

PO Box 3079  
Bundeena  
NSW 2230

28 June 2024

NSW Law Reform Commission  
Locked Bag 5000  
Parramatta  
NSW 2124

By email: nsw-lrc@dcj.nsw.gov.au

Dear Law Reform Commission,

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

I refer to the invitation for submissions on the above Review.

**1. Summary**

- 1.1 I generally support the wording in section 93Z of the *Crimes Act 1900 (NSW)* and suggest only that two clarifications be added:
- (1) that 'the public' should include 'any section of the public,' and
  - (2) that - just as religious belief includes not having a religious belief (definition in subsection (5)), consideration should be given to applying similar interpretation to other grounds of incitement in subsection (1).
- 1.2 I also raise the issue of whether the legislation should be broader in scope, rather than identifying only specific characteristics (in subsection (1)).

**2. Section of the public**

- 2.1 'Section of the public' is a concept formerly used in Australian corporate law to clarify the meaning of a 'public' offer or invitation. It was an offence to offer securities for sale to the public without providing a prospectus or product disclosure statement. To counter arguments that an offer had not been made to the public because (for example):
- a) only 20 people had been in the room, therefore they could not amount to 'the public',
  - b) people had paid for admission to the seminar or conference at which the offer was made, therefore they were not 'the public', or
  - c) an advertisement had been put in a specialist publication, therefore the readers of that specialist publication could not amount to 'the public',
- the concept of a 'section of the public' was introduced.

- 2.2 The principle behind this concept was that even if the recipients of the offer were few in number or chosen by virtue of some unrelated communality (being attendees at a particular conference or readers of, say, a gardening magazine) by which they could be regarded as a particular group, they had otherwise been 'selected' in a general way, being part of a general grouping which any member of the public having those preferences or characteristics was free to join.
- 2.3 It is submitted that the introduction of a similar concept here would be helpful. I suggest the following addition (as marked up) to section 93Z(5) of the Crimes Act 1900 (NSW) at the end of the definition of '*public act*'.

For the avoidance of doubt, an act may be a public act even if it occurs on private land **and 'the public' includes any section of the public.**

### 3. Race or no race

- 3.1 I strongly support the clarification in section 93Z (5) that:

***religious belief or affiliation*** means holding or not holding a religious belief or view.

- 3.2 Logically this is necessarily correct. The full title of the right of freedom of religion is the right to "freedom of thought, conscience, religion or belief." This does not mean 'freedom' to follow only the majority religion or belief, and the right includes freedom 'from' religion. This interpretation is confirmed by human rights courts internationally and particularly in Europe. Thus, the right means the freedom to:

- Choose between different religions and beliefs,
- Convert between religions and beliefs,
- Leave a religion or belief, and
- Hold no religion or belief - following on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing (as any other situation would amount to compulsory religion).

- 3.3 Freedom of religion also encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions. The European Court of Human Rights has, like the UN Human Rights Committee, given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism and religious or philosophical convictions or beliefs,

*if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.*<sup>1</sup>

---

<sup>1</sup> *The right to freedom of religion or belief and its intersection with other rights* by Dr Alice Donald and Dr Erica Howard, Middlesex University, for ILGA Europe, ILGA Europe website at [http://www.ilga-europe.org/sites/default/files/Attachments/the\\_right\\_to\\_freedom\\_of\\_religion\\_or\\_belief\\_and\\_its\\_intersection\\_with\\_other\\_rights\\_.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_.pdf), p 2.

3.4 I suggest that a similar clarification would be appropriate in relation to the other possible grounds spelt out in section 93Z(1), particularly in the light of the clarification in section 93Z(2) which I fully support (because discrimination and violence is often directed against people not because of who they actually are, but because of the perpetrator's own misperceptions or recklessness as to the victim's actual characteristics). For example:

**race** includes **having or not having a particular** colour, nationality, descent, **and** ethnic, ethno-religious or national origin.

3.5 Alternatively, section 93Z could be expanded to cover the concept generally.

#### **4. Should the legislation be broadened further?**

4.1 The necessary balancing of the benefits of freedom of speech against the social harms of incitement to violence is a delicate process which I believe is in general successfully achieved in section 93Z of the Crimes Act 1900 (NSW) in the context of serious racial and religious vilification.

4.2 In particular I agree that the focus on incitement to violence is preferable to legislation which refers to incitement of 'hatred.' 'Hatred' is difficult to define or to identify. Rather, it is the violent result of serious vilification which the NSW legislation rightly targets.

4.3 Having said that, it should be noted that incitement to violence may be indirect and cloaked in metaphor. Prior to the genocide in Rwanda, victim groups were described on radio as 'cockroaches.' Any kind of de-humanising talk can encourage violence against those people described as less than human.

4.4 Similarly, any point of differentiation can be used to incite violence. I therefore submit that it is worth considering amending section 93Z(1) to cover any discriminatory point of differentiation, rather than itemising different possible characterisations (as is presently done).

Yours sincerely

Dr Tamsin Clarke