Anglican Church Diocese of Sydney

27 June 2024

Submission to the Review of Section 93Z of the NSW Crimes Act 1900 – Response to the Serious racial and religious vilification Options Paper

This submission is made in response to the Law Reform Commission of NSW's (**NSWLRC**) Options Paper produced as part of its review into the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) (**Act**) on behalf of Anglican Church Diocese of Sydney (the **Diocese**). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

We welcome the opportunity to participate in this important review process and would be pleased to provide any further feedback that the NSWLRC might request. Our contact details are:

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Introduction

1. We are concerned at the growing incidence of vilification on the basis of religious belief or activity, particularly at those of the Islamic or Jewish faith. Religious vilification is destructive of social cohesion and polarises communities into "us" and "them".

2. However, we do not think that introducing laws that control and supress religious speech is a pathway to healing this division.

3. This brief submission addresses the seven options put forward by the NSWLRC's Options Paper. Any omission of details concerning other issues with proposed reforms should not be taken as support or general assent for elements of the proposal that are not addressed in the Options Paper or in this submission.

Executive Summary

4. We have previously indicated our support for section 93Z to remain in its present form, and we do not recommend any substantive reforms to section 93Z. However, if there was a consensus to remove recklessness as an element of the offence, we would not oppose this change.

5. In the event that any of these proposed changes are made, any changes to serious vilification laws must take into account the serious effect that these laws can have on fundamental religious freedoms of preaching, teaching, proselytising and authentically living out religious faith in community with fellow believers.

Submissions

Definition of "public act"

Option 1: Definition of "public act"
Should the definition of "public act" be changed in s 93Z? If so, should it incorporate the approach of the definitions of "public place" in the *Summary Offences Act 1988* (NSW) and the *Criminal Code* (Cth) to capture communications made to limited numbers of people? Are there any other changes that should be made?

6. We do not think that the definition of "public act" should be changed in section 93Z because it is already broad in its scope and to widen its scope further only increases the risk of restricting legitimate religious activity, such as preaching, teaching and pastoral counsel.

7. The definition of "public act" in s93Z of the Code is:

> ***public act*** includes –
>
> (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and
>
> (b) any conduct (including actions and gestures and the wearing or display of clothing signs, flags, emblems and insignia) observable by the public, and
>
> (c) the distribution or dissemination of any matter to the public.
>
> For the avoidance of doubt, an act may be a public act even if it occurs on private land.[1]

8. As is clear from the definition, the concept of a "public act" is sufficiently broad enough to capture many different kinds of communication to the public, even if that communication takes place on private land, to the public.

9. Given that the prohibition against serious publicly threatening or inciting violence in section 93Z carries significant criminal penalties, we strongly caution against broadening the definition of "public act" to encroach upon private spaces, relationships and contexts that the law has historically respected as beyond its scope of interference, particularly when it comes to speech and communication.[2]

10. A proposed model for the broadened definition put forward in the Options Paper is that of the definition of a "public place" in the *Summary Offences Act 1988* (NSW), which reads:

> ***public place*** means –
>
> (a) a place (whether or not covered by water), or

[1] *Crimes Act 1900* (NSW), s93Z(5).

[2] A good example of such respect of private spaces is anti-discrimination law stopping at the threshold of the family home; see exceptions for residential care roles in the Commonwealth *Sex Discrimination Act 1984*.

(b) a part of premises,

that is open to the public, or is used by the public whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used and whether or not the public to whom it is open consists only of a limited class of persons, but does not include a school.

11. If the definition of a "public act" in section 93Z were to incorporate the approach taken in the definition of "public place" as outlined above, this would be an unacceptable broadening of the scope of the provision. This is because the concept of a public place as defined in the above example extends the scope of the recipient group who receive the communication at issue from members of the public, to individuals who may be present in places that the public may be able to access, even if those places cannot ordinarily be accessed by the public and even if the members of the public who have access consist of a limited class of people.

12. This has the potential to fundamentally change the nature of the offence. The current provision requires a public communication. This change would include private communications in a context where the public may have access, such as a Church, a Mosque, or a Synagogue.

13. Such a change could have the consequence of restricting genuine religious teaching or discussion or proselytising to members of a religious community. Religious teaching that is conducted in the context of private or semi-private religious spaces, in good faith, amongst religious group members that is not inciting violence against others should not be unduly subjected to possible prosecution under section 93Z for failure of a member of the public to understand the context, doctrine, or meaning of that teaching.

