Serious racial and religious vilification

OPTIONS
PAPER

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NSW Law Reform Commission

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the NSW Law Reform Commission is asked to expeditiously review and report on the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW.

In undertaking this review, the Commission should have regard to:

1. the impact of racial and religious vilification on all parts of the NSW community;
2. criminal vilification offences in other Australian and international jurisdictions, and the desirability of harmonisation and consistency between New South Wales, the Commonwealth and other Australian States or Territories;
3. the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW);
4. the impacts on freedoms, including freedom of speech, association and religion;
5. the need to promote community cohesion and inclusion;
6. the views of relevant stakeholders as determined by the Commission; and
7. any other matter that the Commission considers relevant.

[Received 14 February 2024]

1. Introduction

1.1 In February 2024, the NSW Attorney General asked us to expeditiously review and report on the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*) in addressing serious racial and religious vilification in NSW.

1.2 Section 93Z makes it an offence for a person, by public act, to intentionally or recklessly threaten or incite violence towards another person or a group of persons on any of the following grounds:

(a) race

(b) religious belief or affiliation,

(c) sexual orientation

(d) gender identity

(e) intersex status

(f) HIV or AIDS status.

1.3 The maximum penalty in the case of an individual is 100 penalty units ($11,000) or 3 years' imprisonment (or both). In the case of a corporation, the maximum penalty is 500 penalty units ($55,000).

1.4 We consulted with a wide range of people and groups, including judges, prosecutors, police, the legal profession and groups, including religious and faith based groups and community groups. We received 42 written submissions to date. We thank everyone who has contributed to the review.

1.5 This paper briefly outlines some of the options for reform of s 93Z and the criminal law to address serious racial and religious vilification that were raised with us during consultations.

1.6 We understand the importance of wide and genuine consultation in this area. We decided to release this options paper to provide an opportunity for all views on the issues raised with us during consultation to be considered.

1.7 We have not decided whether to adopt any of the options in this paper and we may consider other matters in our final report within the specific terms of reference.

1.8 During consultations some options for reform were raised with us to improve the civil vilification framework. We are reviewing the *Anti-Discrimination Act 1977* (NSW) (Anti-Discrimination Act) and will address the issues raised about the civil vilification framework through that review.

1.9 Concerns were raised about the exclusion of vilification of LGBTQIA+ people and people who live with HIV and AIDS from the terms of reference. We also received submissions about expanding the list of protected attributes in s 93Z, for example to include people with disability. We acknowledge these concerns and will consider the impact on all protected groups under s 93Z of any recommendations we consider making. However, we are required to conduct our review in accordance with the terms of reference set by the NSW Government. We will not be considering whether to expand the existing list of protected attributes under s 93Z.

1.10 We seek your written submissions on these options by Friday 28 June 2024. Once we have considered your submissions, we will prepare our final report with recommendations to the Attorney General.

2. Definition of "public act"

2.1 This section seeks your views on the definition of "public act" in s 93Z.

2.2 For a threat or incitement of violence to be an offence under s 93Z, it must be done "by public act". Section 93Z(5) defines "public act" to include:

- any form of communication "to the public" and
- the distribution or dissemination of any matter, "to the public".

2.3 This focuses on who the conduct is directed towards (that is, the public), not where or how the act occurred.

2.4 We were asked to consider whether the current definition adequately captures situations where the public has limited access to a communication. For example, it may not be clear if the following scenarios are captured:

- livestreaming a video that can only be seen by an online following
- livestreaming a video on an online server, like Discord, that can only be accessed via invitation or subscription, and
- a statement made at a conference or meeting that is accessible by invitation or payment of an admission fee.

2.5 The definition of "public act" in s 93Z could be amended so it incorporates the definition of "public place" in other laws. These define a public place as:

- places that are open to or used by the public, regardless of whether there is a charge for entry or use or whether it is open only to some people,[1] and
- any place the public, or a section of the public, has access to as of right or by invitation, and whether or not there is a charge for admission.[2]

2.6 Adapting some of the elements of these definitions of 'public place' may help ensure that statements made to limited numbers of persons are not excluded from s 93Z. However, this may have implications for people who have conversations in genuinely private spaces.

