Thursday 19 April 2024

NSW Law Reform Commission
Via email: nsw-lrc@dcj.nsw.gov.au

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

Dear Review Members

Jumbunna Institute for Indigenous Education & Research and the National Justice Project at UTS welcome the opportunity to comment on section 93Z of the *Crimes Act 1900* (NSW). Jumbunna Institute for Indigenous Education & Research ("**Jumbunna"**) undertakes research and advocacy on legal and policy issues of importance to Aboriginal and Torres Strait Islander people, their families and communities. Our current projects explore, inter alia, issues related to Aboriginal and Torres Strait Islander people's contact with the criminal justice and legal system. The National Justice Project ("**NJP**") is a cutting-edge human rights law firm working with First Nations people, people with disabilities, refugees and asylum seekers to fight discrimination.

In the course of the conduct of our work both Jumbunna and NJP staff consistently hear stories from community members of their experiences of racism and incitement to serious racism, and the impact those experiences have on both individuals and the community as a whole. It is clear from our research that the impacts of racist speech and incitement (including via digital platforms) are significant and severe, leading to feelings of disempowerment and fear that can give rise to hopelessness and frustration and have negative impacts on health and wellbeing.

The lived realities of racism, and racially motivated hatred and public promotion of violence towards Aboriginal and Torres Strait Islander people is felt and experienced directly by our First Nations team members in the course of their work and lives. The experiences and consequences of racism are not only an important area that we research and explore professionally, but a phenomenon that is unfortunately inextricably linked to the lives of all First Nations people. Staff members who advocate publicly against racism are particularly subjected to increased racist attacks, trolling and commentary.

Enduring setter/colonial structures continue to shape the experiences of Aboriginal and Torres Strait Islander peoples. The settler legal system in Australia has been built upon the dispossession and erasure of Aboriginal and Torres Strait Islander people, while failing to properly protect Indigenous interests. The dehumanising effect of racism in Australia is most evident in the historical and current experience of Aboriginal and Torres Strait Islander Australians and reflects a gross misunderstanding of Indigenous identity and culture. The notion that blacks would 'die out' explicitly permeated Australian mainstream political racist policies up until the 1960s, and explicit racism (allegedly justified in the guise of Special Measures) has continued within government policy to the present day. Historically such policies explicitly advocated the segregation of Aboriginal and Torres Strait Islander people and the implementation of the systematic removal of 'half castes' from their families to assimilate them by 'breeding out the colour'.[1]

Consequently, it is the position of Jumbunna and the NJP that the NSW Government should maintain the criminalisation of serious racial and religious vilification in NSW and that

[1] Dylan Bird, 'Aboriginal identity goes beyond skin colour', *The Age*, Opinion, April 6 2011, url: http://www.theage.com.au/opinion/politics/aboriginal-identity-goes-beyond-skin-colour-20110406-1d40r.html

prosecutions for those offences should be diligently brought. In so doing, it is appropriate that the Government review the current provision's effectiveness in achieving this aim.

Issues have arisen with S93Z since its introduction when considering Aboriginal and Torres Strait Islander communities. These are:

- *Vilification and incitement of violence against Aboriginal and Torres Strait Islander peoples is not effectively dealt with by s93Z.*

  There have been no or very few convictions under s93Z, which shows that vilification and incitement of violence against Aboriginal and Torres Strait Islander peoples is not dealt with by s93Z.

  Two prosecutions were attempted by NSW police. Convictions were initially secured, but then annulled due to a police error, as the police failed to get the consent of DPP before proceeding (a requirement at the time).

  In 2021, NSW Police stated they intended to re-prosecute. It is not clear if this has yet occurred. The NSW Criminal Court Statistics from July 2018 – June 2023 reports that from July 2018 to June 2022, there were no charges under the offence grouping of 'Vilify or incite hatred on racial, cultural, religious or ethnic grounds'.

  However, between July 2022 and June 2023 two defendants were charged with six charges between them. Both defendants' charges were finalised in a local court.[2] One defendant received an Unsupervised Community Sentence, specifically a Conditional Release Order without conviction and without supervision.[3]

  The NSW Criminal Court Statistics provides further statistics relating to Aboriginal defendants. One of the two defendants charged with an offence of 'Vilify or incite hatred on racial, cultural, religious or ethnic grounds' was an Aboriginal defendant, and had 5 charges proven under this offence grouping.[4]

- *Both the NSW and Victoria Police websites acknowledge that hate crimes or 'prejudice motivated' crimes are underreported*

  Underreporting may be in part attributed to crime statistics from Bureau of Crime Statistics and Research (BOCSAR) not capturing 'aggravating features' on sentence, namely, when:

  "*the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability)*" [5]

  This means, when police choose to charge prejudice-motivated offending under an assault or intimidation rather than 93Z, the sentence may be aggravated by 21A(2)(h), but this is not captured by BOSCAR. Therefore, in the absence of statistics from BOSCAR to capture racially-motivated offending under 21A(2)(h), reporting is almost entirely reliant on prosecutions under 93Z.

  While some underreporting can be expected in all criminal offending, there appears to be a greater disparity between the prosecution of section 93Z offences and the reality of prejudice-motivated offending. It remains crucially important to report prejudice-

[2] NSW Government | Bureau of Crime Statistics and Research (2023)NSW Criminal Court Statistics July 2018 – Jun 2023
[3] Ibid
[4] Ibid
[5] *Crimes (Sentencing and Procedure) Act 1999 No 92 (NSW),* section 21A(2)(h)

motivated offending as accurately as possible so as to acknowledge the real experience of Aboriginal and Torres Strait Islander people in the broader community and take action to reduce instances of racism and discrimination appropriately.

- *Similar legislation in other states have also been ineffectual*

  In all other Australian states, similar legislation exists making it racial vilification a specific offence, but there have also been no or very few charges or convictions. (See specific Table 1 below)

1. The impact of racial vilification and hate speech on Aboriginal and Torres Strait Islander communities

At the outset, it is important to acknowledge the very real and significant damage that is done by racial vilification and/or violence in a society and the psychological and physical impacts experienced by those subjected to it. It is not for the protection of political correctness that such provisions are required, but for the protection of the health and well-being of individuals within Australian society, in the same way that offences such as assault exist. Nor however do such general provisions address the unique nature of the offences of hate speech, for they fail to acknowledge both the role that society plays in the development of racist attitudes, and the responsibility it has for the addressing of the same. Hate speech and racial vilification is devastating to those who are targeted, as well as to the wider community.

In our view, there is a lack of understanding and appreciation within the broader Australian community of the real effects that such activity has upon the broader society at large.

Australia's long history of racist policies and contemporary structural disadvantage and racism towards the Aboriginal and Torres Strait Islander people has been directly linked to continuing issues facing the Indigenous population. This includes 'high rates of child removal, poor health outcomes, higher rates of disability, lack of access to housing, poor economic outcomes and higher rates of incarceration'[6]. This is discussed in a 2010 Senate Committee Report on Indigenous people and the criminal justice system. The Committee heard from an Aboriginal psychologist who stated that his patients in Aboriginal communities commonly suffer from "intergenerational trauma" as a result of historical dispossession, forcible removal from their families, racism and the early death of loved ones. He described it leading to a 'pool' of traumatised people in the community.[7]

Similarly, a 2013 study conducted on the mental health impacts of racial discrimination in Victorian Aboriginal communities found that those who experienced the most racism suffered from the most severe psychological stress.[8] The survey recorded that of the 4,000 participants, in the previous 12 months:

- 92 % were called racist names, teased or heard jokes or comments that negatively stereotyped Aboriginal people
- 85 % were ignored, treated with suspicion or treated rudely because of their race

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[6] Cunneen, C., & Russell, S. (2020). Vilification, vigilantism and violence: Troubling social media in Australia. In *Law, Lawyers and Justice* (1st ed., pp. 82–105). Routledge. https://doi.org/10.4324/9780429288128-6 page 12

[7] Select Committee on Regional and Remote Indigenous Communities*: Indigenous Australians, Incarceration and the Criminal Justice System*, March 2010, p. 29

[8] 'Mental health impacts of racial discrimination in Victorian Aboriginal Communities', VIC Health Study, http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Mental-health-impacts-of-racial-discrimination-in-Victorian-Aboriginal-communities.aspx
Date of Access: 25/3/24

- 84% were sworn at, verbally abused or subjected to offensive gestures because of their race
- 81% were told they were less intelligent or inferior than people from other races;
- 79% were left out or avoided because of their Aboriginality
- 67% were spat at, had an object thrown at them, were hit or threatened to be hit because of their race
- 66% were told they did not belong because of their race, and
- 54% had their property vandalised because of their race. [9]

This would amount to approximately 2,680 cases involved persons assaulted or threatened with assault on the basis of their race and 2,160 cases involved damage to property due to race, suggesting that there is significant racially motivated violence to people and property in Victoria. On the basis of the anecdotal evidence received by Jumbunna and NJP researchers, this is not atypical for other Australian states and territories. Such cases could, presumably, fall within a provision such as 93Z where incitement is involved and yet, in those other states as well as NSW, prosecutions under such provisions are extremely rare.

