

NSW Department of Communities and
Justice
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Australia



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BY E-MAIL:

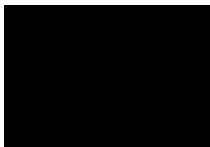
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Dear Review Secretary

The Australian Christian Lobby (ACL) is grateful for the opportunity to make a submission to the NSW *Review of criminal law protections against the incitement of hatred*.

Thank you for giving the following submission your careful consideration.

Yours sincerely,



Joshua Rowe

NSW Director, Australian Christian Lobby

SUBMISSION:

Review of criminal law protections against the incitement of hatred

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au

Overview

ACL would not support any widening of the criminal prohibitions in NSW where it does not genuinely serve the purpose of better protecting groups, and individual members of those groups, in an appropriately focused way. We would stress that strict regard for international law is the only way of achieving this complex task. In any case this is demanded by Australia's international treaty commitments, of which the most relevant in this context are those under the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

This submission appeals to a number of international law standards which are designed to ensure the right balance is achieved between the rights and freedoms of different stakeholders. It expands on some of the international law materials briefly cited in the June 2025 Issues Paper.

Social cohesion is a central theme of the Issues Paper. Only when criminal hate speech laws are properly balanced with protection for freedom of expression can full public support and trust be expected for the legislation. Excessive hate speech restrictions have the potential to divide Australian society and produce frustration – especially where they are used to suppress the expression of different viewpoints or contributions to public debate. Free speech restrictions often produce unequal outcomes, with divisive impact. Applying uniform accepted principles of human rights protection under international law would avoid this.

In this submission certain fundamental international law principles are tabled, which are specifically relevant to criminal law provisions, the main focus of the present Review.

The concept of “hatred” in NSW legislation is important to this Review (it is a key component of s.93ZAA of the Crimes Act), but compared with the clear meaning attributed to it under international law, in NSW it lacks the precision needed for a criminal law provision. In NSW, it is given its “ordinary meaning”, which the Attorney-General described (when introducing the legislation in parliament) as including “a feeling of hostility”.¹ This does not satisfy the basic requirements of certainty.

“Hatred” is popularly misunderstood as including attitudes and opinions that do not reach even “a feeling of hostility”. This is especially important when the effect of such a broad misunderstanding of “hatred” is likely to produce excessive self-censorship, and when an element of the offence depends on the perceptions of the victim group, who will not ordinarily be steered by the strict standard of severity attributed to the term “hatred” under international law, especially when used in criminal provisions.

Other international law issues raised in this submission include incitement and intention as elements of hate speech offences, to ensure they capture only the most serious conduct.

The current Review has the potential to take s.93ZAA of the Crimes Act far away from its original purpose, which was “to ensure that robust laws are in place to address anti-Semitic

¹ The “ordinary meaning” of “hatred” is said to be “a feeling of hostility or strong aversion towards a person”. NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

and other hate-related conduct in the community”,² by targeting hateful, racist language that may ultimately inspire others to commit violent acts.³ The Issues Paper for the present Review invites feedback capable of providing support for wide-ranging changes. It would have been useful when responding to the Issues Paper to know whether one possible outcome of the Review is that s.93ZAA is to be radically repurposed, or if other far-reaching changes are contemplated, as it affects the relevance of the feedback provided by stakeholders.

Although ACL understands that the Review is quite separate from the one recently undertaken by the New South Wales Law Reform Commission (NSWLRC) under section 93Z,⁴ ACL welcomes the considered approach taken by the NSWLRC in that review and commends it for its careful and measured assessment.

The Issues Paper correctly observes that “the appropriate response to vilification is a difficult and contested issue”. Above all it is essential that any outcomes from the Review do not favour one side or other of such a contested issue.

² NSW, Department of Communities and Justice, Crimes Amendment (Prosecution of Certain Offences) Act 2023 – Statutory Review (May 2025) [41].

³ NSW, Parliamentary Debates, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

⁴ NSW Law Reform Commission, Serious racial and religious vilification, Report 151 (2024).

Submission

This submission follows the “Focus Questions” raised in the Issues Paper.

The Issues Paper cites a number of valuable international law sources which are meant to secure particular outcomes in criminal hate speech legislation (importantly, the preservation of freedom of expression while supporting the rights of vulnerable communities and their members). Those sources are supplemented and expanded upon in this submission.

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

NSW legislation should be amended to clarify the definition of ‘hatred’. It should be aligned with the definition used in international law to ensure that the offences cover only the most serious forms of hate speech.