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1. *Summary Offences Act 1988* (NSW) s 3(1) definition of "public place".
2. *Criminal Code* (Cth) dictionary, definition of "public place".

Option 1: Definition of "public act"

Should the definition of "public act" be changed in s 93Z? If so, should it incorporate the approach of the definitions of "public place" in the *Summary Offences Act 1988* (NSW) and the *Criminal Code* (Cth) to capture communications made to limited numbers of people? Are there any other changes that should be made?

3. Mental element of recklessness

3.1 This section seeks your views on the mental element of "recklessness" in s 93Z.

3.2 Some concerns were raised in consultations about this mental element. In s 93Z, recklessness is generally understood to mean that a person:

- foresaw the possibility that their public act might result in a harmful or prohibited consequence, and
- decided to commit that public act regardless of that risk.

3.3 We heard arguments in favour of removing recklessness as a mental element and limiting the offence's application to intentional acts. The arguments included that:

- s 93Z is a serious offence and should be treated as one requiring specific intent to threaten or incite violence
- it may reduce the risk of infringing on the implied freedom of political communication
- it may reduce the risk of deterring or criminalising non-malicious communications and ensure that the criminal law only applies to serious cases of vilification, and
- Australia's international obligations require speech to be criminalised only where there is an intention to threaten or incite violence.

3.4 However, the low number of prosecutions under s 93Z to date may suggest that the element of recklessness has not resulted in inappropriate prosecutions.

3.5 Another reason for keeping recklessness in s 93Z is that it may encourage people to think about the possible consequences before making potentially inflammatory remarks.

3.6 We heard from some stakeholders that there are community concerns about the low number of s 93Z prosecutions. Removing recklessness may not address these concerns, because proving intention to incite violence is more difficult than proving recklessness. A 2013 NSW parliamentary inquiry recommended that recklessness be sufficient to establish an intention to incite under the former serious racial vilification offence in s 20D of the *Anti-Discrimination Act*.[3]

Option 2: Mental element of recklessness

Should the mental element of recklessness be removed from s 93Z?

3. NSW, Legislative Council Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.106]–[4.107], rec 3.

4. Incitement to violence

4.1 This section seeks your views on the meaning of "incite" in s 93Z.

4.2 Some groups raised concerns that incitement to violence is difficult to prove and may be a reason for the low rate of s 93Z prosecutions. These concerns included:

- the meaning of "incite" is narrow, and
- prosecutors appear to consider that proof of incitement requires a high evidentiary standard, including the need to show the impact of a person's speech on the target audience.

4.3 "Incite" is not defined in s 93Z. However, it has been interpreted to mean:

- to rouse, to stimulate, to urge, to spur on, to stir up or to animate, and
- to cover conduct involving commands, requests, proposals, actions or encouragement.[4]

4.4 The conduct must be capable of inciting the relevant emotions or responses in an ordinary member of the class to whom it is directed.[5]

4.5 Section 93Z is not the only offence in the *Crimes Act* that uses the term "incite". For example, there are offences under division 10 of part 3 about inciting persons to engage in sexual acts.[6]

4.6 Concerns were expressed that some language used to vilify protected people is subtle enough to trigger violence but evade prosecution. There were suggestions that "incite" should be replaced or supplemented with additional terms as alternatives. Other terms suggested during consultations included "promote", "advocate", "glorify", "stir up", and "urge".

4.7 Other groups considered that the meaning of incite was clear, well understood and did not require amendment.

Option 3: Incitement to violence

Should the term "incite" in s 93Z be replaced with terms such as "promote", "advocate", "glorify", "stir up" or "urge"? Should s 93Z be amended to provide that the meaning of "incite" incorporates these terms? Should any other amendments be made to address this issue?

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4. *Sunol v Collier (No. 2)* [2012] NSWCA 44 [26].
5. *Sunol v Collier (No. 2)* [2012] NSWCA 44 [28].
6. See, eg, *Crimes Act 1900* (NSW) s 61KC.

5. An offence of inciting hatred

5.1 This section seeks your views on whether to introduce an offence of inciting hatred on the grounds of a protected attribute in s 93Z.

5.2 Some groups told us that s 93Z should capture vilification and hate speech that falls short of threatening or inciting violence. They supported an offence of inciting hatred, to protect the community and reflect expectations that such conduct should be sanctioned by the criminal law.

5.3 Similar offences exist elsewhere. For instance, Western Australia has offences of intentionally inciting racial animosity or harassment and engaging in conduct likely to incite racial animosity or harassment.[7] Other jurisdictions have offences of inciting hatred, serious contempt or severe ridicule on the grounds of a protected attribute by threatening physical harm towards a person or their property.[8]

5.4 Civil vilification legislation, such as s 20C(1) of the *Anti-Discrimination Act*, makes it unlawful to incite hatred toward, serious contempt for, or severe ridicule of, a person or group on the grounds of race or another protected attribute.

5.5 There were concerns about the potential impact of expanding the criminal law in this way. For instance, young people could be charged after saying something controversial and offensive without appreciating the gravity of their words or actions. Similar concerns were raised about Aboriginal people, whose interactions with police might be captured by such an offence.

5.6 Another concern was that there may be different opinions about whether a person's speech is "hate" speech. This suggests this may not be suitable for the criminal law, which draws clear boundaries between criminal and non-criminal behaviour. There are concerns about potential over-reach, including capturing discussions about controversial topics. Some considered this may be better addressed by civil vilification frameworks.

5.7 The implied freedom of political communication restricts the making of laws that burden communications about politics and government that are not proportionate to achieving a legitimate purpose.[9] Expanding s 93Z beyond threats and incitement of violence may make it vulnerable to challenge as not being proportionate to achieving the legitimate end of addressing hate speech and vilification.

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7. *Criminal Code* (WA) s 77, s 78.
8. See, eg, *Racial and Religious Tolerance Act 2001* (VIC) s 24(1), s 25(1); *Racial Vilification Act 1996* (SA) s 4; *Criminal Code* (Qld) s 52A.
9. *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, 274 CLR 1 [44]–[46].

Option 4: An offence of inciting hatred

Should an offence of inciting hatred on the ground of a protected attribute be introduced?

6. Increase maximum penalty

6.1 This section asks whether the maximum penalty for an offence against s 93Z should be increased.

6.2 One possible reason for the low rate of prosecutions of s 93Z could be that other offences, with higher maximum penalties, are available to deal with hate-related behaviour. These include the offence of intimidation, which has a maximum penalty of 5 years' imprisonment.[10] Where the facts of a complaint of criminal conduct would constitute an offence with a higher maximum penalty than s 93Z, it is possible that prosecutors may choose to charge that offence instead.

6.3 Aligning the maximum penalty for s 93Z with the maximum penalty for comparable offences like intimidation could provide an incentive for s 93Z to be used.

6.4 Maximum penalties are reserved for cases in which the nature of the crime and the circumstances of the offender are so serious that they justify the maximum penalty. Parliament can increase a maximum penalty if there are concerns that it is too lenient. Increases in the maximum penalty can reflect changing community standards about the appropriate sentence for that offence. When parliament increases a maximum penalty, courts generally interpret this as indicating that sentences for that offence should increase in line with parliament's intention.[11]

6.5 The maximum penalty for s 93Z is higher than the maximum penalties for the previous serious vilification offences in the *Anti-Discrimination Act* that it replaced. In Australia, only Western Australia's offences of intentionally inciting racial animosity or harassment and engaging in conduct likely to incite racial animosity or harassment have higher maximum penalties.[12]

6.6 Increasing the maximum penalty carries risks of unintended consequences on disadvantaged groups, including young people and Aboriginal people. In particular, Aboriginal people are often charged with offences arising from interactions with police.

Option 5: Increase maximum penalty for s 93Z

Should the maximum penalty for s 93Z be increased? If so, what should be the new maximum penalty?

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10. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.
11. See NSW Law Reform Commission, *Serious Road Crime*, Consultation Paper 23 (2023) [3.8]–[3.9].
12. *Criminal Code* (WA) s 77, s 78.

7. Aggravated offences

7.1 This section asks whether there should be aggravated versions of particular offences where these are motivated by hatred, that have higher maximum penalties.

7.2 NSW courts are required to take into account as an aggravating factor on sentence, that an offence is motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged.[13]

7.3 In consultations, some groups indicated they were dissatisfied with this aggravating factor as a way of dealing with hate-related crime. They said that the aggravating factor is rarely raised in court by prosecutors and that it does not fully hold the offender accountable for their behaviour.

7.4 One option is to adopt Queensland's approach of creating aggravated versions of offences like assault and intimidation, with an additional element of being motivated by hatred based on a protected attribute.[14] Where an offence is proved and a further aggravating element of hatred is also proved, the defendant will be guilty of an aggravated offence with a higher maximum penalty. Some groups argued this would hold offenders accountable for hate-related crimes.

7.5 A potential issue with this option is that offenders may not be willing to plead guilty to an aggravated offence because of the public stigma of committing a hate offence and the higher penalty. It may lead to more contested cases, which take longer to resolve and put resource pressures on courts, prosecutors and Legal Aid.

7.6 Another risk may be that prosecutors accept guilty pleas to standard offences because the maximum penalty for that offence is appropriate for the conduct, and because of the public interest in saving court time and resources. Victims could be disappointed in cases where a guilty plea is accepted to the basic offence.

7.7 There is also a risk of adverse impacts on young people and Aboriginal people, similar to the risks we discuss above.

Option 6: Introduce aggravated offences

Should there be aggravated versions of offences where the offence is motivated by hatred, which attract a higher penalty?

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).
14. *Criminal Code* (Qld) s 52B, s 335(2), s 359E(6).

8. A harm-based test

8.1 This section seeks your views about whether a harm-based test should be introduced into s 93Z, instead of or in addition to the current incitement-based test.

8.2 The harm-based test asks whether the conduct is reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute. This would capture vilification that falls short of threatening or inciting violence.

8.3 During consultations, some groups said that a harm-based test appropriately recognises the harm experienced by victims. This is because it shifts the focus of the test from the impact on the ordinary reasonable member of the offender's audience, to the adverse effect of the conduct on targeted individuals and communities.

8.4 The harm-based test is in civil vilification laws elsewhere, including in the Commonwealth, Northern Territory and Tasmania.[15] Also, recent law reform inquiries into vilification in other states and territories have recommended introducing the harm-based test in their civil vilification laws.[16] These inquiries found that the focus of the harm-based test on the targeted individuals and communities is appropriate. They considered the change would improve the legal and operational effectiveness of civil vilification laws and address their under-use.

8.5 However, a harm-based test may not be appropriate for the criminal context given the seriousness of criminal penalties, including deprivation of a person's liberty. This may be significant where there is not always agreement on what words or acts amount to hatred, so a reasonable person's view may be difficult to assess and apply to the particular circumstances of the offence.

8.6 The option of supplementing the existing elements of s 93Z could narrow its scope and make it more complex to prove.

8.7 This option could have similar risks to the option of introducing an offence of inciting hatred. These include adverse impacts on young people and Aboriginal people, and the potential for challenge on the basis of the implied freedom of political communication.

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15. See, eg, *Racial Discrimination Act 1975* (Cth) s 18C; *Anti-Discrimination Act 1992* (NT) s 20A; *Anti-Discrimination Act 1998* (Tas) s 17.

16. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 120, 123, rec 9, rec 10; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [6.5.1] rec 111; Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 44-45, rec 4; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 17.1, rec 17.2.

Option 7: Introduce a harm-based test
Should an objective harm-based test be introduced into s 93Z?