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PRL Independent Review Secretariat
Department of Communities and Justice

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

The Honourable John Sackar AM KC,

Independent Review: Criminal Hate Speech

We write this submission in our capacity as academics at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit to the review that seeks to consult with all communities on criminal law protections against the incitement of hatred in NSW, following the introduction of the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW).

Terms of reference

The enclosed submission relates to the following terms of reference:

- The sufficiency of criminal law protections against hatred for vulnerable groups in the NSW community, including any improvements that could be made
- The interaction between these protections and existing rights and freedoms, including the implied freedom of political communication and freedom of religion
- Any other matters related to criminal law reform that the Government could consider to enhance social cohesion.

Recommendations

We submit and recommend that:

1. The NSW amalgamated offence of serious vilification, inserted into s 93Z of the *Crimes Act 1900* in 2018, and NSW civil vilification laws in the *Anti-Discrimination Act 1977*, incorporate wide grounds that may form the basis of vilification when compared to other Australian jurisdictions. Accordingly, this collection of civil and criminal vilification laws conforms with obligations in the ICCPR to capture different forms of vilification.
2. Consideration may be given to amending s 93Z to protect a broader range of groups that regularly encounter prejudice and discrimination in society, such as people with a disability or mental illness, who experience homelessness and sex workers. Any such legislative change should ensure that the offence provision fulfils the aim of protecting *subjugated* groups who endure *disproportionate* prejudice in society. The criminal provision should be carefully worded in such a way that it cannot be misused to protect majoritarian, structurally-advantaged groups.
3. The evidence suggests that it will cause more harm than good for s 93ZAA of the *Crimes Act* to commence its current form. The NSW Government should not allow the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) to commence.
4. We do not support the enactment of a new racial hatred offence in NSW in the terms of s 93ZAA. Nonetheless, if such an offence were to commence, the section should be amended to remove the exception for quotes from, or references to, religious texts. A religious speech exception is not justifiable in circumstances where the prosecution must also prove, as an element of the offence, that the speaker intended to incite hatred towards another person or a group of persons on the ground of race.
5. The Government should not enact more criminal offences or increase punishments for serious vilification. Instead, the following measures should be implemented to combat racism and other forms of prejudice:
    a. Improve police education and training on prejudice, hate crime, and the criminal law elements of the offence of serious vilification in s 93Z of the *Crimes Act 1900*.
    b. Conduct an inquiry into structural reforms that could be implemented to improve the policing of hate in the NSW Police Force and to stamp out prejudice within the organisation. This might include a standalone police unit to deal with hate crime, and an independent body to monitor police responses to hate crime.
    c. Improve the collection and publication of data on hate crimes when offences other than s 93Z are charged for hate-related incidents. In particular, the NSW Government should

collect data on the use of s 93Z (and, if it commences, s 93ZAA), offensive language/ behaviour and other provisions to police and prosecute Aboriginal and/or Torres Strait Islander Australians and minority groups for allegedly racist or hateful speech/conduct.

d. Prioritise investment in education, non-criminal anti-racism strategies and justice reinvestment strategies.
e. Encourage government and community leaders to promote tolerance and acceptance, denounce prejudice, and promote international human rights principles and standards.

6. The Government should reinstate the requirement for DPP oversight of criminal prosecutions under s 93Z. If the section commences, require DPP approval for prosecution of offences under s 93ZAA.
7. The Government should implement the recommendations of successive Australian and NSW government reviews and inquiries by repealing the criminal offence of offensive language in s 4A of the *Summary Offences Act 1988* or restricting its scope so that the offence only captures situations where there is intimidation and/or an actual threat of harm.
8. The Government should explore changes that could be made to the criminal law and its enforcement to restrict the misuse of criminal law provisions by police to criminalise expressions of resistance to white authority and white supremacy.
9. Any change to the criminal law should await the findings of the NSWLRC review of the civil vilification regime.
10. The Government should review criminal laws and police powers that unduly restrict protest, free speech and free assembly with a view to winding back the excessive criminalisation of public protest.
11. NSW and Australia should consider adopting a rights-based legislative framework that protects free expression.

The enclosed submission explains the rationale behind these recommendations. Should you have any questions in relation to our submission, please contact the corresponding author, Dr Elyse Methven, by email to [redacted].

Yours sincerely,
Dr Elyse Methven, Senior Lecturer
Professor Thalia Anthony
Derick Luong, Lecturer

Encls.

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Submission

First Nations people please be advised this submission details instances of racial discrimination including violence inflicted against and deaths of First Nations people.

1. Introduction

Racism and prejudice are complex and pervasive problems in Australia that generate significant harm. There have been high incidences of reported transphobic speech, right-wing extremism, Antisemitism, hate speech against women, Islamophobia and racism towards Aboriginal and Torres Strait Islander people in recent years.[1] It is troubling that the NSW Government acted rashly by passing a new criminal offence provision in s 93ZAA of the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (the Act) to respond to this complex social problem. The new criminal law provision, which is uncommenced at the time of writing, does not heed the recommendations of numerous inquiries on combating racism and prejudice in Australia. Instead, s 93ZAA seeks to establish a "hierarchical, two-tier model of protection that differentiates between the attributes protected by s 93Z".[2] This "backwards step" goes against the advice of the NSW Law Reform Commission (NSWLRC) and the vast majority of affected groups and experts it consulted with.[3]

When a criminal legislative response is implemented, the legal parameters of any new or amended criminal law should be judiciously constructed. Legislative responses to Antisemitism and racism, like responses to other forms of vilification and prejudice, should be evidence-based. The criminal law serves an important symbolic function by communicating to the public conduct that is considered seriously wrong. Both civil and criminal vilification and discrimination laws communicate to protected groups that society values their equal dignity and participation in public life, free from threats of

[1] See NSW Law Reform Commission (NSWLRC), *Serious Racial and Religion Vilification* (Report 151, 2024) at [3.1]-[3.29]. See also: Anjalee de Silva and Christine Parker, Platformed Hate Speech against Women: Beyond Self-Regulation (2025) *UNSWLJ* 637; Josh, Butler, 'Rise in activity from rightwing extremists who want to trigger 'race war' in Australia, ASIO warns' (*The Guardian Australia*, online, 9 April 2024) <https://www.theguardian.com/australia-news/2024/apr/10/rise-in-activity-from-right-wing-extremists-who-want-to-trigger-race-war-in-australia-asio-warns>; Cait Kelly, 'Victorian government urged to act as more drag events cancelled in wake of threats from far-right' (*The Guardian Australia*, online, 6 May 2023) <https://www.theguardian.com/world/2023/may/06/victorian-government-urged-to-act-as-more-drag-events-cancelled-in-wake-of-threats-from-far-right>; Zena Chamas and Mazoe Ford, 'Islamophobic and anti-Semitic incidents in Australia at unprecedented levels as the Israel-Gaza war rages' (*ABC News*, online, 2 December 2023) <https://www.abc.net.au/news/2023-12-02/rise-in-islamophobia-antisemitism-amid-israel-gaza-war/10308866>.

