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NSWCCL SUBMISSION

NSW LAW REFORM COMMISSION

SECTION 93Z OF THE CRIMES ACT 1900 (NSW)

19 April 2024

NSWCCL

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties (**NSWCCL**) acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1 Introduction

- 1.1 The NSWCCCL welcomes the opportunity to make a submission to the NSW Law Reform Commission (**NSWLRC**) concerning the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) (the **Crimes Act**) in addressing serious racial and religious vilification in NSW. The submission is made with regard to the terms of reference received by the NSWLRC on 14 February 2024 (the **Terms of Reference**).
- 1.2 This submission will address the following Terms of Reference:
- (a) the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW); and
 - (b) criminal vilification offences in other Australian and international jurisdictions.
- 1.3 The NSWCCCL will also comment on other matters it considers relevant to the NSWLRC's assessment of the effectiveness of s 93Z of the Crimes Act, namely:
- (a) the restrictive and confined language of the offence provision; and
 - (b) the removal of the requirement that prosecutions brought under s 93Z of the Crimes Act require consent of the Director of Public Prosecutions (**DPP**) to proceed.

2 Background and objectives of s 93Z of the Crimes Act

- 2.1 Australia is a signatory to both the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on the Elimination of all forms of Racial Discrimination (**ICERD**).¹ These instruments impose obligations to prohibit discrimination solely based on race, colour, sex, religion or social origin. The ICCPR also functions to protect individuals' freedom of expression, whilst acknowledging this freedom is not without limits.²
- 2.2 While Australia's international obligations are not solely responsible for the NSW Government's decision to introduce offences intended to prohibit discrimination against individuals or groups based on special characteristics, key instruments (such as the ICCPR and ICERD) provide important social and political context to the legal background.
- 2.3 Section 93Z was introduced to the Crimes Act in 2018, creating an offence of publicly threatening or inciting violence on the grounds of certain characteristics held by a person or group of persons.³ These characteristics include a person's race, religion, sexual orientation, gender identity, intersex or HIV/AIDS status.
- 2.4 Section 93Z replaced four serious vilification offences contained in the *Anti-Discrimination Act 1977* (NSW) (the **Anti-Discrimination Act**) with a single indictable offence. It created a consistent maximum penalty, and broadened the protections to include vilification relating to intersex status and religious beliefs or affiliation.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

² Articles 19 and 20, ICCPR.

³ *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW)

- 2.5 Section 93Z of the Crimes Act was introduced, in part, to address the fact that there had been no prosecutions brought under these previous offence provisions. The amending legislation also transferred responsibility for approving prosecutions from the Attorney General (which existed under the pre-existing serious racial vilification offence) to the DPP under the new s 93Z offence.⁴ This requirement was intended to act as a safeguard to ensure prosecutions for alleged offences against s 93Z of the Crimes Act were appropriate.
- 2.6 In December 2023, s 93Z was amended to remove the bar against commencing a prosecution without the approval of the DPP and to specify those who were permitted to commence proceedings. The change allowed prosecutions for alleged offences under s 93Z of the Crimes Act to be commenced by NSW Police. This revision was in response to concerns raised around the time taken to refer matters to the DPP to obtain approval to commence a prosecution, which was seen as a disincentive to laying appropriate charges.⁵ In support of the change, the NSW Attorney General, Michael Daley, stated that: "we want to ensure offences of this type can be prosecuted in a timely and efficient manner to ensure community safety".⁶
- 2.7 We understand that NSW Police have commenced four prosecutions under s 93Z of the Crimes Act, all of which proceeded summarily and resulted in convictions in the Local Court. Two of these convictions were subsequently annulled, and another was overturned on a conviction appeal.⁷ In light of this, the NSWCCCL commends the NSW Attorney General's timely review of s 93Z.

3 Measuring the effectiveness of s 93Z

- 3.1 There are a variety of ways in which the 'effectiveness' of s 93Z of the Crimes Act can be measured. Simply measuring the number of successful prosecutions brought under the provision does not provide a true measure of effectiveness. To measure effectiveness, it is first necessary to measure the extent of serious racial and religious vilification in NSW. Consideration can then be given to whether the section is achieving the stated aims and whether the number of successful prosecutions is appropriate having regard to the prevalence of serious racial and religious vilification.

