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NSW Law Reform Commission  
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### By email

Dear Commissioner

### **Equality Australia submission to the NSW Law Reform Commission review into the effectiveness of section 93Z of the *Crimes Act 1900* (NSW)**

Equality Australia welcomes the opportunity to make a submission to the New South Wales Law Reform Commission review of section 93Z of the *Crimes Act 1900* (NSW).

By way of introduction, Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people. Born out of the successful campaign for marriage equality and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

At the outset, we wish to mention that we are grateful for the Commission having invited us to attend a stakeholder consultation with stakeholders for LGBTIQ+ people and people living with HIV/AIDS, being the other groups protected under section 93Z. Although the terms of reference centre the inquiry on racial and religious vilification, in our view it is important that input is considered from all protected groups and that recommendations travel together to address the concerns of all groups protected by section 93Z. We do not wish to see a hierarchy of protections whereby racial and religious vilification is distinguished from vilification against LGBTIQ+ people and people living with HIV/AIDS. Our guiding principle is that everyone deserves to live with dignity and respect, able to participate fully in all aspects of public life without fear or having their sense of safety undermined. While our submission focuses on LGBTIQ+ people, we would also support and welcome enhanced protections for other groups vulnerable to vilification and hate-based conduct.

This submission covers these things:

- In **Part I**, it provides an overview of the prevalence and type of vilification and hate-based conduct that LGBTIQ+ people continue to experience. NSW's anti-vilification laws must respond to the actual experience of vilification and hate-based conduct that LGBTIQ+ people experience if these laws are going to be effective.
- In **Part II**, we address the current elements in section 93Z that make proving vilification difficult. We also address challenges which have emerged under civil vilification protections.
- In **Part III**, we provide our views on the way forward, including changes we would support.

## **PART I: THE PREVALENCE AND TYPES OF HATE LGBTIQ+ PEOPLE EXPERIENCE**

Regrettably, the need for effective protections against serious vilification and hate-based conduct targeting LGBTIQ+ people is stronger than ever. Harassment, discrimination and violence on the basis of sexual orientation, gender identity, sex characteristics and HIV/AIDS status remains a lived experience for members of our communities, often finding expression in attacks borne out of prejudice, fear or ignorance in our physical and online neighbourhoods.<sup>1</sup> Our communities continue to curb the expression of their identities, their lives and their love in an effort to avoid public attacks.<sup>2</sup>

In 2020, a national survey of LGBTIQ+ people conducted by the Australian Research Centre in Sex, Health and Society (ARCSHS) revealed that more than one-third of participants had reported verbal abuse, one-quarter harassment and one in ten sexual assault in the past 12 months due to their sexual orientation or gender identity.<sup>3</sup> *Private Lives 3* also documented alarming rates of violence and harassment persisting against our communities. The 6,835 LGBTIQ+ participants in *Private Lives 3* reported the following experiences of violence and harassment due to sexual orientation or gender identity in the year before the survey:

- 34.6% – verbal abuse (including hateful or obscene phone calls);
- 23.6% – harassment such as being spat at and offensive gestures;
- 22.1% – written threats of abuse via emails, social media;
- 14.6% – threats of physical violence, physical attack or assault without a weapon;
- 11.4% – receiving written threats of abuse in other ways;
- 4.8% and 3.7% respectively – deliberate damage to property or vandalism of a house and/or car; and

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<sup>1</sup> See e.g. Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University, at 37-41; Leonard et al (2012) [Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender \(GLBT\) Australians](#), Melbourne: ARCSHS, La Trobe University, at 47-8; Australian Human Rights Commission (2015) [Resilient Individuals: Sexual orientation, gender identity and intersex rights](#), Sydney: Australian Human Rights Commission, at 15-16; Leonard and Mann (2018) [The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex \(LGBTI\) People Living with Disability](#), Melbourne: GLHV@ARCSHS, La Trobe University, at 54; Jones (2016) 'The needs of students with intersex variations', *Sex Education*, at 13-14; Centre for Social Research in Health (2019) [Stigma Indicators Monitoring Project: People living with HIV](#), Sydney: CSRH, UNSW, at 1.

<sup>2</sup> Leonard et al (2012) [Private Lives 2](#), Melbourne: ARCSHS, La Trobe University, at 45-7; Australian Human Rights Commission (2015) [Resilient Individuals](#), Sydney: Australian Human Rights Commission, at 18.

