NSWWAA NEW SOUTH WALES WOMEN'S ACTION ALLIANCE

Anti-Discrimination Act review by the New South Wales Law Reform Commission
Submission by NSWWAA
15 August 2025

1. INTRODUCTION

The NSW Women's Action Alliance (NSWWAA) welcomes the opportunity to contribute to this comprehensive review[1] of the *Anti-Discrimination Act 1977* (NSW). As a secular, non-partisan organisation advocating for women and girls, particularly in domains where we face discrimination or vulnerability because of our sex, we bring deep concerns about how current interpretations of anti-discrimination law have created conflicts that undermine women's sex-based protections and rights.

As a member of the Affiliation of Australian Women's Advocacy Alliances (AAWAA),[2] we have consistently raised concerns at national and international levels about the erosion of women's sex-based protections and rights in Australian law, including through communications and special procedures requests to UN Special Rapporteurs and submissions to federal and state parliamentary inquiries.

We invite the Commission to become familiar with the detailed research, analysis, and documentation we have conducted in this area and which is available on our website at womensadvocacy.net. Our most relevant work here is footnoted throughout, and Annex A supplies essential information contained in our recent submission to the NSW Review of criminal law protections against the incitement of hatred.

2. ADDRESSING THE TERMS OF REFERENCE

Term 1: Modernising the Act to reflect contemporary community standards

The Commission asks whether the Act could be modernised and simplified to better promote equal enjoyment of rights and reflect contemporary community standards. We submit that true modernisation must include recognition that women continue to face discrimination and vulnerability because of our biological sex, particularly in the contexts of male violence and access to female-only services, spaces, and protections.

Contemporary community standards, properly understood, recognise both the progress women have made and the ongoing need for women's sex-based protections. The challenge comes in ensuring that modernisation does not inadvertently remove protections that remain essential for women's safety, dignity, and equal participation in public life.

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[1] Anti-Discrimination Act review, NSW Law Reform Commission.
[2] See womensadvocacy.net, AAWAA.

We support modernising outdated language and improving the accessibility of the Act; however, we emphasise that clarity regarding what 'sex' means is fundamental to safeguarding women's sex-based protections and rights. The Commission should define 'sex' as biological sex at birth, consistent with the approach recently affirmed by the UK Supreme Court in *For Women Scotland Ltd v The Scottish Ministers*.[3]

Term 2: Protected attributes requiring reform
The current range of protected attributes requires careful consideration to ensure comprehensive protection whilst avoiding conflicts that undermine existing rights. We support the inclusion of 'sex' as a clearly defined protected attribute for women referring to biological sex, and we note that this remains unprotected in NSW's criminal law framework (see Annex A).

We have concerns about proposed expansions to gender identity protections without adequate safeguards for women's sex-based protections. Any such protections must operate within clear boundaries that preserve women's ability to organise and meet on the basis of our biological sex and to access female-only services where necessary for our safety, privacy, and dignity.

Term 3: Areas of public life requiring reform
The areas of public life covered by discrimination prohibitions should be comprehensive whilst recognising that some sex-based distinctions remain necessary and lawful. We particularly emphasise the need for clear protections in areas where women are vulnerable because of our sex, including female-only crisis services, refuges, prisons, hospital wards, sporting facilities, and changing rooms.

Term 4: Tests for discrimination
The existing tests for discrimination require clarification to ensure they operate effectively whilst preserving necessary sex-based protections for women and girls in New South Wales. The principle of legality – that Parliament is presumed not to intend to override fundamental rights unless it does so in clear terms – must guide interpretation of these tests.[4]

We submit that the tests should recognise that distinctions based on biological sex remain necessary for women's safety, privacy, and dignity, and that such distinctions should not be characterised as unlawful discrimination where they serve legitimate aims through proportionate means.

Term 5: Protections against vilification
The adequacy of vilification protections must be assessed against the need to preserve freedom of expression and the implied right of political communication. We note with concern that sex remains unprotected under NSW's vilification laws whilst gender identity is protected, creating a hierarchy of rights (see Annex A).

