



THE LAW SOCIETY
OF NEW SOUTH WALES

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5 August 2025

The Honourable John Sackar AM KC
Independent Review Secretariat
Department of Communities and Justice
6 Parramatta Square, 10 Darcy Street
PARRAMATTA NSW 2150

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

Dear Mr Sackar,

REVIEW OF CRIMINAL LAW PROTECTIONS AGAINST THE INCITEMENT OF HATRED

Thank you for the opportunity to provide a submission to the review of criminal law protections against the incitement of hatred (**Review**). The Law Society's Human Rights, Criminal Law and Public Law Committees contributed to this submission.

We acknowledge that this Review is confined in scope to address the criminal law reform measures that may best promote social cohesion, and therefore expressly excludes reform to civil vilification provisions, which are currently the subject of inquiry by the NSW Law Reform Commission (**NSWLRC**) as part of its review of the *Anti-Discrimination Act 1977* (NSW). However, given that legal protections for vulnerable groups do not operate in isolation but rather as part of a broader architecture of civil and criminal protections, we suggest that, at the appropriate time, the Government should have regard to how these provisions are operating in concert and whether, viewed as a whole, they are comprehensive, cohesive and adequately serve their protective purpose.

For the reasons set out below, the Law Society does not consider that there should be any broadening of existing offences or introduction of new hate-based offences at the current time for the purpose of promoting social cohesion.

The limited role of the criminal law in promoting social cohesion

It is difficult to quantify the levels of hateful conduct directed towards individuals and/or groups with different protected attributes in NSW, including on account of low community reporting rates.¹ We note, however, the

¹ In its submission to the NSW Law Reform Commission (**NSWLRC**), Anti-Discrimination NSW (**ADNSW**) noted that it is 'very unlikely that ADNSW's complaint statistics reflect the actual level of unlawful behaviour that is occurring in the community as evidence shows that only a very small proportion of affected individuals will make a formal complaint'. See ADNSW, 'Submission on serious racial and religious vilification', submission to the NSWLRC (Submission, April 2024), 5: <https://antidiscrimination.nsw.gov.au/documents/submissions/adns-w-submission-NSWLRC-serious-racial-religious-vilification.pdf>.

following commentary by the NSWLRC in its review on serious racial and religious vilification (**NSWLRC Review**):

Disturbingly, many of the groups who participated in our review reported that their communities have faced increasing levels of discrimination, vilification and other hate-based conduct.²

In addition to hate-based conduct on the basis of religion and race, our members working in the legal assistance sector have noted particular vulnerabilities within the LGBTQI+ community, particularly as regards transgender and gender diverse persons. We are also aware that there may be some groups who are not traditionally covered by laws of this kind who are also subject to hate-based conduct, for example people with disabilities and homeless people.

The Law Society considers speech and conduct grounded in hatred toward any group is unacceptable and can lead to division, discrimination and, in some cases, extremism and violence. In our view, however, the Government should not rely on the criminal law as the only or primary tool to promote social cohesion, a multifaceted concept that has been described as ‘the glue that binds societal members’.³ We suggest that education should be a key tool in promoting this value, and that hate-based criminal offences should be seen as ‘last resort measures to be applied only in strictly justifiable situations’.⁴

Criminal law protections against hatred for vulnerable groups

Existing offences and sentencing principles adequately address hate-based conduct

The Law Society considers that there should not be any broadening of existing offences or introduction of new hate-based offences. Section 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**) established the offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity, intersex or HIV/AIDS status. Upon its commencement by proclamation, s 93ZAA will establish the offence of publicly inciting hatred on the ground of race.

As is acknowledged in the Issues Paper, however, there exists a range of other offences, both at the State and the Commonwealth levels, that may be used to address criminal behaviour motivated by or otherwise involving hatred. These range from offences directed to conduct with particular cultural and historical sensitivities (see, for example, offences at both the State and Commonwealth levels around the display of certain symbols, including Nazi symbols) through to other criminal conduct such as stalking and intimidation,

² NSWLRC, ‘Serious Racial and Religious Vilification Report No 151’ (Report, September 2024), 33 [3.20]: https://lawreform.nsw.gov.au/documents/Publications/Reports/Report_151_Serious_racial_and_religious_vilification.pdf.

³ United Nations Economic Commission for Europe, ‘Social cohesion concept and measurement’ (Report, December 2023), 4 [19]: https://unece.org/sites/default/files/2023-12/2317603_E_ECE_CES_STAT_2023_8_WEB.pdf.

⁴ Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence in 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) 12 [34]: https://www.ohchr.org/sites/default/files/Rabat_draft_outcome.pdf.

assault and damage to property.⁵ In this respect, we note evidence received by the NSWLRC Review that established general offences were considered easier to prove and may be more familiar to police.

The NSWLRC found that ‘introducing vilification offences that include hatred, animosity, contempt and/or ridicule would introduce imprecision and subjectivity into the criminal law’.⁶ We share the concerns that extension of hate speech laws for the purposes of social cohesion may result in a legislative scheme which lacks sufficient clarity.

Furthermore, the fact that hatred or prejudice can be considered as an aggravating factor at sentencing means that the gravity of motivating conduct of this kind is appropriately recognised. For example, s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) is set out as follows:

Aggravating factors The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows—

...

(h) the offence was partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as 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).

Given that one of the purposes of sentencing is to ‘denounce the conduct of the offender’⁷, the fact that hateful and prejudicial conduct can be considered at the stage of sentencing sends a clear message to the community that such conduct is unacceptable.

New offence section 93ZAA lacks sufficient clarity as a criminal offence and does not apply to all vulnerable groups

As s 93ZAA of the Crimes Act has not commenced, it is not possible to comment on its operation. However, the Law Society notes that the offence is complicated. While it requires intentional incitement of hatred by a public act on the basis of race, it also incorporates a harm-based test of whether, objectively, the alleged offender’s conduct would affect the person or group towards whom it was directed. We suggest that this complexity may lead to low levels of police prosecution, as has occurred with s 93Z.⁸ This lack of precedent means it is difficult for lawyers to advise their clients in relation to the offence. Complex drafting also means that members of society may experience difficulties in understanding how the provision applies to their conduct.

⁵ See list of offences in Independent Review Secretariat (DCJ), ‘Review of criminal law protections against the incitement of hatred’ (Issues Paper, June 2025): 6-7. <https://www.nsw.gov.au/sites/default/files/2025-06/issues-paper-for-independent-review-of-criminal-law-protections-against-the-incitement-of-hatred.pdf>.

⁶ NSWLRC, ‘Serious Racial and Religious Vilification Report No 151’ (above n 2), 51 [4.30].

⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 3A(f).

⁸ NSWLRC, ‘Serious Racial and Religious Vilification Report No 151’ (above n 2), 2-3 [1.8-1.10].

We note that some civil society organisations have criticised the fact that s 93ZAA deals only with hatred on the basis of race.⁹ As a matter of principle and to ensure consistent treatment of different protected groups in the community, when the government legislates on matters of discrimination, prejudice and hate, it would be appropriate to deal with the full range of protected attributes. However, we note that existing criminal offences adequately protect vulnerable groups, and it is therefore our view that s 93ZAA, which is limited to conduct based on race, is not required.

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

High threshold for the criminalisation of hate-based offences to protect legitimate expression

The interaction between criminal law protections against hatred and relevant rights and freedoms has been the subject of analysis at the international level. As noted in the Issues Paper, while international instruments such as the *International Covenant on Civil and Political Rights* recognise individual rights such as freedom of expression and freedom of religion, such rights are not absolute.¹⁰

However, as referenced in the Issues Paper, the Rabat Plan of Action, sets a high threshold for the criminalisation of hateful speech, including ‘the reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct’.¹¹ We suggest that offences such as 93ZAA do not reach this threshold, and there are very real risks that legitimate expression, including the expression of offensive social or political views, will be subject to criminal sanction.

It may be illustrative to consider the way in which civil provisions seek to strike an appropriate balance. Section 18C of the *Racial Discrimination Act 1975* (Cth), for example, prohibits offensive behaviour based on racial hatred, but this is accompanied by a range of exemptions set out in s 18D.

While it may be possible that civil hate-speech provisions are drafted in a way to ensure that critical speech and expression are not stifled, we suggest this is more difficult in the criminal context. The Australian Law Reform Commission in its 2006 review of sedition laws referred to the need to ensure ‘a bright line between freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law, which should focus on exhortations to the unlawful use of force or violence’.¹² In our view, such a statement is equally applicable to a consideration of criminal laws directed to hate speech, which may be overly complicated and lead to uncertainty in the community and among law enforcement agencies.

⁹ See, for example, Australian Lawyers for Human Rights, ‘Crimes Amendment (Inciting Racial Hatred) Bill 2025 (NSW)’ (Briefing Note, 20 February 2025): <https://alhr.org.au/crimes-amendment-inciting-racial-hatred-bill-2025-nsw-briefing-note/>.

¹⁰ International Covenant on Civil and Political Rights, 999 UNTS 171 (entered into force 23 March 1976) arts 18(3), 19(3); Human Rights Committee, General Comment No 34 - Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 (12 September 2011) 5-6 [21]-[22].

¹¹ Rabat Plan of Action (above n 4) 11 [29].

¹² Australian Law Reform Commission, ‘Fighting Words: A Review of Sedition Laws in Australia Report 104’ (Report, July 2006), 10: <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC104.pdf>.

Promoting social cohesion

The importance of an expansive approach, emphasising education, civics and community-based programs

We suggest that it is important for governments at both Commonwealth and State/Territory levels, together with broader civil society organisations, to think expansively about ways to encourage social cohesion, including a sense of unity, trust and belonging among all Australians. Threats to social cohesion are underpinned by factors as diverse as economic exclusion and social-cultural trends, including the spread of misinformation and disinformation. Solutions therefore may involve educative measures (e.g., ensuring all students study civics and are educated in and understand their democratic rights and responsibilities) through to support for and funding of community-based health, wellbeing, housing, sports and artistic programs.¹³

Given that Discrimination NSW is the government body tasked with eliminating discrimination, it should also be appropriately funded to undertake educative and preventative work in the field to ensure a measured, evidence-based discussion to counter the rise in misinformation and disinformation circulating online. We also note the Law Society's long-standing position in support of dedicated human rights legislation both federally and in NSW. We suggest that such a framework would serve an educative purpose within the community and could assist in ensuring that legislation which raises issues around the balance of rights and freedoms, for example criminal laws addressing hate-speech, are subject to expert human rights analysis and detailed parliamentary scrutiny, for example through statements of compatibility.

Thank you for the opportunity to comment. Questions at first instance may be directed to [REDACTED]

Yours sincerely,

[REDACTED]
Jennifer Ball
President

¹³ See, for example, suggestions around education and awareness in the Australian Human Rights Commission, 'The National Anti-Racism Framework: A roadmap to eliminating racism in Australia' (Report, November 2024): https://humanrights.gov.au/sites/default/files/2024-11/NARF_Full_Report_FINAL_DIGITAL_ACCESSIBLE.pdf.