

**Submission
No 28**

MEASURES TO PROHIBIT SLOGANS THAT INCITE HATRED

Organisation: NSW Council for Civil Liberties

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NSW Council for Civil Liberties Inc.
PO Box A1386, Sydney South,
NSW 1235, Australia

e: office@nswccl.org.au
t: 02 8090 2952
www.nswccl.org.au

@nswccl
@nswccl

NSWCCL SUBMISSION

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NSWCCL

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>

office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

Introduction

- 1 The NSW Council for Civil Liberties (**'NSWCCL'**) thanks the Legislative Assembly Committee on Law and Safety (**'Committee'**) for the invitation to make a submission in their inquiry into measures to prohibit slogans that incite hatred and threaten community safety (**'Inquiry'**).
- 2 The NSWCCL is proudly non-sectarian but within our managing committee there are Jewish, Muslim, Palestinian and Christian people, along with atheists. Our members share a deep commitment to the elimination of all forms of racism. The NSWCCL advocates for the rights of individuals in NSW and opposes restrictions on the fundamental freedoms that those individuals enjoy, including the rights of all to express their views and beliefs without suppression.
- 3 The limited time afforded to organisations like the NSWCCL, individuals and other members of the community to make submissions and the particular concern of this approach given the subject matter of the Inquiry is addressed below. Participation and inclusion are fundamental to democracy. The decision to allow only four weeks over the Christmas and New Year period for public submissions on such a radical proposal, impacting a sensitive and significant issue, is shamefully anti-democratic and reflects a disregard for principles of transparent and responsible governance.
- 4 We add here that the timing of the Committee's inquiry has necessitated the NSWCCL drawing on their submission in the recent *Review of Criminal law protections against hatred for vulnerable groups* (**'Review'**). The conduct and scope of the Review serves as a comparator that highlights the inadequate approach of the current inquiry.
- 5 The subject of this Inquiry is the use of slogans that are directed at certain communities to intimidate those communities and instill a fear of violence. The Committee has been advised to consider the following terms of reference:
 - (a) The threat that the use of phrases like "globalise the intifada" poses to community cohesion and safety and the importance of maintaining social harmony and cohesion;
 - (b) How best to prevent the use of phrases that are so inherently hateful by their nature that they lead to incitement of hatred and threaten community safety;
 - (c) The need to protect communities from hatred, intimidation and violence;
 - (d) Australian and international examples of best practice to combat the use of such slogans, including measures and approaches taken in the United Kingdom;
 - (e) The Australian Constitution and the implied freedom of political communication;
 - (f) Existing offences and other measures in New South Wales and Commonwealth legislation, including offences and measures that have been announced; and
 - (g) Any other related matters.
- 6 The NSWCCL calls on the Committee to avoid the inherent biases that the author of the terms of reference draws on them to follow.
- 7 While in isolation reference (a) is not of itself objectionable, in the presence of reference (b) the Committee is being drawn to assume that the phrase "globalise the intifada" and others like it are phrases that are "inherently hateful" and/or ones that will "lead to incitement of hatred and threaten community safety". The Committee should be cautious to make clear it does not make this assumption in the conduct of its inquiry.
- 8 Bias is also reflected in the drafting of reference (d). While Australian and international examples of best practice should be considered, the author of the reference incorrectly assumes, or at the very least suggests, that the United Kingdom is such an example. The NSWCCL does not

believe that it is, and sets out some reasons below. Again the Committee should be cautious to make clear it does not make this assumption in the conduct of its inquiry and should at the very least acknowledge the United Kingdom's approach to these matters is controversial and contested.

9 The NSWCCCL submission addresses each of the Terms of Reference as reflected below.

Reference A - The threat that the use of phrases like "globalise the intifada" poses to community cohesion and safety and the importance of maintaining social harmony and cohesion;

- 10 The NSWCCCL recognises that individuals and community groups in NSW are best placed to comment on the extent and impact of hatred on vulnerable groups in the NSW community. The NSWCCCL emphasises that consultation with the community on such matters is critical and ought to be meaningful and broad-ranging. It is of deep concern then that the NSW Government has not facilitated this as a matter of priority.
- 11 The lack of participation and inclusion in this inquiry undermines the ability of the Committee to report on its own terms of reference. The Committee is unable to consider the supposed threat of the abovenamed phrase or the maintenance of social harmony and cohesion without broad, comprehensive and facilitated community consultation.
- 12 The NSWCCCL is concerned about the weaponisation of hatred directed towards vulnerable groups as a political tool to pass legislation which unduly restricts civil liberties.¹ The NSWCCCL strongly opposes all forms of hate directed towards vulnerable groups. However, responding to hate in the community must be evidence-based and carefully considered with reference to other fundamental freedoms that are owed to individuals. As a first step, the NSW Government should be collecting data on hate-based acts from the community (noting that this data is currently likely not representative owing to underreporting and inconsistent collection).²
- 13 The NSWCCCL emphasises that any recommendations or proposed offence directed toward the prevention of hatred and uplifting of social cohesion should do so without being limited solely to one subset of the NSW community. Choosing specific phrases to oppose or even make unlawful, risks doing exactly this, especially if the meaning of these phrases are contested. If contested, any such approach risks isolating portions of the community who do not agree with the meaning that has been held over their own. This disenfranchisement of the views of members of the community takes us further away from social cohesion not closer to it. The phrase selected in reference (a) is just such a term.
- 14 The term "globalise the intifada" is not one that is "inherently hateful" or one that will "lead to incitement of hatred and threaten community safety". Any suggestion that the term is already unlawful in NSW may be a reference to the highly subjective nature of laws recently introduced in NSW to address hate speech. It is a serious concern that our laws do not reflect complexities like this and certainly not one that should be expanded on.
- 15 The Arabic word 'intifada' is one that translates literally to "shaking off". To suggest using the term "shaking off" or to "globalise the shaking off" is "inherently hateful" or one that will "lead to incitement of hatred and threaten community safety" would be absurd. It follows then that attempts, existing or proposed, seeking to restrict the use of "globalise the intifada" are ones that restrict specifically the speech of the Arabic speaking community. This is not a responsible

¹ NSW Council for Civil Liberties, Submission No 71 to Justice and Communities Committee, NSW Legislative Council, *Antisemitism in New South Wales* (April 2025).

