SUBMISSION TO
THE NSW LAW REFORM COMMISSION

CONSULTATION INTO
SECTION 93Z OF THE CRIMES ACT 1900 (NSW)
SERIOUS RACIAL AND RELIGIOUS VILIFICATION

28 JUNE 2024

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Introduction

I am pleased to provide this submission on the Options Paper issued by the NSW Law Reform Commission on the topic of serious racial and religious vilification (**Options Paper.)**

At a time of increasing tensions both global and domestic, I commend the desire to address the hostility faced by people on the basis of race and religion.

The need to address this hostility must be balanced with the freedom of the individual to express their own beliefs and to challenge beliefs contrary to their own.

This freedom is fundamental to a flourishing society because human beings are both impelled by their own nature and "bound by moral obligation to seek the truth, especially religious truth."[1] Part of the search for truth necessarily involves "communication and dialogue, in the course of which [people] explain to one another the truth they have discovered, or think they have discovered, in order thus to assist one another in the quest for truth."[2]

For this reason, any proposed limitation on the discussion of matters of religious faith and the search for religious truth must not be taken lightly, even when aimed at the protection of religious belief.

The proposals contained in the Options Paper do not strike the right balance between protecting against racial and religious hostility and protecting the free exchange of ideas. The key problem with the paper is that it proposes provisions that are ambiguous or subjective, which is not appropriate for criminal law.

Moreover, there are additional ways to discourage religious vilification.

If a lack of understanding of religion and religious beliefs is the cause of some of the hostility directed towards people of faith, then education is more important than sanctions. It would be preferable if a person refrained from vilification out of understanding, rather than the threat of legal consequences.

I appreciate the invitation to provide comment on the Options Paper.

Yours faithfully

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[1] Second Vatican Council. Dignitas Humanae [Declaration on Religious Freedom]. 7 December 1965. Vatican. [online]. Available at: http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html, no 2.
[2] Ibid.

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?

The current definition of "public act" in s. 93Z is expansive and is also non-exhaustive, so there is no reason why the section requires amendment in order to capture other acts that are of a public nature.

The proposals to incorporate a definition of "public place" into s. 93Z should not be adopted.

Despite the suggestion in the Options Paper that the inclusion of a definition of "public place" is similar to the *Criminal Code Act 1995* (Cth), the proposal is different in two key respects. Firstly, the *Criminal Code* prohibits specific displays or gestures in a public place. Displays and gestures are defined, visual markers whereas s. 93Z relates to more ambiguously and broadly-defined "public acts." Secondly, the *Criminal Code* offers defences for religious, academic, educational, artistic, literary or scientific purposes. These defences are not offered in s. 93Z. Adopting a definition of "public place" without also limiting the scope of prohibited conduct and providing defences risks extending the remit of 93Z in a way that is far too broad for a serious criminal offence.

Proposals to capture livestreaming of content should not be adopted.

The offence in s. 93Z currently takes into account the intended audience of a statement. However, the possibility of livestreaming or recording and publishing could result in something that was intended for a particular audience by the speaker being shared with an audience for whom it was not intended by a separate publisher.

Option 2 – Mental element of recklessness

Should the mental element of recklessness be removed from s. 93Z?

Paragraph 3.4 of the Options Paper states that the low number of prosecutions under s. 93Z to date may suggest that the element of recklessness has not resulted in inappropriate prosecutions and consequently, there is no need to remove the mental element of 'recklessness.'

However, the *Crimes Amendment (Prosecution of Certain Offences) Act 2023* only passed NSW Parliament in November 2023 and it is too early to determine the effect of this change on prosecution levels. Additionally, if other amendments are made that would expand the remit of s. 93Z, then 'recklessness' should be removed to better reflect the seriousness of the effect and better align with Australia's international obligations.

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" incorporates these terms? Should any other amendments be made to address this issue?

A general principle of statutory interpretation is that words should be given their ordinary meaning. Several NSW decisions[3] have used the dictionary meaning of incite in interpreting the meaning of the term. For example, in *Anderson v Thompson* [2001] NSWADT 11, the NSW Anti-Discrimination Tribunal said: "It is sufficient to endorse the "Oxford Dictionary" meaning of the word which was accepted in that decision which is taken to mean, "to arouse; to stimulate; to urge or spur on; to stir up; or to animate"[4].