There is also emerging evidence on how experiences of racism in the workplace impacts Aboriginal and Torres Strait Islander employment. In 2020 Jumbunna and the Diversity Council of Australia released Gari Yala – Speak the Truth: Centring the experiences of Aboriginal and/or Torres Strait Islander Australians at Work found that Indigenous employees experience significant workplace racism and exclusion and racism impacts wellbeing and job satisfaction. The report found that:

- 38 percent of the research participants reported being treated unfairly because of their Indigenous background
- 44 percent reported hearing racial slurs in the workplace, and
- 59 percent experienced appearance racism – receiving comments about the way they look or 'should' look as an Aboriginal or Torres Strait Islander person.[10]

Such experiences and their impacts are not, of course, limited to Aboriginal and Torres Strait Islander communities. Following the September 11 attack, a hotline was set up in NSW in 2005 in relation to racially motivated attacks. Research conducted by Tania Dreher's into reports made to the hotline found that the most common impact that September 11 had on those of Middle Eastern descent in Australia was "*fear coupled with feelings of insecurity and isolation*", and they and their families were afraid to leave the house.[11] It has been established that the wider consequence of racist attacks, verbal or physical, is to oppress members of the victim group, leaving them with an increased sense of helplessness.[12]

Richard Delgado has also illustrated the devastating psychological and physical health impact of hate speech on individuals, documenting responses to racial insults that include feelings of humiliation, isolation and self-hatred and find that such speech may result in mental illness.[13] He documents that African Americans have higher blood pressure levels and mortality rates from hypertension, hypertensive disease and stroke at higher levels than

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[9] 'Mental Health Impacts of racial discrimination in Victorian Aboriginal Communities', op cit, p. 2

[10] Diversity Council Australia/Jumbunna Institute (Brown, C., Dalmada-Remedios, R., Gilbert, J. O'Leary, J. and Young, N.) *Gari Yala (Speak the Truth): Centring the Work Experiences of Aboriginal and/or Torres Strait Islander Australians*, Sydney, Diversity Council Australia/Jumbunna Institute, 2020.

[11] Tanja Dreher, "'Targeted' Experiences of Racism in NSW after September 11, 2001' (2005), referenced in Mark Walters, 'Changing the Criminal Law to Combat Racially Motivated Violence', (2006) 8 *UTS Review* 66 p.

[12] Ibid, p.74

[13] Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name Calling', in Mari Matsuda (ed), *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment,* Westview Press: Colorado, 1993, p. 91

white Americans.[14] In the study Delgado references, it states that there is strong evidence to support the connection between insults and higher blood pressure.[15]

International research also confirms these effects of racism. A 2004 national study conducted in America of 2,000 people investigated the impact of prejudice. The researchers found that racially motivated abuse was prevalent including verbal attacks and physical violence. Around 30 percent of those interviewed stated that they had been the victim of prejudicial violence or verbal abuse at least once in the past year[16] and one third of those interviewed had experienced verbal attack, abusive language, harassing telephone calls or hate mail.[17] Importantly, those targeted specifically because of their skin colour or race tended to have greater negative psychological symptoms than the victims of non-prejudicially motivated attacks, confirming the unique damage that results from attacks motivated by race. Recorded symptoms included stress, fear and severe depression.[18] Sullaway notes that victims of hate speech suffer from symptoms similar to that of posttraumatic stress disorder; such as panic, fear and extreme anxiety.[19] Moreover, there is evidence that suicide rates for ethnic immigrant groups in the United States are significantly predicted by the degree of the negativity of hate speech that they experience.[20] As Toby Mendel writes, "such speech is grossly degrading and presents a direct attack on the very humanity of its targets."[21]

Katharine Gelber has identified the effects of racial-motivated hate speech as follows:[22]

1. a limiting of victims' personal liberty
2. the internalisation of discriminatory messages, such that the hearer begins to believe the claims of appropriate inequality
3. the perpetuation of further acts of subordination, and
4. silencing of the hearer/s by making them unable to speak back.

Gelber's empirical study of all finalised complaints brought under the NSW racial anti-vilification legislation from 1989 to 1998 includes a complaint made by an Indigenous woman who was insulted by people in a vehicle at a service station. They yelled "you black slut", "You're nothing but a coon", and "I've shot worse coons than you". Gelber presents this as an example of how damaging a racial insult can be to an individual and the larger society. "The utterance appears to be one which propagates, perpetuates and maintains racist discrimination."[23], conjuring up the horrible and disturbing parts of Australian history in relation to hunting Aboriginal people and the inferiority of Aboriginal people by labeling the woman as an animal, less than human. The example illustrates the complex relationship between hate speech and its effects. Racial insults do not merely offend the person targeted but have a deep psychological impact on victims as well as contributing to maintaining racist structures in society.

Internationally, judicial decisions have recognised the intimate link between hate speech and violence. The 2003 United States Supreme Court decision *Virginia v Black*[24] was concerned

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[14] Ibid, p. 92

[15] Harburg, Erfurt, Hauenstein, Chape, Schull & Schork, 'Socio-Economical Stress, Suppressed Hostility, Skin Colour, and Black-White Male Blood Pressure: Detroit', 35 *Psychosomatic Medicine* 276 (1973) in Richard Delgado, Ibid, p. 92

[16] Howard J Ehrlich, Barbara E.K Larcom & Robert D. Purvis, 'The Traumatic Impact of Ethnoviolence', in *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography (*Laura Lederer & Richard Delago eds., 1995) p. 63-64.

[17] Ibid, at 64

[18] Howard J Ehrlich, Barbara E.K Larcom & Robert D. Purvis, op cit, p.64

[19] Sullaway, M (2004), Psychological perspectives on hate crime laws. *Psychology, Public Policy, and Law*, 10, pp 250–292.

[20] Mullen, B., & Smyth, J. (2004). 'Immigrant suicide rates as a function of ethnophaulisms: Hate speech predicts death.' *Psychosomatic Medicine*, 66, 343–348.

[21] Toby Mendel, 'Does International Law Provide for Consistent Rules on Hate Speech?', in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses,* Cambridge University Press: New York, 2012, p. 426

[22] Katharine Gelber, 'What to do about hate speech: an "institutionalised argumentation" Model', ANU Conference Paper, 2000. Accessed 5/2/13.

[23] Katharine Gelber, 'What to Do About Hate Speech', op cit, p. 8.

[24] *Virginia v Black* 538 US 342 (2003)

with cross burning, a prime example of the interconnection between hate speech, incitement and violence. The court discussed the history of the Ku Klux Klan using cross-burning to instill fear in the African American community, stating that:

"*…the person who burns a cross directed at a particular person often is making a serious threat, meant to coerce the victim to comply with the Klan's wishes unless the victim is willing to risk the wrath of the Klan*."[25]

The capacity of hate speech to incite violent acts against the victims is most evident when used by nation-states via national racial hate rhetoric directed towards political ends. The use of political hate speech in Nazi Germany and Rwanda led to the systematic genocide of millions of people.[26] The anti-Semitic and anti-Tutsi sentiments perpetuated by the respective German and Rwandan governments led to a sense of increased distrust and hatred for those groups targeted; "dehumanising the targeted group legitimises efforts to harm them."[27]

Target groups have experienced similar effects as a result of racism in Australia. Post September 11 (9/11), people of Middle Eastern backgrounds or appearance felt constantly vilified in Australia. Scott Poynting and Greg Noble's 2004 report on the extent of discriminatory abuse against Arabic Australians and Muslims in Sydney and Melbourne demonstrates this. Two thirds of those responding to questions had personally experienced an increase in racist abuse since 9/11. Of the participants of Islamic faith, 27 percent experienced racism on a weekly basis and 71 percent of those who experienced racist abuse or violence stated that a white Australian was the perpetrator.[28] One year after this study was completed, the Cronulla Riots publicly displayed racial hatred and abuse in full force, when 5,000 white Australians in Cronulla attacked those of Middle Eastern appearance. This resulted in widespread property damage and racially motivated physical violence. The riots were instigated by, amongst other things, heavy use of racial hate speech in the form of text messages sent by individuals, and subsequently reported by public radio stations. The riots clearly show the inextricable connection between racial hate speech and the racially motivated violence that can follow. Surprisingly, the Riots did not generate any charges under s20D of the *Anti-Discrimination Act 1977 (NSW),* notwithstanding evidence that would have supported such charges. One might posit that the reason for this was the increased complexity and difficulty of establishing such a charge, when charges of assault and incitement to assault, aggravated under section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act* 1999 *(NSW)* are available to the Prosecutor.

1.1 Racial Vilification, Hate Speech, Harm and the Connection to Violence

Jumbunna and NJP researchers consistently hear stories of aggressive racial discrimination, and public threats or incitement to violence towards Aboriginal and Torres Strait Islander peoples and communities from working with communities, as well as what is reported in the media and experienced directly by our team members.

