

**Submission
No 16**

MEASURES TO PROHIBIT SLOGANS THAT INCITE HATRED

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Parliament of NSW

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Dear Mr Atalla

Submission to Inquiry into Measures to Prohibit Slogans that Incite Hatred

Thank you for the invitation to make a submission to this important inquiry.

We write as internationally recognised experts in the harms, and regulation, of hate speech. [Professor McNamara](#) has 30 years' experience as a socio-legal researcher, having received over \$1 million in funding including from the Australian Research Council. [Professor Gelber](#) has 30 years' experience as a political science researcher, having received over \$1.4 million in funding including from the Australian Research Council. Individually and in collaboration we have published widely on the topic of hate speech laws, and have given evidence to numerous parliamentary and law reform inquiries.

Through both our theoretical and empirical work we have consistently:

- i) supported the enactment of carefully drafted hate speech laws that balance the right not to be subjected to vilification and discrimination with other rights, particularly to the right to freedom of expression; and
- ii) cautioned against over-estimating the capacity of legal measures to prevent the harms associated with hate speech.

We draw on our decades of research and recognised expertise in making this submission.

Can some expressive conduct harm community cohesion and safety?

It is now well established, and incontrovertible, that certain types of expressive conduct – known popularly as ‘hate speech’ – can harm community cohesion and safety to a degree that warrants legal prohibition. Speech that is genuinely harmful in these ways is to be distinguished from speech that is offensive, that hurts people’s feelings, or that is vituperative. It is important to note that the concept of ‘hate speech’ is used very capaciously in public debate. However, it should not be used

capaciously in law because to do so would over-regulate speech and risk democratic practice. This includes the risk of unjustified erosion of peaceful assembly.¹

Speech that is genuinely harmful to community cohesion and safety enacts a type of discriminatory harm through words.² It is discriminatory in the sense that those who are susceptible to harms of this nature are those who are subjected to systemic marginalisation and discrimination in the context within which the speech occurs. In Australia, relevant grounds of marginalisation are recognised in both criminal laws and civil anti-discrimination laws.

This kind of genuinely harmful speech can harm in two ways. The first is that it harms causally. This means that the hate speech leads people to enact subsequent harms to members of target groups, and these harms are causally linked to the hate speech and arise as a consequence of it. Such harms may be acts of violence, threats, or discrete acts of discrimination such as in employment or housing. The second way in which this speech harms targets is by constituting harm in and of itself. This means that the hate speech harms in the very act of performing it. No second, discrete or consequential act of discrimination or violence is required for this to occur. Constitutive harms include ranking targets as inferior, justifying discrimination against them, and denying them human dignity. All of the harms of hate speech have negative consequences for wellbeing, inclusion and social cohesion, and they are well-evidenced.³

The existence of these harms, and a desire to prevent or reduce them, have prompted legislatures, both in Australia and internationally, to enact laws to sanction those who engage in public speech of this sort – via civil remedies, criminal penalties or both.⁴ In the pursuit of this end, however, care must be taken to devise statutes that achieve the right balance between the regulation of genuinely harmful speech on the one hand, and the protection of speech which ought to remain free of state regulation on the other – even as it may be subjected to criticism and ‘counter-speech’.⁵ One of the measures used to achieve this balance has always been to allow *context* to be taken into account in determining whether or not a discrete instance of expressive conduct has crossed a line, and to legislate for a set of principles to guide this assessment. Legislation that sought to prohibit a specific phrase (or phrases), without reference to context, speaker intention or audience effects, would be a significant departure in Australian law, and would risk losing the balance of competing interests which has been a characteristic of NSW and Australian hate speech laws since they were first introduced in the late 1980s.

¹ International Covenant on Civil and Political Rights, Article 21.

² Katharine Gelber, ‘Differentiating Hate Speech: A Systemic Discrimination Approach’, *Critical Review of International Social and Political Philosophy* 24(4) (2021): 393-414.

³ See, for example, Katharine Gelber & Luke McNamara, ‘Evidencing the Harms of Hate Speech’, *Social Identities* 22(3) (2016): 324-341; Jannike Vedeler, Terje Olsen, and John Eriksen, ‘Hate Speech Harms: A Social Justice Discussion of Disabled Norwegians’ Experiences’, *Disability and Society* 34, no. 3 (2019): 376; Laura Leets, ‘Experiencing Hate Speech: Perceptions and Responses to Anti-Semitism and Antigay Speech’, *Journal of Social Issues* 58, no. 2 (2022): 354; Laura Beth Nielsen, ‘Subtle, Pervasive, Harmful: Racist and Sexist Remarks in Public as Hate Speech’, *Journal of Social Issues* 58, no. 2 (2002): 270.

