Submission to NSW Law Reform Commission
Serious racial and religious vilification options paper

We thank the NSW Law Reform Commission for the opportunity to make a submission on the Serious racial and religious vilification options paper, (the 'options paper'). Our responses to the outlined options are as follows:

Definition of 'public act'

We support the suggestion in cl 2.5 of the options paper, that the definition of 'public act' in s93Z should be changed to include places that are open or used by the public regardless of whether there is a charge for entry or whether it is open to only some people, such as at a conference. We believe it should also be broad enough to include material that is disseminated via social media. The definition of 'public place' in the *Summary Offences Act 1988 (NSW*) does not include schools, but in the recent case of *Wolf v Secretary, Department of Education* [2023] NSWCATAD 20227 the NSW Civil and Administrative (NCAT) Appeal Panel found that a public act included vilification by a teacher in the context of teaching a class of students.

The concern that broadening 'public act' might have implications for people who have conversations in genuinely private places can be mitigated by a clear definition of 'public act' as an act in which it is reasonably foreseeable that a member of the public could have seen or heard the act (without requiring proof that a member of the public did see or hear the act), and through explicit exclusions, such as conversations taking place in the home among family members.

Mental element of recklessness

The mental element of recklessness should be retained. While recklessness can mean having disregard to one's actions, in the context of s93Z recklessness is understood to mean that a person 'foresaw the possibility that their public act might result in a harmful or prohibited consequence' (options paper 3.2) but decided to do it anyway. This is sufficient to ensure that a person with good motives is not captured by this law. Requiring intent would make the provision very difficult to prosecute. The low rate of prosecutions under s93Z does not suggest that recklessness has set the bar too low for a criminal offence, and demonstrates that there is not a risk of unduly burdening the implied freedom of political communication.

Incitement to violence

It is our submission that the term 'incitement' should not be replaced by terms such as 'promote, advocate or glorify' because incitement is an established category of offence in criminal law and is appropriate given that s93Z is a criminal offence. We recommend amending the provision to state that it does include advocating and urging.

The risk in *replacing* incitement with several different terms is that each of those terms will then have to be defined and it is possible that terms such as 'promote', 'stir up' or 'glorify' might be defined too broadly, raising objections that s93Z interferes with speech.

These definitional issues have emerged in the context of debates about s18C of the *Racial Discrimination Act* 1975 (Cth), which makes it unlawful to 'offend, insult, humiliate or intimidate' another person or a group of people because of their race. Critics of s18C have argued that the inclusion of these terms in the offence is too broad and vague, and unduly restricts free speech. Retaining the term 'incitement' avoids these sorts of criticisms and is appropriate for a criminal offence.

It is the case that 'incitement' captures and regulates more overt forms of speech that target persons and groups, on the grounds that they are more likely to provoke or incite violent conduct. Professor Sorial has suggested that there are two possible unintended consequences to the category of incitement.

First, such laws are likely to punish speakers who fail to express themselves appropriately because they may lack education or other necessary skills for speaking in the 'right' sort of way. Histrionic or hyperbolic ranting is often characterized as incitement. By contrast, legal regulation tends to protect those speakers who can couch their claims in ways that seem acceptable, even though they may cause more harm with their words.[1]

Second, many racist groups have been able to modify their language in such a way that ensures they evade being captured by the legislation. There is emerging evidence that the speech of some extreme groups is becoming more sophisticated, polite and civil. Moreover, because their racist ideology is increasingly conveyed through civil and respectable language, it has become more acceptable to a wider and more diverse audience.[2]

Nevertheless, while these are *possible* consequences, the rates of prosecution under s93Z do not bear these concerns out. It is also possible that the civil provisions are better suited to addressing these sophisticated types of discriminatory speech than the criminal law.

An offence of inciting hatred

While inciting hatred can lead to violence and so in *principle*, an offence of inciting hatred might be desirable, the potential legal consequences are not.

First, there may be community pushback to an offence of inciting hatred, on the grounds of legal overreach. Professor Sorial has identified this issue in relation to incitement laws more generally, but the problem is more acute in relation to hatred. For example, the law might capture vitriolic or controversial speech that is expressive of hate but which might not cause violence.

Second, hatred is considered an emotion, and it is not the role of the criminal law to regulate emotion; its function is to regulate peoples' conduct or behavior.

Third, given the criminal standard of beyond a reasonable doubt, proving hate might be difficult and make prosecution under s93Z even harder.

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[1] see Sorial, S. 2015, 'Hate speech and distorted communication: rethinking the limits of incitement in *Law and Philosophy*, 34: 299-324

[2] see Mason, G, The Reconstruction of Hate Language. in Gelber K, and Stone A (eds.), Hate Speech and Freedom of Speech in Australia, (Sydney: The Federation Press, 2007) pp. 34–58

Finally, while the expression of hatred should not be tolerated in a cohesive and multicultural society, the criminal law is not the appropriate mechanism to achieve this, and civil provisions might be better suited to protecting the community.

Maximum penalty

Laws such as s93Z are effective in more than one way. For target communities and their members, they provide an assurance that the society in which they live deems them worthy of dignity by seeking to prevent the harms of serious vilification. Such laws can also be used educatively by target communities themselves. The law is therefore of use even in the absence of prosecutions. Given that the penalties are already significant, we do not support an increase in the maximum penalty.

A harm-based test

The wording suggested in the options paper mirrors that in s18C of the *Racial Discrimination Act* (Cth), It is our view that these terms are not appropriately placed in the criminal law, because they capture conduct that falls short of the gravity required for a criminal offence. The appropriate place for a harm-based test is in the civil law, not the criminal law.

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