



NEW SOUTH WALES
WOMEN'S ACTION
ALLIANCE

Review of criminal law protections against the incitement of
hatred by the NSW Government
Submission from NSWWAA
4 August 2025

The NSW Women's Action Alliance (NSWWAA) welcomes the opportunity to contribute to the Review of criminal law protections against the incitement of hatred.¹ NSWWAA is non-sectarian and unaligned with any political party. We advocate for women and girls, especially in domains where we face discrimination or vulnerability because of our sex. Our membership includes mothers, grandmothers, teachers, public servants, researchers, academics, professionals, volunteers, business women, retirees, and medical professionals all from a diversity of backgrounds and all of whom seek to speak on matters that affect us.

As a member of the Affiliation of Australian Women's Advocacy Alliances (AAWAA)² NSWWAA has consistently supported legislative limits on speech that crosses the threshold into genuine intimidation or violence, while also sounding the alarm when poorly drafted measures risk suppressing legitimate democratic debate.³

Summary of recommendations

NSWWAA submits that reforms to criminal law protections against incitement of hatred must continue to protect individuals and groups from serious harm, while also upholding fundamental freedoms of expression and political communication. We ask that the NSW Parliament

- Preserve the existing incitement to violence threshold in criminal law.
- Extend explicit statutory protection against incitement to violence on grounds of sex.
- Introduce statutory public interest defences for legitimate advocacy, research, and reporting.
- Reinstate mandatory, independent prosecutorial consent before bringing incitement charges.
- Establish ongoing public reporting and independent review mechanisms to ensure transparency and proportionality.

¹ [Review of criminal law protections against the incitement of hatred](#), NSW Government, Communities and Justice.

² See womensadvocacy.net, AAWAA.

³ View some of AAWAA's submissions on this topic: [Inquiry into the potential for a Human Rights Act for South Australia by the Social Development Committee Parliament of South Australia Submission](#); [New ACMA powers to combat misinformation and disinformation](#), AAWAA; and [Statutory Review of the Online Safety Act 2021, Department of Infrastructure, Transport, Regional Development, Communications and the Arts](#), AAWAA.

The evolving NSW legal landscape and the rationale for caution

The current review comes at a time when New South Wales has moved both to strengthen and broaden hate speech protections. The introduction of section 93Z of the Crimes Act 1900 (NSW)⁴ criminalised public threats or incitement to violence on several grounds, including race, religion, gender identity, and sexual orientation; however, the recent Crimes Amendment (Inciting Racial Hatred) Act 2025 (NSW)⁵ departs from this high threshold by creating an offence under section 93ZAA for public incitement of ‘racial hatred’ even in the absence of violence. Similarly, the Anti-Discrimination Amendment (Religious Vilification) Act 2025 (NSW) expanded the civil regime in the Anti-Discrimination Act 1977 (NSW)⁶ to prohibit public acts inciting hatred, serious contempt, or severe ridicule on the ground of religion.⁷

While there is a clear need to protect individuals and groups from vilification and incitement to hatred – especially where this crosses the threshold into violence – any extension or modification of NSW’s legal framework must be drafted with precision and rigorous safeguards for fundamental rights. The current system, anchored by section 93Z of the Crimes Act 1900, maintains a careful balance by criminalising only the most egregious forms of incitement (i.e., those likely to result in violence or serious harm). And while recent expansions demonstrate NSW’s commitment to addressing hatred and promoting social cohesion at the civil law level, our concern is that any move to lower the threshold for criminal liability from incitement to violence to the much vaguer concept of ‘hatred’ – as seen in the new racial-hatred offence and proposed for broader application – brings with it unacceptable risks. Chief among these are threats to the implied freedom of political communication under the Australian Constitution, rights to expression, assembly, and association under the ICCPR⁸ (articles 19, 21, and 22, respectively), and women’s equal participation under CEDAW⁹ article 7.

We therefore emphasise that vague concepts such as ‘hatred’ or ‘contempt’ – without a clear nexus to violence – invite subjective, inconsistent and politically influenced enforcement, which recent international evidence¹⁰ (as well as our own documentation¹¹) shows can chill democratic debate on matters of genuine public interest, especially those involving women’s sex-based protections and rights.

Further, the protection of freedom of expression is not only a legal necessity under ICCPR article 19 but a vital component of social cohesion: robust, rigorous debate is key to resolving social tension, not its cause. And the rights of women to participate equally and meaningfully in public discourse (as protected by CEDAW article 7) are at risk if laws are so broadly drafted that they can be used to penalise those who assert biological realities or advocate for female-only provisions in law and policy.

⁴ [Crimes Act 1900 No 40](#).

⁵ [Crimes Amendment \(Inciting Racial Hatred\) Act 2025 No 9](#).

