

**Submission  
No 120**

## **MEASURES TO PROHIBIT SLOGANS THAT INCITE HATRED**

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## **Submission to the Legislative Assembly Committee on Law and Safety: Measures to prohibit slogans that incite hatred**

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### **Claim to being a subject matter expert**

I am an Associate Professor of Law at the University of Technology Sydney (UTS), with over two decades of experience as an academic legal scholar and teacher in the areas of legal theory, law and humanities, feminist legal studies, and legal responses to harm. I hold a PhD from the University of Washington (2009) and have been a member of the Faculty of Law at UTS since 2010.

## **Executive Summary**

This submission addresses the NSW Legislative Assembly Committee on Law and Safety's inquiry into the use of slogans said to intimidate communities and instil fear of violence. It proceeds from the position that existing NSW and Commonwealth laws are already adequate to address intimidation, threats, incitement to violence, and public disorder, and that further criminalisation of slogans or political phrases would be unnecessary, constitutionally vulnerable, and likely to undermine, rather than promote, community cohesion and safety.

The submission demonstrates that New South Wales already has a comprehensive, layered legal framework capable of responding to conduct that genuinely causes harm. NSW criminal law addresses stalking and intimidation, public threats and incitement to violence against targeted communities, riot, affray, violent disorder, and offensive public conduct. Civil and criminal vilification regimes provide additional pathways where public acts incite hatred or threaten physical harm. At the Commonwealth level, offences dealing with advocacy of violence, terrorism-related conduct, and the use of telecommunications to threaten or harass further reinforce this framework. Taken together, these provisions show that there is no legislative gap that would justify the creation of slogan-specific offences.

A central argument of the submission is that criminal law is ill-suited to regulating contested political meaning. Criminal liability depends on clarity, certainty, and conduct-based thresholds. Political slogans, by contrast, are inherently context-dependent and polysemic. Attempting to regulate them through criminal offences shifts interpretive power away from courts and toward police, inviting arbitrary, selective, and uneven enforcement. Australian case law, particularly in the context of public order and protest, illustrates the dangers of relying on vague or content-based offences that burden political communication and chill lawful dissent.

The submission further explains that these risks are heightened in Australia by the implied freedom of political communication, which operates as a structural limitation on legislative power rather than a personal right. Once new offences or police powers are enacted, courts can only assess their constitutionality after the fact. Chilling effects on protest and political participation occur well before any judicial scrutiny. Content-based regulation of slogans is therefore unlikely to satisfy constitutional proportionality analysis, particularly where less burdensome, conduct-based alternatives already exist.

The submission also responds to the Committee's request for international comparisons by examining the recent United Kingdom experience. It shows that the UK's post-2022 expansion of protest offences and police powers under the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Act 2023 is widely regarded as a failure. These reforms have lowered thresholds for intervention, expanded police discretion, and shifted protest regulation toward pre-emptive control. Far from improving social cohesion, they have generated legal uncertainty, chilling effects, and sustained criticism from courts, scholars, and human rights organisations.

A contemporary case study of UK hunger-striking remand prisoners illustrates the human consequences of this approach. Unconvicted protest defendants have been held on remand for prolonged periods under an expanded protest-control framework, despite formal court involvement. This demonstrates that judicial oversight is not a substitute for legislative restraint. Even in a jurisdiction with an express human rights statute, courts have been unable to prevent remand from functioning as de facto punishment in protest cases.

The submission concludes that the UK experience should be treated as a warning, not a model. Importing similar approaches into New South Wales would risk entrenching conflict, expanding discretionary police power, and undermining democratic legitimacy without delivering meaningful gains in safety or cohesion.

Accordingly, the submission recommends that the Committee reject proposals to criminalise slogans or expand protest-related police powers, affirm the adequacy of existing NSW and Commonwealth laws, and recognise that community safety and social harmony are best protected through proportionate enforcement of conduct-based offences, not through the criminalisation of political language.

### **Position:**

This submission opposes further criminalisation of protest slogans. Existing NSW and Commonwealth laws are sufficient to address intimidation, threats, incitement, and violence. Expanding criminal offences or police powers would be harmful, constitutionally risky, and counterproductive.

### **Recommendation:**

The Committee should reject further criminalisation of slogans, avoid importing UK-style protest controls, and affirm that community safety and cohesion are best protected through proportionate enforcement of existing conduct-based laws.