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[3] *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)*, UK Supreme Court.
[4] Particular attention should be made in regard to courts' and ther agencies' interpretation of amendments made in 2013 to the *Sex Discrimination Act 1984* (Cth). See AAWAA's work on this matter: Tickle v Giggle and the principle of legality and Equality Australia and the Lesbian Action Group: contesting the meaning of 'woman' in women's spaces.

Any expansion of vilification protections must include robust public interest defences to protect legitimate advocacy, academic research, and democratic debate. The chilling effect on women's ability to advocate for our sex-based protections is already evident in NSW and must not be exacerbated by overly broad vilification provisions. Annex A discusses these matters in detail.[5]

Term 6: Harassment protections
Sexual harassment protections should be comprehensive whilst recognising that female-only environments may be necessary to protect women from harassment and ensure our equal participation. The expansion of harassment protections to other attributes must not undermine women's rights to associate on the basis of sex.

Term 7: Positive obligations
Any positive obligations to prevent discrimination and harassment should recognise that meaningful prevention may require sex-segregated, biological-female-only facilities and services. The duty to make reasonable adjustments should not override the legitimate needs of women for female-only spaces and services.

Terms 8-13: Broader reform considerations
The remaining terms concerning exceptions, complaints procedures, enforcement mechanisms, and interactions with Commonwealth law all raise questions about how to balance competing rights whilst preserving essential protections for women. It is crucial that the Commission fulfil its duty to protect women's rights throughout all areas of reform. See Annex A for further detail.

3. DETAILED RESPONSE TO QUESTION 4.7: SEX DISCRIMINATION

The consultation paper raises important questions about how 'sex' should be defined and treated as a protected attribute. Clear, precise definitions are vital to ensure legal certainty, safeguard women's rights, and clarify how 'sex' interacts with other protected attributes. This section outlines our key concerns and recommendations on these matters.

Response to question 4.7(1): Defining the protected attribute of 'Sex'

The Commission asks, "What changes, if any, should be made to the way the ADA expresses and defines the protected attribute of 'sex'?" NSWWAA submits that the ADA must include a clear, unambiguous definition of 'sex' that refers to biological sex at birth. This clarity is essential for several interconnected reasons.

Legal certainty and the rule of law
The absence of a clear definition of 'sex' creates legal uncertainty that undermines the rule of law and leaves both service providers and women seeking protection vulnerable to inconsistent interpretation. As the Federal Court's decision in *Tickle v Giggle* demonstrated, the absence of clear statutory definitions allows courts to make fundamental policy determinations about the meaning of 'sex' that Parliament never explicitly authorised.[6]

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[5] Striking the right balance: Reforming hate speech law for women's safety and democratic freedoms in NSW.
[6] See AAWAA's work on this matter: Tickle v Giggle and the principle of legality and Equality Australia and the Lesbian Action Group: contesting the meaning of 'woman' in women's spaces.

The consultation paper notes the distinction between ‘sex’ (chromosomal, gonadal, anatomical characteristics) and ‘gender’ (personal and social identity). We strongly support maintaining this distinction in law, as conflating these concepts undermines women's sex-based protections and rights.

Rejecting the move from ‘sex’ to ‘gender’ discrimination
The consultation paper notes a view that it would be “more accurate and inclusive” for the ADA to refer to ‘gender’ discrimination rather than ‘sex’ discrimination. We categorically reject this proposal for the following reasons:

1. *Constitutional and international law basis*. The federal Sex Discrimination Act 1984 gives effect to Australia's obligations under CEDAW,[7] which specifically protects rights on the basis of sex, not ‘gender’. Any move away from sex-based protections for women and girls would undermine Australia's compliance with its international obligations.
2. *Established legal framework*. As the consultation paper acknowledges, ‘sex discrimination’ is well-established language in Australian law. Only Tasmania[8] uses ‘gender’ as a protected attribute, and the Queensland Human Rights Commission recommended against adding a ‘gender’ attribute to avoid uncertainty.[9]
3. *Material reality of sex-based discrimination against women and girls*. Women and girls face discrimination because of our sex: our capacity for pregnancy, our physical vulnerability to male violence, and our historical exclusion from public life on the basis of our reproductive function. These realities cannot be addressed through ‘gender’ protections that focus on self-declared identity rather than the material reality of women’s circumstances.