² Gail Mason, 'A Picture of Bias Crime in New South Wales' (2019) 11(1) *Cosmopolitan Civil Societies: an Interdisciplinary Journal* 47.

approach to speech and certainly not inclusive. In itself, this sort of restriction is divisive and moves the community further away from social cohesion.

- 16 Beyond the literal, the term “globalise the intifada” has a specific significance and meaning for the Palestinian community for whom the phrase goes to the fighting of oppression. That being said, this specific meaning is not, and increasingly not, restricted to that community. As has been reported, it has been used in the NSW community to speak to fighting oppression in other international contexts, most recently with respect to the USA’s attack on Venezuela.³ The term has been used in a wide range of other contexts, including the Arabic description of the Warsaw Ghetto uprisings, where Jews resisted against Nazi genocide, as well as, the Arab spring. As a historical term, *intifada* describes a specific, largely civilian-led uprising and should not be mischaracterised as synonymous with terrorism or violence.
- 17 Attempts to restrict the use of “globalise the intifada” are divisive as they target and disproportionately impact the Arabic speaking community, Palestinian community, any others who see the phrase as applicable to the causes that interest them, those supporting these communities or related causes. It does not assist social cohesion for the NSW Government to take up and codify a contested meaning in opposition to these communities. The division caused by doing so is only magnified by the inherent injustice of seeking to suppress a phrase that to many members of the NSW community speaks to fighting oppression.

Reference B - How best to prevent the use of phrases that are so inherently hateful by their nature that they lead to incitement of hatred and threaten community safety;

- 18 NSWCCCL believes a more sound approach to responding to speech which is inherently hateful is to ban speech which incites violence. We consider this an acceptable level of restriction on freedom of speech. Furthermore this exemplifies conduct which has general application, rather than attempting to describe or list every slogan currently in use that the NSW Government deems offensive. Slogans can change – words can be adopted and abandoned and new ways can be found to express unwanted conduct.
- 19 The mischief addressed by the terms of reference relate to “slogans that are directed at certain communities to intimidate those communities and instill fear of violence”. This raises a number of concerns and questions of criminal law that make the path of criminalisation unworkable.
- 20 Firstly, how does the NSW Government define a slogan? For example, can a slogan or a phrase be one word? In its ordinary meaning a ‘slogan; usually means a short and striking or memorable phrase (as is used in advertising). If legislation was pursued to the effect of banning ‘slogans’ or ‘phrases’, a relevant consideration is whether the prosecution would have to establish syntactical requirements for a phrase. That is, a group of words having a certain form and meaning in the context in which they were spoken.
- 21 Secondly, at present, there is no statutory definition of ‘community’ within any state, territory or Commonwealth legislation; this is similarly true for New Zealand, the United Kingdom, Canada,

³ ‘Woman wearing ‘globalise the intifada’ jacket among three arrested at Sydney protest against US action in Venezuela’ *The Guardian* (Web Page, 5 January 2026)
<<https://www.theguardian.com/australia-news/2026/jan/05/us-trump-attack-venezuela-sydney-protest-three-arrest-ed-ntwnfb>>

and the United States of America. Conversely, the ordinary meaning of the term is too imprecise to form the basis of a legal definition; this is true also for the definitions adopted at common law.⁴ For example, would a neighbourhood group constitute a community? How would community expectations regarding what conduct is threatening be determined by a court? Furthermore, would it be necessary for the intimidation and/or instilment of fear of violence to have actually occurred to the impacted community and that harm need to be proven? If this effect is required, would the intimidation and fear be confined to that of a reasonable person?

- 22 In criminal law, offences usually have a requirement of *mens rea*, that is a relevant intention to commit the crime, in this case incite hatred or threaten community safety. The element of *mens rea* would also have to be considered on the element of 'intimidation' and 'instil fear of violence'. The suggestion that certain phrases would be banned outright indicates a disregard for the *mens rea* of the potential offender. That is, what a person genuinely understood to be meant by the utterance of a phrase
- 23 These concerns underscore the dangers and concerns of legislating speech and thought, as is being investigated by this inquiry. Again, NSWCCCL holds that offences related to the restriction of speech should be confined to conduct that breaches a general principle of incitement of violence. This approach does not add burdensome subjectivity to the criminal law that would have dangerous consequences that undermine established legal principles, freedom of expression and democracy.

Reference C - The need to protect communities from hatred, intimidation and violence;

- 24 The NSWCCCL rejects the assumption that laws are able to achieve the enhancement of social cohesion. The criminal law alone is not equipped or designed to achieve social cohesion. It is a reactionary and coercive mechanism that should be reserved for the targeted punishment of harmful conduct, and is not effective when used to encourage broad-brushed social change. Instead, preventative mechanisms directed towards reducing antisocial conduct on the social and structural level are better suited to achieving the goal of social cohesion. These include, for example, education through public awareness campaigns on cultural diversity, media literacy, the dangers and sources of disinformation, and promotion of public debate. More granular impact may be achieved through community engagement and organisation-driven programs targeted towards specific instances of hate occurring in communities.
- 25 The criminal law as it currently stands goes as far as it can to adequately protect against the incitement of hatred towards vulnerable groups in NSW. The NSWCCCL submits that recent changes indeed take it too far. There are extensive protections already in place both across the Commonwealth and NSW statute books (as listed below) targeted towards the prevention of serious harms which arise out of hate-based acts. Behind this question lies an erroneous assumption that the criminal law is an effective mechanism to target antisocial conduct and raises false expectations about what it is capable of achieving. In this sense, no change to the criminal law will be able to better protect vulnerable groups from incitement of hatred because it largely acts after the event. Its general deterrent effects are usually overstated.
- 26 Responding to hate, intimidation and violence in the community must be evidence-based and carefully considered with reference to other fundamental freedoms that are owed to individuals.

