To: NSW Law Reform Commission

From: Mr Mahmud Hawila, Barrister

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Re: Inquiry into the effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW

Date: 19 April 2024

Background

Hate speech and vilification create significant harms to targeted communities.

Any failure to effectively respond to verbal-textual hostility, including hate speech and vilification contrary to section 93Z, can provide what Perry and Alvi (2012) call a "permission to hate", which could in turn lead to an escalation to physical violence against the person, property and targeted community at large.

Not all forms of verbal-textual hostility have received equal attention of lawmakers. Verbal-textual hostility directed at an individual without a public context is largely unregulated despite its primary harms to the individual. In contrast, vilification provisions target the secondary (possible) transmission of hatred to others.

The inconsistent approach has become a major issue with any legislative responses to verbal-textual hostility as the laws are too often focused on the illocutionary effects of transmitting verbal-textual hostility and not the perlocutionary force of the primary victimisation. In this respect, governments have privileged the social harms of vilification over the primary harms to the victim. This is unlike most other crime types (terrorism being an exception), which firmly focusses criminal justice responses on the primary act of violence against the victim.

Verbal-textual hostility offences in NSW

In the context of verbal-textual hostility that threatens (rather than incites), the *Crimes Act 1900* (NSW) provides multiple, arguably more effective, responses to threats of violence that are not mired in the assessment of hate motivation or the possible curtailment of freedom of expression. These alternative provisions for threats of violence—s31, s199 and s249K of the *Crimes Act 1900* (NSW), s13 of the *Crimes (Domestic and Personal Violence) Act, and* s474.17 of the *Criminal Code*

Act 1995 (Cth) —provide varying penalties, with some threats carrying more significant maximum penalties than others. For example, in the *Crimes Act 1900* (NSW), the maximum penalty for hate motivated threats and incitement under s93Z is 3 years imprisonment, which contrasts with the maximum penalties for textual threats (s31 – 10 years), stalking and intimidation (s199 – 5 years), threats to property (s199 – 7 years), and blackmail (s249K – 14 years). Serious vilification, importantly, can also exist in the contexts of these other crimes—for example, hate mail.

Even though s93Z crimes arguably have wider social harms than threats made in other contexts, it has a lower maximum penalty (3 years imprisonment). It is seemingly perceived by the NSW Government as less harmful. The difference in harm index and maximum penalties imposed for comparable crimes without hate motivation has created a 'hierarchy of harm'.

Underutilisation of s93Z

Section 93Z was added to the *Crimes Act 1900* in 2018.

The lack of a single successful s93Z prosecution has been widely publicised.

Law is only as good as it is operationalised, and in NSW, police officers have been inadequately prepared for responding to complaints of hate crime and/or serious vilification. In this respect, any proposed amendments to section 93Z precede robust evidence as to precisely why the provision has been marred with controversy and is underutilised in its current form.

Last year, the NSW government expeditiously and without evidence or community consultation amended s93Z to remove the requirement for approval from the Director of Public Prosecutions (DPP) to commence prosecutions. The 2023 rushed amendments have obviously not cured the issues with s93Z.

The present 'expeditious review' of s93Z has also launched without the gathering of critical evidence. It appears to have been instigated perfunctorily in response to a perceived uptick in verbal-textual hostility directed at some targeted communities.

Expeditiously reviewing s93Z without evidence and wider community consultation is likely to further jeopardise freedom of speech unnecessarily and, critically, lead to additional barriers for victims of other forms of serious vilification. An 'expeditious review' with unclear Terms of Reference will likely not deliver such cure. It will accelerate NSW down the path of piecemeal, haphazard legislative

amendments that will not strengthen community safety in NSW. Instead, broad community consultation combined with the careful collection and analysis of evidence is needed to properly cure any failings with s93Z.