Specific examples include:

- An online meeting for those seeking to volunteer for the Yes referendum vote in 2023 was interrupted by people in balaclavas who shouted racist statements. Some also had swastikas visible in the background

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[25] *Virginia v Black* At 343,357 (2003)

[26] Alexander Tsesis, 'Dignity & Speech: Regulation of Hate Speech in a Democracy', 44 *Wake Forest Law Review,* 499, pp 509-15 (p. 502)

[27] Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* 2002, p. 105

[28] Scott Poynting and Greg Noble, "Living with Racism: The Experience and Reporting by Arab and Arab Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001" (2004) http://hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf

- Far-right extremists published a video online directed at Indigenous Senator Lidia Thorpe, in which they read a racist statement, burned an Indigenous flag, and performed a Nazi salute,
- ASIO recognition of the increasing threat of extremist groups to commit and incite violence, including against Aboriginal and Torres Strait Islander peoples and calls for a 'race-war'. Investigations into ideologically motivated extremism forms a significant proportion of ASIO cases,[29] and
- The rise of online incitement and violent vilification directed towards Aboriginal and Torres Strait Islander communities.[30]

The 2023 Voice Referendum resulted in a spike in racist behaviours and threats aimed at Aboriginal and Torres Strait Islander people and communities. Indigenous-run mental health hotline 13YARN reported a 108 percent increase in callers reporting abuse, racism and trauma compared with the same period in 2022. Such spikes in reported racism and poor mental health exacerbate an already existing concern for Indigenous peoples in Australia.[31]

The referendum experience also highlighted to use of digital media as a tool for racist behaviour. In May 2023 the eSafety Commissioner described a more than 10 per cent increase in the proportion of complaints about online cyber abuse, threats and harassment of Indigenous Australians.[32] As reported by Anderson et al (2023), the First Peoples' Assembly of Victoria went from blocking two people per day for racist abuse on social media to blocking around 50 people citing the Voice Referendum as the reason for such an escalation.[33]

The reality is that Jumbunna and NJP researchers hear stories and see reporting of racial vilification and incitement regularly, so there are clearly cases that fall, prima facie, within the definition of the section. In order then for the section to be an effective prohibition, it is necessary to identify what about the provision is inadequate or problematic. It is, with respect, clear that the provision does not meet the end to which it was intended and that there needs to be a significant change in the way in which criminal provisions regarding threats of incitement to racial violence work in New South Wales. We note further that this appears to be the case with the various criminal provisions aimed at similar behaviour throughout Australia.

In our respectful submission, the current review represents an excellent opportunity to reform the existing provisions in order to move from aspiration to effect in ensuring that prosecutors are able and willing to prosecute racially motivated crimes.

S93Z differs from the other prohibitions contained in the remainder of the Act in that it provides for criminal penalties for the intentional or reckless threat or incitement of violence towards another person, or group of people on the basis of race, religion, sexual orientation, gender identify, intersex status or HIV/AIDS diagnosis. Since its introduction in 2018, there have been six people charged under S93Z, two convictions annulled in 2021, two charges withdrawn in 2021 and two prosecutions purportedly adjourned to 2023.[34]

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[29] Australian Government | Australian Security Intelligence Organisation (2024) *ASIO Submission to the Legal and Constitutional Affairs Reference Committee: Inquiry into right wing extremist movements in Australia*

[30] Sydney Morning Herald (21 May 2023) Amber Schultz, Voice debate spurs rise in cyber abuse, threats and harassment, accessed 19 March 2024

[31] Sydney Morning Hearls (2023) L Banks, 'Our people aren't feeling safe in their own country' accessed 8 April 2024

[32] Sydney Morning Herald (21 May 2023) Amber Schultz, Voice debate spurs rise in cyber abuse, threats and harassment, Date of access 19/3/24

[33] The Lancet (2023) Ian Anderson, Yin Paradies, Marcia Langton, Ray Lovett and Tom Calma

[34] Parliament of NSW | Legislative Assembly (2022) First Session of the Fifty-Seventh Parliament Questions and Answers NO. 175, 8694 Prosecutions Under 93Z of the Crimes Act – Mr Paul Lynch to the Attorney General, Date of access 13/3/24

Three key issues arise for the potential application of s93Z in relation to Aboriginal and Torres Strait Islander people. Firstly, the focus of the provision is on incitement to serious racism and racially motivated violence aimed at (or from within) culturally and linguistically, and religiously diverse communities and those who target them. This leaves Aboriginal and Torres Strait Islander peoples, 60 per cent of whom regularly experience some form of racial prejudice, outside the systems established to enforce such offences.[35]

Secondly, the provision of powers to NSW Police to launch prosecutions under s93Z may also dissuade Aboriginal and Torres Strait Islander people from pursuing a complaint given police have yet to overcome their historic, continuing and entrenched hostility to Aboriginal and Torres Strait Islander communities. It is also worth noting here that two prosecutions attempted to date under the provision collapsed due to the failure of NSW Police to secure the consent of the Director of Public Prosecutions before proceeding with the cases, as was required at that time.[36]

In the third instance, with the advent of social media, racism in Australia has become prolific on the internet, as well as increasingly normalised. Cunneen and Russell (2020) note that "the racist violence manifesting on social media draws on a much deeper colonial mentality towards Aboriginal peoples and other racial minorities, and the emboldened racism in social media has been legitimized and supported by various elites and mainstream media outlets".[37]

In their research they shared examples found on 'anti-crime' Facebook groups in Australia including:

This is why people should have guns if it looks like they're going to get away shoot them Just Shoot Em anyway doesn't matter (Townsville Crime Alerts & Discussion 16 October 2017

Don't ring the cops just beat the fuck out of them with poles and leave them in the gutter and just call the ambos (Dubbo Crimes Page, 30 October 2018)

Keep the shovel handy and flog the oxygen out of the scum (Dubbo Crimes Page, 12 November 2018)[38]

In 2022 Senator Lidia Thorpe, a Gunnai, Gunditjmara and Djab Wurring Senator for Victoria was tagged in a disturbing video posted by far-right extremists. The clip, which was posted on X, formerly known as Twitter, by a group calling themselves the "warriors of convict resistance", depicted a man in a balaclava reading a racist statement, burning an Indigenous flag, and performing a Nazi salute. In the clip, two men can be seen in the shadowy clip - one holding a British flag - standing by while another reads from a sheet of paper proclaiming Aboriginal people as 'the enemy' and welcoming the 'conquering' of their land. In the background, posted to a fence, is a sign calling Indigenous Senator Linda Thorpe a racial slur.

The video was accompanied with the caption: 'It was an invasion, we won'. The voice over adds statements 'Our forefathers did invade this land, in fact, they conquered it. The prize is the big red country, and our enemy is the Aboriginal', 'We will restate our claim as the rightful owners of this land, fuelled by our inevitable and eternal victory", 'When we burn the Aboriginal flag we aim to offend the cultural sensitivity of the Aboriginals and their supporters in order to make you feel the same pain and anger we feel when we see our flag being burnt', and 'Understand this land belongs to and is a part of white Australia.'[39]

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[35] Reconciliation Australia (2021) Reconciliation Barometer, page 5

[36] The Guardian | Australia edition (2021) NSW police botch the only two race hate prosecutions under new laws, Date of access 13/3/24

[37] Cunneen and Russell (2020) op cit page 1

[38] Ibid pages 7-8

[39] Daily Mail Australia (2022) L Parsons, Balaclava-wearing gang calling themselves the 'Convict Resistance' BURN the Aboriginal flag alongside racial slur against Indigenous senator Lidia 'Thorpe – before performing a Nazi salute.

The following year, in the lead up to the Voice Referendum, another social media post was made releasing a video showing a hooded man making a series of racist remarks against Aboriginal and Torres Strait Islander peoples before burning an Aboriginal flag and performing a Nazi salute. The unidentified man also singled out Senator Thorpe in the video.[40]

Despite the rise in racially motivated threats to Aboriginal and Torres Strait Islander people and communities during the referendum, it would appear that no charges have been laid in any jurisdiction under relevant legislation.

As is demonstrated above, hate speech creates and fosters an environment where it is acceptable to subordinate and oppress minorities, and makes it easier for people to engage, or be incited to engage in violent conduct, or to escalate violence because of who it is directed at. The constant fear and danger that those targeted experience leads to the silencing of those threatened, and Charles Lawrence has noted that hate speech damages the 'free exchange of ideas' in a democratic, liberal society because it instils real fear into those targeted and does not allow the normal social communication necessary for the free exchange of ideas.[41]

2. 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.

At Appendix B a table is provided that summarises the legislative enactments of the various Commonwealth, states and territories in regard to incitement to racial vilification and violence. Analogous legislation in other Australian jurisdictions show generally that these types of laws are ineffective for Aboriginal and Torres Strait Islander and other communities in their current form and a new approach needs to be taken. Harmonisation of criminal vilification offences across jurisdictions would contribute to understanding the seriousness of such offences and may help streamline education and prevention measures. However it should be noted that, currently the provisions are not being used effectively in any jurisdiction for criminal vilification of Aboriginal and Torres Strait Islander communities, despite evidence that communities experience vilification and threats of violence regularly.

2.1 New South Wales

As noted above, there have been two successful prosecutions under section 93Z of the Crimes Act in NSW, as referred to above. This is despite the fact that six persons have, to date, been charged with committing an offence under s93Z since its introduction in 2018.

With regard to the element of 'incitement', in *Sunol v Collier* (No 2) [2012] NSWCA 44 (citing *Young v Cassels),* the court states that the definition of incite is to 'rouse, stimulate, to urge, to spur on, to stir up, to animate.'[42] In addition to the above elements, the criminal offence provision requires that a fifth element to be proved, namely that the incitement must be by means which include either:

(i) threatening physical harm towards, or towards any property of, the person or group of persons, or

(ii) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Consequently, under the criminal provision, not only does the act have to be proved to incite violence, there must also be evidence that the inciting act was by means which specifically

[40] Al Jazeera (2023) A MC, As vote nears, 'horrific racism' mars Australian Voice referendum campaign
[41] Charles Lawrence III, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus', in *Words that Wound,* op cit, p. 77.
[42] *Sunol v Collier (No 2) [2012] NSWCA 44,* at para 26

threatened physical harm/damage to the person or property or incited others to threaten physical harm/damage to the person or property. There is significant difficulty from an evidential standpoint in proving not just than an act was done intending to incite people, but that it was done in a way that actually threatened, or inciting others to actually threaten, violence. Presumably hate speech that merely argued that violence would be a suitable avenue, but didn't actually incite violence, would not fall within the provision. The difficulty of proving the intention to incite may be the reason behind the lack of prosecution under the provision, and specifically the lack of interaction from Aboriginal and Torres Strait Islander communities.

