

Review of criminal law protections against the incitement of hatred

Issues Paper

Summary of issues for consultation

June 2025

Introduction

The NSW Attorney General has appointed former NSW Supreme Court Justice, the Honourable John Sackar AM KC (the **Reviewer**), to review criminal law protections against hate speech for vulnerable communities (the **Review**). The Review findings are to be reported to the Attorney General by 5 November 2025.

Further information is available at <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/review-of-criminal-law-protections-against-incitement-of-hate.html>.

Terms of Reference

The Reviewer is asked to review and report on the criminal law protections against the incitement of hatred following the introduction of the *Crimes Amendment (Inciting Racial Hatred) Act 2025 (Inciting Racial Hatred Act)*.

In particular, the Review should consider:

- 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.

Stakeholder feedback is requested

Stakeholders' written comments are sought to assist with considering the matters outlined in the Terms of Reference.

There are **focus questions** at the end of this document. The focus questions are to assist you in providing a structure to your submission and to assist consideration of the issues identified in the Terms of Reference.

Although submissions that respond to the focus questions provided below are useful to the Reviewer, a submission that does not follow this structure will also be accepted and considered – you are welcome to respond to some or all of the focus questions, or raise additional matters relevant to the Terms of Reference.

Please provide submissions to PRLIndependentReviewSecretariat@dcj.nsw.gov.au by close of business on **6 August 2025**. Please advise us if you do not consent to your submission being published online or referred to in the final report for the Review.

Consideration of section 93Z and civil vilification laws is outside the Terms of Reference

The Review's Terms of Reference require consideration of **criminal law protections** against the incitement of **hatred**, following the NSW Parliament passing the Inciting Racial Hatred Act, which introduced new section 93ZAA of the *Crimes Act 1900* (**Crimes Act**). New section 93ZAA criminalises intentionally inciting hatred by a public act on the ground of race (see further below).

This Review's Terms of Reference do not include consideration of potential reforms to:

- Section 93Z of the Crimes Act, which criminalises threatening or inciting **violence** on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.
- **Civil vilification protections** in the *Anti-Discrimination Act 1977* (**ADA**) that protect against public acts that incite hatred, serious contempt or severe ridicule towards a person or group, based on specific protected attributes.

Background to this Review

Vilification and hate-based conduct causes significant harm to victims and the community.¹ However, the appropriate response to vilification is a difficult and contested issue.

This Review occurs in a broader context of legislative amendments and reviews to respond to hate-based conduct.

- In **2018**, section 93Z was added to the Crimes Act, replacing four separate serious vilification offences that had previously appeared in ADA.² It was introduced in response to concerns about the effectiveness of the previous offences.³
- In **2023**, NSW Parliament passed an amendment to section 93Z of the Crimes Act to enable either a police officer or the Director of Public Prosecutions (**DPP**) to commence a prosecution under the provision.⁴ This change responded to concerns that the time taken to refer matters to the DPP and obtain approval was discouraging police from prosecuting offences under section 93Z.⁵
 - This amendment commenced on 1 January 2024. Unless NSW Parliament passes a law to prevent this, the requirement for DPP approval to commence prosecutions will be reinstated two years after commencement of the amendment (that is, in January 2026).
 - A statutory review of the amendment was undertaken by the Department of Communities and Justice (on behalf of the Attorney General). The report on the outcome of the review, tabled in NSW Parliament in May 2025, found that the amendment remains appropriate to meet its policy objectives. Consequently, the review recommended that the amendment should be retained and the sunset provision, which would reinstate the requirement for DPP prosecutions only in January 2026, should be repealed.⁶
- In **2024**, the NSW Law Reform Commission (**NSWLRC**) conducted a review of the criminal law response to serious racial and religious vilification under section 93Z of the Crimes Act. The NSWLRC's final report, tabled in NSW Parliament on 21 November 2024, concluded that section

¹ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [3.6].

² *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 1, sch 2 [1]–[4].

³ NSW, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 42 (Mark Speakman, Attorney General).

⁴ *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 [1], amending *Crimes Act 1900* (NSW) s 93Z(4).

⁵ NSW, *Parliamentary Debates*, Legislative Assembly, 21 November 2023, 12, 25 (Michael Daley, Attorney General).

⁶ NSW, Department of Communities and Justice, *Crimes Amendment (Prosecution of Certain Offences) Act 2023 – Statutory Review* (May 2025) rec 2 [10], [12].

93Z should not be amended and new vilification offences should not be introduced. For more information about the NSWLRC review, see **Appendix A**.

