Anglican Church Diocese of Sydney

21 April 2024

Submission to the Review of Section 93Z of the New South Wales *Crimes Act 1900*

1. This submission is made on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 267 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

2. We welcome the opportunity to make a submission to the review of the effectiveness of section 93Z in addressing serious racial and religious vilification in NSW. Our contact details are

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Terms of Reference

3. The Terms of Reference ask the NSW Law Reform Commission (the Commission) to expeditiously review and report on the effectiveness of section 93Z of the Crimes Act 1900 (NSW) in addressing serious racial and religious vilification in NSW.

4. The Terms of Reference direct the Commission to have regard to:
    a. the impact of racial and religious vilification on all parts of the NSW community;
    b. 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;
    c. the availability of civil vilification provisions in the Anti-Discrimination Act 1977;
    d. the impacts on freedoms, including freedom of speech, association and religion;
    e. the need to promote community cohesion and inclusion;
    f. the views of relevant stakeholders as determined by the Commission; and
    g. any other matter that the Commission considers relevant.

5. This submission will focus on the issues raised by items (a) to (d).

(a) The impact of racial and religious vilification

6. We are concerned at the growing incidence of vilification on the basis of religious belief or activity, particularly directed at those of the Islamic or Jewish faith. In 2023, we supported the amendments to the *NSW Anti-Discrimination Act* 1977 to prohibit religious vilification not for our own sake, but for the sake of other faiths, in the hope that this would help to address what appears to be a rising tide of islamophobia and antisemitism. Religious vilification is destructive of social cohesion and polarises communities into "us" and "them". We agree with State member for Bankstown Jihad Dib, that "Anti-Semitism has no place in our multicultural society, nor does Islamophobia or any type of racial or religious vilification."[1]

(b) Criminal vilification offences

7. Tasmania and the Northern Territory do not have criminal offences for racial and religious vilification. The following table summarises the key provisions in other domestic jurisdictions.

ACT	Criminal Code 2002, s.750	engage in an act that intentionally threatens physical harm toward or is reckless about whether the act incites others to threaten the harm, which incites hatred toward, revulsion of, serious contempt for, or severe ridicule of
CTH	Criminal Code Act 1995, s80.2A, s80.2B	intentionally urging a person to use force or violence intending that force or violence will occur
NSW	Crimes Act 1900, s93Z	intentionally or recklessly threaten or incite violent conduct, violence towards person(s) or violence towards property
QLD	Anti-Discrimination Act 1991, s131A	knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule... in a way that includes ... threatening physical harm ... or inciting others to threaten physical harm
SA	Racial Vilification Act 1996, s4	incite hatred towards, serious contempt for, or severe ridicule... in a way that includes ... threatening physical harm ... or inciting others to threaten physical harm

[1] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-136029

VIC	Racial and Religious Tolerance Act 2001, s25(1)	intentionally engage in conduct that the offender knows is likely to incite hatred against that other person and threaten, or incite others to threaten, physical harm
	Racial and Religious Tolerance Act 2001, s25(2)	knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of
WA	Criminal Code Act 1913, ss.76-80	Intent to (s.77, s.80A) or conduct likely to (s.78, 80B) "create, promote or increase animosity towards [=*hatred of or serious contempt for*] or harassment of [=*threaten, seriously and substantially abuse or severely ridicule*] a racial group"

8. Four jurisdictions – ACT, Queensland, South Australia and Victoria – are similar, in that an essential element of the offence is a **threat of physical harm** to person or property, or the **inciting of others** to threaten physical harm, which **incites hatred** (/ revulsion / serious contempt / severe ridicule).

9. In NSW, the criminal offence has a lower threshold than these four jurisdictions. It has a similar essential element – a **threat of violence** towards person or property, or the **inciting of others** to violence towards person or property, but there is no additional requirement that it also "incites hatred" (/ revulsion / serious contempt / severe ridicule).