In light of this, it appears that an amendment along the lines of that proposed in Option 3 is unnecessary.

Option 4 – An offence of inciting hatred

Should an offence of inciting hatred on the ground of a protected attribute be introduced?

An offence of inciting hatred should not be introduced into the criminal law. Criminal laws should have a high amount of clarity so that a person knows if they are engaging in conduct that could result in a deprivation of their liberty. However, hatred is both difficult to define and highly subjective. As noted in the Options Paper, there are varying opinions about what constitutes "hate speech" and there is an increasing tendency to label any type of criticism or disagreement as such. Given this subjectivity and ambiguity, an offence of inciting hatred should not be introduced.

Option 5 – Increase maximum penalty for s. 93Z

Should the maximum penalty for s. 93Z be increased? If so, what should the new maximum penalty be?

The maximum penalty for s. 93Z should not be increased because there is no compelling reason to do so. As noted in the Options Paper, prosecutors can charge an alleged offender with a different offence that attracts a higher maximum penalty, if the charge is supported by the facts and if warranted in the circumstances.

[3] See, for example, *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 at [23]; *Burns v Dye* [2002] NSWADT 32 at [19]; *Veloskey v Karagiannakis* [2002] NSWADTAP 18 at [21]; *Burns v Laws (No 2)* [2007] NSWADT 47 at [102].

[4] At [27].

Option 6 – Introduce aggravated offences

Should there be aggravated versions of offences where the offence is motivated by hatred, which attract a higher penalty?

Aggravated offences should not be introduced. As noted in the comments under Option 4, hatred is both subjective and difficult to define, and there is an increasing tendency to characterise any type of criticism or disagreement as "hate speech." Opening up to a finding of aggravation based on a concept as subjective as 'hatred' is not appropriate.

Option 7 – Introduce a harm-based test

Should an objective harm-based test be introduced into s. 93Z?

A harm-based test should not be introduced into s. 93Z. Several states, including NSW, do not even have a harm-based test for civil vilification and no state has a harm-based test for criminal vilification; all states with a criminal offence of vilification require a threat of physical harm in order for the offence to be made out[5]. Introducing such a test would make NSW's vilification laws the most extreme in the country by a significant margin.

Existing civil vilification laws that include a harm-based test also include an exemption for religious, academic, educational, artistic, literary or scientific purposes. Section 93Z makes no provision for any such defences. Additionally, the existing civil religious vilification laws in NSW, which do not have a harm-based test, also contain similar defences[6]. Introducing a harm-based test into s. 93Z would have the effect of making criminal vilification provisions broader and with fewer defences than civil ones.

In addition to its impact on inter-religious discourse, the introduction of a harm-based test could have the effect of criminalising religious teaching. The anti-discrimination claim made against Archbishop Julian Porteous under Tasmania's harm-based civil provisions for issuing a pastoral letter about marriage to parents of students in Catholic schools demonstrated that vilification laws are open to being used by activists to silence views with which they do not agree. While Archbishop Porteous' prosecution may be an extreme example of the use of these laws, cases such as these would only be more inappropriate if these types of complaints also included the threat of a criminal conviction and imprisonment.

Even if prosecutions under a harm-based test in the future were limited, the presence of such a provision within the criminal law would be an intolerable imposition on free speech, as its very existence would result in some people self-censoring legitimate views out of fear of criminal prosecution.

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[5] *Criminal Code Act 1899* (Qld), s. 52A; *Racial and Religious Tolerance Act 2001* (Vic), ss. 24 and 25; *Racial Vilification Act 1996* (SA), s. 4; *Criminal Code 2002* (ACT), s. 750.

[6] *Anti-Discrimination Act 1977* (NSW), s. 49ZE.

Conclusion

The desire to reduce hostility on the basis of race and religion is commendable and is an important step in ensuring that racial and religious diversity are not only tolerated, but valued, in New South Wales.

Unfortunately, the proposed amendments to section 93Z of the *Crimes Act 1900* in the Options Paper go too far in this respect because they suggest provisions that are ambiguous and subjective, which is not appropriate for criminal law.

Any law that both seeks to limit the freedom of expression and contains the threat of a deprivation of liberty must be clear and objective and the proposed provisions – other than that outlined in Option 2 – do not achieve that goal and should not form part of the Commission's recommendations.