⁴ Second Reading Speech, Crimes Amendment (Prosecution of Certain Offences) Bill 2023.
<<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-94421>>

⁵ Second Reading Speech, Crimes Amendment (Prosecution of Certain Offences) Bill 2023.
<<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-94421>>;

<<https://dcj.nsw.gov.au/news-and-media/media-releases/2023/prosecution-of-threats-and-incitement-to-violence-set-to-be-stre.html#:~:text=The%20proposed%20change%20will%20enable,offences%20in%20New%20South%20Wales.>>

⁶ <https://dcj.nsw.gov.au/news-and-media/media-releases/2023/prosecution-of-threats-and-incitement-to-violence-set-to-be-stre.html#:~:text=The%20proposed%20change%20will%20enable,offences%20in%20New%20South%20Wales.>

⁷ The NSWCCCL acknowledges that the two convictions were annulled due to the failure of NSW Police to secure approval from the DPP to commence the prosecutions (the prosecutions were commenced prior to the Crimes Amendment (Prosecution of Certain Offences) Act 2023 coming into force);

<https://www.parliament.nsw.gov.au/hp/housepaper/28874/QuestionsAndAnswers-LA-175-20221108-Proof.pdf>;

[https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20\(Daley\)%20-%206%20March%202024.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20(Daley)%20-%206%20March%202024.pdf)

- 3.2 The latest data collected by the Australian Bureau of Statistics indicates that 13% of Australians experienced some form of discrimination in 2020.⁸ Recently, there has also been an alarming resurgence of racially fuelled conduct and hate speech arising from the events in Israel and Gaza, and the Russian invasion of Ukraine.⁹
- 3.3 It is widely understood that actions promoting prejudice and hatred can cause significant psychological and social harm to individuals from targeted groups. Acts of vilification against minority groups result in impacted persons feeling ostracised and undermines their sense of belonging to the Australian society. Gone unchecked, this type of anti-social behaviour also gives licence to others to act in a similar fashion.
- 3.4 It is incorrect to suggest there has been an absence of prosecutions under the vilification offences. The DPP, Sally Dowling SC, recently confirmed at a Budget Estimates hearing that her office had received 13 briefs from NSW Police requesting approval to lay charges under s 93Z of the Crimes Act (prior to the law being amended to allow Police to commence prosecutions without approval from the DPP).¹⁰ Of these, 11 were approved by the DPP and 9 charges were subsequently laid against 7 individuals. For two individuals, these charges resulted in convictions (one of which was overturned on appeal for a 'technical reason').¹¹
- 3.5 On the one hand, viewing the small number of prosecutions under s 93Z of the Crimes Act since its introduction in 2018 as a measure of success is tantamount to admitting there have been few occurrences of vilification worthy of prosecution. This illogical conclusion is out of step with community expectations and experiences, as evident from the aforementioned statistics.
- 3.6 There is a live question, however, of whether there have been instances of serious vilification in NSW over recent years that would warrant the application of s 93Z of the Crimes Act and have not been prosecuted. Section 93Z of the Crimes Act is intended to deal with the most serious instances of vilification, whereas more commonplace offending can potentially be dealt with by more general criminal offences under the criminal law. While there has been occasional media commentary on the offence provision being ineffective, this commentary tends to be unable to point to a particular instance that would unequivocally have called for the application of s 93Z of the Crimes Act.
- 3.7 On the other hand, the shortage of successful prosecutions suggests that s 93Z may be falling short of its stated aims in addressing the most serious expressions of vilification of vulnerable minority groups. One reason for the lack of successful prosecutions under s 93Z is the fact that

⁸ Australian Bureau of Statistics, *General Social Survey (2020)* <https://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/2020>;

[https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20\(Daley\)%20-%206%20March%202024.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20(Daley)%20-%206%20March%202024.pdf)

⁹ The Guardian, *Islamophobic and Antisemitic Incidents Record Large Spike in Australia, Advocates Say* (10 November 2023) <https://www.theguardian.com/australia-news/2023/nov/10/islamophobic-and-antisemitic-incidents-rise-in-australia-advocates-say>; Crikey, *Ukrainian Australians say pro- Russian abuse is on the rise after attack at rally* (December 15 2022) <https://www.crikey.com.au/2022/12/15/ukrainian-australians-pro-russian-abuse-rising/>

¹⁰ [https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20\(Daley\)%20-%206%20March%202024.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20(Daley)%20-%206%20March%202024.pdf)

¹¹ [https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20\(Daley\)%20-%206%20March%202024.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3213/Transcript%20-%20UNCORRECTED%20PC5%20-%20Budget%20Estimates%202023-2024%20(Daley)%20-%206%20March%202024.pdf)

the confined elements of the offence make it difficult to prove the requisite intention – noting that speech conveys different intentions depending on tone, context and surrounding circumstances.

