

5 July 2024

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

Dear Chief Justice Bathurst

Review of section 93Z of the Crimes Act 1900 (NSW)

Legal Aid NSW welcomes the opportunity to respond to the NSW Law Reform Commission's options paper on the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) (**Crimes Act**) in addressing serious racial and religious vilification in NSW.

Our feedback is informed by the experience of our lawyers across our criminal and civil law divisions, including our experience representing defendants in criminal proceedings, assisting people who have been subjected to public harassment and vilification and through our partnership with National Legal Aid's specialist Your Story Disability Legal Service.¹

Legal Aid NSW acknowledges the serious detrimental impact of vilification on the health and wellbeing of individuals as well as on wider community cohesion.

We support removing the mental element of recklessness from section 93Z. Otherwise, generally our view is that section 93Z is fit for purpose, considering the range of other related well-established offences.

Option 1: Definition of "public act"

The options paper notes that section 93Z may not apply to online communication, such as livestreaming, or communication that takes place in closed public spaces, such as meetings and conferences.

¹ We also refer to our first submission to this review, Legal Aid NSW, Submission No 23 to NSW Law Reform Commission, *Serious racial and religious vilification review* (22 April 2024).

We agree that conduct that incites violence in online spaces and spaces open to a section of the public, should not escape the purview of the law. However, in our view, such conduct is covered by other well-established offences and hence there is no need to extend the scope of section 93Z.

For example, if a person threatened violence towards another person over a livestream, the prosecution could use their discretion to charge that person with the federal offence of using a carriage service to menace, harass or cause offence,² or the NSW offence of stalking or intimidation with intent to cause physical or mental harm.³ These offences each attract a penalty of 5 years imprisonment, which is higher than the penalty under section 93Z.⁴

If the offence was motivated by hatred for, or prejudice against a group of people to which the offender believed the victim belonged, the court must take this aggravating factor into account on sentencing.⁵

Option 2: Mental element of recklessness

Legal Aid NSW supports removing the mental element of recklessness from section 93Z.

As noted in our first submission to this inquiry, the criminal offence in section 93Z is a serious offence that carries a prison sentence.

We consider that it should be treated as an offence of specific intent—that is, a crime where intention to cause a specific result is an element. Legal Aid NSW does not support recklessness satisfying the mens rea element of the offence.

The usual mens rea for criminal offences of specific intent does not include recklessness. Legal Aid NSW is not satisfied that there is reason for this offence to be treated differently from other offences of specific intent. As has been recognised by the United Nations Office of the High Commissioner of Human Rights and the Rabat Plan of Action,⁶ the protection of freedom of expression requires that speech

² *Criminal Code Act 1995* (Cth), s 474.17.

³ *Crimes Act 1900* (NSW), s 13.

⁴ The maximum penalty for publicly threatening or inciting violence under section 93Z is three years imprisonment.

⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(h).

⁶ Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights*, Addendum Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred, UN Doc A/HRC/22/17/Add.4 (11 January 2013), Appendix, Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence.

be criminalised only when an intention to threaten or incite violence can be proved, negligence and recklessness are not sufficient.

Option 3: Incitement to violence

We understand that there have only been a small number of prosecutions under section 93Z, and we appreciate that some groups are concerned that the narrow meaning of the term “incite” has contributed to its lack of use.⁷

In our view, the low number of prosecutions under section 93Z can likely be attributed to the former requirement for approval from the Director of Prosecutions to bring a charge under that section, as well as the availability of a range of related, well-established offences, such as stalking or intimidation with intent to cause fear of physical or mental harm,⁸ offensive conduct,⁹ offensive language,¹⁰ and riot.¹¹

In our view the term “incite” is well understood by courts and practitioners. However we are not opposed to the use of other, similar terms suggested, such as “promote” or “urge”.

Option 4: An offence of inciting hatred

Legal Aid NSW does not support the introduction of an offence of inciting hatred on the ground of a protected attribute.

We acknowledge that hate speech can have a serious and detrimental impact on individuals and communities without specifically inciting violence. However, we are also concerned that such an offence could be used to charge already over-policed groups such as young people, Aboriginal people, and people with a mental illness, were they to use offensive language towards police.

