



Our ref: 24/59

10 May 2024

The Honourable Tom Bathurst AC KC  
Chairperson  
NSW Law Reform Commission

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

Dear Mr Bathurst,

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

1. The NSW Bar Association thanks the NSW Law Reform Commission for the opportunity to provide a submission to its review of the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW (s 93Z Review).

**Introduction**

2. NSW has a culturally diverse population. According to Multicultural NSW, more than 2.3 million people in NSW (29.3% of the population) were born in more than 300 other countries, 50.3% of NSW residents have at least one of their parents born overseas and NSW residents speak more than 280 languages at home.<sup>1</sup> According to 2021 Census data,<sup>2</sup> the main religious affiliation in NSW was Christianity (47.6%) and 12.1% of people in NSW were affiliated with a non-Christian religion. The most commonly reported were Islam (4.3%), Hinduism (3.4%) and Buddhism (2.8%). 33.2% of people in NSW identified as having no religious affiliation.
3. The Association welcomes the assurance from the NSW Government that it is deeply committed to maintaining social cohesion and measures to raise awareness, to educate and strengthen community cohesion.<sup>3</sup> Section 93Z of the *Crimes Act* is one of many legislative tools available to address, and respond to, racial and religious vilification in NSW. There is also a range of other important measures, including education, that should be considered.

---

<sup>1</sup> Multicultural NSW statistics based on 2021 Census data, available here: <https://multicultural.nsw.gov.au/about-us/>

<sup>2</sup> Australian Bureau of Statistics 2021 Census data – snapshot of NSW, available here: <https://www.abs.gov.au/articles/snapshot-nsw-2021>

<sup>3</sup> NSW Government Media Release, Review of State's laws on threats and incitement to violence, published 19 January 2024, available here: <https://www.nsw.gov.au/media-releases/review-of-states-laws-on-threats-and-incitement-to-violence>

4. In NSW, s 93Z of the *Crimes Act* provides an offence of publicly threatening or inciting violence on ground of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. The *Anti-Discrimination Act 1977* (NSW) (the *ADA*) also prohibits vilification<sup>4</sup> because of prescribed characteristics, including race, religion, homosexuality, being transgender or having HIV or AIDs. The Association considers that the effectiveness of s 93Z of the *Crimes Act* should be considered in tandem with the civil regime.
5. In a submission to the Victorian Parliament’s Legislative Assembly’s Legal and Social Issues Committee’s inquiry into anti-vilification protections (**Victorian Parliament Anti-Vilification Protections Inquiry**), the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) highlighted the following as drivers of hate that it has identified through consultations:<sup>5</sup>
  - a. cultural ignorance and assumptions based on stereotypes;
  - b. visible markers of a person’s identity (e.g. religious garments, flags, skin colour);
  - c. systemic social issues such as gender inequality, fear and general bigotry; and
  - d. political commentary and media reporting that drive or reinforce negative stereotypes about marginalised communities.
6. Hate conduct has been reported to spike following particular events. For example, spikes have been reported during political and social debates that play out in the media (e.g. during the 2017 postal survey on marriage equality and the federal debate on the former Federal Government’s Religious Discrimination Bill in 2019).<sup>6</sup> Australians of Asian descent and nationals of Asian countries living in Australia (e.g. international students) reported experiencing high incidences of racism during the COVID-19 pandemic<sup>7</sup> and Australia’s former Race Discrimination Commissioner expressed concerns about racism directed towards First Nations people in Australia during the Voice to Parliament referendum.<sup>8</sup>
7. A recent increase in incidents of racial and religious prejudice in Australia has been documented across several minority groups. Although these studies are largely nation-wide, the findings are

---

<sup>4</sup> Pursuant to the *ADA*, unlawful vilification is a public act that incites hatred towards, serious contempt for, or severe ridicule of a person or group – see ss 20C, 38S, 49ZE, 49ZT and 49ZXB of the *ADA*.

<sup>5</sup> VEOHRC submission dated 31 January to the Victorian Parliament Anti-Vilification Protections Inquiry, p 31, available here:

[https://www.parliament.vic.gov.au/494c55/contentassets/4091789b6180492aae1781ed6c0a0c70/submission-documents/051\\_2020.01.31\\_-\\_victorian\\_equal\\_opportunity\\_human\\_rights\\_commission\\_published.pdf](https://www.parliament.vic.gov.au/494c55/contentassets/4091789b6180492aae1781ed6c0a0c70/submission-documents/051_2020.01.31_-_victorian_equal_opportunity_human_rights_commission_published.pdf)

<sup>6</sup> Ibid, p 45. Report from the Human Rights Law Centre and media release from Equality Australia cited in the VEOHRC submission to the Victorian Parliament Anti-Vilification Protections Inquiry.

<sup>7</sup> Bassina Farbenblum and Laurie Berg, “We might not be citizens but we are still people”: Australia’s disregard for the human rights of international students during COVID-19’ (2020) 26(3) *Australian Journal of Human Rights*, 486–506.

<sup>8</sup> Chin Tan, ‘Whatever the voice vote’s result, Australia has a racism problem we must tackle’. *The Guardian* (6 October 2023).

likely reflected in NSW as the most populous state. The 40% increase in race discrimination enquiries to the Anti-Discrimination Board of NSW from 2021-2022 to 2022-23 would support this connection.<sup>9</sup> Examples include:

- a. First Nations people: According to Reconciliation Australia's 2022 Australian Reconciliation Barometer survey, more First Nations people reported experiencing at least one form of racial prejudice in the past six months in 2022, compared with the same period in any year since 2014 (an increase of 8% since 2020);<sup>10</sup>
  - b. Antisemitism: During the twelve-month period, from 1 October 2022 to 30 September 2023, the Executive Council of Australian Jewry (ECAJ) reported that there were 495 anti-Jewish incidents logged by the ECAJ. This was an increase of 3.5% in the overall number of reported anti-Jewish incidents compared to the previous twelve-month period.<sup>11</sup> The ECAJ has also published preliminary statistics reporting 662 antisemitic incidents during October-November 2023 (a significant increase when compared to the 79 incidents reported during the October-November 2022 period);<sup>12</sup> and
  - c. Islamophobia: The Islamophobia Register recorded a ten-fold increase in reports of Islamophobic incidents in the two-week period following 7 October 2023.<sup>13</sup>
8. The effects of vilification can be wide-ranging, including include fear, intimidation, offence and exclusion.<sup>14</sup> Vilification can also have a silencing effect; modification of public behaviour by victims in order to avoid censure and stereotyping is common.<sup>15</sup>
9. As explained by Professor Katharine Gelber and Professor Luke McNamara, the purpose of anti-vilification laws is two-fold:

Anti-vilification laws are intended to provide a remedy for the individuals directly targeted by vilifying conduct, as well as discourage further harassment and violence that can result from allowing such conduct to circulate publicly. This approach acknowledges that there are,

---

<sup>9</sup> There were 365 enquiries in the 2022-23 FY compared to 261 in the 2021-22 FY. See Anti-Discrimination NSW, Annual Report 2022-23, p 13 and (Anti-Discrimination NSW, Annual Report 2021-22, p 15.

<sup>10</sup> Australian Reconciliation Barometer 2022 Full Research Report (September 2022) p 79, available here: <https://www.reconciliation.org.au/wp-content/uploads/2022/11/2022-Australian-Reconciliation-Barometer-FULL-Report.pdf>

<sup>11</sup> Article regarding the ECAJ Report on Antisemitism in Australia 2023, available here: <https://www.ecaj.org.au/anti-jewish-incidents-in-australia-2023-ecaj-report/>

<sup>12</sup> ECAJ preliminary statistics, published 15 December 2023, available here: <https://www.ecaj.org.au/preliminary-statistics-concerning-surge-in-antisemitic-incidents-following-hamas-atrocities-in-israel-on-7-october-2023/>

<sup>13</sup> Islamophobia Register Australia, Press Release dated 23 October 2023, available here: [https://islamophobia.com.au/wp-content/uploads/2023/10/Islamophobia-Register\\_23-OCT-Press-Release.docx-1.pdf](https://islamophobia.com.au/wp-content/uploads/2023/10/Islamophobia-Register_23-OCT-Press-Release.docx-1.pdf)

<sup>14</sup> Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *UNSW Law Journal* 488, 505.

<sup>15</sup> *Ibid.*

broadly speaking, two forms of harm from vilifying behaviour. Firstly, causal harm encompasses the distinct harms experienced by targets of the conduct, such as public ridicule. Second, consequential harm considers the flow-on effects of the conduct upon the broader community, such as societal marginalisation of the targeted group.<sup>16</sup>

### International human rights law obligations

10. Australia has obligations under international law to prohibit racial and religious hatred, discrimination and vilification.
11. Article 18(1) of the International Covenant on Civil and Political Rights (ICCPR) prescribes a right to freedom of thought, conscience and religion, including a right to manifest religion or belief in worship, observance, practice and teaching.
12. Article 20(2) of the ICCPR requires each State Party to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.<sup>17</sup>
13. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) requires States Parties to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.<sup>18</sup>
14. With the exception of absolute rights, international law requires the balancing of competing human rights and freedoms. In the context of anti-vilification, the balancing of human rights requires exceptions to the anti-vilification provisions to go only as far as is necessary, taking into account competing rights such as the right to freedom of opinion and freedom of expression contained in Articles 19(1) and 19(2) of the ICCPR. Article 19(3) of the ICCPR notes that the exercise of freedom of expression rights carries special duties and responsibilities. As such, the right to freedom of expression may be subject to certain restrictions, provided by law, and necessary for respect of the rights or reputations of others. Article 20 of the ICCPR contains mandatory limitations on

---

<sup>16</sup> As summarised in the report of the Victorian Parliament Anti-Vilification Protections Inquiry tabled 3 March 2021, p 39, available here: <https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-anti-vilification-protections/reports>

<sup>17</sup> In ratifying the ICCPR, Australia recorded a reservation on Article 20, as follows: *Australia interprets the rights provided for by articles 19 [freedom of expression], 21 [freedom of assembly] and 22 [freedom of association] as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters.* See Parliament of Australia website here: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/Freedom\\_of\\_Religion/Interim\\_Report/section?id=committees%2Freportjnt%2F024110%2F25199](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedom_of_Religion/Interim_Report/section?id=committees%2Freportjnt%2F024110%2F25199)

<sup>18</sup> Australia also made a reservation in relation to Article 4(a) of the ICERD in 1975 stating that it was not then in a position to criminalise all the matters covered under the article. That reservation has not been withdrawn. See Attorney-General's Department's webpage available here: <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression>

freedom of expression, and requires countries, subject to reservation/declaration, to outlaw vilification of persons on national, racial or religious grounds.<sup>19</sup>

### *Unduly narrow Terms of Reference*

15. The Association considers that the narrow focus of the s 93Z Review's Terms of Reference, on the effectiveness of s 93Z in addressing serious racial and religious vilification in NSW, is a missed opportunity to consider the effectiveness s 93Z in addressing vilification on the basis of sexual orientation, gender identity or intersex or HIV/AIDS status. In this context, the Association notes the '*Fuelling Hate: Abuse, Harassment, Vilification and Violence Against Trans People in Australia*' report published by the Trans Justice Project and the Victorian Pride Lobby in August 2023. The report's findings included that in the previous 12 months:<sup>20</sup>

- a. 49% of trans participants experienced online anti-trans abuse, harassment or vilification; and
- b. 47% of trans participants experienced in-person anti-trans abuse, harassment or vilification.<sup>21</sup>

**Any reform of s 93Z should be considered alongside the ADA Review and following assessment of the effect of recent amendments to s 93Z**

### Recent NSW inquiries and legislative reform

#### *The ADA Review*

16. The s 93Z Review coincides with the Commission's separate and comprehensive review of the ADA (the ADA Review). The Commission commenced initial consultation for the ADA Review in 2023 and 87 preliminary submissions have been published on the Commission's website. The Commission's consultation paper, informed by issues raised in the preliminary submissions, has not yet been published.

17. In its preliminary submission to the ADA Review,<sup>22</sup> the Association expressed its view that the ADA needs a major overhaul and that, unlike the anti-discrimination legislation in other states and territories, the ADA has not adapted to generations of change in understandings of discrimination,

---

<sup>19</sup> Further information regarding the scope of the requirement to prohibit advocacy of hatred that constitutes incitement to discrimination is on the Attorney-General's Department's webpage available here: <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-opinion-and-expression#:~:text=Article%20of%20the%20ICCP,national%2C%20racial%20or%20religious%20ground>

<sup>20</sup> The survey was completed between 17-25 April 2023.

<sup>21</sup> Trans Justice Project and Victorian Pride Lobby, *Fuelling Hate: Abuse, Harassment, Vilification and Violence Against Trans People in Australia* (August 2023), p 6, available here: <https://transjustice.org.au/fuelling-hate-report-blog/>

<sup>22</sup> Association's preliminary submission to the ADA Review dated 18 October 2023, available here: [https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary\\_submissions/PAD86.pdf](https://lawreform.nsw.gov.au/documents/Current-projects/ada/preliminary_submissions/PAD86.pdf)

language and perceptions of inequality. In relation to vilification, the Association's preliminary submission identified the following matters for the Commission's consideration:

- a. inconsistencies in the terminology (particularly regarding protected attributes) between the *ADA*'s provisions and s 93Z of the *Crimes Act*;
- b. whether the vilification provisions in the *ADA* should be expanded to include other protected attributes; and
- c. the current test for vilification, noting the *ADA* imposes a higher standard than the test under s 18C of the *Racial Discrimination Act 1975* (Cth) and the *ADA* does not respond to constitutive harms.

18. The Association notes that the definitions of protected attributes vary across Australian jurisdictions. By way of example:

#### Race

- a. s 93Z(5) of the *Crimes Act* states that 'race' includes colour, nationality, descent and ethnic, ethno-religious or national origin;
- b. s 3 of the *Racial and Religious Tolerance Act 2001* (Vic) states that 'race' includes colour; descent or **ancestry**; nationality or national origin; **ethnicity** or ethnic origin, and **if two or more distinct races are collectively referred to as a race- (i) each of those distinct races; (ii) that collective race** (emphasis added);
- c. the definition of 'race' in s 3 of the *Racial Vilification Act 1996* (SA) means the nationality, **country of origin**, colour or ethnic origin of the person **or of another person with whom the person resides or associates** (emphasis added);

#### Religious belief

- d. s 93Z(5) of the *Crimes Act* states that 'religious belief or affiliation' means holding or not holding a religious belief or view;
- e. s 49ZE of the *ADA* prohibits vilification on the ground the person (or group of persons) has, or does not have, a religious belief or **affiliation**, or **engages, or does not engage, in religious activity** (emphasis added);
- f. the *Discrimination Act 1991* (ACT) defines 'religious conviction' to include having (or not) a religious **conviction, belief, opinion or affiliation; engaging (or not) in religious activity; the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander people; and engaging in the cultural heritage and distinctive spiritual practices, observances, beliefs and teachings of Aboriginal and Torres Strait Islander peoples** (emphasis added); and

g. s 3 of the *Racial and Religious Tolerance Act 2001* (Vic) defines ‘religious belief or activity’ to include holding or not holding a **lawful** religious belief or view, and **engaging in, not engaging in or refusing to engage in a lawful religious activity** (emphasis added).

19. The Association considers it would be preferable for the terminology of anti-vilification provisions to be considered comprehensively by the Commission during the *ADA* Review.

*Recent reforms to NSW vilification provisions*

20. There are other significant and recent legislative developments in NSW relevant to the s 93Z Review.

21. Schedule 1[1] and [3] of the *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) commenced on 1 January 2024. The Amendment Act enables prosecutions under s 93Z to be commenced by the Director of Public Prosecutions (DPP) or a police officer. Previously, s 93Z prosecutions could not be commenced without the approval of the DPP. This amendment to s 93Z will sunset on 1 January 2026, effectively providing for a two-year trial.<sup>23</sup> The amending Act further requires a statutory review to be completed by 1 January 2025, including a report tabled in each House of Parliament, to determine whether the policy objectives of the amendment remain appropriate.<sup>24</sup>

22. The Association notes the evidence of the Director of Public Prosecutions before the NSW Parliament Portfolio Committee No. 5 – Justice and Communities on 6 March 2024.<sup>25</sup> The Director of Public Prosecutions did not identify any particular concerns regarding the operation of s 93Z of the Crimes Act prior to the legislative amendments which enable police to commence prosecutions.

23. The *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) amended the *ADA* to make it unlawful to vilify a person or group of persons on the ground of religious belief or affiliation or religious activity.<sup>26</sup> These new provisions commenced on 12 November 2023.

Recent federal inquiries and foreshadowed legislative reform

24. The Association also understands that the Federal Government is currently considering the Australian Law Reform Commission’s report on its inquiry into religious educational institutions and anti-discrimination laws ‘*Maximising the Realisation of Human Rights: Religious Educational*

---

<sup>23</sup> Section 2(2) of the *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW).

<sup>24</sup> Sch 11, Pt 42, s 95 of the *Crimes Act*.

<sup>25</sup> See Transcript of Committee proceedings, NSW Parliament Portfolio Committee No. 5 – Justice and Communities, 6 March 2024, p 54, available here:

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

<sup>26</sup> See ss 49ZD and 49ZE of the *ADA*.

*Institutions and Anti-Discrimination Laws* published on 21 March 2024 (ALRC Report). The ALRC Report suggests that the Australian Government should consider whether to prohibit vilification on all grounds protected under Commonwealth anti-discrimination laws, noting that the *Sex Discrimination Act 1984* (Cth) does not currently expressly prohibit vilification on the grounds protected under that Act.<sup>27</sup>

25. Following the publication of the ALRC Report, it has been reported that the Federal Government is proposing bills to amend the *Sex Discrimination Act 1984* (Cth), and to create a Religious Discrimination Act that includes anti-vilification provisions.<sup>28</sup>
26. The Association also notes the potential role of the Federal Government's proposed Misinformation and Disinformation Bill in addressing racial and religious vilification.<sup>29</sup> The Australian Government's fact sheet regarding the draft Bill, released for public consultation in 2023, noted that the proposed powers would only apply to misinformation and disinformation that is reasonably likely to cause or contribute to serious harm. One of the harms intended to be captured included 'hatred against a group in Australian society on the basis of ethnicity, nationality, race, gender, sexual orientation, age, religion or physical or mental disability'. An example of serious harm in the fact sheet was 'misinformation about a group of Australians inciting other persons to commit hate crimes against that group'.<sup>30</sup>

#### Concerns regarding the timing of the s 93Z Review

27. The Association suggests that any consideration of further reform of s 93Z of the *Crimes Act* would preferably occur in tandem with the *ADA* Review, or be informed by the Commission's Report on the *ADA* Review, as well as following assessment of the impact of the recent amendments to s 93Z. The latter would include an evaluation of the nature, volume and outcome of s 93Z prosecutions by NSW Police and the Director of Public Prosecutions since 1 January 2024. The Association

---

<sup>27</sup> See paragraph 9.41 of the ALRC Report, available here: <https://www.alrc.gov.au/news/adl-final-report-tabled/#:-:text=The%20Australian%20Law%20Reform%20Commission,with%20Australia's%20international%20legal%20obligations>

<sup>28</sup> See, for example, an article published by The Guardian on 23 March 2024, available here: <https://www.theguardian.com/australia-news/2024/mar/23/australias-religious-and-sex-discrimination-laws-need-fixing-a-new-report-says-what-happens-next#:-:text=Dreyfus%20has%20said%20%E2%80%9Cno%20student,and%20maintain%20communities%20of%20faith.%E2%80%9D>

<sup>29</sup> The Association understands that the Federal Government is considering refinements the draft Bill following consultation in 2023. See article published by the Guardian dated 13 November 2023, available here: <https://www.theguardian.com/australia-news/2023/nov/13/labor-misinformation-bill-objections-freedom-of-speech-religious-freedom>

<sup>30</sup> See Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts Communications Legislation Amendment (Combating Misinformation and Disinformation) Bill 2023 - Fact sheet dated June 2023 p 4, available here: <https://www.infrastructure.gov.au/sites/default/files/documents/communications-legislation-amendment-combating-misinformation-and-disinformation-bill-2023-factsheet-june2023.pdf>



considers that it is unfortunate that the s 93Z Review has been instituted with apparent haste and before the impact of the recent amendments to s 93Z can be assessed.

28. By way of comparison, the Victorian Parliament Anti-Vilification Protections Inquiry involved a comprehensive consultation and public hearing process. The Committee's report was tabled in the Victorian Parliament on 3 March 2021<sup>31</sup> and consultation on its recommendations is ongoing.

29. Notwithstanding the Association's observations on the scope and timing of the s 93Z Review, the Association provides comments on the following matters.

#### **Caution should be taken before adopting elements from similar provisions in other jurisdictions**

30. There are a range of differences in the elements of offence provisions, as well as the broader criminal and civil vilification regimes, in other jurisdictions.

31. The Association urges caution when considering apparent inconsistencies between s 93Z of the *Crimes Act* and vilification provisions in other jurisdictions. Whilst it is generally preferable for there to be consistency of legislation between Australian jurisdictions, the Association does not advocate for reform to reflect existing legislation simply for the sake of consistency.

32. For instance, unlike s 93Z, the ACT offence of serious vilification does not carry a custodial sentence<sup>32</sup> and the Queensland offence<sup>33</sup> carries a significantly lower custodial penalty in comparison to NSW (6 months maximum as opposed to 3 years). As noted above, the Victorian criminal offence provisions are currently under review.<sup>34</sup>

33. The role and scope of available civil remedies is also important. Western Australia, for example, does not have a civil regime addressing racial or religious vilification.

34. It is also important to note that NSW, unlike Victoria, the ACT and Queensland, lacks a statutory human rights framework under which statutory provisions are to be interpreted in a way compatible with human rights.

#### **The threshold of harm in the ADA**

35. A core element of s 93Z of the *Crimes Act* is the level or threshold of harm - that is, 'threatens or incites violence' - required to be established. 'Violence', as defined in s 93Z(5), includes violent

---

<sup>31</sup> Report of the Victorian Parliament Anti-Vilification Protections Inquiry, available here:

<https://www.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-anti-vilification-protections/reports>

<sup>32</sup> Section 750, *Criminal Code 2002* (ACT).

<sup>33</sup> Section 131A, *Anti-Discrimination Act 1991* (Qld).

<sup>34</sup> Report of the Victorian Parliament Anti-Vilification Protections Inquiry (n 28), recommendation 20: *That the Victorian Government reform the current criminal offences of serious vilification to simplify and lower the thresholds, and in particular, to specify that: A person must not, on the ground of one of the protected attributes, intentionally or recklessly engage in conduct that - (a) is likely to incite hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons; or (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.*

conduct and ‘violence towards a person or group of persons’ includes violence towards property of the person or a member of the group, respectively.

36. By contrast, the relevant harm threshold under ss 20C and 49ZE of the *ADA* is ‘to incite hatred towards, serious contempt for, or severe ridicule of.’<sup>35</sup> This threshold has been established, for example, as follows:

- a. In *Ekeremawi v Jones (No 3)* [2014] NSWCATAD 58, radio presenter Alan Jones was found to have breached s 20C by reading out an email on his program that was found to be ‘so strongly expressed’ that it was likely to have the effect of inciting hatred or serious contempt in an ordinary member of the audience of people of Arab race (at [66]);
- b. In *Ekeremawi v Commissioner of Police (NSW)* [2019] NSWCATAD 79, a NSW Police Force training exercise with two police officers portraying the armed offenders wearing keffiyahs racially vilified Palestinians and Arabs;
- c. In *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77, a newspaper article breached s 20C on the basis that it incited an ordinary reasonable reader to hate or despise Palestinians, to view them with contempt and see them as inferior to Israelis (at [83]); and
- d. In *Wolf v Secretary, Department of Education* [2023] NSWCATAD 202, a high school teacher’s conduct, whilst teaching a class, was found to incite, hatred towards, serious contempt for, or severe ridicule of, persons of Indian race on the ground of their race, in breach of s 20C (at [15]).

**Should the relevant harm threshold in s 93Z be lowered to include hatred, revulsion, contempt and/or ridicule?**

37. The Association notes there are different approaches regarding the threshold of harm required to be established in offence provisions in other Australian and UK jurisdictions.

38. The Association further notes that there are a number of legal and practical limitations to addressing racial and religious vilification under the *ADA*. This includes:

- a. **Public condemnation:** Confidential conciliation is the preferred mechanism to resolve alleged breaches of civil vilification laws in Australia.<sup>36</sup> Unless specified in a settlement agreement, conciliation provides no public condemnation of vilification, and does not

---

<sup>35</sup> Section 20C renders it unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of their race. Section 49ZE prohibits the same conduct on the ground of the religious belief or affiliation (or lack thereof), or engagement in religious activity (or lack thereof) of the person or group members. A complainant (unlike s 93Z) must prove the contravention on the balance of probabilities. The respondent can seek exemptions for fair reports, matters subject to a defence of absolute privilege and acts done reasonably and in good faith for academic, artistic, scientific, research, or religious discussion or instruction purposes or for other purposes in the public interest.

<sup>36</sup> Gelber and McNamara (above n 14), p 495.

facilitate wider educative and deterrent impacts.<sup>37</sup> For First Nations people in particular, individual complaints mechanisms have led to ‘exhaustion, resignation, fear of retaliation and disillusionment’.<sup>38</sup> A study of a 20-year period between 1989 and 2010 found that nationally, only c.1.8% of complaints of unlawful vilification were referred to a court/tribunal for adjudication and, of these, around half of the complaints were upheld.<sup>39</sup> Thus, an insignificant number of cases are known publicly.<sup>40</sup> Crucially, an effective criminal provision can facilitate deterrence and access while establishing precedent; and

- b. Standing and costs: Only members of the targeted group have standing to lodge a complaint.<sup>41</sup> Representative complaints by organisations are only available where there is a ‘sufficient interest’ to have standing.<sup>42</sup> Private litigation of a public wrong places a significant burden on victims, particularly when damages can be minimal and costs can be great.

39. The Association notes that these matters are likely to be considered by the *ADA* Review.

40. Bearing in mind the divergent approaches taken in other jurisdictions and under the *ADA*, a question arises as to whether the current harm threshold in s 93Z should be lowered, or an additional offence introduced, to capture conduct intended to incite hatred, revulsion serious contempt or severe ridicule. This would reflect the various approaches in the ACT, Queensland and Victoria.

41. The Association considers that these questions regarding the harm threshold should include consideration of important factors, as detailed below.

The criminality may also be addressed by existing NSW and Commonwealth offences

42. First, depending upon the circumstances, a range of other offences may be able to be prosecuted in the event that there are no reasonable prospects of a successful prosecution under s 93Z of the *Crimes Act* including:

- a. *Crimes Act*
  - i. Sending documents containing threats, s 31;
  - ii. Riot, s 93B;
  - iii. Affray, s 93C;
  - iv. Displaying Nazi symbols, s 93ZA;
  - v. Threatening to destroy or damage property, s 199;

---

<sup>37</sup> Ibid, p 495 - 496.

<sup>38</sup> Fiona Allison, ‘A Limited Right to Equality: Evaluating the Effectiveness of Racial Discrimination Law for Indigenous Australians Through an Access to Justice Lens’ (2013-2014) 17(2) *Australian Indigenous Law Review* 3, p 12.

<sup>39</sup> Katharine Gelber and Luke McNamara, ‘Private Litigation to Address a Public Wrong: A Study of Australia’s Regulatory Response to “Hate Speech”’ (2014) 33 *Civil Justice Quarterly* 307, 314.

<sup>40</sup> Gelber and McNamara (above n 14), p 496.

<sup>41</sup> Section 88, *ADA*.

<sup>42</sup> Section 87A(1)(c), *ADA*.

- vi. Intimidation or annoyance by violence or otherwise, s 545B;
- b. *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
  - i. Stalking or intimidation with intent to cause fear of physical or mental harm, s 13;
- c. *Summary Offences Act 1988* (NSW)
  - i. Offensive conduct, s 4;
  - ii. Offensive language, s 4A;
- d. *Criminal Code Act 1995* (Cth)
  - i. Urging violence against groups, s 80.2A;
  - ii. Urging violence against members of groups, s 80.2B;
  - iii. Advocating terrorism, s 80.2C;
  - iv. Advocating genocide, s 80.2D;
  - v. Public display of prohibited Nazi symbols or giving Nazi salute, s 80.2H;
  - vi. Using a carriage service to make a threat, s 474.15;
  - vii. Using a carriage service to menace, harass or cause offence, s 474.17.

43. It is acknowledged that there is a distinction between s 93Z and most other criminal offences. While most other offences require certain actions to be directed towards a specific individual or individuals,<sup>43</sup> an offence may be committed under s 93Z if a person by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the grounds specified in subsections 93Z(1)(a)-(f). It is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence.<sup>44</sup> Section 93Z seeks to maintain social cohesion by deterring actions that may have a negative effect on the conduct of third parties and provides for circumstances where the victim is not necessarily targeted individually, but is part of a broader group, which is harmed as a whole.<sup>45</sup> The inclusion of threatening violence within s 93Z also provides for circumstances where an offender did not intend to incite, or was reckless as to inciting, a third party to inflict violence.<sup>46</sup>

44. Despite the above distinction, it is important to note that where a prosecution may not have reasonable prospects of success under s 93Z, there may be sufficient evidence to pursue a range of other criminal offences, many of which have higher maximum penalties, depending upon the circumstances.

#### Racial and religious hatred may also be taken into account as an aggravating factor on sentence

45. Secondly, the motivation of an offender may also be taken into account as an aggravating factor on sentence. If an offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability), subsection

---

<sup>43</sup> See comments in relation to the previous offence in section 20D of the *Anti-Discrimination Act 1977* (NSW) in Department of Attorney General and Justice, Submission to the Legislative Council Standing Committee on Law and Justice inquiry into racial vilification law in NSW, March 2013, p 6; Legislative Council Standing Committee on Law and Justice, "Racial vilification law in New South Wales", Report 50 - December 2013, para 2.54.

<sup>44</sup> Subsection 93Z(3), *Crimes Act*.

<sup>45</sup> Department of Attorney General and Justice submission (above n 42), p 6.

<sup>46</sup> The Hon. Mark Speakman SC MP, Second Reading Speech - Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018, NSW Legislative Assembly, 5 June 2018, p 42.

21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows this to be taken into account as an aggravating factor on sentence. The examples listed in parentheses in subsection 21A(2)(h) are not an exhaustive list.<sup>47</sup> In *Holloway v R* [2011] NSWCCA 23, Hall J said at [32]:

*In any multi-cultural society, criminal acts involving racial violence ought to be strongly deterred and this fact taken into account in a case such as the present when sentencing an offender in respect of such conduct: Crimes (Sentencing Procedure) Act 1999, s.21A(2)(h).*

### The potential disproportionate impact on First Nations people

46. Thirdly, and importantly, lowering the threshold of harm under s 93Z of the *Crimes Act*, or introducing a new offence, could have a disproportionate or discriminatory effect on communities that the legislation intends to protect, particularly First Nations people and other minority groups who are already overpoliced. Any contemplated reform of s 93Z should take into account prosecution data of existing public order offences and the potential impact of reform of s 93Z on the NSW Government's Closing the Gap commitments to reduce adult and juvenile incarceration rates by 15% and 30% by 2031 respectively. According to the latest NSW BOCSAR Closing the Gap Quarterly Report on Aboriginal overrepresentation in the criminal justice system (April 2024), 30.4% of prisoners are Aboriginal, an increase of 7.7% since December 2021; and the rates of Aboriginal people on remand has increased by 27.3 % since December 2021.<sup>48</sup>

47. In its Final Report *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, the ALRC examined the overrepresentation of Aboriginal and Torres Strait Islander people as recipients of fines for offensive language:

Primarily: most offensive language Criminal Infringement Notices (CINs) are issued for language directed at police; and, if tested in court, may not meet the legal definition of 'offensive'. Instead, under CINs, police are the 'victim, enforcer and judge' of the law, which provides strong foundation for conflict and misuse.

The Royal Commission into Aboriginal Deaths in Custody recognised the role of offensive language provisions in incarcerating Aboriginal and Torres Strait Islander people, and recommended that offensive language provisions be monitored.

The high incidence of Aboriginal and Torres Strait Islander offensive language offending has been ascribed to the likelihood of Aboriginal and Torres Strait Islander people being out in public, amounting to an increased likelihood of police interaction. Aboriginal and Torres Strait Islander people are likely to be over-represented in areas of social disadvantage, including homelessness, mental health issues and lower education; and are more likely to be reliant on

---

<sup>47</sup> *Dunn v R* [2007] NSWCCA 312 at [32].

<sup>48</sup> BOCSAR NSW Closing the Gap Target 10 Quarterly Report, available here: <https://www.bocsar.nsw.gov.au/Publications/Aboriginal-OR/CJS-Aboriginal-over-representation-quarterly-Dec-2023.pdf>

public services. This visibility means that there is a high likelihood of interaction with police, which can easily escalate.<sup>49</sup>

48. Recent data concerning the disproportionate prosecution of First Nations people in NSW for public order offences is telling in this regard. Between July 2022 – June 2023, NSW Criminal Courts Statistics data<sup>50</sup> reports that:

- a. across all NSW Higher, Local and Children’s Criminal courts there were 648 defendants with a finalised charge for offensive language (81.5% proven)
  - i. 248 defendants with a finalised charge were Aboriginal defendants (83.5% proven), representing approximately 38% of the cohort (that is, defendants with a finalised charge in 22/23 FY);
- b. across all NSW Higher, Local and Children’s Criminal courts there were 1,367 defendants with a finalised charge for offensive behaviour (76.1% proven); and
  - i. 587 defendants with a finalised charge were Aboriginal defendants (75.1% proven), representing approximately 43% of the cohort (that is, defendants with a finalised charge in 22/23 FY).

#### Conclusion on the harm threshold

49. On balance, the Association considers that it is premature to form a view as to whether the threshold of harm under s 93Z should be lowered. Before such a step is taken, evidence of the impact of the removal of the requirement for DPP approval to commence prosecutions under s 93Z, including its impact on First Nations people, should be considered. Further, before such a step is taken the effectiveness of civil vilification provisions should be assessed. Potential reform of s 93Z should be considered alongside the Commission’s review of the *ADA*. Overhaul of civil remedies for vilification under the *ADA* may render unnecessary any expansion of the operation of the criminal law offence created by s 93Z, particularly bearing in mind the existence of other offences under existing NSW and Commonwealth provisions.

#### *Conclusion*

50. The criminal law is a blunt tool in addressing conduct underpinned by complex historical, social and political factors. The Association is concerned that further reform of s 93Z of the *Crimes Act*, at this stage, would be premature. This is particularly so given the recent reforms which enable

---

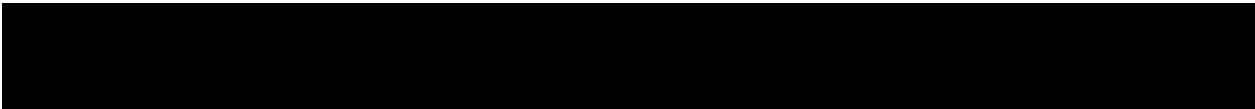
<sup>49</sup> ALRC, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2017), [12.173-12.175] (footnotes omitted), available here: <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>

<sup>50</sup> NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics July 2018 – June 2023*, available here: [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_publication/Pub\\_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2023.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2023.aspx) Note that ‘offensive language’ and ‘offensive behaviour’ are defined under the Australian and New Zealand Standard Offence Classification (ANZSOC), and not by reference to s 4 and s 4A of the *Summary Offences Act 1988* (NSW).

police officers to commence s 93Z prosecutions, and in circumstances where the Commission is currently conducting a comprehensive review of the *ADA*.

51. Section 93Z of the *Crimes Act* should not be considered in isolation from other important measures to foster and support tolerance and cohesion in NSW. This includes education and public awareness campaigns, for example, the development of a national anti-racism strategy being led by the Australian Human Rights Commission. Reports about the use social media following recent events in Sydney have highlighted the significant potential of social media platforms to incite racial and religious vilification. The Association urges consideration of these matters alongside consideration of any reform to the civil and criminal legislative tools to address religious and racial vilification.

52. Thank you for the opportunity to make a submission to the s 93Z Review. The Association looks forward to further opportunities to engage with the Commission regarding these matters, particularly as consultation continues on the *ADA* Review.



Yours sincerely



Dr Ruth Higgins SC

President