional partnerships in the area it resides, so as to increase the accuracy and reliability of its intelligence base, and be and be seen to be more independent of the United States.
- 13 The current External Reference Advisory Group established by Inspector-General Gwyn should become a permanent fixture of the operation of the Inspector General of Intelligence and Security and as such, be provided for in legislation.
- 14 Applicants for gun licences and renewal of gun licences (licences should be renewed biennially) to be checked against the hate speech and hate crime records with a presumption that if the person has engaged in serious hate speech or hate crimes or is a member of or aligned with a supremacist group then they are not eligible for gun ownership. There should be a right of review of a decision to withhold a gun licence on this ground.

- 15 The government develop a whole of government robust approach to preventing extremism, to be focussed on strengthening the resilience and connection of vulnerable groups, in this case, the Muslim community with the wider community. It should be ‘people focussed’ and be modelled on an approach of ‘working with’ the community for the end goal of self-empowerment, rather than delivering services ‘to’ them.
- 16 The focus should move from CVE to PVE (preventing violent extremism) and from surveillance to promoting integration. That will require a multi-pronged approach in all areas identified by IWCNZ in its plan.
- 17 As part of this strategy, government to develop programmes to improve employment opportunities for Muslim youth and youth from other marginalised communities in New Zealand.

D Countering Islamophobia/ Hate Speech and Hate Crimes in New Zealand

- 77 A critical part of any CVE programme must address hate speech (including online) and hate crimes. Hence, this section should be read as part of the CVE topic above. In brief, New Zealand has enacted legislation further to obligations under ICERD and ICCPR to make it unlawful to incite disharmony on the grounds of race, colour, ethnic or national origin. It also makes such incitement a criminal offence where the higher standard of intent is established. The origins, legislative history and current status of New Zealand’s hate speech rules are set out in Appendix 1.⁶⁵
- 78 For several years prior to and immediately after the Christchurch attacks, there had been widespread dissemination of Islamophobic thinking and opinions and encouragement to anti-Islamic actions, primarily via the internet. This is public knowledge and is also the experience of IWCNZ and their Muslim associates.⁶⁶

⁶⁵ Note that the omission of religion has been a problem since the inception of the legislation. The only case in which the criminal offence of inciting racial disharmony has been successfully invoked was *King-Ansell v Police* [1979] 2 NZLR 531 which dealt with the issue of invective levelled at Jews. In order to satisfy the statutory requirements, the Supreme Court had to resort to a broad and non-technical interpretation. As religious discrimination was outside the scope of the RRA, the main ground of appeal before the Supreme Court was whether Jews were of a particular ‘ethnic origin’. The Court found that ‘ethnic’ fell within the scope of the section because of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past.

⁶⁶ Note that the New Zealand Attitudes and Values Study confirmed an increasing bias towards communities that are targeted or highly represented negatively in the media and confirmed an increasing xenophobic bias towards Muslims in New Zealand. (Shaver Sibley et al, “News exposure predicts anti-Muslim prejudice” PLOS ONE JOURNAL published March 31, 2017 as part of research of the 20-Year New Zealand Attitudes and Values Study, “Shaver Study”). One of the co-authors of the research has said, “Sadly, there may be real-world

Among such language were words that were threatening and abusive towards Muslims that could be said to be likely to excite hostility against Muslims, both in New Zealand and coming to New Zealand.

- 79 Consequently, some actions are likely to have breached s 61 of the Human Rights Act but for the fact Islam is a religion which encompasses persons of diverse colour, race and ethnic and national origin. Consequently, on a plain reading construction, there is doubt as to whether persons of the Muslim faith are protected under the section. Hence, the Act needs amendment to include religious and ethical belief as grounds under s 61 and 131.

Hate Speech vs Freedom of Expression

- 80 There is a tension between the prohibition of hate speech and the right to freedom of expression. The right to freedom of expressions is defined in article 19 ICCPR. There is no right to be free from hate speech as such but Article 20 ICCPR requires states to prohibit by law advocacy of national religious or racial hatred that constitutes incitement of hostility, hatred or violence.
- 81 Sections 61 and 131 HRA represent the domestic implementation of obligations under article 20 ICCPR. Section 14 of the New Zealand Bill of Rights Act 1990 enshrines the rights under Article 19 ICCPR.