The above question invites comment on the extent and impact of “hatred”, but as pointed out in the Overview above, there is no distinct and meaningful understanding of that term either legally in NSW,⁵ or in the public mind. The concern is that this question invites feedback that is responsive to a far broader range of matters than “criminal law protections” (e.g. ss. 93Z and 93ZAA), which are central to the Terms of Reference.

The description of “hatred” provided by the NSW Attorney-General in reference to s.93ZAA (reaching to a threshold as low as “a feeling of hostility”)⁶ is already far too wide, relative to international law. The concept of “hatred” as publicly understood is even broader, and likely to overstate the incidence of “hatred” in the feedback.

The concept of “hatred” under international law

The Rabat Plan of Action (which is mentioned in the Issues Paper) endorsed definitions of key terms like “hatred” and “hostility” as follows:

“Hatred” and “hostility” refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term “advocacy” is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term “incitement” refers to statements about national, racial or

⁵ Criminal and civil provisions in New South Wales both employ the term “hatred” but the criminal provisions, by their nature, address conduct which is much more serious. The civil provisions of the *Anti-Discrimination Act 1977* protect against public acts that incite hatred, serious contempt or severe ridicule towards a person or group, based on specific protected attributes. This review is concerned in part with section 93ZAA of the *Crimes Act*, which created an offence where “(a) the person, by a public act, intentionally incites hatred towards another person or a group of persons on the ground of race, and (b) the public act would cause a reasonable person who was the target of the incitement of hatred, or a reasonable person who was a member of a group of persons that was the target of the incitement of hatred, to—(i) fear harassment, intimidation or violence, or(ii) fear for the reasonable person’s safety.”.

⁶ The “ordinary meaning” of “hatred” is said to be “a feeling of hostility or strong aversion towards a person”. NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups.⁷

This is the standard that should apply in NSW offences to correct the uncertainty in the scope of existing provisions, and to ensure that the offences cover only the most serious forms of hate speech.

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?

Existing criminal law provisions in NSW more than adequately protect against the incitement of hatred towards all vulnerable groups in NSW. However, they do not meet international law standards because they impinge excessively on freedom of expression, for reasons outlined in response to Question 3.

In addition to s.93ZAA (which is discussed in response to Question 3), the following criminal provisions apply in NSW.

NSW criminal law provisions

Under s.93Z(1) of the *Crimes Act 1900* (NSW) a person commits an offence if, *by a public act, they intentionally or recklessly threatened or incited violence towards another person, or a group of persons, on the grounds or race, religious belief or affiliation, sexual orientation, gender identity, intersex status or HIV or AIDS.*

Section 93Z consolidated four existing serious vilification prohibitions formerly in the *Anti-Discrimination Act 1977* (NSW) (ADA), in light of numerous reviews, most recently in 2018. The changes made then responded to community concerns about the effectiveness of those earlier ADA provisions, and reflected community standards, as well as the seriousness of the conduct prohibited through an increased maximum penalty regime.⁸ The changes also broadened the characteristics protected, and updated the language used to describe them. All vulnerable groups in NSW would therefore seem to be well protected. The NSW Law Reform Commission's *Serious racial and religious vilification review* reported in 2024 after due consideration of s.93ZAA, and for a range of reasons did not recommend any changes to s 93Z.

In addition to specific criminal hate speech provisions in NSW is the protection offered by the general criminal law across a broad range of offences in NSW. It is also significant that at sentencing an aggravating factor applicable to those offences is where they were partially or

⁷ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, A/HRC/22/17/Add.4, appendix, ("Rabat Plan") p. 10, footnote 5.

⁸ NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.

wholly motivated by hatred or prejudice on the basis of a broad range of protected attributes.⁹

Many of these matters are usefully raised in the Issues Paper.

Commonwealth criminal law provisions

Hate speech-specific protection also exists at Commonwealth level in the Criminal Code, most recently and dramatically extended by the Amendment (Hate Crimes) Act 2025 (Cth) with coverage that overlaps ss. s.93Z and 93ZAA, and extends to a range of new hate-related conduct.

When these changes were introduced, the Commonwealth Attorney-General proclaimed that they deliver “the toughest laws Australia has ever had against hate crimes”.¹⁰ It would be very alarming if changes were proposed in NSW which expanded upon those enacted at Commonwealth level. It would also be extraordinary if this occurred as a result of the current Review which seems to have very narrow scope.