The suggestion to replace ‘sex’ with ‘gender’ discrimination in the ADA overlooks key legal and practical realities. The Sex Discrimination Act is primary law and overrides government – including the Australian Government Guidelines on Sex and gender – which merely provide administrative definitions.

The Act’s protections and exemptions are based on sex to safeguard women’s privacy, safety, dignity, and fairness, especially in areas so vital to anti-discrimination legislation such as female-only protections, services, and sports. Moving to a ‘gender’ framework would introduce legal confusion, undermine accurate data collection, and conflict with Australia’s obligations under CEDAW. Maintaining ‘sex’ as a protected attribute is essential for women’s protections and rights and for robust anti-discrimination law.

We are concerned that the NSW Law Reform Commission might be tempted to look for a straightforward or administratively tidy solution to the current confusion surrounding the definition and treatment of ‘sex’ in law, perhaps by deferring to these guidelines or adopting seemingly easier avenues for reform. However, the real task is not to be distracted by approaches that appear simple or expedient. Only a clear, legislative definition grounded in statutory law and parliamentary intent – rather than administrative guidance – will resolve the existing uncertainty and ensure robust sexed-based protections and rights for women and

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[7] Convention on the Elimination of All Forms of Discrimination against Women.
[8] *Anti-Discrimination Act 1998* (Tas) s 16.
[9] Queensland Human Rights Commission, Building Belonging: Review of Queensland’s *Anti-Discrimination Act 1991* (2022) 272, 280.

girls. It is crucial that the Commission resists shortcuts and instead commits to legal clarity and genuine compliance with Australia's obligations under CEDAW.

Binary and non-binary language issues
The consultation paper notes that the ADA currently uses binary concepts requiring comparisons with "a person of the opposite sex" in direct discrimination tests, whilst also recognising "indeterminate sex." The paper suggests following the federal Sex Discrimination Act's reference to people of a "different sex."

NSWWAA supports updating language for clarity whilst maintaining recognition that

- Sex is fundamentally binary in humans, with a small number of people born with differences of sex development (DSDs)
- Comparative tests for discrimination must recognise that biological-sex-based protections for women and girls are necessary precisely because of the binary nature of the sex-based oppression we experience
- Changes to comparative language must not undermine women's ability to access female-only services and spaces

Interaction with other protected attributes
Any definition of 'sex' must be carefully coordinated with related attributes to avoid creating conflicts that undermine women's protections and rights on the basis of our female sex.

1. *Sex vs transgender grounds/gender identity.* The consultation paper notes proposals to replace 'transgender grounds' with 'gender identity'. We oppose this change if it would allow legal sex to be changed in a way that removes the biological category of 'female'. Any protections based on gender identity must operate within sex classes rather than overriding them.
2. *Sex characteristics*. The consultation paper notes that unlike most Australian discrimination laws, the ADA does not protect against intersex discrimination. We support adding protection for people with intersex conditions, but this must be defined in a way that recognises intersex as developmental variations within the sex binary, not as evidence that sex is not binary.

Response to question 4.7(2): Pregnancy and breastfeeding discrimination
The Commission asks, "Should the ADA prohibit discrimination based on pregnancy and breastfeeding separately from sex discrimination?" NSWWAA supports listing pregnancy and breastfeeding as separate protected attributes whilst maintaining their recognition as forms of sex-based discrimination experienced by females. This approach would

1. *Provide greater legal clarity*. Separate listing would make it clear that discrimination against pregnant or breastfeeding women is prohibited, removing any uncertainty about coverage.
2. *Align with other jurisdictions*. As the consultation paper notes, many other Australian discrimination laws include pregnancy (and some breastfeeding) as separate attributes.
3. *Maintain connection to sex*. Pregnancy and breastfeeding must be recognised as sex-specific experiences that occur only in female bodies. Any separate protection must explicitly acknowledge this reality.
4. *Strengthen protection*. Separate listing would provide additional protection whilst maintaining the understanding that such discrimination is fundamentally sex-based.