⁴ See *Potter v Minahan* (1908) 7 CLR 277 at 289.

Throughout the past two years, the community has not been provided with an evidence-base from the NSW Government that the repression of speech can increase social harmony. In fact, in passing the inciting racial hatred laws in 2024, the NSW Government acted against its expert independent review of the hate speech laws in NSW.

- 27 It is unlikely that reform of criminal law protections against the incitement of hatred will promote social cohesion. As expressed above, the NSWCCCL contends that criminal law protections which are aimed exclusively at banning speech are likely to exacerbate existing societal divisions. It is ill-conceived to presume a deterrent to hateful conduct will be capable of achieving the aim of social harmony.
- 28 The mechanisms through which social cohesion is best achieved are those which aim to prevent social dysfunction at its inception, rather than those which serve as a deterrent. In its Report regarding Serious Racial and Religious Vilification, the NSW Law Reform Commission set out examples of such measures, including media regulation and social media regulation, community education and engagement, government investment in anti-racism strategies and education regarding hate crime, vilification and the other existing elements of section 93Z.⁵
- 29 In addition, public communication by media, political commentators, public figures and politicians impact the collective attitudes and social norms which have the capacity to shape the zeitgeist in a manner which may either damage or promote social cohesion.
- 30 These themes are echoed in the Australian Human Rights Commission's Anti-Racism Framework recommendations, which include, relevantly:
- (a) investing in early intervention strategies beyond civil and criminal penalties to address far-right extremism, including promoting community wellbeing and focussing on atrocity prevention;
 - (b) reviewing anti-racism and cultural safety training for students in primary and secondary school, police, legal aid providers, first responders, support services and the courts and implementing mandatory and ongoing anti-racism and First Nations cultural safety training for leadership and staff; and
 - (c) providing funding for the Australian Human Rights Commission to develop public awareness and education campaigns regarding racial literacy.⁶
- 31 To this end, the NSWCCCL contends that the criminal law is a 'blunt instrument' to manage tension in the community, and that an approach centred around education and human rights is more likely to be effective.⁷

Reference D - Australian and international examples of best practice to combat the use of such slogans, including measures and approaches taken in the United Kingdom;

- 32 The United Kingdom government has taken extremely repressive measures regarding the pro-Palestine movement. In 2024, the United Kingdom government proscribed the direct action group, Palestine Action, as a terrorist organisation. Since then over 2700 people have been arrested for defying the proscription and expressing support for the group.⁸ Predominantly those

⁵ New South Wales Law Reform Commission, *Serious racial and religious vilification* (Report No 151, September 2024) 41.

⁶ Australian Human Rights Commission, *The National Anti-Racism Framework: A roadmap to eliminating racism in Australia* (Report, November 2024).

⁷ Anne Charlton, 'Media Statement: Review of s93Z of the Crimes Act', *New South Wales Council for Civil Liberties* (Web Page, 19 January 2024) <https://www.nswccl.org.au/review_s93z_crimes_act>.

⁸ Defend Our Juries, 'Lift the Ban' <<https://defendourjuries.net/lift-the-ban/>>.

arrested and charged under these terrorism offences have been older, middle-class, white British citizens, using their relative privilege in support of civil liberties.⁹

- 33 On 17 December 2025, following the Bondi terror attack, the UK's Metropolitan Police and Greater Manchester Police released a joint statement announcing that they would be "more assertive" and begin arresting any persons observed using the phrase "globalise the intifada".¹⁰
- 34 In the week that followed, police arrested four people for allegedly using the phrase during pro-Palestine protests; each was charged with "racially aggravated public order offences" under s 5 of the *Public Order Act 1986* and s 31 of the *Crime and Disorder Act 1998*.¹¹ These arrests have inflamed community tensions.¹²
- 35 Under the *Public Order Act 1986*, a person is only liable of an offence if they (i) intend to be threatening or abusive, or (ii) are aware they are being threatening or abusive, or (iii) intend to be disorderly, or (iv) are aware they may be being disorderly.¹³
- 36 The UK police have contended that current laws are thus "inadequate", as the use of phrases such as 'globalise the intifada' therefore do not meet prosecution thresholds.¹⁴ Yet, the UK Government's own review on those laws in 2024 concluded that (i) "*any expansion of these offences would restrict current freedoms of expression and assembly*",¹⁵ (ii) there was "*a general risk of legislating in response to one set of protests because of the risk of unintended consequences when new legislation comes to be applied to other protests*", and (iii) despite "*the number of pro-Palestine marchers [providing] plenty of opportunities for gaps to become apparent [it was] difficult to identify any real situations where a gap in [existing] legislation means that [relevant] mischief cannot currently be addressed by arrest and prosecution.*"¹⁶
- 37 Accordingly, the Government's Independent Reviewer of Terrorism Legislation, Mr. Jonathan Hall KC, concluded that any amendment to existing legislation designed to capture phrases such as 'globalise the intifada' would be an "*unjustifiable intrusion on free expression*", and thus recommended against the Government introducing or amending legislation to capture the same.¹⁷

⁹ Weizman & Brown (2025) The shrinking space for public protest: Examining the United Kingdom's proscription of Palestine Action, *Georgetown Journal of International Affairs*.

¹⁰ Commissioner Sir Mark Rowley and Chief Constable Sir Stephen Watson, 'Joint Statement from the Commissioner of the Metropolitan Police and the Chief Constable of Greater Manchester Police' (Press Statement, 17 December 2025) ('Joint Statement').