NSW civil provisions

Although this Review does not specifically concern the related *civil* provisions of the ADA, it is relevant to consider the interface between them and the *criminal* hate speech protection that exists in NSW. The ADA protects against public acts that *incite hatred, serious contempt or severe ridicule towards a person or group, based on a broad range of protected attributes*. Given the uncertain meaning of “hatred” in both the civil and criminal provisions, it is important to maintain a clear distinction between the two regimes, and especially to apply the criminal provisions only to the most serious conduct, warranting criminal sanctions, expressing society’s very strong disapproval. That can only be achieved by amending existing provisions to reflect that. The result would not be a diminution in protection by criminal law but would confine criminal law to its appropriate space.

Because criminal provisions are ordinarily meant to be deterrent, among other purposes, it is crucial that they avoid a chilling effect on the legitimate exercise of freedom of expression. Any changes that would apply existing criminal provisions more broadly, by extending their coverage to less serious conduct than at present, would therefore be a significant retrograde step.

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?

The balance between protecting vulnerable groups and protecting freedoms is essential. To get this balance right, any new hate speech laws must be drafted to comply with ICCPR

⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h) applies where: “the offence was partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, gender identity, sexual orientation or age, or having particular variations of sex characteristics or a particular disability)”.

¹⁰ <https://www.markdreyfus.com/media/media-releases/albanese-government-strengthens-hate-speech-laws-mark-dreyfus-kc-mp/>

article 19, particularly 19(3), ‘necessity’ and ‘proportionality’, and only the most serious conduct should be criminalised. The term ‘incite’ in 93ZAA should not be watered down, have a lower threshold or replaced with less precise terminology. ‘Intent’ should be the determining factor, in line with international law, and not negligence or recklessness. The ‘reasonable person’ test should apply to a person generally in the community and not be biased by applying to a member of the victim group.

The Terms of Reference require the Review to consider the interaction between criminal law protections against hatred for vulnerable groups and existing rights and freedoms, including the implied freedom of political communication and freedom of religion. It also seeks stakeholder views on how the criminal law can strike an appropriate balance between protecting against the incitement of hatred towards vulnerable groups and protecting other important freedoms.

This is an extremely important issue.

Principles for balancing freedom of expression and protection against hate speech

The interrelation between freedom of expression and protection against hate speech has been the subject of careful consideration by the ICCPR monitoring body, the Human Rights Committee, and in 2012 and 2019 by the then appointed UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹¹

When properly drafted in compliance with international law, hate speech laws serve their important positive purpose in support of discrimination-related prohibitions, without unduly interfering with freedom of expression.

The model for this is established in the ICCPR article 19, which protects freedom of expression in the following familiar terms:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article 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.

In applying article 19(3) in this Review, and any resulting proposals, the following principles enunciated by the Human Rights Committee should be observed:

¹¹ Report to the General Assembly by Frank La Rue, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/67/357, 7 September 2012 (Special Rapporteur’s 2012 report); Report to the General Assembly by David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019 (Special Rapporteur’s 2019 report).

- Restrictions imposed by law must conform to the strict tests of necessity and proportionality.
 - Restrictions must be “necessary” for a legitimate purpose.
 - Restrictions must be directly related to the specific need on which they are predicated.
 - Restrictions must not be overbroad.
 - Restrictive measures must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve that function; they must be proportionate to the interest to be protected.
- The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.
- A “law” must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.
- Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.¹²

Another important principle is that “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat”.¹³

Only the most serious conduct should be criminalised; and principles of legality, proportionality and necessity must be maintained.

The Special Rapporteur in 2019 made a number of comments in reference to balancing freedom of expression in hate speech provisions. He noted how the Committee on the Elimination of Racial Discrimination (CERD), the expert monitoring body for ICERD – which has a strong focus on racial hate speech – followed the lead of the Human Rights Committee and the Rabat Plan. The “due regard” language in article 4 of ICERD (which stipulates that States are called upon to “eradicate all incitement to, or acts of” racial discrimination, with due regard to other rights protected by human rights law, including the freedom of expression) meant that strict compliance with freedom of expression guarantees is required.¹⁴ CERD emphasised that criminalisation¹⁴ is reserved for serious cases only, and it

¹² Human Rights Committee, General Comment 34, paras. 22, 25, 33-34.

¹³ Ibid, para 35.

¹⁴ Special Rapporteur’s 2019 report, paras 11 and 15.

echoed the principles of legality, proportionality and necessity enumerated by the Human Rights Committee for freedom of expression:

The criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.¹⁵

The Rabat Plan had earlier clarified that criminalisation should be left for the most serious sorts of incitement under article 20(2) of the ICCPR.¹⁶

The principles of legality (requiring certainty and foreseeability of legislation), and those of proportionality and necessity (as expressed in article 19(3) of the ICCPR), are crucial to this Review and are firmly stated by all the main UN authorities concerned with achieving the right balance between all relevant rights and freedoms.

Incitement

It would be a matter of serious concern if the term “incite” in section 93ZAA and other criminal provisions were replaced with terminology which is less precise, or operates at a lower threshold, such as “promote”, “glorify”, “stir up” or “urge”. (The WA formula “create, promote or increase” for similar reasons would be unacceptable.)¹⁷ Such terms on their own should be rejected for their imprecision, lack of objective meaning and low threshold.

“Incite” has a particular meaning under international law, endorsed by the Rabat Plan, and connected with “imminent risk”.¹⁸ Only terminology which matches the strict requirements of the international law meaning of “incite” is considered appropriate for NSW offences, so that the law is clear both as to the circumstances, and the threshold, at which the offence is committed.

The Issues Paper paraphrased article 20 of the ICCPR by stating, “International human rights law requires State parties to the ICCPR (such as Australia) to prohibit, by law, the incitement of discrimination, hostility or violence based on national, racial or religious grounds”. This needs to be expanded. In 2012, the then Special Rapporteur usefully broke these elements down to emphasise that article 20(2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence.¹⁹

When considering a range of conduct that included “insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination”, the Special Rapporteur in 2019 emphasised that it may only be prohibited where it “clearly amounts to incitement to

¹⁵ Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 12.

¹⁶ Special Rapporteur’s 2019 report, para 18.

¹⁷ *Criminal Code* (WA) ss 77, 78.

¹⁸ Rabat Plan, p. 10, footnote 5.

¹⁹ Special Rapporteur’s 2012 report, para 43.

hatred or discrimination". For example, the term "ridicule" is "extremely broad and [is] generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the ties to incitement and to the framework established under article 19(3) of the [ICCPR] help to constrain such a prohibition to the most serious category."²⁰

It is also important to bear in mind, as the Human Rights Committee clarified in General Comment 34, that whenever a State limits expression, including the kinds of expression defined in article 20(2) of the ICCPR, it must still justify the prohibitions and their provisions in strict conformity with article 19.²¹ Articles 19 and 20 are compatible with and complement each other.

Given the concerns already mentioned about the concept of "hatred" (in response to Question 1), ACL considers that the shortcomings of such terminology should not be compounded in criminal provisions by uncoupling it from "incitement".

Intention

The Issues Paper mentioned that the "Rabat Plan of Action also considered the interaction between freedom of expression and prohibitions on incitement. It identified six factors for determining when expression amounting to incitement should be criminalised." The Issues Paper noted some of them (including a "reasonable probability that the speech would succeed in inciting actual action against the target group"). The Rabat Plan also mentioned "intent" as a determining factor, "meaning that 'negligence and recklessness are not sufficient for an offence under article 20 of the [ICCPR]".²²

A harms-based test is seriously problematic

Under s.93ZAA, the public act that intentionally incites hatred on the basis of race must cause a reasonable person who was the target of the incitement of hatred, or a reasonable person who was a member of the targeted group of persons, to fear harassment, intimidation or violence, or fear for the reasonable person's safety.

"Harassment" is a problematic concept in criminal hate speech legislation. "Harassment" in NSW may be taken to refer to unwanted, offensive, humiliating, or intimidating behaviour that creates a hostile environment. It is triggered too easily, and its focus is the impact on the victim, not the culpability of the person responsible for the conduct.

The standard of a "reasonable person" taken from the victim group is highly controversial.

Since section 18C of the Racial Discrimination Act 1975 was enacted, the model has been replicated in other jurisdictions. Tasmania's *Anti-Discrimination Act 1998* (Tas), section 17 (*prohibition of certain conduct and sexual harassment*) bears some similarity to section 18C but was the first to apply to a wide range of grounds, taken from discrimination prohibitions. It renders conduct unlawful where it "*offends, humiliates, intimidates, insults*

²⁰ Special Rapporteur's 2019 report, para 17.