However, we emphasise that any such provisions must

- Explicitly state that pregnancy and breastfeeding are experiences of only female persons
- Not use gender-neutral language that obscures the sex-based nature of these experiences for females
- Include protection for related conditions such as miscarriage, stillbirth, and postnatal depression

4. RESPONSES TO OTHER QUESTIONS FROM CONSULTATION PAPER 24

Question 5.1-5.2: New protected attributes. What principles should guide decisions about new attributes, and should any be added?

New protected attributes should be added only where there is clear evidence of need and where they can be accommodated without creating conflicts with existing rights. Any new attributes must operate within a framework that preserves women's sex-based protections.

We have particular concerns about proposals to expand gender identity protections without adequate safeguards for biological females. Such expansions risk creating hierarchies of rights that prioritise subjective identity claims over the material reality of women's sex and our associated vulnerabilities. See Annex A.

Question 6.11. Discrimination based on carer's responsibilities

(1) Should discrimination based on carer's responsibilities be prohibited in all protected areas of public life?

Yes, carer discrimination should be prohibited across all areas given that caring responsibilities disproportionately affect women and are a significant source of women's sex-based disadvantage.[10]

(2) Should discrimination be prohibited in all protected areas for all protected attributes?

Not necessarily. Some sex-based distinctions remain necessary and lawful, particularly where women's safety, privacy, dignity, and freedom of expression and association are at stake. A blanket prohibition without appropriate exceptions could undermine essential protections for women. See Annex A.

Question 7.7. Sport exceptions: Should the ADA provide exceptions to discrimination in sport?

Yes, sex-based exceptions in sport are essential to preserve competitive fairness, safety, and dignity for female athletes.[11] These exceptions should be clearly defined and robustly protected – recognising the significant physical advantages that male puberty confers – so that

- Female sporting categories remain available to biological females only
- Safety considerations in contact sports are properly addressed
- Competitive fairness and dignity is maintained across all levels of female sport

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[10] Gender equality and caring, WGEA.

[11] See AAWAA's response to the Call for input to the report of the Special Rapporteur on violence against women and girls to the UN General Assembly on violence against women and girls in sport

Question 8.1-8.2. Vilification protections: Should the ADA protect against vilification based on a wider range of attributes, and should NSW adopt a harm-based test?
Any expansion of vilification protections must be carefully balanced against freedom of expression and political communication. We strongly oppose any move away from the current incitement to violence threshold towards broader concepts of 'harm' or 'hatred' that could criminalise legitimate advocacy and democratic debate. See Annex A.

Most critically, we note that biological sex remains unprotected under NSW vilification laws whilst gender identity is protected. This omission must be addressed, particularly given the harassment and intimidation that women face for advocating for sex-based protections. See Annex A.

Question 11.2: Special measures: Should the ADA generally allow for special measures?
Yes, the ADA should strengthen its special measures provisions to explicitly recognise that measures to protect and advance women based on biological sex are lawful and necessary for achieving substantive equality. These provisions should provide clear guidance that such measures are not discrimination but positive action required under international law.

5. INTERNATIONAL AND COMPARATIVE CONTEXT

The UK Supreme Court's recent decision in *For Women Scotland Ltd v The Scottish Ministers*[12] provides important guidance for Australian jurisdictions by affirming that 'woman' in equality legislation refers to biological sex. This approach provides the clarity needed to resolve conflicts between women's sex-based protections and gender identity rights whilst protecting both.

In addition, the UN Special Rapporteur on violence against women and girls has specifically warned about the intimidation faced by women advocating for our sex-based protections and the "decreasing space available for women and women's organisations to organise" in several countries.[13] The Commission should take note of these international concerns and ensure that NSW law preserves space for women's sex-based organising and advocacy.

6. INTERNATIONAL OBLIGATIONS UNDER CEDAW ARTICLE 7

Article 7 of CEDAW specifically requires states to ensure women can participate "in the formulation of government policy and the implementation thereof". Yet Australian governments have systematically excluded women's groups from meaningful consultation on gender identity laws that directly affect our rights.[14]

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[12] *For Women Scotland Ltd (Appellant) v The Scottish Ministers (Respondent)*, UK Supreme Court.
[13] Statement by Ms Reem Alsalem, Special Rapporteur on violence against women and girls, 22 May 2023.
[14] See AAWAA's submissions Shadow report to the Fourth Universal Periodic Review of Australia, 2025. Submitted by a coalition of Australian feminist organisations, to the United Nations Human Rights Council, and Communication to the Commission on the Status of Women (CSW) Patterned and specific violations of women's human rights in Australia, 27 July 2025.

This pattern represents a clear breach of Australia's CEDAW obligations and undermines the rule of law by preventing those most affected by legislative changes from meaningful participation in democratic processes. The Commission must ensure that this review does not repeat these failures.

7. THE FAILURE OF DEMOCRATIC PROCESS: LESSONS FROM THE NSW EQUALITY BILL

Our submission is informed by the deeply concerning process surrounding the NSW Equality Legislation Amendment (LGBTIQA+) Bill 2023, which exemplifies how the systematic exclusion of women's voices from law reform violates fundamental democratic principles and Australia's international obligations.[15]

Despite the Committee on Community Services acknowledging a "large amount of public interest in the bill", the inquiry adopted a fundamentally undemocratic approach: only invited 'stakeholders' could make submissions, with a majority representing only one side of the debate on matters affecting women and girls, and public participation was limited to a Likert-scale online survey that did not allow prose-based responses.

This process violated Article 19 of the International Covenant on Civil and Political Rights[16] (freedom of expression) and Article 7 of CEDAW (women's right to participate in public policy formulation). The online survey showed that NSW residents were overwhelmingly opposed to the bill (85.13%), and a petition with over 25,000 signatures was presented to Parliament – yet these voices were effectively ignored.

This scenario – which has played out similarly in other jurisdictions[17] – demonstrates how women's voices have been sidelined in relevant law reform processes. We see, then, that changes to sex, gender, and equality law in NSW are not just hypothetical but have already occurred, with demonstrated consequences for women's rights and democratic process. There is an urgent need for NSW to learn from past process failures if this review of the ADA is to be legitimate and robust.

8. KEY RECOMMENDATIONS

Based on our analysis of the Terms of Reference and the issues raised in the consultation paper, we make the following key recommendations.

- *Definitional clarity*. The ADA should define 'sex' as biological sex as observed or recorded at birth to provide legal certainty and protect women's sex-based rights.
- *Maintain sex-based language*. The ADA should retain 'sex discrimination' rather than adopt 'gender discrimination' to preserve alignment with constitutional and international law obligations.

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[15] See our concerns, documented at the time, at Content and lack of public consultation in NSW Equality Bill poses serious questions about democratic process, and NSW Equality bill being rammed through despite lack of democratic process and far-reaching changes to 20 Acts of Parliament. We lodged special procedures requests with the UN's SRVAWG and with the NSW Government.

[16] International Covenant on Civil and Political Rights.

[17] See concerns we raised in Western Australia and Queensland, as well as statements of reservation contained in Inquiry into the Births, Deaths and Marriages Registration Bill 2022, Report No. 41, 57th Parliament Legal Affairs and Safety Committee, Queensland Parliament, February 2023.

- *Separate pregnancy and breastfeeding protection*s. The ADA should list pregnancy and breastfeeding as separate protected attributes whilst maintaining their recognition as sex-based experiences of female persons.
- *Comprehensive sex-based exemptions for females*. The ADA should include robust exemptions that explicitly protect female-only crisis services, refuges, prisons, hospital wards, sporting competitions, and other facilities essential for women's safety, privacy, and dignity.
- *Strengthened special measures*. The ADA should strengthen provisions recognising that measures to advance women based on our sex are lawful and necessary for achieving substantive equality.
- *Mandatory consultation requirements*. The ADA should include requirements for meaningful engagement with women's advocacy groups on any proposed amendments affecting women's sex-based protections, with adequate timeframes and transparent reporting.

Based on the arguments and evidence provided at Annex A, we make these further recommendations. They directly address the documented procedural and substantive failings that currently penalise sex-based advocacy and leave women's interests exposed—while still providing adequate protection against genuine discrimination.

- *Public interest defences*. The ADA should include explicit defences protecting academic research, journalism, legitimate advocacy for women's rights, and conscientious objection where reasonable.
- *Procedural safeguards*. Any reforms should include independent oversight of discrimination complaints involving women's sex-based advocacy, transparent reporting, and regular review mechanisms to assess practical operation.
- *Protection for biological sex in vilification law*. The current gap leaving sex unprotected in NSW's vilification framework must be addressed.
- *Preservation of freedom of expression*. Any expansion of vilification or harassment provisions must preserve robust protections for democratic debate and legitimate advocacy.

