NSW Law Reform Commission
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28 June 2024
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Dear Review Secretary,

The Australian Christian Lobby (ACL) is grateful for the opportunity to make a submission in response to the *Serious Racial and Religious Vilification Options Paper* issued in the *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 giving the following submission your careful consideration.

Yours sincerely,

Joshua Rowe
ACL State Director NSW

SUBMISSION:

Serious Racial and Religious Vilification Options Paper

Effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au

Executive Summary

This submission addresses the following issues raised by the Options Paper in connection with proposals to amend section 93Z:

- The nature of "violence" required to be incited, should exclude "psychological violence".
- The mental element of the offence should be "intention", unless section 93Z continues to apply only to inciting violence, in which case "intention and recklessness" would still be appropriate.
- "Incite" should be retained as the defining act, and should not be substituted by, or extended to, acts of less specificity and directness, such as "promote", "glorify", "stir up" and "urge".
- A "harm-based" test should not be introduced, as it has no proper application in the criminal law or civil context in the terms proposed.
- An offence of inciting "hatred" is likely to operate in Australia at too low a threshold, given its existing usage, and could only be rendered compliant with international law if accompanied by substantive, effective safeguards.
- It is inappropriate to follow State/Territory legislation, when international standards are the most relevant, and achieve the necessary balance between the rights engaged, and State/Territory legislation does not.

The ACL submits that the Inquiry should have close regard to, and fully observe, the requirements of international law set out in the Appendix when considering any changes to section 93Z.

Section 93Z currently makes it an offence for a person, by public act, to intentionally or recklessly threaten or incite violence towards another person or group on various grounds (race, religious belief or affiliation, sexual orientation, gender identity, intersex status, or HIV or AIDS status).

The nature of "violence"

"Violence", contemplated by section 93Z, should exclude "psychological violence".

If section 93Z were extended to "psychological violence" it would not be sufficiently foreseeable whether conduct, especially speech, fell within its ambit. This is likely to have a serious adverse curtailing influence against perfectly lawful conduct, including legitimate free speech.

Psychological harm is susceptible to subjective interpretive standards, and capable of triggering claims at an excessively low threshold. There exists an understandable propensity to perceive psychological harm in matters important to a person's self-identity, but would produce undesirable outcomes if it were the basis of an offence under the Crimes Act.

It would also be necessary to exclude psychological harm from the definition of "violence" in order to preserve criminal provisions from impinging upon the implied freedom of political communication, and free speech.

The mental element

If "violence" were to include "psychological" violence, with the uncertainty and subjectivity that it would entail, the mental element of "recklessness" should be removed, so that the offence is committed only by "intention". Since the offence under section 93Z is of marked gravity, carrying serious stigma, the mental element demands such objective certainty.

International law is clear that hate speech provisions should only apply to the most serious cases.

Incitement

We would be extremely concerned at the prospect of replacing the term "incite" in section 93Z with terms which are less precise, or operate at a lower threshold, such as "promote", "glorify", "stir up" and "urge". Such terms on their own would be a matter of serious concern for their imprecision, lack of objectivity and even undiscernible meaning. They are too inexact and extend to too great a range of harmless conduct to be appropriate in this context.

"Incite" has an established meaning under international law (see Appendix) connected with "imminent risk". Only terminology which matches the strict requirements of the international law definition of "incite" is considered appropriate for this offence, so that it is clear both as to the circumstances, and the threshold, at which it is committed.

A harm-based test

We are unequivocally opposed to the introduction of a harm-based test, determined by whether conduct is "reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute".

The prohibition of conduct of that description lacks the necessary justification under established international law principles, set out in the Appendix. In our view the threshold at which it would apply is not even appropriate in civil vilification laws, and the track record of misuse of legislation with such a harms-based test speaks for itself, particularly as it has been invoked in Tasmania (under the *Anti-Discrimination Act 1998* (Tas), section 17), where it was been applied against Archbishop Julian Porteous merely for distributing a tract providing guidance to members of the Catholic Church, or Claire Chandler, expressing concern in support of the rights of biological women, in connection with single-sex spaces and sports. Although the Terms of Reference of this Inquiry are confined only to "racial and religious" vilification, the fact that claims are made (and officially processed) in response to such expressions of opinion and belief indicates the degree to which free speech is unjustifiably restricted by a prohibition framed in such terminology.

We also note that there is no requirement that the conduct prohibited by section 17 the *Anti-Discrimination Act 1998* (Tas) must occur in public. This is relevant to the definition of "public

act" in section 93Z, which should apply strictly to conduct directed to the public, and should exclude conversations that are private, or which are otherwise not addressed to the public, even if they occur in public spaces.

It is also relevant in the context of racial and religious vilification to note that protection against vilification should not operate in effect as a blasphemy law, by preventing speech which is critical of religious or other beliefs, including where they are critiqued, deconstructed, or their origins and credentials exposed. In practice the point at which speech causes "offence" or "insult" (as suggested in the harm-based proposal) varies from one religion to another, yet it is important to ensure that any criminal law applies uniformly. At such a threshold, harm-based speech could operate indirectly or be invoked to the same effect as a blasphemy law, with differential impact on different religions.

The UN Human Rights Committee has pointed out, in its General Comment 34, the real risk that laws based on "lack of respect for a religion or belief system" will entail discrimination:

> Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [*ICCPR*], except in the specific circumstances envisaged in article 20, paragraph 2 [*the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*]… Such prohibitions must also comply with the strict requirements of article 19, paragraph 3, as well as such articles as 2, 5, 17, 18 and 26 [*articles 2 and 26 concern discrimination*]. Thus, for instance, it would be impermissible for any such laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers. Nor would it be permissible for such prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith.[1]

Furthermore, as the international law materials in the Appendix indicate, terminology like "ridicule" is generally precluded from restriction under international human rights law, which protects the rights to offend and mock. The ties to incitement and to the framework established under article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) help to confine hate speech prohibitions to the most serious category.

We are opposed to the very idea that such a harm-based test be introduced in section 93Z. It has questionable justification under the ICCPR even within a civil prohibition.

An offence of "inciting hatred"

We do not consider the offence of inciting "hatred" to be appropriate for section 93Z, especially given how the concept of "hatred" has developed in Australian jurisdictions, to become associated with anti-vilification prohibitions at a lower threshold than is appropriate for this offence. The term "hatred" does not denote a particular, single standard, of the appropriate level of stringency required for this offence.

We therefore recommend that an offence not be introduced of inciting "hatred" on the grounds of a protected attribute.

[1] General Comment no. 34, Article 19, Freedoms of opinion and expression, para 48.

State/Territory comparisons

When assessing available options in this Inquiry we would caution against following the pattern of the more easily triggered criminal and civil prohibitions found in State and Territory legislation, and would express our own opposition to measures which do not meet the requirements of the ICCPR, notably those established in connection with articles 19(3) and 20(2) (see Appendix).

The low number of prosecutions under section 93Z

We would be interested to learn from this Inquiry the reasons for the low number of prosecutions under section 93Z, particularly whether this is attributable to shortcomings in the mechanisms for enforcement, rather than the text of the section.

We would not support any widening of the criminal (or civil) prohibitions where it does not genuinely serve the purpose of better protecting racial or religious groups and individuals from harm, in an appropriately focused way (in accordance with international law) and particularly where it insulates beliefs and ideologies from criticism.

Appendix

Extracts from the report of 2019 to the General Assembly by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/74/486, 9 October 2019)

8. Under article 20 (2) of the [International Covenant on Civil and Political Rights], States parties are obligated to prohibit by law "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". States are not obligated to criminalize such kinds of expression. The previous Special Rapporteur explained that article 20 (2) relates to (a) advocacy of hatred, (b) advocacy which constitutes incitement, and (c) incitement likely to result in discrimination, hostility or violence (A/67/357, para. 43)...

13. In its general comment No. 34 (2011), the Human Rights Committee found that whenever a State limits expression, including the kinds of expression defined in article 20 (2) of the Covenant, it must still "justify the prohibitions and their provisions in strict conformity with article 19".16 In 2013 , a high-level group of human rights experts, convened under the auspices of the United Nations High Commissioner for Human Rights, adopted an interpretation of article 20 (2).17 In the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, key terms are defined as follows:

> "Hatred" and "hostility" refer to intense and irrational emotions of opprobrium, enmity and detestation towards the target group; the term "advocacy" is to be understood as requiring an intention to promote hatred publicly towards the target group; and the term "incitement" refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups (A/HRC/22/17/Add.4, appendix, footnote 5).18

14. A total of six factors were identified in the Rabat Plan of Action to determine the severity necessary to criminalize incitement (ibid, para. 29):