- 3.8 The measure of effectiveness of s 93Z of the Crimes Act is not limited to the number of prosecutions under the provision, let alone successful prosecutions. It can also be determined by the law's symbolic and educative impact.¹²
- 3.9 People of ethnic and religious minority backgrounds interviewed as part of a qualitative study in 2015 expressed 'overwhelming support' for the retention of hate speech laws.¹³ They articulated the importance of such laws outside of formal enforcement action.
- 3.10 Of interest, the NSWCCCL notes that recent statistics from the NSW Bureau of Crime Statistics and Research suggest that police have charged Indigenous persons with offences under s 93Z of the Crimes Act.¹⁴ This data indicates that the provision may in fact be disproportionately impacting vulnerable minority groups. The NSWCCCL encourages the NSWLRC to make further inquiries into any suspected disproportionate deployment of this offence provision against minority groups.
- 3.11 Vilification laws, such as s 93Z of the Crimes Act, send a clear message that hate speech is an unacceptable part of society, and sets an objective standard against which members of the community can be held to account. The lack of prosecutions commenced under s 93Z does not necessarily indicate the laws are weak if they set a standard for public behaviour. On the contrary, that may be an indicator of their effectiveness.
- 3.12 It should be acknowledged, however, that without prosecutions being conducted, there are limited opportunities for the community to engage with, or become aware of, vilification laws.
- 3.13 Legislation that intends to prohibit hate speech whilst also 'striking the right balance between community safety and freedom of speech' is likely to be complex and controversial.¹⁵ This delicate balance was evident in comments made by Fagan J in *R v Baydra; R v Namoa (No 8)* [2019] NSWSC 24, where his Honour stated, at [74]: "[publicly] disseminating in Australia the religious belief that Muslims are under a duty to attack non-believers....would constitute an offence to the State, not excused [under s 93Z(1)(b) of the Crimes Act] by the reference to scripture". The NSWCCCL submits that the current formulation of s 93Z of the Crimes Act strikes an appropriate balance between community protections and safety, and freedom of speech.¹⁶

¹² Bill Swannie, 'Corrective Justice and Redress under Australia's Racial Vilification Laws' (2021) 40(1) *University of Queensland Law Journal* 27.

¹³ Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia' (2015) 49(3) *Law & Society Review* 631, 633, 655.

¹⁴ New South Wales Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics July 2018 – June 2023 – Aboriginal detailed offence*

¹⁵ New South Wales, *Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018 Second Reading Speech, Legislative Assembly (Mark Speakman)* (5 June 2018) <<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-102452'>>

¹⁶ https://www.nswccl.org.au/review_s93z_crimes_act

- 3.14 Whilst there has been commentary on the offence provision being ineffective by reference to the lack of prosecutions,¹⁷ it must be remembered that these laws form part of a wider latticework of legal protections for minority groups.
- 3.15 The NSWCCCL would reiterate its support for educative and human rights based models that deal with community tensions rather than the blunt instrument of criminal law which gives the police power to target vulnerable people in discriminatory ways.¹⁸

4 The availability of civil vilification provisions in the Anti-Discrimination Act 1977 (NSW)

- 4.1 New South Wales currently has strong 'hate speech' laws enshrined in s 93Z of the Crimes Act. These laws should be seen in the context of both Commonwealth and State anti-discrimination laws which provide civil remedies in many circumstances. Application of the criminal law should always be a last resort, and s 93Z is intended to address the most serious instances of vilification in our community. The NSWCCCL is unequivocally of the view that the law should not criminalise legitimate free speech.¹⁹
- 4.2 There is a key difference between the intended purpose of civil and criminal vilification laws in preventing and addressing harm. Criminal provisions enable the community to commence action against alleged offenders with penal consequences available to express the community's condemnation of the behaviour. On the other hand, civil provisions enable action by individual members of the community against other members resulting in personal compensation.
- 4.3 It is appropriate for the State to criminalise public incitement of violence on the grounds of race, religion and other individual characteristics. Given the conduct sought to be addressed by s 93Z of the Crimes Act concerns the most serious instances of vilification, maligned individuals should not bear the responsibility of commencing action as they do under civil penalty provisions.

5 Criminal vilification offences in other Australian and international jurisdictions

Australia comparison

- 5.1 The various Australian States and Territories have taken an inconsistent and piecemeal approach to the criminal vilification offences with some states and territories adopting a two-tiered prohibition through civil sanctions and criminal laws. The maximum penalties for conviction of the racial-discrimination legislation varies²⁰ in each jurisdiction as does the threshold for prosecution.²¹

¹⁷ The Guardian, *NSW Race Hate Laws Not Used in Two Years Since Introduction* (4 June 2020) <<https://www.theguardian.com/australia-news/2020/jun/04/nsw-race-hate-laws-not-used-in-two-years-since-introduction>>

¹⁸ https://www.nswccl.org.au/review_s93z_crimes_act

¹⁹ New South Wales Council for Civil Liberties, *Media Statement: Review of s93Z of the Crimes Act* <https://www.nswccl.org.au/review_s93z_crimes_act>.

²⁰ See, eg, *Anti-Discrimination Act 1991* (Qld) s 131A(1) (70 penalty units or 6 months imprisonment). Cf *Crimes Act 1900* (NSW) s 93Z(1) (100 penalty units or imprisonment for 3 years, or both); *Criminal Code 2002* (ACT) s 750 (maximum penalty: 50 penalty units, no imprisonment).

²¹ In Queensland, the Attorney-General must consent to a person being prosecuted (*Anti-Discrimination Act 1991* (Qld) s 131A(2), (4)); in South Australia the Director of Public Prosecutions must consent to the prosecution of this offence (*Racial Vilification Act 1996* (SA) s 5)

- 5.2 Generally, all criminal provisions capture incitement of hatred against or towards a person or group and where the incitement involves threats of physical harm or damage to property.²² Involves threats of physical harm or damage to property. There is also disparity in the characteristics that are protected by the offence provisions.
- 5.3 In addition, the Australian Capital Territory, Victoria and Queensland all have human rights charters that require statutory provisions to be interpreted in a way that is compatible with listed human rights.

International Case Study: Scottish hate crime laws

- 5.4 Recent changes to hate crime laws in Scotland have put the spotlight on the delicate balance that exists between freedom of speech and protection of individuals and are worth the Commissioner's consideration.
- 5.5 On 1 April 2024, the Scottish Parliament introduced new offences for 'threatening, abusive or insulting' behaviour which is intended to 'stir up hatred' based on prejudice towards certain prescribed characteristics.²³ The laws have given rise to public debate on the limitations of free speech and the potential overreach of protections for minority groups under criminal law. A person convicted on indictment under the new offences could face a maximum penalty of seven years imprisonment.
- 5.6 By comparison to s 93Z of the Crimes Act, Scotland's new hate crime laws introduce a lower legal threshold for the commencement of criminal prosecutions. While the former is directed towards the 'incitement of violence', the Scottish provisions require only that the 'threatening or abusive' behaviour 'stirs up hatred'.
- 5.7 NSWCCCL considers that lowering the legal threshold under s 93Z in a similar way has the potential to alter the fabric of democracy in NSW by criminalising legitimate free speech. This is reflected in the number of reports that were submitted by members of the Scottish public in the immediate aftermath of the hate crime laws coming into force. Specifically, in the week following the introduction of these laws, Police Scotland received over 7,000 online reports from individuals reporting incidents of hate crimes taking place.²⁴ Of these, Police Scotland recorded only 240 as legitimate hate crime incidents (about 3.3% of all reports).
- 5.8 The key risk here is community rejection of free speech in favour of protections enshrined by criminal law. While there is a delicate balance to be struck between these competing priorities, NSWCCCL does not consider a lowering of the legal threshold under s 93Z to be a reasonable response to present concerns around the prosecution rate.

6 Other matters

Removal of the requirement that prosecutions under s 93Z of the Crimes Act not be commenced without approval of the DPP

²² Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-vilification Legislation Reviewed against International Law Standards' (2023) 42(3) *University of Queensland Law Journal* 317, 324.