Section 14: Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

- 82 NZBORA also contains a right to freedom from discrimination under NZBORA:

Section 19 :(1)Everyone has the right to freedom from discrimination on the grounds of discrimination in the [Human Rights Act 1993](#).

consequences for Muslims in this country, people who encounter prejudice across their daily routines, at the workplace, and in their children's schools." (Professor J Bulbulia of Victoria University quoted in Otago University press release available here: <http://www.otago.ac.nz/news/news/otago642250.html>).

- 83 Many targets of hate speech believe that hate speech is a form of discrimination against them and hence s 61 has an equal status to s 14 so the issue is which right prevails. This view has been rejected by the courts.⁶⁷
- 84 It is generally considered that the first limb of the s 61 test is not difficult to meet due to the elasticity in the concepts. It was met in relation to the cartoons in the *Fairfax* decision. It is the second limb, where the question is whether the material is likely to excite hostility against a group or bring them into contempt by reason of their race, colour, or ethnic or national origin that is the barrier where most claims fail.
- 85 The court in *Fairfax* held that the legislative mandate was to consider the effect of the impugned words on others *outside* the target group. The question was whether ‘*a reasonable person, aware of the context and circumstances surrounding the expression, would view it as likely to expose the protected group to the identified consequences*’.⁶⁸ The audience was held to be the readership of the two newspapers at issue and because the piece was balanced within the publication and around the same time with other views about the food in schools programme, it held the cartoons were unlikely to excite the necessary hostility. Another contributing factor was the breadth of the audience. The Court rejected the submission that the focus should be on the group of people being targeted.⁶⁹
- 86 Currently there is no legislative pointer or judicial comment enabling the taking account of the knowledge and experience of the target group when considering the second limb and whether the language used was likely to incite hostility against them. The focus is on a reasonable person, *aware of the context and circumstances surrounding the expression*. Yet members of the target group will have valuable insight and input at this stage. They are in as good a position, if not better, than a ‘reasonable person’ not from that target group, to know if the impugned words are likely to excite hostility or ill will in non-target group members against them, the target group. Currently the test lacks a valuable source of input in the decision

⁶⁷ See the latest decision under s 61 where Muir J in *Wall v Fairfax* [20018] 2 NZLR 471 discussed whether there was a conflict of rights as argued by Ms Wall’s counsel. [28] to [37]. The Court rejected this as a clash of rights case as Fairfax, the publisher, was a private media company and so not bound by NZBORA. Its obligations were to comply with s 61 and s 131 only. The case was about Fairfax’s right to freedom of speech and the government’s interest in protecting its citizens from harmful speech and discrimination.

⁶⁸ See [50] and [51]

making process. In the case of IWCNZ and other Muslim persons in New Zealand prior to the Christchurch attacks, they could accurately predict when waves of hostility arose and their perception of the likely consequences of the speech upon them should be a factor in the mix of considerations.

- 87 It is therefore recommended that s 61 and 131 be amended to require consideration of the experience of the target group that the words were directed against, in relation to the impact of hate speech upon others. This need not replace the reasonable person's hypothetical view but adds to the considerations.

Comparative sentencing

- 88 It is noted that the sentences under Section 131 are out of step with comparative offences in the criminal law. For example, XXXX, the white supremacist who spread information about the Christchurch shooting over the internet, was given a custodial sentence of 21 months for what the Judge described as a hate crime yet s 131 only mandates a sentence of up to 3 months or fine of \$7000.

Hate speech on internet

- 89 To date the cases which have been decided under s 61 have concerned mainstream newspapers (or private radio station in relation to *Archer*). The speech clearly comes within the terms 'publish, distribute, broadcast or other electronic communication'. The type of recent Islamophobic hate speech which has been disseminated via the internet and particularly in certain websites is most likely to be caught under the term 'electronic communication' but the provision could be updated to make that explicit. This is important because where words are distributed and the writer is not a member of a sector group that is accountable, for example to the Broadcasting Standards Association, persons engaging on social media have no accountability other than s 61 and 131.