[2] NSWLRC, n 1, [1.24].

[3] Ibid, [1.25].

violence or intimidation. However, criminalisation should be a last resort and reserved for seriously harmful conduct.[4]

The ability of criminal law to generate positive social change is limited, particularly when it comes to combating racism and prejudice. As critical race theorists acknowledge,[5] racism is ordinary and systemic in society; it is not aberrational. A problem with criminal law is its focus on the exceptional, deviant, individual offender. It is concerned with those who upset the "social order". *While it can punish egregious breaches, the criminal law cannot effectively resolve problems imprinted into the fabric of our social order*.

When considering whether a new or amended criminal law is necessary and fit-for-purpose, we must also consider how that law will be enforced. Routinely, when conduct is criminalised in Australia, marginalised groups, including people with a disability, mental illness or who are experiencing homelessness and Aboriginal and Torres Strait Islander people, bear the brunt of such criminalisation. Harmful consequences that flow from the over-policing and imprisonment of such groups are well-documented and include the misuse of heavy-handed police powers, fractured families and communities, increased likelihood of recidivism, resentment and distrust of law enforcement and the criminal justice system, and the exacerbation of existing social and economic inequalities. The enactment of s 93ZAA, without adequate safeguards, risks further entrenching these harms. The discretionary power of police to determine what constitutes "public incitement of racial hatred" may lead to inconsistent or selective enforcement and may disproportionately affect already over-policed communities. There is also a risk that the new offence may be used to suppress legitimate political expression or protest, particularly where racial or cultural identity is implicated in public discourse.

In this way, the criminalisation model may paradoxically silence the very communities it purports to protect. Without a clear, evidence-based threshold for what constitutes "incitement of racial hatred" under s 93ZAA, the offence invites arbitrary application and fails to provide the legal certainty expected of a criminal prohibition. Moreover, the introduction of this offence without complementary investment in education, community engagement, and restorative approaches undermines its stated objective of addressing racial hatred.

By prioritising a punitive legal response over structural and preventative measures, the NSW Government has missed an opportunity to lead with an inclusive, community-informed strategy.

[4] David Kaye, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, Un Doc A/74/486 (9 October 2019). <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/A_74_486.pdf>.

[5] See, e.g., Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 4th ed, 2023).

Effective responses to racism and other forms of vilification must centre the voices of those most affected and engage with the root causes of prejudice, such as social exclusion, economic marginalisation, and historical injustice. Instead, s 93ZAA risks becoming a symbolic gesture that lacks practical efficacy and may even deepen the divisions it seeks to heal.

Ultimately, combating racism and prejudice requires a sustained commitment to systemic reform, public education, and social justice. Legislative measures must be part of a broader, holistic strategy, not a substitute for it. Without this, the criminal law remains a blunt instrument, ill-suited to the complex and deeply embedded nature of racial and cultural injustice in Australia.

2. Term of Reference 1: The sufficiency of criminal law protections against hatred for vulnerable groups in the NSW community, including any improvements that could be made

2.1 The elements of the offence of inciting racial hatred in s 93ZAA

The criminal offence in s 93ZAA of the *Crimes Act 1900*, which passed in February 2025 but has yet to commence, makes it an offence to intentionally incite hatred by a public act on the basis of race. The public act must be done in circumstances that would cause a reasonable person who was either the target, or a member of a group of persons that was the target, of the incitement of hatred to fear harassment, intimidation, violence or for their personal safety.

"Race" is defined in s 93ZAA(5) and includes colour, nationality, descent and ethnic, ethno-religious or national origin. The maximum penalty for an offence is two years imprisonment and/or a fine of $11,000 for individuals or $55,000 for corporations. By contrast, the maximum penalty for an offence of serious vilification under s 93Z is three years imprisonment and/or a fine of $11,000 for individuals or $55,000 for corporations.

At first blush, s 93ZAA lowers the bar for conduct that can be criminally prosecuted when compared to s 93Z. The latter criminal provision restricts its scope to acts which intentionally or recklessly threaten or incite *violence* towards another person or group of persons on any of the enumerated grounds (s 93Z(1)). By contrast, s 93ZAA criminalises the incitement of *hatred*.

There are aspects of s 93ZAA that restrict its reach. The first limiting factor is that the provision is restricted to the *intentional* incitement of hatred. Intention is a subjective mens rea state that requires the prosecution to prove that the defendant wanted or desired to bring about the result of causing racial hatred. As affirmed by the High Court of Australia in *Zaburoni v The Queen*,[6] intention in this context denotes a state of mind where the accused meant to or desired to bring about the prohibited result. It does not include an alternative mens rea state of recklessness, which is the case for s 93Z. It is not sufficient that the accused merely foresaw hatred as a likely or possible outcome; the prosecution must prove that hatred was the intended consequence of their conduct.

We note that the Aboriginal Legal Service NSW/ACT recommended to the NSWLRC removing the mental element of recklessness from s 93Z, as it believed specific intent better reflected the seriousness

[6] [2016] HCA 12.

of, and maximum sentence for, the offence of serious vilification. The ALS submitted that less serious, reckless vilification could be better dealt with under the civil provisions in the Anti-Discrimination Act.[7]

The second limiting factor is that s 93ZAA applies to *race*-based incitement of hatred only. At the time of its introduction, community groups raised concerns about s 93ZAA being restricted to hate speech on the grounds of race, and not on the grounds of other attributes. The introduction of a new crime on these terms went against the findings and recommendations of Honourable Tom Bathurst AC KC in the NSWLRC Report 151 into Serious racial and religious vilification.[8]

By contrast, s 93Z protects a broader variety of attributes – specific religious belief or affiliation, sexual orientation, gender identity, intersex status, and HIV or AIDS status. Section 93Z has been criticised for omitting groups that may also require protection from serious vilification; for instance, people who are vilified on the basis of disability, mental illness, performing sex work or experiencing homelessness. Consideration should be given to amending s 93Z to protect this broader range of groups that encounter prejudice and discrimination in society. At the same time, any legislative change should ensure that the terminology used fulfils the purpose of protecting subjugated groups who endure "*disproportionate* problems of prejudice-related crime and violence".[9] The criminal provision should be carefully worded in such a way that it cannot be misused to protect majoritarian, structurally-advantaged groups, such as white supremacists.