- In **early 2025**, a package of legislative reforms passed NSW Parliament.⁷ The reforms, which included new section 93ZAA of the Crimes Act, indicate ‘Parliament was concerned to ensure that robust laws are in place to address antisemitic and other hate-related conduct in the community’.⁸
- On **12 February 2025**, the NSW Legislative Council’s Portfolio Committee No. 5 – Justice and Communities commenced an inquiry into antisemitism in NSW (**Antisemitism Inquiry**). The Terms of Reference for the Antisemitism Inquiry include the causes underlying increasing incidents of antisemitism across NSW and the threat that these incidents present to social cohesion.⁹ The Committee is due to report by 1 September 2025.
- On **8 May 2025**, the Attorney General announced the appointment of the Reviewer to conduct this Review of criminal law hate speech protections for vulnerable communities.¹⁰ A key purpose of this Review is to assist the NSW Government to ‘look at how laws in New South Wales can be improved to address hate speech based on other attributes and promote social cohesion’.¹¹
- The NSWLRC is currently conducting a review of the ADA. The first consultation paper, which focuses on the conduct prohibited by the ADA (including civil vilification), was released in **May 2025**.¹²

Criminal law protections against hatred for vulnerable groups

The extent and impact of hate-based conduct

Hate-based conduct can have damaging effects on social cohesion, including by fostering division between groups, reducing the participation of certain individuals and groups in society, and empowering others to engage in hateful conduct.¹³

While the full extent of hate-based conduct in NSW may not be known, the NSWLRC heard about the significant and increasing effect of vilification and its significant impact on religious, racial and other groups in the community during its 2024 review.¹⁴ Further, several submissions to the current

⁷ *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW); *Crimes Amendment (Places of Worship) Act 2025* (NSW); *Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025* (NSW).

⁸ NSW, Department of Communities and Justice, *Crimes Amendment (Prosecution of Certain Offences) Act 2023 – Statutory Review* (May 2025) [41].

⁹ Portfolio Committee No 5 – Justice and Communities, Legislative Council, Parliament of NSW, ‘Inquiry into Antisemitism in NSW: Terms of Reference’ (12 February 2025).

¹⁰ NSW Attorney General, ‘Review into Hate Speech Protections for Vulnerable Communities’ (Media Release, 8 May 2025).

¹¹ NSW *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

¹² NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW): Unlawful conduct* (Consultation Paper No 24, May 2025).

¹³ See, eg, NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [3.17]–[3.19].

¹⁴ *Ibid* [1.37], [3.8]–[3.11].

Antisemitism Inquiry have raised concerns about increasing incidents of antisemitism and the negative impacts on victims and the community.¹⁵

Current criminal law protections against hatred

The new offence of intentionally inciting racial hatred

The Inciting Racial Hatred Act passed NSW Parliament on 21 February and received assent on 2 March 2025. It will commence on a date fixed by proclamation.¹⁶

The Inciting Racial Hatred Act introduced an offence of inciting racial hatred under new section 93ZAA of the Crimes Act. Its purpose is to target hateful, racist language that may ultimately inspire others to commit violent acts.¹⁷

Elements of new section 93ZAA

On commencement, the new offence will have the following elements:

Element	Explanation
The alleged offender engages in a public act .	The definition of 'public act' is taken from the existing definition in section 93Z of the Crimes Act. It includes any form of communication to the public (including via electronic methods), any conduct (including actions and gestures) observable by the public, and the distribution or dissemination of any matter to the public. ¹⁸
By this public act, the person incites hatred .	<p>'Incite' is not defined in section 93ZAA. Courts have held that the test of incitement focuses on whether an ordinary member of the target audience of the alleged offender's act would be incited.¹⁹ New section 93ZAA(3)(a) clarifies that it is irrelevant whether or not, in response to the alleged offender's public act, any person formed an actual state of mind or carried out an act of hatred.</p> <p>'Hatred' is not defined in new section 93ZAA. It instead takes its ordinary meaning, 'which is a feeling of hostility or strong aversion towards a person'.²⁰</p>

¹⁵ See, eg, Australian Jewish Association, Submission No 34 to NSW Legislative Council's Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 1–2; Australia's Special Envoy to Combat Antisemitism, Submission No 42 to NSW Legislative Council's Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 2–3; Ethnic Communities Council of NSW, Submission No 46 to NSW Legislative Council's Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 3–5; Australian Human Rights Commission, Submission No 54 to NSW Legislative Council's Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 3–5; NSW Jewish Board of Deputies, Submission No 56 to NSW Legislative Council's Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 3–5.

¹⁶ *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW) s 2.

¹⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

¹⁸ *Crimes Act 1900* (NSW) s 93Z(5) (definition of 'public act').

¹⁹ *Sunol v Collier (No 2)* [2012] NSWCA 44 [34]; *Margan v Manias* [2015] NSWSC 307 [82]–[85].

²⁰ NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

Element	Explanation
The incitement of hatred by a public act is intentional .	This means that public acts that are done without any intention to incite hatred, or with recklessness as to whether they may incite hatred, are not captured by the offence. ²¹
The intentional incitement of hatred by a public act is on the basis of race .	<p>This is different to section 93Z, which captures a broader range of protected attributes. However, the definition of ‘race’ in new section 93ZAA is taken from the existing definition in section 93Z of the Crimes Act. It includes ‘colour, nationality, descent and ethnic, ethno-religious or national origin’.²²</p> <p>New section 93ZAA(3)(b) provides that it is irrelevant whether the alleged offender'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.</p>
<p>The public act that intentionally incites hatred on the basis of race would 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:</p> <ul style="list-style-type: none"> • fear harassment, intimidation or violence, or • fear for the reasonable person’s safety. 	This may be described as a ‘harm-based’ test, as it asks whether, objectively, the alleged offender’s conduct would affect the person or group it was directed towards. ²³
An exemption applies to acts that consist only of directly quoting from, or otherwise referencing, a religious text for the purpose of religious teaching or discussion.	This exemption is intended to protect freedom of religion and recognise that some historical religious texts contain out-dated language. ²⁴
<p>The maximum penalty is:</p> <ul style="list-style-type: none"> • for an individual – 100 penalty units or imprisonment for 2 years, or both, or • for a corporation – 500 penalty units. 	<p>This is lower than the maximum penalty for the offence in section 93Z (which requires an incitement to violence), which is:</p> <ul style="list-style-type: none"> • for an individual – 100 penalty units or imprisonment for 3 years (or both), or • for a corporation – 500 penalty units.

²¹ Ibid.

²² *Crimes Act 1900* (NSW) s 93Z(5) (definition of ‘race’).

²³ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [4.62].

²⁴ NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 15 (Michael Daley, Attorney General).

Element	Explanation
A prosecution under section 93ZAA can only be commenced by the DPP or a police officer .	This reflects section 93Z. It is intended to prevent potential vexatious prosecutions. ²⁵

New section 93ZAB of the Crimes Act (not yet commenced) requires a statutory review of the new offence to be undertaken by the NSW Legislative Council Portfolio Committee No. 5 – Justice and Communities, 12 months after the offence commences. A report on the outcome of the review is required to be tabled in NSW Parliament as soon as practicable after the end of the 12 month period following commencement of the new offence.

In line with new section 93ZAC (not yet commenced), the offence will be repealed three years after it commences.

Other relevant criminal offences

A range of NSW and Commonwealth offences may be available when a person engages in criminal conduct involving hatred.²⁶ Relevant NSW offences include:

- Publicly **threatening or inciting violence** on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.²⁷
- Knowingly **displaying a Nazi symbol**, by a public act and without a reasonable excuse.²⁸
- **Stalking or intimidating** another person, with intent to cause them physical or mental harm.²⁹
- Conducting yourself in **an offence manner**³⁰, or using **offensive language**, in, near or within hearing from a public place or school.³¹
- **Common assault**, although not occasioning actual bodily harm.³²
- **Assault** occasioning actual bodily harm.³³
- Intentionally or recklessly **destroying or damaging property** that belongs to another person.³⁴
- **Threatening to destroy or damage the property of another person** with intent to cause a person to fear the threat would be carried out.³⁵
- Intentionally or recklessly sending or delivering, or directly or indirectly causing to be received, **any document that threatens to kill or inflict bodily harm on any person**, with knowledge of the contents.³⁶

²⁵ Ibid.

²⁶ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [2.32].

²⁷ *Crimes Act 1900* (NSW) s 93Z.

²⁸ *Crimes Act 1900* (NSW) s 93ZA.

²⁹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

³⁰ *Summary Offences Act 1988* (NSW) s 4(1).

³¹ *Summary Offences Act 1988* (NSW) s 4A(1).

³² *Crimes Act 1900* (NSW) s 61.

³³ *Crimes Act 1900* (NSW) s 59.

³⁴ *Crimes Act 1900* (NSW) s 195.

³⁵ *Crimes Act 1900* (NSW) s 199.

³⁶ *Crimes Act 1900* (NSW) s 31(1).

- **Using or threatening unlawful violence** towards another person using more than just words, where that conduct would cause a reasonable person present to fear for their personal safety (**affray**).³⁷
- Where 12 or more people are present together and use or threaten unlawful violence for a common purpose, and their conduct would cause a reasonable person present to fear for their personal safety (**riot**).³⁸

Relevant Commonwealth offences include:

- **Advocating force or violence** against groups³⁹ or members of groups or close associates.⁴⁰
- **Threatening force or violence** against groups⁴¹ or members of groups or close associates.⁴²
- **Advocating damage** to or **destruction** of real property or a motor vehicle.⁴³
- **Threatening damage** to or **destruction** of real property or a motor vehicle.⁴⁴
- **Advocating force or violence** through **causing damage to property**.⁴⁵
- Offences involving **Nazi gestures** and **Nazi or terrorist symbols**.⁴⁶
- Offences involving use of a 'carriage service' (such as the internet or a mobile phone), including using a carriage service to **menace, harass or cause offence**⁴⁷ and using a carriage service to **make a threat to kill or cause serious harm** to another person, intending that the person will fear the threat will be carried out.⁴⁸

Hatred or prejudice as an aggravating factor at sentencing

In NSW, if an offender has committed a general offence which was partially or wholly motivated by hatred or prejudice, this is considered an aggravating factor at sentencing. An aggravating factor increases the seriousness of an offence, and may increase the severity of the penalty imposed by the court.

The relevant aggravating factor captures a broad range of protected attributes. It 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).*⁴⁹

Offences of inciting hatred in other Australian states

There are vilification offences in all Australian jurisdictions other than the Northern Territory and Tasmania. However, NSW, Victoria and Western Australia (**WA**) are the only Australian jurisdictions

³⁷ *Crimes Act 1900* (NSW) s 93C(1).

³⁸ *Crimes Act 1900* (NSW) s 93B(1).

³⁹ *Criminal Code* (Cth) s80.2A.

⁴⁰ *Criminal Code* (Cth) s 80.2B

⁴¹ *Criminal Code* (Cth) s 80.2BA.

⁴² *Criminal Code* (Cth) 80.2BB.

⁴³ *Criminal Code* (Cth) s 80.2BC.

⁴⁴ *Criminal Code* (Cth) s 80.2BD.

⁴⁵ *Criminal Code* (Cth) s 80.2BE.

⁴⁶ *Criminal Code* (Cth) ss 80.2H, 80.2HA.

⁴⁷ *Criminal Code* (Cth) s 474.17.

⁴⁸ *Criminal Code* (Cth) s 474.15.

⁴⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

that have offences of **inciting hatred** (or similar).⁵⁰ The Victorian offence was introduced earlier this year and will commence on 20 September 2025, unless it is proclaimed to commence earlier.⁵¹

The WA offences capture inciting hatred on the ground of race,⁵² and the new Victorian offence captures inciting hatred on a broader range of grounds.⁵³ For more information about the similarities and differences between the Australian offences of inciting hatred, see **Appendix A**.

Stakeholder views

The Terms of Reference require this Review to consider the sufficiency of criminal law protections against hatred for vulnerable groups in NSW, including any improvements that could be made. Stakeholder views are sought on the nature and extent of hatred towards vulnerable groups in NSW, and whether the criminal law sufficiently protects against the incitement of hatred towards these groups (see **focus questions 1-2** below).

Interaction with fundamental rights and freedoms

A key issue for this Review is how criminal law prohibitions against the incitement of hatred towards vulnerable groups may strike an appropriate balance between protecting against hate-based conduct and protecting other important freedoms.

International human rights law recognises individual rights to freedom of religion and freedom of expression. However, these rights may be limited by law, subject to meeting certain tests.

International human rights law also requires nation states to prohibit, by law, the incitement of discrimination, hostility or violence based on national, racial or religious hatred. This requirement may also be understood to apply to other protected attributes.

The Australian Constitution contains an implied freedom of political communication. This does not create personal rights and it is not absolute. Rather, it places a limit on the law-making powers of the Commonwealth and the States to what is necessary for the effective operation of the system of representative and responsible government that is provided for by the Australian Constitution.

The Australian Constitution also contains a protection for freedom of religion. It limits the Commonwealth's law-making power, but not the States'.

For more information about relevant rights and freedoms, see **Appendix A**.

Stakeholder views

The Terms of Reference require this 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. Stakeholder views are sought 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 (see **focus question 3** below).

⁵⁰ *Crimes Act 1958* (Vic) s 195N (uncommenced); *Criminal Code* (WA) ss 77, 78.

⁵¹ *Justice Legislation Amendment (Anti-vilification and Social Cohesion) Act 2025* (Vic) s 2(2)–(3).

⁵² *Criminal Code* (WA) ss 77, 78.

⁵³ *Crimes Act 1958* (Vic) ss 195M (definition of 'protected attribute') (uncommenced), 195N(1)(b) (uncommenced).

Enhancing social cohesion

The role of the criminal law in promoting social cohesion

Criminal vilification offences may be considered to have an important role in maintaining social cohesion, including having a symbolic, educational and deterrent function.⁵⁴ A key consideration for this Review is what criminal law reform measures may best promote social cohesion.

In the Second Reading Speech for the Bill that introduced new section 93ZAA of the Crimes Act, the Attorney General explained that it ‘respond[s] to the immediate and pressing issue of racially based hate speech that faces our community now’.⁵⁵ However, the Attorney General also noted the NSW Government acknowledges that hate speech based on other attributes occurs and condemns this.⁵⁶ During parliamentary debate on the Bill, it was acknowledged that ‘many people’ wanted the scope of the offence to be broadened to protect other groups, and that this was a key reason for the Government committing to this Review.⁵⁷

A further consideration is whether reforming criminal law protections against the incitement of hatred towards vulnerable groups could potentially have unintended consequences. For example, in its 2024 report, the NSWLRC noted that it received many submissions concerned about the enforcement of criminal vilification offences against marginalised groups.⁵⁸

Other measures to promote social cohesion

Another consideration is what other measures (related to criminal law reform) could assist with promoting social cohesion. For example, several submissions to the NSWLRC review emphasised the importance of other, non-legal mechanisms for preventing and addressing serious vilification.⁵⁹ Further, some submissions to the current Antisemitism Inquiry support measures such as improved education and community engagement to promote social cohesion.⁶⁰

Criminal law reform measures could be complemented by other, non-legislative measures aimed at promoting social cohesion. For example, alongside the legislative reforms introduced earlier this year, the NSW Government increased funding:

- to the NSW Police Force Engagement and Hate Crime Unit, ‘to allow for boosted engagement and communication with the community’,⁶¹ and

⁵⁴ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [3.54], [3.57].

⁵⁵ NSW, *Parliamentary Debates*, Legislative Assembly, 18 February 2025, 14 (Michael Daley, Attorney General).

⁵⁶ *Ibid.*

⁵⁷ NSW, *Parliamentary Debates*, Legislative Assembly, 19 February 2025, 4 (Dr Marjorie O’Neill).

⁵⁸ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [3.70]–[3.74].

⁵⁹ *Ibid* [3.62].

⁶⁰ See, eg, Woollahra Council, Submission No 22 to NSW Legislative Council’s Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (1 April 2025) 2–4; Sydney Jewish Museum, Submission No 23 to NSW Legislative Council’s Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (3 April 2025) 1–3; Jewish Council of Australia, Submission No 44 to NSW Legislative Council’s Portfolio Committee No 5 – Justice and Communities, Parliament of NSW, *Antisemitism in New South Wales* (6 April 2025) 2, 4.

⁶¹ NSW, *Parliamentary Debates*, Legislative Assembly, 19 February 2025, 48 (Michael Daley, Attorney General).

- to the NSW Social Cohesion Grants for Local Government program,⁶² which funds local councils to enhance social cohesion in their communities.

Stakeholder views

The Terms of Reference require consideration of any other matters related to criminal law reform that the NSW Government could consider to enhance social cohesion. Stakeholder views are sought on whether or not reforming criminal law protections against the incitement of hatred towards vulnerable groups may assist with promoting social cohesion (see **focus questions 4-6**).

Focus questions

Stakeholders are invited to respond to the focus questions below.

Criminal law protections against hatred for vulnerable groups
<ol style="list-style-type: none"> 1. What is the extent and impact of hatred towards vulnerable groups in the NSW community? 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?
Interaction between criminal law protections against hatred and relevant rights and freedoms
<ol style="list-style-type: none"> 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?
Promoting social cohesion
<ol style="list-style-type: none"> 4. Would reforming criminal law protections against the incitement of hatred towards vulnerable groups assist with promoting social cohesion in NSW? 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? 6. Are there other measures related to criminal law reform that may promote social cohesion?

⁶² Ibid.

Appendix A: Further information

Relevant findings from the 2024 NSW Law Reform Commission review

The Terms of Reference for the 2024 NSWLRC review focused on the criminal law response to serious racial and religious vilification under section 93Z of the Crimes Act. Accordingly, the review did not consider whether the list of attributes captured by the section should be expanded.⁶³

However, the NSWLRC noted:

- it was encouraged by stakeholders not to recommend a ‘hierarchical, two-tier model of protection’ that differentiates between the groups protected by section 93Z, and
- ‘[i]t would be a backwards step for NSW to differentiate between the attributes currently protected by s 93Z’.⁶⁴

The NSWLRC’s final report, tabled in NSW Parliament on 21 November 2024, concluded that section 93Z should not be amended. The NSWLRC considered that the low number of prosecutions under section 93Z did not, of itself, make the case for reform. The low numbers may be due to a range of factors other than the elements of the offence, including a preference by police to charge general offences.⁶⁵

The NSWLRC noted there was no clear community consensus, including among religious and multicultural groups, that reform to section 93Z was required, and that many cautioned against such reforms.⁶⁶

The NSWLRC also opposed introducing new vilification offences, such as an offence of inciting hatred. The NSWLRC considered:

- This would introduce imprecision and subjectivity into the criminal law, as there are different opinions in the community about what hatred means, and it could be difficult to prove terms like ‘hatred’ to the criminal standard.⁶⁷
- Such an offence could have negative consequences, such as disproportionately impacting on certain groups and upsetting the ‘balance’ of rights.⁶⁸

Further, the NSWLRC opposed the use of a harm-based test, which focuses on the likely effect of the accused’s act on targeted individuals and groups.⁶⁹ The NSWLRC’s concerns included that:

- Unlike an incitement-based test, a harm-based test does not consider the impact of the accused’s conduct on any third-party audience. Instead, it focuses on the likely impact of the conduct on the target group.⁷⁰
- Harm-based tests are often objective, which means they do not have any mental element (involving consideration of the accused’s state of mind). It would be an overreach to criminalise hate-based conduct without any mental element, as the offence could capture people who may not appreciate the significance of their behaviour.⁷¹

⁶³ NSW Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) [1.31].

⁶⁴ *Ibid* [1.24]–[1.25].

⁶⁵ *Ibid* [1.41].

⁶⁶ *Ibid* [1.42].

⁶⁷ *Ibid* [4.30], [4.32], [4.38].

⁶⁸ *Ibid* [4.44], [4.49].

⁶⁹ *Ibid* [4.56], [4.59].

⁷⁰ *Ibid* [4.62].

⁷¹ *Ibid* [4.61], [4.70].

It is noted that new section 93ZAA of the Crimes Act (not yet commenced) includes a harm-based test in addition to a mental element of intention and an incitement-based test (not instead of these elements).

Comparison of Australian offences of inciting hatred

There are some similarities and some differences between the NSW offence of inciting hatred under new section 93ZAA of the Crimes Act and relevant offences in Victoria and Western Australia:

- The NSW offence requires the accused's act to be **public**,⁷² and the WA offences require the conduct to be **otherwise than in private**.⁷³ However, the Victorian offence of inciting hatred does not expressly require a public act.⁷⁴
- The NSW and Victorian offences both use the term '**incite**'.⁷⁵ However, the relevant WA offences use the terminology of 'create, promote or increase'.⁷⁶
- The NSW offence uses the term '**hatred**', which is not defined.⁷⁷ The new Victorian offence prohibits conduct that is likely to incite 'hatred', 'serious contempt', 'revulsion' or 'severe ridicule'.⁷⁸ The relevant WA offences prohibit engaging in public conduct to create, promote or increase 'animosity' (meaning hatred or serious contempt) or 'harassment' (which includes to threaten, seriously and substantially abuse or severely ridicule).⁷⁹
- In respect of the mental element, the NSW offence requires **intention** only.⁸⁰ The mental element for the Victorian offence also includes 'belief' that the conduct would probably incite hatred.⁸¹ In WA, there is a tiered system, where the offence of engaging in conduct intended to incite hatred carries a higher penalty, and the offence of engaging in conduct 'likely' to incite hatred carries a lower penalty and does not include a mental element.⁸²
- Like in NSW, the WA offences capture inciting hatred on the ground of **race** only.⁸³ However, the new Victorian offence captures inciting hatred on a broader range of grounds: disability, gender identity, race, religious belief or activity, sex, sex characteristics, sexual orientation, and personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the aforementioned attributes.⁸⁴
- Unlike the NSW offence, neither the new Victorian offence nor the WA offences of inciting hatred have a **harm-based test** requiring that a reasonable person who was the target of the incitement, or who was a member of the targeted group of persons, would fear:
 - harassment, intimidation or violence, or
 - for their safety.

⁷² *Crimes Act 1900* (NSW) s 93ZAA(1)(a) (uncommenced).

⁷³ *Criminal Code* (WA) ss 77, 78.

⁷⁴ *Crimes Act 1958* (Vic) s 195N (uncommenced).

⁷⁵ *Crimes Act 1900* (NSW) s 93ZAA(1)(a) (uncommenced); *Crimes Act 1958* (Vic) s 195N(1)(a) (uncommenced).

⁷⁶ *Criminal Code* (WA) ss 77, 78.

⁷⁷ *Crimes Act 1900* (NSW) s 93ZAA(1)(a) (uncommenced).

⁷⁸ *Crimes Act 1958* (Vic) s 195N(1)(a) (uncommenced).

⁷⁹ *Criminal Code* (WA) ss 77, 78.

⁸⁰ *Crimes Act 1900* (NSW) s 93ZAA(1)(a) (uncommenced).

⁸¹ *Crimes Act 1958* (Vic) s 195N(1)(c) (uncommenced).

⁸² *Criminal Code* (WA) ss 77, 78.

⁸³ *Criminal Code* (WA) ss 77, 78.

⁸⁴ *Crimes Act 1958* (Vic) ss 195M (definition of 'protected attribute') (uncommenced), 195N(1)(b) (uncommenced).

- The NSW offence contains an **exemption** for quoting from, or otherwise referencing, a religious text for the purpose of religious teaching or discussion.⁸⁵ The WA offence of conduct likely to incite hatred – but not the offence of conduct intended to incite hatred – has multiple exemptions based on reasonableness and good faith for a variety of public interest purposes.⁸⁶
- While **prosecutions** for the NSW offence can be commenced by the DPP or a police officer,⁸⁷ the equivalent offences in WA⁸⁸ and Victoria⁸⁹ can only be prosecuted by, or with the consent of, the DPP.
- Further, the new legislation in Victoria requires the DPP, in deciding whether the offence is to be prosecuted, to consider all circumstances (including the social, cultural and historical circumstances) surrounding the relevant conduct.⁹⁰ This is intended to ensure power dynamics and context are taken into account.⁹¹
- In WA, there are separate offences of **possessing threatening or abusive material intended for publication** – these offences: have higher penalties where the publication is **intended to create, promote or increase animosity** or **harassment**, have lower penalties where the publication is ‘likely’ to do so (with no mental element), and also only apply in relation to **racial groups**.⁹²

Relevant rights and freedoms under Australian and international law

International human rights law

Freedom of expression and freedom of religion

The *International Covenant on Civil and Political Rights (ICCPR)* recognises individual rights to:

- freedom of expression, which captures the right to seek, receive and communicate information and ideas, and
- freedom of religion, which captures the right to have or adopt a religion or belief, and the right to demonstrate religion or belief through worship, observance, practice and teaching.⁹³

These rights to freedom of expression and freedom to manifest religion or belief are not absolute, and may be restricted, provided certain requirements are met.⁹⁴ That is, any limitations to these freedoms:

- must be set out in laws,⁹⁵ and

⁸⁵ *Crimes Act 1900* (NSW) s 93ZAA(2) (uncommenced).

⁸⁶ *Criminal Code* (WA) s 80G.

⁸⁷ *Crimes Act 1900* (NSW) s 93ZAA(4) (uncommenced).

⁸⁸ *Criminal Code* (WA) s 80H.

⁸⁹ *Crimes Act 1958* (Vic) s 195Q(1) (uncommenced).

⁹⁰ *Crimes Act 1958* (Vic) s 195Q(2) (uncommenced).

⁹¹ Victoria, *Parliamentary Debates*, Legislative Council, 1 April 2025, 1314 (Aiv Puglielli).

⁹² *Criminal Code* (WA) ss 79, 80.

⁹³ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) arts 18(1), 19(2).

⁹⁴ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) arts 18(3), 19(3); Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011) 5-6 [21]-[22]; Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 3 [8].

⁹⁵ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) arts 18(3), 19(3).

- can only be imposed to protect respect for the rights or reputations of others or to protect national security, public order of public health or morals (in the case of freedom of expression),⁹⁶ or
- can only be imposed to protect public safety, order, health or morals or the fundamental rights and freedoms of others (in the case of freedom of religion),⁹⁷ and
- must be necessary and proportionate.⁹⁸

Requirement to prohibit incitement of hatred

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.⁹⁹ This requirement has also been interpreted to apply to other protected attributes, such as sex, language, religion, political or other opinion, national or social origin, property, birth or other status,¹⁰⁰ disability, sexual orientation, gender identity or intersex status.¹⁰¹

Under the *International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, State parties (such as Australia) are also required to take ‘immediate and positive measures’ to eradicate incitement to racial hatred.¹⁰² These measures include making it an offence, punishable by law, to incite (others) to racial discrimination.¹⁰³ To comply with this obligation, the Committee on the Elimination of Racial Discrimination (**CERD Committee**) has recommended that State parties should, by law, prohibit incitement to hatred, contempt or discrimination against members of a group on grounds of their race, colour, descent, or national or ethnic origin.¹⁰⁴

While State parties are required to prohibit by law the relevant forms of incitement under the ICCPR and the CERD, they are not obligated to criminalise them.¹⁰⁵ In 2013, a group of human rights experts was convened in Rabat by the Office of United Nations High Commissioner for Human Rights to consider the interpretation of the requirement to prohibit incitement to national, racial or religious hatred. The ‘Rabat Plan of Action’ that was adopted recommends that criminal sanctions should be seen as measures of last resort and applied only in strictly justifiable circumstances.¹⁰⁶ The CERD

⁹⁶ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(3); Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011) 5–6 [21]–[22].

⁹⁷ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 18(3); Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 3 [8].

⁹⁸ Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011) 6 [22], 8 [33]–[34]; Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 3 [8].

⁹⁹ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 20(2).

¹⁰⁰ *Ibid* art 2(1).

¹⁰¹ 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) 6 [9].

¹⁰² *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4.

¹⁰³ *Ibid* art 4(a).

¹⁰⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, UN Doc CERD/C/GC/35 (26 September 2013) 4 [13].

¹⁰⁵ 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) 6 [8], 9 [18].

¹⁰⁶ “Rabat Plan of Action on the Prohibition of Advocacy or National, Racial or religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence” in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) 12 [34].

Committee has also recommended that criminalisation of forms of racist expression should be reserved for serious cases.¹⁰⁷

Interaction between prohibitions on incitement and relevant freedoms

Legal prohibitions on the incitement of hatred, as required by the ICCPR and CERD, may limit freedom of expression and freedom of religion. Subject to complying with the requirements outlined above, prohibitions on incitement of hatred can be compatible with those freedoms.¹⁰⁸

The Rabat Plan of Action also considered the interaction between freedom of expression and prohibitions on incitement.¹⁰⁹ It identified six factors for determining when expression amounting to incitement should be criminalised.¹¹⁰ This test has been largely adopted by the CERD Committee in relation to racist hate speech.¹¹¹

Key aspects of the test include that:

- the context of the speech should be considered, including the economic, social and political climate and patterns of discrimination, and
- there must be a reasonable probability that the speech would succeed in inciting actual and imminent action against the target group. That is, there should be a real and imminent danger resulting from the expression.

Australian constitutional law

The implied freedom of political communication

The High Court of Australia has recognised that, based on its text and structure, the Australian Constitution protects freedom of political communication.¹¹²

The freedom does not create personal rights.¹¹³ Rather, it limits the exercise of Commonwealth and State law-making power to what is necessary for the effective operation of the system of representative and responsible government that is provided for by the Constitution.¹¹⁴

Once a law is found to effectively burden this implied freedom, the test for the court in determining whether the law is constitutionally valid involves:

¹⁰⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, UN Doc CERD/C/GC/35 (26 September 2013) 4 [12].

¹⁰⁸ Human Rights Committee, *General Comment No 11: Prohibition of propaganda for war and inciting national, racial or religious hatred* (Art. 20), UN Doc CCPR/C/2/Rev. 5 (29 July 1983) 1 [2]; Human Rights Committee, *General Comment No 34 - Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011) 12 [48], [50]; Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, UN Doc CERD/C/GC/35 (26 September 2013) 2 [6]; Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 3 [7]–[8].

¹⁰⁹ “Rabat Plan of Action on the Prohibition of Advocacy or National, Racial or religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence” in Human Rights Committee, Annual Report of the United Nations High Commissioner for Human Rights, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [17].

¹¹⁰ Ibid [29].

¹¹¹ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, UN Doc CERD/C/GC/35 (26 September 2013) 5 [15].

¹¹² *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

¹¹³ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1; *Wotton v Queensland* (2012) 246 CLR 1.

¹¹⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Nationwide News v Wills* (1992) 177 CLR 1.

- firstly, asking whether the purpose of the law is legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government, and
- secondly, enquiring as to whether the law is reasonably appropriate and adapted to advance that end, in a manner compatible with the maintenance of the constitutionally prescribed system of government.¹¹⁵

In *Sunol v Collier (No 2)*, the NSW Court of Appeal considered the implied freedom of political communication in relation to section 49ZT of the *Anti-Discrimination Act 1977* (NSW), which is a civil prohibition against homosexual vilification.¹¹⁶ The Court found that section 49ZT burdened the implied freedom, but that the purpose of preventing vilification was a legitimate end of government compatible with the maintenance of the constitutionally prescribed system of government, and that the provision was reasonably appropriate and adapted to that end.¹¹⁷

Freedom of religion

Section 116 of the Australian Constitution provides that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The constitutional protection applies only to the Commonwealth. It does not limit the States' ability to legislate or take other actions restricting freedom of religion.¹¹⁸

¹¹⁵ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–568; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178, 194–195 [2] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 364 (Kiefel CJ, Bell and Keane JJ).

¹¹⁶ *Sunol v Collier (No 2)* [2012] NSWCA 44.

¹¹⁷ *Ibid* [42]–[53].

¹¹⁸ *The Attorney General for the State of Victoria (at the relation of Black) and Ors v The Commonwealth of Australia* (1981) 146 CLR 559, 577, 605, 652.