<sup>3</sup> Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University, at 41.

- 3.9% – physical attack or assault with a weapon (knife, bottle, stones).

When compared with the 2012 national *Private Lives 2* survey of 5,476 LGBT Australians, the 2020 results suggest that the incidence of violence and harassment is increasing over time.

For transgender people in Australia, evidence suggests that rates of hate and violence are even higher and continue to intensify.<sup>4</sup> In 2023, the Trans Justice Project and Victorian Pride Lobby conducted a large survey with 3,099 adults in Australia targeted at investigating anti-trans hate. It revealed that over 50% of trans participants had experienced anti-trans hate. 16% of trans participants had experienced anti-trans violence in the last 12 months and 1 in 3 of all participants had seen anti-trans violence in the past year.<sup>5</sup> 34% of trans participants said they had experienced more or significantly more in-person anti-trans abuse, harassment, or vilification in 2023 than in 2020.<sup>6</sup> 85% of all participants had seen significantly more online anti-trans hate since 2020.<sup>7</sup>

LGBTIQ+ people are also currently experiencing particular kinds of vilification and hate-based conduct. They include:

- the direct targeting of LGBTIQ+ people, particularly gender non-conforming people or drag artists;
- the slurring of LGBTIQ+ people as ‘groomers’ or a ‘risk to children’;
- repeated trolling and harassment of trans and gender diverse people, including online, such as by using photos before or during gender affirmation processes to degrade or harass, or widely publishing information about trans participants in amateur sporting competitions;
- attacks on allies, such as librarians or councillors, who are supportive of events like Drag Story Time.

Recently, LGBTIQ+ events have also been cancelled because community-based organisations have not been able to guarantee the safety of people involved, including because they cannot afford to, because police have advised that they cannot guarantee protection, or because the threat of attack undermines the sense of community and celebration that the event is intended to foster.

This hate conduct is a key driver of LGBTIQ+ people experiencing poorer health outcomes overall than the general population. This is acknowledged in the 2022-2027 NSW LGBTIQ+ Health Strategy, which states that *‘Mental and emotional distress is the most prevailing issue faced by LGBTIQ+ people, with persistent exposure to stigma, discrimination, social isolation, and environments that create social anxiety, being the key causes. Exposure to and experiences of violence, abuse and neglect, and harmful patterns of alcohol and other drug use, are also connected to these causes.’*<sup>8</sup>

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<sup>4</sup> See e.g. Badge et al (2023) [Fuelling Hate: Abuse, harassment, vilification and violence against trans people in Australia](#). Melbourne: Trans Justice Project and Victorian Pride Lobby.

<sup>5</sup> Ibid, at 5.

<sup>6</sup> Ibid, at 6.

<sup>7</sup> Ibid.

<sup>8</sup> NSW Government (2022) [NSW LGBTIQ+ Health Strategy 2022-2027: For people of diverse sexualities and genders, and intersex people, to achieve health outcomes that matter to them](#), at 8.

## SOME CASE STUDIES

We think reflecting on several real-life examples of serious vilification and hate-based conduct against LGBTIQ+ people will be useful for the discussion which follows on whether the law adequately responds to these experiences. We have provided these examples in a confidential schedule to our submission. We ask that the NSW Law Reform Commission treat this schedule as confidential.

## PART II: REFLECTIONS ON THE CURRENT PROTECTIONS

The elements of section 93Z are difficult to establish and our civil vilification protections have been undermined in their effectiveness through litigation and the victimisation of people who bring complaints.

### THE DIFFICULTY OF ESTABLISHING SECTION 93Z

Section 93Z has several elements:

- the requirement for a public act that threatens or incites violence towards another person or group of persons (the **conduct requirement**);
- the requirement that the threat or incitement of violence be “*on the grounds of*” the actual or presumed<sup>9</sup> race, religion, sexual orientation, gender identity, intersex status or HIV/AIDS status of the targeted person or a member of the group (the **nexus requirement**);
- the requirement that the threat of or incitement to violence be intentional or reckless (the **mental requirement**).

Each of these elements has to be established in respect of a public act.