> (a) The "social and political context prevalent at the time the speech was made and disseminated";
>
> (b) The status of the speaker, "specifically the individual's or organization's standing in the context of the audience to whom the speech is directed";
>
> (c) Intent, meaning that "negligence and recklessness are not sufficient for an offence under article 20 of the Covenant", which provides that mere distribution or circulation does not amount to advocacy or incitement;
>
> (d) Content and form of the speech, in particular "the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed";
>
> (e) Extent or reach of the speech act, such as the "magnitude and size of its audience", including whether it was "a single leaflet or broadcast in the mainstream media or via

> the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement";
>
> (f) Its likelihood, including imminence, meaning that "some degree of risk of harm must be identified", including through the determination (by courts, as suggested in the Plan of Action) of a "reasonable probability that the speech would succeed in inciting actual action against the target group".

15. In 2013, the Committee on the Elimination of Racial Discrimination, the expert monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination, followed the lead of the Human Rights Committee and the Rabat Plan of Action. It clarified the "due regard" language in article 4 of the Convention as meaning that strict compliance with freedom of expression guarantees is required.19 In a sign of converging interpretations, the Committee emphasized that criminalization under article 4 should be reserved for certain cases, as follows:

> The criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.20

16. The Committee on the Elimination of Racial Discrimination explained that the conditions defined in article 19 of the International Covenant on Civil and Political Rights also apply to restrictions under article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.21 With regard to the qualification of dissemination and incitement as offences punishable by law, the Committee found that States must take into account a range of factors in determining whether a particular expression falls into those prohibited categories, including the speech's "content and form", the "economic, social and political climate" during the time the expression was made, the "position or status of the speaker", the "reach of the speech" and its objectives. The Committee recommended that States parties to the Convention consider "the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question".22

17. The Committee also found that the Convention requires the prohibition of "insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination", emphasizing that such expression may only be prohibited where it "clearly amounts to incitement to hatred or discrimination".23 The terms "ridicule" and "justification" are extremely broad and are generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the ties to incitement and to the framework established under article 19(3) of the Covenant help to constrain such a prohibition to the most serious category.

18. In the Rabat Plan of Action, it is also clarified that criminalization should be left for the most serious sorts of incitement under article 20 (2) of the Covenant, and that, in general, other approaches deserve consideration first (A/HRC/22/17/Add.4, appendix, para. 34). These approaches include public statements by leaders in society that counter hate speech

and foster tolerance and intercommunity respect; education and intercultural dialogue; expanding access to information and ideas that counter hateful messages; and the promotion of and training in human rights principles and standards. The recognition of steps other than legal prohibitions highlights that prohibition will often not be the least restrictive measure available to States confronting hate speech problems.

16 [Human Rights Committee, general comment No. 34 (2011)], para. 52, and, in the context of art. 20 (2) of the Covenant in particular, see para. 50.

17 See, e.g., Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013) on combating racist hate speech.

18 The previous Special Rapporteur Frank La Rue defined as a key factor in the assessment of incitement whether there was "real and imminent danger of violence resulting from the expression" (A/67/357, para. 46). See also Article 19, *Prohibiting Incitement to Discrimination, Hostility or Violence* (London, 2012), pp. 24–25.

19 Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 19. The Committee understands the due-regard clause as having particular importance with regard to freedom of expression, which, it states, is "the most pertinent reference principle when calibrating the legitimacy of speech restrictions".

20 Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), para. 12.

21 Ibid., paras. 4 and 19–20.

22 Ibid., paras. 15–16.

23 Ibid., para. 13.

Extracts from General Comment No.34, Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, 12 September 2011.

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be "provided by law"; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality.42 Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.43

42 See communication No. 1022/2001, Velichkin v. Belarus, Views adopted on 20 October 2005.

43 See the Committee's general comment No. 22, Official Records of the General Assembly, Fortyeighth Session, Supplement No. 40 (A/48/40), annex VI

25. For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly53 and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.54 Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.

53 See communication No. 578/1994, de Groot v. The Netherlands, Views adopted on 14 July 1995. 54 See general comment No. 27.

33. Restrictions must be "necessary" for a legitimate purpose...

34. Restrictions must not be overbroad. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law".72 The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.73

35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.74

72 General comment No. 27, para. 14. See also Communications No. 1128/2002, Marques v. Angola; No. 1157/2003, Coleman v. Australia.

73 See communication No. 1180/2003, Bodrozic v. Serbia and Montenegro, Views adopted on 31 October 2005.

74 See communication No. 926/2000, Shin v. Republic of Korea.