- 90 As a further means of giving notice to those who might engage in hate speech online as to where the boundaries lie, it is suggested that the Harmful Digital Communications Act specifically require companies to outline publicly how they define hate speech and enforce rules against it. Companies should also be required to identify and be able to disclose quickly, to an enquirer, whether the commentator is making the comments from New Zealand.

United Nations Guidance

91 The United Nations has been active since 9/11 in an ongoing process of assisting national states with their duties under Article 19 and 20 ICCPR. The Office of the High Commissioner for Human Rights (OHCHR) brought experts together in Rabat in October 2012 at which they developed a Plan of Action.⁷⁰

Rabat Plan of Action

92 The Plan recommended that a clear distinction should be made between three types of expression:

- (i) expression that constitutes a criminal offence
- (ii) expression that is not criminally punishable, but may justify a civil suit or administrative sanction
- (iii) expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance, civility and respect for the rights of others.

93 The plan says that where expression incites hatred then it must be criminalised. In such cases, marginalised communities should be supported to take action. In determining what type of language would meet that test, the plan recommended account be taken of six factors.⁷¹

94 In relation to the third type of expression, there was a myriad of steps that were recommended could be taken and an obligation was on States to take action. Legislation was only part of a larger toolbox to respond to the challenges of hate speech. New Zealand has enacted legislation in relation to (i) and (ii) in the form of s 131 and 61 HRA. The Plan indicates a much broader set of policy measures was required for the third type of speech, which can negatively impact upon community members human rights in multiple ways.⁷² Recommendations made to states were to:

⁷⁰ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. October 2012. Attached to the Annual report of the United Nations High Commissioner for Human Rights, 11 January 2013. Note also General Recommendation No 35 from the Committee on the Elimination of Racial Discrimination. 26 September 2013 on combatting racist hate speech. It adopts the Rabat Plan listing of the factors to take into account in what speech should constitute a criminal offence. It also emphasises the importance of freedom of expression and the elimination of all forms of race discrimination. Again, it recommends a wide variety of policy approaches to eliminate racist speech.

⁷¹ Rabat Plan of Action. Paragraph 29. They are: Context, Speaker, Intent, Content and Form, Extent of the speech act, Likelihood, including Imminence.

⁷² Para 35 to 50 address these.

- Enhance engagement in broad efforts to combat negative stereotypes of and discrimination against individuals and communities on the basis of nationality, ethnicity and race. [42]
- promote intercultural understanding, including gender sensitivity. [43]
- promote and provide teacher training on human rights values and principles and introduce or strengthen intercultural understanding as part of the school curriculum. [44]
- build capacity to train and sensitize security forces and police concerning the prohibition of incitement to hatred. [45]
- enhance the function in national human rights institutions to foster social dialogue and accept complaints of incitement to hatred. [46]
- ensure the systematic collection of data in relation to incitement to hatred offences
- have a public policy and regulatory framework to promote pluralism and diversity of the media with non-discrimination and universal access to it as a means of communication.

95 IWCNZ says that the government must ensure the adoption of all these steps to address speech that infringes the rights of others and creates disharmony despite falling outside of s 61 and 131. The Rabat Plan of Action also has specific steps for non-government stake holders. The government should ensure these are drawn to the attention of relevant NGO actors.

Political dog whistle language

96 The messaging of some politicians (particularly around election time), on social media and in social commentary is that migrants are causing harm. In fact, they have a lower crime rate; have boosted the economy and contribute to New Zealand in many diverse ways. Many of the problems for which migrants are held responsible are caused by structural, systemic and regulatory issues within New Zealand. The Rabat plan says this about political parties:

57 *Political parties should adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speech.*

97 IWCNZ says that the government itself and the public sector have a responsibility to address misconceptions about migrants and alter the messaging.⁷³

⁷³ It has obligations under Objective 17 of the UN Global Compact on Migration to ensure migrants are not targeted and scapegoated.