¹¹ BBC, 'Two arrested after police say they will act against intifada chants', *BBC* (online, 18 December 2025) <<https://www.bbc.com/news/articles/cde65de81jgo>>.

¹² See, Lizzie Dearden, 'Two U.K. Police Forces Pledge to Arrest People Who Chant 'Globalize the Intifada'', *NYT* (online, 17 December 2025) <<https://www.nytimes.com/2025/12/17/world/europe/uk-police-antifada-bondi-shooting-synagogue.html>>.

¹³ *Public Order Act 1986* s 6(4).

¹⁴ Commissioner Sir Mark Rowley and Chief Constable Sir Stephen Watson, 'Joint Statement from the Commissioner of the Metropolitan Police and the Chief Constable of Greater Manchester Police' (Press Statement, 17 December 2025) ('Joint Statement').

¹⁵ Jonathan Hall KC, 'Written Evidence accompanying the Report on Terrorism Legislation and Protests' (Home Office's Independent Reviewer of Terrorism Legislation, January 2024) 2.

¹⁶ Jonathan Hall KC, 'Report on Terrorism Legislation and Protests' (Home Office's Independent Reviewer of Terrorism Legislation, 23 November 2023) 1.

¹⁷ *Ibid.*

Germany

- 38 On 9 October 2023, several people were arrested and charged with offences under s 140 of the *German Criminal Code* for allegedly chanting the slogans “*from the River to the Sea, Palestine will be free*” and “*from Duisburg to Gaza, Yalla Intifada*” at a pro-Palestine protest in Duisburg.¹⁸
- 39 The organiser of the protest was convicted in the first instance. On appeal, the organiser was acquitted of all charges. In her reasons, the Judge on appeal cited an excerpt from a previous decision of the Hesse state Administrative Court in Kassel, namely:
- 40 *When classifying the slogan under criminal law, it must be taken into account that it expresses the desire for a free Palestine from the (Jordan) river to the Mediterranean, i.e. in an area in which Israel lies within its current borders. However, the slogan as such says nothing about how this - politically highly controversial - goal is to be achieved. In principle, there are various politically conceivable ways and means of achieving this abstract goal, for example through international treaties, a two-state solution, a unified state with equal civil rights for Israelis and Palestinians or by means of armed struggle. Whether the alternative paths outlined are politically realistic is irrelevant. In any case, the slogan as such does not contain a compelling call for armed struggle against Israel. The [relevant authority] has not presented any concrete evidence that the use of the slogan (...) is to be understood as a compelling call for violence and terror against Israel, nor is this evident to the court.*
- 41 Following the appeal decision, Dusseldorf authorities sought to ban a subsequent pro-Palestine protest on the basis that protestors would likely shout slogans denying Israel's right to exist.¹⁹
- 42 The Higher Administrative Court of North Rhine-Westphalia ruled that the protest could proceed, stating in its reasons that such slogans do “*not readily reveal any meaning constituting incitement to hatred*”, and noted more potently (emphasis added):²⁰
- 43 *Such pronouncements [denying the right of the State of Israel to exist] are initially directed against the State of Israel as an institution, which does not necessarily imply a denial of the right to exist of Jews (or non-Jewish residents) living within its territory. As the Administrative Court correctly stated, a critical examination of the founding of the State of Israel, particularly from the perspective of international law, and the demand for a peaceful transformation of existing conditions are not objectionable under criminal law. This is fundamentally an expression of opinion protected under Article 5, Paragraph 1, Sentence 1 of the Basic Law. Authorities and courts must observe the constitutional requirements derived from Article 5, Paragraph 1, Sentence 1 of the Basic Law when interpreting and applying Section 130 of the Criminal Code. The fundamental right under Article 5,*

¹⁸ Dietmar Gaisenkersting, 'Duisburg Regional Court rules chants of “From the river to the Sea, Palestine will be free” and “Yalla Intifada” are not punishable by law', *WSWS* (online, 25 May 2025) <<https://www.wsws.org/en/articles/2025/05/26/hqzu-m26.html>>.

¹⁹ Majed Al-Zeer, 'German Court Rules Police Cannot Ban General Criticism of Israel at Pro-Palestine Protests', *European Palestinian Council for Political Relations* (online, 17 December 2025) <<https://www.eupac.org/german-court-rules-police-cannot-ban-general-criticism-of-israel-at-pro-palestine-protests/>>.

²⁰ *Higher Administrative Court of North Rhine-Westphalia, 15 B 1300/25.*

*Paragraph 1, Sentence 1, Clause 1 of the Basic Law grants everyone the right to freely express and disseminate their opinion in speech, writing, and images. **The fundamental right to freedom of expression applies regardless of whether the expression is rational or emotional, reasoned or unfounded, and whether others consider it useful or harmful, valuable or worthless.***

Reference E - The Australian Constitution and the implied freedom of political communication;

- 44 The subject of the Inquiry impacts many fundamental rights, including the implied freedom of political communication. In Australia, fundamental rights such as the freedom of expression and freedom of religion are guaranteed through international legal instruments and Australia's domestic law. These fundamental rights and freedoms must not be unjustifiably encroached upon by legislative interference.
- 45 The NSWCCCL considers that the legislature ought to have regard to the following when introducing any new law that restricts fundamental rights and freedoms, like the freedom of political communication, to ensure compliance with Australia's international obligations and constitutional requirements:
- (a) all relevant rights and freedoms must be identified to ensure that they are not unintentionally and unduly infringed by the new law;
 - (b) the new law must be considered in light of the scope and permitted restrictions of these rights and freedoms, as set out in international and domestic law (and must be consistent with the scope and permitted restrictions); and
 - (c) where possible, the legislature ought to consider non-legal means of addressing the 'mischief' the subject of the relevant law, rather than imposing limitations on key rights and freedoms.