The underutilisation of s93Z may, in part, be the result of police decision-making in the discretionary exercise of determining which charges to bring before the Court. There is a relative simplicity of charging under these other provisions as opposed to investigating and marshalling evidence to prove to the requisite high standard of criminal liability the specific hate motivation s93Z requires.

It is worthwhile noting that the *Anti-Discrimination Act 1977* (NSW), like s93Z of the *Crimes Act 1900,* also confines itself to only public acts that incite or threaten. Both have been underutilised since enactment, and very few cases serve as a precedent to guide law enforcement and prosecutorial decision-making.

The underutilisation could also emerge with the paucity of public education about hate crimes more generally—and vilification, in particular—and the onerous responsibility placed on victims and bystanders to make either a civil or criminal complaint. s93Z is meant to protect the most vulnerable members of our communities, yet the same vulnerable communities have the burdensome responsibility for proving the hate motivation and evidencing that sufficiently to trigger a correct assessment by first responders.

Critically, especially in relation to s93Z, the most obvious problem with the operationalisation of this provision has to do with the inadequate training of police officers to recognise, record, and investigate potential breaches of the Act, and subsequently, refer and brief prosecution. NSW Police Force have made the decision to adopt the “objective” test of hate crimes, such that only a police officer is authorised to assess a matter as hate motivated. This contrasts with the “subjective” test adopted in other jurisdictions such as England and Wales, where the victim’s assessment triggers police action.

It is equally important to recognise that NSW Police Force sworn officers do not adequately reflect the demographics of those for whom this law was created, and as such, those officers have limited lived experience to assess vilification. Limited training at recruit level offers limited insights into these crimes and how responding officers should apply standard operating procedures (if any exist for s93Z and other hate crimes). Targeted communities consistently report that first responders are hesitant or lack the skills to recognise and respond to hate crime, or assess the harms of acts of

interpersonal violence more broadly. Also, officers regularly dismiss victims' "subjective" assessment of the offending and its underlying motivation.

Consequently, no police action is taken, no report submitted, no investigation undertaken, and therefore, no prosecution is brought before the Courts. The failure to take victims' assessments seriously, or to adequately train officers for responding to hate crime and serious vilification, instantly leads to reporting apathy, lack of trust in police for the whole community, and ultimately the normalisation of verbal-textual hostility.

Robust evidence on the force and effects of each of these issues is needed to get s93Z right, protect targeted communities, and adequately safeguard freedom of speech.

Recommendations

Recommendation 1

Unsurprisingly, therefore, the first recommendation is for the NSW Law Reform Commission to replace this unprecedented 'expeditious review' with a full inquiry into hate speech and hate crimes in NSW.

This will facilitate the collection of much-needed evidence. It will also allow an open and transparent process for all people in NSW to share their stories and have their voices heard, particularly those vulnerable communities whom s93Z originally sought to protect.

A rushed 'law and order' approach to achieving community cohesion ought to be resisted, and as exemplified in the 2023 amendments to s93Z, has failed thus far.

Recommendation 2

s93Z is meant to address serious racial, religious, *sexuality, gender, and HIV/AIDS* vilification. Yet, the current inquiry is only considering racially or religiously motivated verbal-textual hostility. This creates another layer of hierarchy and is likely to facilitate a "competition of suffering" (Mason-Bish 2013) that will favour one targeted community over another.

Further, if we are to recommend any immediate changes to s93Z, the second consideration ought be to remedy the most obvious gap; providing coverage for other targeted communities currently recognised under the *Anti-Discrimination Act 1977* (NSW) but absent from 93Z. Most critically, this

provision offers no justice for disabled people who experience ableist vilification, which is so normalised and systemic that it often goes without notice.

If s93Z is perceived to be ineffective for racial and religious minorities, then its underutilisation by other targeted communities also ought to have been included in this review.