## **Substantive Submission:**

- 1. Existing laws are adequate: NSW and Commonwealth frameworks already address threats, intimidation, harassment, incitement, terrorism-related conduct, and public disorder** (ToR: (f) existing NSW and Commonwealth offences/measures)

Proposals to create slogan-specific offences proceed as if NSW lacks the legal tools to respond to intimidation and fear of violence. That is not correct. New South Wales and Commonwealth law already provide a layered framework that (1) criminalises threats and intimidation, (2) criminalises public acts that threaten or incite violence against communities, (3) criminalises violence and public disorder, and (4) criminalises online/telecommunications threats and harassment. Where conduct genuinely crosses the line into intimidation or incitement of violence, the legal system already has multiple pathways for intervention and prosecution, without needing to criminalise political phrases as such.

### **A. Threats, intimidation, and harassment are already criminal offences in NSW**

NSW law already criminalises conduct that is directed at causing fear of harm, including intimidation and stalking. Section 13 of the Crimes (Domestic and Personal Violence) Act 2007 (NSW) makes it an offence to stalk or intimidate another person with the intention of causing that person to fear physical or mental harm.

This offence is directed to the very mischief at the heart of the Terms of Reference: the use of conduct (including communications in context) to instil fear of harm. The point is that the criminal law already draws the appropriate line: it targets intentional intimidation and fear-inducing conduct, not contested political meaning in the abstract.

### **B. NSW already has a specific criminal offence for publicly threatening or inciting violence against targeted communities**

If the concern is “slogans” that allegedly operate as threats or incitement, NSW already has an offence that directly targets that problem.

Section 93Z of the Crimes Act 1900 (NSW) makes it an offence, by a public act, to intentionally or recklessly threaten or incite violence towards another person or a group on protected grounds, including race and religious belief or affiliation (as well as sexual orientation, gender identity, intersex status, and HIV/AIDS status).

The NSW Law Reform Commission’s own background material frames s 93Z as part of a broader matrix of NSW and Commonwealth offences relevant to serious vilification and violence risk, alongside civil vilification provisions.

In other words, NSW law already provides a mechanism to prosecute public, identity-targeted threats or incitement to violence. What a slogan-specific offence would largely do is shift the focus away from this conduct-based threshold (threat/incitement + public act + intention/recklessness + protected ground) and toward punishing language or symbolism, which is both overbroad and constitutionally fraught.

### **C. NSW law already addresses violence and public disorder (including threats of unlawful violence)**

Even leaving aside s 93Z, NSW criminal law contains well-developed public order offences that capture conduct that genuinely threatens public safety:

- Riot (s 93B, Crimes Act 1900): where 12 or more persons present together use or threaten unlawful violence for a common purpose in circumstances that would cause a person of reasonable firmness to fear for personal safety.
- Affray (s 93C, Crimes Act 1900): using or threatening unlawful violence toward another where the conduct would cause a person of reasonable firmness present to fear for personal safety.
- Violent disorder (s 11A, Summary Offences Act 1988): three or more persons using or threatening unlawful violence in a way that would cause a person of reasonable firmness to fear for personal safety.

These offences demonstrate that NSW law already has calibrated responses for escalation from protest into threatened or actual unlawful violence. They are triggered by violence/threats, not by contested meanings attached to political phrases.

### **D.. NSW already regulates offensive public conduct and language (without resorting to slogan bans)**

NSW law also includes summary-level offences dealing with offensive language and offensive conduct in public, which can be relied upon where the conduct meets statutory tests:

- Offensive language (s 4A, Summary Offences Act 1988) prohibits offensive language in or near, or within hearing from, a public place or school (subject to defences).
- The Summary Offences Act 1988 also provides for offences relating to offensive conduct and includes limiting language clarifying that offensive conduct is not established “merely” by using offensive language.

Whatever one thinks of these summary offences as a policy matter, their existence underscores the basic point: NSW does not lack legal tools for harmful public speech contexts. The question is not “is there a gap?”, but whether Parliament should expand criminal law further into political expression.

### **E. Civil and criminal vilification architecture already exists in NSW**

In addition to the general criminal law and s 93Z, NSW has a civil vilification framework in the Anti-Discrimination Act 1977 (NSW). For example, s 20C makes racial vilification unlawful where a person, by a public act, incites hatred, serious contempt or severe ridicule on the ground of race.

NSW has also legislated for serious racial vilification as a criminal offence (s 20D), triggered when the vilification involves aggravating elements including threats of physical harm (as reflected in the amending legislation that inserted the offence and in parliamentary materials discussing the provision).