The above are aimed at restoring balance, legal clarity, and genuine equality in NSW's discrimination protections. Each measure would help ensure that anti-discrimination law protects all citizens equally, respects fundamental freedoms, and preserves public confidence in its fairness and neutrality.

9. CONCLUSION

The review of the NSW Anti-Discrimination Act presents a critical opportunity to address conflicts of rights that have emerged in Australian law by ensuring that women's voices are genuinely heard and our sex-based protections preserved. However, this can only be achieved if the Commission learns from recent failures in democratic process and in the courts to follow the principle of legality.

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

NSWWAA NEW SOUTH WALES WOMEN'S ACTION ALLIANCE

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

The NSW Women's Action Alliance (NSWWAA) welcomes the opportunity to contribute to the Review of criminal law protections against the incitement of hatred.[18] NSWWAA is non-sectarian and unaligned with any political party. We advocate for women and girls, especially in domains where we face discrimination or vulnerability because of our sex. Our membership includes mothers, grandmothers, teachers, public servants, researchers, academics, professionals, volunteers, business women, retirees, and medical professionals all from a diversity of backgrounds and all of whom seek to speak on matters that affect us.

As a member of the Affiliation of Australian Women's Advocacy Alliances (AAWAA)[19] NSWWAA has consistently supported legislative limits on speech that crosses the threshold into genuine intimidation or violence, while also sounding the alarm when poorly drafted measures risk suppressing legitimate democratic debate.[20]

Summary of recommendations

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

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

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[18] Review of criminal law protections against the incitement of hatred, NSW Government, Communities and Justice.
[19] See womensadvocacy.net, AAWAA.
[20] View some of AAWAA's submissions on this topic: Inquiry into the potential for a Human Rights Act for South Australia by the Social Development Committee Parliament of South Australia Submission; New ACMA powers to combat misinformation and disinformation, AAWAA; and Statutory Review of the *Online Safety Act 2021*, Department of Infrastructure, Transport, Regional Development, Communications and the Arts, AAWAA.

The evolving NSW legal landscape and the rationale for caution

The current review comes at a time when New South Wales has moved both to strengthen and broaden hate speech protections. The introduction of section 93Z of the *Crimes Act 1900* (NSW)[21] criminalised public threats or incitement to violence on several grounds, including race, religion, gender identity, and sexual orientation; however, the recent *Crimes Amendment (Inciting Racial Hatred) Act 2025* (NSW)[22] departs from this high threshold by creating an offence under section 93ZAA for public incitement of 'racial hatred' even in the absence of violence. Similarly, the *Anti-Discrimination Amendment (Religious Vilification) Act 2025* (NSW) expanded the civil regime in the *Anti-Discrimination Act 1977* (NSW)[23] to prohibit public acts inciting hatred, serious contempt, or severe ridicule on the ground of religion.[24]

While there is a clear need to protect individuals and groups from vilification and incitement to hatred – especially where this crosses the threshold into violence – any extension or modification of NSW's legal framework must be drafted with precision and rigorous safeguards for fundamental rights. The current system, anchored by section 93Z of the Crimes Act, maintains a careful balance by criminalising only the most egregious forms of incitement (i.e., those likely to result in violence or serious harm). And while recent expansions demonstrate NSW's commitment to addressing hatred and promoting social cohesion at the civil law level, our concern is that any move to lower the threshold for criminal liability from incitement to violence to the much vaguer concept of 'hatred' – as seen in the new racial-hatred offence and proposed for broader application – brings with it unacceptable risks. Chief among these are threats to the implied freedom of political communication under the Australian Constitution, rights to expression, assembly, and association under the ICCPR[25] (Articles 19, 21, and 22, respectively), and women's equal participation under CEDAW[26] Article 7.

We therefore emphasise that vague concepts such as 'hatred' or 'contempt' – without a clear nexus to violence – invite subjective, inconsistent and politically influenced enforcement, which recent international evidence[27] (as well as our own documentation[28]) shows can chill democratic debate on matters of genuine public interest, especially those involving women's sex-based protections and rights.