14. Changing the scope of a "public act" could also have the unfortunate effect of "chilling" legitimate religious speech and activity amongst religious communities who do not understand the nuances of the offence in section 93Z but are overly cautious for fear of criminal prosecution that could reach into their Church gathering and pulpit.

15. The current definition of "public act" is sufficient as it its and does not need to be changed as the Options Paper proposes.

Mental element of recklessness

Option 2: Mental element of recklessness
Should the mental element of recklessness be removed from s93Z?

16. We have previously indicated our support for section 93Z to remain in its present form. However, if there was a consensus to remove recklessness as an element of the offence, we would not oppose this change, as we can see that there is a reasonable case for its removal.

17. We are concerned that the concept of 'violence' could be interpreted to include psychological injury. Courts have upheld the proposition that criminally unlawful violence against a person can include actions that give rise to psychological injury.

18. An example of this is in New South Wales, where "actual bodily harm", which has historically been understood to result from physical force or violence, can now include harm that is the result of violence to a person's mental health. The New South Wales Criminal Court of Appeal stated in *Shu Qiang Li v R*:

> A further matter is that, if the victim had been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would be likely to have amounted to "actual bodily harm" (see *R v Lardner*, unreported, NSWCCA, 10 September 1998.)[3]

19. The concepts of physical and psychological harm are treated as synonymous, with no material distinction between the concepts. This could lead to a finding that 'violence' includes actions that lead to psychological injury.

20. This is particularly concerning with regard to the element of recklessness in the context of religious teaching and instruction on areas that relate to other protected attributes listed in the offence. Our concern is best illustrated by example. If a religious preacher or counsellor advocated that families must raising their children in accordance with scriptural teaching on family, sex and gender identity, could this constitute inciting violence against these children?

21. A religious teacher should not be at risk of prosecution under this section for teaching orthodox religious doctrine with no intention to incite violence, but with the knowledge that some members of the community may take such offence at his words that there is a substantial risk that they could suffer mental distress.

22. Recklessness should be removed from the section to ensure that good-faith preaching, teaching and proselytising of religious individuals and groups cannot be subject to prosecution if they traverse contentious issues that affect groups that possess protected attributes listed in the offence.

23. Religious institutions must be able to continue to teach and encourage adherence to their beliefs. For this reason, section 93Z should clarify that harm inflicted by violence only includes physical harm.

24. If the recklessness element is not removed from section 93Z, the section should explicitly make clear that concept of 'violence' at issue in the section is limited to physical violence and cannot extend to the concept of non-physical or psychological 'violence'.

[3] *Shu Qiang Li v R* [2005] NSWCCA 442 [45].

Incitement to violence

Option 3: Incitement to violence
Should the term "incite" in s 93Z be replaced with terms such as "promote", "advocate", "glorify", "stir up" or "urge"? Should s 93Z be amended to provide that the meaning of "incite incorporate these terms? Should any other amendments be made to address this issue?

25. We do not think that the term "incite" should be replaced with terms such as "promote", "glorify", "stir up" or "urge" because the existing term is sufficient to capture the activity that the section was designed to address.

26. We note the Options Paper outlined that there was a concern amongst some contributors to the review process that incitement to violence was difficult to prove and may be a reason for the low rate of section 93Z prosecutions.

27. We do not think that a low rate of prosecutions is cause for changing the use of the term "incite". As the Options Paper makes clear, the term "incite" is already the subject of judicial interpretation and has already been interpreted to mean "to rouse", "to stimulate", "to urge", "to spur on", or "to stir up or to animate.[4] Furthermore, as the Options Paper outlines, the breadth of conduct which the term can cover is broad, including conduct that involves commands, requests, proposals, actions or encouragement.[5]

28. If judicial interpretation has already provided clarity on the ambit of the word, "incite", there is no need for its replacement in the legislative text, as the perceived lack of breadth or usefulness that certain contributors have alleged is already provided for in that judicial interpretation, and cannot be the reason for lack of prosecutions under the section.

29. We note that similar issues were raised in the previous Parliamentary Committee review in 2013 of the then section 20D, that the test was too restrictive and not sufficiently wide enough to capture a breadth of activity, including implied threats.[6] The Committee at the time did not recommend the repeal of the element of the offence that was allegedly restricting the prosecution of wider activity, including implied threats, as the Committee did not understand the test then, which is as broad as the current definition of a "public act" under the current section 93z, to not capture implied threats. The current breadth of the test in 93Z is sufficient to capture both explicit and implied threats of violence.