United Nations Strategy and Plan on Hate Speech

98 In May 2019 the United Nations Secretary-General, Antonio Guterres issued a United Nations Strategy and Plan of Action on Hate Speech. It lists the key actions to be taken: They are:

- Monitoring and analysing hate speech
- Addressing root causes, drivers and actors of hate speech
- Engaging and supporting victims of hate speech
- Convening relevant actors
- Engaging with new and traditional media
- Using technology
- Using education as a tool for addressing and countering hate speech
- Fostering peaceful, inclusive and just societies to address the root causes and drivers of hate speech
- Engage in advocacy
- Develop guidance for external communications
- Leverage partnerships
- Building the skills of UN staff
- Supporting member states

99 Finally, last month, the Special Rapporteur, on the promotion and protection of the freedom of opinion and expression, David Kaye, issued his Report.⁷⁴ Again he endorses the Rabat Plan of Action and warns strongly against governments obliging internet companies to ban offensive speech outright, rather than apply the human rights standards.

Conclusion

100 Consequently there is a wealth of information and assistance available to the government on how to deal with speech that causes concern even if it does not meet the legal definition under s 61. IWCNZ says that leaders of all parties in parliament and particularly those in government, must lead in influencing society against hate speech and hate crimes.

Christchurch Call

⁷⁴ 9 October 2019.

101 Further to the 'Christchurch Call, the challenges of hate online and hate speech, and the speed with which it mutates, require urgent consideration. Given the Human Rights Commission has responsibilities relating to discrimination and human rights and the mediation of s 61 complaints, it would appear to be the agency to undertake additional activities in relation to hate speech and hate online. This should include a review of jurisdictional issues and abilities to pursue foreign actors who are intentionally damaging New Zealand and/or its citizens with online hate.

102 Again, further to the 'Christchurch Call', an inquiry needs to be undertaken into how social media companies can be regulated to better protect New Zealand society and reduce online hate, while ensuring that free speech rights are protected. This could be done by a select committee. The report of the Special Rapporteur has provided guidance in this area.

Data on complaints of hate crimes and hate speech

103 The results of requests to the police under the Official Information Act suggest there have been no hate threats, speech or crimes in New Zealand and there is not a problem. This is completely erroneous. It reflects the fact that police have not been recording such complaints and that there is no proper system for data collation. Ms Danzeisen recalls she had to insist that the police record the Syrian pig incident referred to in the submissions.

104 The OIA response is contrary to what the police, in fact, know. For example, on request for support, the police provided a WOWMA camp with a police presence for all three days. Why would they do this if they were not convinced there was a risk that hate crimes might be committed. As the United Nations says repeatedly, it is vitally important to collect data so that it can feed into support and prevention strategies. The police must establish reporting systems that are accessible, user friendly and capture important data.

105 Reference is made to Part 1 of the submissions and the hate speech and abuse that is directed at Muslim women in New Zealand. It is ongoing.⁷⁵

Recommendations to address hate speech and hate crimes

- 16 A system for the reporting, collation and analysis of complaints of hate speech and hate crimes be developed as a matter of urgency:
- (i) It must be user friendly and reporting must be able to be done from a home computer as well as in a police station or via phone to the police.
 - (ii) The police must follow the matter up where the person asks it to be followed up.
 - (iii) The system and the police must collect data on the ethnicity of persons who are victims and, where it is able to be identified, the ethnicity of perpetrators.
 - (iv) The police must start from the assumption that the complaint is true and be resourced to do this work properly.
- 17 The reporting system to be linked into security agencies databases so that those people perpetrating hate speech and hate crimes can be monitored.
- 18 The reporting system to also enable anonymous reporting of hate crimes and hate speech directed at persons.
- 19 Research projects be developed in the public service, private research organisations and academia, into how people get caught into white supremacist ideology and alt-right activities and, too, identify effective means of deradicalizing such persons.
- 20 S 61 HRA be amended to include the ground of religious or ethical belief in addition to colour, race or national or ethnic origin.
- 21 S 61 HRA be amended to include provision for the court to take account of the experience of the target group as to the likelihood of the material at issue being likely to excite hostility against or to bring into contempt any group of persons in New Zealand on the ground of their colour etc.
- 22 S 131 HRA sentences be aligned to those in the criminal law for comparable offences.
- 23 Expand and reform the Human Rights Act to meet the challenges of hate online and hate speech and the speed in which it mutates.

