

22 April 2024

The Honourable Tom Bathurst AC KC
Chair
NSW Law Reform Commission
By email: nsw-lrc@dcj.nsw.gov.au- external site

Dear Chief Justice Bathurst

Review of section 93Z Crimes Act 1900 (NSW)

Legal Aid NSW welcomes the opportunity to provide feedback for the NSW Law Reform Commission's review of the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**) in addressing serious racial and religious vilification in NSW.

Our feedback is informed by the experience of our lawyers across our criminal and civil law divisions, including our experience representing defendants in criminal proceedings, assisting people who have been subjected to public harassment and vilification and National Legal Aid's specialist Your Story Disability Legal Service.

Legal Aid NSW acknowledges the serious detrimental impact of vilification on the health and wellbeing of individuals as well as on wider community cohesion. While inciting violence against people because of their religion, race or other protected attribute¹ is largely captured by other criminal offences, we recognise the importance of specifically criminalising incitement in section 93Z and the message this sends that this form of behaviour is unacceptable.

We also acknowledge that Australia has obligations to prohibit certain types of hate speech and incitement under the *International Convention on the Elimination of All Forms of Racial Discrimination*² (ICERD) and the *International Covenant on Civil and Political Rights*³ (ICCPR), in a way that preserves freedom of expression in accordance with article 19 of the ICCPR.

¹ The protected grounds in section 93Z Crimes Act 1900 (NSW) also include sexual orientation, gender identify, intersex status, or HIV or Aids status.

² *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

While we do not support recklessness satisfying the mens reas element of the section 93Z offence as discussed further below, we consider that section 93Z is otherwise fit for purpose, considering the range of other related well-established offences.

We make general observations on the operation of section 93Z, and the operation of civil prohibitions on vilification below.

Observations on the operation of section 93Z Crimes Act, offence of publicly threatening or inciting violence

Legal Aid NSW has not represented clients charged under section 93Z Crimes Act, and we understand that there have only been a small number of prosecutions under this provision. However, we have extensive experience representing clients charged with other related offences such as stalking or intimidation with intent to cause fear of physical or mental harm⁴, offensive conduct,⁵ offensive language⁶ and use a carriage service to make a threat.⁷ In our experience the court considers any derogatory racial or religious slurs or threats of violence made by the defendant when determining the overall level of criminality or seriousness of the offence and takes a dim view of this conduct. Where there is evidence that a crime was motivated by hatred towards a particular race or religion this can be raised as an aggravating factor on sentence.

We consider that a contributing factor to the low number of prosecutions under section 93Z may be the exercise of prosecutorial discretion to use other available charges. In many instances behaviour that could form the basis of a charge under section 93Z is also covered by other related offences which may be perceived as more straightforward to prosecute, more appropriately fit the facts of the matter and/or have a higher maximum penalty. For example, riot has a maximum penalty of 15 years imprisonment⁸ and stalking or intimidation with intent to cause fear of physical or mental harm has a maximum penalty of 5 years imprisonment.⁹ This is considerably higher than the maximum penalty for publicly threatening or inciting violence under section 93Z of three years imprisonment.

We consider that the impact of removing the requirement for the Director of Public Prosecutions to approve a prosecution¹⁰ should be assessed over a sufficient period before any changes to the threshold of the offence are considered.

⁴ Crimes (Domestic and Personal Violence) Act (NSW), s13(1).

⁵ Summary Offences Act 1988 (NSW), s4.

⁶ Summary Offences Act 1988 (NSW), s4A.

⁷ Criminal Code Act 1995 (Cth), s474.15.

⁸ Crimes Act 1900 (NSW), s93B.

⁹ Crimes (Domestic and Personal Violence) Act (NSW), s13(1).

¹⁰ This requirement was removed in December 2023

Mens rea

Publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status in section 93Z is a serious offence that carries a prison sentence.

We consider that it should be treated as an offence of specific intent—that is, a crime where intention to cause a specific result is an element. Legal Aid NSW does not support recklessness satisfying the mens rea element of the offence.

The usual mens rea for criminal offences of specific intent does not include recklessness. Legal Aid NSW is not satisfied that there is reason for this offence to be treated differently from other offences of specific intent. As has been recognised by the United Nations Office of the High Commissioner of Human Rights and the Rabat Plan of Action¹¹, the protection of freedom of expression requires that speech be criminalised only when an intention to threaten or incite violence can be proved, negligence and recklessness are not sufficient.

The availability of civil vilification provisions in the *Anti-Discrimination Act 1977 (NSW)* (term of reference 3)

Legal Aid NSW supports civil prohibitions on vilification and considers it appropriate for such provisions to be wider than the criminal offence of incitement in section 93Z Crimes Act. However, while the ADA prohibits vilification because of race, transgender status, homosexuality, HIV/Aids status and religion, we consider that the complexity of the provisions and procedural hurdles reduce the utility of these provisions.