⁶ [Anti-Discrimination Act 1977 No 48](#).

⁷ [Anti-Discrimination Amendment \(Religious Vilification\) Act 2023 No 15](#).

⁸ [International Covenant on Civil and Political Rights](#).

⁹ [Convention on the Elimination of All Forms of Discrimination against Women](#)

¹⁰ [Statement by Ms Reem Alsalem, Special Rapporteur on violence against women and girls](#), 22 May 2023.

¹¹ [Submissions](#), AAWAA.

Accordingly, we submit that adequacy in the current law is best measured not by the ease with which allegations of incitement to hatred can be made or prosecuted, but by the law's fidelity to Australia's international legal obligations, its respect for the implied constitutional freedom of political communication, and its demonstrable effectiveness in promoting safety as well as open, inclusive public debate.

A high threshold for criminal liability remains essential

The record in NSW shows that the current incitement to violence threshold, as set out in section 93Z of the Crimes Act, works to balance protection against harm with the safeguarding of democratic freedoms. It targets only the most dangerous forms of speech – those made with intent or recklessness, and likely to incite violence – thereby meeting both the 'necessity' and 'proportionality' criteria under the ICCPR. Evidence from other jurisdictions, especially Scotland¹² and Ireland,¹³ demonstrates that criminalising 'hatred' alone (without any link to violence or harm) casts a chill over lawful speech, intensifies community division, and is vulnerable to ideologically driven application.

This is not speculative. The Scottish Hate Crime and Public Order Act 2021 criminalises the stirring up of hatred by 'threatening or abusive' conduct, without requiring an intent to incite violence.¹⁴ The resulting confusion has produced thousands of police complaints, many of which police do not consider criminal, and has triggered calls for re-examination and reform.¹⁵ In New Zealand, the Law Commission and a select parliamentary committee rejected similar proposals specifically because of the risks posed to freedom of expression protected under the New Zealand Bill of Rights Act 1990.¹⁶

In addition to this, Australia is bound by article 19 of the ICCPR, which guarantees the right of citizens to seek, receive, and impart information and ideas of all kinds, subject only to restrictions which are provided by law and are necessary to respect the rights or reputations of others, or for the protection of national security, public order, public health, or morals. Critically, article 20(2) of the ICCPR only obliges states to prohibit advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. This means that any move to criminalise non-violent 'hatred', 'contempt' or 'ridicule' (especially for categories not mandated under article 20) would require the legislature to meet a far stricter test of necessity and proportionality under article 19(3). Further, under article 26 of the ICCPR and articles 2 and 7 of CEDAW, all people must have equal protection under the law and equal opportunity to participate in public life – and in both conventions, sex is a protected characteristic. Laws that, for example, silence women for stating biological reality or advocating for women's sex-based protections and rights would violate these obligations.

¹² See [A woman's guide to the Hate Crime and Public Order \(Scotland\) Act 2021](#), Murray Blackburn Mackenzie; and [Free speech warning from police watchdog on hate crime law](#), *The Times*.

¹³ [Ireland drops plans for hate speech law, minister says](#), Reuters.

¹⁴ [Hate Crime and Public Order \(Scotland\) Act 2021](#), legislation.gov.uk.

¹⁵ See [Weekly hate Crime and Incident Report](#), Police Scotland; [More than 3,000 hate crime complaints made to Police Scotland](#), BBC; [How is Scotland's new hate crime law going?](#), BBC; [Tory demands for Hate Crime Act to be repealed are rejected by MSPs](#), *The Scotsman*.

¹⁶ [New Zealand Law Commission's review of hate crime \(2025\)](#), Lawcom.govt.nz; [Maxim Institute policy paper on hate speech inquiries](#), Maxim Institute; [New Zealand Parliamentary Hansard debate on incitement and hate speech bills](#), NZ Parliament Hansard.

The omission of sex as a protected attribute

Despite recent expansions to vilification laws in New South Wales, the female sex remains unprotected under both the Crimes Act and the Anti-Discrimination Act. Unlike attributes such as race, religion, or sexuality, sex-based hostility against women and girls is neither explicitly recognised as an aggravating factor in criminal sentencing nor as a basis for civil or criminal vilification.¹⁷

This anomaly is not only inequitable, but fundamentally inconsistent with Australia's obligations under international law. This is a clear gap not just in NSW law but in most Australian jurisdictions, and only serves to reinforce the necessity of our recommended changes. An arrangement that protects a male person on the basis of gender identity, while excluding a woman targeted for her sex, undermines the entire human rights rationale for incitement and vilification laws.