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

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[21] *Crimes Act 1900* No 40.
[22] *Crimes Amendment (Inciting Racial Hatred) Act 2025* No 9.
[23] *Anti-Discrimination Act 1977* No 48.
[24] *Anti-Discrimination Amendment (Religious Vilification) Act 2023* No 15.
[25] International Covenant on Civil and Political Rights.
[26] Convention on the Elimination of All Forms of Discrimination against Women.
[27] Statement by Ms Reem Alsalem, Special Rapporteur on violence against women and girls, 22 May 2023.
[28] Submissions, AAWAA.

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

A high threshold for criminal liability remains essential

The record in NSW shows that the current incitement to violence threshold, as set out in section 93Z of the Crimes Act, works to balance protection against harm with the safeguarding of democratic freedoms. It targets only the most dangerous forms of speech – those made with intent or recklessness, and likely to incite violence – thereby meeting both the 'necessity' and 'proportionality' criteria under the ICCPR. Evidence from other jurisdictions, especially Scotland[29] and Ireland,[30] demonstrates that criminalising 'hatred' alone (without any link to violence or harm) casts a chill over lawful speech, intensifies community division, and is vulnerable to ideologically driven application.

This is not speculative. The Scottish *Hate Crime and Public Order Act 2021* criminalises the stirring up of hatred by 'threatening or abusive' conduct, without requiring an intent to incite violence.[31] The resulting confusion has produced thousands of police complaints, many of which police do not consider criminal, and has triggered calls for re-examination and reform.[32] In New Zealand, the Law Commission and a select parliamentary committee rejected similar proposals specifically because of the risks posed to freedom of expression protected under the *New Zealand Bill of Rights Act 1990*.[33]

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

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[29] See A woman's guide to the *Hate Crime and Public Order (Scotland) Act 2021*, Murray Blackburn Mackenzie; and Free speech warning from police watchdog on hate crime law, *The Times*.
[30] Ireland drops plans for hate speech law, minister says, Reuters.
[31] *Hate Crime and Public Order (Scotland) Act 2021*, legislation.gov.uk.
[32] See Weekly hate Crime and Incident Report, Police Scotland; More than 3,000 hate crime complaints made to Police Scotland, BBC; How is Scotland's new hate crime law going?, BBC; Tory demands for Hate Crime Act to be repealed are rejected by MSPs, *The Scotsman*.
[33] New Zealand Law Commission's review of hate crime (2025), Lawcom.govt.nz; Maxim Institute policy paper on hate speech inquiries, Maxim Institute; New Zealand Parliamentary Hansard debate on incitement and hate speech bills, NZ Parliament Hansard.

The omission of sex as a protected attribute

Despite recent expansions to vilification laws in New South Wales, the female sex remains unprotected under both the Crimes Act and the Anti-Discrimination Act. Unlike attributes such as race, religion, or sexuality, sex-based hostility against women and girls is neither explicitly recognised as an aggravating factor in criminal sentencing nor as a basis for civil or criminal vilification.[34]

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

Public interest defences and the risk of overreach

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

This problem is not hypothetical. In recent years, the eSafety Commissioner has issued guidance stating that "making harmful claims that gender is binary"[35] could amount to online gendered violence. This means that statements such as 'sex is binary' or 'only females give birth' could constitute harmful online gendered violence, blurring any line between legitimate debate and actionable abuse. In another example, the Australian Human Rights Commission has declined to grant a lesbian group an exemption to host female-born lesbian events on the grounds that exclusion of males who identify as lesbian would be discriminatory.[36]

The effect is a culture increasingly reluctant to permit any public discussion of women's sex-based protections and rights, with women facing loss of income, reputational damage, or social exclusion for expressing lawful and evidence-based positions.[37] Laws that criminalise mere 'hatred', 'contempt' or 'ridicule', without explicit statutory defences, would inevitably compound this chilling effect, contrary to both the spirit and letter of Australia's international commitments.

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[34] Crimes Legislation Amendment (Racial and Religious Hatred) Bill 2025. We note the SDA includes anti-discrimination measures but not anti-vilification.
[35] Gendered violence, eSafety Commissioner.
[36] Australian Human Rights Commission *Sex Discrimination Act 1984* (Cth), section 44(1) Notice of decision on application for temporary exemption: Lesbian Action Group.
[37] See recent joint Stakeholder submission to the United Nations Human Rights Council Australia's fourth Universal Periodic Review (UPR), AAWAA.

Experiences in comparable jurisdictions demonstrate that separating ‘hatred’ from violence blurs the line between robust disagreement and criminality. Scotland's Hate Crime and Public Order Act has been criticised[38] for stifling debate on women's sex-based protections and rights; and Ireland's initial hate speech legislation, proposing to criminalise material inciting hatred, faced public and political backlash over free speech concerns (see earlier), and as a result, the government removed the hate speech provisions and passed the *Criminal Justice (Hate Offences) Act 2024*, which targets aggravated hate-motivated crimes.[39]

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

The need for independent prosecutorial consent

One of the most significant recent changes to section 93Z of the Crimes Act was the removal in January 2024 of the requirement for independent prosecutorial consent,[40] which has raised legitimate concerns;[41] previously, a prosecution under this provision could not proceed without approval from the Director of Public Prosecutions (DPP).[42] This provided a check against frivolous or politicised prosecutions, ensuring decisions to charge were grounded in evidence and the public interest, rather than public or political pressure. The absence of this safeguard makes it easier for ideologically driven or vexatious complaints to result in criminal proceedings, particularly in contentious areas such as women’s sex-based protections and rights or debate around gender identity. Independent prosecutorial consent is also a feature in overseas jurisdictions (such as the United Kingdom)[43] where experience confirms it is vital in protecting minority or dissenting viewpoints from strategic use of hate speech law to suppress legitimate advocacy or dissent. We strongly advocate for the reintroduction of independent prosecutorial consent as a vital safeguard.

Procedural and technical design

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

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[38] *Hate Crime and Public Order (Scotland) Act 2021*, legislation.gov.uk. See also A Woman's Guide to the *Hate Crime and Public Order (Scotland) Act 2021*, Murray Blackburn Mackenzie, and Free speech warning from police watchdog on hate crime law, The Times.
[39] Ireland drops plans for hate speech law, minister says, Reuters.
[40] Prosecution of threats and incitement to violence set to be streamlined, Communities and Justice
[41] NSWCCL Statement: NSW cannot be prosecuted into social cohesion, NSW Council for Civil Liberties; and *Crimes Amendment (Inciting Racial Hatred) Bill 2025* (NSW) Briefing Note, ALHR.
[42] Getting tough on hate speech: Section 93Z of the *Crimes Act 1900* (NSW), Sydney Criminal Lawyers.
[43] Referrals, approvals and notifications, The Crown Prosecution Service.

harm.[44] This is in sharp contrast with the Scottish model, which has proven overbroad in practice.[45] Accordingly, NSW should retain the current section 93Z model as the core of its criminal incitement framework. Any incorporation of new protected attributes – including sex – must adhere strictly to the violence/serious harm threshold, and must not introduce lower standards based on subjective or elastic concepts like 'offence', 'ridicule', or 'affront'.

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

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

Particular caution is warranted in the era of algorithm-driven digital platforms. The *Online Safety Act 2021* (Cth) already enables administrative authorities to require the removal of online content considered harmful, with little transparency or public debate.[46] Expanding criminal law to cover broad and undefined incitement offences risks giving private tech companies, in a bid to avoid liability, new incentives to suppress and remove not only genuinely dangerous material, but also legitimate and important discussion.[47] Experience has already shown that social media platforms more often censor gender-critical and feminist speech, while permitting abuse against women, especially those who question gender norms.[48] The UN Special Rapporteur on violence against women and girls, Ms Reem Alsalem, has specifically drawn attention to this adverse pattern.[49]

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

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

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

[46] For criticism, see Submission Statutory Review of the *Online Safety Act 2021*, Merillot submission.

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

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

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

misclassification of offenders by gender identity.[50] This has direct implications for resource allocation, women's safety, and public understanding of the scale and nature of certain forms of violence and discrimination.

Conclusion

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

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