Equality before the law

- 46 Australia is a signatory to a number of international instruments which require State parties to recognise and protect fundamental rights and freedoms. The rights of freedom of expression is particularly pertinent in circumstances where the legislature seeks to restrict certain phrases, or even categories of speech through laws. However, it is imperative that all relevant rights and freedoms be identified and assessed so that they are not inadvertently infringed. For instance, regard must be had to the cardinal principle of human rights law that no one human right is to be favoured over another.²¹
- 47 The *International Covenant on Civil and Political Rights (ICCPR)*, to which Australia is a signatory, provides that each State party is to ensure that all individuals within its jurisdiction enjoy the rights provided for by the ICCPR 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.²² The principle of equality before the law is enshrined in ICCPR article 26, which relevantly provides:²³

²¹ Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards' (2023) 42(3) *University of Queensland Law Journal* 317; *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993, adopted 25 June 1993) para 5.

²² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2(1) (*ICCPR*).

²³ ICCPR art 26.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

- 48 The legislature ought to have regard to this fundamental tenet of international human rights law when drafting and implementing new domestic laws. As outlined above, the approach at hand does not accord equal protection to all vulnerable groups from the intentional incitement of hatred. Consequently, there is a risk that restrictions create a hierarchy of protection of one group over another.
- 49 The terms of reference suggest that the focus of the Inquiry is restricting speech on the basis of racial and cultural meanings. Hierarchies are also created if protection is not afforded to inciting hatred on the basis of protected attributes such as religious belief, sexual orientation, gender identity, intersex status and HIV or AIDS status. It does not accord with the principle of equality before the law, as, in operation, if it prioritises certain protected attributes over other protected attributes.
- 50 There is a genuine risk that laws addressing certain phrases, or categories, and not addressing matters in a general sense, may lead to unequal outcomes and expand existing divisions within our community. NSWCCCL considers that combating hate speech is better addressed through non-legal means rather than through resorting to the criminal law. However, in the event that further laws are proposed, they ought to apply equally to all protected attributes to comply with Australia's international law obligations.

The right to freedom of expression and freedom of religion

- 51 As stated in the ICCPR, the freedom of expression carries 'special duties and responsibilities' and may be subject to 'certain restrictions'.²⁴ Similarly, the freedom to 'manifest one's religion' may be subject to limitations, which are 'prescribed by law' and are necessary to protect, *inter alia*, 'the fundamental rights and freedoms of others'.²⁵
- 52 International law instruments recognise, in varying terms, that incitement of hatred on the basis of race and other protected attributes must be prohibited by law. Relevantly:
- (a) the ICCPR requires that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' must be prohibited by law;²⁶ and
 - (b) the *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)* requires State parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.²⁷
- 53 However, where a law restricts the freedom of expression (or similarly, freedom of religion), it remains necessary to have regard to the principles of legality, proportionality and necessity. This means that the restriction must be:²⁸
- (a) provided for in law;
 - (b) narrowly defined to serve a legitimate interest; and

²⁴ ICCPR art 19 (3).

²⁵ ICCPR art 18(3).

²⁶ ICCPR art 20. We note that Australia has made a reservation in respect of art 20.

²⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969, entered into force for Australia 30 October 1975) art 4(a). We note that Australia has made a reservation in respect of article 4(a).

²⁸ ICCPR art 18(3), 19(3).

(c) necessary in a democratic society to protect that interest.

54 Unless specific caution is used, further offences risks unintended outcomes, including unduly restricting freedom of expression and religion. As noted above, the criminal law, in its current form and so far as it is able, adequately protects against the incitement of hatred towards vulnerable groups in NSW. In our view, this means that further restrictions are not necessary.

The implied freedom of political communication

55 In domestic law, the High Court of Australia has found that the Australian Constitution contains an implied freedom of political communication. This is drawn by implication to the text and structure of the Constitution, and the maintenance of the constitutionally prescribed system of representative and responsible government.²⁹

56 The implied freedom is not an absolute right or uncontrolled licence to freedom of expression, and the case law sets out the circumstances in which this implied freedom may be limited by the legislature.³⁰ However, just as the legislature ought to have regard to international law principles where it seeks to restrict the freedom of expression, it must ensure that any such restriction is consistent with the constitutionally guaranteed implied freedom of political communication.

57 The test for the court to determine whether a law is constitutionally valid is determined as follows:³¹

(a) first, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

(b) second (and if the answer to the first question is yes) is the law legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

(c) third, is the law reasonably appropriate and adapted to serve that legitimate end?

58 If the law is not legitimate, reasonably appropriate and adapted in a manner compatible with maintenance of the constitutionally prescribed system of government, it will contravene the implied right of political communication.

59 The implied freedom was considered in the context of inciting hatred on the ground of homosexuality (section 49ZT(1) ADA) by the New South Wales Court of Appeal in the decision of *Sunol v Collier (No 2)*.³² Section 49ZT(2) ADA includes an exception in relation to conduct which is a public act 'done reasonably and in good faith', for various purposes, including 'in the public interest'.

60 In *Sunol*, the majority of the Court held that section 49ZT(1) ADA did burden the implied freedom.³³ However it was held to be reasonably appropriate and adapted to service a legitimate end, on the basis that seeking to prevent homosexual vilification is a 'legitimate end of government'.³⁴ In upholding its constitutionality, the majority did also take note that the

²⁹ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (**Lange**).

³⁰ *Lange* (n 39) 561.

³¹ *Lange* (n 39) 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).

³² [2012] NSWCA 44 (**Sunol**).

³³ *Sunol* (n 39) [42] (Bathurst CJ), [68] (Allsop P)

³⁴ *Sunol* (n 39) [52] (Bathurst CJ); [73] (Allsop P).

exemption in section 49ZT(2) ADA would capture any form of communication that is legitimate political debate, and this provided 'adequate protection'.³⁵

61 No such protection is suggested in the approach of this Inquiry and should the scope of any proposed provisions not be carefully and clearly expressed, we would suggest they would not be legitimate, reasonably appropriate and adapted in a manner compatible with maintenance of the constitutionally prescribed system of government.

