

Anti-Discrimination NSW

Submission on serious racial and religious vilification

NSW Law Reform Commission's review into the effectiveness of section 93Z
of the *Crimes Act 1900 (NSW)*

18 April 2024

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

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Contents

Introduction	1
About ADNSW	1
The current review	1
Section 93Z of the Crimes Act.....	2
Operation of section 93Z	2
Effectiveness of section 93Z	3
Civil vilification provisions in the ADA.....	3
Vilification complaints under the ADA.....	4
Case Study 1.....	5
Effectiveness of the civil vilification provisions	6
Higher threshold than federal civil vilification provisions	6
Incitement	6
Harmonise grounds in civil and criminal provisions	7
Requirement for a public act	7
No protection for perceived characteristics.....	8
Section 88 requirement	8

Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the NSW Law Reform Commission (the **Commission**) for inviting submissions to its review of the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW (the **LRC Review**). The LRC Review's terms of reference indicate that the Commission should have regard to:

- the impact of racial and religious vilification on all parts of the NSW community;
- criminal vilification offences in other Australian and international jurisdictions, and the desirability of harmonisation and consistency between New South Wales, the Commonwealth and other Australian States or Territories;
- the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW);
- the impacts on freedoms, including freedom of speech, association and religion;
- the need to promote community cohesion and inclusion;
- the views of relevant stakeholders as determined by the Commission; and
- any other matter that the Commission considers relevant.

About ADNSW

The *Anti-Discrimination Act 1977* (**ADA**) makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities. Sexual harassment, as well as vilification on the grounds of race, transgender status, homosexuality, HIV/AIDS and religion is also unlawful.

ADNSW works to eliminate discrimination in NSW by:

- answering enquiries
- resolving complaints
- raising awareness about discrimination and its impacts
- managing applications for exemptions from the ADA
- advising the government about discrimination issues.

Scope of the current review

ADNSW notes with disappointment that the LRC Review's terms of reference are limited to the grounds of race and religion, rather than the full range of attributes protected under section 93Z. Any review of the effectiveness of section 93Z in addressing serious vilification should consider all the protected attributes under that section and not merely a subset, and any recommendations should be directed at improving the safety of all people with any protected attributes.

Section 93Z of the Crimes Act

Operation of section 93Z

A person commits an offence under s 93Z if, by a public act, they intentionally or recklessly threaten or incite violence towards another person, or group of people, on any of the following grounds:

- race
- religious belief or affiliation
- sexual orientation
- gender identity
- intersex status
- HIV/AIDS status

It is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of the other person or member of a group were correct or incorrect at the time.

A 'public act' includes:

- any form of communication to the public, including speaking, writing, displaying notices, playing recorded material, broadcasting and communicating through social media or other electronic methods
- any conduct observable by the public, including actions, gestures and wearing or displaying clothing, signs, flags, emblems and insignia, and
- distributing or disseminating any matter to the public.

An act may be a public act even if it occurs on private land.

'Violence' is defined to include violent conduct and violence towards a person or group of persons includes violence towards the property of the person or a member of the group, respectively.

Case law arising out of civil vilification proceedings has established that actual incitement is not necessary to satisfy that element of the prohibition. Rather, the courts have established that the test is an objective one, asking whether "could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race?".¹

A person will only be guilty of this offence if they:

- intend to incite or threaten violence by their act, or
- know that inciting or threatening violence is a possible outcome of their act, but they do the act anyway (this is "recklessness").

¹ *Z v University of A & Ors (No 7)* [2004] NSWADT 81, at 103

Effectiveness of section 93Z

The serious vilification provisions in NSW (including the now repealed s 20D of the ADA) have been the subject of several review processes, including the Standing Committee on Law and Justice's 2013 Inquiry into racial vilification law in NSW (**2013 Inquiry**)², and former ADNSW President Stepan Kerkyasharian AO's 2016-17 Consultation into Serious Vilification Laws in NSW. When section 93Z was enacted in 2018 following campaigning from the Keep NSW Safe Coalition, it was expected that the new section would overcome a number of 'procedural impediments' with section 20D identified by the 2013 Inquiry.