²³ The Hate Crime and Public Order (Scotland) Act 2021 (Commencement and Transitional Provision) Regulations 2024.

²⁴ <https://www.spa.police.uk/news-insights/insights/authority-responds-to-hate-crime-statistics/>

- 6.1 When s 93Z of the Crimes Act was introduced, it featured a requirement that prosecutions under this provision not be commenced without the approval of the DPP. As previously mentioned, this requirement was removed in December 2023 to enable members of NSW Police to commence prosecutions on their own volition. The amendment was rushed through Parliament without appropriate public scrutiny, or even scrutiny by the very vulnerable communities that the reforms asserted to protect.²⁵
- 6.2 The NSWCCCL considers the consent clause provided an essential safeguard against misconceived serious vilification charges being brought by police (or private prosecutors) under s 93Z of the Crimes Act. The DPP has inherent within their functions the obligation to consider whether a prosecution would be in the public interest. This necessarily operated to balance the protection of individuals' freedom of expression against the public interest in bringing a prosecution.
- 6.3 Because of the sensitivity of the offence (and potential seriousness), it is appropriate to be dealt with by the ODPP in the ordinary course. There have been many criticisms of the police in the past as having been insensitive to issues of discrimination, which have no doubt been extended to vilification.²⁶
- 6.4 The NSWCCCL acknowledges the training understood to be offered to, and undertaken by, members of NSW Police in relation to the application of s93Z of the Crimes Act. This includes:²⁷
- (a) an online 'Hate Crime Awareness' course, which includes an explanation of s93Z legislation;
 - (b) the NSW Police Force's Engagement and Hate Crime Unit (**EHCU**) also delivers face to face training to frontline and specialist police, with the EHCU available to advise police on these specific laws; and
 - (c) The NSW Police Force's Computerised Operational Policing System also directs police upon charging an individual that they must consult with the Operational Legal Advice Unit regarding the threshold definition.
- 6.5 The NSWCCCL is concerned that NSW Police have been given power to launch prosecutions under s 93Z in circumstances where there remain entrenched hostilities between members of the NSW Police and vulnerable minority groups.
- 6.6 Such concerns are reflected in the following limited recent examples (which are not intended to be exhaustive):
- (a) On 23 February 2024, NSW Police Officer, Beau Lamarre-Condon, was charged with the murder of Jesse Baird and his partner, Luke Davies.
 - (b) On 21 December 2023, the NSW Government released the final report by the Special Commission of Inquiry into LGBTIQ hate crimes. The review observed that NSW Police had 'in significant respects' engaged with the inquiry in a way that was 'adversarial or

²⁵ New South Wales Council for Civil Liberties, *Media Statement: Review of s93Z of the Crimes Act* <https://www.nswccl.org.au/review_s93z_crimes_act>.

²⁶ Nicholas Cowdery, 'Review of Law of Vilification: Criminal Aspects'.

²⁷ <https://www.parliament.nsw.gov.au/lcdocs/other/19267/Answers%20to%20Supplementary%20questions%20-%202023%20February%202024%20-%20Budget%20Estimates%20CATLEY.pdf>

unnecessarily defensive'.²⁸ In addition, the review commented that 'even very recently', there has been a resistance within the police to acknowledge the extent of hostility LGBTQ+ people experienced at the hands of NSW Police.²⁹

- (c) The Australian Institute of Criminology reports that, between 1 July 2022 and 30 June 2023, there were 10 indigenous deaths in police custody (an increase from eight deaths in custody for the previous 12 month period).³⁰
- (d) On 2 May 2019, the NSW Civil and Administrative Tribunal ordered NSW Police to publish an apology and implement racial vilification training for senior officers after a tribunal found a police training exercise in October 2017 racially vilified Palestinians and Arabs and portrayed them as potential terrorists.³¹

6.7 The NSWCCCL also notes the following comments of the Australian National Imams Council in relation to the amendments made to s 93Z of the Crimes Act in December 2023:³²

The proposed amendments to remove the DPP will likely result in unintended consequences without providing the desired outcomes. For instance, it will involve police officers being required to apply a complex law. It will give rise to risks of inconsistent application and prosecution actions being found to be invalid or dismissed down the track.

This in turn threatens to undermine the very confidence in the law and institutions, and also creates anxiety within communities about how the law might be applied ...