2.2 International Comparison

The following international jurisdictions were looked at: UK, Scotland, Canada, New Zealand, US and Germany. The equivalent provisions of these jurisdictions have been included. In all jurisdictions except New Zealand and the US, the racial vilification / incitement provisions were contained in the Crimes Act or equivalent legislations.

In the USA the First Amendment protects the right to free speech and there are no laws that criminalise hate speech. However, this does not protect speech that incites imminent violence or lawlessness, as outlined below. Canada has a body of case law that resulted in offenders being sentenced to imprisonment.

In New Zealand, the provision is contained in the Human Rights Act and, much like Australia, there has not been many cases applying the racial vilification/ incitement provisions. Further information is provided at Appendix B.

2.2.1 International Law

Australia has international obligations under the following:

- Article 4 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which requires that State Parties should "*declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin*".[43]
- Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which requires that "*Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity".*[44]
- Article 8 (2) (e) of the UNDRIP requiring that State Parties "*shall provide effective mechanisms for prevention of, and redress for:*
    - *Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."*[45]

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) explicitly states that the right to freedom of speech carries with it certain responsibilities, and therefore is not immune to restrictions. Article 20(2) of the ICCPR states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'[46] As it can be seen, the United Nations has recognised the importance of regulation with regards to racial hatred and there needs to be state reform to ensure that international obligations are met successfully.

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[43] *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 4
[44] United Nations (2007) United Nations Declaration on the Rights of Indigenous Peoples, Article 2.
[45] United Nations (2007) United Nations Declaration on the Rights of Indigenous Peoples, Article 8.
[46] International Covenant on Civil and Political Rights, Article 20(2).

3. The availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW)

The following cases involve civil proceedings under the Anti-Discrimination Act 1977 and are provided as background to the kind of behaviour that is typically dealt with under the civil, rather than criminal, provisions.

Burns v Radio 2UE Sydney Pty Ltd[47]

Complaints of vilification against radio presenters for remarks about a homosexual couple on TV show The Block, made by a listener of the radio programme who is a homosexual man (not the men on The Block)

Sunol v Collier (No 2)[48]

In this matter, the appellant vilified homosexuals by posting materials on internet websites, in breach of s49ZT of the Act. As mentioned above, the judgment references *Young v Cassells,* and state that the definition of incite is to 'rouse, stimulate, to urge, to spur on, to stir up, to animate' (at 26).

The case dealt with the question of the principle of freedom of speech in the context of vilification. The public act in question cannot simply express hatred; it must be one "which would encourage or spur others to harbour such emotions" (at 28). In terms of discussing the freedom of political communication, the vilification law was deemed to burden this freedom; but to be lawful as it was reasonably appropriate and adapted to serving a legitimate end, namely preventing homosexual vilification. (para 52). As was stated by Bathurst CJ, "*It does not seem to me that debate, no matter how robust, needs to descend to public acts which incite hatred…"* (para 52). The same can be said with regards to racial vilification, and clear parallels can be drawn between homosexual vilification and racial vilification in this manner.

Cohen v Hargous; Karelicki v Hargous[49]

In this matter the Administrative Decisions Tribunal found 'offending comments were capable of inciting serious contempt for or severe ridicule of Jewish people on the ground of their race', including comments such as "when Jews get involved everything turns to shit, because Jews are shits!".[50] The Applicant was successful, and damages were awarded.

Western Aboriginal Legal Service Limited v Jones[51]
This case concerned the comments of radio broadcaster Alan Jones that were deemed to be racially vilifying the Aboriginal population under s20C of the ADA.
The facts of the case were that an Aboriginal woman had accused a real estate agency of being racist when she was denied assistance in looking for rental properties, but her white friend was not. Whilst on radio Jones stated:

> "*So, the Aboriginal woman argued discrimination and she got an award of six thousand dollars. Now I think that's a joke. And I'll tell you why I think it is. If I owned the only property on the real estate agent's list, the only property for letting, and a bloke walked through the door, and I don't care what colour he is, looking like a skunk and smelling like a skunk, with a sardine can on one foot and sandshoe on the other, and a half drunk bottle of beer under the arm, and he wanted to rent the final property available and it was mine, I'd expect the agent to*

[47] *Burns v Radio 2UE Sydney Pty Ltd* [2004] NSWADT 267, [13].
[48] *Sunol v Collier* (No 2) [2012] NWSCA 344.
[49] *Cohen v Hargous; Karelicki v Hargous [2006] NSWADT 209*.
[50] Gelber & Stone, *Hate Speech and Freedom of Speech*, p. 113.
[51] *Western Aboriginal Legal Service Limited v Jones [2000] NSWADT 102*.

say no without giving reasons. What discrimination would the agent be guilty of then?"

In determining whether the comments were in breach of the civil provisions, the ADT held that the question is "whether an ordinary reasonable person would consider the public act to be reasonable in all the circumstances". The court came to the conclusion that it was not a reasonable act and ordered an apology to be publicly made.

Kazak v John Fairfax Publications Ltd[52]
The ADT ruled that an article published in the Australian Financial Review, which stated that 'the Palestinians cannot be trusted in the peace process' and that 'the Palestinians remain vicious thugs who show no serious willingness to comply with agreements' was in breach of NSW's racial vilification laws. Furthermore, the Tribunal stated that a liberal approach should be applied in determining whether there is a breach of the provisions, "so long as that construction is not unreasonable or unnatural."[53]

Whippy v University of Sydney[54]
Mr Whippy (identifies as Black) made a complaint alleging unlawful discrimination on the ground of race by the University of Sydney, where he was studying at the time. The complaint relates to comments made by a lecturer during a film studies class, when showing excerpts of *The Birth of a Nation* which Whippy considered constituted racist propaganda.

Wolf v Secretary, Department of Education[55]
Applicant lodged complaint of race discrimination, racial vilification and victimisation on behalf of her daughter against the Department of Education and a high school teacher. The Applicant's daughter is partially of Indian heritage. The teacher played a YouTube video during class which showed an Indian woman speaking in English and Hindi. The teacher mocked her accent, and repeated harmful stereotypes about Indian people in front of the class.
Lamb v Campbell[56]
William 'Billie' Lamb, a Wiradjuri man of the Dubbo clan, commended a proceeding under the Anti-Discrimination Act 1977 (NSW) against Wayne Campell. Judgment held that Campbell "delivered an unprovoked verbal assault" ([1]) against Lamb, which was "vile, racist and homophobic" ([2]). Lamb was standing in his friend's driveway having a conversation. Campbell lived next door and began yelling racist and homophobic slurs at Lamb, unprovoked.
Campbell ordered to pay $2,250 and publish a public apology in local newspaper. If he failed to publish the apology, he had to pay another $2,250.

Riley v New South Wales[57]
Three Aboriginal men who worked in a school facilitating support services and programs for Indigenous students alleged staff at the school racially discriminated and racially vilified them. However, the application was dismissed as the tribunal was not satisfied this occurred.

Ekermawi v Commissioner of Police[58]
Court found that the NSW Police Force racially vilified Palestinians and Arabs. The NSW Police published material about a training exercise in which the two police officers portraying

[52] *Kazak v John Fairfax Publications Ltd [2000] NSWADT 77.*
[53] *Kazak v John Fairfax Publications Ltd* (2000) NSWADT 77 at para 22.
[54] *Whippy v University of Sydney* [2023] NSWSC 1607.
[55] *Wolf v Secretary, Department of Education* [2023] NSWCATAD 202.
[56] *Lamb v Campbell* [2021] NSWCATAD 103.
[57] *Riley v New South Wales* [2019] NSWCATAD 223.
[58] *Ekermawi v Commissioner of Police* [NSW] [2019] NSWCATAD 79.

the armed offenders wore keffiyehs, a traditional headdress associated with Palestinian and Arabic men.
Tribunal ordered the NSW Police Force issue an apology, and institute a program of education regarding racial vilification.

Malenha v Sullivan[59]
Applicant and Respondents were neighbours in a social housing complex. Applicant was born in Portugla and grew up in South America and alleges Respondent repeatedly and consistently subjected her to racial abuse, including yelling at her to 'Shut up, only speak English', calling her a 'Portuguese prostitute', and telling her to 'get out' and 'go home' as she 'doesn't belong here'.
Tribunal found the conduct constituted racial vilification, and ordered the Respondent publish a public apology and pay the Applicant $2,500.

Trad v Jones (No 3)[60]
Alan Jones made remarks and read out correspondence from listeners on radio show that constituted vilification of the Lebanese Muslim community.
Respondents ordered to pay $10,000, conduct a review of its training, policies and practices on racial vilification, and publish an apology.

Margan v Taufaao[61]
Complaint made of homosexual vilification after respondent behaved in an aggressive manner at a Sydney nightclub, including the use of homosexual slurs and physical violence directed at the victim (Applicant was a witness).
Tribunal ordered Respondent pay $10,000 in compensation to the Applicant.

Droga v Birch[62]
Applicant identifies as Jewish. Applicant submitted a complaint alleging racial vilification against his neighbours, who hung a sign between their properties displaying a swastika and a person hanging from a gallows, with threatening words.
However, Tribunal found there was no 'public act' so complaint dismissed.

Margan v Manias[63]
The applicant alleges unlawful homosexual vilification under s 49ZT of the Act and the offence of serious homosexual vilification under section 49ZTA of the Act. The actions complained of include public comments made by the respondent like "I am going to eradicate all gays from Oxford Street" and "Do not worry I am doing good work". These comments were accepted as 'incitement' as "[m]embers of the public hearing them would have been "prompted" or "spurred on" to harbour these feelings." Respondents ordered to pay damages and publish an apology "as a quarter-page advertisement in the Sydney Star Observer".
There was also physical assault of the applicant on another occasion, for which the respondent was charged with five assault offences. This was not considered 'incitement' and was rejected.

Burns v McKee[64]

[59] *Malenha v Sullivan* [2017] NSWCATAD 222.
[60] *Trad v Jones (No 3)* [2009] NSWADT 318.
[61] *Margan v Taufaao* [2017] NSWCATAD 216.
[62] *Droga v Birch* [2017] NSWCATAD 22.
[63] *Margan v Manias* [2013] NSWADT 177.
[64] *Burns v McKee* [2017] NSWCATAD 66.

The applicant alleged that comments published by the respondent on the Causes.com website breached ss 49ZS and 49ZT of the Act, and amount to homosexual vilification. The respondent published:

> *"The cultural shift towards 'gay marriage' has a very dark and dangerous underbelly. This is because homosexuals are three times more likely to commit sex crimes against children than heterosexuals. Two pedophiles form a union in a 'gay marriage' and become 'gay dads' by adopting a baby for the purpose of later sharing with their kind on a 'boy lover' network. Gay marriage is therefore promoted by pedophiles as a mask for their perverted nature. The joys of gay fatherhood, indeed."*

The second sentence was found to have breached the provision, and the respondent was ordered to publish an apology on the Causes.com website.

Burns v Dye[65]
The applicant's front door was defaced by the respondent, who drew "a large penis and the words "fag lives here, faggots should die"" on it. This amounted to unlawful homosexual vilification under the Act as it constituted "a form of communication to the public" and satisfied 'incitement'.
The respondent was ordered to pay damages and send an apology letter to the applicant.

Burns v Corbett[66]
The respondent made multiple statements which were reported in multiple newspapers, including the front page of a Victorian newspaper, the *Hamilton Spectator*, and the websites of the *Sydney Morning Herald* and the *Australian*. The passage in the *Hamilton Spectator* stated:

> *"I don't want gays, lesbians or paedophiles to be working in my kindergarten.*
> *'If you don't like it, go to another kindergarten.'*
> *When asked if she considered homosexuals to be in the same category as paedophiles, Ms Corbett replied 'yes'.*
> *'Paedophiles will be next in line to be recognised in the same way as gays and lesbians and get rights,' she said."*

The statements amounted to unlawful homosexual vilification.

4. The impacts on freedoms, including freedom of speech, association and religion

We note that, in the general discussion of this issue amongst many commentators, concerns have been raised regarding a purported 'threat' that regulation poses to the principle of Freedom of Speech. The importance of freedom of speech to a liberal democracy is undoubtedly a relevant consideration when it comes to laws regulating what someone can or cannot say. However, two points may be made.

Firstly, it has long been the case in Australia that the principle of Freedom of Speech has been a conditioned one which gives way to other considerations where appropriate. The principle is neither absolute, nor, in truth, central to the constitutional polity established by the Constitution. Secondly, the purpose of the principle of freedom of speech is to facilitate the free exchange of ideas and perspectives, something that is impeded when individuals are prohibited from properly participating in that marketplace because of the effects of hate speech. Hate speech, incitement to and racially motivated violence silence minorities and destabilise communities. Thereby laws that ensure that there will be severe consequences for hate speech provide those who otherwise may be too fearful to contribute to debate a chance to have their voices heard. This is what a democracy is based on: the full participation in society of every citizen, no matter their colour, creed or country of birth.

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[65] *Burns v Dye* [2002] NSWADT 32.
[66] *Burns v Corbett* [2013] NSWADT 227.

Such arguments also reveal a cultural prejudice, prioritising an esoteric 'principle' over the real harm that can be suffered by victims of racial vilification.

While we acknowledge that the principle of freedom of speech is highly valued in any democratic, liberal society, it cannot however be described as an absolute right in any such democracy, including Australia. As Dr William Jonas set out in his paper, there are many laws that necessarily restrict the right to freedom of speech in Australia. These include defamation laws, laws on sedition to protect national security and laws regarding false advertising.[67]

John Stuart Mill contributed significantly to the philosophical justification of freedom of speech. He argued that the fullest form of freedom of expression should be allowed in society, no matter how immoral it may seem to others.

"*If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind*."[68]

He stated that it is important to preserve 'the marketplace of ideas'. Under Mill's harm principle, any behaviour, statement or action should be permitted in a democratic society, so long as it does not harm another individual. It would seem that laws regulating serious racial vilification would not contradict Mill's harm principle, classified as not interfering with individual freedom, but rather protecting people from feeling victimised or fearful for their own safety. The freedom of speech principle is inextricably linked to a democratic society; but this principle should not be held above in the importance of protecting citizens from serious harm.

4.1 Freedom of Speech in Australia

There is no express guarantee of individual free speech enshrined in the Australian Constitution. Freedom of speech has only been discussed in case law in the context of the implied political communication principle, which has been held to be implicit in the system of representative democracy under sections 7 & 24 of the Constitution. That discussion is summarised below:

In a unanimous decision in *Lange v ABC* (1997) 145 ALR 96, the High Court held that the freedom of political communication principle is intrinsic to the Australian system of representative government.[69] As stated in the Constitution, members of the Senate and the House of Representatives shall be 'directly chosen by the people'. Thereby it follows that citizens need to have the freedom to be able to make informed decisions regarding electing members of the government.[70] As stated in this case, freedom of communication is an 'indispensable' attribute of the system of representative government.[71] *Lange* also makes clear that the protection of freedom of political communication is not absolute. "…it is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution."[72] The Court emphasised that the principle operates as a limited right, and does not operate as a constitutional defence;

"[sections 7 & 24] do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power."[73]

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[67] Dr William Jonas, 'Racism and the Fourth Estate' Seminar, Monday 12th of August 2002.
[68] John Stuart Mill, *On Liberty,* Hackett Publishing: Indiana, 1978, p.16.
[69] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, at 106.
[70] *Lange v ABC,* at 106.
[71] *Lange v ABC,* at 106.
[72] *Lange v ABC,* at 107.
[73] *Lange v ABC,* at 107.

In *Lange*, the High Court established a two-limbed test to decide whether a law breaches the implied freedom of political communication:

1. Does the law burden political communication?
2. Is the law appropriate and adapted to an end that is consistent with the system of representative and responsible government established by the Constitution?[74]

If the answer to the first question is yes, and the answer to the second question is no, the law will be deemed to be unconstitutional.

In *ACT v Commonwealth* (1992) 108 ALR 577, Mason J stressed the importance of the implied freedom of political communication principle, stating that without it, the government would "cease to be truly representative"[75] and "only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision."[76]

Nonetheless, the principle remains a conditional one, limited to those communications necessary for the effective operation of our system of Government. It is extremely difficult to see how hate speech and speech calling for violence against individuals of a particular race could be seen to meet that test.

In Eatock v Bolt [2011] FCA 1103 Federal Court judge Bromberg J held that Herald Sun opinion columnist Andrew Bolt and the Herald & Weekly Times had contravened the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) in two articles published in 2009. The nine Aboriginal applicants in the case included one of Jumbunna's leaders, Distinguished Professor Larissa Behrendt. Bromberg J highlighted that "[a]t the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings."[77]

Bolt's articles demeaned 'fair-skinned Aborigines' for identifying as Aboriginal to gain 'political and career clout'.[78] In one of the articles, Bolt wrote of Pat Eatock: "*[she] became the first Aborigine to stand for federal parliament in the ACT, even though she looked as white as her Scottish mother or some of her father's relatives*".[79] In 2007, Ms Eatock elected to sue Bolt not under defamation laws, but under the provisions of the *Racial Discrimination Act* prohibiting offensive behaviour because of race. Among the issues considered in the case was the significance of language and the damage it can cause.

Bolt argued in the case, that he had a freedom of expression to write the things he did, and he conducted the case as though that freedom had been unfairly restricted by the *Racial Discrimination Act.* Many commentators supported that position. In finding that Bolt had breached the section however, the Court made specific note of the extent to which the comments made by Bolt were wrong, poorly researched and inflammatory. The issue, in the Courts opinion, was that there must be some degree of responsibility that attaches to such a privilege, and by publishing clearly incorrect information as fact, and by electing race as the issue with which to attack the Plaintiffs, Bolt had failed to live up to that responsibility. Indeed, the whole purpose of the freedom of expression is to allow the unpopular idea to be propounded by the unpopular speaker. But this aim is not served by allowing racially vilifying attacks to be made against the speakers themselves, because of who they are, rather than what they believe or advocate. It is in reducing the victim to less than a citizen that hate

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[74] *Lange v ABC,* at 567-568.
[75] *ACT v Commonwealth*, (1997) 145 ALR 96 at 594.
[76] *ACT v Commonwealth*, at 594.
[77] Human Rights Law Centre (2011) Federal Court upholds the right to be free from racial discrimination, Date accessed 27/04/2024.
[78] Andrew Bolt, 'It's so hip to be black', *Herald Sun,* 15 April 2009.
[79] Andrew Bolt, 'It's so hip to be black', op cit

speech crosses the boundary between a freedom to partake in democracy, and the oppression of those who wish to live in one.

5. The need to promote community cohesion and inclusion

Jumbunna and the NJP agree in principle with the importance of community cohesion and inclusion. However, the current lack of a systemic, government-led coordinated approach to addressing racism in Australian society and the preference for 'social cohesion' by government has weakened policy and program approaches to anti-racism work. For Aboriginal and Torres Strait Islander communities, this means the focus remains on victims of racial vilification to 'fix the problem' with little or no focus on the broader community to address the issue of racism itself. Until this changes and given the extent of entrenched and consistent direct and systemic racism aimed at Aboriginal and Torres Strait Islander communities, we do not see the promotion of community cohesion and inclusion as a either a priority or a likely outcome for Aboriginal and Torres Strait Islander communities.

6. Section 93Z: Pitfalls & Problems

Since its introduction, S93Z has failed to provide protection for Aboriginal and Torres Strait Islander people and communities from vilification and incitement to and threats of racial violence. This is not due to the section itself but lies in the complex mixture of:

- the normalisation of racial vilification in the context of these communities based on historic, constant and ongoing experiences of direct racial vilification
- the systemic nature of institutionalised racism in Australia and the requirement to rely on police for prosecutions
- the limited knowledge among Aboriginal and Torres Strait Islander communities due to the lack of an appropriate *and funded* community education program delivered by Aboriginal Community Controlled organisations (ACCOs), community service providers and community legal centres, and
- the challenges presented by the growth of online hate speech and incitement to criminal vilification and the response of the legal and criminal system.

This limited knowledge and reluctance to act in part contributes to the absence of cases citing S93Z involved vilification or incitement against Aboriginal and Torres Strait Islander people to date, despite Indigenous peoples and communities being subject to the highest levels of ongoing racial vilification and threat in the Australian community. Enforcement of racial vilification laws has been problematic in the past and the previous offence which existed from 1989 until the 2018 reforms was not used to secure a successful prosecution.[80]

After the 2018 introduction of S93Z, the NSW Government provided a grant of $200,000 to Legal Aid to assist in raising awareness of the new laws however this occurred more than one year after the reforms were introduced leading to a prolonged gap in the campaign roll out to 2020.[81] This was a limited attempt at community education that fell short of focussing on Aboriginal and Torres Strait Islander communities.

The recent removal of the requirement for approval for prosecution by DPP and power to launch prosecutions to NSW Police is highly problematic given the historic and ongoing relationship NSW Police have with Aboriginal and Torres Strait Islander communities. Police

[80] The Guardian Australia (2021) C Knaus and M McGowan, NSW police botch the only two race hate prosecutions under new laws.
[81] The Guardian Australia (2021) C Knaus and M McGowan, NSW police botch the only two race hate prosecutions under new laws.

in NSW and across the country are often perpetrators of racist abuse and vilification themselves.[82]

Complexities arising from social media are also to be taken into consideration. In August 2023, The Guardian Australia reported on at least two Zoom® meetings for those seeking to volunteer in Casey and Boroondara in Victoria for the Yes vote in the recent Voice Referendum that were interrupted by people in balaclavas who shouted racist statements. Some also had swastikas visible in their backgrounds. [83]

Online threats of violence, cyberbullying, harassment, incitement and aggression against First Nations Peoples raises threshold questions of the provision. However, there is comprehensive research which shows the role that such online acts play in an already traumatic context of racist abuse and hate when it comes to inciting violence. Dr Tristan Kennedy's 2020 research Indigenous peoples; experiences of harmful content on social media found that:

- 78 per cent of research respondents had witnessed hate speech at least weekly over a six-month period
- Types of violence observed in content analysis conducted by this research included homicidal ideation, physical assault, battery, rape, lynching and public humiliation
- The most concerning form of inciting of violence against Indigenous people was the increasing instances of "fight club" style violence being organised by [non-Indigenous] people via social media, and
- The research also noted that harmful speech also uses colonial tactics of dispossession, denial of Indigenous Custodianship and support for assimilationist policies which have been linked to an increased chance of violence and lateral violence.[84]

Reports to the *Call It Out* Register include reports of and direct online abuse, and we are seeing an increasingly 'lynch-mob' mentality towards Aboriginal and Torres Strait Islander people online and on social media pages including the following:[85]

"On an image of a First Nations man someone has commented - cops need more target practice and 5 cent and laughing faces."

"The ONLY way to give these mongrels PAUSE is to string a few hundred of them up to lamp posts, which happens to be the PROPER way to deal with high treason."

"To householder, vote no. Useless stone age degenerates. Encourage ALL ABOS to suicide."

"Mate keep being racist on posts like this and I'll have me and my mates run a train through your fucking girlfriend. Dumb cunt. Nothing but a racist half cast piece of entitled garbage."

"Captain cook should of finished what he started!"

There are limitations to the protection offered under legislation in the context of online racism and racial vilification. There are limited protections for hate speech under s18C of the RDA however s18D excludes from s18C anything said or done 'reasonably and in good faith'.[86]

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[82] Chris Cunneen, Conflict, Politics and Crime: Aboriginal Communities and the Police, 2001, Sydney: Allen and Unwin; Porter, A. (2016). Decolonizing policing: Indigenous patrols, counter-policing and safety. Theoretical Criminology, 20(4), 548-565. See https://journals.sagepub.com/doi/abs/10.1177/1362480615625763

[83] The Guardian Australia (2023) J Taylor and A Bogle, Zoom meetings for Indigenous voice volunteers 'bombed' by people yelling racist comments.

[84] Kennedy, T (2020) Indigenous Peoples' Experiences of Harmful Content on Social Media, Macquarie University, Sydney.

[85] Unpublished, Anonymous, report made to Call It Out First Nations Racism Register 2022-2024, Jumbunna Institute of Indigenous Education and Research.

[86] Racial Discrimination Act 1975 (Cth), S18D.

Cunneen and Russell cite data from the Australian Human Rights Commission indicating that while complaints made under 18C of the RDA more than doubled in the period 2015-16 to 2016-17, only 5 per cent of complaints in the latter period related to online materials.[87] They suggest that this could be a result of the locus of enforcement responsibility under Australian hate speech legislation lies with the victims.[88] In the context of online incitement and vilification, victim initiated proceedings make it very difficult in the context of closed groups with a group administrator. As well, in spite of platform codes for governing such behaviour, it has proved difficult to successfully have such materials removed as the platforms themselves are slow to act and have proved unwilling to regulate racist conduct by their users.

Two legislative avenues – *Enhancing Online Safety for Children Act 2015 (Cth)* and the *Criminal Code Amendment (Unlawful Showing of Abhorrent Violent Material) Act 2019 (Cth)* are both limited by powers to investigate complaints directed at a specific child in the first instance, and the exclusion of hate speech or incitement in the second.

The provision has only been considered in the following two cases since it came into force (neither involving online vilification against Aboriginal and Torres Strait Islander people)] however neither made any determinations regarding the section:

Southey v Australian Press Council[89]

This application for summary dismissal surrounded discrimination against a murderer on parole who had undergone gender reassignment surgery whilst incarcerated. Upon news of their parole, the Daily Telegraph posted a letter to the editor stated disgruntled and threatening comments regarding the plaintiff's surgery. The plaintiff complained to the Australian Press Council about the publication on the basis that it was discriminatory. The Council refused and thus the plaintiff launched proceedings against them. The defendants lodged an application for summary dismissal which the judge dismissed. Senior Member Tibbey decided that there was a sufficient ground for the Civil and Administrative Tribunal to hear whether the Australian Press Council contravened this act. Nothing further has come from this case but that is likely due to the decision being handed down in December 2023.

R v Bayda (No 8)[90]

This case very briefly considers the legislation. This case involved Sameh Bayda and Alo-Bridget Namoa who were charged with conspiring to conduct terror attacks. In discussing whether the offenders were culpable on the basis that they were religious fanatics, Fagan J decides that they will not be any less culpable due to having been converted to religious fanaticism by online teachings. In passing, Fagan J makes a comment that those propagating Jihad online would be liable under 93Z if they were prosecuted. Specifically, at [75], Fagan J states "Publicly disseminating in Australia the religious belief that Muslims are under a duty to attack non-believers (as taught by the online propagandists and by Bayda's Islamic mentors in Sydney in 2013) is an incitement to communal violence. Since the commencement of s 93Z(1)(b) of the Crimes Act it would constitute an offence in this State, not excused by the reference to scripture." However, as the defendants were not propagating violence, rather planning to commit violence, Fagan J did not comment further on the legislation.

7. Proposed Recommendations

[87] Cunneen and Russell (2020) page 19.
[88] Ibid.
[89] Southey v Australian Press Council [2023] NSWCATAD 307.
[90] *R v Bayda (No 8) [2019] NSWSC 24*

Jumbunna and the NJP respectfully propose the following recommendations to the review committee:

1. A funded community education and engagement approach that provides appropriate training on the provision (and potentially other relevant legislative avenues for hate speech generally) to Aboriginal community-controlled organisations (ACCOs), community legal centres and community service providers to deliver into community to raise awareness of S93Z and its potential use.
2. Acknowledging that by solving racism in Australian society, we therefore solve the problem the provision is aimed at is not likely to occur in the near future, committed government investment to resource anti-racism initiatives are suggested.
3. If NSW Police are to retain the provision of powers to launch prosecutions under s93Z, that a dedicated unit be established with the Force to handle direct complaints of incitement and vilification. This would enable ACCOs, the legal community and community service provider staff to act as a 'middle ground' between potential complainants reluctant to deal with police and police who are experienced in culturally safe and appropriate community engagement as well as the provision itself. This could, in part, overcome the reluctance of Aboriginal and Torres Strait Islander people to approach police themselves and allow for advocates to work with police in the first instance.
4. Clarity on online incitement and vilification in the provision to ensure it keeps step with use of technology to capture the growing levels of incitement and vilification through social media.

In closing our submission, we would like to refer once more to our *Call It Out Register*. The register receives a significant number of racist reports (around 10% in 2022-23) from non-Indigenous people, these range from claims of reverse racism to insidious reports and go as far as explicit threats of violence towards community as well as public figures who are of Aboriginal and Torres Strait Islander descent. The following online post was provided to the Register by one such non-Indigenous person. It highlights what Aboriginal and Torres Strait Islander people and communities have been faced with for over two centuries, first explicitly endorsed and supported by government, and in contemporary times, perpetrated in person or by faceless, anonymous racists online.

> *"Kill niggers. Behead niggers. Roundhouse kick a nigger into the concrete. Slam dunk a nigger baby into the trashcan. Crucify filthy blacks. Defecate in a niggers food. Launch niggers into the sun. Stir fry niggers in a wok. Toss niggers into active volcanoes. Urinate into a niggers gas tank. Judo throw niggers into a wood chipper. Twist niggers heads off. Report niggers to the IRS. Karate chop niggers in half. Curb stomp pregnant black niggers. Trap niggers in quicksand. Crush niggers in the trash compactor. Liquefy niggers in a vat of acid. Eat niggers. Dissect niggers. Exterminate niggers in the gas chamber. Stomp nigger skulls with steel toed boots. Cremate niggers in the oven. Lobotomize niggers. Mandatory abortions for niggers. Grind nigger fetuses in the garbage disposal. Drown niggers in fried chicken grease. Vaporize niggers with a ray gun. Kick old niggers down the stairs. Feed niggers to alligators. Slice niggers with a katana. Obliterate Abbos. Drown Abbos. Run over Abbos in trucks. Crack a bottle open over an Abbos head. Use Abbos as shooting practice. Toss Abbo babies off bridges. Snap frail Abbo legs. Crush Lydia Thorpe's head in a hydraulic press. Watch Abbos kill their children and eat them. Watch Niggers stay stuck in the stone age for 60,000 years."*[91]

[91] Unpublished, Anonymous, report made to Call It Out Register 2023-24, Jumbunna Institute of Indigenous Education and Research

Kind regards

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Appendices

Appendix A: *Criminal vilification offences in other Australian Jurisdictions*

Jurisdiction	Other legislation	Effectiveness
Cth	Criminal Code Act 1995: s 80.2A **Offences** (1) A person (the **first person**) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and (b) the first person does so intending that force or violence will occur; and (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and (d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth. Penalty: Imprisonment for 7 years. (2) A person (the **first person**) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and (b) the first person does so intending that force or violence will occur; and (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion. Penalty: Imprisonment for 5 years. (3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness. Note There is a defence in section 80.3 for acts done in good faith.	Inserted: 22 Dec 2010 History: Even though it is ostensibly easier to charge under this offence as there is no DPP requirement, it has never been utilised. It has been mentioned in one case. In Ridd v James Cook University (2021) 274 CLR 495 at [20], the provision was cited as the authority that 'hate speech' is unlawful but was not considered further.
Victoria	Racial and Religious Tolerance Act 2001: s 7 (1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. (2) For the purposes of subsection (1), conduct— (a) may be constituted by a single occasion or by a number of occasions over a period of	Inserted: 2001 History: This provision has only been argued and considered at length in Australian Macedonian Advisory Council Inc v LIVV Pty Ltd [2022] VCAT 1336. The case concerned racism against Greeks. Ultimately, the member dismissed the

	time; and (b) may occur in or outside Victoria.	complained. In the decision, she did clarify a question of law: "*So in the context of s 7 the question that must be asked is whether, having regard to the content of the article as a whole set in its historical and social context, to the nature of an ordinary member of the audience it might reach, whether the natural and ordinary effect of what was stated in the article is to stir up, etc or stimulate and encourage the hatred of, serious contempt for, or revulsion or severe ridicule of [a race] on the ground of their race*." In Sitha v Toll Holdings Ltd [2022] VCAT 1336, a man was denied a job on the basis that he looked Aboriginal. This was found not to fall under s 7 of the Act as it did not incite hatred and therefore the claim was dismissed.
Queensland	Anti-Discrimination Act 1991 (Qld): ss 124A (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group. (2) Subsection (1) does not make unlawful— (a) the publication of a fair report of a public act mentioned in subsection (1) ; or (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.	Inserted: 2001 History: In Owen v Menzies [2012] QCA 170 the provision was discussed at length as to whether it contravenes the Right to Freedom of Political Communication. The Court found that it did not In Smith v Sanreef Pty Ltd [2020] QCAT 353, the court heard an argument pursuant to this section. The Applicant alleged that they had been removed from a dining premises on account of their race. Whilst Member Gordan found against racial vilification, he did spend a considerable amount of his judgement applying the law to the specific facts [13]-[17]. In Anderson v Thiess Pty Ltd [2015] FWCFB 478, the court considered that this section was a legitimate constraint on

		the Freedom of Expression [26] (this was in the context of religion however). In Trustees of Toowoomba Sports Ground Trust v Hagan [2007] FMCA 910 the Respondent made an application to the Anti-Discrimination Commission of Queensland on the basis that the presence of the offending word on the grandstand and apparent refusal by the Association to remove the sign is a public act that encourages hatred towards, serious contempt for and severe ridicule of Aboriginal people. The sign read 'The ES "Nigger Brown" Stand' Federal Magistrate Burnett found that this language 'is not the type of communication that the Parliament intended to prohibit' and dismissed the issue.
West Australia	Criminal Code Act Compilation Act 1913: Chapter XI — Racist harassment and incitement to racial hatred.	Inserted: 2004 This chapter outlines extensive protections against general harassment and/or incitement to racial hatred. These included acts that intend to (77) or are likely to (78) insight racial animosity or racist harassment. Or even have in your possession material that is intended to (79) or are likely to (80) insight racial animosity or racist harassment. It does have a requirement that the DPP must give consent to charge someone under these acts (80H). History: It appears that these provisions have never been employed.
South Australia	Racial Vilification Act 1996: 4—Racial vilification A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by—	Inserted: 1996 History: This provision has never been utilised nor

	(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or (b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group. Maximum penalty: If the offender is a body corporate—$25 000. If the offender is a natural person—$5 000, or imprisonment for 3 years, or both. 5—DPP's consent required for prosecution	discussed in case law.
Tasmania	Anti-Discrimination Act 1998: s 19 A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of — (a) the race of the person or any member of the group; or (b) any disability of the person or any member of the group; or (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or (d) the religious belief or affiliation or religious activity of the person or any member of the group; or (e) the gender identity or sex characteristics of the person or any member of the group.	Amended: 2019 History: This Act has been successful in prosecuting hate speech against homosexuality (Durston v Anti-Discrimination Tribunal (No 2) [2018] TASSC 48) but has not been applied to race.
Australian Capital Territory	Criminal Code 2002: s 750 (1) A person commits an offence if— (a) the person intentionally carries out an act; and (b) the act is a threatening act; and (c) the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following: (i) disability; (ii) gender identity; (iii) HIV/AIDS status; (v) race; (vi) religious conviction;	Inserted: 2016 This Act has not been considered by any cases

	(via) sex characteristics; (vii) sexuality; and (d) the act is done other than in private; and (e) the person is reckless about whether the act is done other than in private.	
Northern Territory	Anti-Discrimination Act 1992: 27 Prohibition of aiding contravention of Act (1) A person shall not cause, instruct, induce, incite, assist or promote another person to contravene this Act. (2) A person who causes, instructs, induces, incites, assists or promotes another person to contravene this Act is jointly and severally liable with the other person for the contravention of this Act.	Inserted: 2022 The most recent enactment, no cases have yet considered this provision.

Appendix B: Examples of International Jurisdictions

UK	
Public Order Act 1986 (UK) ss 18-23 contains provisions relating to inciting racial hatred.	**S 18 Use of words or behaviour or display of written material.** (1) A person who uses **threatening, abusive or insulting** words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if— (a) he **intends thereby to stir up racial hatred**, or (b) having regard to all the circumstances **racial hatred is likely to be stirred up** thereby. (2) An offence under this section **may be committed in a public or a private place**, except that no offence is committed where the words or behaviour are used, or the written material is displayed, by a person inside a dwelling and are not heard or seen except by other persons in that or another dwelling. (4) In proceedings for an offence under this section it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the written material displayed, would be heard or seen by a person outside that or any other dwelling. (5) A person who is not shown to have intended to stir up racial hatred is not guilty of an offence under this section if he did not intend his words or behaviour, or the written material, to be, and was not aware that it might be, threatening, abusive or insulting. (6) This section does not apply to words or behaviour used, or written material displayed, solely for the purpose of being included in a programme [included in a programme service]. **Other relevant provisions:** - S 19 Publishing or distributing written material - S 20 Public performance of play - S 21 Distributing, showing or playing a recording - S 22 Broadcasting or including programme in cable programme service - S 23 Possession of racially inflammatory material
Crime and Disorder Act 1998 (UK) ss **28-32** contains 'racially-aggravated offences' (s 29 included as example). (Not sure if this section is relevant as it does not really relate to inciting violence)	**S 29 Racially or religiously aggravated assaults.** (1) A person is guilty of an offence under this section if he commits— (a) an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm); (b) an offence under section 47 of that Act (actual bodily harm); [(ba)an offence under section 75A of the Serious Crime Act 2015 (strangulation or suffocation);] or (c) common assault, which is [racially or religiously aggravated] for the purposes of this section. (2) A person guilty of an offence falling within subsection (1)(a), (b) or (ba) above shall be liable— (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;