Despite those expectations, it remains difficult to prosecute perpetrators under the serious vilification provisions in the NSW Crimes Act. Section 93Z requires establishing multiple elements to the criminal standard of proof – 'beyond reasonable doubt' – meaning there are potentially 'easier' options available to prosecutors.

Since the new laws were introduced in 2018, only two prosecutions have been instituted under section 93Z. Both offenders were initially convicted, however both convictions were later annulled as prosecutors had not obtained the consent of the Director of Public Prosecutions which was a requirement under section 93Z(4).³

Civil vilification provisions in the ADA

The ADA provides protection against vilification on the grounds of race (s 20C), transgender status (s 38S), homosexuality (s 49ZT) and HIV/AIDS status (s 49ZXB). In November 2023, the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* also introduced prohibitions on religious vilification (Part 4BA of the ADA).

The civil vilification provisions in the ADA make it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of people based on a protected ground.

A 'public act' in the ADA includes:

- a. any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, or
- b. any conduct observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, or
- c. the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of a person or group of people based on a protected ground.

² Standing Committee on Law and Justice: Inquiry into racial vilification law in New South Wales, [vilihttps://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2260](https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2260)

³ [NSW police botch the only two race hate prosecutions under new laws](#), The Guardian, 2 March 2021

Exceptions are included to account for the following circumstances:

- a. a fair report of a public act, or
- b. a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege, whether under the *Defamation Act 2005* or otherwise, in proceedings for defamation, or
- c. a public act, done reasonably and in good faith, for academic, artistic, scientific, research or for other purposes in the public interest, including discussion or debate about and expositions of an act or matter.

Under s 88 of the ADA, a vilification complaint cannot be made unless each person making the complaint has the characteristic that was the ground for the conduct that constitutes the alleged contravention or claims to have that characteristic and there is no reason to doubt the claim.

Vilification complaints under the ADA

ADNSW has seen a steady increase in vilification complaints in the last five years, particularly complaints based on racial, homosexual and transgender vilification. In FY22/23, ADNSW received almost four times the amount of racial vilification complaints and five times the amount of homosexual vilification complaints than in each of the previous three years.

Table 1: Vilification complaints received by ADNSW by type and financial year.

Type/Financial year	19/20	20/21	21/22	22/23	23/24 YTD	Total
Racial vilification	24	24	21	80	45	194
Homosexual vilification	10	4	5	25	9	53
HIV/AIDS vilification	1	0	0	1	0	2
Transgender vilification	3	2	4	21	2	32
Religious vilification	n/a	n/a	n/a	n/a	11	11
Total	38	30	30	127	67	292

Table 2: Vilification enquiries received by ADNSW by type and financial year.

Ground/Financial year	19/20	21/21	21/22	22/23	23/24 YTD	Total
Racial vilification	35	35	13	23	17	123
Homosexual vilification	14	4	8	9	4	39
HIV/AIDS vilification	2	2	1	0	1	6
Transgender vilification	6	3	4	7	4	24
Religious vilification	n/a	n/a	n/a	n/a	14	14
Total	57	44	26	39	40	206

It is very unlikely that ADNSW's complaint statistics reflect the actual level of unlawful behaviour that is occurring in the community as evidence shows that only a very small proportion of affected individuals will make a formal complaint⁴.

The current complaint handling framework in the ADA relies on an individual affected by unlawful conduct to make a complaint against a named respondent. ADNSW's role involves bringing the parties together in a confidential conciliation process to try to resolve the issue in an informal and mediated way. One of the challenges that often arises in vilification complaints is locating and contacting a respondent given that vilifying conduct often occurs in public and involves individuals who do not know each other.

Where the identity of the respondent is known, conciliation provides opportunities for resolution with outcomes that may satisfy a complainant, such as a published apology or an assurance that the conduct will not occur again, as is demonstrated in Case Study 1.

Case Study 1

Rhonda* is an Aboriginal woman. She has been having a dispute with one of her neighbours for many years.