Reference F - Existing offences and other measures in New South Wales and Commonwealth legislation, including offences and measures that have been announced; and

62 Changes to existing offences risks unintended consequences impacting civil liberties, including unjustified limitations on the freedom of expression as outlined above. Furthermore, the NSWCCCL considers that the criminal law is ill-suited to addressing the mischief that the Inquiry intends to address, which would be better addressed through non-legal mechanisms, including public awareness campaigns (targeting topics such as cultural diversity, media literacy and the dangers and sources of disinformation), the promotion of public debate, and organisation-driven programs responding to specific instances of hate occurring in communities. These points are expanded below.

63 First, the NSWCCCL submits that the criminal law, in its current form and so far as it can, protects against the incitement of hatred towards vulnerable groups in NSW. There was already an extensive range of both State-based and Commonwealth criminal laws which protect Australians against the incitement of hatred. These include the following:

- (a) section 93Z of the Crimes Act prohibits the intentional or reckless threatening or incitement of violence against another person or group of persons with certain protected characteristics, including on the grounds of race;
- (b) other NSW criminal laws, including laws relating to stalking and intimidation, common assault, affray and intentional destruction of property, prohibit harms that may arise from the incitement of hatred; and
- (c) Commonwealth criminal laws prohibit:
 - (i) a range of actions relating to advocating the use of force or violence against a person or their property because they are a member of a protected group, distinguished by, among other things, race, religion, nationality or national or ethnic origin;³⁶
 - (ii) the use of terrorist and Nazi symbols or gestures;³⁷ and
 - (iii) the use of carriage services to threaten,³⁸ menace, harass, or cause offence.³⁹
- (d) The Summary Offences Act

64 Not only are these protections comprehensive, but they have also been routinely and effectively deployed against hate-based acts. The police have used their broad powers to move people on and prosecute the use of hate symbols, arson, graffiti and property damage, which has been

³⁵ *Sunol* (n 39) [52] (Bathurst CJ), see also [71] (Allsop P).

³⁶ *Criminal Code Act 1995* (Cth) ss 80.2A–80.2BE (**Criminal Code**).

³⁷ Criminal Code Part 5.1, subdivision CA.

³⁸ Criminal Code s 474.15.

³⁹ Criminal Code s 474.17.

used in response to antisemitism in NSW.⁴⁰ Further, section 93ZAA was added to the criminal laws. The NSWCCCL opposed the introduction of 93ZAA and is opposed to further repressing speech to attempt to address social cohesion.

65 Second, the NSWCCCL submits that the criminal law is ill-suited to address the issue that Inquiry intends to address, and would be better addressed through non-legal mechanisms. The NSWCCCL notes that:

- (a) while the criminal law may play a role in defining community expectations, to indicate disapproval of certain actions, to educate the community about right and wrong, and to deter wrongdoing, it largely comes after the event and is not effective as the primary mechanism to achieve these goals;
- (b) the criminal law, by its nature and application, simply cannot protect against the incitement of hatred on the grounds of race. There is no evidence to suggest that criminalising acts of hate and racism have an impact on reducing those phenomena, nor that doing so would curb radicalisation.⁴¹ Rather, its criminalisation risks the unintended consequence of permitting hatred to fester in private communities and risks further radicalising groups who hold these harmful views; and
- (c) instead, the NSW Government should direct its efforts to addressing the structural and societal causes of hate-based acts and speech, which involves the enhancement of non-legal, community-based solutions (including, for example, public awareness campaigns directed at fostering tolerance and increasing media literacy, as well as more targeted responses to specific instances of hate occurring in communities).

66 Third, the NSWCCCL submits that when criminal law is used to solve a societal problem, it must be drawn with precision and certainty. There is a real risk that further offences will be ineffective in promoting social cohesion, whilst infringing on freedom of speech and chilling legitimate public discourse.

67 The NSWCCCL cautions against increasing NSW Police power to prosecute offences related to the subject of the Inquiry. In circumstances where existing hostilities exist between vulnerable minority groups and NSW Police, the NSWCCCL is concerned that these minority groups may be overrepresented in prosecutions instigated by NSW Police. The NSWCCCL notes that:

- (a) As addressed in the NSWCCCL's submissions to the NSW Law Reform Commission on section 93Z,⁴² some non-exhaustive examples of tensions currently existing between NSW Police and vulnerable groups include:
 - (i) the Special Commission of Inquiry into LGBTQI+ hate crimes noted that NSW Police had 'in significant respects' engaged with the inquiry in a way that was 'adversarial or unnecessarily defensive'.⁴³ In addition, the review commented that

⁴⁰ 'Media Release: NSW Government's Proposed New Laws Threaten Free Speech and Protest Rights', *New South Wales Council for Civil Liberties* (Web Page, 7 February 2025) <https://www.nswccl.org.au/proposed_new_laws_threaten_free_speech_and_protest_rights>; 'Anti-Semitic incidents in Sydney could shape future of hate crime laws as more detectives committed', *ABC News* (Web Page, 22 January 2025) <<https://www.abc.net.au/news/2025-01-22/nsw-antisemitism-crackdown-hate-crime-law-policing/104843316>>.

⁴¹ Human Rights Law Centre's Democratic Freedoms team, 'Explainer: NSW's proposed laws on hate crimes and places of worship', *Human Rights Law Centre* (Web Page, 11 February 2025) <<https://www.hrlc.org.au/explainers/nsw-hate-speech-laws/>>.

⁴² NSW Council for Civil Liberties Inc, Submission No 9 to Law Reform Commission, *Serious racial and religious vilification* (19 April 2024) [6.6].

⁴³ State of NSW, *Special Commission of Inquiry into LGBTIQ hate crimes* (Report, December 2023) 108.