⁷⁵ Recently a pregnant woman was walking home with her Muslim friends when a carload of 8 men stopped and abused them and beat them up.

- 24 In line with the 'Christchurch Call', the speaker of the House be called upon to establish a select committee to inquire into regulation of social media companies.
- 25 Community organisations be funded to research and run digital literacy programmes that focus on education about and the prevention of hate online.
- 26 The government take responsibility to comply with Objective 18 of the Global Compact on Migration to counter the anti-migrant statements and targeting and scapegoating of migrants, especially during election time.
- 27 It should also take the lead in cultural awareness training of judges and court registrars.
- 28 New Zealand on Air has a responsibility to allocate funding taking account of the need for representing minority faces in media in a positive light.

E Reparations

- 106 The Muslim community has suffered catastrophic consequences as a result of the attack on the two Christchurch mosques. There are now thirty-three widows. There are scores of fatherless children and people who have lost siblings, cousins, uncles, other relatives and friends.
- 107 It cannot be said definitively that the shooter would have been apprehended before the horrific attacks on the mosques if there had been adequate security intelligence relating to the threats posed to the Muslim community in New Zealand. What is certain is that a number of public sector agencies failed to provide greater support and protection to that community, both before 2019, as pressure on them grew and after, in their trauma and shock. It is likely that, but for their failures, the horrific events of March 15, 2019, might not have occurred.
- 108 The Accident Compensation Scheme has proved inadequate to compensate the victims' partners and families for the catastrophic economic losses many of them are now experiencing. For example, where a family relied upon the income of a partner and adult child, only the partner's income is compensated for. Many of those who witnessed the attacks or its aftermath yet suffered no physical injury are now suffering from post-traumatic stress disorder impacting their ability to work yet they have no entitlement to compensation for their economic loss.

109 Currently, twentyfive women who were widowed in the Christchurch attacks have neither family in New Zealand nor a male guardian or male support. Culturally, in more conservative Muslim groups, this is very important. Other older women have lost adult sons who supported them and with whom they lived.

Recommendations on reparations.

- 29 The State Services Commissioner provide a personal apology to the membership of the IWCNZ Administration Council during the period 15 March 2014 to 15 March 2019; to the IWCNZ membership; to the Muslim community, and to the country for the failings of the Security Services and Public Service to adequately respond to their persistent requests for assistance and support.
- 30 Individuals holding Ministerial office and Directors of the public service agencies listed below, during the period 15 March 2014 to 15 March 2019, provided a personal apology to the above identified groups for the failings of their services, namely: SIS and GCSB; Police; Department of Internal Affairs and Office of Ethnic Communities; Directors of Customs and Immigration; Ministry of Education
- 31 Reparations be made to those who have suffered economic loss that is not covered by ACC or any other workplace scheme, being loss arising as a direct result of the Christchurch attacks. This includes families of those who passed, those who were injured and their families, those who were present during the attacks and were traumatised by what they saw, medical, police and other professional workers who had to support the injured, take care of the deceased and deal with the awfulness of the situation.
- 32 Every person who lost an immediate family member in the attacks be permitted to have one person come to New Zealand in the deceased's place, whether or not they otherwise fit the immigration criteria.

F Education: Addressing Islamophobia, cultural ignorance and bullying in education.

110 New Zealand is now a 'super diverse' country. Among minorities, Muslims have the most negative status. Bullying is widely acknowledged as an issue of great concern in New Zealand schools.⁷⁶ Ms Danzeisen reports that in the secondary education

⁷⁶ In January 2018 the Children's Commissioner, in conjunction with the New Zealand School Trustees Association, issued a report of the results of its consultation with children to assist in the process of development of the National Education and Learning Priorities. Shockingly, of the six key insights the second was: *many children and young people told us they experience racism at school and are treated unequally because of their culture*. On 13 May 2019 the Education Review Office produced its report on Bullying,

sector, Muslim students report feeling unsupported by their teachers.⁷⁷ Sometimes they are targeted in the class to explain terrorist events by Muslim extremists overseas. Schools are a powerful institution with the ability to strongly influence the national culture. The Rabat Plan of Actions recommends:

44. States should promote and provide teacher training on human rights values and principles, and introduce or strengthen intercultural understanding as part of the school curriculum for pupils of all ages.