Her neighbour often complains about Rhonda's yard and where she parks her car. On several occasions, Rhonda heard her neighbour yell out to her on the street and verbally abuse her. The abuse included calling her a black bastard, black mongrel and telling her she was not welcome in the neighbourhood and should 'go back to live with the other black mongrels'.

Rhonda lodged a complaint with ADNSW.

At the conciliation conference, the neighbour said he had not verbally abused Rhonda but acknowledged that there had been an ongoing dispute between the two of them. The complaint was resolved when the neighbour provided a written assurance to Rhonda that he would not verbally abuse her or damage her property in the future.

** Name has been changed to protect privacy.*

Despite some successes, ADNSW's complaint statistics indicate that few vilification complaints are resolved through conciliation; most are either withdrawn by the complainant or terminated under the ADA. Is it possible that the lack of an ongoing relationship between the parties contributes to this lack of conciliated outcomes, as parties may be less motivated to compromise where there is no continuing connection between them. The statistics may also reflect difficulties with pursuing a complaint under the ADA's civil vilification provisions.

⁴ Tackling the "Known Unknown": How Equality Bodies Can Address Under-Reporting of Discrimination Through Communications, 2012 Equinet, the European Network of Equality Bodies. <https://equineteurope.org/wp-content/uploads/2013/05/Tackling-the-Known-Unknown-FINAL-MERGED.pdf>

Effectiveness of the civil vilification provisions

ADNSW strongly supports a review of the effectiveness of civil vilification provisions in the ADA, (noting that the Commission is currently undertaking a comprehensive review of the ADA⁵), as there are some aspects of the legislation which make it difficult to pursue a complaint of vilification in the civil jurisdiction.

Higher threshold than federal civil vilification provisions

The ADA's civil vilification provisions require a complainant to establish harm threshold that is higher than other comparable models such as the Commonwealth model. Section 18C of the *Racial Discrimination Act 1975* (Cth) provides:

- 1) It is unlawful for a person to do an act, otherwise than in private, if:
 - a. the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - b. the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- 2) For the purposes of subsection (1) an act is taken not to be done in private if it:
 - a. causes words, sounds, images or writing to be communicated to the public; or
 - b. is done in a public place; or
 - c. is done in the sight or hearing of people who are in a public place.
- 3) In this section: 'public place' includes any place to which the public have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission to the place.

In contrast to the federal law's threshold requiring the conduct to 'offend, insult, humiliate or intimidate' another person or group, the equivalent provisions in the ADA require the offending conduct to "incite hatred, serious contempt or severe ridicule". This high threshold of harm may constitute a barrier to complainants being able to establish the conduct amounted to vilification under NSW law.

Incitement

The inclusion of 'incitement' in the NSW model also requires vilifying to elicit a response from a wider audience, not just from members of the affected group. Unlike the federal provisions which focus on the effect of the conduct on the target group, such as whether the individual is 'offended' or 'insulted', the test for civil vilification in the ADA doesn't allow consideration of the harm suffered by an individual or group targeted on the ground of their protected attribute.

As noted above, it is not necessary for a person actually to be incited to violence, rather the test is an objective test requiring consideration of whether the conduct is *capable* of inciting reasonable members of the public to hate, have serious contempt for, or severely ridicule the targeted group.

⁵ <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review.html>

Harmonise grounds in civil and criminal provisions

The vilification provisions in the ADA are narrower than the protections provided in section 93Z of the *Crimes Act 1900* (NSW). Section 93Z provides protection for people based on their race, religion, sexual orientation, gender identity, intersex status and HIV/AIDS status, compared with the civil provisions which only include race, homosexuality, transgender status, HIV/AIDS status and religion.

As outlined in ADNSW's preliminary submission in response to the Terms of References for the Commission's review of the ADA⁶, ADNSW supports modernising the protected grounds in the ADA to include sexual orientation, gender identity and intersex status. ADNSW also supports harmonising the protections available in the NSW Crimes Act with the civil vilification provisions in the ADA.

