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28 June 2024

By email

NSW Law Reform Commission
e nsw-lrc@dcj.nsw.gov.au

Dear Commissioners

Equality Australia response to the Options Paper for the Commission's review into s 93Z of the Crimes Act 1900

Thank you for the opportunity to provide our comments in response to the Options Paper released by the NSW Law Reform Commission in June 2024.

In the schedule to this letter, we have enclosed our response to the Options Paper, which is intended to be read alongside our first and more extensive submission on the prevalence and types of hate-based conduct experienced by LGBTIQ+ people and the changes we would like to see.

While we have answered each question in the Options Paper separately, ultimately any reforms to s 93Z must be considered together to ensure the overall framework (including both civil and criminal protections) works together to provide adequate protections for all people in NSW who face vilification and hate-based conduct.

We also appreciate that the Commission has reviewed s 93Z in light of all the groups that it protects, notwithstanding the focus of the inquiry on racial and religious vilification. We do not wish to see a hierarchy of protections in any eventual reform.

We would be happy to provide the Commission with further feedback or comments if requested. Given I will be finishing up as Legal Director with Equality Australia on 28 June, please direct your requests to who will commence as our new Legal Director on 1 July.

We would be happy for you to publish this submission on your website, but ask that you please redact our staff personal contact details and signatures.

Warm regards,

Ghassan Kassisieh
Legal Director

SCHEDULE: RESPONSE TO OPTIONS PAPER

Question from the Options Paper	Our comments and recommendations
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?*	We **support** extending the definition of a 'public act' to capture communications made to a limited number of people in closed or limited public settings (such as online messenger groups, conferences or meetings with limited attendees).
Option 2: Mental element of recklessness *Should the mental element of recklessness be removed from s 93Z?*	**No.** The mental element of recklessness recognises that a person who is aware of a substantial risk that their conduct will likely incite violence towards a person on any of the protected groups remains criminally responsible for their behaviour if they persist in that conduct while aware of that substantial risk. Removing this element would increase the threshold for an offence that is already overly burdensome to establish. Retaining the mental element of 'recklessness' is important to capture conduct like that recently seen in Belfield, Sydney. In that case, a video was shared by a member of a group prior to the gathering of pro-trans protesters which encouraged *'the real boys'* to *'go there tomorrow, and f*cking shake them up, drag them by their head and remove them from St Michael's Belfield'*. The protestors were subsequently pelted with rocks and glass, and physically assaulted by a mob.[1] If the requisite mental element remained recklessness, the person who made and shared that video could have been held responsible for inciting violence, regardless of whether their *actual intent* was for their comments to be taken literally.
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?*	We **support** the term 'incite' being supplemented with terms such as 'promote', 'advocate' or 'urge', provided that the offence remains targeted around inciting physical violence towards people or property. Otherwise, the offence would need to amended more significantly to consider the need for defences similar to sections 20C, 38S(2), 49ZE(2), 49ZT(2) and 49ZXB(2) of the *Anti-Discrimination Act 1977* (NSW).
Option 4: An offence of inciting hatred *Should an offence of inciting hatred on the ground of a protected attribute be introduced?*	We **support** the attempt to broaden the type of conduct which may be captured by our anti-vilification protections to conduct which falls just short of inciting actual physical violence against a person or property. This recognises that hostile environments, where physical violence becomes possible or even normalised, start with the spreading of hateful messages that foster

[1] Jordan Baker and Perry Duffin, 'Time to rise: Christian activist charged after protest violence', Sydney Morning Herald (Webpage, 22 March 2023).

Question from the Options Paper	Our comments and recommendations
	prejudicial attitudes towards people with protected attributes. Such an approach would address some of the difficulties in establishing section 93Z which we identified in Part II of our first submission. However, for this approach to be successful, *"on the ground"* of a protected attribute, must be extended to include vilification on the ground of: • a characteristic that a person with the relevant attribute generally has; • a characteristic that is often imputed to a person with the relevant attribute (e.g. a stereotype); • a relevant attribute that a person is presumed to have, or to have had at any time, by the person engaging in the conduct; • a relevant attribute that a person had, even if the person did not have it at the time the conduct was engaged in; • a personal association with a person with the protected attribute, if the personal associate has been targeted because of that association.[2] An example of where this offence might be useful is the deliberate spreading of misinformation or disinformation (such as associating LGBTIQ+ people, or certain expressions of LGBTIQ+ identities, as a risk to children), which in turn has encouraged threats to violence and the cancellation of LGBTIQ+ events and visibility. The person may have not expressed themselves blatantly as threating or inciting violence or damage to property, but the expression has had that effect in circumstances where the person ought to have known that this was likely the result. To avoid the risk of overcriminalisation, such an offence may need to consider additional elements such as: • limiting the offence to the intentional or reckless incitement of hatred or a practice or course of conduct that incites hatred (rather than a single public statement without considering its context); • combining the element of inciting hatred with a result, such as the arousal of fear, or interference with the peaceful enjoyment of an event or facility associated with people who hold a protected attribute; • providing a defence similar to sections 20C, 38S(2), 49ZE(2), 49ZT(2) and 49ZXB(2) of the *Anti-Discrimination Act 1977* (NSW), so that legitimate expression is not stifled.

[2] An example of this approach is set out in proposed s 124A of the *Anti-Discrimination Act 1991* (Qld): see Respect at Work and Other Matters Amendment Bill 2024 (Qld), cl 21.

Question from the Options Paper	Our comments and recommendations
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?*	We **support** an increase in the maximum penalty for serious vilification so that it is commensurate with offences covering equivalent forms of behaviour. As an example, already in the *Crimes Act 1900* (NSW): • threats to kill or inflict bodily harm on any person (where contained in a document) attract a maximum penalty of 10 years imprisonment; [3] and • threats to destroy or damage property attract a maximum penalty of 5 years imprisonment,[4] and 7 years if the threat occurs during a public disorder.[5] A higher maximum penalty would still allow courts to take into account the relative seriousness of the conduct during sentencing and set a lower penalty (or a non-custodial penalty) if that would be more appropriate in all the circumstances of the case. As an alternate, the maximum penalty could also be tiered based on whether there was actual damage to a person or property.
Option 6: Introduce aggravated offences *Should there be aggravated versions of offences where the offence is motivated by hatred, which attract a higher penalty?*	We **support** the idea of a class of aggravated offences to recognise the unique harms experienced when an offence is accompanied by hate-based motives. What is vital is that any aggravated offences: • capture all common types of hate crimes that the groups it covers are more likely to experience (including offences against a person or their property); • capture instances where the motive for conduct is mistakenly based on stereotypes or characteristics wrongly imputed to the attribute, rather than the protected attribute itself (for example, a drag artist who is attacked based on a stereotype that they pose a risk to children); and • include all people who are regularly targeted based on associations and characteristics associated with an attribute, including people who do not have the attribute themselves. These aggravated offences can comfortably sit alongside the sentencing factor in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW), because courts are instructed '*not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence*'.[6]

[3] *Crimes Act 1900* (NSW), s 31.

[4] *Crimes Act 1900* (NSW), s 199(1).

[5] *Crimes Act 1900* (NSW), s 199(2).

[6] *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(h) and 21A(4).

Question from the Options Paper	Our comments and recommendations
	However, motivation-framed offences and sentencing factors have not been enough to capture hate-based conduct because proving a prejudice motive beyond reasonable doubt is very difficult and does not address victim vulnerability because of discriminatory targeting.[7] Accordingly, we think this proposal should not be pursued as a substitute for introducing an inciting hatred or harm-based protection, but as an additional way to recognise the unique harm that comes from criminal assaults and damage to property which is accompanied by hate or prejudice. For further thinking on this question, see pages 8 and 9 of our first submission to this Inquiry.
Option 7: Introduce a harm-based test *Should an objective harm-based test be introduced into s 93Z?*	**Yes.** As raised in our initial submission to this inquiry, we support introducing an objective, harm-based test, in addition to a reformed incitement-based test (alongside a defence for legitimate forms of expression). This would appropriately recognise the harm experienced by people and groups who are the target of hate, by directly prohibiting conduct that undermines their sense of safety, belonging and dignity. It would also lower the threshold from inciting violence alone, making it easier to capture conduct that amounts to vilification. To avoid the risk of overcriminalisation, such an offence may need to consider additional elements such as: • combining the physical element with a serious result, such as the arousal of fear, or interference with the peaceful enjoyment of an event or facility associated with people who hold a protected attribute; • providing a defence similar to sections 20C, 38S(2), 49ZE(2), 49ZT(2) and 49ZXB(2) of the *Anti-Discrimination Act 1977* (NSW), so that legitimate expression is not stifled. For further thinking on this question, see pages 7 and 8 of our first submission to this Inquiry.

[7] For a good discussion, see Tasmanian Sentencing Advisory Council (2023) *Consultation Paper – Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing*, pp. 18-19; Tasmanian Sentencing Advisory Council (2024) *Prejudice and Discrimination as Aggravating Factors in Sentencing*, especially pp. 24-27, 31-34, 37.