- 111 Currently, s 78 of the Education Act 1964 enables state secular schools to be closed for up to one hour a week, during school hours, so that religious instruction can take place. It is understood that close to 50% of schools take advantage of this provision. The instruction is always Christian and often Old Testament. There is currently a case before the High Court seeking a Declaration that the provision is discriminatory. Many non-Christian parents and guardians, (atheists and persons from non-Christian religions) who opt their children out of the classes -report their children expressing distress at being separated from their peers and feeling isolated and disadvantaged. Some also report later playground bullying for not being a 'believer' and children being threatened they will go to 'hell'.
- 112 s 78 was enacted in the 1960's at a time when New Zealand was more than 80% Christian. In today's super-diverse New Zealand population where less than 50% of the population is Christian, this provision is divisive; favours one religion over others and does not meet the need for harmony and cultural tolerance at school. IWCNZ says it should be replaced with compulsory anti-bullying programmes and positive education on the diversity of religions and cultures.

Recommendations

- 33 There should be CPD programmes for teachers to learn how to teach diverse students and how to teach students about diversity, tolerance

Prevention and Strategies in New Zealand Schools, published by the New Zealand Government. This indicated 39% of students have experienced bullying. On 2 September 2019 the Children's Commissioner called for compulsory anti-bullying programmes in every New Zealand school.

⁷⁷ Feedback has been received at IWCNZ and WOWMA youth camps for many years now. She advises that in IWCNZ and WOWMA camps, a majority of those attending report discrimination and unhappiness at school. There is no requirement for teaching of the Muslim faith to come from approved materials and some teachers are using inaccurate materials from Islamophobic websites as resource material.

and empathy and to value difference. These should also be part of the basic teacher training curriculum for primary and secondary students.⁷⁸

- 34 Materials on the Muslim faith and values, approved by Muslim leaders, should be available as teaching material for all teachers and unconfirmed materials from the internet should be avoided.
- 35 ERO should audit schools for their cultural competence to work towards harmonious race relations and management of diversity. All schools should enable a system where students can complain about race or religious based discrimination by teachers.
- 36 The current provision in the Education Act that permits a school to be closed for an hour a week for religious instruction (which is interpreted to mean Christian) and allows parents to opt students out, should be removed and consideration be given to the teaching of cultural and religious diversity as a compulsory part of the curriculum.
- 38 Anti-bullying programmes should be mandatory in all schools in New Zealand and ERO should audit schools' compliance with them.

G Immigration

- 113 There is a relatively new government policy of refusing immigration to parents and elders of settled migrants. The Muslim community is unique in the disproportionate lack of elder persons in its community. Past immigration policies put huge demographic pressure on the working age community and allowing elders to join their families alleviates the strain on the working age population. While they may not bring large incomes, they are contributors to the family and to society generally by their ability to guide and advise from experience. Elders provide stability and pass on knowledge and wisdom to the generations beneath them. They play an important role in grounding and stabilising youth.

Recommendations

- 37 The government reconsider its policy of refusing elder immigration entry to elderly intending migrants who are parents and elders of New Zealand residents or citizens.

⁷⁸ IWCNZ also says this should be the case for persons holding pivotal positions in society, such as the judiciary and police.

- 38 The government make an exception to its immigration rules so that those who have lost a support person in the Christchurch attacks are enabled to have another person migrate to support them.

H Employment

- 114 Muslim youth find it difficult to obtain employment. That impacts their sense of belonging and their economic status. These factors influence radicalisation. In the Canadian Committee study, witnesses asked for tools that would promote equity and inclusion. They also sought a mandatory pay equity for race and religion.

Recommendation

- 39 A plan of action be formulated by government and private sector to develop equal employment opportunity initiatives for persons from minority communities in New Zealand.



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