As the examples in the Confidential Schedule demonstrate, the factual complexity in any specific case makes it very difficult to establish each of these elements all at the same time and in a single public act, particularly in a dynamic or online environment where more than one person is involved.

Looking at the examples in the Confidential Schedule, some of the particular difficulties appear to be:

- **The impact of a cascading series of individual public acts by different individuals**, which together result in inciting or carrying out actual threats or acts of violence towards people or property. However, the subsequent public acts may not reveal the prejudicial nexus for those acts without the context of the first public act, in circumstances where the first public act itself does not on its face meet the conduct and/or nexus requirement. A good example of this is in Case Study 1, where the initial post did not threaten or incite violence towards the property targeted in the post, but subsequent comments (which were not deleted by the original author of the post) then began to spur on vandalism of the property referred to in the first post.
- **The failure of our laws to consider the harm from the perspective of the person or group who has been targeted.** That is, section 93Z is concerned with the potential effect of the conduct on a third-party audience, rather than the effect of the conduct on the people who are targeted. This is

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<sup>9</sup> Crimes Act 1900 (NSW), s 93Z(2).

what prompted the Victorian Legislative Assembly Legal and Social Issues Committee to recommend an additional harm-based offence and civil protection.<sup>10</sup> These harm-based protections can simplify the tests for serious vilification because they get to the gist of the harm; namely the adverse effects of the conduct on the dignity and sense of safety of people in the targeted group. Harm-based protections would more readily respond to the experiences of each of the individual people attacked as set out in the Case Studies in the Confidential Schedule.

- **The public act may be done (or said to be done) for a number of reasons, making it difficult to prove the nexus and mental requirements.** Some threats or incitements to violence are not framed as being on the grounds of a person’s actual or presumed attributes, but based on stereotypes or assumptions that the person has wrongly imputed to those attributes. While anti-discrimination laws generally extend protections to capture conduct done on the basis of characteristics which are imputed to an attribute (e.g. stereotypes),<sup>11</sup> section 93Z does not appear to do so. This makes it unclear whether a person who threatens or incites violence against LGBTIQ+ people or associated property because they wrongly perceive LGBTIQ+ people to be a threat to children, to women or to religious or political values or ideals, actually meets the nexus requirement of inciting threats on “*the ground of*” the person’s sexual orientation or gender identity. Further, as shown in Case Study 1, 2 and 3, the people who took action or who spurred others to take action against persons or property appear to have been motivated by purposes other than the protected attributes of the people or groups who are being targeted – but indeed appear to be motivated by their *own* protected attribute. For example, some of the conduct spurring on violence appears to be directed at *defending* particular sites of significance from what are perceived as threats, including based on their own beliefs. This may dislocate the nexus requirement from the mental requirement; meaning that while the person *did* intend to threaten or incite violence, they did not do so “*on the grounds of*” the actual or presumed attributes of the targeted person or group, but some other basis (e.g. in defence of their own political or religious opinions or ideology). Without admissible evidence showing that the act was done on the grounds of a person or group’s actual or imputed attribute, rather than some other purpose, it makes it very difficult to take action in respect of conduct under section 93Z.
- **A single person may engage in a course of conduct which, together, constitutes the harmful conduct but individually may not be sufficient to meet the ‘threatens or incites violence’ threshold.** As shown in Case Study 4, a single person may engage in a repeated series of public acts that – individually may not be sufficient to meet the threshold (although, arguably some may) – but together has had the effect of widespread harm to members of the targeted group, particularly where the conduct has been communicated and shared widely online. This may be the case when conduct involves targeting a particular person, and the post itself does not threaten or incite violence against that person but has that actual effect because of the size of the person’s platform and the manner in which the person communicates the opinion or information (e.g. by using particularly unflattering images designed to degrade, humiliate or

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<sup>10</sup> Parliament of Victoria Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into anti-vilification protections](#), recs 9-10, 20.

<sup>11</sup> See e.g. *Anti-Discrimination Act 1977* (NSW), s 49ZG(2).

embarrass the targeted person). There appears to be no ability to group together like conduct into an offence that attaches to a course of conduct rather than a single public act.

- **The laws do not protect allies and associates from hate.** The nexus requirement cannot be met where the threat of violence is directed at people who *support* or are *personally associated* with the protected groups. For example, conduct directed at librarians hosting Drag Story Time events or the children of LGBTIQ+ people attending these events do not appear to be protected under section 93Z, given the nexus requirement for the target to be an actual or presumed member of the group.