10. The Commonwealth offence has the highest threshold, in that it requires an intentional urging a of a third person to use force or violence, intending that force or violence will occur.

11. In Western Australia, it is a criminal offence to incite hatred / serious contempt or to threaten / seriously abuse / severely ridicule. This is the lowest threshold for a criminal vilification offence in Australia, although noting that it only applies to racial vilification, not religious vilification. Section 25(2) of the *Racial and Religious Tolerance Act* 2001 (Vic) is the lowest threshold for a criminal religious vilification offence. The offence is "inciting serious contempt for, or revulsion or severe ridicule of", though the procedural difficulty proving intention to incite raises the bar somewhat.

12. Notwithstanding the conceptual desirability of harmonisation and consistency of laws across the country, we do not recommend changes to section 93Z on this basis. The 'majority position' represented by ACT, Queensland, South Australia and Victoria adds the additional element of "inciting hatred" etc. to the offence. This review has arisen out of concerns that there have been no prosecutions under s. 93Z for religious vilification. Raising the bar by adding an additional element is unlikely to address this concern. Furthermore, the 'majority position' is in fact pluriform with respect to *mens rea*.

    ACT - ***intentionally*** threatens physical harm or is ***reckless*** (*re. incitement*)
    QLD - ***knowingly or recklessly*** incite hatred towards
    VIC - ***intentionally*** engage in conduct that the offender ***knows is likely*** to incite hatred

13. With respect to international jurisdictions, we are strongly opposed to any amendments modelled on the *Public Order Act 1986 (UK)*. The *Public Order Act* creates offences relating to threatening, abusive or insulting words or behaviour, or display of visible representations, which:

a. Are likely to cause fear of, or to provoke, immediate violence: section 4;
b. Intentionally cause harassment, alarm or distress: section 4A; or
c. Are likely to cause harassment, alarm or distress (threatening or abusive words or behaviour only): section 5.

It is a defence to section 4A and section 5 for the accused to demonstrate that their conduct was reasonable, which must be interpreted in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference (by prosecution) with them must be convincingly established. A prosecution may only proceed if necessary and proportionate.

14. The capaciously wide scope of the terms "threaten", "abusive", "harassment", "alarm" and "distress" accompanied with the vague tests of "reasonableness" and "proportionality" have occasioned a slew of litigation in the United Kingdom (including the recent charges laid against Sam Kerr). This litigation arises under the provisions that do not require threats of violence or incitement to violence, but instead regulate threatening or abusive words that cause harassment, alarm or distress. It has seen police arrest and charge members of the public for statements confirming traditional beliefs of marriage, gender and sexuality and in respect of Biblical claims to exclusive truth.[2] We do not consider that this law provides an acceptable model for reform.

15. In our view, section 93Z should not adopt a standard based on "insult", "harassment", "alarm" or "distress", because of the ill-defined and subjective nature of these terms. This is not appropriate for an offence with significant criminal sanctions. There are life-long consequences for individuals convicted of a criminal offence, and therefore the scope of this offence should be restricted to the most serious examples of racial or religious vilification.

16. Section 93Z was introduced into law by the *Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018* (the Bill). That Bill was introduced in 2018 in response to concerns that no prosecutions then had been brought under the serious religious vilification provision (section 20D) then contained in the *Anti-Discrimination Act 1977*. A 2013 Parliamentary Committee had considered these claims at length and made a number of recommendations. Key recommendations of the 2013 Committee reflected in the current form of 93Z include:

    a. the making of "threats" is a stand-alone element, and incitement is not a necessary element of the offence. The then Attorney-General stated in the Second Reading Speech:

    > "The new offence also includes 'threatens' as an alternative to incitement in order to criminalise this conduct. By including threatening violence as a limb of the new offence, the prosecution would not necessarily need to adduce evidence that the defendant in fact intended to incite or was reckless as to inciting a third party to inflict violence."[3]

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[2] See, for eg, https://christianconcern.com/ccpressreleases/police-drop-case-against-tory-councillor-arrested-for-hate-crime-for-supporting-christian-free-speech/; https://www.dailymail.co.uk/news/article-7293257/Police-arrest-preacher-64-grab-Bible-promoting-Christianity.html.