Requirement for a public act

The definition of 'public act' in the ADA is not clear, differs from the definition in the NSW Crimes Act and does not reflect developments in jurisprudence. Unlike the criminal definition, the definition in the ADA does not explicitly cover the dissemination of materials through social media, which is the primary method of communication for many people in the NSW population and is a platform used for hate speech.

The definition in NSW criminal law clarifies that conduct can be considered public even if it occurs on private land, and civil vilification cases have also interpreted the meaning of 'public act' under the ADA. In the case of *Ekeru v Commissioner of Police, NSW Police Force* [2019] NSWCATAD 7926⁷ a police exercise that took place in a public station was a public act, even though it was closed to the general public by the police to the extent possible throughout the exercise. More recently, in the case of *Wolf v Secretary, Department of Education* [2023] NSWCATAD 20227 the NSW Civil and Administrative (NCAT) Appeal Panel found that a teacher teaching a class within a NSW High School was a 'public act' and that comments made during that class constituted racial vilification.

ADNSW considers that the definition of 'public act' in the ADA should be updated to reflect developments in jurisprudence, which would make it easier for people in NSW to understand the law and its coverage.

Material posted online

The definitions in the ADA were developed before the arrival of the internet and social media. This has led to confusing and contradictory decisions in relation to who is responsible for vilifying conduct online, for vilifying comments on individual's posts, and where conduct takes place across jurisdictions. Given the proliferation of hate speech online, the ADA should explicitly cover the dissemination of materials through social media and online platforms, and clarify who is liable for online hate speech.

⁶ https://lawreform.nsw.gov.au/content/dam/dcj/law-reform-commission/documents/Current-projects/ada/preliminary_submissions/PAD83.pdf

⁷ <https://www.caselaw.nsw.gov.au/decision/5cc8dd12e4b0196eea406988>

No protection for perceived characteristics

People who are presumed or perceived to be of a particular race or religion are not covered in the ADA provisions, which is at odds with other provisions in the ADA, for example, people presumed to be homosexual or infected with HIV/AIDS are protected under sections 49ZF, 49ZXB and 49ZXC of the ADA.

People who are subjected to racism or derogatory comments because it is assumed they are of a particular race or religion can be equally harmed by that conduct, even if they don't actually belong to that group. Under the current civil vilification provisions those people would have no recourse to make a complaint.

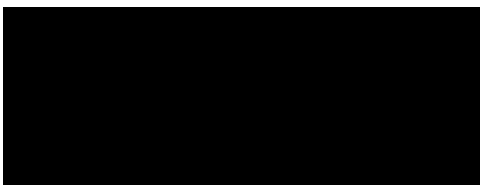
The 2013 Inquiry recommended that the NSW Government should amend the ADA's racial vilification provisions "to include persons of a presumed or imputed race".⁸ ADNSW considers that all vilification provisions in the ADA should be made consistent and should extend to include persons vilified on the ground of a presumed or imputed characteristic.

Section 88 requirement

As noted on page 4 above, section 88 of the ADA provides that only a member of the targeted group which is subjected to alleged vilification has standing to lodge a complaint under the civil provisions.

This means that people who encounter public conduct they believe may constitute vilification, such as comments on radio or television that vilify a particular group, cannot make a complaint about that behaviour. ADNSW often receives reports of potential vilifying conduct, but is unable to investigate the conduct because the concerned person is not themselves a member of the group vilified.

ADNSW thanks the Commission for the opportunity to make this submission in response to its Review of s 93Z of the NSW Crimes Act.



Helen McKenzie
President
Anti-Discrimination NSW

⁸ Standing Committee on Law and Justice, NSW Parliament, Report 50 – December 2013, *Racial vilification law in New South Wales*
<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2260/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

Phone (02) 9268 5544

Toll free number 1800 670 812

complaintsadb@justice.nsw.gov.au

Telephone interpreter service

131 450

Website

antidiscrimination.nsw.gov.au

Head office

Locked Bag 5000, Parramatta NSW 2124