The existence of both civil and criminal pathways matters for the Terms of Reference: NSW already has mechanisms to respond across a spectrum, from harmful vilification (civil) to threats/incitement to violence (criminal). The leap to a slogan-specific offence is therefore not “filling a gap”; it is a decision to recast political expression itself as criminal risk.

## **F. Commonwealth law already criminalises terrorism-related advocacy, group-based violence advocacy, and telecommunications threats/harassment**

Commonwealth criminal law already provides strong tools where rhetoric crosses into urging violence or terrorism-related conduct.

The Criminal Code Act 1995 (Cth) includes offences for advocating/urging violence against groups or members of groups (and related threatening offences) in Division 80 (including ss 80.2A–80.2B and related provisions).

It also criminalises the use of telecommunications (“carriage services”) to make threats and to harass:

- s 474.15: using a carriage service to make a threat to kill or cause serious harm, with the intention that the recipient fear the threat will be carried out.
- s 474.17: using a carriage service in a way that reasonable persons would regard as, in all the circumstances, menacing, harassing or offensive.

This is directly relevant to modern slogan dissemination, which often occurs online. Commonwealth law already provides a route to address menacing and threatening communications, without criminalising particular political phrases.

## **G. Case law and commentary underline why “gap-filling” through slogan bans is misguided**

A recurring lesson from Australian free speech jurisprudence is that the law must be careful not to burden political communication by penalising speech merely because it is insulting or offensive. The High Court’s decision in *Coleman v Power* is routinely cited for the proposition that laws aimed at “insulting” language can impermissibly burden political communication where they capture political protest and criticism of officials.

Academic commentary following *Coleman* has emphasised that the implied freedom operates as a constraint where criminal or public order provisions are deployed against political speech, particularly where the law is imprecise or confers wide discretion.

The upshot for this inquiry is straightforward: NSW already has targeted offences for intimidation, threats, and incitement to violence, including a bespoke offence (s 93Z) directed at public threats/incitement against communities. Introducing slogan-specific offences is not a technical fix; it is a policy choice to expand the criminal law into contested political meaning, increasing uncertainty, discretion, and chilling effects.

## **2. Criminal law is ill-suited to regulating contested political meaning and invites arbitrary enforcement**

ToR: (e) implied freedom (because the section is built around burden, discretion, chilling effects, and High Court protest/speech cases).

Proposals to criminalise slogans or politically charged phrases rest on a flawed premise: that the criminal law can reliably identify, stabilise, and regulate the meaning of political

language. Both criminal law doctrine and constitutional principle demonstrate that this premise is unsound. Criminal law is designed to regulate conduct, not contested meaning, and attempts to extend it into the regulation of political language invite arbitrariness, overreach, and selective enforcement.

### **A. Criminal law requires clarity, certainty, and conduct-based thresholds**

A foundational principle of criminal law is legal certainty. Offences must be defined with sufficient precision so that individuals can know in advance what conduct is criminal and so that enforcement does not depend on subjective or discretionary judgments. This principle is closely connected to the rule of law and has particular force where criminal liability carries stigma, punishment, and coercive state power.

Political slogans, by contrast, are inherently polysemic. Their meaning varies according to historical context, speaker identity, audience, location, tone, and accompanying conduct. The same phrase may function as a historical reference, a political demand, a critique of state power, or, in some contexts, a threat. Criminal law lacks the doctrinal tools to adjudicate such meaning without collapsing into impressionistic assessments by police or prosecutors.

Australian courts have long recognised the dangers of criminal offences that hinge on indeterminate concepts such as “offensiveness” or “insult”. In *Coleman v Power* (2004) 220 CLR 1, the High Court warned against the use of public order offences to suppress political expression merely because it is insulting or provocative. McHugh J observed that laws criminalising “insulting” language risk capturing political protest and criticism that lie at the heart of democratic communication (at 31–32 [92]). Kirby J similarly emphasised that political speech is often “emotive, exaggerated, and offensive” and that this does not remove it from constitutional protection (at 54–55 [196]).

While *Coleman* concerned statutory interpretation and constitutional limitation, its reasoning speaks directly to the present issue: criminal liability cannot turn on whether a political message is upsetting, confronting, or ideologically charged.

### **B Content-based regulation shifts power from courts to police**

When criminal law targets content rather than conduct, the practical effect is to transfer interpretive power from courts to frontline decision-makers. Police are required to make rapid judgments about meaning, intent, and audience impact, often in highly charged protest environments. These judgments are necessarily subjective and influenced by institutional priorities, political context, and implicit bias.