Legal Aid supports civil protections against hate speech and supports amending the *Anti-Discrimination Act 1977* (NSW) to empower Anti-Discrimination NSW to conduct own motion investigations into alleged incidents of vilification, which would extend to acts that incite hatred on the basis of protected attributes.

Option 5: Increase maximum penalty for s 93Z

⁷ NSW Law Reform Commission, *Serious racial and religious vilification* (Options Paper, 7 June 2024) 6.

⁸ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s13(1).

⁹ *Summary Offences Act 1988* (NSW), s4.

¹⁰ *Summary Offences Act 1988* (NSW), s4A.

¹¹ *Crimes Act 1900* (NSW), s93B.

Legal Aid NSW does not support increasing the maximum penalty for section 93Z.

We note that the requirement for the Director of Public Prosecutions to approve a prosecution under section 93Z was removed in December 2023.¹² We are mindful that we are yet to see the impact of this amendment on the use and operation of the section. Our view is that the impact of this amendment should be assessed over a sufficient period before any changes to the threshold of the offence are considered.

Option 6: Introduce aggravated offences

Legal Aid NSW does not support the introduction of an aggravated offence where the conduct concerned is motivated by hatred or prejudice against a protected group.

As identified in the options paper, when determining the appropriate sentence for an offence, courts are already required to take into account that an offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged.¹³

In our experience the court considers any derogatory racial or religious slurs or threats of violence made by the defendant when determining the overall level of criminality or seriousness of the offence and takes a dim view of this conduct.

We understand that groups have raised concerns that prosecutors rarely raise this aggravating factor in court. However, we do not agree that this is a reason to introduce new aggravated offences. We do not have evidence to indicate that prosecutors would be more likely to bring a charge of an aggravated offence as opposed to raising an aggravating factor on sentence.

Option 7: Introduce a harm-based test

We do not support introducing a harm-based test into section 93Z that would criminalise conduct that is reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute.

Legal Aid NSW supports the introduction of an objective harm-based test into the civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW).¹⁴ We consider it is appropriate for civil prohibitions on vilification to be broader than criminal law.

¹² *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 cl 1.

¹³ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

¹⁴ Contained in *Anti-Discrimination Act 1977* (NSW) ss 20C, 38S, 49ZE, 49ZT, 49ZXB.

We note that the terms ‘offend, insult, humiliate, intimidate and/or ridicule’ have been the subject of much consideration and case law.¹⁵ For speech to be captured by section 18C of the *Racial Discrimination Act 1975* (Cth), it must have “profound and serious effects, not to be likened to mere slights.”¹⁶ We are concerned about importing these terms from 18C¹⁷ into a criminal offence, where they would be separated from their civil context.

Such a provision would capture conduct that should not attract a criminal penalty or conduct that is better captured by a summary offence.¹⁸ We are also concerned that the introduction of such an offence could have a disproportionate impact on already over-policed populations, including Aboriginal people and young people.

Another option would be to introduce a narrower harm-based test, for example, a prohibition on conduct that is reasonably likely to intimidate a person with a protected attribute, or cause that person to fear harm to themselves, or to other persons, with that protected attribute.

In operation, such an offence would overlap with the offence of stalking or intimidation with intent to cause fear of physical or mental harm.¹⁹ Intimidation is defined to include conduct that causes a reasonable apprehension of violence to any person²⁰ as well as conduct amounting to harassment.

As it is currently drafted, section 93Z is a specific and targeted offence against inciting violence. We see value in specifically criminalising incitement and sending the message that this form of behaviour is unacceptable.

As discussed above in relation to Option 2, we consider that section 93Z should be treated as an offence of specific intent. We are also concerned that an objective harm-based test could potentially criminalise reckless or negligent speech that was not intended to cause harm. In our view, if a harm-based test were to be introduced, the prosecution must be required to prove that the accused intended to cause the harm particularised.

Thank you again for the opportunity to provide a submission. If you have any questions or would like to discuss this matter further, please contact

¹⁵ See the summary in *Eatock v Bolt* [2011] FCA 1103 [262] – [268].

¹⁶ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007.

¹⁷ *Racial Discrimination Act 1975* (Cth) 18C.

¹⁸ E.g. offensive conduct, offensive language

¹⁹ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).

²⁰ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

Yours sincerely

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A/Chief Executive Officer