[3] Second Reading Speech (n 7) 44 (Mark Speakman, Attorney-General).

b. incitement does not require proof of actual incitement – see 93Z(3):

> "it is not necessary to adduce evidence of the state of mind of any other person apart from the accused or that any other person has acted as a result of the accused's alleged act."[4]

c. the standard of "recklessness" was introduced:

> "Recklessness is sufficient to establish criminal intent, and it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence."[5]

d. incorrect imputations of belief could not stop a prosecution – see 93Z(2):

> "to make out the offence, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of a person or a member of a group of persons were correct or not at the time that the offence is alleged to have been committed."[6]

17. In light of the breadth of these reforms, it is not considered that any further reform to the element of intent is necessary.

18. In considering whether section 93Z needs to be reformed, it is important to note that a civil religious vilification prohibition was added in NSW in November 2023. Any proposal for reform of section 93Z must then be considered against the civil prohibition. If a form of conduct is not covered by the criminal provision, is the mischief addressed because it is covered by the civil provision?

(c) Civil vilification provisions

19. A new Part 4BA was added to the *NSW Anti-Discrimination Act* 1977 (**ADA**) in November 2023, to prohibit Religious Vilification. The test in s49ZE(1) – that a public act must "incite hatred towards, serious contempt for or severe ridicule of" – is identical to the other anti-vilification provisions in the ADA in relation to race (s20C), transgender (s38S), homosexuality (s49ZT) and HIV/AIDS status (s49ZXB).

20. There are civil vilification provisions in all jurisdictions except Western Australia. The following table summarises the key provisions.

		Hatred	Revulsion	Serious Contempt	Severe Ridicule	Offend, Insult, Humiliate or Intimidate	Ridicule (need not be severe)
ACT	Discrimination Act 1991, 67A						

[4] Second Reading Speech (n 7) 42 (Mark Speakman, Attorney-General).
[5] Second Reading Speech (n 7) 43 (Mark Speakman, Attorney-General).
[6] Second Reading Speech (n 7) 44 (Mark Speakman, Attorney-General).

NSW	Anti-Discrimination Act 1977 ss20B, 20C, 38R, 38S, 49ZD, 49ZE, 49ZS, 49ZT, 49ZXA, 49ZXB						
QLD	Anti-Discrimination Act 1991, s124A						
SA	Civil Liability Act 1936, s73						
VIC	Racial and Religious Tolerance Act 2001, s8						
CTH	Racial Discrimination Act 1975, s18C						
NT	Anti-Discrimination Act 1992, s20A						
TAS	Anti-Discrimination Act 1998, s17						

21. As can be seen in the table above, the elements for the civil offence of vilification can be broadly grouped into two standards:
    a. Inciting hatred, serious contempt or severe ridicule (ACT, NSW, Qld, SA, and Vic, with the ACT and Vic adding “revulsion”);[7] and
    b. Offending, insulting, humiliating or intimidating (Cth – Racial Discrimination only, NT, and Tas)

22. We support maintaining the “hatred / serious contempt / severe ridicule” standard for the civil offence in NSW, and strongly oppose the “offend / insult / humiliate / intimidate” formulation. The latter test – particularly the low bar established by “offend” and “insult” – would restrict debate about religious belief, including proselytising for one’s faith and criticism of other religious beliefs. Religious faiths make exclusive truth-claims that other faiths find offensive. It is offensive to Muslims to say that Jesus is the Son of God (Maryam 19:88-92, At-Tawbah 9:30) and it is offensive to Christians to say that Jesus is not the Son of God. Similarly, the words “humiliate” and “intimidate” (taken subjectively) open the door to the claim that a person *felt humiliated* by religious teaching that described conduct as immoral, or that they *felt intimidated* by religious teaching about the eternal consequences of their conduct.