- 'even very recently', there had been a resistance within the police to acknowledge the extent of hostility LGBTQI+ people experienced at the hands of NSW Police;⁴⁴
- (ii) the Australian Institute of Criminology reported that, between 1 July 2022 and 30 June 2023, there were 10 indigenous deaths in police custody.⁴⁵ This number has disgracefully increased. In 2024-25, 33 Aboriginal and Torres Strait Islander people died in police custody;⁴⁶
 - (iii) data collated by the NSW Bureau of Crime Statistics revealed Aboriginal young people were more than twice as likely to be targeted with very frequent bail checks;⁴⁷
 - (iv) the Law Enforcement Conduct Commission found that unconscious racism resulted in a Custody Manager failing to call an ambulance to assist an Aboriginal man in mental distress;⁴⁸ and
 - (v) on 2 May 2019, the NSW Civil and Administrative Tribunal ordered NSW Police to publish an apology and implement racial vilification training for senior officers after a tribunal found a police training exercise in October 2017 racially vilified Palestinians and Arabs and portrayed them as potential terrorists.⁴⁹
- (b) In addition, the NSW Bureau of Crime Statistics and Research reported that between 2022 and 2023, Indigenous persons were charged with offences under section 93Z of the Crimes Act.⁵⁰
 - (c) These examples emphasise the legitimate concerns that minority groups may have regarding the prospect of police prosecution under any further offences. If prosecution is gratuitously directed towards these groups it will itself be detrimental to social cohesion.

68 As stated above, the NSWCCCL submits that further offences are not necessary or appropriate, as the law already sufficiently protects against the incitement of hatred towards vulnerable groups in NSW. Further discretionary powers granted to NSW Police to decide what is hateful will likely result in a further breakdown of social harmony. NSWCCCL holds that there are sufficient existing offences in both state and federal legislation that are aimed at addressing hate.

NSW Offences

69 In this table NSWCCCL has also included offences which do not involve hatred as a specific element of the offence but could still be used in circumstances of hate speech or crimes. These offences are often more familiar to police and do not require proving subjective elements, such as hate, to establish an offence.

⁴⁴ Ibid 14.114.

⁴⁵ Merran McAlister, Hannah Miles and Samantha Bricknell, 'Deaths in custody in Australia 2022-23' (Statistical Report No 44) *Australian Institute of Criminology*.

⁴⁶ Merran McAlister, Hannah Miles and Samantha Bricknell, 'Deaths in custody in Australia 2024-25' (Statistical Report No 57) *Australian Institute of Criminology*.

⁴⁷ 'Data reveals police bail checks are targeting Aboriginal children, racial discrimination complaints filed', *Justice and Equity Centre* (Web Page, 1 July 2025) <<https://jec.org.au/first-nations-justice/discriminatory-policing/data-reveals-police-bail-checks-are-targeting-aboriginal-children-racial-discrimination-complaints-filed/>>.

⁴⁸ Law Enforcement Conduct Commission, (online, 23 June 2025) <<https://www.lecc.nsw.gov.au/news/media-release-law-enforcement-conduct-commission-finds-custody-manager-who-ignored-an-aboriginal-man-self-harming-in-custody-engaged-in-serious-misconduct>>.

⁴⁹ *Ekermawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79.

⁵⁰ New South Wales Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 – June 2023 – Aboriginal detailed offence*.

| Statute | Offence | Maximum Penalty |
|---|---|--|
| <i>Crimes Act 1900</i> (NSW) s 93Z | <u>Offence of publicly threatening or inciting violence</u> : intentionally or recklessly publicly threatening or inciting violence on the grounds of certain characteristics held by a person or group of persons: a person's race, religion, sexual orientation, gender identity, intersex or HIV/AIDS status | In the case of an individual—100 penalty units or imprisonment for 3 years (or both) In the case of a corporation—500 penalty units |
| <i>Crimes Act 1900</i> (NSW) s 93ZAA | <u>Offence of publicly inciting hatred on ground of race</u> : intentionally publicly inciting hatred on the ground of race | For an individual—100 penalty units or imprisonment for 2 years, or both For a corporation—500 penalty units |
| <i>Crimes Act 1900</i> (NSW) s 93ZA(1AA) | <u>Offence of displaying Nazi symbols</u> : knowingly displaying, by public act and without reasonable cause, a Nazi symbol on or near a synagogue, a Jewish school or the Sydney Jewish Museum | For an individual—200 penalty units or imprisonment for 2 years, or both, or For a corporation—1,000 penalty units |
| <i>Crimes Act 1900</i> (NSW) s 93ZA(1) | <u>Offence of displaying Nazi symbols</u> : knowingly displaying, by public act and without reasonable cause, a Nazi symbol on any other place | For an individual—100 penalty units or imprisonment for 12 months, or both, or For a corporation—500 penalty units |
| <i>Crimes Act 1900</i> (NSW) s 93ZB | <u>Offence of displaying prohibited terrorist organisation symbols</u> : knowingly displaying, by public act and without reasonable cause, a prohibited terrorist organisation symbol | For an individual—200 penalty units or imprisonment for 2 years, or both, or For a corporation—1,000 penalty units |
| <i>Summary Offences Act 1988</i> (NSW) s 4A(1) | <u>Offensive language</u> : using offensive language in, near or within hearing from a public place or school | 6 penalty units |
| <i>Crimes Act 1900</i> (NSW) s 61 | <u>Common assault</u> : intentionally or recklessly causing another person to apprehend immediate and unlawful violence, or inflicting unlawful force on another person | 2 years' imprisonment |
| <i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW) s 13(1) | <u>Stalking or intimidating another person</u> , with intent to cause them physical or mental harm | 5 years' imprisonment and/or 50 penalty units (\$5,500) |
| <i>Crimes Act 1900</i> (NSW) | <u>Destroying or damaging property</u> : | 5 years' imprisonment, or 7 |