The High Court has repeatedly cautioned against laws that confer broad discretionary power capable of being exercised in ways that burden political communication. In *Brown v Tasmania* (2017) 261 CLR 328, the Court emphasised that protest policing regimes that rely on wide discretion are constitutionally suspect because they invite uneven and unpredictable enforcement (see 372–373 [123] (Kiefel CJ, Bell and Keane JJ)). Gordon J warned that broad discretionary powers directed at protest “necessarily burden political communication” and risk chilling lawful participation (at 430–431 [347]).

Slogan-based offences would magnify this problem. Rather than asking whether conduct amounts to a threat, intimidation, or incitement to violence (questions courts are well-

equipped to assess), police would be required to decide whether a phrase carries an impermissible political meaning. That is not a legal determination; it is an interpretive and political one.

### **C. The implied freedom of political communication heightens the risk**

In Australia, the dangers of regulating political meaning through criminal law are intensified by the implied freedom of political communication. Because the implied freedom is not a personal right but a limitation on legislative power, it operates indirectly. Individuals do not enjoy *ex ante* immunity from enforcement; rather, laws are assessed after the fact for constitutional validity.

As a result, chilling effects occur before courts ever intervene. People self-censor; protests are deterred; police act conservatively or expansively depending on institutional signals. The High Court has acknowledged this phenomenon. In *Unions NSW v New South Wales* (2013) 252 CLR 530, the Court recognised that burdens on political communication operate not only through convictions but through deterrence and chilling effects (at 554–555 [44]).

Criminalising slogans would therefore burden political communication in advance of any judicial scrutiny, precisely because participants cannot reliably predict how meaning will be interpreted or enforced.

### **D. Experience with public order and offensive language offences confirms the risk**

Australian experience with public order offences demonstrates how vague speech-based provisions operate in practice. Summary offences relating to offensive language or conduct have historically been enforced disproportionately against protesters, Indigenous people, and marginalised communities.

Empirical and doctrinal scholarship has documented how such offences function less as neutral rules than as tools of situational control, enabling police to manage public space and dissent. McNamara and Quilter have shown that offensive language offences operate as discretionary mechanisms that disproportionately affect politically and socially marginal speakers (“Public Order Policing and the Criminalisation of Protest”, (2016) 40 *Crim LJ* 327). This scholarship underscores why expanding criminal liability into political language exacerbates inequality rather than promoting safety.

### **E. Criminal law cannot resolve political disagreement or historical contestation**

Political slogans often condense long-standing historical disputes, collective memories, and ideological positions. Criminal law is structurally incapable of resolving such disputes. When the state attempts to do so, it risks transforming political disagreement into criminal deviance.

Comparative scholarship warns against this move. As Ashworth and Zedner observe, criminal law loses legitimacy when it is used to manage social conflict rather than to address concrete harm (*Preventive Justice* (2014) ch 2). In the protest context, criminalisation of symbolic expression often entrenches conflict and radicalisation rather than diffusing it.

The UK experience discussed elsewhere in this submission confirms this risk. Attempts to control political meaning through expansive protest and speech offences have not produced cohesion; they have produced prolonged detention, legal uncertainty, and human rights crises.

## **F. Conduct-based offences already draw the appropriate line**

The strength of existing NSW and Commonwealth law lies precisely in its conduct-based thresholds. Offences for threats, intimidation, stalking, incitement to violence, terrorism advocacy, and public disorder require proof of conduct, intent, recklessness, or objective danger. Courts can assess these elements using established evidentiary and doctrinal tools.

By contrast, slogan-specific offences abandon these safeguards and substitute symbolic meaning for conduct. That substitution is neither necessary nor desirable. It invites arbitrary enforcement, increases constitutional risk, and undermines confidence in the neutrality of the criminal law.

## **G. Conclusion**

Criminal law is a powerful and coercive instrument. Its legitimacy depends on clarity, predictability, and a focus on demonstrable harm. Regulating contested political meaning fails on all three counts. It transfers interpretive authority to police, burdens political communication before courts can intervene, and risks criminalising dissent rather than preventing violence.

For these reasons, criminal law is ill-suited to regulating political slogans. Existing conduct-based offences already strike the appropriate balance. Expanding criminal liability into the domain of political meaning would undermine the rule of law without delivering genuine gains in safety or cohesion.