In addition to the subjective element of intentional incitement of hatred, the prosecution must prove an objective element of fear for the reasonable person's safety, or fear of harassment, intimidation or violence (s 93ZAA(1)(b)). The Attorney General described in the Second Reading Speech to the *Crimes Amendment (Inciting Racial Hatred) Bill 2025* that the relevant question to be asked is: "objectively, would a reasonable person who was the target of the incitement of hatred, or a reasonable person who is a member of the targeted group of persons, fear these things? It does not need to be shown that the targeted person or group actually did fear the outcomes."[10]

The combination of subjective and objective elements in s 93ZAA is likely to make the offence conceptually more difficult for police officers to understand, be trained on, and to identify offending

[7] Aboriginal Legal Service, Submission to Review of s 93Z relating to Serious Racial and Religious Vilification, https://lawreform.nsw.gov.au/documents/Current-projects/s93z/options-paper-submissions/SV64.pdf
[8] NSWLRC n 1.
[9] Gail Mason, 'Hate crime laws in Australia: Are they achieving their goals?' (2009) 33 *Criminal Law Journal* 326, 328.
[10] Michael Daley, Attorney General, *Parliamentary Debates* (NSW Legislative Assembly, 18 February 2025).

conduct or speech in practice.[11] This subjective/objective combination may also raise difficulties for any prosecutor tasked with evaluating whether there are reasonable prospects of conviction (in particular, to be satisfied that there is sufficient admissible evidence to prove each element of the offence beyond a reasonable doubt).[12] This complicated exercise is exacerbated by the vagueness of the definition of "hatred", as discussed below at 2.5 We note in Part 2.3 below that the elements of similar offences in WA and Victoria are framed in simpler terms.

It is irrelevant, according to s 93ZAA(3), as to whether the defendant's assumptions or beliefs about the race of another person, or a member of a group of persons, were correct or incorrect at the time the offence is alleged to have been committed. It is also irrelevant whether or not, in response to the defendant's public act, any person formed an actual state of mind or carried out an act of hatred. This means that it does not need to be shown that another person was, in fact, incited to feel hatred based upon the first person's public act.

2.1.1 Should Religious Teachings be Excluded from Prosecution?

Section 93ZAA(2) excludes from prosecution "an act that consists only of directly quoting from or otherwise referencing a religious text for the purpose of religious teaching". The Government has not convincingly justified why religious teachings should be excluded from prosecution under s 93ZAA in circumstances where the prosecution would already have established, if the other elements of s 93ZAA are proven, that this religious teaching has the intended purpose of inciting hatred towards another person or a group of persons on the ground of race and caused a reasonable targeted person to fear harassment, intimidation or violence, or fear for the reasonable person's safety. Simply put, where speech is intentionally deployed to incite hatred, its derivation from a religious text should not justify its use. If such an exclusion on religious grounds is justified, why not also exclude the quotation or referencing of historical, scientific or literary texts, for the purposes of education, scientific or scholarly debate, for example? Independent NSW MP Alex Greenwich has observed that "[v]ague references to religious texts are often used to justify hatred for and violence against homosexual, bisexual and transgender people. It could be used to justify racial hate."[13] While overall, we do not support the

[11] See e.g. Critique of the mens rea elements of sexual assault laws by Ian Dobinson and Lesley Townsley, 'Sexual Assault Law Reform in NSW: Issues of Consent and Objective Fault' (2016) 32 *Criminal Law Journal* 152; Critique of drug-induced homicide offence by Elyse Methven, 'Dancing with Death: Why the NSW Homicide Offences of Drug Supply Causing Death May Cause More Harm than Good' 43 *Criminal Law Journal* 155.
[12] See ODPP NSW Prosecution Guidelines: https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-1#guidelineanchor10
[13] Alex Greenwich, *Parliamentary Debates* (NSW Legislative Council, 19 February 2025).

introduction of a new racial hatred offence in NSW, we submit that if the offence were to commence, s 93ZAA should be amended to remove the religious teaching exception.

2.2 Singling Out Racism and Antisemitism as Worthy of Greater Protection than Other Forms of Prejudice

According to the NSW Attorney General, Michael Daley, in the Second Reading Speech to the Bill, s 93ZAA is a "targeted legislative response" to "recent instances of antisemitic behaviour" in Sydney.[14] By only protecting people on the ground of race, s 93ZAA singles out race as a category that is worthy of greater protection than other groups in s 93Z. Further, the reiteration during the Second Reading Speech of the fact that the Bill was implemented to address Antisemitism leaves the impression that the Government has rushed through a law to respond to one form of racism without adequately considering how the law might be used to target other forms. This impression is consistent with government rhetoric at a state and federal level in recent years, which has exceptionalised and prioritised Antisemitism over other kinds of racism and prejudice prevalent in Australian society.

There is a risk that this explicit prioritisation of Antisemitism over other forms of racism, and racism over other forms of prejudice, could *alienate and marginalise community groups* who feel under-protected or unprotected by how police enforce the criminal law. The unequal treatment for people under the law, as well as the perception of such unequal treatment, can also create resentment among certain groups who may feel that their inherent dignity is less valued, and that they have inferior standing when it comes to influencing government policy.

2.3 Similar Laws in Victoria and WA

Victoria

Victoria also introduced an inciting racial hatred law through the *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Bill 2024* (Vic) that has yet to commence. It will repeal Victoria's *Racial and Religious Tolerance Act 2001* (Vic) and amend the *Crimes Act 1958* (Vic) and *Equal Opportunity Act 1984* (Vic) to expand Victoria's anti-vilification regime to include both criminal and civil anti-vilification provisions. In Victoria, under the *Racial and Religious Tolerance Act 2001* (Vic) s 24(2), it is an offence to

[14] Michael Daley, Attorney General, *Parliamentary Debates* (NSW Legislative Assembly, 18 February 2025).

> on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

There is a similar offence of serious religious vilification in s 25(2).

The *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Bill 2024* (Vic) seeks to expand the list of protected attributes to include disability, gender identity, race, religious belief or activity, sex, sex characteristics, sexual orientation and personal association with a person who is identified by reference to any of the attributes protected. Importantly, it also proposes a new s 195N offence in the Victorian *Crimes Act* which will make it an offence to incite or intend to incite "hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons" on the basis of those persons' protected attribute(s). Alongside the expanded set of protected attributes iterated by the new offence, the use of the phrase "likely to incite" lowers the threshold of the offence from its current iteration. The new incitement offence is also proposed to carry a maximum three-year prison sentence, higher than the current maximum penalty of six months' imprisonment and/or 60 penalty units.

Western Australia

Western Australia has a range of laws in ss 77-80B of the *Criminal Code Compilation Act 1913* (WA). Of these, s 77 is most similar to s 93ZAA and makes the following an offence:

> Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offences with lesser penalties are found in ss 78 (Conduct likely to incite racial animosity or racist harassment), 80A (Conduct intended to racially harass) and 80B (Conduct likely to racially harass).

According to the NSWLRC, between 8 December 2004 and 31 July 2024, the offence under s 77 has only been proven 5 times. The lesser offences under ss 78, 80A and 80B have been proven once, 17 times and 29 times respectively.[15]

[15] NSWLRC n 1, 49.

2.4 Sufficient Laws are Already in Place

It is common for politicians and commentators to call for increased police powers and tougher penalties to combat social ills. This has been observed in recent decades in political rhetoric about student protests at universities and in public places, which has invoked law-and-order discourses to justify heightened surveillance, disciplinary measures and even criminal sanctions. For instance, protests concerning issues such as climate justice, Indigenous rights, or the Israeli-Palestinian conflict have, at times, been characterised by public officials as threats to public order or national security, thereby legitimising coercive state responses.

