

6 August 2025

The Honourable John Sackar AM KC
Independent Review Secretariat
Department of Communities and Justice

By email: PRLIndependentReviewSecretariat@dcj.nsw.gov.au

Dear Supreme Court Justice Sackar

Criminal law protections against hate speech for vulnerable communities

Legal Aid NSW welcomes the opportunity to provide feedback to the review of criminal law protections against the incitement of hatred following the introduction of the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (**Inciting Racial Hatred Act**).

Our feedback is informed by the experience of our lawyers across our criminal and civil law divisions, including our experience representing defendants in criminal proceedings, and assisting people who have been subjected to public harassment and vilification.

We acknowledge that hate speech can have a serious and detrimental impact on individual communities. Legal Aid NSW supports civil prohibitions on hate-based conduct and vilification and considers it appropriate for such provisions to be wider than criminal law provisions. We note the Terms of Reference of this review and limit our discussion of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) and section 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**).

Criminal law protections against hatred for vulnerable groups

Question 1: What is the extent and impact of hatred towards vulnerable groups in the NSW community?

Legal Aid NSW does not collect data on the extent of hatred towards vulnerable groups. We support the NSW Law Reform Commission (**NSWLRC**) relying on evidence-based research and statistics for determination of the extent and impact of hatred towards vulnerable groups in NSW.

Question 2: Does the criminal law adequately protect against the incitement of hatred towards all vulnerable groups in NSW? If not, how could the criminal law better protect against the incitement of hatred towards these groups?

Law and policy reform should be a necessary and proportionate response to an identified concern. Legal Aid NSW considers that there is a sufficiently broad range of NSW and Commonwealth criminal law protections to prosecute criminal conduct involving hatred.¹

We are concerned that the creation of any new offences is inconsistent with the recommendations of the NSWLRC. The NSWLRC was specifically tasked with reviewing vilification and hate speech laws and produced a final report in September 2024.² That review, involving comprehensive consultation with a broad range of stakeholders, ultimately recommended against the creation of new vilification offences or expansion of section 93Z of the Crimes Act.³

The combination of targeted criminal laws such as section 93Z, general criminal offences including intimidation and behaving in an offensive manner, and anti-vilification provisions under the ADA, covers the field, providing a range of penalties and remedies proportionate to the seriousness of the conduct involved.

If any offence in NSW is partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged, this context is considered at sentencing as an aggravating factor.⁴ This includes people of a particular religion, racial or ethnic origin, language, gender identity, sexual orientation or age, or having particular variations of sex characteristics or a particular disability.⁵

The impact of both the removal of the Director of Public Prosecutions approval process⁶ and the introduction of new section 93ZAA of the Crimes Act⁷ is yet to be seen. We consider the impact of these amendments should be assessed over a

¹ Issues Paper Summary of Issues for Consultation *Review of criminal law protections against the incitement of hatred* NSWLRC (June 2025) 6 -7.

² NSW Law Reform Commission, *Serious Racial and Religious Vilification* (Final Report, September 2024) 50.

³ Ibid. Section 93Z of the Crimes Act provides that it is an offence to, by a public act, intentionally or recklessly threaten or incite violence towards another person or a group of persons on the ground of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

⁴ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

⁶ This requirement was removed from s 93Z of the Crimes Act in December 2023.

⁷ New section 93ZAA of the Crimes Act makes it an offence to, by a public act, intentionally incite hatred towards another person or a group of persons on the ground of race.

sufficient period to determine their effectiveness in protecting vulnerable groups, and general deterrence.

If the protected attributes in section 93ZAA were expanded, we consider that a requirement for the Director of Public Prosecutions only to approve a prosecution should be implemented.

Interaction between criminal law protections against hatred and relevant rights and freedoms

Question 3: How can the criminal law strike an appropriate balance between protecting against the incitement of hatred towards vulnerable groups and protecting other important freedoms, including the implied freedom of political communication and freedom of religion?

We agree with the NSWLRC that expanding criminal vilification offences to cover the incitement of hatred could have negative consequences, including “upsetting the ‘balance’ of rights and disproportionately impacting certain groups”.⁸

We are concerned about the breadth of section 93ZAA of the Crimes Act because the term “hatred” is not defined, there is no requirement to prove intention to cause a person (or group of persons) specific harm, and the reasonable person test introduces a standard of reasonableness to be determined by reference to persons within an affected class. This, in addition to the absence of a “good faith” exemption, renders the scope of the provision extraordinarily wide – to the extent that it may constitute an impermissible burden on the implied freedom of political communication.

Academic literature has considered the breadth of “hate speech” as including a whole spectrum of discourse “stretching from hatred and incitement to hatred; to abuse, vilification, insults and offensive words and epithets; and arguably also to extreme examples of prejudice and bias” and that a “certain threshold of intensity must be reached before a particular expression can be qualified as hate speech.”⁹

The United Nations Rabat Plan of Action calls for a “clear distinction” to be made between:

⁸ NSW Law Reform Commission, *Serious racial and religious vilification* (Final Report, September 2024) 42.

⁹ See James B. Jacobs and Kimberley Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998) 11; Robert Post, ‘Hate speech’, in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford University Press, 2009) 123– 38; and Tarlach McGonagle, ‘General Recommendation 35 on combating racist hate speech’, in David Keane and Annapurna Waughray (eds), *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination: A Living Instrument* (Manchester University Press, 2017).

expression that constitutes a criminal offence, expression that is not criminally punishable, but may justify a civil suit or administrative sanctions and expression that does not give rise to criminal, civil or administrative sanctions but still raises concerns in terms of tolerance, civility, and respect for the rights of others.¹⁰

The Rabat Plan of Action suggests that legislation draw from the guidance and definitions provided in the Camden Principles such that the terms “hatred” and “hostility” refer to “intense and irrational emotions of opprobrium, enmity and detestation towards the target group”, and that the term incitement refers to “statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups”.¹¹

Principle 12.3 of the Camden Principles makes clear that States should not prohibit “criticism directed at, or debate about, particular ideas, beliefs or ideologies, or religions or religious institutions, unless such expression constitutes hate speech”. The Rabat Plan of Action also refers to there being a “high threshold” for restricting freedom of expression,¹² and that “criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations”.¹³

Section 93ZAA of the Crimes Act should provide an exemption similar to that in section 18D of the *Racial Discrimination Act 1975* (Cth), which provides that section 18C¹⁴ does not render unlawful anything said or done “reasonably and in good faith”:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or

¹⁰ Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) Appendix: Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence (**Rabat Plan of Action**) [20].

¹¹ Article 19, *The Camden Principles on Freedom of Expression and Equality*, Principle 12: Incitement to hatred.

¹² Rabat Plan of Action [29].

¹³ Rabat Plan of Action [34].

¹⁴ Section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people, and the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

- (ii) a fair comment on any event or matter of public interest if the comment is an expression of genuine belief held by the person making the comment.

Promoting social cohesion

Question 4: Would reforming criminal law protections against the incitement of hatred towards vulnerable groups assist with promoting social cohesion in NSW?

Legal Aid NSW agrees with the NSW Bar Association, the Law Society of NSW and the ALS in stating that the criminal law is a “blunt tool in addressing conduct underpinned by complex historical, social and political factors”.¹⁵ In our experience, criminal laws disproportionately impact Aboriginal and Torres Strait Islander people, young people, and people with a mental illness. Conduct that incites hatred against vulnerable groups is more appropriately dealt with by civil jurisdictions rather than the criminal law.

Criminalising hate-based conduct may lead to deprivation of liberty and incarceration. This has the potential to reinforce radical views¹⁶ and contribute to disengagement and further risks to the community, particularly where rehabilitative programs and services are not provided prior to reintegration.¹⁷

Question 5: Could reforming criminal law protections against the incitement of hatred towards vulnerable groups have potentially negative or unintended consequences? If so, are there any further safeguards that could reduce this risk?

We are concerned that reforming criminal law protections could result in the criminalisation of over-policed groups such as young people, Aboriginal and Torres Strait Islander people, and people with a mental illness or cognitive disability. The NSWLRC received submissions concerned that hate speech laws could have “disproportionate, negative effects on some individuals and communities that the offence was designed to protect”¹⁸ and that racial discrimination laws are “routinely used by culturally dominant groups to litigate against culturally marginalised groups.”¹⁹

The Royal Commission into Aboriginal Deaths in Custody recognised the role of offensive language provisions in incarcerating Aboriginal and Torres Strait Islander

¹⁵ New South Wales Bar Association, Submission No 39 to *Serious racial and religious vilification* (10 May 2024) 14.

¹⁶ Adrian Cherney, ‘Prison Radicalisation and Deradicalisation in Australia’ (2020) *Counterterrorism Yearbook* 2020 23, 24.

¹⁷ Inspector of Custodial Services, *The management of radicalised inmates in NSW* (Report, May 2018) 81.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

people.²⁰ As noted by the NSW Bar Association, most offensive language provisions disproportionately affect First Nations people and of all prosecutions for public order offences in NSW between July 2022 and June 2023, 38% of all adult defendants were Aboriginal and 43% of all child defendants were Aboriginal.²¹

Legal Aid NSW is concerned that expanding inciting hatred offences could disproportionately impact marginalised people who may lack the ability to properly articulate feelings of injustice in stressful situations, for example on arrest or at a police station. The new offence in section 93ZAA introduces a "reasonable person" test that asks whether objectively, the alleged offender's conduct would affect the person or group it was directed towards.²² This criminalises the conduct of people who may not appreciate the significance of their behaviour.²³ It is irrelevant whether the alleged offender's assumptions or beliefs about race (or if expanded, other protected attributes) were correct or incorrect at the time.²⁴

We are concerned this may capture people who may not intend to make a person, or group of persons, fear harassment, intimidation or violence. For example, a young person using offensive words or gestures during an arrest. It could also be used against an Aboriginal or Torres Strait Islander person speaking publicly about 'White Australia' and the injustices perpetrated by a system of authority which has its origins in British colonialism.

[Question 6: Are there any other measures related to criminal law reform that may promote social cohesion?](#)

Legal Aid NSW supports community education and engagement and collaborative service approaches as the most effective means to promote social cohesion within the existing framework of laws in NSW.

Where existing laws are underutilised by vulnerable and disadvantaged groups, Legal Aid NSW recommends community legal education to empower people to identify and deal with law-related issues. Legal Aid NSW delivers community legal education to a diverse client base, which includes children, people with disability, people from culturally and linguistically diverse (**CALD**) communities and LGBTQIA+ people. In 2023-24 we presented 208 community legal education events for CALD and newly arrived migrant audiences.²⁵

²⁰ *Royal Commission into Aboriginal Deaths in Custody* (Report, April 1991) vol 5 [86].

²¹ New South Wales Bar Association, Submission No 39 to *Serious racial and religious vilification* (10 May 2024) 14.

²² NSW Law Reform Commission, *Serious racial and religious vilification* (Final Report, September 2024) 57.

²³ *Ibid* 6.

²⁴ *Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025* (NSW) s 93ZAA(3)(b).

²⁵ Legal Aid NSW, *Annual Report* (Annual Report 2023-4, October 2024) 49.

Legal Aid NSW's Aboriginal Services Branch ensures Aboriginal and Torres Strait Islander perspectives are built into all areas of our work, particularly in delivering culturally appropriate, multi-disciplinary services to our Aboriginal and Torres Strait Islander clients. We strongly encourage working in partnership with Aboriginal and Torres Strait Islander people, communities and organisations to identify and provide services that meet their needs and achieve access to justice.

Another example of how we work to change community attitudes and behaviours is the Your Story Disability Legal Support service, which provided community legal education to raise awareness about the Disability Royal Commission, disability rights and access to legal support. Your Story travelled extensively across Australia and delivered 1,303 legal education events to the community. These events included presentations, panel discussions, information sessions, afternoon teas, expo stalls, webinars and media interviews. Your Story developed 242 accessible legal information resources, including factsheets, brochures and podcasts in various languages, videos with audio, Auslan and captions and Easy Read guides. We worked with our partners to increase awareness about the Disability Royal Commission and provide accessible community legal education to advance the rights of people with disability and change attitudes about disability in the community.²⁶

Legal Aid NSW also supports evidence-based restorative justice approaches and collaborative service design to reduce offending and promote social justice outcomes through holistic problem-solving and multidisciplinary services. For example, the Walama List,²⁷ Children's Court Assistance Scheme,²⁸ and Justice Advocacy Service.²⁹

We note that, in considering the causes of grievance-fuelled violence, the Australian Institute of Criminology stated that "ongoing adequate mental health and social care for those with unstable living conditions and emotional vulnerability may be of more practical value and more likely to prevent an act of violence."³⁰

²⁶ Legal Aid NSW, *Annual Report* (Annual Report 2023-24, October 2024) 182.

²⁷ District Court of NSW, *Practice Note 26: Walama List Sentencing Procedure*, 5 March 2025.

²⁸ Legal Aid NSW funds four community legal centres to operate Children's Court Assistance Schemes (CCAS) in seven Children's Court locations in NSW. The CCAS provides information to young people about court, counselling, conflict resolution and referral to welfare services.

²⁹ The Justice Advocacy Service is a court-based diversion service which supports young people and adults with cognitive impairment in contact with the NSW criminal justice system, including as victims, witnesses and suspects/defendants.

³⁰ Australian Institute of Criminology, *Grievance-fuelled violence: Modelling the process of grievance development* (Report, No 47, 2023) 43.

We support submissions to the NSWLRC suggesting the following additional alternatives to criminal law to promote social cohesion:³¹

- Government investment in anti-racism strategies.
- Police training and education on hate crime, vilification and the existing elements of section 93Z of the Crimes Act.
- Structural reforms to the NSW Police Force, such as a standalone police unit to deal with vilification, an independent body to monitor police responses to hate crime, and/or the creation of hate crime scrutiny panels.
- Bench books on vilification for judicial officers.³²

Thank you for the opportunity to provide feedback. If you have any questions or would like to discuss this matter further, please contact [REDACTED]
[REDACTED]

Yours sincerely

[REDACTED]

Monique Hitter

Chief Executive Officer

³¹ NSW Law Reform Commission, *Serious racial and religious vilification* (Final Report, September 2024).

³² NSW Law Reform Commission, *Serious racial and religious vilification* (Final Report, September 2024) 42.