Our civil lawyers report that clients occasionally seek advice about vilifying or harassing conduct they have been subjected to in public, most often relating to race or religion. For example, circumstances include derogatory racial slurs during interactions with police, educational staff, neighbourhood disputes, and workplace incidents.

Complex vilification provisions

Clients are often confused by the technical requirements of anti-vilification provisions in the ADA, which focus on the effect of conduct on a third party and require an applicant to identify the relevant audience to which the public act was directed.¹²

¹¹ Human Rights Council, Annual Report of the United Nations High Commissioner for Human Rights, *Addendum Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, UN Doc A/HRC/22/17/Add.4 (11 January 2013), Appendix, *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence*.

¹² *Jones v Trad* [2013] NSWCA 389 at [53]

Clients can also be confused by the threshold for ‘incite’, which the NSW Court of Appeal has considered has its ordinary natural meaning (being to urge, spur on, stir up, animate, stimulate or rouse someone or some request of another or others to do something). It is not sufficient for the words to simply express hatred, serious contempt for, or severe ridicule of a person on the relevant ground, but rather the relevant public act must be one which could encourage or spur others to harbour such emotions.¹³

For many clients these concepts are difficult to understand and deter them from using the law to attempt to remedy the harm or loss they have experienced.

We consider that it is conceptually more straightforward for unrepresented applicants to understand anti-vilification provisions that focus on the direct effect of conduct on the victim. For example, this approach is taken in section 18C *Racial Discrimination Act 1975* (Cth) which states:

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Under a harm-based test, the evidentiary burden on the complainant is not as onerous. The complainant is not required to identify an audience or prove that an ordinary member of that audience was incited to strong negative emotions as a result of the respondent’s conduct. Instead, the complainant’s evidentiary burden focuses on the respondent’s conduct and whether it was reasonably likely in all the circumstances to cause harm.

We note that the threshold for section 18C is higher than the everyday understanding of the words ‘offend, insult, humiliate or intimidate’ may be. For speech to fall within the provision it must have “profound and serious effects, not to be likened to mere slights.”¹⁴

In *Eatock v Bolt*¹⁵ the Federal Court explained:

The definitions of “insult” and “humiliate” are closely connected to a loss of or lowering of dignity. The word “intimidate” is apt to describe the silencing consequences of the dignity denying impact of racial prejudice as well as the use of threats of violence. The word “offend” is potentially wider, but given the

¹³ *Sunol v Collier and Another (No 2)* [2012] NSWCA 44

¹⁴ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007

¹⁵ *Eatock v Bolt* [2011] FCA 1103

context, “offend” should be interpreted conformably with the words chosen as its partners.

We suggest that the NSWLRC consider the appropriateness of the broader definition of ‘offensive behaviour’ in section 18C of the RDA for the NSW context.

Procedural requirements of civil vilification provisions

Procedural requirements can also present difficulties. For example, the person complaining of vilification needs to be from the group that was targeted and must be able to identify the person about whom they are complaining, which can be difficult when vilification happens in public places and the perpetrator is a stranger.

As we outlined in our recent preliminary submission on the review of the ADA, we consider that an appropriately funded Anti-Discrimination NSW should be empowered to conduct own motion investigations into breaches of the ADA, without requiring an individual complaint. We consider such a power to self-initiate investigations should extend to alleged vilification, in addition to alleged incidents of discrimination and sexual harassment. For example, an investigation could arise because of information received through an anonymous report, through information provided to Anti-Discrimination NSW or other means. Such powers could be modelled on the powers of the Victorian Equal Opportunity and Human Rights Commission to investigate matters related to the *Equal Opportunity Act 2010* (Vic) and extend to alleged incidents of vilification.¹⁶

Scope of religious vilification provision

Legal Aid NSW supports a prohibition on religious vilification in the ADA, however we are concerned that section 49ZE is too broad and is not limited to lawful religious activities.

Legal Aid NSW considers that the protection from religious vilification should contain appropriate and clear limits. We consider it should apply to religious belief or affiliation, defined consistently with section 93Z of the Crimes Act as “holding or not holding a religious belief or view.”

Protected attributes

Legal Aid NSW considers that the protected attributes in the ADA need to be reviewed and updated, including the grounds on which vilification is unlawful. We consider that the existing provisions on homosexual and transgender vilification should be broadened to apply to sexual orientation and gender identity.

¹⁶ *Equal Opportunity Act 2010* (Vic), s 127. The Victorian Equal Opportunity and Human Rights Commission can investigate any matter relating to the operation of the *Equal Opportunity Act 2010* (Vic). Vilification provisions are contained in the *Racial and Religious Tolerance Act 2001* (Vic), and the Victorian Equal Opportunity and Human Rights Commission is not empowered to investigate alleged incidents of vilification.

If you would like to discuss our submission further, please contact Tijana Jovanovic,
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Yours sincerely



Monique Hitter
Chief Executive Officer