## **3. Constitutional considerations and the implied freedom of political communication (Terms of Reference e)**

Any proposal to prohibit or criminalise protest slogans raises serious constitutional concerns under the implied freedom of political communication, as developed by the High Court of Australia. The implied freedom is not a personal right but a structural limitation on legislative and executive power, derived from the system of representative and responsible government established by the Constitution (*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 138–139 (Mason CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 560–561).

Political slogans used in protest constitute a core form of political communication. The High Court has consistently emphasised that the implied freedom protects not only civil or moderate speech, but also expression that is confrontational, provocative, or offensive. In *Brown v Tasmania* (2017) 261 CLR 328, the Court made clear that protest activity lies at the heart of political communication protected by the Constitution (at 362–363 [82] (Kiefel CJ, Bell and Keane JJ); 430–431 [347] (Gordon J)). As Gordon J observed, protest “is an exercise in political communication” and frequently “involves disruption, inconvenience and offence” (at 431 [347]).

Legislation that targets specific slogans or phrases on the basis of their perceived political meaning or ideological content would plainly burden political communication. The relevant constitutional question is therefore whether such a burden can be justified under the structured proportionality test articulated in *McCloy v New South Wales* (2015) 257 CLR 178 at 193–195 [2] (French CJ, Kiefel, Bell and Keane JJ), and affirmed in *Brown v Tasmania* (2016) 261 CLR 328 at 359–360 [70].

Under that framework, a law must pursue a legitimate purpose compatible with the maintenance of representative and responsible government, and must be suitable, necessary, and adequate in its balance. While protecting communities from violence and intimidation is undoubtedly a legitimate objective, criminalising slogans as such is unlikely to satisfy the remaining limbs of the test.

First, such measures are of questionable suitability. Laws that focus on words or phrases in isolation do not directly address the conduct that causes harm, such as threats, intimidation, harassment, or violence. As the plurality in *Brown* warned, laws burdening political communication must have a rational and functional connection to their stated purpose (at 360–361 [72]–[74]). There is no necessary or direct causal relationship between the utterance of a slogan, divorced from context, and the incitement of violence or intimidation.

Secondly, criminalising slogans is unlikely to be necessary, given the extensive body of existing NSW and Commonwealth law that already addresses harmful conduct. The necessity limb requires that no reasonably practicable, less burdensome means be available to achieve the same purpose (*McCloy* at 195 [2]; *Clubb v Edwards* (2019) 267 CLR 171 at 189–190 [31] (Kiefel CJ, Bell and Keane JJ)). Existing offences relating to threats, intimidation, harassment, public disorder, incitement to violence, and terrorism demonstrate that the legislative objective can be achieved without imposing additional content-based restrictions on political speech.

Thirdly, such laws are unlikely to be adequate in their balance. The burden imposed on political communication would be substantial, particularly in protest contexts where slogans function as compressed, symbolic forms of political expression. As the High Court recognised in *Coleman v Power* (2004) 220 CLR 1, even “insulting”, “offensive”, or “provocative” speech may fall within the scope of constitutionally protected political communication (at 31–32 [92] (McHugh J); 54–55 [196] (Kirby J)). The speculative benefit of banning particular phrases must be weighed against the democratic harm caused by chilling lawful political participation.

Academic commentary consistently underscores this point. Stone has argued that the implied freedom is particularly concerned with protecting unpopular or disruptive political expression, because such speech is most vulnerable to suppression (*Political Communication and Constitutional Freedom* (1999) 189–192). McGarrity and Hufnagel similarly observe that protest regulation frequently fails proportionality analysis because it targets expression rather than harm, producing significant chilling effects on democratic participation ((2018) 41 UNSWLJ 961 at 968–972).

There are also serious concerns regarding discretion and enforcement. Laws targeting slogans would necessarily confer broad discretion on police and prosecutors to interpret meaning, intent, and offensiveness. The High Court has repeatedly warned that discretionary regimes of this kind risk disproportionate burdens on political communication (*Unions NSW v New*

South Wales (2013) 252 CLR 530 at 554–555 [44]; Brown at 372–373 [123]). Scholarly analysis confirms that such discretion is likely to be exercised unevenly, particularly against racialised groups, protest movements, and politically marginal communities (see Gray, “Chilling Political Dissent” (2020) 43 MULR 1 at 24–30).

Importantly, the implied freedom does not permit the state to restrict political communication merely because it is said to undermine social cohesion or cause offence. As *Coleman v Power* makes clear, offence or discomfort is not a sufficient justification for burdening political speech (220 CLR 1 at 17–18 [19] (Gleeson CJ)). Democratic systems depend upon the capacity to contest meaning, history, and power through robust, and sometimes unsettling, political expression.

Finally, once the state assumes the power to prohibit specific political phrases, there is no principled limit on the extension of that power. As *Lange* and *Stone* caution, content-based regulation of political language invites incremental erosion of the implied freedom, particularly in moments of moral panic or political anxiety ((2015) 39 MULR 629 at 652–656). The implied freedom exists precisely to guard against such encroachments on democratic contestation.

For these reasons, any legislative proposal that criminalises slogans as such would face serious constitutional vulnerability. The Committee should recognise that the implied freedom of political communication operates as a substantive constraint on legislative action, and that expanding criminal law into the regulation of political language risks undermining the constitutional foundations of Australian democracy.

#### **4. Protest and public order regulation in the United Kingdom: expanding offences, excessive police discretion, and a failing model (PCSCA 2022, POA 2023) (Terns of Reference (d))**

Recent developments in the United Kingdom’s protest and public order framework are often cited as evidence of “strong” or “decisive” action against disruptive or harmful protest activity. In fact, these developments demonstrate the risks of over-criminalisation, excessive police discretion, and rights erosion, and are widely regarded by legal scholars, courts, and human rights organisations as a failed and deeply problematic approach.

Since 2022, the UK has enacted a suite of reforms that dramatically expand protest-related offences and police powers, most notably through the Police, Crime, Sentencing and Courts Act 2022 (PCSCA) and the Public Order Act 2023 (POA 2023). These reforms have shifted the UK away from a historically context-sensitive, rights-based approach to protest regulation toward a model that prioritises pre-emptive control and suppression.

##### **(a) PCSCA 2022: lowering thresholds and widening police discretion**

The PCSCA 2022 significantly amended the Public Order Act 1986 by expanding police powers to impose conditions on public assemblies and processions. In particular, it broadened the concept of “serious disruption” and enabled police to impose conditions where they reasonably believe protest activity may cause serious disruption to the activities of an organisation or to the life of the community.

This shift is constitutionally significant. It lowers the threshold for state intervention from imminent breach of the peace to anticipated disruption, a concept that is vague, elastic, and highly dependent on police interpretation. As commentators have noted, the effect is to authorise police intervention well before any unlawful conduct occurs, and in circumstances where protest remains peaceful and expressive.

This expansion of discretion marks a departure from earlier UK jurisprudence that emphasised restraint in preventive protest policing. In *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55, the House of Lords made clear that preventive action against protest requires a high threshold of imminence. Lord Brown rejected the idea that police could intervene merely because of a “real risk” of future disorder, insisting instead on imminence as a safeguard against arbitrary suppression of protest ([66]–[67], [141]–[142]). The PCSCA reforms effectively sidestep this principle by reconfiguring disruption, rather than violence, as the trigger for intervention.

### **(b) Public Order Act 2023: new offences and quasi-preventive control through SDPOs**

The Public Order Act 2023 goes further still. It introduces a suite of new protest-related offences, including “locking on” and offences relating to interference with key infrastructure, alongside the creation of Serious Disruption Prevention Orders (SDPOs).

SDPOs are particularly concerning. They allow courts to impose extensive prohibitions and requirements on individuals, including restrictions on association, movement, and protest participation, where the court considers it necessary to prevent future serious disruption. Crucially, SDPOs may be imposed without a criminal conviction, based on past protest-related conduct and predictions of future behaviour.

Legal scholars and civil liberties organisations have characterised SDPOs as a form of preventive justice that collapses the distinction between criminal punishment and anticipatory control. They significantly expand the state’s capacity to regulate political participation and place individuals under ongoing surveillance-like constraints, raising profound rule-of-law concerns.

### **(c) Human rights critique: chilling effects and incompatibility with Articles 10 and 11**

The cumulative effect of these reforms has been widely criticised as incompatible with the UK’s obligations under Articles 10 and 11 of the European Convention on Human Rights, which protect freedom of expression and freedom of assembly.

In *DPP v Ziegler* [2021] UKSC 23, the UK Supreme Court affirmed that protest-related offences must be assessed through a fact-specific proportionality analysis, and that interference with Articles 10 and 11 may render prosecution unlawful where it is not necessary or proportionate ([59]–[60], [62]–[65]). The post-2022 legislative framework sits uneasily with this jurisprudence, as it shifts decision-making power away from courts and toward police, while reducing the role of contextual proportionality at the point of enforcement.

Human Rights Watch, in its 2026 report “Silencing the Streets: The Right to Protest Under Attack in the UK”, concluded that the PCSCA and POA reforms have “severely curtailed” the right to peaceful protest and recommended repeal or substantial amendment. The report

emphasised that the reforms grant excessively broad and poorly defined powers to police, leading to uncertainty, selective enforcement, and widespread chilling effects.

Similarly, the legal NGO JUSTICE has warned that the rapid accumulation of protest offences and powers has produced a confusing and coercive framework that undermines legal certainty and democratic accountability. Academic commentary echoes these concerns, describing the UK's current approach as one that "recasts protest as a problem of public order management rather than democratic participation".

#### **(d) A cautionary example, not best practice**

Far from representing best practice, the UK's recent protest law reforms demonstrate the dangers of responding to political controversy with expansive, discretionary, and pre-emptive legal controls. These measures have not resolved social conflict or improved community cohesion. Instead, they have intensified mistrust between communities and police, generated legal uncertainty, and attracted sustained domestic and international criticism.

Importantly, the UK has not addressed concerns about protest slogans by banning phrases as such. Instead, it has expanded a broader architecture of protest control that now sits in tension with its own human rights jurisprudence. This experience underscores a key lesson for New South Wales: expanding police powers and criminal offences in response to political speech risks undermining democratic legitimacy while failing to address the underlying causes of social conflict.

For these reasons, the UK approach should be understood not as a model to emulate, but as a warning. It illustrates how the expansion of protest offences and police discretion can erode fundamental freedoms without delivering meaningful gains in safety or cohesion.

### **5. Case study: UK hunger-striking remand prisoners as a warning against expanding protest and speech control (Terms of reference (d))**

Recent events in the United Kingdom provide a stark, real-time case study demonstrating the dangers of expanding protest-related offences, police discretion, and pre-emptive control of political activity. Since November 2025, a group of pro-Palestinian activists held on remand in the United Kingdom have engaged in a prolonged hunger strike in protest against their detention, the conditions of their confinement, and the legal framework under which they have been charged.

The hunger strike has been described by multiple observers as the largest coordinated prison hunger strike in the UK in decades. Several participants have required repeated hospitalisation, and international concern has been expressed by United Nations Special Procedures mandate holders regarding their treatment in custody, access to medical care, and the broader legal context in which their detention has occurred. The strikers are not serving sentences following conviction; they are unconvicted defendants held on remand, some for extended periods exceeding 18 months.

This situation is not an aberration. It is a foreseeable outcome of the UK's post-2022 legal trajectory, which has reframed politically contentious protest activity as a matter for expansive policing, new protest-specific offences, and preventive detention mechanisms,

particularly following the enactment of the Police, Crime, Sentencing and Courts Act 2022 and the Public Order Act 2023.

### **(a) Remand as de facto punishment in protest cases**

The hunger strike illustrates how expanded protest and public order powers can convert pre-trial detention into a form of punishment, even where guilt has not been established. UK law formally provides custody time limits for defendants held on remand, often described as a six-month safeguard. In practice, however, these limits are routinely extended, with no statutory cap on the number of extensions. Parliamentary scrutiny in the UK has acknowledged that a significant proportion of remand prisoners are held well beyond six months, including for periods exceeding two years.

In protest-related cases, this dynamic is especially acute. Once protest activity is framed as involving “serious disruption”, public safety risk, or national security concerns, the threshold for continued detention becomes easier to satisfy, even where the underlying conduct is non-violent. The result is that individuals engaged in political protest may experience extended incarceration without conviction, producing precisely the kind of desperation that leads to hunger strikes as a last resort.

### **(b) Have the courts reviewed these cases?**

Yes, but only in a limited and structurally constrained sense. Remand decisions in the UK are formally made by independent courts, and defendants are entitled to apply for bail and to challenge extensions of custody time limits. Lawyers for the hunger-striking detainees have also taken steps toward High Court proceedings concerning detention conditions and executive decision-making.

However, the existence of court involvement should not be mistaken for an effective systemic safeguard. Courts in these contexts are constrained in at least three critical ways.

First, bail and remand decisions are individualised. Judges assess whether statutory criteria are met in a particular case; they cannot address the broader legislative architecture that produces punitive remand at scale, nor can they recalibrate the balance struck by Parliament in expanding offences and police powers.

Secondly, custody time limits are porous by design. Courts are permitted to extend detention where statutory tests are satisfied, even where delays are systemic rather than attributable to the defendant. This means that judicial oversight operates within a framework that already tolerates prolonged pre-trial detention, leaving courts with little capacity to prevent remand from becoming a tool of protest control.

Thirdly, judicial review is a blunt instrument. Where challenges are framed as reviews of executive action, courts are limited to assessing legality, rationality, and procedural fairness. They do not re-determine the merits of political choices about protest policing, nor do they offer timely relief for detainees whose health is deteriorating in custody. This structural limitation is why UN experts have emphasised dialogue and legislative restraint, rather than litigation alone, as the appropriate response.

In short, while courts are formally involved, they are left managing the consequences of an over-expansive legal framework, not correcting it.

### **(c) What this demonstrates for New South Wales**

The UK hunger strike should be understood as a warning, not a model. It shows how rapidly expanded protest offences and broad police discretion can escalate political conflict, entrench mistrust, and produce severe human consequences, without improving community cohesion or safety.

Importantly, the UK has not addressed contentious slogans by simply banning phrases. Instead, it has built a dense architecture of protest control that now sits in tension with its own human rights jurisprudence and is subject to sustained criticism by courts, parliamentarians, and international observers. The hunger strike makes visible the endpoint of that trajectory: prolonged remand, diminished avenues for effective legal redress, and political protest recast as a problem of containment rather than democratic engagement.

For New South Wales, the lesson is clear. Expanding criminal offences or police powers in response to political slogans or protest activity risks importing the same failures. Once broad discretion is granted, courts cannot undo the chilling and punitive effects that follow. Community safety and cohesion are not enhanced by legal frameworks that produce desperation, resistance, and human rights crises. They are undermined.

## **6. Why the UK experience is particularly instructive for New South Wales: constitutional contrast and caution (Terms of Reference (d) and (e))**

The United Kingdom experience is especially instructive for New South Wales because it demonstrates the limits of legal safeguards even in a jurisdiction with an express human rights framework. In the UK, protest regulation operates within the Human Rights Act 1998 and the European Convention on Human Rights, which provide textual guarantees of freedom of expression (Article 10) and freedom of assembly (Article 11), and require courts and public authorities to apply proportionality analysis.

Despite those protections, the UK's post-2022 expansion of protest offences and police powers has produced prolonged pre-trial detention, broad preventive controls, and acute human rights concerns, culminating in the current hunger strikes by remand prisoners. This has occurred not because courts are indifferent, but because courts are structurally constrained to operate within the statutory framework enacted by Parliament. Judicial review and bail decisions have proven incapable of preventing the cumulative and coercive effects of an over-expansive protest-control regime.

The position in Australia is, if anything, more precarious. Unlike the UK, Australia does not have a statutory bill of rights. Protection for political protest and expression rests primarily on the implied freedom of political communication, which functions as a limit on legislative power rather than a free-standing right. Once Parliament expands criminal offences or police discretion in relation to protest or political speech, courts are confined to applying constitutional proportionality analysis after the fact. They cannot supervise day-to-day

policing decisions, prevent chilling effects in real time, or readily undo the harms caused by prolonged detention or aggressive enforcement.

The UK hunger strike demonstrates that judicial oversight is not a substitute for legislative restraint. If courts operating under an express human rights framework are unable to prevent remand from functioning as punishment in protest cases, there is little reason to believe that Australian courts would be better placed to mitigate similar outcomes once broad protest- or speech-based powers are enacted.

This comparison underscores a central point for the Committee: the appropriate moment to protect democratic participation and community cohesion is at the legislative stage, not by relying on courts to correct excesses after harm has already occurred.

## **7. Concluding recommendation to the Committee**

The United Kingdom's recent experience should be treated as a clear warning rather than an example to emulate. Expanding protest offences, criminalising political expression, or granting police broad discretionary powers in response to controversial slogans has not enhanced social cohesion or public safety in the UK. Instead, it has produced prolonged pre-trial detention, legal uncertainty, chilling effects on political participation, and severe human consequences that courts have been unable to remedy.

New South Wales already possesses a comprehensive legal framework to address intimidation, threats, harassment, incitement, and violence. The introduction of further criminalisation directed at slogans or political speech is unnecessary, constitutionally risky, and likely to reproduce the same failures now visible in the UK.

For these reasons, the Committee should reject proposals to criminalise slogans or expand protest-related police powers, affirm the adequacy of existing laws, and resist calls to follow the UK's recent legislative trajectory. Community safety and cohesion are best served by enforcing conduct-based offences proportionately, preserving space for political dissent, and avoiding legislative measures that entrench conflict rather than resolve it.