Public interest defences and the risk of overreach

A crucial safeguard long recognised in both international law and comparative legislative practice is the inclusion of robust public interest defences. The lack of explicit carve-outs in section 93Z of the Crimes Act means that those engaged in academic research, journalism, lawful advocacy, or public interest critique must rely solely on the discretion of police and prosecutors. This absence of clear, codified defences creates real risks of selective or inconsistent application, and can leave individuals vulnerable to investigation or prosecution for statements that, while controversial, are both lawful and integral to informed democratic participation.

This problem is not hypothetical. In recent years, the eSafety Commissioner has issued guidance stating that “making harmful claims that gender is binary”¹⁸ could amount to online gendered violence. This means that statements such as ‘sex is binary’ or ‘only females give birth’ could constitute harmful online gendered violence, blurring any line between legitimate debate and actionable abuse. In another example, the Australian Human Rights Commission has declined to grant a lesbian group an exemption to host female-born lesbian events on the grounds that exclusion of males who identify as lesbian would be discriminatory.¹⁹

The effect is a culture increasingly reluctant to permit any public discussion of women's sex-based protections and rights, with women facing loss of income, reputational damage, or social exclusion for expressing lawful and evidence-based positions.²⁰ Laws that criminalise mere ‘hatred’, ‘contempt’ or ‘ridicule’, without explicit statutory defences, would inevitably compound this chilling effect, contrary to both the spirit and letter of Australia's international commitments.

¹⁷ [Crimes Legislation Amendment \(Racial and Religious Hatred\) Bill 2025](#). We note the SDA includes anti-discrimination measures but not anti-vilification.

¹⁸ [Gendered violence](#), eSafety Commissioner.

¹⁹ [Australian Human Rights Commission Sex Discrimination Act 1984 \(Cth\), section 44\(1\) Notice of decision on application for temporary exemption: Lesbian Action Group](#).

²⁰ See recent joint [Stakeholder submission to the United Nations Human Rights Council Australia's fourth Universal Periodic Review \(UPR\)](#), AAWAA.

Experiences in comparable jurisdictions demonstrate that separating ‘hatred’ from violence blurs the line between robust disagreement and criminality. Scotland's Hate Crime and Public Order Act has been criticised²¹ for stifling debate on women's sex-based protections and rights; and Ireland's initial hate speech legislation, proposing to criminalise material inciting hatred, faced public and political backlash over free speech concerns (see earlier), and as a result, the government removed the hate speech provisions and passed the Criminal Justice (Hate Offences) Act 2024, which targets aggravated hate-motivated crimes.²²

The NSW Parliament should exercise caution before seeking to extend the section 93ZAA model to other protected attributes, especially given the exclusion of biological sex as this risks prioritising a male's subjective identification as a ‘woman’ over the lived, material, and biological reality of females, thus creating a hierarchy of human rights in NSW. We endorse the retention of the high threshold built into section 93Z, which requires proof of intention or recklessness to threaten or incite violence and limits the offence to that most dangerous form of expression.

The need for independent prosecutorial consent

One of the most significant recent changes to section 93Z of the Crimes Act was the removal in January 2024 of the requirement for independent prosecutorial consent,²³ which has raised legitimate concerns;²⁴ previously, a prosecution under this provision could not proceed without approval from the Director of Public Prosecutions (DPP).²⁵ This provided a check against frivolous or politicised prosecutions, ensuring decisions to charge were grounded in evidence and the public interest, rather than public or political pressure. The absence of this safeguard makes it easier for ideologically driven or vexatious complaints to result in criminal proceedings, particularly in contentious areas such as women's sex-based protections and rights or debate around gender identity. Independent prosecutorial consent is also a feature in overseas jurisdictions (such as the United Kingdom)²⁶ where experience confirms it is vital in protecting minority or dissenting viewpoints from strategic use of hate speech law to suppress legitimate advocacy or dissent. We strongly advocate for the reintroduction of independent prosecutorial consent as a vital safeguard.

Procedural and technical design

While we agree that governments have a duty to intervene before hatred spills into violence, international law says the threshold must remain high. The Supreme Court of Canada, for instance, upheld the constitutionality of civil hate speech law only after limiting its application to the ‘most extreme manifestations’, that is, detestation or vilification likely to produce real

²¹ [Hate Crime and Public Order \(Scotland\) Act 2021](#), legislation.gov.uk. See also [A Woman's Guide to the Hate Crime and Public Order \(Scotland\) Act 2021](#), Murray Blackburn Mackenzie, and [Free speech warning from police watchdog on hate crime law](#), The Times.

²² [Ireland drops plans for hate speech law, minister says](#), Reuters.

²³ [Prosecution of threats and incitement to violence set to be streamlined](#), Communities and Justice

²⁴ [NSWCCL Statement: NSW cannot be prosecuted into social cohesion](#), NSW Council for Civil Liberties; and [Crimes Amendment \(Inciting Racial Hatred\) Bill 2025 \(NSW\) Briefing Note](#), ALHR.

