

5 April 2024

NSW Law Reform Commission  
Locked Bag 5000  
Parramatta  
NSW 2124  
Australia

**By email: [nsw-lrc@dcj.nsw.gov.au](mailto:nsw-lrc@dcj.nsw.gov.au)**

Dear Responsible Officer,

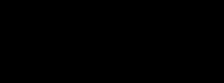
***Review of the effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW***

I refer to the invitation by the NSW Law Reform Commission for submissions on the above Review. HRLA welcomes the opportunity to provide this submission.

HRLA is Australia's only human rights law firm specialising exclusively in the areas of religious liberty and freedom of thought, speech and conscience. We regularly represent clients and litigate religious freedom matters in all States and Territories and regularly make submissions on the human rights implications of legislative and policy proposals that have implications for religious freedom.

I enclose HRLA's submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,



John Steenhof  
Principal Lawyer

## **Human Rights Law Alliance Submission**

### ***Review of the effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW***

1. HRLA's submission is restricted to comments on some of the implications for religious liberty and freedom of expression of s.93Z in its current form, and certain issues which should constrain its amendment.

#### **Freedom of expression must be preserved**

2. Important context for this Review is that there is no protection in Australia for freedom of religion (including religious expression), as understood in terms of article 18 of the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>, or freedom expression under article 19.<sup>2</sup> Even though Australia is treaty-bound to implement these rights in Australia they are not protected in Australian law as required, and are already excessively encroached upon by state and territory discrimination and anti-vilification laws.
3. S.93Z must not encroach in any way on such ICCPR rights. It is fundamentally wrong, and a serious ICCPR violation, to criminalise a person for their speech which is the legitimate exercise of their freedom of religion or expression.
4. Every restriction that is placed on freedoms of religion or expression must be justified in strict conformity with articles 18.3 and 19.3 of the ICCPR, governed by principles of legality, proportionality and necessity, and being the least restrictive means of achieving the legitimate aim pursued.
5. It is necessary to keep these basic standards in mind for the purposes of this Review.

#### **Certainty is an absolute prerequisite for criminal anti-vilification provisions**

6. By virtue of the far-reaching consequences of criminal liability, especially carrying custodial sentences as s.93Z does, the effect of s.93Z is far wider than the scope of the speech proscribed

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<sup>1</sup> "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching....."

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others..."

<sup>2</sup> "1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals."

by that provision. The chilling effect of criminal provisions can seriously undermine the processes and functioning of democracy where there is uncertainty as to their scope. S.93Z must therefore avoid all uncertainty at all costs.

- 6.1. The prerequisite currently stated in s.93Z for inciting violence lends certainty. It could be improved by confining the mental element to intention, to the exclusion of recklessness.
- 6.2. Criminalisation should be reserved for serious cases (such as those to be prohibited in article 20(2) of the ICCPR, involving incitement).<sup>3</sup>

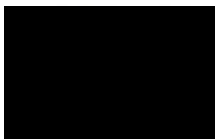
#### Prohibited grounds

7. For as long as s.93Z is clearly confined (to inciting violence), at a high threshold, and the prohibited grounds of “sexual orientation” and “gender identity” are as currently defined, s.93Z is not problematic.
8. However, the current hyper-politicisation of issues of sexuality and gender means that anti-vilification provisions which have any uncertain boundaries will produce serious adverse impact on free speech (including religious and other expression) in ways that are already felt throughout Australia. This must be avoided at all costs, by confining s.93Z to its current ambit.

#### Conclusion

9. The Review should be steered by certain basic ground rules, chief among being that criminal anti-vilification provisions must possess utmost precision, and that they must not produce unjustifiable restrictions on the freedoms of religion or expression as understood by articles 18 and 19 of the ICCPR. S.93Z is not problematic in its current form and should not be amended.
10. We are grateful for the opportunity to make this submission and welcome any opportunity to appear in support of it.

Yours sincerely,



John Steenhof  
Principal Lawyer

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<sup>3</sup> “1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”