| | | |
|---|--|---|
| s 195(1)(a), s 195(2)(a) | intentionally or recklessly destroying or damaging property that belongs to another person | years if during a public disorder |
| <i>Crimes Act 1900</i> (NSW) s 195(1)(a), s 195(2)(a) | <u>Threatening to destroy or damage the property of another person</u> with intent to cause a person to fear the threat would be carried out | 5 years' imprisonment, or 7 years if during a public disorder |
| <i>Crimes Act 1900</i> (NSW) s 31(1) | <u>Sending or delivering a document containing threats</u> : 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 | 10 years' imprisonment |
| <i>Crimes Act 1900</i> (NSW) s 93C(1) | <u>Affray</u> : using or threatening violence towards another person using more than just words, where that conduct would cause a reasonable person present to fear for their personal safety | 10 years' imprisonment |
| <i>Crimes Act 1900</i> (NSW) s 93B(1) | <u>Riot</u> : 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 | 15 years' imprisonment |

As An Aggravating Factor

70 An offence is aggravated if it 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).⁵¹

Civil Protections

71 Under the *Anti-Discrimination Act 1977* (NSW), it is unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the grounds of:

- Race
- Being a transgender person or persons
- Homosexuality
- Religious belief, affiliation or activity (or lack of religious belief, affiliation or activity), and
- Having HIV/AIDS⁵²

72 Complaints under the ADA are brought by individuals, rather than criminal prosecutions brought by the Police or DPP. Individuals make complaints to Anti-Discrimination NSW. If the complaint cannot be resolved by conciliation, Anti-Discrimination NSW may refer the complaint to the NSW Civil and Administrative Tribunal, which may make orders such as:

- Damages up to \$100,000 for any loss or damage suffered because of the vilification

⁵¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

⁵² *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZT, s 49ZE, s 49ZXB

- Orders restraining the respondent from continuing or repeating their conduct, or
- Orders requiring the respondent to publicly apologise to the complainant (as per NSWCLR Report 151 P23)

73 Civil claims do not have to meet the onerous criminal standard of beyond reasonable doubt. They only need to meet the standard of the balance of probabilities.

Commonwealth Offences

| Statute | Offence | Maximum Penalty |
|-------------------------------------|---|---|
| <i>Criminal Code (Cth)</i> s 80.2A | <u>Urging violence against groups</u> : advocating the use of force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion | 5 years' imprisonment, or 7 years where the force or violence would threaten the peace, order and good government of the Commonwealth |
| <i>Criminal Code (Cth)</i> s 80.2B | <u>Urging violence against members of groups or close associates</u> : advocating the use of force or violence against members of groups or close associates distinguished by race, religion, nationality, national or ethnic origin or political opinion | 5 years' imprisonment, or 7 years where the force or violence would threaten the peace, order and good government of the Commonwealth |
| <i>Criminal Code (Cth)</i> s 80.2C | <u>Advocating terrorism</u> : advocating the doing of a terrorist act or the commission of a terrorism offence, and being reckless as to whether another person will carry out the act or offence | 5 years' imprisonment, or the maximum penalty of the terrorism offence advocated, whichever is lesser |
| <i>Criminal Code (Cth)</i> s 80.2D | <u>Advocating genocide</u> and being reckless as to whether another person will engage in genocide | 7 years' imprisonment |
| <i>Criminal Code (Cth)</i> s 80.2H | <u>Public display of prohibited Nazi symbols</u> or <u>giving Nazi salute</u> in a public place | 12 months' imprisonment |
| <i>Criminal Code (Cth)</i> s 474.17 | Using a <u>carriage service</u> to <u>menace, harass</u> or <u>cause offence</u> | 5 years' imprisonment |
| <i>Criminal Code (Cth)</i> s 474.15 | Using a <u>carriage service</u> to <u>make a threat to kill or cause serious harm</u> to another person, intending that the person will fear the threat will be carried out | 10 years' imprisonment for threats to kill, or 7 years for threats to cause serious harm |

74 Complementary Commonwealth Anti-Discrimination Legislation:

- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth)

Reference G - Any other related matters.

75 As set out above, any reform of criminal law protections may, in some instances, introduce unjustified restrictions on certain fundamental rights and freedoms. In order to safeguard against this risk, the legislature ought to review any proposed criminal law reforms through the lens of

Australia's international law obligations to ensure consistency with the ICERD and ICCPR, and Australia's domestic law. Any such laws should also be narrow and specific to ensure their scope is clearly defined, and subject to appropriate oversight (for example, by allowing only prosecution by the ODPP).

- 76 As set out above, NSWCCCL considers that combating hate speech is better addressed through non-legal means rather than through resorting to the criminal law. The NSWCCCL recommends prioritising non-legal reform, including holistic change and education to manage community tension. To do otherwise is to risk stifling and undermining free speech, and inhibiting the rights that individuals are entitled to enjoy in a democratic society. A society which can openly discuss the causes of hate and rationally resolve differences by public speech will improve social cohesion. Non-legal measures have the added benefit that they do not serve as a fetter on freedom of expression and other fundamental rights and freedoms.
- 77 In addition, certain tensions exist between NSW Police and vulnerable groups. In order to improve social cohesion, it is essential to address these tensions, including through considering the manner in which the criminal law is enforced in addition to public commentary by the media, politicians and public officials around these issues.
- 78 It is the NSWCCCL's position that political speech ought to be protected except in circumstances where speech is inciting violence towards a protected group. In any healthy and functioning democracy, it is normal and natural for individuals and/or communities to disagree on political arguments and even in some instances be uncomfortable by the political position of others. Despite this discomfort, it is undemocratic to police political views for the subjective comfort of one group over another.
- 79 We trust this submission will be useful to the Reviewer.

Yours sincerely,

Adam Connor
Secretary
NSW Council for Civil Liberties