²⁵ [Getting tough on hate speech: Section 93Z of the Crimes Act 1900 \(NSW\)](#), Sydney Criminal Lawyers.

²⁶ [Referrals, approvals and notifications](#), The Crown Prosecution Service.

harm.²⁷ This is in sharp contrast with the Scottish model, which has proven overbroad in practice.²⁸ Accordingly, NSW should retain the current section 93Z model as the core of its criminal incitement framework. Any incorporation of new protected attributes – including sex – must adhere strictly to the violence/serious harm threshold, and must not introduce lower standards based on subjective or elastic concepts like ‘offence’, ‘ridicule’, or ‘affront’.

Any expansion of offence categories must be accompanied by (1) explicit public interest defences and (2) the restoration of DPP consent before proceeding. We further recommend mandated public, disaggregated reporting of complaints, investigations, and outcomes. Only with transparency and mandated, routine, periodic review can Parliament judge both the efficacy and proportionality of these laws, recalibrating as experience and evolving evidence demand.

Risks in the digital age and the cost of expanding hate speech laws

Particular caution is warranted in the era of algorithm-driven digital platforms. The Online Safety Act 2021 (Cth) already enables administrative authorities to require the removal of online content considered harmful, with little transparency or public debate.²⁹ Expanding criminal law to cover broad and undefined incitement offences risks giving private tech companies, in a bid to avoid liability, new incentives to suppress and remove not only genuinely dangerous material, but also legitimate and important discussion.³⁰ Experience has already shown that social media platforms more often censor gender-critical and feminist speech, while permitting abuse against women, especially those who question gender norms.³¹ The UN Special Rapporteur on violence against women and girls, Ms Reem Alsalem, has specifically drawn attention to this adverse pattern.³²

Finally, criminal hate speech law cannot be disentangled from the operation of police and social institutions; poorly targeted or overly broad offences risk distorting crime data, especially in cases involving administrative sex changes (‘sex self-identification’) result in the

²⁷ See [Saskatchewan \(Human Rights Commission\) v. Whatcott 2013 SCC 11 \(Supreme Court of Canada\)](#); [Saskatchewan \(Human Rights Commission\) v. Whatcott](#), Global Freedom of Expression; [Legal Restriction on Hate Speech in Canada](#), Centre for Free Expression. In the Whatcott standard, ‘harm’ includes, but is not limited to, physical harm. The threshold is speech that poses a real risk of causing illegal discrimination, hostility, or social exclusion. The prohibition is carefully defined so it does not capture mere offence, ridicule, or affronts to dignity; rather, it requires a likely effect of encouraging or legitimising discriminatory attitudes or behaviours within society.

²⁸ [Scotland’s hate crime law: the problem with using public order laws to govern online speech](#); [Scotland’s new Hate Crime Act imperils freedom of expression](#), *Edinburgh Law Review*, PE2097/A; [Repeal the Hate Crime and Public Order \(Scotland\) Act 2021](#), Scottish Government.

²⁹ For criticism, see [Submission Statutory Review of the Online Safety Act 2021](#), Merillot submission.

³⁰ See [Reform the eSafety act: A safer online environment will help eliminate discrimination and violence against women and girls](#), AAWAA.

³¹ See [Twitter’s free speech threatens radical trans activism](#), *The Spectator*, January 2023; [Twitter regularly suspends and bans feminists](#), Twitter thread on Twitter’s banning of gender critical tweets since 2018; [Twitter closes Graham Linehan account after trans comment](#), *The Guardian*, June 2020; [Reddit is banning women’s health subreddits under new rules](#), *Feminist Current*, July 2020; [YouTube has taken down the video “to keep our community safe”](#), Tweets by Helen Joyce; [Etsy equates ‘Detransitioner awareness’ designs with hatred](#), July 2023.

³² [Statement by Ms Reem Alsalem, Special Rapporteur on violence against women and girls](#), 22 May 2023.

misclassification of offenders by gender identity.³³ This has direct implications for resource allocation, women's safety, and public understanding of the scale and nature of certain forms of violence and discrimination.

Conclusion

NSWWAA supports robust criminal sanctions for genuinely dangerous incitement, but expansion of hate speech law must not occur by sacrificing basic freedoms or exposing women and girls to further vulnerability. Incitement to violence must remain the threshold for criminal liability. Sex must be made a protected attribute. Clear statutory defences and public interest exceptions must be enacted, and independent consent to prosecute must be restored. Only with these safeguards in place – tied directly to Australia's international legal commitments – can New South Wales honour its responsibilities to women and girls, while preserving the rights of all to speak and participate fully in democratic life.

³³ See our [Communication to the Commission on the Status of Women \(CSW\) on Patterned and specific violations of women's human rights in Australia](#), 27 July 2025.