30. Furthermore, we note that there has recently been a successful prosecution under section 93Z, where the accused was found to have instigated a violent brawl on the basis

[4] New South Wales Law Reform Commission, "Serious racial and religious vilification: Options Paper (June 2024), [4.3]; *Sunol v Collier (No.2)* [2012] NSWCA 44, [26].
[5] Options Paper, [4.3].
[6] NSW Standing Committee on Law and Justice, "Racial Vilification Law in NSW" (December 2013) 4.155-4.171, <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.parliament.nsw.gov.au/lcdocs/inquiries/2260/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>

of ethno-religious/racial differences.[7] It should be noted that Section 93Z also has an important educative purpose. The fact that there have been no convictions under the section until this recent decision does not negate, but may in fact suggest that the section is fulfilling its educative purpose. Now that there has been a successful conviction under the section it is also clear that it is capable of dealing with the issues it was designed to address.

31. We therefore submit that there is no need to update the section for lack of effect by swapping the term "incite" for a synonym that is already included within its meaning by virtue of judicial interpretation.

An offence of inciting hatred

Option 4: An offence of inciting hatred
Should an offence of inciting hatred on the ground of a protected attribute be introduced?

32. We oppose the introduction of a new offence of inciting hatred on the ground of a protected attribute.

33. Other jurisdictions include the incitement of hatred as part of their equivalent offence to section 93Z. For example, the ACT, Queensland, South Australia and Victoria similarly include an essential element of the offence as a threat of physical harm or the inciting of others to threaten physical harm, which incites hatred.[8]

34. As we have previously submitted, we do not think the current section 93Z should be amended to add the additional element of incitement to hatred. Raising the bar through an additional element would unlikely address the concern that has precipitated this inquiry, that section 93Z is producing no prosecutions. In any case, as we have stated above, this fear has now been dealt with since the recent successful prosecution under section 93Z

35. We firmly oppose the introduction of an entirely new offence that merely requires the incitement of hatred on the basis of a protected attribute. This would be an unacceptable inclusion as a criminal offence.

36. There already exists a civil prohibition on the incitement of hatred on the ground of race in in section 20C of the *Anti-Discrimination Act 1977* (NSW). Furthermore, a new Part 4BA was added to the *Anti-Discrimination Act* in November 2023 to prohibit religious vilification:

[7] Alexi Demetriadi, "NSW breaks judicial ground with first successful hate-speech conviction under section 93Z, *The Australian,* 9 June 2024, <https://www.theaustralian.com.au/nation/nsw-breaks-judicial-ground-with-first-successful-hatespeech-conviction-under-section-93z/news-story/17148ad3fe1accee517f612d9b140601>.
[8] *Criminal Code 2002* (ACT), s750;*Anti-Discrimination Act 1991* (QLD), s131A; *Racial Vilification Act 1996* (SA), s4; *Racial and Religious Tolerance Act 2001* (VIC), s25(1).

49ZE Religious Vilification Unlawful

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of –

(a) a person on the ground the person –

(i) has, or does not have, a religious belief or affiliation, or

(ii) engages, or does not engage, in religious activity, or

…

(2) Nothing in this section render unlawful –

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about expositions of an act or matter.

40. The mischief that the proposed introduction of an offence of inciting hatred would target is already addressed by the civil provisions in the *Anti-Discrimination Act*. Conduct that already amounts to a civil offence, inciting or promoting hatred (*absent* a threat of incitement to physical harm) should not be a criminal offence under NSW State law.

41. This is particularly the case if the new criminal offence, like section 93Z, provided no suitable defence for legitimate religious activity and expressions of religious belief and teaching in the public sphere. We are concerned that introducing a broad offence with limited defences will have the unintended consequence of criminalising religious speech concerning traditional views of sexuality and criminalising criticism of and debate between different religions.

42. There have already been a number of vilification complaints initiated based on claims that traditional or religious teachings on sexuality, gender and marriage promote hatred, severe ridicule or serious contempt of LGBT persons. Most of these complaints have been successfully defended, though the cost in time, money and stress still remains for the defendant. Without sufficient defences for religious speech, a judge could find that certain religious speech amounted to serious vilification.

43. A principal concern with vilification law is the potential for judicial findings to be influenced by personal philosophical assumptions or beliefs. This concern has been aired in judicial authority. Principal Member Britton in the NCAT has said that applying the test, 'does not lend itself to empirical measurement and involves an impressionistic assessment'.[9] Furthermore, she has said that, 'reasonable minds may differ on whether a particular public act has the capacity to incite'.[10] Gordon M has observed that, 'The difficulty of course is that what I regard as "extreme" will differ from what other decision makers regard as extreme.'[11] Gorden M also stated in the same case that, '[t]he uncertainty about these things must make the task of lawyers trying to assess the merits

[9] *Burns v Sunol (No2)* [2017] NSWCATAD 236, [62].
[10] *Burns v Sunol* [2015] NSWCATAD 178, [51].
[11] *Valkyrie and Hill v Shelton* [2023] QCAT 302 (18 August 2023) [74].

in these cases very difficult.'[12] If it is difficult for lawyers to assess situations where vilification laws may be applicable, how much more will it be so for religious leaders and the laity, who are the people who will be required to comply with these laws, and at threat of criminal sanction?