We do not disagree with the stated need to respond urgently to racism and Antisemitic attacks, but rather, question whether that response should take the form of a rashly introduced criminal law. And although it was rushed through Parliament, almost half a year later, this new criminal provision has not yet commenced.[16] The delay between the passing and commencement of the legislation undermines the argument that there was a pressing need for a new incitement of racial hatred criminal offence. One might question whether the Government was more concerned with appeasing influential lobby groups and vocal media commentators.

Extensive criminal and civil laws exist at a NSW state and federal level that target conduct and speech that vilifies, incites violence towards, discriminates against or causes offence to people, whether this be on the basis of race, or on other grounds. These laws are listed on pp 6-7 of the Issues Paper and in our submission to the NSWLRC review of the effectiveness of s 93Z of the *Crimes Act 1900*. We agree with the NSWLRC that data should be collected to track how general criminal offences are being policed and charged in situations involving hatred or prejudice.[17]

Some of these laws have simpler elements than the offence in s 93Z and carry more serious punishments. The Government should not add to these laws, but rather, in some instances, restrict their scope so that they are not being misapplied to speech that is not sufficiently serious to warrant interference from the criminal law. Criminal laws should also be restricted so that they do not capture mere "offensive" speech of marginalised or minority groups that seeks to challenge police authority. We discuss this further below.

[16] Michael Daley, Attorney General, *Parliamentary Debates* (NSW Legislative Assembly, 18 February 2025).
[17] See NSWLRC n 1.

2.5 Vague Definition of "Hatred" May Capture Conduct Unworthy of Criminalisation

Section 93ZAA will make it an offence to intentionally incite *hatred* towards another person or a group of persons on the ground of race. The term "hatred" has been criticised as imprecise and subjective.[18] Hatred is not defined in s 93ZAA, although in the second reading speech to the Bill, the Attorney General referred to hatred as meaning "a feeling of hostility or strong aversion towards a person". He also referenced the *Macquarie Dictionary* definition of hatred as "the feeling of someone who hates; intense dislike; detestation" and the *Oxford English Dictionary* definition of hatred as "a feeling of intense dislike or aversion towards a person or thing; an emotion in which such a feeling is experienced; loathing; hostility; malevolence". With these definitions in mind, it is important to underscore that the nature of a hate crime arises due to hostility towards a person *because* they are a member of a marginalised group.

The NSW Opposition Liberal/ National Coalition was "reluctant" to support the Bill due to its "criminalisation of speech, in the absence of a direct incitement to engage in an act of violence".[19] The Opposition also expressed reservations about criminalising hate, which it noted "is not defined in the Crimes Act or in this bill. Hatred is essentially an emotion or feeling. It is not in itself an act. Hatred may have many motivations and dimensions."[20] In its Report of Serious Racial and Religious Vilification, the NSWLRC referred to a selection of tribunal observations about defining "hatred" in civil proceedings, to the effect that the concept of hatred is difficult even for lawyers to pin down, and involves "impressionistic, rather than empirical assessments."[21] The NSWLRC also referred to the difficulties of defining hatred and "stirring up hatred" in the Irish criminal offence (*Prohibition of Incitement to Hatred Act 1989*), resulting in its "underuse".[22] There is a real possibility that such ambiguity could result in s 93ZAA capturing conduct unworthy of criminalisation, especially when there are few defences under the provision. A related concern is that public fear of broad police enforcement of the section might stifle legitimate community debate.

A central principle of the rule of law is that the law must be drafted in a clear and precise fashion so that it can be fairly enforced. A potential problem with the vague and subjective definition of hatred is that improper ideas might cloud the judgement of those enforcing or adjudicating this provision. For instance, they may choose to have regard to the controversial IHRA definition[23] of Antisemitism that

[18] NSWLRC, n 1, 51.
[19] Damien Tudehope, *Parliamentary Debates* (NSW Legislative Council, 20 February 2025).
[20] Ibid.
[21] NSWLRC, n 1, 51-52.
[22] Ibid, 52.
[23] 'Working Definition of Antisemitism', https://holocaustremembrance.com/resources/working-definition-antisemitism

has now been instituted by numerous Australian organisations and bodies, and has been recommended by the Australian Special Envoy on Antisemitism to be adopted by others.[24] This definition has attracted criticism because it conflates criticism of the actions of the state of Israel with Antisemitism.[25]

Given that police in other countries have sought to quash pro-Palestine chants,[26] the broadening of hate laws is likely to open the gates to the policing of criticism of the Israeli state. At a time of Israel's blockade of aid and the mass starvation of the Palestinian people which has been recognised by the NSW Supreme Court,[27] including imminent famine of up to 40,000 Palestinian children under the age of one, criticism of the inhumane actions of the Israeli state are not only legitimate but, we believe, necessary.

Allegations of Antisemitism on university campuses have been weaponised to silence student expressions of opposition to the continuing occupation and unfolding genocide[28] of Palestinians by the state of Israel under President Netanyahu.[29] University staff have been investigated for misconduct[30] and had research funding suspended.[31] Students have been investigated by university management and police due to peaceful involvement in pro-Palestinian campus protests.[32]

In other sectors, including the media and legal professions, staff have lost their jobs[33] and been issued with warnings[34] due to voicing opposition to Israeli atrocities committed in Gaza and wearing the keffiyeh.[35] Artists and writers have had their contracts rescinded on this same basis.[36] This backdrop of

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[24] Jillian Segal, 'Special Envoy's Plan to Combat Antisemitism' https://www.aseca.gov.au/sites/default/files/2025-07/2025-aseca-plan.pdf 6.
[25] See contemporary examples of Antisemitism in the 'Working Definition of Antisemitism' https://holocaustremembrance.com/resources/working-definition-antisemitism.
[26] https://www.aljazeera.com/video/newsfeed/2025/6/29/uk-police-investigate-glastonbury-performers-who-led-pro-palestine-chants
[27] *Commissioner of Police (NSW Police Force) v Joshua Lees* [2025] NSWSC 858, [26],
[28]See https://www.nytimes.com/2025/07/30/opinion/gaza-genocide-hospitals-health-system-israel.html; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel*) (ICJ, Order of 26 January 2024).https://www.icj-cij.org/case/192/orders
[29] https://www.campusreview.com.au/2025/06/talking-about-palestine-a-career-killer-report/
[30] https://www.arabobserver.com/israeli-lobby-silencing-anti-zionist-academics-at-australian-university/
[31] https://www.theguardian.com/australia-news/2025/feb/28/arc-suspends-870000-grant-to-pro-palestine-academic-randa-abdel-fattah-senators-told
[32] https://www.theguardian.com/australia-news/2025/jun/02/students-recommended-for-expulsion-university-of-melbourne-pro-palestine-office-protest-ntwnfb;
[33]https://www.bbc.com/news/articles/cj4exrwj8pjo; https://www.theguardian.com/australia-news/article/2024/jun/17/melbourne-black-star-pastry-employees-sacked-wearing-keffiyeh-work-discrimination-case
[34] https://www.deepcutnews.com/p/legal-aid-nsw-bans-staff-from-discussing
[35] https://www.theguardian.com/australia-news/article/2024/jun/17/melbourne-black-star-pastry-employees-sacked-wearing-keffiyeh-work-discrimination-case#:~:text=Two%20employees%20who%20were%20sacked,breached%20Victoria's%20Equal%20Opportunity%20Act.
[36] https://www.smh.com.au/culture/books/state-library-probed-writers-political-religious-views-before-cancellations-20240715-p5jttd.html; https://www.abc.net.au/news/2024-08-14/mso-cancel-jayson-gillham-

speech being silenced is significant; it is in this context that there are calls for further restrictions on speech, and a dangerous conflation of opposition to the policies and actions of the Israeli government with Antisemitism. It is integral that peaceful debate and robust criticism of such policies in the media, universities and public spaces remain free from government interference.