²¹ Human Rights Committee, General Comment 34, para 50.

²² Special Rapporteur's 2019 report, para 14.

or *ridicules* another person on the basis of...[a listed attribute]...in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be *offended, humiliated, intimidated, insulted or ridiculed*". A similar provision applies in the Northern Territory's *Anti-Discrimination Act 1992* (NT) section 20A (*offensive behaviour because of attribute*), prohibiting "an act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and is done because of an attribute of the other person" (The Northern Territory Government recently signalled its intention to repeal these vilification provisions). A new section 124C was added to Queensland's *Anti-Discrimination Act 1991* (Qld) (by the *Respect at Work and Other Matters Amendment Act 2024*, with suspended effect). It focuses on the "harm" caused to people who are members of a group with a protected attribute, of hateful, reviling, seriously contemptuous, or seriously ridiculing conduct. It is enough that there is conduct that *a reasonable person with the same relevant attribute would consider* hateful, reviling, seriously contemptuous, or seriously ridiculing. (The QLD Government decided to postpone the commencement of the reform package.)

The problem is that in practice harms-based provisions are particularly likely to insulate beliefs and ideologies from criticism, where they are associated with particular attributes (e.g. certain gender theories are closely associated with gender identity), and liability turns on the perceptions of individuals with such attributes.

ACL considers that the NSWLRC was correct to oppose the use of a harm-based test in its 2024 review.²³ Nothing should substitute for the mental element (e.g. of intention) on the part of the accused, including for the consequences of their actions.

A harm-based test lacks the necessary justification under established international law principles. It also fails in the requirement that the law, especially criminal law, be certain and foreseeable in its operation. It is difficult for any person to foresee whether their actions will expose them to criminal liability based on how someone else, taken from the victim group, will perceive them. It is also likely to incentivise socially divisive activism.

The track record of misuse of legislation with such a harms-based test speaks for itself, particularly as it has been invoked in Tasmania (under the *Anti-Discrimination Act 1998* (Tas), section 17), against Archbishop Julian Porteous merely for distributing a tract providing guidance to members of the Catholic Church, or Senator Claire Chandler, expressing concern in support of the rights of biological women, in connection with single-sex spaces and sports.

Exclusions

The NSW offence under s.93ZAA contains an exclusion for quoting from, or otherwise referencing, a religious text for the purpose of religious teaching or discussion. The fact that this needs to be clarified, or excluded, is indicative that the offence applies to conduct at far too low a level of seriousness.

²³ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [4.70].

The factors already mentioned, which lower the threshold for the offence, raise serious concern that the existing exclusion is far too narrow. If the prerequisites of “incitement” and “intention” are also removed these concerns escalate.

It is highly problematic if hate speech legislation is capable of limiting public discussion, yet that is the unfortunate trend, as legislation prohibits speech at progressively lower thresholds. The Commonwealth *Criminal Code Amendment (Hate Crimes) Bill 2024* (Hate Crimes Bill) was passed on 6 February 2025, and it disappplied a good faith defence in the Criminal Code that allowed political and other speech, including good faith commentary about matters of public interest. The basis for removing the defence was not that such speech could not be caught by the criminal prohibitions (indeed it could), but that the defence should not apply when it is caught.

It is indicative of the tendency for change in hate speech laws in Australia, creating criminal or civil liability for speech which encroaches increasingly into what is meant to be the protected scope of the freedom of expression.

Summary

Criminal legislation must meet the international law requirements outlined above to achieve the most equitable outcome and one which appropriately balances all applicable rights and freedoms. Failure to satisfy any of those requirements may be sufficient to remove the legislation from the permissive scope of article 19(3) of the ICCPR.

One of ACL’s key interests is to secure protection for the promotion and understanding of Christian belief, and public discussion, including in areas of developing public policy. Both criminal and civil hate speech provisions have the capacity to conflict with the internationally determined scope of the freedom of religion and freedom of expression. As traditional assumptions and beliefs (including religious ones) become increasingly opposed in particular sections of the community, these freedoms need to be maintained by law, not eroded by the expansion of hate speech and vilification provisions.

Such provisions should not operate to prevent speech which is critical of beliefs and ideologies, including where they are critiqued, deconstructed, or their origins and credentials exposed. When such provisions adopt vague terminology, or apply at too low a threshold, or apply tests which incentivise complaints, they can and are likely to operate with differential impact on different parts of the community, in a way that is inimical to social cohesion.

The Issues Paper acknowledges the existence of the implied freedom of political communication. However, the implied freedom represents only a tiny fraction of the protection required by the freedom of expression. (Strictly speaking, it is not a human right at all.) The limited protection that the implied freedom offers makes it all the more important that the NSW Government secures a proper balance in its laws between protecting against the genuine harms of hate speech and the freedom of expression.

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

Criminal hate speech laws play an important role in preventing destructive speech which has real, adverse impact in alienating vulnerable groups. However, for hate speech legislation to be effective it must attract public support and trust. An undesirable trend in hate speech and vilification legislation in states and territories, and at Commonwealth level, is that successive changes in the law make complaints easier to make (leading to criminal prosecution), and civil claims for damages easier to bring.

The constant lowering of the threshold in both criminal and civil legislation has the effect of changing the very meaning of “hate speech” and “vilification”, even to incur liability for those who engage in public discussion on important but sensitive matters of public concern.

This is symptomatic of major legislative design flaw, with serious negative societal impacts. The result is growing self-censorship, and frustration that certain subjects are not open to discussion when they should be. This does not engender social cohesion but the opposite. Hate speech legislation which is focused on genuine and serious harms can and should be effective in achieving its aims. By contrast, legislation which extends to lower thresholds that encroach further and further on existing standards of free speech is likely to be counter-productive, especially where it is likely in practice to benefit some groups, or some viewpoints, over others.

Section 93ZAA of the Crimes Act was enacted in early 2025, “to ensure that robust laws are in place to address antisemitic and other hate-related conduct in the community”.²⁴ It was prompted by a surge in antisemitic attacks and other forms of hate speech in Australia during early 2025, particularly targeting religious and ethnic groups, and is intended to target hateful, racist language that may ultimately inspire others to commit violent acts.²⁵ The current review is no longer focused on that issue, but invites feedback capable of providing support for much more wide-ranging and fundamentally different changes. The concern is that opportunities are taken at every point in some Australian jurisdictions to match developments occurring in other jurisdictions, and that in this process the threshold at which hate speech and vilification laws are triggered is driven down, at great cost to the fundamental freedoms of Australians.

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?

Most of the concerns with hate speech and vilification laws would be met in legislation which gives proper protection to the freedom of expression, as understood in terms of article 19 of the ICCPR. That is a fundamental requirement of legislation in NSW, given Australia’s ratification of the ICCPR. It is only achieved where the legislation does more than

²⁴ NSW, Department of Communities and Justice, Crimes Amendment (Prosecution of Certain Offences) Act 2023 – Statutory Review (May 2025) [41].

²⁵ NSW, Parliamentary Debates, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

give lip service to the ICCPR but avoids it having greater restrictive effect than article 19 allows. The negative consequences for failing to achieve that have already been mentioned.

There is no need for further protection against hate speech under NSW laws. However, the limited protection in Australian law for freedom of expression is a matter of continuing concern. Apart from the implied freedom of political communication, there is little that is capable of putting a brake on legislative incursion on the remaining free speech scope that exists in Australia. For this reason, special care should be taken in the review to ensure the full measure of protection is given to the freedom of expression required by the ICCPR when considering hate speech legislation.

Please also see our response to Question 4.

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

Any measures introduced must meet the requirements of the ICCPR and ICERD.

On the question of the type of speech that may be criminalised, and alternatives to criminal law which may promote social cohesion, the Special Rapporteur in 2019 usefully mentioned important roles of leadership, and of measures that foster tolerance and intercommunity respect, including training in human rights principles and standards, as follows.

“In the Rabat Plan of Action, it is also clarified that criminalization should be left for the most serious sorts of incitement under article 20(2) of the Covenant, and that, in general, other approaches deserve consideration first (A/HRC/22/17/Add.4, appendix, para. 34). These approaches include public statements by leaders in society that counter hate speech and foster tolerance and intercommunity respect; education and intercultural dialogue; expanding access to information and ideas that counter hateful messages; and the promotion of and training in human rights principles and standards. The recognition of steps other than legal prohibitions highlights that prohibition will often not be the least restrictive measure available to States confronting hate speech problems.”²⁶

When assessing available options in this Review, we would caution against following the pattern of the more easily triggered criminal and civil prohibitions found in state and territory legislation, and also at Commonwealth level, and would reiterate our opposition to measures which do not meet the requirements of the ICCPR and ICERD discussed above.

²⁶ Special Rapporteur’s 2019 report, para 18.