44. We are also concerned about the breadth of a vilification provision based on the incitement of hatred because it could become a 'blasphemy law' by another name through criminalising criticism of one religion against another. The following summary from Professor Red Adhar of the chief findings of the case *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[13] reveals the complexities of vilification law applied in this context:

> The Catch the Fire decision valiantly endeavoured to clarify the law but actually generated new uncertainties. We learn that critical and destructive statements about religious beliefs are acceptable, as are statements that offend or insult believers. It is only 'extreme' statements that incite hatred of religious persons or groups in third persons that matter. We also learn that predicting the outcome of this test is difficult, for the judges themselves could not agree that the statements before them were likely to have incited negative emotions. We now know that religious speech does not actually have to result in an audience feeling hatred or contempt, for it is enough that it is capable of stirring up hatred toward a religious group. If the 'natural and ordinary effect' of the words on 'reasonable' or 'ordinary' members of the target audience would be to stimulate hatred towards the believers in question, prima facie liability follows. Statements attacking beliefs but urging respect for the persons holding those beliefs, may be taken into account for their ameliorative effect, but only if they are genuine and not expressions of 'feigned concern'. We learn that the judges did not agree as to whether 'inaccurate' and 'unbalanced' presentations of religious beliefs and practice count against the religious speaker. To claim the statutory defence of conduct engaged in 'reasonably' and in 'good faith' for a genuine religious purpose we learn that the truth per se of the statements made is no defence. The focus instead is whether the hypothetical reasonable citizen in an open and just multicultural society would consider the speech excessive and beyond the bounds of tolerance. If so, then the speech is unlawful. There are more than enough grey areas here to make any religious speaker or writer think twice before launching into the public domain.[14]

45. Commenting on this case, Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee wrote:

> As someone who once supported their introduction and is a member of one of the minority groups they purport to protect, I can say with some confidence that these laws have served only to undermine the very religious freedoms they intended to protect … If we love God, then it requires us to hate idolatry. If we believe there is such a thing as goodness, then we must also recognise the presence of evil. If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell. If we believe our religion is true, then it requires us to believe others are false. Yet, this is exactly what this law serves to outlaw and

[12] Ibid, [61].
[13] [2006] VCA 284.
[14] Rex Adhar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *University of Queensland Law Journal* 293, 314.

> curtail: the right of believers of one faith to passionately argue against or warn against the beliefs of another… All these anti-vilification laws have achieved is to provide a legalistic weapon by which religious groups can silence their ideological opponents, rather than engaging in debate and discussion.[15]

46. For these reasons we strongly oppose the introduction of an offence of inciting hatred. Should such a provision be nonetheless introduced it would need strong protections for religious activity and statements of religious belief:

    (a) An exception for religious bodies should operate so that the teaching and practices of religious bodies and schools are not regulated. This exception should retain the following phrase from the proposed Religious Discrimination Bill 2022 (Cth): 'For the purpose of subsection (2)(c), a religious discussion or instruction purpose includes, but is not limited to, conveying or teaching a religion or proselytising';

    (b) A general exception for 'a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter', should be included, which operates according to words equivalent to the existing exception at section 18D of the *Racial Discrimination act 1975* (Cth).

    (c) The legislation should clarify that it is to be interpreted consistent with the principle that, freedom of religion and expression is an essential component of a tolerant and pluralistic democracy;

    (d) It should somehow be made clear in the exceptions section that the key question within the reasonableness test outlined at subpoint (b) above is whether the statement was made reasonably for a religious discussion or instruction purpose, and **not** whether the religious belief statements themselves are reasonable according to general community standards. It should be clear that nothing is intended in the new offence that would limit a religious claim that a religion offers the ultimate and exclusive form of truth, or that immoral behaviour can have eternal consequences.

    (e) It should be made clear that the 'good faith' exception test is to be interpreted according to the understanding applied by Nettle JA in *Cath the Fire Ministries*, as opposed to French J in *Bropho v Human Rights & Equal Opportunity Commission*.[16]

    (f) There should be particular examples provided to clarify the scope of the prohibition and that will clearly show the kinds of religious teaching that won't be subject to prosecution under the offence.