2.6 Misuse of Criminal Law to Target Marginalised Groups

We note that this review relates to the protection of *vulnerable* groups. As presently drafted and enforced, the NSW vilification regime and other criminal offences may not serve their primary purpose, which is to protect marginalised groups from racist and hateful conduct. We fear that expanded racial hate laws may be used against marginalised groups who are already familiar with having their speech policed by law enforcement. As we note in our submission to the NSWLRC (2024):

> The literature on policing hate speech highlights the problems with police being charged as the agents of stamping out racial prejudice while at the same time being responsible for over-policing targeted racialised communities, such as First Nations, Muslim and Vietnamese communities. In the seminal book by Professor Gail Mason and colleagues, *Policing Hate Crime*, the authors suggest that in the absence of a dedicated police group addressing hate crimes, systematic approaches and organisational leadership, it will be impossible to achieve coherence. Consequently, the discretion placed in the hands of individual officers in the NSW Police Force can result in the groups the law seeks to protect becoming criminalised. Certainly, with reports of white supremacist attitudes in the NSW Police Force, it is concerning that biases within the NSW Police will err towards protecting Anglo-Saxon people. On this issue, we note the existence of the Engagement and Hate Crime Unit (EHCU) and the Hate Incident Review Committee (HIRC) within the NSW Police, but also, limitations recognised by the report of the Special Commission of Inquiry into LGBTIQ Hate Crimes with respect to the EHCU and HIRC, including with regard to how hate crimes are brought to the attention of the EHCU and HCRIC, the limited (intelligence only) function of the EHCU, and the lack of independent review mechanisms of police decisions with respect to hate crimes.
>
> Given contemporary reports of racism in Australian police forces, we contend that the police may not be best positioned to determine the quality, motivations and harms of racism.[37]

concert-gaza-comments/104220344; https://www.theguardian.com/australia-news/2025/may/08/court-greenlights-trial-of-pianists-discrimination-claim-after-melbourne-orchestra-cancelled-concert-ntwnfb

[37] See Submission to NSWLRC, https://lawreform.nsw.gov.au/documents/Current-projects/s93z/prelim-subs/SV20_-_UTS_Law_-_Criminal_Justice_Cluster.pdf 26-27 and references therein.

Systemic racism and sexism has been found to exist in the Queensland Police,[38] and direct and systemic racism in the Northern Territory Police, notably in relation to Aboriginal and Torres Strait Islander people.[39] The coronial findings into the death of Kumanjayi Walker in the NT (2025) document racist attitudes towards Aboriginal people held by members of the NT police force, at an individual, structural and institutional level.[40] The Coroner found that NT police officer Zachary Rolfe was racist, and that there was a risk that this racism affected his response to an Aboriginal man "in a way that increased the likelihood of a fatal outcome."[41] The Coroner also found that NT Police was an organisation with significant hallmarks of institutional racism. There was evidence presented to the Inquest of "the widespread use of racist language, not only in the Alice Springs Police Station but of its 'normalisation' in the NT Police Force more broadly." [42] It is unsurprising that Aboriginal and Torres Strait Islander people are reluctant to report racism to police,[43] whose officers are a source of racism, and even more reluctant to report racism inflicted *by* the police.

When policing is targeted at cultural minorities, it is difficult to conduct policing to also protect those cultural minorities.[44] Mason and colleagues provide the example of the post 9/11 environment in the United States.[45] While police were aware that 9/11 had precipitated an acceleration of hate violence towards Muslim communities in the US, and sought to build trust with Muslim communities, the context of the "war on terror" meant that community policing was undercut by counter-terrorism policing aimed at Muslim communities. This meant that Muslim people who reported hate crimes could become police suspects because of their membership of the Muslim community. Consequently, they suggest that building community-based policing is a better way to protect marginalised communities than criminal and carceral strategies.[46]

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[38] Queensland Human Rights Commission, *Strengthening the Service* (2024) (https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0014/51431/QHRC-Strengthening-the-Service-report-full.pdf#page=13.11

[39] *Inquest into the death of Kumanjayi Walker* [2025] NTLC 8 https://agd.nt.gov.au/__data/assets/pdf_file/0004/1541758/Inquest-into-the-death-of-Kumanjayi-Walker-2025-NTLC-8.pdf

[40] Ibid.

[41] Ibid, [198].

[42] Ibid.

[43] Mario Peucker, Tom Clark and Holly Claridge, 'Mapping the Journey of (non-) Reporting in Response to Racism' (2024) 45(3) *Journal of Intercultural Studies* https://www.tandfonline.com/doi/full/10.1080/07256868.2023.2296026#d1e204; Human Rights Law Centre, End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community https://www.hrlc.org.au/app/uploads/2025/04/1809-End-The-Hate-Report.pdf

[44] Gail Mason, et al, *Policing Hate Crime: Understanding Communities and Prejudice* (Routledge 2017), 61.

[45] Ibid, 61.

[46] Gail Mason, JaneMaree Mather, Jude McCulloch, Sharon Pickering, Rebecca Wickes and Carolyn McKay, *Policing Hate Crime: Understanding Communities and Prejudice*, Routledge 2017, 61.

A related concern is the misuse of the criminal law to target speech that criticises culturally dominant groups. Aboriginal and Torres Strait Islander people are overpoliced by the criminal law, including via offensive language criminal provisions, for *opposing* racism or resisting white "authority".[47] In the case of *R v Brown*, described by criminal law scholar Tamara Walsh, a woman was convicted of public nuisance for calling police officers "Captain Cook white cunts".[48] In the appeal against sentence, the Queensland Court of Appeal noted that the offender "had been raped by an Anglo-Australian man as a child on Palm Island, that her brother had recently hanged himself, and that in her struggle with police, she had sustained serious damage to her eye which caused some loss of vision and required surgery." Walsh acknowledges that "it was clear to the court that the offensive remark she made had a depth of meaning that reflected her experience of powerlessness in the face of 'white' male dominance".[49] In the case of *Green v Ashton*,[50] an Aboriginal woman was convicted for telling a police officer, "I don't care, you are all racist cunts". Methven writes that:

> Police do not typically use offensive language laws to protect minorities from racism. Instead, studies and inquiries have documented how police have used these laws as an instrument of racism (Wootten, 1991; White, 2002; Feerick, 2004; Anthony et al., 2021). The excessive enforcement of offensive language laws against First Nations Australians has been linked to the fiction of Australia as *terra nullius*, with Watego, Mukandi and Coghill (2018) arguing:
>
> > The presence of Blackfullas exposes the lie of unoccupied land, and offends white sensibilities. Consequently, it is the bodies, acts and speech of Blackfullas that must be regulated, curtailed and caged as a means to contain the lie, or at the very least, rationalize the imperative for lying. (p. 422)

With respect to the crime of racial vilification in Western Australia, police in 2006 charged a 15-year-old Aboriginal girl in Kalgoorlie for calling an Anglo-Saxon woman a "white slut". The complainant said she was concerned about the physical assault, not the verbal one, and likened the abuse to schoolyard name-calling. Dismissing the charge, the magistrate in Kalgoorlie Children's Court said that racial vilification laws were intended to deal with serious abuse and that petty name-calling should not

[47] Tamara Walsh, "Public nuisance, race and gender" (2018) 26(3) *Griffith Law Review* 334, Rob White, "Indigenous Young Australians, Criminal Justice and Offensive Language" (2002) 5 *Journal of Youth Studies*; Elyse Methven "A little respect: Swearing, police and criminal justice discourse (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58;Hannah Trollip, Luke McNamara, Helen Gibbon, "The factors associated with the policing of offensive language: a qualitative study of three Sydney Local Area Commands." (2019) 31(4) *Current Issues in Criminal Justice* 493.
[48] Tamara Walsh, "Public nuisance, race and gender" (2018) 26(3) *Griffith Law Review* 334.
[49] Ibid, 349.
[50] [2006] QDC 8.

be punished under such laws.[51] What was worrying about this case was that the prosecution saw it fit to charge the defendant with this serious offence as a "test case" for the then new law.[52]

Aboriginal and Torres Strait Islander people have effectively used anger and swearing to resist oppression and injustice.[53] There is a concern that such speech might be captured by a broad reading of the offence of inciting racial hatred. Mununjali and South Sea Islander woman and Professor of Indigenous health at Queensland University of Technology, Dr Chelsea Watego, has argued that anger can be an 'effective anti-racism strategy'[54] She writes:

> Last time I checked, anger was a normal and natural human emotion, which … should have the right to experience. But more than that, I reckon being angry is the only thing that has got black people anything, either locally or globally (but certainly not as much as it has got white people in the course of history)… … Race is about power, and power is not readily relinquished – we simply cannot outthink or outrun it. We must fight it head on, and for that fight we need to be angry."[55]

Methven has also argued, with respect to the policing of offensive language, that:

> Lacking access to real justice, swearing at white people and their institutions allows First Nations people to 'laugh at their oppressors and exercise their own legal method by using swear words which portray the police and their legal culture as grotesque' (Langton, 1988, pp. 219–20; see also Eades, 2008). It is as the targets of ever-present racism set against the backdrop of illegitimate colonial control that First Nations women deftly deploy *cunt* to 'crack the facades of power', whether it be to express anger at white authority figures such as police (through phrases like *white cunts* or *dog cunts*) or as transgressive humour (such as using *cunt* in the courtroom to mock the idea of white 'justice' (McCullough, 2014; also see Walsh, 2017).[56]

We can also learn from the case of Australian footballer Samantha Kerr in the UK. When Australians first learnt in 2024 that Kerr had been charged for using so-called "racist" language on 30 January 2023, little was known about the facts of the case. However, it was reported in the mainstream media that Kerr had called a police officer a "stupid white bastard".[57] It was later revealed in court proceedings that Kerr had called a London Metropolitan police officer "fucking stupid and white" after the officer

[51] WA court dismisses charges over racial insult Program:AM, 15 Sep 2006, https://www.abc.net.au/listen/programs/am/wa-court-dismisses-charges-over-racial-insult/1264924
[52] Ibid.
[53] See Marcia Langton, Being Black: Aboriginal Cultures in 'Settled' Australia (Aboriginal Studies Press, 1988).
[54] https://www.theguardian.com/commentisfree/2018/jan/31/the-audacity-of-anger
[55] Ibid.
[56] Elyse Methven, 'It might be powerful; but is it offensive? Unpacking judicial views on the c-word' (2024) 36(2) *Current Issues in Criminal Justice* 135.
[57] https://www.theguardian.com/football/2024/mar/06/sam-kerr-allegedly-called-police-officer-a-stupid-white-bastard-source-says

had doubted Kerr's claims that she had been "held hostage" in a taxi.[58] Kerr and her partner had been out in Clapham, south-west London, before hailing a black cab. Kerr was charged under s 4A of the *Public Order Act UK* (1987). The alleged racial nature of Kerr's language prompted police to racially aggravate her charge within the terms of s 28 of the *Crime and Disorder Act 1998* (UK).

When the prosecutor questioned Kerr in court about what the race of the officer had to do with anything when she called the officer "stupid and white", Kerr replied: "I felt it was him using his privilege and power over me because he perceived me to be something I'm not."[59] Kerr also denied in cross-examination that she had chosen that moment, as the prosecution put it, "to demonstrate [her] hostility towards him because of his whiteness". Kerr's legal counsel had argued that her client's words should be construed in light of the stress and fear that she felt for her life in the taxi, as well as the police questioning of Kerr's version of events and calling her "Missy".

There was criticism of the decision to prosecute Kerr for a racially aggravated offence, as it disregarded the privileged position of white people in UK society. The NSW offences of serious vilification and inciting racial hatred (uncommenced) in ss 93Z and 93ZAA are also at risk of capturing so-called "reverse racism" against the white majority. Professor Karen O'Connell has argued that "white people are the dominant people historically and culturally within Australia. They are not in any sense an oppressed group whose political and civil rights are under threat".[60] Associate Professor Mario Peucker has observed that:

> Racism also reflects and manifests as systemic exclusion and marginalisation based on historically rooted power imbalances and racial hierarchies that put white people at the top.
>
> To put it very simply, the scholarly (if not the legal) definition is that 'racism equals power plus prejudice'.
>
> …
>
> This may sound a bit abstract, but if we do not recognise this power dynamic, we trivialise racism as little more than name-calling. We will fail to understand how racism operates and how it continues to affect people from racially marginalised groups in their daily lives.[61]

Peucker points to the fact that in the UK, where Kerr was charged: "institutional racism – including within the police force – has been recognised since the release of the Macpherson Report on Stephen

[58] Ibid.
[59] https://www.bbc.com/news/articles/c0m12zmmvxxo
[60] Karen O'Connell, 'Pinned like a Butterfly: Whiteness and Racial Hatred Laws' (2008) 4(2) *ACRAWSA e-Journal* 59.
[61] Mario Peucker, "Sam Kerr's alleged comments may have had a racial element, but they were not 'racist'" (The Conversation, 8 March 2024) https://theconversation.com/sam-kerrs-alleged-comments-may-have-had-a-racial-element-but-they-were-not-racist-225267

Lawrence in 1999. It was reaffirmed in 2023 by the Baroness Casey Review, despite some political pushback."[62] Powerfully, Peucker argues:

> The issue of power structures should also be seen through an institutional lens. It is difficult to imagine a person on the streets of London with more institutional power than a white police officer.
> Being called a "stupid bastard" might hurt someone's feelings. But while I'm in no position to judge whether Sam Kerr's alleged actions have caused "distress" to the officer – as the law would require – labelling the incident as racist is clearly not in line with what racism means.
> Such a definition would not align with the concept's institutional and systemic dimensions. It is not what anti-discrimination laws were intended to outlaw.
> Claims of anti-white or "reverse" racism are based on a shallow, misguided and inaccurate understanding of what racism really constitutes.[63]

Joel Hodge also writes that a neutral conception of racism runs the risk of concealing other forms of racial injustice, particularly the historical injustices which mean minorities continue to suffer disadvantages in social and economic wellbeing.[64]

One pathway that could be taken is to make it clear in the legislation that the purpose of criminal vilification laws (and if it commences, the inciting racial hatred offence) is to protect culturally marginalised groups. A more significant and impactful change comes at the level of law enforcement and institutional reform. There needs to be a dedicated police group addressing hate crimes that is informed by expert evidence, broader training of police on vilification legislation, recognising and combating racism and prejudice within the police force, and organisational leadership that acknowledges the existence of, and does not tolerate, prejudice and discrimination within the force. Education and training on vilification legislation, racism and prejudice should also take place at other levels of the criminal justice system, including judicial officers and the DPP.

[62] Ibid.
[63] Ibid.
[64] Joel Hodge, 'How Sam Kerr sparked a national conversation on racism' (*Eureka*, online, 27 March 2024) <https://www.eurekastreet.com.au/article/how-sam-kerr-sparked-a-national-conversation-on-racism>.

2.7 Concerns Remain about Unjustified Prosecutions

As we raised in our 2024 submission to the NSWLRC on the effectiveness of s 93Z,[65] the literature raises concerns about how inappropriate policing practices and biases might affect decisions to prosecute hate crimes. Consideration should be given to increasing the oversight of a police officer's decision to charge a person with serious vilification, and, if it commences, the offence of inciting racial hatred. The previous requirement for DPP consent to prosecute serious vilification charges acted as a safeguard to ensure that the decision-maker was familiar with the NSW Office of the DPP Guidelines for Prosecution, which include requirements for decisions to be made in the public interest, to ensure that there is a reasonable prospect of conviction, and for decisions to not be affected by such factors as political pressure, political consequences or the political associations of the accused and persons involved.

[65] https://lawreform.nsw.gov.au/documents/Current-projects/s93z/prelim-subs/SV20_-_UTS_Law_-_Criminal_Justice_Cluster.pdf

3. Terms of Reference 2: The interaction between these protections and existing rights and freedoms, including the implied freedom of political communication and freedom of religion

3.1 Introduction

According to the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, criminalisation should be reserved for serious instances of vilification.[66] This is especially the case when such criminalisation might interfere with fundamental democratic rights, such as the rights to freedom of speech and free assembly. There is a real risk that any further criminalisation, including the commencement of s 93ZAA of the *Crimes Act*, can directly or indirectly suppress or stifle free expression, debate and criticism.

3.2 The Implied Freedom of Political Communication

In Australia, there is no Bill of Rights. Nor is there an explicit constitutional recognition of the right to free speech analogous to the US First Amendment. Rather, a "weak" freedom of political communication, which acts as a constraint on government, has been implied by the High Court of Australia into the Australian Constitution. As such, freedom of speech is not guaranteed as a matter of substantive law in Australia, with the constitutionally implied freedom of political communication merely serving as a means to challenge the validity of laws which may impermissibly burden political communication, provided the contested law does not burden political communication for a legitimate, proportionate purpose. At the constitutional level, the implied freedom of political communication is tested through a structured proportionality analysis, as developed in *Lange v ABC* and refined in *McCloy v New South Wales*. Under this framework, a law that burdens political communication will be invalid unless it:

1. Serves a legitimate purpose compatible with the system of representative and responsible government;
2. Is suitable (i.e., rationally connected to that purpose);
3. Is necessary (i.e., there are no obvious, less restrictive means of achieving the same purpose); and
4. Is adequate in balance, meaning the law's effect on the freedom is proportionate to the importance of the law's objective.

[66] David Kaye, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, Un Doc A/74/486 (9 October 2019) <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/A_74_486.pdf>.

As yet, no claim made on this basis has succeeded in impugning Australian anti-vilification laws, and it is unlikely that anti-vilification laws would fall afoul of the implied freedom of political communication on the current jurisprudence, particularly if such laws are carefully drafted to pursue the legitimate aim of protecting individuals and communities from harm, without unnecessarily encroaching upon political discourse. Regardless, a democratic society like Australia must remain vigilant against laws that, even in pursuit of laudable goals, risk silencing dissent or deterring legitimate debate. As the UN Special Rapporteur has cautioned, criminalisation should be a measure of last resort, not a default response to offensive or disturbing speech. The challenge for Australia lies in ensuring that laws like s 93Z strike an appropriate balance—targeting genuinely harmful conduct without encroaching upon the fundamental freedoms that underpin a vibrant, pluralistic democracy.

Due to the numerous problems with the uncommenced s 93ZAA identified above, it is our contention that the proposed offence of inciting racial hatred does not strike the appropriate balance.

It is also worthwhile noting that free speech is also recognised, in part, from Australia's common law tradition. There is the common law notion that "everybody is free to do anything, subject only to the provisions of the law." The common law principle of legality also requires courts to presume legislatures do not possess an intention to interfere with fundamental rights and freedoms — including freedom of speech — unless such contrary intention is clearly manifest by way of unmistakable and unambiguous language. The human rights charters of the ACT, Victoria and Queensland can also be argued to be another form of free speech safeguard in Australia — where these charters require legislation to be construed in a manner which is compatible with recognised human rights (i.e. the rights found in the ICCPR) — to the extent it is possible to do so consistently with the purpose of the legislation. Notably, no such human rights charter exists in NSW.

3.3 International Law Obligations and their Interpretation

It is important to distinguish between whether states are obliged under international human rights law to make conduct *unlawful* or to make it *criminal*. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) are the two main international law instruments which place obligations on Australia to enact laws that prohibit hate speech. Australia is bound by both agreements.

Article 20(2) of the ICCPR requires State Parties to prohibit the "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".

Article 4(a) of the ICERD requires States Parties to criminalise "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". With respect to Article 4, the UN Committee on the Elimination of Racial Discrimination has observed that "broad or vague restrictions on freedom of speech have been used to the detriment of groups protected by the Convention" and stressed that "measures to monitor and combat racist speech should not be used as a pretext to curtail expressions of protest at injustice, social discontent or opposition."[67]

Regard should also be had to Article 19 of the ICCPR, which requires laws to be implemented in such a way that preserves freedom of expression. However, Article 19(3) states that freedom of expression:

> carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Criminal sanction, when used to suppress speech, should be a last resort. The widening of criminal law, coupled with any resultant expansion of procedural police powers, may have the consequence of further stifling debate and dissent. Since October 2023, we have witnessed a disturbing pattern of police using move-on powers, extraordinary emergency powers, force, and powers of arrest against protestors who assemble to oppose the occupation of Palestine, the bombings and starvation of the Palestinian people by the Israeli government and the supply of weapons components by Australia to Israel.[68] Censorious tendencies in the application of public order laws, particularly in the context of political protest, reflect a worrying trend toward the securitisation of dissent. One stark example is the case of Greens candidate and activist Hannah Thomas, who suffered serious eye injuries whilst being arrested by NSW Police at a pro-Palestinian rally in 2025.[69] Such incidents raise legitimate questions about the proportionality of state responses to civil disobedience and the extent to which public order justifications are being stretched to suppress politically unpopular speech. The invocation of broad statutory powers—often

[67] https://docs.un.org/en/CERD/C/GC/35.
[68] See https://www.theguardian.com/australia-news/2025/jul/07/hannah-thomas-eye-injury-arrest-nsw-police-emergency-riot-powers-ntwnfb; https://www.amnesty.org.au/amnesty-joins-call-for-urgent-repeal-of-anti-protest-laws-following-police-brutality-toward-palestine-protesters/; https://www.crikey.com.au/2025/03/20/australia-police-state-protest-laws-crime-punishment-coal-gas-palestine-israel/; https://www.9news.com.au/national/israel-hamas-update-pro-palestine-protest-at-port-botany-ends-in-arrests/17471b1b-8f6c-4c4f-b41d-4ab3d378e4ab
[69] https://www.theguardian.com/australia-news/2025/jul/07/hannah-thomas-eye-injury-arrest-nsw-police-emergency-riot-powers-ntwnfb.

with little oversight and limited accountability—risks normalising the treatment of protest as a threat to security rather than an exercise of democratic participation.

This approach runs counter to the spirit of Article 19 of the ICCPR, to which Australia is a signatory. While restrictions on expression are permissible under Article 19(3), they must meet strict tests of legality, necessity, and proportionality. The UN Human Rights Committee has consistently emphasised that States must not rely on vague or overly broad legal provisions to silence criticism of government policy, nor can they invoke "public order" in a way that undermines the core of the right itself.[70] Criminalising expressive conduct with ambiguous and subjective criteria, and deploying excessive powers against protestors—especially in the absence of imminent harm—fails these tests and risks breaching Australia's international obligations.

The combination of expanding hate speech offences, aggressive policing of dissent, and the lack of a constitutionally entrenched right to freedom of expression places Australia at a crossroads. Without strong statutory or constitutional safeguards, there is a real risk that the threshold for what counts as "unlawful" or "dangerous" speech will continue to erode. In turn, this could chill political expression, disproportionately affect minority communities, and undermine the robust democratic debate essential to accountable government.

Rather than defaulting to punitive legal measures, NSW and Australia must consider adopting a rights-based legislative framework that genuinely protects free expression while addressing harmful conduct through proportionate and narrowly tailored means. In doing so, it should heed the warnings of international human rights bodies and ensure that freedom of expression is not sacrificed in the name of vague appeals to order or civility.

[70] See, eg, https://www.ohchr.org/en/press-releases/2023/04/un-human-rights-chief-urges-uk-reverse-deeply-troubling-public-order-bill.

4. Terms of Reference 3: Any other matters related to criminal law reform that the Government could consider to enhance social cohesion.

4.1 Anti-Protest Laws

One way to enhance social cohesion is to wind back the criminalisation of public protest through recently enacted police powers and criminal offence provisions. While there are several such pieces of recently introduced legislation that encroach on the right to protest,[71] an example of legislation that unduly constrains free speech and public assembly is the *Crimes Amendment (Protecting Places of Worship) Act 2025* (NSW). The Act grants police powers to arrest and move on people in or near a place of worship. The use of imprecise terminology such as "near" increases the potential for police misuse of these powers. The NSW Council for Civil Liberties has argued that "these offences could be used to charge members of a congregation protesting their own organisation, sexual abuse survivors demanding justice from that church, and any short-notice demonstration that happens within the vicinity of a place of worship, such as Sydney Town Hall."[72]

Protest is an integral right in a robust democracy. The criminalisation of protest fosters a broader view and treatment of protestors as obstructive, anti-social and even dangerous. The passing of more criminal laws and greater procedural powers to limit protest also shifts government resources away from more meaningful ways to combat racism and increase community cohesiveness, such as community education and police training in relation to the enforcement of existing laws.

4.2 Police Training and Combating Institutional Racism

As evidenced in our analysis above, criminal anti-vilification and offensive language crimes in NSW and Australia are policed in a discriminatory and uneven fashion. In addition, there is evidence of individual and institutional racism in the police force. A way that social cohesion could be increased is for racism, and the inappropriate or excessive use of police force against minorities, to be taken seriously by NSW Police, and the appropriate resourcing and empowerment of the NSW Law Enforcement Conduct Commission to robustly scrutinise the police. There is a culture of denial and evasion with respect to racism in the NSW Police force, where senior police leadership downplay the existence of racism, and the inappropriate and unlawful use of police powers by officers.[73] Perpetrators

[71] See examples of anti-protest legislation in David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 8th edition, 2025) 545-6.
[72] NSW Legislative Council for Civil Liberties, Submission, AntiSemitism in NSW, April 2025, 4.
[73] See, eg, https://www.theguardian.com/australia-news/2023/jul/31/nsw-police-use-force-against-indigenous-australians-at-drastically-disproportionate-levels-data-shows

are likely to be inadequately sanctioned, if sanctioned or investigated at all. The government should prioritise the education and training of police to combat racism within the ranks of police. NSW Police leadership should introduce systemic changes to address the disproportionate impact of policing on Aboriginal and Torres Strait Islander people and their overrepresentation in the criminal justice system.

4.3 Vagueness and Subjectivity Problematic for Other Criminal Laws

We note that observations about vagueness and subjectivity have been made about the crime of offensive language in s 4A of the *Summary Offences Act 1988*. This criminal offence has been stridently criticised for being too broad, so that people are unable to easily anticipate whether their language will be criminalised, and therefore liable to unfair and uneven enforcement.[74] The NSW Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody recommended in 2021 that s 4A (offensive language) be amended to:

> ensure that the offence only captures a situation where there is intimidation and/or an actual threat of harm, except if the offensive language is used in or near or within hearing of a school.[75]

We urge the NSW Government to either repeal s 4A or limit the scope of the crime of offensive language so that it is limited to threats of harm or intimidation. It is perverse that the speech (predominantly phrases that include the swear words *fuck* and *cunt*) of Australians, and disproportionately, Aboriginal and Torres Strait Islander Australians, is being punished under this broad provision while acts of serious vilification against minority and marginalised groups are ostensibly under-policed.

[74] See, eg, NSW Law Reform Commission (Penalty Notices Report 132, 2012).
[75] Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (NSW Legislative Council, 15 April 2021) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf> (Recommendation 10).