

**Submission to the Independent Review of Criminal Law Protections against the
Incitement of Hatred in NSW – Consultation
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I thank the Secretariat for the invitation to make a submission in relation to the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (“Inciting Racial Hatred Act”). This new section, 93ZAA follows s 93Z. S 93Z criminalises public threats or incitement to violence based on various protected attributes, including race and religious belief or affiliation. The legislative purpose of this new section is to target hateful, racist language that may inspire others to commit violent acts, with a focus on inciting hatred.¹

My response to the focus questions of this consultation are as follows:

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

There is no doubt that ‘hate speech’ and incitement of hatred causes significant harms to individuals, groups and the wider community. It can not only incite violence, but also undermine social cohesion and the dignity and status of marginalized groups. It can function to reinforce systemic discrimination and to silencing or marginalise minority voices in public discourse. It is well-documented in the recent NSW Law Reform Commission report on Serious racial and religious vilification (“NSW LRC Report”) that ‘hate based’ conduct is increasing.²

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?

The criminal law is one part of a complex regulatory landscape, which also includes other criminal offences that may cover incitement including offences such as intimidation and assault, and civil provisions against vilification in S 20C and 20D of the *Anti-Discrimination Act 1977* (NSW) (ADA). Motivations of hatred can also be considered as an aggravating factor when sentencing under NSW sentencing provisions (s21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* NSW. These other provisions may play a more important role in protecting vulnerable groups.

As noted in the NSW LRC Report, s 93Z is not widely used for a range of reasons, including that police may prefer to use other offences like assault and intimidation, and because incitement may be difficult to prove (p.38).

While there is minimal evidence that legal regulation of such hate-based conduct prevents it from occurring or fosters social cohesion, the existence of such laws often performs an important expressive and educative function. Law serves an expressive function in signaling to affected groups that social and legal institutions do not endorse or in any way validate hate-based conduct. It signals to victim groups that society takes the harms of hate speech seriously, even if some of its citizens do not. This expressive function exists irrespective of how effective the laws are in practice. Legal regulation also plays an important educative function in signaling that hate speech is unacceptable.³ While inciting hatred can lead to

¹ Review of Criminal Law Protections against the Incitement of hatred, Issues Paper, Summary of Issues for consultation, June 2025, pg. 4. (“Issues Paper”)

² NSW Law Reform Commission Report 151 Serious racial and religious vilification. September 2024, p. 33-35. (“NSW LRC Report”)

³ See Sarah Sorial. 2015. Hate Speech and Distorted Communication. *Law and Philosophy*, 34(3): 299-324, p. 320.

violence and so in principle, an offence of inciting hatred might be desirable, **the potential legal consequences are not.**

Notwithstanding these educative and expressive functions of law, the criminal law is not the only or best mechanism for protecting vulnerable groups. The criminal standard of proof (beyond a reasonable doubt) is more onerous than the civil standard (on the balance of probabilities), increasing the threshold for successful prosecutions. This may mean that in practice, it will not be used, and this may also explain why only seven people have been charged under 93Z, only two were found guilty, and only one of these convictions upheld on appeal.⁴ There is no evidence to suggest that the new s93ZAA will fare any differently. It would also be difficult to prove such an imprecise and subjective emotion like 'hatred,' further compounding the problems of uptake for police and prosecutors.

The expression of hatred should not be tolerated in a cohesive and multicultural society, but the criminal law is not the appropriate mechanism to achieve this, and civil provisions might be better suited to protecting the community. For example, the conciliation process used under the ADA might achieve the educative and expressive function these laws are designed to promote, thereby fostering better social cohesion. Education campaigns in various context explaining the harms caused by hate-based speech and conduct would be more effective as well as better regulation of media reporting about vulnerable or minority groups in the community.

While there have been concerns raised that civil provisions place the onus on vulnerable persons and groups to make a complaint, the criminal provisions will not necessarily alleviate this burden; affected persons will still need to contact police and engage with the criminal process. Some vulnerable persons and communities may not have trust in contacting police or in the criminal process, especially if they are an over-represented group in the criminal justice system.

There are also the unintended risks of legislative duplication between s 93Z and s 93ZAA, given that the same attribute of race is protected in both, creating confusion; of legal over-reach, such that other kinds of speech that are poorly expressed may be captured by this new offence or that it might be used against the very groups it is designed to protect.

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?

In determining whether this section of the criminal law unduly burdens the implied freedom of political communication, the High Court will apply the three-part implied freedom test, developed further in *McCloy*, as a three-part test, setting out the following questions:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If "yes" to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as "compatibility testing".
3. If "yes" to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as

⁴ NSW LRC Report, p. 2-3.

"proportionality testing" to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance ...⁵

It is possible to argue that s 93ZAA does effectively burden the implied freedom because it will prevent speakers from 'inciting hatred.' The legislative purpose is to prohibit racist and hateful language that could incite violence. This purpose would arguably meet 'compatibility' testing, because social cohesion is essential to the maintenance of a constitutionally proscribed system of representative government.

Whether the law would pass the third test is, however, questionable based on the arguments raised in this submission. The law may not be suitable to achieve its purpose given the low rate of successful prosecutions and the preference for both police and targeted groups and individuals to use other criminal and civil provisions. It might not be necessary given that there are other criminal and civil provisions that already capture vilification and other hate-based conduct. In this regard, the new section seems duplicative. Finally, given the risk of legal over-reach, and the subjective nature of the offence (the regulation of hatred) and the imprecise definition of hate, the law may have a chilling effect on speech, so might not be adequate in its balance.⁶ It would be difficult to predict whether this section would survive constitutional challenge, but these may be some elements to take into consideration.

As discussed, there may be other, more appropriate mechanisms to promote social cohesion that do not rely on the criminal law.

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

See above.

5. Could reforming criminal law protections against the incitement of hatred towards vulnerable groups have potentially negative or unintended consequences?

The new section could have unintended consequences. Subsection 1 (b) introduces a 'harm-based' objective test, against the recommendations of the NSW Law Reform Commission. Harm-based tests only require an assessment based on whether the inciting of hatred is reasonably likely to have that effect; there is no mental element.

This is a difficult objective test to meet, as reasonable minds will differ about conduct that may incite hatred. It introduces uncertainty into the criminal law, potentially making the offence difficult to prove to the requisite standard of beyond reasonable doubt and the section may capture conduct that falls short of the gravity required for a criminal offence. As discussed in my joint submission to the NSW LRC consultation, the appropriate place for a harm-based test is in the civil law, not the criminal law.

⁵ *McCloy* (n 2) [2]-[3].

⁶ See Shireen Morris and Sarah Sorial. 2024. Farm Transparency and the Problem of Statutory Purpose in the implied freedom test. *Public Law Review* 35.