⁴ See generally, Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney: Sydney Institute of Criminology Monograph Series No 16, 2002).

⁵ Katharine Gelber, ‘Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)’ In: Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses*. Cambridge University Press (2012):198-216.

Existing legal provisions in NSW and other jurisdictions

There is a very wide range of legislative provisions across all jurisdictions in Australia in relation to various forms of ‘hate speech’. We note that the volume of law making in this area has increased considerably in the last few years. For example, Victoria updated its civil and criminal prohibitions in relation to vilification in 2025 and Queensland updated its vilification laws in 2024, both following significant community consultation. In all jurisdictions except the NT, new provisions have been enacted in the last three years to combat the public expression of Nazi symbols and slogans and terrorist symbols.

Here, for the purposes of clarity, we will focus only on those jurisdictions that have recently moved to *criminalise* (or further criminalise) racist hate speech: NSW, Victoria, Western Australia and the Commonwealth.

In NSW a new criminal offence of inciting of racial hatred was created in 2025.⁶ This was the first time in NSW that an incitement of hatred offence was introduced into the criminal law. The key elements of this crime are the intentional incitement of hatred that would cause a reasonable person to fear harassment, intimidation or violence, or to fear for their safety. It only criminalises the incitement of *racial* hatred; it does not extend to hatred directed at groups defined by religion, sexuality or any other identity characteristic.⁷ Prosecution requires the consent of the DPP.

This move towards the criminal law in NSW followed on the much longer experience of Western Australia, which, in 1990, had introduced a range of offences to criminalise the incitement of racial hatred. These included: conduct intended or likely to incite racial animosity or racist harassment;⁸ possession of material for dissemination with intent to, or likely to, incite racial animosity or harassment;⁹ conduct intended to or likely to racially harass;¹⁰ and possession of material for display with intent to, or likely to, racially harass.¹¹ These offences are also only limited to the ground of race. Prosecution requires the consent of the DPP.

Victoria’s 2025 update to vilification laws includes two new criminal provisions. The first is a prohibition on inciting hatred against, serious contempt for, revulsion towards, or severe ridicule of a person on the ground of a protected attribute. The fault standard for this offence is either intent to incite, or a belief that the conduct is likely to so incite.¹² The second offence is a prohibition on threatening physical harm or property damage, with the same standards required – either intent to threaten, or a belief that the conduct is likely to threaten.¹³ A prosecution for these offences requires the consent of the DPP. These provisions will commence in September 2026.

⁶ *Crimes Act 1900* (NSW), s 93ZAA.

⁷ The *Crimes Act 1900* (NSW) already contained an offence of *threatening or inciting violence* on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status (s 93Z).

⁸ *Criminal Code* (WA), ss 77, 78.

⁹ *Criminal Code* (WA), ss 79, 80.

¹⁰ *Criminal Code* (WA), ss 80A, 80B.

¹¹ *Criminal Code* (WA), ss 80C, 80D.

¹² *Crimes Act 1958* (Vic), s 195N.

¹³ *Crimes Act 1958* (Vic), s 195O.

In 2025 the Commonwealth updated offences originally introduced in 2007, to criminally prohibit advocating force or violence against groups or against members of groups,¹⁴ with a recklessness standard. At the same time, the grounds on which the offence could be prosecuted were expanded from the existing grounds of race, religion, nationality, national or ethnic origin or political opinion, to add sex, sexual orientation, gender identity, intersex status and disability. This is in addition to other extant provisions prohibiting threatening force or violence against groups or members of groups,¹⁵ advocating or threatening damage to or destruction of property or a vehicle,¹⁶ advocating force or violence through causing damage to property,¹⁷ advocating terrorism,¹⁸ advocating genocide,¹⁹ and publicly displaying or trading in prohibited terrorist organisation or Nazi symbols or giving a Nazi salute.²⁰