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[15] Amir Butler, 'Why I've changed my mind on vilification laws', *The Age* (Melbourne), 4 June 2004 <https://www.theage.com.au/national/why-ive-changed-my-mind-on-vilification-laws-20040604-gdxz1s.html>.
[16] (2004) 135 FCR 105.

Increase maximum penalty

Option 5: Increase maximum penalty for s 93Z
Should the maximum penalty for s 93Z be increased? If so, what should be the new maximum penalty?

47. We do not support increasing the maximum penalty for section 93Z.

48. The current maximum penalty is sufficient to provide an educative effect and to dissuade individuals for engaging in behaviour that would constitute the proscribed conduct under the offence.

Aggravated offences

Option 6: Introduce aggravated offences
Should there be aggravated version of offences where the offence is motivated by hatred, which attract a higher penalty?

49. We do not support the introduction of a version of the section 93Z offence where if the offence is motivated by hatred, it would attract a higher penalty.

50. Section 93Z deals with a broad range of conduct that can include religious preaching, teaching and other associated activities. We are concerned that if motivation by hatred were to be added as an aggravating factor in the offence that though a correct prosecution of incitement to violence under the offence may take place, a court could misconstrue associated religious beliefs or teachings as indicating animus, for lack of expertise in the religious doctrines and beliefs concerned.

51. As discussed above regarding the difficulties applying vilification laws, lawyers and even judges differ as to the application of standards applied and judicial minds may differ according to different philosophical understanding with regard to religious concepts involved and therefore whether or not the existence of hatred could be established on the basis of unpopular religious beliefs and teachings being proclaimed alongside the incitement to violence.

52. We oppose the introduction of an offence that would require a court to consider the existence of a motivating hatred for these reasons. Additionally, a court already must consider the existence of aggravating factors, including hatred as a motivating factor, by reason of section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It is therefore unnecessary to add to the offence what is already available to the court in sentencing procedure.

A harm-based test

Option 7: Introduce a harm-based test
Should an objective harm-based test be introduced into s93Z

53. We oppose the introduction of a harm-based test into section 93Z.

54. As highlighted in the Options Paper, a harm-based test exists in civil vilification laws in other Australian jurisdictions, in Commonwealth, Northern Territory and Tasmania.[17] We submit that it would be inappropriate to include civil standards into a criminal offence, as the criminal penalties and possible deprivation of liberty require the higher standard of proof that exist in the criminal offence. Furthermore, a civil standard applied at a criminal level with no necessary protections for good-faith religious activity, preaching and teaching would be seriously detrimental to religious freedoms in the state of NSW. Such lowering of standards would restrict legitimate religious activity and debate.

55. With respect to international jurisdictions, we strongly oppose any amendments modelled on the *Public Order Act 1986 (UK)*. This Act creates offences that relate to threatening, abusive or insulting words or behaviour, or display of visible representations, which:

    (a) Are likely to cause fear of, or to provoke, immediate violence: section 4;

    (b) Intentionally cause harassment, alarm or distress: section 4A; or

    (c) Are likely to cause harassment, alarm or distress (threatening or abusive words or behaviour only): section 5.

56. It is a defence to section 4A and section 5 for the accused to demonstrate that their conduct was reasonable, which must be interpreted in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference (by prosecution) with them must be convincingly established. A prosecution may only proceed if necessary and proportionate.

57. The scope of the terms "threaten", "abusive", "harassment", alarm and "distress" accompanied with the vague tests of "reasonableness" and "proportionality" have created a plethora of litigation in the UK. This litigation has arisen under the offences that don't require incitement to violence or require threats of violence, but regulate threatening or abusive words that that cause harassment, alarm or distress; similar to the proposals put forward in the Options Paper of a test that asks whether conduct is 'reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute.'[18]

[17] Options Paper, [8.4].
[18] Options Paper, [8.2].

58. We oppose the introduction of an offence that would adopt standards based on "insult", "harassment", "alarm", "distress", "humiliate", "offend", etc, because of the ill-defined and subjective nature of these terms. This would not be appropriate for an offence with significant criminal sanctions. There are life-long consequences to being convicted for a criminal offence and therefore the scope of such offences, like 93Z, should be restricted to only the most serious examples of racial or religious vilification.

59. We thank the Law Reform Commission for the opportunity to make submissions on these important issues and welcome any future opportunity to participate in this review process.

Bishop Michael Stead

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The following heads of faith give their support to this submission:

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