28 June 2024

New South Wales Law Reform Commission

By email: nsw-lrc@dcj.nsw.gov.au

Re: New South Wales Law Reform Commission's review of the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW.

Thank you for the opportunity to make a submission in response to the Commission's recent options paper (7th June 2024) (hereafter 'OP').

About the author

I am a PhD candidate in the Faculty of Law and Justice at University of New South Wales (UNSW) and a Lecturer in the faculty of Law at University of Technology Sydney (UTS). My doctoral research examines whether anti-vilification laws are an adequate response to the problem of Islamophobia in New South Wales. I am supervised by Luke McNamara, Professor in Law at University of New South Wales and Geoffrey Brahm Levey, Associate Professor of Political Science at University of New South Wales.

Introduction

In this submission, I respond to options 3-5 as presented in the NSWLRC's Options Paper on *Serious Racial and Religious Vilification* (June 2024) ('OP'). These are:

Option 3: Incitement to violence

Incitement to violence sets a high evidentiary burden and is difficult to prove. It may also be a reason for the low rate of prosecutions under s 93Z. The definition of incite is narrow and as mentioned in the OP, there is also a need to show the potential impact of a person's speech on the target audience. Some speech may *vilify* individuals based on protected attributes)such as race or religion); however, it may not directly *incite* violence.

It is worth noting that hate incidents are sometimes already dealt with via the summary offence of using *offensive* language in a public place under s 4A of the *Summary Offences Act 1988* (NSW).[1] The maximum penalty is a fine of $660. Noting that s 93Z sets a significantly higher threshold than an offence like s 4A, it is submitted that consideration should be given to whether an aggravated version of the offence defined by s 4A might be introduced as an alternative to s 93Z. The merits of this public order offence option would need to be fully examined, but potential benefits of this model include:[2]

1. The public order model would deliver a more modest penalty than s 93Z, but would be more likely to be prosecuted, thus offering satisfaction and protection to more victims, and producing greater confidence in the law.

[1] See D Brown, D Farrier, L McNamara, A Steel, M Grewcock, J Quilter, M Schwartz, T Anthony & A Loughnan, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney: Federation Press, 7th ed, 2020), pp 562-63.
[2] Rita Jabri Markwell and Maryam Hashimi, Parliamentary submission, Inquiry into Serious Vilification and Hate Crimes (12 June 2021).

2. The public order model aims to maintain safe public spaces which is very important for minority communities.
3. As a less punitive use of the criminal law that (if modelled on s 4A) that would not result in imprisonment, objections to prosecutions based on free speech considerations are likely to be reduced.[3]

It is appropriate to acknowledge that, given the history of how s 4A has been used against disproportionately against Aboriginal people in NSW,[4] it will be important to ensure that a new offence on the public order model does not replicate this pattern.

Option 4: An offence of inciting hatred

My PhD research is ongoing and so my response to this optional is somewhat tentative, but I tend to agree with the view expressed in the OP (at [5.6]) that speech that stirs hatred but is not of a violent nature should be "addressed by civil vilification frameworks" (noting that there may be considerable scope for improvement of these – discussed further below). Criminalisation of conduct that incites hatred would carry a risk of potential overuse if such an offence were to be used every time an individual expresses views that are hateful or merely of an offensive nature. Criminalising hate speech can be especially harmful to individuals who do not realise their speech is hateful. It may also have exaggerated impacts on certain minority communities such as young people and Aboriginal people.

Most states and territories, including NSW, have enacted civil laws that make speech that stirs hatred unlawful.[5] Although it is beyond the scope of the NSWLRC's current reference, for the record I note that one of the weaknesses in Australian civil vilification framework is

[3] See generally, L McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney: Sydney Institute of Criminology Monograph Series No 16, 2002).
[4] Ibid, pp 548-9.
[5] *Anti-Discrimination Act 1977* (NSW) s49ZE; *Anti-Discrimination Act 1991* (Qld) s124A; *Racial and Religious Tolerance Act 2001* (Vic).

that's 18C of the *Racial Discrimination Act* 1975 (Cth) does not currently extend to *religious* hatred.[6] This can be problematic as individuals from targeted communities such as Muslim communities may not necessarily be targets of hate speech that stirs violence but instead may be confronted with speech that is hateful. Thus, there may be value in introducing uniform civil legislation at the federal level to capture speech that vilifies individuals based on their religious beliefs.

Option 5: Increase maximum penalty for s 93Z

I submit that the maximum penalty for crimes involving s 93Z should not be increased. Consistent with the public order model (discussed above), *lower* penalties (such as 'on-the-spot' fines or community service orders) may be appropriate forms of sanction. This less punitive approach to criminalisation would assist in promoting the educative function of the criminal law and maintaining peace and order within our communities. Lower penalties will also reduce the risk of unintended consequences of higher s 93Z penalties impacting on already disadvantaged sections of our community such as young people and Indigenous Australians.

Conclusion

I support hate speech regulation and vilification laws that aim to strike a balance between freedom of speech, tolerance, and equality. However, I am cautious of criminalising hate speech that does not incite violence and may be (or be perceived to be) merely of an offensive nature. It is submitted that an offences like s 4A of the *Summary Offences Act 1988* (NSW) might be a more appropriate model for pursuing a more effective criminal law response to serious racial and religious vilification than broadening the scope and/or seriousness of s 93Z.

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[6] See K Gelber & L McNamara, 'Anti-vilification Laws and Public Racism in Australia: mapping the gaps between the harms occasioned and the remedies provided' (2016) 39(2) *UNSWLJ* 488-511.

If I can be of any further assistance in relation to the Commission's work, please do not hesitate to contact me.

Sincerely,

Maryam Hashimi