Recommendation 3

Third, we urge the NSW Law Reform Commission to review how and *who* assesses hate motivations under s93Z. An "objective" assessment by police officers of specific speech/text acts is entirely ineffective if first responders are unaware of the meaning and intent of offending speech/text. Threats of violence or the incitement to violence rarely present as clearly as "I am going to kill you", and are often coded in other language that amplifies the harms. Careful consideration should be given to the "subjective" test, where the victim's assessment triggers hate crime charges.

As noted in Asquith's (2013) analysis of the specific speech recorded in 100,000 hate crime cases reported to the London's Metropolitan Police Service, there is a direct link between what is said and what is subsequently done. However, unlike threats of violence—which were largely proxies for action—other forms of hate speech such as pathologisation, criminalisation, demonisation, sexualisation, and expatriation were directly correlated to crimes against the person and property (see Tables 1 and 2 of the Appendix). In particular, concurrent or subsequent violent behaviour (common assault, assault occasioning actual or grievous bodily harm, etc.) was correlated more often to expatriation than threats of violence in public violence in and around the victim's home. Terrorisation or threats of violence were only correlated to statistical significance when made in private spaces.

An additional, and concerning, finding of Asquith's UK research was the over-representation of white, cishet, abled complainants and the disproportionate application of the laws to members of minority communities, for whom hate crime provisions were initially created. As with all criminal justice, vulnerable marginalised people are too often subject to harsher punishment and have fewer resources to defend their actions.

Conclusion

Laws responding to textual-verbal hostility were always going to face problems: conceptual, practical, and in terms of limiting free speech. Responding to verbal-textual violence after it has

occurred, and then only in relation to the possible incitement of others, is too late and too onerous on complainants. More effort in developing primary prevention techniques is likely to elicit more social change than unreported court cases directed as individuals or organisations.

We look forward to the opportunity to further engage with the NSW Law Reform Commission's inquiry into s93Z in the coming weeks and welcome any queries in relation to this submission.

Yours sincerely,

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References

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Appendix

Table 1: Themes of Recorded Verbal-Textual Hostility in complaints to the London Metropolitan Police Service (Asquith 2013)

THEME *N* = 5,584	FREQUENCY Speech Acts *n*=11 421	FREQUENCY Incidents *n*=5584	EXPLANATORY NOTES
Interpellation	81.0%	39.6%	Naming the other; calling the other into being
Pathologisation	4.5%	2.2%	Dirt and disease
Demonisation	13.5%	6.6%	Devils, demons and mongrels
Sexualisation	15.1%	7.4%	Sexual organs, sexual acts
Criminalisation	0.6%	0.3%	Liars, cheats and criminals
Expatriation	15.6%	7.6%	Exile from space, neighbourhood, nation
Terrorisation	20.6%	10.1%	Threats of violence and death
Profanity	47.7%	23.3%	Cursing and swearing
Other	5.9%	2.9%	Silly, stupid, ugly

Table 2: Examples of Coding for Themes of Recorded Verbal-Textual Hostility in complaints to the London Metropolitan Police Service (Asquith 2013)

CODING FOR SPEECH/TEXT THEMES *N* = 5,584	INTERPELLATION	PATHOLOGISATION	DEMONISATION	SEXUALISATION	CRIMINALISATION	EXPATRIATION	TERRORISATION	PROFANITY	OTHER
"here comes the nigger"	✓								
"white trash"	✓	✓							
"fucking faggot, piece of shit"	✓	✓						✓	
"Chinese bitch, I hope you get SARS"	✓	✓	✓				✓	✓	
"brown rats, go back to your own country"	✓		✓			✓			
"get out, Gypsy whore"	✓			✓		✓			
"fucking Paki cunt"	✓			✓				✓	
"fuck off, you lying Jewish bastard	✓				✓	✓		✓	
"fuck off, you black nigger, you're a slave"	✓					✓			✓
"I'm going to have you, you fucking Paki"	✓						✓	✓	
"fucking lesbian, fucking dyke"	✓							✓	
"die cunt"				✓			✓	✓	