	(b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both. (3) A person guilty of an offence falling within subsection (1)(c) above shall be liable— (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
Sentencing Act 2020 (UK)	**S 66 Hostility** (1) This section applies where a court is considering the seriousness of an offence which is aggravated by— (a) racial hostility, (b) religious hostility, (c) ... This is subject to subsection (3). (2) The court— (a) must treat the fact that the offence is aggravated by hostility of any of those types as an aggravating factor, and (b) must state in open court that the offence is so aggravated. (3) So far as it relates to racial and religious hostility, this section does not apply in relation to an offence under sections 29 to 32 of the Crime and Disorder Act 1998 (racially or religiously aggravated offences).
Scotland	
Hate Crime and Public Order (Scotland) Act 2021	**S 4 Offences of stirring up hatred** (1) A person commits an offence if— (a) the person— (i) behaves in a manner that a reasonable person would consider to be threatening, abusive or insulting, or (ii) communicates to another person material that a reasonable person would consider to be threatening, abusive or insulting, and (b) either— (i) in doing so, the person intends to stir up hatred against a group of persons based on the group being defined by reference to race, colour, nationality (including citizenship), or ethnic or national origins, or (ii) a reasonable person would consider the behaviour or the communication of the material to be likely to result in hatred being stirred up against such a group. ...
Canada	
Criminal Code (RSC 1985, C-46)	**S 318 Advocating genocide** (1) Every person who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term of not more than five years. ... **S 319 Public incitement of hatred**

	(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. (2.1) Everyone who, by communicating statements, other than in private conversation, wilfully promotes antisemitism by condoning, denying or downplaying the Holocaust (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or (b) is guilty of an offence punishable on summary conviction. ...
Canadian Human Rights Act	This Act did contain a provision (s 13) which dealt with online hate messages/ communications that were discriminatory, but this provision was repealed in 2013.
Cases which applied s 319 The following website contains a list of notable hate crime cases: https://sites.ontariotechu.ca/hatecrime/cases/index.php In R. v. Mackenzie (2016), the judgment includes summaries of a few cases which contravened s 319(2).	**R v Ahenakew (2009)**: In 2002, the accused spoke at a conference and in an interview where he made comments which wilfully promoted hatred against people of the Jewish faith. - His comments during the speech: o 'This person called a white person will never stand, stand up for you, for anything. When he first got here, he started to break our people. He started to take everything, he would grab it from us, and then he started to lie and steal from us. That's why I call them liars and thieves. That's what we have as neighbours in this country. (Translation from Cree) o You know, I'm very dead serious when I say it's all right for the non-Indian people, all the immigrants that we have in this country to beat up on ya, to breach and break up your treaty rights, break up your families. You know, and even destroy your kids. It's all right to do that in this country. And they say, you know, the best country in the world. Bullshit. Maybe for them, yeah, the immigrants for sure. But, but not for us. o My God, we're having a lot of problems aren't we? You know, the racial problems, you know, there's all kinds of bigots and so forth that are, that are wrong. You know, my great grandson goes to school in immersion, goes to school here in Saskatoon and these goddamn immigrants, you know, East Indians, Pakistanis, Afghanistan, and whites and so forth, (inaudible)... dirty little Indian, and he's the cleanest of the whole goddamn works there. You know. That's what I'm saying, it's starting right there, six years old, you know. So what do we do? We look after our people first, first and foremost.' - The accused was charged with contravention of s 319(2). He was acquitted of the crime on appeal. o The judge stated that remarks were "revolting,

	disgusting, and untrue", but they did not constitute "promoting hatred" due to lack of intention. **R. v. Mackenzie (2016)**: Mr Mackenzie pleaded guilty to two sets of charges. One involved contravention of s 319(2). - Mr Mackenzie painted on public transit property and parked private motor vehicles various statements calling for the killing or bodily harm of Syrians. - Sentence: 3 days' imprisonment and 2 years' probation. **R v Presseault (2007)**: The accused, Mr Presseault, pleaded guilty to inciting hatred contrary to s 319(2). For about a year, Mr Presseault operated a White Supremacist Internet site that incited hatred and called for the eradication of Jews and blacks. - The dissemination of his message of hate and racism could potentially reach a large, though not easily quantifiable audience, because of the wide distribution which the Internet allowed. - Sentence: 6 months imprisonment and 3 years' probation.
New Zealand	
Human Rights Act 1993	**S 61 Racial disharmony** (1) It shall be unlawful for any person— (a) to **publish or distribute** written matter which is **threatening, abusive, or insulting**, or to broadcast by means of radio or television or other electronic communication words which are threatening, abusive, or insulting; or (b) to **use in any public place** as defined in section 2(1) of the Summary Offences Act 1981, or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting; or (c) to **use in any place words which are threatening, abusive, or insulting** if the person using the words **knew or ought to have known** that the words were reasonably likely to be published in a newspaper, magazine, or periodical or broadcast by means of radio or television,— being **matter or words likely to excite hostility** against or bring into contempt any group of persons in or who may be coming to New Zealand on the ground of the **colour, race, or ethnic or national origins** of that group of persons. ... **S 131 Inciting racial disharmony** (1) Every person commits an offence and is liable on conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding $7,000 who, with **intent to excite hostility or ill-will** against, or bring into contempt or ridicule, any group of persons in New Zealand **on the ground of the colour, race, or ethnic or national origins** of that group of persons,— (a) **publishes or distributes** written matter which is **threatening, abusive, or insulting**, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or (b) **uses in any public place** (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, **words which are threatening, abusive,**

	or insulting,— being matter or words **likely to excite hostility or ill-will against, or bring into contempt or ridicule**, any such group of persons in New Zealand **on the ground of the colour, race,** or ethnic or national origins of that group of persons. (2) For the purposes of this section, **publishes** or **distributes** and **written matter** have the meaning given to them in section 61.

Cases which applied ss 61 and 131
 	
Only three decisions applied these provisions of the Act.
	Proceedings Commissioner v Archer (1996) 3 HRNZ 123 (CRT): s 61 was raised in relation to comments made in a radio broadcast.
	
	- Comments made: Japanese people are "slanty eyed bastards" who live off "rice and shit" and that people "might not notice if we dropped another bomb on Japan"; suggestion that Chinese people would find it easier to pull a rickshaw in Christchurch because of the flat terrain.
	- The s 61 claim was upheld.
	  o The judge found that the broadcast was likely to excite hostility against or bring into contempt Japanese and Chinese people.
	
	Wall v Fairfax New Zealand Ltd [2018] NZHC 104: Two cartoons were published in New Zealand newspapers owned by
	
	Fairfax New Zealand Ltd featured negative depictions of Māori and Pasifika.
	
	- The High Court dismissed the case as it found that this did not breach s 61.
	  o The Court balanced the publisher's right to freedom of speech under the New Zealand Bill of Rights Act 1990 (NZ) against the government's interest in protecting individuals from harmful speech and discrimination.
	
	King-Ansell v Police [1979] 2 NZLR 531 (CA): this case contains a prosecution under what is now s 131.
	
	- The appellant (leader of the National Socialist Party of New Zealand) printed 9,000 copies of a pamphlet that targeted Jewish people.
	- However, the main issue for the Court of Appeal was whether the phrase "ethnic origin" included Jewish people.
	  o It was found that "Jews in New Zealand" form a group with common ethnic origins within the meaning of the section.

United States	
	In the US, the First Amendment protects the right to free speech and there are no laws that criminalise hate speech. However, this does not protect speech that incites imminent violence or lawlessness (*Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). *Brandenburg v. Ohio* sets out a test (known as the *Brandenburg* test) to determine whether certain speech crosses the threshold from protected to unprotected speech. This test requires: - The speaker must intend to incite or produce imminent lawless action, and - The speaker's words or conduct must be likely to produce such action. It is also a federal crime to intentionally "solicit, command, induce, or otherwise endeavor to persuade" another person to engage in a crime of

	violence against a person or property (18 U.S.C. § 373). But there is no reference to offences with a racial motivation.
Germany	
Strafgesetzbuch [Criminal Code] (Germany)	**S 130 Incitement of masses** (1) Whoever, in a manner suited to causing a disturbance of the public peace, 1. **incites hatred against a national, racial, religious group or a group defined by their ethnic origin**, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or calls for violent or arbitrary measures against them or 2. violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups, sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population incurs a penalty of imprisonment for a term of between three months and five years. (2) Whoever 1. **disseminates** content (section 11 (3)) or makes it available to the public, or offers, supplies or makes available to a person under 18 years of age content (section 11 (3)) which a) **incites hatred against one of the groups referred to in subsection (1) no. 1**, sections of the population or individuals on account of their belonging to one of the groups referred to in subsection (1) no. 1, or sections of the population, b) **calls for violent or arbitrary measures** against one of the persons or bodies of persons referred to in letter (a) or c) **attacks the human dignity** of one of the persons or bodies of persons referred to in letter (a) by insulting, maliciously maligning or defaming them, or 2. produces, purchases, supplies, stocks, offers, advertises or undertakes to import or export content (section 11 (3)) as referred to in no. 1 (a) to (c) in order to use it within the meaning of no. 1 or to facilitate such use by another incurs a penalty of imprisonment for a term not exceeding three years or a fine.