It is notable that, with the exception of some of the discrete offences on Nazi symbols and gestures,²¹ all Australian laws concerned with racist hate speech take a principled and general approach. They do not seek to presumptively characterise any particular expressions as intrinsically constituting racist hate speech. That is, they preserve the presumption of innocence of any accused person and remain sensitive to the need to evaluate utterances in the *context* in which they are used. Importantly, they all require the prosecution to prove against the accused person a *fault element* related to the causing of racist harm. In most cases, and consistent with Australia's criminal law traditions, this is a *subjective* fault element (variously expressed as intent, awareness of a substantial risk or belief in a probability), though Western Australia's list of racist hate speech includes both more serious offences that turn on a subjective fault standard (intent) and lesser offences that turn on an objective standard (likelihood).²²

Importance of education

Our research of many years supports the conclusion that, while important, hate speech laws represent only one small part of a comprehensive anti-racism strategy. This is especially so of *criminal* laws, which must be reserved for the most serious forms of hate speech, and must be compatible with the principles that give Australian criminal law its integrity and legitimacy.

Non-punitive education strategies are essential to effective anti-racism work. This includes education about the nature, history and effects of all forms of racism including antisemitism. It also includes the promotion of standards of ethical civil engagement – including in relation to how people exercise their right to protest. It is important to recognise that these 'best practice' standards and expectations need not be synonymous with the necessarily higher thresholds used to assess liability or responsibility as a matter of law. The standards for ethical democratic practice in a multicultural and

¹⁴ *Criminal Code* (Cth), ss 80.2A, 80.2B.

¹⁵ *Criminal Code* (Cth), ss 80.2BA, 80.2BB.

¹⁶ *Criminal Code* (Cth), ss 80.2BC, 80.2BD.

¹⁷ *Criminal Code* (Cth), s 80.2BE.

¹⁸ *Criminal Code* (Cth), s 80.2C.

¹⁹ *Criminal Code* (Cth), s 80.2D.

²⁰ *Criminal Code* (Cth), ss 80.2H, 80.2HA, 80.2J, 80.2JA

²¹ For example, the *Criminal Code* (Cth), s80.2H(7)(b) specifies the Hakenkreuz and sig-rune.

²² Compare s 77 and s 78 of the *Criminal Code* (WA).

diverse society are different to the thresholds that are appropriate for defining conduct that warrants criminal punishment.

There is a role for enhanced community education and leadership about how particular protest slogans might be perceived by different audiences – and the difference between how a message is *received* and what the speaker *means or intends*. Blunt criminalisation of specific phrases – the meanings of which are multiple and contested – is a poor vehicle for education of this sort, which requires good faith constructive dialogue. Specifically, imputing to a person who participates in a protest chant, a racist and/or violent motivation that they genuinely did not have, is unlikely to be an effective way of educating that person (or others) about the desirability of exercising their right to protest in ways that do not have unnecessarily adverse effects on other people – especially people who are not the target of the protest activity in question.

Relationship to the implied freedom of political communication

An important consideration in the framing of hate speech laws is that the implied freedom of political communication constrains the law-making power of governments in Australia. Recently, in *Farmer v Minister for Home Affairs*, the High Court of Australia summarised the law as follows:

The implied freedom of political communication under the Constitution denies legislative and executive power to restrict freedom of communication on governmental or political matters unless the restriction is imposed to fulfil a constitutionally legitimate purpose and the restriction is reasonably appropriate and adapted to advance that purpose by constitutionally legitimate means. To be constitutionally permissible, both the purpose and the means of achieving it must be compatible with the system of representative and responsible government for which the Constitution provides.²³

While the High Court has not yet been called on to determine the constitutionality of any of Australia's many hate speech laws in light of the implied freedom of political communication, other courts have done so, and found them to be constitutionally valid.²⁴

We note that in recent years the Supreme Court of NSW has found two statutes that curtail the right to protest to be constitutionally invalid on the basis of inconsistency with the implied freedom.²⁵ If the NSW Parliament was minded to enact a new criminal offence directed at one or more discrete protest slogans, close scrutiny of the law's constitutional validity will follow, in accordance with the High Court's three-part test.

There is little doubt that the criminalisation of particular protest slogans or chants would constitute a *restriction* on communication on governmental or political matters. Indeed, such a restriction would be *designed* to achieve this effect (rather than being merely incidental). Telling protestors what they *cannot say* at a protest limits political communication.

²³ *Farmer v Minister for Home Affairs* [2025] HCA 38, [1] (Gageler CJ, Gordon and Beech-Jones JJ).

²⁴ See, for example, *Wertheim v Haddad* [2025] FCA 720; *Faruqi v Hanson* [2024] FCA 1264.

²⁵ *Lees v NSW* [2025] NSWSC 1209; *Kvelde v NSW* [2023] NSWSC 1560.

In our view it is also very likely that the asserted legislative purpose – to combat and deter racism including antisemitism and to promote community safety – would be regarded as a *legitimate purpose*.

Our assessment is that the third limb of the three-part test – that the law must be reasonably appropriate and adapted to achievement the legitimate purpose – may present an insurmountable hurdle for a law that criminalises the utterance of a specific phrase where that phrase is not unambiguously racist, historically incontrovertible, or otherwise inherently and necessarily designed to promote hatred. A court considering the constitutional validity of such a law will inquire as to whether there is ‘an obvious and compelling alternative that is equally practicable and would impose a lesser burden on the implied freedom of political communication.’²⁶ It is not hard to conceive of such an alternative; namely, a law that required the court to consider whether, on the occasion that gave rise to the criminal charge, the slogan was used in a way which was designed to incite hatred against Jews, or threaten or incite violence against Jews. The task of identifying a less burdensome alternative of this kind would be aided by the fact that such offences already exist in NSW.²⁷

Conclusion

A central theme of this submission is that when it comes to conduct said to constitute ‘hate speech’, sensitivity to context is critical. This is especially so in relation to words the meaning of which is open to interpretation and contested. The opening paragraph of this inquiry’s terms of reference describe the problem to be addressed as: ‘... the use of slogans that are directed at certain communities to intimidate those communities and instil fear of violence.’ We submit that this framing may run the risk of foreclosing a fair assessment of whether the slogans that have prompted the inquiry deserve to be characterised as ‘hate speech’ of the sort that should be the subject of legislative proscription. In a given situation, a phrase such as ‘Globalise the Intifada’ or other slogans that have been used in recent protests *may* be used in this way. But in other instances, these slogans will be directed at governments rather than the Jewish community, or designed to express support for the rights of the Palestinian people and to persuade the governments of Australia and Israel to change policies and actions, rather than to cause Australian Jews to fear violence.

We therefore submit that it is unwise to enshrine in legislation a determination that such phrases are, everywhere and always, antisemitic hate speech.²⁸

Our expert opinion is that criminal hate speech laws should be limited to:

- legislation that criminalises conduct that encourages or threatens violence, or property damage, against members of a targeted group;
- legislation that criminalises the display of specific symbols or the use of specific gestures that are universally and unambiguously understood to convey and promote racial hatred (e.g. Nazi flag, Nazi salute); and

²⁶ *Lees v NSW* [2025] NSWSC 1209, [156] (Mitchelmore J).

²⁷ *Crimes Act 1900* (NSW), ss 93ZAA, 93Z.

²⁸ We note that in *University of Toronto (Governing Council) v Doe et al* (2024) ONSC 3755, [106], Koehnen J found that the ‘automatic conclusion that [such] phrases are antisemitic is not justified’ ([106]).

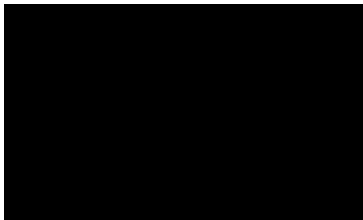
- legislation that creates a general offence of conveying or promoting racial hatred, where the presumption of innocence applies, and where it will fall to a court to determine whether, in the given instance, the elements of the offence (including the required fault standard) are proven beyond reasonable doubt.

The *Crimes Act 1900* (NSW) already contains offences of these three types.²⁹

Thank you for considering our submission.

Please contact us if we can be of any further assistance.

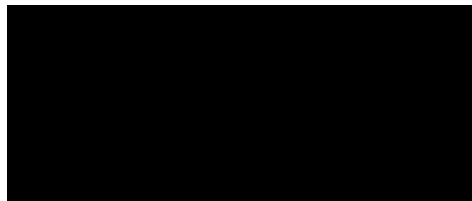
Sincerely



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²⁹ *Crimes Act 1900* (NSW), ss 93Z, 93ZAA, 93ZA.