- 6.8 Increased police involvement in serious vilification matters risks inflaming existing tensions with certain community groups and may unintentionally lead to an increase in these groups being charged with offences under s 93Z of the Crimes Act. Concern expressed in the past about locating law enforcement authority and prosecutorial discretion for the prosecution of serious vilification in the hands of the police may be well-founded.³³
- 6.9 An alternative rationale for the consent requirement is that there are categories of offences where particular sensitivities exist. In such circumstances, the weighing of the discretionary factors relevant to the decision to prosecute is likely to be a sensitive and difficult exercise. For the offence provision under s 93Z of the Crimes Act, those sensitivities are acute given the racial and religious context involved.
- 6.10 Those requirements and types of safeguards can be important in a criminal justice system that sometimes has a tendency to punish minorities and victims. This is because they may be embroiled in disputes with other minority groups and prosecutions are often complainant driven.
- 6.11 The NSWCCCL acknowledges that the DPP retains the power (rarely exercised) to take over proceedings commenced by Police, including in respect of s 93Z of the Crimes Act. However, this

²⁸ <https://www8.austlii.edu.au/au/other/nsw/NWBCCPublnq/2023/3.pdf>

²⁹ 14.114., <https://www8.austlii.edu.au/au/other/nsw/NWBCCPublnq/2023/3.pdf>

³⁰ McAlister M, Miles H & Bricknell S 2023. Deaths in custody in Australia 2022-23. Statistical Report no. 44. Canberra: Australian Institute of Criminology. <https://doi.org/10.52922/sr77222>

³¹ *Ekeremawi v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 79; <https://www.smh.com.au/national/nsw/nsw-police-ordered-to-apologise-for-vilifying-arabs-in-terror-exercise-20190502-p51jfd.html>

³² <https://www.anic.org.au/news/anic-concerned-about-rushed-approach-to-amending-section-93z-of-the-crimes-act-nsw/>

³³ Nicholas Cowdery, 'Review of Law of Vilification: Criminal Aspects' (28 August 2009) *Roundtable on Hate Crime and Vilification Law: Developments and Directions*.

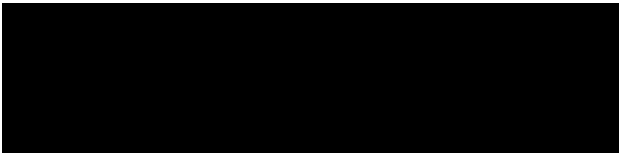
is not a sufficient counterbalance in circumstances where the conduct intended to be addressed by the offence provision is of a highly sensitive nature.

Procedural impediments to the effectiveness of s 93Z of the Crimes Act


- 6.12 The NSWCCCL considers there are a number of procedural impediments to the commencement of prosecutions under s 93Z of the Crimes Act. Relevantly, the requirement for the prosecution to prove beyond reasonable doubt that an individual 'intentionally or recklessly threatens or incites violence' sets a high standard.
- 6.13 This standard is necessary, however, when the weight of criminal law is deployed to set community standards. Were the legal threshold to be lowered, it will not make faith communities any safer from a perceived risk of violence or the risk of actual violence occurring. In addition, Lowering the threshold could substantially alter the fabric of our democracy.³⁴
- 6.14 While removing or relaxing the offence elements under s 93Z may make the offence easier to prosecute, this will have implications for the freedom of expression in NSW. The NSWCCCL considers that, where legislation creates a criminal offence intended to curtail this freedom, the bar must be set very high.
- 6.15 The NSWCCCL notes there are other avenues under the criminal law to pursue outcomes for addressing the vilification of vulnerable minority groups. For example, The Crimes Act contains a suite of alternative offences that could be employed as an alternative to s 93Z. For example:
- (a) common assault;
 - (b) affray;
 - (c) threatening to destroy or damage property; and
 - (d) intimidation or annoyance by violence or otherwise.
- 6.16 In addition, where any such offence is motivated by hatred or prejudice against a group of people to which an offender believes any victim belongs, this is an aggravating factor for the purpose of sentencing.³⁵

We trust this submission will be useful to the committee.

Yours sincerely,



Timothy Roberts
Secretary
NSW Council for Civil Liberties



³⁴ https://www.nswccl.org.au/review_s93z_crimes_act

³⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW).