

To: The Honourable John Sackar, AM KC
From: Professor Nicole L Asquith, Professor of Policing, University of Tasmania
Re: Independent Review on criminal law protections against the incitement of hatred in NSW
Date: 7 August 2025

FOCUS QUESTIONS

Criminal law protections against hatred for vulnerable groups

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

This is difficult to know in a context of no population studies in Australia. Crime data such as that generated by the Australian Bureau of Statistics (esp *Personal Safety, Australia*) provide a robust mechanism for understanding victimisation, yet, to date, the ABS has not included hate crime or criminal vilification as reportable crimes in these population studies. Additionally, the ABS' *Recorded Crime, Victims* similarly does not report on hate crimes or criminal vilification, and only analyses crime data that have been reported and properly recorded by police. As such, the only evidence of the harms of hate are partisan community studies and scant academic research, both of which are unable to fully document the immediate and cumulative bio-psycho-social impacts of hate. From the limited evidence available, we know that many communities are targeted, and some victim-survivors experience, ongoing, repeated, daily victimisation. Extrapolating from population studies on complementary crimes against the person, such as family and domestic violence, we can expect that the harms of targeted violence and (criminal) vilification are extraordinary. Whether it is criminal vilification from organised hate groups, or hate speech over the back fence from neighbours, targeted violence can have long-lasting consequences for victim-survivors and their communities (and other targeted communities), can abridge their social connectedness and civic participation, and reduce their opportunities to live a fulfilling life.

If unaddressed or unrecognised by those institutions tasked with responding to crime and victimisation, victim-survivors are left to negotiate a “bare life”¹, where they are not perceived by others as fully human or deserving of the social goods of humanity. Dehumanising vilification—along with extreme criminal vilification that advocates for the elimination of whole classes of people—not only damages the psycho-social wellbeing of victim-survivors, but is also thought to increase the likelihood of physiological harm. Compared to crimes committed at random, targeted hate crimes are more harmful as they are often more violent (including torture and desecration of the dead), damage cardiovascular health, and create ill-adapted health behaviours and negative impacts on pre- and post-natal infant health.² Victims also report poorer and decreased mental

¹ Agamben, G 2000 *Means Without End: Notes on Politics*. University of Minnesota Press.

² Lewin, S 2001 Torture, ill-treatment, and sexual identity. *The Lancet* 358: 9296, P1899-; Benier, K 2017 The harms of hate: Comparing the neighbouring practices and interactions of hate crime victims, non-hate crime victims and non-victims. *Int*

health, often as a consequence of the layered impact of victimisation and minority stress³, which can have lifecourse effects.⁴

The flow-on effects of hate are also significant, as they create collective harms that inhibit individual and collective belonging, and create safety stressors.⁵ Twenty percent of victims experience repeated, ongoing victimisation, most commonly as part of routine activities such as public transport, shopping, and in their contact with neighbours.⁶ Yet the scant Australian evidence of the harms of hate crime and hate speech has not differentiated between isolated or ongoing incidents of hate crime or criminal vilification nor documented the cumulative harms of repeat victimisation. Evidence from other ongoing interpersonal violence, such as domestic violence, indicates that repeat violent victimisation is correlated with significant and cumulative psychological harms.⁷ However, to date, there are no data on the immediate or cumulative bio-psycho-social impacts of (repeat) hate crime victimisation. This leaves a significant gap in the evidence, which hampers the development of effective criminal justice and health service delivery.⁸

Rev Vict 23:2, 179-201; Iganski, P & Lagou, S 2014 The personal injuries of hate crime, in Hall, N et al (eds), *The Routledge International Handbook on Hate Crime*. Routledge, 34-46; Thorneycroft, R & Asquith, NL 2021 Unexceptional violence in exceptional times: Disablist and ableist violence during COVID-19. *IJCSD* 10:2, 140-155; Caceres, BA et al 2018 Cardiovascular Disease Risk in Sexual Minority Women (18-59 Years Old): Findings from the National Health and Nutrition Examination Survey. *J WHI* 28:4, 333-41; Williams, DR 2019 Understanding how discrimination can affect health. *HSR* 54: S2, 1374-88; Wicke, T & Cohen Silver, R 2009 A Community Responds to Collective Trauma. *Am J Community Psychol* 44:3-4, 233-48; Sackar, J. 2023. *Special Commission of Inquiry into LGBTIQ Hate Crimes*. NSW Government.

³ Hoy-Ellis, CP 2023 Minority Stress and Mental Health: A Review of the Literature. *J Homosex*, 70:5, 806-830; Iner, D et al 2023 *Islamophobia in Australia IV (2014-2021)*. CSU.

⁴ *op. cit.* Williams; Graham-Kevan, N et al 2015 Repeat victimisation, traumatisation, and victim vulnerability. *The Open Criminology Journal*, 8:1, 36-48

⁵ Perry, B & Alvi, S 2012 'We are all vulnerable'. *Int Rev Vict* 18:1, 57-71; *op. cit.* Wicke & Cohen Silver; Abu-Ras, WM & Suarez, ZE 2009 Muslim Men and Women's Perception of Discrimination, Hate Crimes, and PTSD Symptoms Post 9/11.

Traumatology 15:3, 48-; Noelle, M 2002 The Ripple Effect of the Matthew Shepard Murder: Impact on the Assumptive Worlds of Members of the Targeted Group. *Am Behav Sci* 46:1, 27-50; Blazak, R 2022 Ripples of Hate: Measuring how hate crimes hurt more, in C Turpin-Petrosino (ed), *Islamophobia and Acts of Violence*. New York: OUP, 65-87; Hall, E & Bates, E 2019 Hatescape? A relational geography of disability hate crime, exclusion and belonging in the city. *Geoforum* 101: May, 100-10; Fox, C & Asquith, NL 2018 Measuring the Tangible Fear of Heterosexist Violence, *J. Interpers. Violence* 33:6, 980-1007; Smith, JD et al. 2019 *Hate crime, faith and belonging*. London: Faith & Belief Forum; Walters et al 2020 Group identity, empathy, and shared suffering: Understanding the 'community' impacts of anti-LGBT and Islamophobic hate. *Int Rev Vict* 26:2, 143-162; Keel et al 2022 The vicarious effects of hate. *Ethn Racial Stud* 45:7, 1283-1303; Asquith, NL & Fox, CA 2016 No Place Like Home: Honour, Heteronormativity and Hate Crimes, in A. Dwyer et al (eds), *Queering Criminology*. Palgrave, 163-182; Iner, D et al 2022 Expected but not accepted: Victimisation, gender, and Islamophobia in Australia. *Int Rev Vict* 28:3, 286-304; Dugan, L & Chenoweth, E 2020 Threat, emboldenment, or both? The effects of political power on violent hate crimes. *Criminology* 58:4, 714-46

⁶ *op. cit.* Iner et al 2022; Donovan, C et al 2023 Re-Conceptualising Repeat Reports of Hate Crime/Incidents as Hate Relationships Based on Coercive Control and Space for Action. *Social Res Online*, 28:2, 502-517; *op. cit.* Iner, D et al 2023

⁷ Gero K et al 2022 Associations of state-level and county-level hate crimes with individual-level cardiovascular risk factors. *BMJ Med* 12:1, e054360; *op. cit.* Williams; Herek, GM et al 1997 Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults: Prevalence, Psychological Correlates, and Methodological Issues. *J. Interpers. Violence* 12:2, 195-215; Kelleher, C 2009 Minority stress and health. *Counselling Psychology Quarterly* 22:4, 373-; Craig, KM 2002 Examining hate-motivated aggression. *Aggress Violent Behav* 7:1, 85-; *op. cit.* Abu-Ras & Suarez.

⁸ Hutson, HR et al 1997 Hate Crime Violence and its Emergency Department Management. *Ann Emerg Med* 29:6, 786-91; Craig-Henderson K & Sloan LR 2003 After the hate: Helping psychologists help victims of racist hate crime. *Clin Psychol* 10:4, 481-

- 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?*

No, it does not. It does not because as it is currently scoped, s93Z (and s93ZA and s93ZAA) does not include all targeted communities (even though its civil partner, the *Anti-Discrimination Act* does), and as with any crime that must be reported to police, not all targeted communities feel able to report their experiences to police. This is why some communities have established their own reporting systems to capture the extent of hate incidents, hate crimes, hate speech/text, and incitement to violence and hatred. However, only a few communities—Jewish, Muslim, Asian, and First Nations—have the resources and capacity to collect community data. All other targeted communities—especially disabled and unhoused people—are without the victim advocacy and lobbying power, which is explicitly reflected in their absence from s93Z, s93ZA or s93ZAA. For the current provisions in s93Z, s93ZA, and s93ZAA to be more effective, they need to be reconsidered and redrafted with a view to all forms of hate speech and include all targeted communities.