Taken together, these points reveal the difficulty of establishing section 93Z in all but the clearest of cases. It also means that very real and frightening experiences of anti-LGBTIQ hate conduct that have recently occurred in NSW are not readily captured by section 93Z. Instead, ordinary offences have been relied upon, and it is not clear in all cases whether sentencing has considered the effect of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as an aggravating consideration. As discussed in Part III of this submission, it may be time to consider a broader set of hate-based conduct offences alongside improved vilification protections.

## THE EFFECTIVENESS OF CIVIL PROTECTIONS

Alongside our concerns around the responsiveness of section 93Z to recent examples of anti-LGBTIQ+ hate conduct, NSW civil anti-vilification protections have also been undermined in their effectiveness because of unresolved constitutional challenges regarding the implied freedom of political communication. These arguments have been raised and resolved in a number of other jurisdictions dealing with similar provisions.<sup>12</sup>

In 2024, NCAT twice declined to deal with an application concerning transgender vilification on the basis that it involved an exercise of federal jurisdiction.<sup>13</sup> The NSW Attorney-General, who intervened in one of the cases, conceded that if a federal matter is genuinely raised and is capable on its face of legal argument, then the NCAT had no jurisdiction to deal with it in light of the High Court's decision in *Burns v Corbett* [2018] HCA 16 and *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16.<sup>14</sup>

In the absence of federal anti-vilification protections for LGBTIQ+ people, the NSW anti-discrimination protections are effectively a dead letter to any action where the respondent raises the implied freedom of political communication. This is because the costs and adverse costs risk involved in a constitutional challenge being heard by a court (such as the Supreme Court) effectively stifles most civil vilification complaints concerning LGBTIQ+ issues being brought or progressed, and there is no other forum in which a vilification complaint can be heard.

The Federal Court of Australia is also currently considering similar questions regarding the constitutionality of section 18C of the *Racial Discrimination Act 1975* (Cth), arising from a dispute

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<sup>12</sup> See e.g. *Owen v Menzies & Ors; Bruce v Owen; Menzies v Owen* [2012] QCA 170; *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

<sup>13</sup> *Blanch v Smith* [2024] NSWCATAD 20; *Dennis v Smith* [2024] NSWCATAD 91.

<sup>14</sup> *Blanch v Smith* [2024] NSWCATAD 20 at [7].

between two Australian senators (who would be in a much better financial position than most litigants to mount a complex and costly legal challenge).<sup>15</sup>

This makes the funding of a case that resolves the constitutional questions a priority, as well as ensuring any reforms to vilification protections can withstand constitutional challenge.

## VICTIMISATION

It is important to observe that many victims of hate conduct are also discouraged from taking action because of the fear of further victimisation, particularly by those who peddle hate as sport and build their profile from doing so.

There is no systemic legal response for persons who benefit from their hate in the way we might address other kinds of ill-gotten gains from criminal conduct under proceeds of crime legislation. For example, some people have been allowed to build their public profiles and followings by repeated hate conduct, sometimes even crowdfunding to support their ongoing campaigns or building notoriety from their conduct.

One idea to consider is whether a person, who is convicted of a vilification or hate-based conduct offence, might be required by a court to divest their online platforms or followings similar to the making of a forfeiture order against tainted property.<sup>16</sup> Again, the implied freedom of political communication would need to be analysed to ensure any legislation can withstand challenge against such an order.

## PART III: THE WAY FORWARD

There are a number of options for reforming or replacing section 93Z with anti-hate conduct provisions that capture contemporary and harmful experiences of hate conduct and that address the spreading of hate.

Whichever options are explored, we consider they need to achieve the following:

- *first*, they need to capture the types of harmful conduct that people are experiencing, including direct forms of harassment, damage to property and threats of violence. These provisions may need to consider differences between the targeting of a particular person and the targeting of a group at large, as well as single acts compared with courses of conduct;
- *second*, they need to address and prevent the *spreading* of hate that encourages others to engage in hateful conduct (that is, addressing the element of incitement alongside harm-based protections);
- *third*, they need to be readily enforceable and provable, including in appropriate cases brought by individuals or law enforcement;
- *fourth*, they need to be alive to the potential for the rapid and repeated spreading of hate in an online or electronic environment, meaning that a complaints-based or after-the-fact model of enforcement is not sufficient to avert serious risks of harm. This may mean looking at ancillary

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<sup>15</sup> *Faruqi v Hanson (evidence rulings)* [2024] FCA 225 at [8]-[9].

<sup>16</sup> See e.g. *Confiscation of Proceeds of Crime Act 1989* (NSW), s 18.

changes to personal violence protections (such as APVO protections) or the ability to urgently seek ‘take down’ orders to ensure that preventative measures can be taken;

- *fifth*, they need to be supported by resources and broader responses that prevent the spreading of hate rather than merely addressing its consequences. This includes education, resources for community-led responses, and financial and other support for people or organisations experiencing hate to ensure they can continue to host events, address risks to personal safety and pursue action against offenders.

Having considered these broader outcomes, **one option** in respect of section 93Z is to reform and/or supplement it with a different legal test, such as that proposed by the Victorian Legislative Assembly Legal and Social Issues Committee.<sup>17</sup> A harm-based test, in addition to a reformed incitement test (alongside a defence for legitimate forms of expression), would lower the threshold, making it easier to capture conduct that amounts to vilification. If this option is adopted, then we would also advocate for improvements to standard anti-vilification protections found in other states and territories to ensure that they protect everyone who experiences hate.

For us, this means:

- updating the NSW definitions of ‘sexual orientation’ and ‘gender identity’, and replacing ‘intersex status’ with ‘sex characteristics’, in light of more inclusive and best practice definitions such as those now found in other laws e.g. in NSW (for sexual orientation)<sup>18</sup> and Northern Territory (for sexual orientation, gender identity and sex characteristics)<sup>19</sup>;
- reforming the configuration of the elements of the offence to ensure that the protections can capture conduct against:
  - people who are targeted because of their actual protected attribute or presumed attribute (e.g. targeted because they are gay or trans or presumed to be gay or trans);
  - people who are targeted because of imputed stereotypes, assumptions or beliefs about attributes (e.g. targeted because they are thought to be a risk to children, women or religious beliefs, because they are associated with people who are gay or trans, or presumed to be gay or trans); and
  - people who are targeted because of their personal association or support for people with particular attributes (e.g. targeted because they are involved in an LGBTIQ+ affirming event, such as drag story time, or because they are the children in rainbow families).

We have explored these issues in more detail in our recent submission to the Victorian consultation on anti-vilification protections. You can read our submission [here](#).

**A second option** is to consider the Queensland approach of introducing a series of aggravated offences (with increased maximum penalties relative to the associated standard offence), alongside

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<sup>17</sup> Parliament of Victoria Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into anti-vilification protections](#).

<sup>18</sup> *Conversion Practices Ban Act 2024* (NSW), Sch 2 (definition of ‘sexual orientation’) (which now includes asexuals) [not yet commenced].

<sup>19</sup> *Anti-Discrimination Act 1992* (NT), ss 4(1) (definition of ‘sexual orientation’, ‘gender identity’ and ‘sex characteristics’) and 4(5A).

the section 93Z protection, where the offender is wholly or partly motivated by hate.<sup>20</sup> So, for example, common offences against persons or property could be introduced in an aggravated form where prejudice has motivated the conduct. The benefit of this approach is that offences which have better known elements can be adapted, while still sending a strong message against hate-based conduct and recognising the unique harm which is caused when criminal conduct is accompanied by hate-based motives. This would, for example, recognise that the vandalism of a property with anti-LGBTIQ+ epithets occasions a harm over and above the economic harm caused by criminal property damage that does not include such epithets. If the Commission were minded to consider this approach, we would advocate for improvements to the Queensland approach in the manner set out in our submission to the parliamentary inquiry on the Queensland Bill (see [here](#)).

Either way, we do consider that criminal offences should be reserved for the most serious forms of vilification or hate conduct that involves threatening people or property, as we are concerned about the potential effects of overcriminalisation on groups that are disproportionately affected by criminal offences as well as the need to ensure that offences do not stifle legitimate expression.

We would be happy to provide the Commission with further information or views on potential reform models if that would assist.

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<sup>20</sup> See e.g. *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld).