Aboriginal Legal Service (NSW/ACT) Limited

28 June 2024

The Hon. Tom Bathurst AC KC
Chair, NSW Law Reform Commission
By email: nsw-lrc@dcj.nsw.gov.au

Dear Mr Bathurst,

Re: Review of section 93Z *Crimes Act 1900* (NSW)

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**the ALS**) regarding NSW Law Reform Commission's review of the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**) in addressing serious racial and religious vilification in NSW.

The ALS is a proud Aboriginal Community-Controlled Organisation (**ACCO**) and the peak legal services provider to Aboriginal and Torres Strait Islander adults and children in NSW and the ACT. More than 280 ALS staff members based at 27 offices support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law.

We also deliver a variety of wrap-around programs including bail support, mental health referrals, family violence prevention, and child and family advocacy. We represent Aboriginal and Torres Strait Islander families in the NSW Coroner's Court and provide a variety of discrete civil law services in tenants' advocacy, assistance with fines and fine-related debt, and discrimination and employment law.

We recognise that Australia is bound by the *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**) and the *International Covenant on Civil and Political Rights* (**ICCPR**) to prohibit certain hate speech and incitement without unduly infringing upon freedom of expression (per Article 19 of the ICCPR).

As an ACCO, we take seriously the impact of racial vilification on Aboriginal and Torres Strait Islander people in NSW, and support the objectives of this Review to minimise violence and threats made on the basis of a person's immutable characteristics. We are supportive of the 2018 reforms which strengthened the existing law in relation to the offence of serious racial vilification and racially motivated violence.

We understand that only seven charges have been laid under s 93Z since 2018. Of those seven, two resulted in convictions (which were later annulled as NSW Police did not seek approval from the Director of Public Prosecutions) and five were withdrawn. Since the removal of the requirement for any prosecutions under s 93Z to be approved by the Director of Public Prosecutions, no charges under this provision have been laid.

To enable stakeholders to provide informed feedback, further details should be provided regarding the seven charges that have been laid to date including at a minimum: the age of the persons charged, whether any of the charges were for conduct or language directed toward police officers, and the

reasons for the withdrawal of any charges. In the absence of the above, we have provided the below feedback on a provisional basis.

This response supplements the verbal feedback we provided during earlier consultations with the Commission, in which we raised the following general observations:

- Section 93Z may provide a mechanism to address discrimination and violence against Aboriginal and Torres Strait Islander people in the form of hate speech. Criminalising racial vilification may also serve a symbolic function by demonstrating that this behaviour is unacceptable.
- The ALS does not have practice-facing experience in relation to the way this provision operates. None of our clients have been prosecuted under s 93Z.
- Behaviour which may be captured by s 93Z is also captured by a range other offences which are easier to prove and carry higher maximum penalties.
- One reason for the low numbers of charges under this provision may be that police are charging people with other offences like 'use of a carriage service to menace or harass', 'intimidation' or 'common assault', which we see frequently in our practice.
- In November, following lobbying by faith groups, the Premier enacted changes which give police the power to charge a person under s 93Z without prior approval from the Director of Public Prosecutions (DPP). We are concerned that police have been given the power to launch prosecutions under s 93Z without DPP approval.
- We urge caution about use of criminalisation as a tool for achieving social policy objectives generally, because of the disproportionate harms that flow to the communities we service in the form of policing and imprisonment.
- We are concerned that the potential for s 93Z to protect Aboriginal people may also cause harm to Aboriginal people who are prosecuted by police, for example, for using offensive language in speaking up about the way they are treated by police.
- We support prioritising investment in education and anti-racism strategies to reduce violence motivated by race, religion and other attributes.

Definition of 'Public Act'

We oppose amending the definition of 'public act' in the absence of any evidence supporting a need for such amendment. We are unaware of any circumstances by which a broadened definition of 'public act' may have resulted in a charge under s 93Z. We note that, where there is doubt as to whether the conduct was done 'by public act', there are other charges available to charge in the alternative, including urging violence against members of groups or using a carriage service to make threat.[1]

Mental Element of Recklessness

We support the removal of the mental element of recklessness from s 93Z. We consider that specific intent to incite or threaten violence is appropriate when considering the seriousness of the offence, reflected by the maximum penalty of three years imprisonment. We are supportive of broad civil prohibitions on vilification and consider such remedies to be appropriate where a specific intent to incite violence cannot be established beyond reasonable doubt.

[1] Under s 80.2B and s474.15 of the *Criminal Code Act* (Cth), respectively.

Incitement to Violence

The ALS opposes amendment of the term 'incite' in the absence of evidence supporting a need for such amendment. The term 'incite' has an ordinary meaning and has been interpreted broadly by the courts.[2]

An Offence of Inciting Hatred

We oppose the introduction of a new criminal offence of inciting hatred. As noted during earlier consultation, we urge caution about use of criminalisation as a tool for achieving social policy objectives generally because of the proven risk of disproportionate harms flowing to the communities we service in the form of policing and imprisonment. We consider such an offence may unduly be charged against marginalised groups, including Aboriginal people and people with disability, during interactions with police.

We routinely see police-client interactions escalate and result in 'trifecta' charges such as offensive language and resist arrest. As noted in the report, *Police Responses to People with a Disability*:[3]

> Heavy handed police responses can very clearly escalate risks for a person with disability. These include the risks of 'fight or flight' behaviours, risks to the personal safety of the person and importantly the risk of criminalisation, where minor issues result in charges against a person with disability for what might be understood as minor 'offending' but which is, in essence, for behaviour that police themselves provoke.

The UN has observed that "failure to act on 'real' incitement cases" and "overzealous reactions to innocuous cases" can create "a climate of impunity for some and a climate of intimidation for others".[4] We consider the criminal law to be an unsuitable mechanism for prohibition on 'hate' speech which does not involve an intent to incite or threaten violence against a person or group of persons.

Maximum Penalty

The ALS strongly opposes any increase in the maximum penalty for s 93Z. We note the current maximum penalty of three years imprisonment and/or a fine of $11,000 is significant and adequately reflects the criminality of the offence.

Further, prior to their annulments, the two convictions under s 93Z resulted in sentences of an intensive corrections order and a community corrections order, suggesting the court had significant scope to address the criminality of the conduct.[5]

Section 93Z is one of a number of charging options available to police to deal with relevant conduct, along with the NSW and Commonwealth offences identified by the Commission. This spectrum of offences adequately covers the range of criminality for conduct in this area, with s 93Z operating at the lower end of the scale.

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[2] *Sunol v Collier (No 2)* [2012] NSWCA 44 [26], [28].

[3] Leanne Dowse, Simone Rowe, Eileen Baldry, Michael Baker, 'Police responses to people with disability' (Research Report, The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021) 11.

[4] Heiner Bielefeldt, *Report of the Special Rapporteur on Freedom of Religion or Belief*, UN Doc A/HRC/31/18 (23 December 2015) [63].

[5] Christopher Kanua and Michael McGowan, 'NSW police botch the only two race hate prosecutions under new laws', *The Guardian (online)*, 2 March 2021.

Aggravated Offences

The ALS opposes the introduction of any aggravated versions of offences where the offence is motivated by hatred. Under s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*, a sentencing court must take into account if an offence was motivated by hatred for or prejudice against a group of people to which the defendant believed the victim belonged, including people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability. The courts readily apply this aggravating factor in sentencing where applicable.

A Harm-Based Test

We neither support nor oppose the introduction of a harm-based test in s 93Z, but as noted above, require further information about the details of the circumstances in which the offence has been previously charged to be able to comment on the potential benefits or risks of such an amendment. In general terms, we consider that the two convictions under s 93Z suggest the current formulation is likely effective, as it was only a technical error in the charging process that led to their annulment. We would welcome the opportunity to provide further feedback on draft wording for any proposed objective, harm-based test.

Conclusion

Vilification on any of the listed grounds in s 93Z has no place in our communities, and we acknowledge the potential for s 93Z to serve as a protective mechanism for the Aboriginal and Torres Strait Islander communities we serve. We note, however, that criminalisation is generally an ineffective means to achieve social policy objectives, and the enforcement of the criminal law in practice disproportionately causes harm to Aboriginal communities, rather than providing protection and safety.

We recommend instead prioritising community education and working with impacted groups to develop solutions that provide a more effective means of achieving social change. We recommend the NSW Government engage in meaningful consultation with impacted groups under the specified grounds of s 93Z, including Aboriginal community groups across the state, to co-design and implementing initiatives that address and reduce threats, incitement, hate speech and other forms of vilification in NSW. We recommend that this work be integrated with processes already being undertaken in relation to anti-racism strategies and frameworks for NSW.

We note that we have assisted the Commission in engaging with Aboriginal Organisations and the Coalition of Aboriginal Peak Organisations in earlier stages of this review, and encourage that the views of participants in those consultations are taken into account.

We welcome the opportunity to provide feedback to the Commission on any specific law reforms under consideration. If you have any questions or require further feedback, please do not hesitate to contact

Sincerely,

Nadine Miles
Principal Legal Officer
Aboriginal Legal Service (NSW/ACT) Limited