

NSWCCL SUBMISSION

**NSW INDEPENDENT REVIEW
BY THE HON. JOHN SACKAR
AM KC**

**REVIEW OF CRIMINAL LAW
PROTECTIONS AGAINST
THE INCITEMENT OF
HATRED**

6 August 2025

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introduction

- 1 The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the independent review by the Hon. John Sackar AM KC (**Reviewer**) into criminal law protections against the incitement of hatred (**Review**).¹
- 2 The subject of the Review is the introduction of the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) (**Inciting Racial Hatred Act**). The Inciting Racial Hatred Act will introduce section 93ZAA into the *Crimes Act 1900* (NSW) (**Crimes Act**), which will provide that a person will commit an offence where, by a public act, the person intentionally incites hatred on the ground of race. NSWCCL opposes section 93ZAA and submits that the section should be repealed.
- 3 This submission is structured to mirror the Review's terms of reference and six focus questions.
- 4 However, at the outset, NSWCCL makes the following observations on the scope of the Review:
 - (a) The terms of reference artificially exclude consideration of section 93Z of the Crimes Act and civil vilification protections in the *Anti-Discrimination Act 1977* (NSW) (**ADA**). These exclusions are problematic, particularly so with respect to section 93Z, which is an offence that is intimately related to the harm that section 93ZAA is designed to prevent. These restrictions on the Review scope limit the utility of the Review as a survey of the effectiveness of criminal law protections against the incitement of hatred.
 - (b) There is a further degree of artificiality to the terms of reference, insofar as there is an assumption that these laws are able to achieve the enhancement of social cohesion. The criminal law alone is not equipped or designed to achieve social cohesion. It is a reactionary and coercive mechanism that should be reserved for the targeted punishment of harmful conduct, and is not effective when used to encourage broad-brushed social change. Instead, preventative mechanisms directed towards reducing antisocial conduct on the social and structural level are better suited to achieving the goal of social cohesion. These include, for example, education through public awareness campaigns on cultural diversity, media literacy, the dangers and sources of disinformation, and promotion of public debate. More granular impact may be achieved through community engagement and organisation-driven programs targeted towards specific instances of hate occurring in communities.

Criminal law protections against hatred for vulnerable groups

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

- 5 The NSWCCL is a non-political, non-sectarian organisation dedicated to upholding civil liberties, human rights, the rule of law and the fundamental freedoms which individuals enjoy as a matter of law and practice. The NSWCCL advocates for the rights of individuals in NSW and opposes restrictions on the fundamental freedoms that those individuals enjoy, including the rights of all to express their views and beliefs without suppression.
- 6 The NSWCCL recognises that individuals and community groups in NSW are better-placed to comment on the extent and impact of hatred on vulnerable groups in the NSW community. In this respect, the NSWCCL emphasises that as part of the Review, consultation with the community is critical and ought to be broad-ranging. The NSWCCL also emphasises that any

¹ New South Wales Department of Communities and Justice, *Review of criminal law protections against the incitement of hatred* (Issues Paper, June 2025) (**Issues Paper**).

offence directed toward the prevention of hatred and uplifting of social cohesion should do so without being limited solely to one subset of vulnerable groups in NSW.

- 7 The NSWCCCL strongly opposes all forms of hate directed towards vulnerable groups. That said, the NSWCCCL is concerned about the weaponisation of hatred directed towards vulnerable groups as a political tool to pass legislation which unduly restricts civil liberties.² Responding to hate in the community must be evidence-based and carefully considered with reference to other fundamental freedoms that are owed to individuals. As a first step, the NSW Government should be collecting data on hate-based acts from the community (noting that this data is currently likely not representative owing to underreporting and inconsistent collection),³ rather than increasing the scope of criminal conduct to increase prosecutions.

Focus 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?

- 8 The criminal law as it currently stands goes as far as it can to adequately protect against the incitement of hatred towards vulnerable groups in NSW. As is discussed at paragraphs 10 - 11 below, there are extensive protections already in place both across the Commonwealth and NSW statute books targeted towards the prevention of serious harms which arise out of hate-based acts. Behind this question lies an erroneous assumption that the criminal law is an effective mechanism to target antisocial conduct and raises false expectations about what it is capable of achieving. In this sense, no change to the criminal law will be able to better protect vulnerable groups from incitement of hatred because it largely acts after the event. Its general deterrent effects are usually overstated.
- 9 In relation to the specific section 93ZAA, the NSWCCCL submits that it is inappropriate to achieve its stated goals and opposes its introduction. In particular, the introduction of section 93ZAA risks unintended consequences impacting civil liberties, including unjustified limitations on the freedom of expression as outlined at paragraphs 17 - 36 below. Furthermore, the NSWCCCL considers that the criminal law is ill-suited to addressing the 'mischief' that section 93ZAA intends to address, which would be better addressed through non-legal mechanisms, including public awareness campaigns (targeting topics such as cultural diversity, media literacy and the dangers and sources of disinformation), the promotion of public debate, and organisation-driven programs responding to specific instances of hate occurring in communities. These points are expanded on below.
- 10 First, the NSWCCCL submits that the criminal law, in its current form and so far as it can, protects against the incitement of hatred towards vulnerable groups in NSW. As the Issues Paper for the Review identifies,⁴ there is already an extensive range of both State-based and Commonwealth criminal laws which protect Australians against the incitement of hatred. These include the following:
- (a) section 93Z of the Crimes Act prohibits the intentional or reckless threatening or incitement of violence against another person or group of persons with certain protected characteristics, including on the grounds of race;

² NSW Council for Civil Liberties, Submission No 71 to Justice and Communities Committee, NSW Legislative Council, *Antisemitism in New South Wales* (April 2025).

³ Gail Mason, 'A Picture of Bias Crime in New South Wales' (2019) 11(1) *Cosmopolitan Civil Societies: an Interdisciplinary Journal* 47.

⁴ Issues Paper (n 1) 6–7.

- (b) other NSW criminal laws, including laws relating to stalking and intimidation, common assault, affray and intentional destruction of property, prohibit harms that may arise from the incitement of hatred; and
- (c) Commonwealth criminal laws prohibit:
 - (i) a range of actions relating to advocating the use of force or violence against a person or their property because they are a member of a protected group, distinguished by, among other things, race, religion, nationality or national or ethnic origin;⁵
 - (ii) the use of terrorist and Nazi symbols or gestures;⁶ and
 - (iii) the use of carriage services to threaten,⁷ menace, harass, or cause offence.⁸
- (d) The Summary Offences Act

11 Not only are these protections comprehensive, but they have also been routinely and effectively deployed against hate-based acts. The police have used their broad powers to move people on and prosecute the use of hate symbols, arson, graffiti and property damage, which has been used in response to the recent spate of antisemitism we have seen in NSW.⁹ It follows, then, that section 93ZAA is not necessary to supplement existing criminal laws.

12 Second, the NSWCCCL submits that the criminal law is ill-suited to address the 'mischief' that section 93ZAA intends to address, which would be better addressed through non-legal mechanisms. The NSWCCCL notes that:

- (a) while the criminal law may play a role in defining community expectations, to indicate disapproval of certain actions, to educate the community about right and wrong, and to deter wrongdoing, it largely comes after the event and is not effective as the primary mechanism to achieve these goals;
- (b) the 'mischief' that section 93ZAA is intended to address is the incitement of hatred on the grounds of race. In particular, in the Second Reading Speech for the Inciting Racial Hatred Act, the NSW Attorney General noted that the provision has been introduced to: 'respond to the recent instances of antisemitic behaviour that we have seen in Sydney';¹⁰
- (c) the criminal law, by its nature and application, simply cannot protect against the incitement of hatred on the grounds of race. There is no evidence to suggest that criminalising acts of hate and racism have an impact on reducing those phenomena, nor that doing so would curb radicalisation.¹¹ Rather, its criminalisation risks the unintended

⁵ *Criminal Code Act 1995* (Cth) ss 80.2A–80.2BE (**Criminal Code**).

⁶ Criminal Code Part 5.1, subdivision CA.

⁷ Criminal Code s 474.15.

⁸ Criminal Code s 474.17.

⁹ 'Media Release: NSW Government's Proposed New Laws Threaten Free Speech and Protest Rights', *New South Wales Council for Civil Liberties* (Web Page, 7 February 2025) <https://www.nswccl.org.au/proposed_new_laws_threaten_free_speech_and_protest_rights>; 'Anti-Semitic incidents in Sydney could shape future of hate crime laws as more detectives committed', *ABC News* (Web Page, 22 January 2025) <<https://www.abc.net.au/news/2025-01-22/nsw-antisemitism-crackdown-hate-crime-law-policing/104843316>>.

¹⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 13 (Michael Daley, Attorney General) (**Second Reading Speech**).

¹¹ Human Rights Law Centre's Democratic Freedoms team, 'Explainer: NSW's proposed laws on hate crimes and places of worship', *Human Rights Law Centre* (Web Page, 11 February 2025) <<https://www.hrlc.org.au/explainers/nsw-hate-speech-laws/>>.

consequence of permitting hatred to fester in private communities and risks further radicalising groups who hold these harmful views; and

- (d) instead, the NSW Government should direct its efforts to addressing the structural and societal causes of hate-based acts and speech, which involves the enhancement of non-legal, community-based solutions (including, for example, public awareness campaigns directed at fostering tolerance and increasing media literacy, as well as more targeted responses to specific instances of hate occurring in communities).

13 Third, the NSWCCCL submits that when criminal law is used to solve a societal problem, it must be drawn with precision and certainty. However, section 93ZAA in its current form is imprecise, and there is a real risk that it will be ineffective in promoting social cohesion, whilst infringing on freedom of speech and chilling legitimate public discourse. The provision also contains an unduly limited exception and great care must be taken to identify further necessary exemptions to strike the appropriate balance in protecting civil liberties. The NSWCCCL notes that:

- (a) the first limb of the offence uses the undefined terms 'incites' and 'hatred', the former of which has been fraught in application with respect to section 93Z and the latter of which is a subjective and difficult to define concept;
- (b) the second limb of the offence applies the 'reasonable person' standard. While aiming for objectivity, this standard is inherently subjective and open to varying interpretations (influenced by individual perspectives, contextual differences and evolving social standards);
- (c) sub-section 93ZAA(3) provides that in determining whether a person has committed an offence under the provision, it is irrelevant whether a person actually formed a state of mind or carried out an act of hatred in response to the conduct. This unduly broadens the scope of possible culpable conduct, and could be used to stifle free speech; and
- (d) sub-section 93ZAA(2) includes a limited exemption for acts that consist only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching or discussion, but the provision does not otherwise include exemptions to preserve the fundamental freedom of speech so critical in democratic societies (e.g., for the purposes of academic debate or discussion, journalistic communications, direct quotes in other communications or legitimate political communications).

14 Fourth, the NSWCCCL submits that section 93ZAA is unduly restricted to race. The NSWCCCL notes that:

- (a) there are a number of vulnerable groups that are currently the targets of acts that are intended to incite hatred, including, for example, women, members of the LGBTQIA+ community and persons with disabilities. The NSW Attorney General acknowledged this in the Second Reading Speech for the Inciting Racial Hatred Act, noting that: 'Our Government acknowledges that hate speech based on other attributes—such as those we see in section 93Z that include religion, sexual orientation or gender identity—occurs and condemns it.' The NSWCCCL considers that in circumstances where there are other vulnerable groups that are the target of hate speech, to the extent that section 93ZAA is required, it is inappropriate that section 93ZAA is limited to race; and
- (b) in addition, limiting the offence in section 93ZAA to race may inadvertently result in stark inequality of treatment between two groups. For example, there is tension between Australia's Sikh and Hindu communities regarding political support for an independent

Sikh State in India.¹² In these circumstances, section 93ZAA may only be invoked to protect Sikh groups,¹³ as the definition of 'race' would not apply to Hindu groups.¹⁴

15 Fifth, the NSWCCCL submits that NSW Police should not have the power to prosecute offences under section 93ZAA. In circumstances where existing hostilities exist between vulnerable minority groups and NSW Police, the NSWCCCL is concerned that these minority groups may be overrepresented in prosecutions instigated by NSW Police. The NSWCCCL notes that:

- (a) As addressed in the NSWCCCL's submissions to the NSW Law Reform Commission on section 93Z,¹⁵ some non-exhaustive examples of tensions currently existing between NSW Police and vulnerable groups include:
 - (i) the recent murder of Jesse Baird and his partner, Luke Davies, by NSW Police Officer, Beau Lamarre-Condon, on 23 February 2024;
 - (ii) the Special Commission of Inquiry into LGBTQI+ hate crimes noted that NSW Police had 'in significant respects' engaged with the inquiry in a way that was 'adversarial or unnecessarily defensive'.¹⁶ In addition, the review commented that 'even very recently', there had been a resistance within the police to acknowledge the extent of hostility LGBTQI+ people experienced at the hands of NSW Police;¹⁷
 - (iii) the Australian Institute of Criminology reported that, between 1 July 2022 and 30 June 2023, there were 10 indigenous deaths in police custody (an increase from eight deaths in custody for the previous 12 month period);¹⁸
 - (iv) data collated by the NSW Bureau of Crime Statistics revealed Aboriginal young people were more than twice as likely to be targeted with very frequent bail checks;¹⁹
 - (v) the Law Enforcement Conduct Commission found that unconscious racism resulted in a Custody Manager failing to call an ambulance to assist an Aboriginal man in mental distress;²⁰ and
 - (vi) on 2 May 2019, the NSW Civil and Administrative Tribunal ordered NSW Police to publish an apology and implement racial vilification training for senior officers after a tribunal found a police training exercise in October 2017 racially vilified Palestinians and Arabs and portrayed them as potential terrorists.²¹

¹² 'Media Release: Response to Government's Proposed New Racial Hate Speech Law', *New South Wales Council for Civil Liberties* (Web Page, 18 February 2025) <https://www.nswccl.org.au/new_racial_hate_speech_law>.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ NSW Council for Civil Liberties Inc, Submission No 9 to Law Reform Commission, *Serious racial and religious vilification* (19 April 2024) [6.6].

¹⁶ State of NSW, *Special Commission of Inquiry into LGBTIQ hate crimes* (Report, December 2023) 108.

¹⁷ *Ibid.* 14.114.

¹⁸ Merran McAlister, Hannah Miles and Samantha Bricknell, 'Deaths in custody in Australia 2022-23' (Statistical Report No 44) *Australian Institute of Criminology*.

¹⁹ 'Data reveals police bail checks are targeting Aboriginal children, racial discrimination complaints filed', *Justice and Equity Centre* (Web Page, 1 July 2025) <<https://jec.org.au/first-nations-justice/discriminatory-policing/data-reveals-police-bail-checks-are-targeting-aboriginal-children-racial-discrimination-complaints-filed/>>.

²⁰ Law Enforcement Conduct Commission, (online, 23 June 2025)

<<https://www.lecc.nsw.gov.au/news/media-release-law-enforcement-conduct-commission-finds-custody-manager-who-ignored-an-aboriginal-man-self-harming-in-custody-engaged-in-serious-misconduct>>.

²¹ *Ekermawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79.

- (b) In addition, the NSW Bureau of Crime Statistics and Research reported that between 2022 and 2023, Indigenous persons were charged with offences under section 93Z of the Crimes Act.²²
- (c) These examples emphasise the legitimate concerns that minority groups may have regarding the prospect of police prosecution under section 93ZAA. As discussed above, the terms of section 93ZAA are vaguely defined. In these circumstances, the NSWCCCL has concerns that prosecution under section 93ZAA may be gratuitously directed towards these groups, in a manner which is of itself, detrimental to social cohesion.
- (d) Ultimately, the NSWCCCL contends that the sensitivity of section 93ZAA means that these matters are best dealt with by the Office of The Director of Public Prosecutions (**ODPP**).

16 As stated above, the NSWCCCL submits that section 93ZAA is not necessary or appropriate, as the law already sufficiently protects against the incitement of hatred towards vulnerable groups in NSW. However, in the event that section 93ZAA is not repealed, it ought to be modified so that it offers equal protection to all protected attributes, and its scope should be clearly defined. In the second reading speech, Attorney General Michael Daley stated that '[c]riminalising hate speech on the grounds of all attributes that are protected by civil vilification regimes is challenging and complex'.²³ While we agree this is a challenging and complex problem, the criminal law must be balanced and directed towards the specific harms that vulnerable groups as a collective experience – hate speech, to the extent that it has been determined to be criminal conduct, should parallel the scope of protection found in section 93Z of the Crimes Act.

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

Focus 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?

- 17 In Australia, fundamental rights such as the freedom of expression and freedom of religion are guaranteed through international legal instruments and Australia's domestic law. This section considers how to best ensure that these fundamental rights and freedoms are not unjustifiably encroached upon by legislative interference.
- 18 The NSWCCCL considers that the legislature ought to have regard to the following when introducing any new law that restricts fundamental rights and freedoms – such as section 93ZAA – to ensure compliance with Australia's international obligations and constitutional requirements:
 - (a) all relevant rights and freedoms must be identified to ensure that they are not unintentionally and unduly infringed by the new law;
 - (b) the new law must be considered in light of the scope and permitted restrictions of these rights and freedoms, as set out in international and domestic law (and must be consistent with the scope and permitted restrictions); and
 - (c) where possible, the legislature ought to consider non-legal means of addressing the 'mischief' the subject of the relevant law, rather than imposing limitations on key rights and freedoms.

²² New South Wales Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 – June 2023 – Aboriginal detailed offence*.

²³ *Second Reading Speech* (n 10) 14.

Equality before the law

- 19 Australia is a signatory to a number of international instruments which require State parties to recognise and protect fundamental rights and freedoms. The Issues Paper identifies – correctly so – that the rights of freedom of expression and freedom of religion are particularly pertinent in circumstances where the legislature seeks to restrict certain categories of speech through laws such as section 93ZAA.²⁴
- 20 However, it is imperative that all relevant rights and freedoms be identified and assessed so that they are not inadvertently infringed. For instance, regard must be had to the cardinal principle of human rights law that no one human right is to be favoured over another.²⁵
- 21 The *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia is a signatory, provides that each State party is to ensure that all individuals within its jurisdiction enjoy the rights provided for by the ICCPR 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²⁶ The principle of equality before the law is enshrined in ICCPR article 26, which relevantly provides:²⁷
- All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*
- 22 The legislature ought to have regard to this fundamental tenet of international human rights law when drafting and implementing new domestic laws. As outlined at paragraph 14 above, section 93ZAA does not accord equal protection to all vulnerable groups from the intentional incitement of hatred. This provision is expressed to protect against intentionally inciting hatred *only* on the basis of race. Consequently, section 93ZAA creates a hierarchy of protection – it safeguards against intentionally inciting hatred on the ground of race, however that same protection is not afforded to inciting hatred on the basis of other protected attributes such as religious belief, sexual orientation, gender identity, intersex status and HIV or AIDS status. It therefore does not accord with the principle of equality before the law, as, in operation, it prioritises certain protected attributes (being race) over other protected attributes.
- 23 In practice, this creates a genuine risk that section 93ZAA may lead to unequal outcomes and expand existing divisions within our community. As addressed at paragraph 14 above, in the event of a dispute regarding the formation of Khalistan (a Sikh nation), section 93ZAA would only be able to be invoked to protect Sikh groups. This is because ethno-religious or national elements of the Sikh community mean that the definition of 'race' would be satisfied – however, Hindu groups would not have this same protection.
- 24 NSWCCCL considers that combating hate speech is better addressed through non-legal means rather than through resorting to the criminal law. However, in the event that a law such as section 93ZAA is to be introduced, it ought to apply equally to all protected attributes to comply with Australia's international law obligations.

²⁴ Issues Paper (n 1) p 13.

²⁵ Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards' (2023) 42(3) *University of Queensland Law Journal* 317; *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993) para 5.

²⁶ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1) (*ICCPR*).

²⁷ ICCPR art 26.

The right to freedom of expression and freedom of religion

- 25 The Issues Paper identifies international law instruments which recognise the right to freedom of expression and freedom of religion.²⁸ As stated in the ICCPR, the freedom of expression carries 'special duties and responsibilities' and may be subject to 'certain restrictions'.²⁹ Similarly, the freedom to 'manifest one's religion' may be subject to limitations, which are 'prescribed by law' and are necessary to protect, *inter alia*, 'the fundamental rights and freedoms of others'.³⁰
- 26 International law instruments recognise, in varying terms, that incitement of hatred on the basis of race and other protected attributes must be prohibited by law. Relevantly:
- (a) the ICCPR requires that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' must be prohibited by law;³¹ and
 - (b) the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) requires State parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.³²
- 27 However, where a law restricts the freedom of expression (or similarly, freedom of religion), it remains necessary to have regard to the principles of legality, proportionality and necessity. This means that the restriction must be:³³
- (a) provided for in law;
 - (b) narrowly defined to serve a legitimate interest; and
 - (c) necessary in a democratic society to protect that interest.
- 28 Section 93ZAA will be enshrined in the Crimes Act, thereby satisfying the requirement of 'legality'. However, as submitted at paragraph 13 above, section 93ZAA is broadly defined and uses terms susceptible to multiple interpretations. In our view, this is not consistent with the requirement of 'proportionality', which requires that section 93ZAA be clearly and explicitly defined, either in legislation or through authoritative interpretation.³⁴ The vague drafting of section 93ZAA risks unintended outcomes, including unduly restricting freedom of expression and religion. In addition, as submitted at paragraph 10 above, the criminal law, in its current form and so far as it is able, adequately protects against the incitement of hatred towards vulnerable groups in NSW. In our view, this means that section 93ZAA is not necessary.
- 29 Special Rapporteur, David Kaye, has stated that any restrictions on the freedom of expression 'must be ... [subject to] strict oversight'.³⁵ Section 93ZAA(4)(b) provides that a police officer may commence a prosecution for an offence under section 93ZAA. However, there is no restriction on the seniority of the police officer who may commence a prosecution, and there is no oversight by the ODPP, increasing the risk of inappropriate or oppressive use of power against individual

²⁸ Issues Paper (n 1) pp 13–14; ICCPR art 18, 19(2), (3).

²⁹ ICCPR art 19 (3).

³⁰ ICCPR art 18(3).

³¹ ICCPR art 20. We note that Australia has made a reservation in respect of art 20.

³² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, entered into force for Australia 30 October 1975) art 4(a). We note that Australia has made a reservation in respect of article 4(a).

³³ ICCPR art 18(3), 19(3).

³⁴ Rabat Plan of Action (n 35) at footnote 5, referencing Article XIX, *Camden Principles on Freedom of Expression and Equality* (London, April 2009) principle 12.

³⁵ Kaye Report (n 25) 5 [5]–[6].

civilians. This also has the effect of leaving sensitive decisions about what conduct constitutes 'hate' in the hands of on-duty police officers, which we submit is a consideration that must be appropriately balanced by a dispassionate and independent office of prosecutions. This acts as a safeguard against the further infringement of critical civil liberties.

- 30 Consequently, section 93ZAA and any future, analogous laws must be reviewed from the perspective of Australian's international law obligations to ensure consistency with the ICERD and ICCPR. Such laws should be: articulated with clarity, narrow in scope, subject to adequate oversight and protect all persons equally. The government should undertake consultation with community groups and international legal experts prior to the introduction of new criminal law offences which risk comprising the fundamental rights of freedom of expression.

The implied freedom of political communication

- 31 In domestic law, the High Court of Australia has found that the Australian Constitution contains an implied freedom of political communication. This is drawn by implication to the text and structure of the Constitution, and the maintenance of the constitutionally prescribed system of representative and responsible government.³⁶
- 32 The implied freedom is not an absolute right or uncontrolled licence to freedom of expression, and the case law sets out the circumstances in which this implied freedom may be limited by the legislature.³⁷ However, just as the legislature ought to have regard to international law principles where it seeks to restrict the freedom of expression, it must ensure that any such restriction is consistent with the constitutionally guaranteed implied freedom of political communication.
- 33 The test for the court to determine whether a law is constitutionally valid is determined as follows:³⁸
- (a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?
 - (b) second (and if the answer to the first question is yes) is the law legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
 - (c) third, is the law reasonably appropriate and adapted to serve that legitimate end?
- 34 If the law is not legitimate, reasonably appropriate and adapted in a manner compatible with maintenance of the constitutionally prescribed system of government, it will contravene the implied right of political communication.
- 35 As recognised in the Issues Paper, the implied freedom was considered in the context of inciting hatred on the ground of homosexuality (section 49ZT(1) ADA) by the New South Wales Court of Appeal in the decision of *Sunol v Collier (No 2)*.³⁹ That provision is relevantly similar to the new section 93ZAA, although noting it is a civil rather than criminal provision. Relevantly, section 49ZT(2) ADA includes an exception in relation to conduct which is a public act 'done reasonably and in good faith', for various purposes, including 'in the public interest'. In comparison, section

³⁶ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**).

³⁷ *Lange* (n 39) 561.

³⁸ *Lange* (n 39) 567–568; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178, 194–195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 364 (Kiefel CJ, Bell and Keane JJ).

³⁹ [2012] NSWCA 44 (**Sunol**).

93ZAA contains an exception from the offence only where the act consists 'only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching'.⁴⁰

- 36 In *Sunol*, the majority of the Court held that section 49ZT(1) ADA did burden the implied freedom.⁴¹ However it was held to be reasonably appropriate and adapted to service a legitimate end, on the basis that seeking to prevent homosexual vilification is a 'legitimate end of government'.⁴² In upholding its constitutionality, the majority did also take note that the exemption in section 49ZT(2) ADA would capture any form of communication that is legitimate political debate, and this provided 'adequate protection'.⁴³ No such protection is available in section 93ZAA. However, the decision of the New South Wales Court of Appeal differs from the position of other States, which found that similar provisions did not burden the implied right to political communication.⁴⁴ In our view, whilst it is unlikely that the section 93ZAA is inconsistent with the implied right, in circumstances where it does burden that right, the scope of the provision ought to be carefully and clearly expressed.

Promoting social cohesion

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

- 37 It is unlikely that reform of criminal law protections against the incitement of hatred will promote social cohesion. As expressed at paragraphs 14 - 15 of this submission, the NSWCCCL contends that criminal law protections which are aimed exclusively at racial hate-speech are likely to exacerbate existing societal divisions.
- 38 Similarly, at paragraphs 9 and 12 of this submission it was expressed that the criminal law is not an instrument through which social cohesion can be compelled. It is ill-conceived to presume a deterrent to hateful conduct will be capable of achieving the aim of social harmony.
- 39 The primary mechanisms through which social cohesion is best achieved are those which aim to prevent social dysfunction at its inception, rather than those which serve as a deterrent. In its Report regarding Serious Racial and Religious Vilification, the NSW Law Reform Commission set out examples of such measures, including media regulation and social media regulation, community education and engagement, government investment in anti-racism strategies, police training and education regarding hate crime, vilification and the other existing elements of section 93Z.⁴⁵
- 40 In addition, public communication by media, political commentators, public figures and politicians impact the collective attitudes and social norms which have the capacity to shape the zeitgeist in a manner which may either damage or promote social cohesion.
- 41 These themes are echoed in the Australian Human Rights Commission's Anti-Racism Framework recommendations, which include, relevantly:
- (a) investing in early intervention strategies beyond civil and criminal penalties to address far-right extremism, including promoting community wellbeing and focussing on atrocity prevention;

⁴⁰ Crimes Act s 93ZAA(2).

⁴¹ *Sunol* (n 39) [42] (Bathurst CJ), [68] (Allsop P)

⁴² *Sunol* (n 39) [52] (Bathurst CJ); [73] (Allsop P).

⁴³ *Sunol* (n 39) [52] (Bathurst CJ), see also [71] (Allsop P).

⁴⁴ *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48; *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284; *Owen v Menzies* (2012) 265 FLR 392.

⁴⁵ New South Wales Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) 41.

- (b) reviewing anti-racism and cultural safety training for students in primary and secondary school, police, legal aid providers, first responders, support services and the courts and implementing mandatory and ongoing anti-racism and First Nations cultural safety training for leadership and staff; and
- (c) providing funding for the Australian Human Rights Commission to develop public awareness and education campaigns regarding racial literacy.⁴⁶

42 To this end, the NSWCCCL contends that the criminal law is a 'blunt instrument' to manage tension in the community, and that an approach centred around education and human rights is more likely to be effective.⁴⁷

Focus 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?

- 43 As set out in response to Focus Question 3 (paragraphs 17 - 36 above) the reform of criminal law protections may, in some instances, introduce unjustified restrictions on certain fundamental rights and freedoms. In order to safeguard against this risk, the legislature ought to review any proposed criminal law reforms through the lens of Australia's international law obligations to ensure consistency with the ICERD and ICCPR, and Australia's domestic law. Any such laws should also be narrow and specific to ensure their scope is clearly defined, and subject to appropriate oversight (for example, by allowing only prosecution by the ODPP).
- 44 As set out above, NSWCCCL considers that combating hate speech is better addressed through non-legal means rather than through resorting to the criminal law. The NSWCCCL recommends prioritising non-legal reform, including holistic change and education to manage community tension.
- 45 Section 93ZAA presents a real risk of stifling and undermining free speech, and inhibiting the rights that individuals are entitled to enjoy in a democratic society. A society which can openly discuss the causes of hate and rationally resolve differences by public speech will improve social cohesion.

Focus Question 6. Are there other measures related to criminal law reform that may promote social cohesion?

- 46 As set out above, it is the view of the NSWCCCL that non-legal measures are better equipped to promote social cohesion than criminal law reform. These measures have the added benefit that they do not serve as a fetter on freedom of expression and other fundamental rights and freedoms, as discussed above at paragraphs 9, 12 and 17 - 36.

⁴⁶ Australian Human Rights Commission, *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia* (Report, November 2024).

⁴⁷ Anne Charlton, 'Media Statement: Review of s93Z of the Crimes Act', *New South Wales Council for Civil Liberties* (Web Page, 19 January 2024) <https://www.nswccl.org.au/review_s93z_crimes_act>.

47 In addition, as identified above at paragraph 15, certain tensions exist between NSW Police and vulnerable groups. In order to improve social cohesion, it is essential to address these tensions, including through considering the manner in which the criminal law is enforced in addition to public commentary by the media, politicians and public officials around these issues. Mechanisms such as education, cultural competence training and public awareness campaigns may provide an avenue through which distrust between NSW Police and minority groups can be ameliorated.

We trust this submission will be useful to the Reviewer.

Yours sincerely,

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