Additionally, as the adjudication of the law is out of the hands of individual complainants, what happens with a complaint under these provisions is left to the police and courts to decide, which can leave complainants feeling like the harms they experience are irrelevant to criminal justice and judicial outcomes. This is a much wider issue than hate speech and hate crime, and is a critical factor in all interpersonal violence. Provision for victim-survivor representation in court proceedings is essential if the harms caused are to be fully considered. This may counter-balance the lack of lived and deep learned experience of hate crime and hate speech in the criminal justice system, which is still overwhelmingly cishet, abled, white, Christian and housed.

In the absence of victim-survivor representation, more effort needs to be taken to increase the cultural capability of criminal justice practitioners to ensure that they are aware of the additional harms caused by targeted violence. Increasing cultural capability of criminal justice practitioners must centre the experiences of all targeted communities to avoid the situation we currently face, where the exemplar of hate crime and hate speech is primarily focussed on the experiences of specific targeted communities, and racist violence more generally. How hate speech, vilification, and hate crime present differs significantly between targeted communities, and forming symbolic law on the experiences of specific communities undermines the capacity of police, in particular, to recognise, respond and record outlier experiences of other targeted communities.

Interaction between criminal law protections against hatred and relevant rights and freedoms

- 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?*

There is no such thing as free speech⁹, even in those jurisdictions that have constitutional protections on speech. Irrespective of the jurisprudential context, some speech is valued more highly than others, and in the current context, this is clear in the framing of 93ZAA (and s93ZA), whereby only vilification directed at specific targeted communities is thought significant—or politically advantageous—to regulate. This partisan construction of criminal vilification is no more obvious than in the plethora of complaints made to NSW Police Force in relation to speech/text advocating for intervention into the genocidal violence in Gaza, which under the *IHRA*¹⁰ definition is constituted by some as antisemitic. If this construction of valid and necessary political speech against genocide is to be criminalised as per the *Special Envoy's Plan to Combat Antisemitism*¹¹, then the disequilibrium between freedom of political speech and the regulation of vilification will become more pronounced.

Further, there continues to be a dissonance between the protection against vilification of some targeted communities and freedom of religion, especially hate speech and vilification against LGBTIQ+ Australians. Current exceptions in vilification and discrimination law enables the continued dehumanisation of LGBTIQ+ people, which is most obvious in the advocacy and practice of conversion therapy repackaged by some religious communities as theological, remedial and necessary. s93ZAA(2) empowers some religious communities to continue this practice (along with broader vilification of LGBTIQ+ people) unabated if conducted in “...directly quoting from or otherwise referencing religious text for the purpose of religious teaching”. Whilst the 2024 *Conversion Practices Ban Act* now criminalises these practices (as is the case also in Victoria, ACT and South Australia), it is unclear whether a conflict arises between s3(3c) and (4) of that Act and the proposed wider remit of 93ZAA to include heterosexist and cissexist vilification, and if not resolved, this conflict may in fact enable the lawful incitement of hate against LGBTIQ+ people as part of religious practice.

⁹ Fish, S 1994 *There's No Such Thing as Free Speech and it's a Good Thing, Too*. Oxford University Press

¹⁰ International Holocaust Remembrance Alliance 2016 *IHRA non-legally binding working definition of antisemitism*.

¹¹ Segal, J 2025 *Special Envoy's Plan to Combat Antisemitism*. ASECA.

Balancing the limited right to freedom of political communication and freedom of religious practice in Australia has always been about balancing the rights of some over others. Those communities who are not instituted as central to Australian culture and political communication—such as LGBTIQ+ people whose rights have been historically and contemporaneously abridged—will continue to have their safety and wellbeing curtailed so long as exemptions are provided for religious institutions, practices, and theology. As such, there is no way to “balance” these rights without abridging the full civic participation and enhancing the opportunities of vilification directed at other communities.

Promoting social cohesion

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

The criminal law is a partisan, blunt, and very expensive instrument to facilitate social change, including social cohesion. If law was able to create social cohesion, then the existing provisions—both criminal code and sentencing provisions (as well as international law)—would have impacted on rates of vilification, harassment, and violence. However, this has not been the case, as far as can be ascertained from the existing community data, and the very limited number of complaints lodged with state agencies such as the NSW Police Force and the NSW Anti-Discrimination Board. Not all targeted communities are capable or have the resources to pursue legal remedies for targeted violence—including vilification—which results in a very skewed view of the harms created by vilification. As has been seen, at least, since COVID, the incitement to violence is easily facilitated by mis- and disinformation shared widely online in social and traditional media fora. The current provisions barely address this widespread hatred, vilification, and incitement—and its ability to cross national borders—and are framed in such a way that in-person or offline vilification are more easily captured under the Act.

The adjudication of law too often occurs behind the closed doors of courts, and even when reported, the audience of such judicial outcomes are limited to those who actively investigate case outcomes, or those that come to the attention of the media and political actors and are reported publicly. The wider Australian community is ill-informed—if informed, at all—about their rights and responsibilities under these provisions. As such, they have very limited impact on promoting social cohesion. If the average Australian is unaware of the laws governing incitement to violence and

hatred, let alone, that hatred and vilification are criminalised due to the increased harms of such speech/text, or that some speech/text acts are harmful, then the capacity of such law to enliven social cohesion is greatly reduced. Social cohesion is more readily understood as requiring a preventative strategy to reduce or eliminate the hatred and vilification in the first place. Relying on law after the fact to do the hard work of informing, upskilling, and empowering communities to recognise, respond and report vilification and incitement to violence appears misplaced when considered in relation to building social cohesion.

If enacted, these laws must be accompanied by widespread community education about the advantages of diversity, equity and inclusion, the harms of hate speech and vilification, and Australians' rights and responsibilities to act to prevent these crimes in the first place. Additionally, given the lack of diversity in policing and the wider criminal justice system, it is difficult for these laws to be applied without prejudice or bias. If criminal justice practitioners do not have lived or robust learned expertise in hatred and vilification, they are unlikely to recognise it as such, and less likely to support victims in making a complaint. As noted in previous enquiries, and in AMAN's submission to this review, the responsibility for promoting social cohesion through laws such as s93Z (and s93ZA, and s93ZAA) rests with vulnerable, and for the most part, under-resourced communities and individuals. This inverts the goal of social cohesion (as well as laws restricting incitement to hatred), as it requires the most vulnerable to take action in order to facilitate change in the most privileged communities. These communities are targeted not only because of a pathological hatred of a select few perpetrators, but also because they are vulnerable and their needs are not perceived to be core to the values of the nation.

The "competition of suffering"¹² and hierarchy of victimhood is explicitly enacted by s93ZA and s93ZAA, whereby, only those who are racially or religiously diverse are recognised as being harmed by hatred and vilification. s93ZA and s93ZAA were perfunctorily enacted without wider consultation with targeted communities, which has resulted in a hierarchical framing of victimisation. In the former, s93ZA, only symbols primarily directed at Jewish communities and their places of significance have been protected, leaving all other targeted communities without comparable protections, including those symbols of hate and hate speech directed at other religious communities and institutions. Additionally, s93ZA privileges Jewish places of worship and

¹² Mason-Bish, H 2013 *Conceptual Issues in the Construction of Disability Hate Crime*. In Roulstone, A & Mason-Bish, H, eds, *Disability, Hate Crime and Violence*. London & New York: Routledge.

remembrance as the only recognised institutions that are targeted despite widespread attacks on other religious institutions, and more broadly, the targeting of other communities' places of significance. Religious freedom—in this instance, the freedom to practice Judaism—trumps other religious freedoms, and ignores the human rights of other targeted communities, for whom, religious institutions may in fact be the perpetrators of harmful vilification, such as that espoused by religions and their leaders about LGBTIQ+ and disabled Australians.

Additionally, as noted in previous submissions, laws such as s93Z (and s93ZA, and s93ZAA) criminalise the secondary act of incitement, but leaves the primary act of hate speech largely unregulated. It is only when others may be convinced or primed to act in hateful ways that the harms of hate speech are considered. In the primary encounter between victim and offender, the hate speech is not regulated, and it is in only a small number of incidents when police recognise, report, and advise the DPP to apply the sentencing provisions for hate aggravation that this speech is recognised as evidence of hate; though not as an act that is harmful in itself.

Another way in which these laws are partisan is in the need for these acts to be public. Incitement in private spaces is protected even if the harms are significantly increased by the absence of a reasonable third person. This framing of verbal-textual hostility as only harmful when another person is able to hear/read it leaves unaddressed the multitude of ways in which some targeted communities experience privatised hate, such as that directed against LGBTIQ+ and disabled people in residential settings, which can have devastating impacts on the psychological and physical wellbeing of victim-survivors.

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?*

There are already negative and unintended consequences from the existing legal provisions contained in s93Z, s93ZA, and s93ZAA. Privileging the experiences of one targeted community—especially, 93ZA—creates a hierarchy of victimisation. While there is a strong case for criminalising Nazi symbols for their link to the acts of genocide conducted under the banner of these symbols, lest we not forget that long before the Shoah was instrumentalised, disabled, gay, and transgender people were criminalised and murdered in the name of racial purity. Recognising and responding to these other forms of hate not only strengthens provisions specifically protecting Jewish

communities, but also facilitates a universal design for these laws, ensuring that all communities targeted by hate are protected.

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

I do not believe that social cohesion can be facilitated or promoted by the blunt instrument of the criminal law. Symbolic law such as s93Z (and s93ZA and s93ZAA) is only effective if the wider community knows and understands what the law is meant to symbolise. Too few Australians know about these laws, or their rights and responsibilities under these laws. As such, these laws have limited capacity to shape social and individual attitudes unless they are enacted concurrently with widespread community education. This has been the approach taken to complementary law reform such as the introduction of coercive control in family and domestic violence, or even change to road rules. Yet, for over three decades NSW and other state and federal governments have assumed that laws such as s93ZAA can do the hard work of changing hearts and minds simply by being enacted. While additional training and upskilling of NSW Police Force officers in recent years is laudable (though there is no evaluation as to whether this additional training has had an impact on the recognition, reporting and investigation of hate crimes), the same has not occurred across the criminal justice system, let alone allied social and government agencies and organisations. In the absence of sector, organisational, and community education and upskilling, laws such as s93ZAA will remain ineffective in promoting social cohesion.

Further, s93ZAA only recognises incitement to racist hatred. It leaves untouched all other forms of hatred and incitement to hatred. This further entrenches the “competition of suffering”¹³ and the privileged place some racial/ethnic/religious communities are awarded by the state. During this time of increased Islamophobia and antisemitism in the context of acts of genocide in Gaza, other targeted communities have faced similarly extreme violence that have gone without notice or consideration in the drafting and enactment of s93ZAA (or even s93ZA). Despite the attention brought to bear by the landmark Sackar Special Commission of Inquiry into LGBTIQ+ Hate Crimes, assaults of gay men and transgender women—facilitated by online hook-up and dating apps—have escalated significantly and have barely been reported. And throughout this time of heightened concern about targeted violence, disabled people (including children) have been killed, most commonly by family, carers and perceived friends. Who will speak for those communities and their

¹³ *op. cit.* Mason-Bish

needs for social cohesion when even the scant symbolic laws enacted do not even recognise that they are similarly targeted?

While s93Z is exempt from this current review, the fact that disabled people (along with unhoused people) are not even enumerated in s93Z points to the ways in which some targeted communities are privileged over others. These two communities face extreme targeted violence that goes unrecognised and unreported. Where are their protections against hatred and the incitement to violence?

In a context of partisan and partial research evidence of hate crime and criminal vilification, too often governments are reliant on evidence presented by those communities who have the resources and capacity to influence government and legislators, and/or pursue criminal responses. Until Australian governments invest in understanding the experiences of all targeted communities, including the funding of population studies, the narratives collected by more privileged marginalised communities will continue to dominate the discourse, and their experiences of hate and incitement to violence will continue to shape the law and policy responses.