(d) The Impact on Religious Freedom

23. It is vital that any steps taken to respond to religious vilification should not have the unintended consequence of restricting genuine religious teaching or discussion or proselytising. Rightly, the civil prohibition of religious vilification does not impact upon the teaching of religious institutions, due to the operation of section 56 of the ADA. The civil prohibition also provides a defence in subsection 49ZE(2)(c) for “a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes”. Judicial consideration of this test (or the almost identical provision in section 8 of the Victorian *Racial and Religious Tolerance Act 2008*) has provided some clarity on how the application of the test, however many questions remain.[8]

24. That judicial treatment also illustrates the challenges to freedom of speech and religion presented by civil religious vilification prohibitions. The following summary from

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[7] In WA, hatred/serious contempt /severe ridicule is the standard for the criminal offence, as noted above.
[8] For instance, see *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VCA 284 (14 December 2006), per Nettle, Neave and Ashley JJA.

Professor Rex Ahdar of the chief findings of the key case (*Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[9]) demonstrates the extent of these challenges:

> "The Catch the Fire decision valiantly endeavoured to clarify the law but actually generated new uncertainties. We learn that critical and destructive statements about religious beliefs are acceptable, as are statements that offend or insult believers. It is only 'extreme' statements that incite hatred of religious persons or groups in third persons that matter. We also learn that predicting the outcome of this test is difficult, for the judges themselves could not agree that the statements before them were likely to have incited negative emotions. We now know that religious speech does not actually have to result in an audience feeling hatred or contempt, for it is enough that it is capable of stirring up hatred toward a religious group. If the 'natural and ordinary effect' of the words on 'reasonable' or 'ordinary' members of the target audience would be to stimulate hatred towards the believers in question, prima facie liability follows. Statements attacking beliefs but urging respect for the persons holding those beliefs, may be taken into account for their ameliorative effect, but only if they are genuine and not expressions of 'feigned concern'. We learn that the judges did not agree as to whether 'inaccurate' and 'unbalanced' presentations of religious beliefs and practice count against the religious speaker. To claim the statutory defence of conduct engaged in 'reasonably' and in 'good faith' for a genuine religious purpose we learn that the truth per se of the statements made is no defence. The focus instead is whether the hypothetical reasonable citizen in an open and just multicultural society would consider the speech excessive and beyond the bounds of tolerance. If so, then the speech is unlawful. There are more than enough grey areas here to make any religious speaker or writer think twice before launching into the public domain."[10]

25. Commenting on the *Catch the Fire Ministries* litigation, which ground through the courts for 5 years, Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee, wrote:

> As someone who once supported their introduction and is a member of one of the minority groups they purport to protect, I can say with some confidence that these laws have served only to undermine the very religious freedoms they intended to protect ... If we love God, then it requires us to hate idolatry. If we believe there is such a thing as goodness, then we must also recognise the presence of evil. If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell. If we believe our religion is true, then it requires us to believe others are false. Yet, this is exactly what this law serves to outlaw and curtail: the right of believers of one faith to passionately argue against or warn against the beliefs of another... All these anti-vilification laws have achieved is to provide a legalistic weapon by which religious groups

[9] [2006] VCA 284 (14 December 2006), Nettle, Neave and Ashley JJA (*Catch the Fire Ministries)*.
[10] Rex Ahdar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *University of Queensland Law Journal* 293, 314.

> can silence their ideological opponents, rather than engaging in debate and discussion.[11]

26. In order to avail themselves of the defence at subsection 49ZE(2) a defendant must establish that their conduct was "done reasonably … for … religious discussion or instruction purposes". As Bathurst CJ stated in *Sunol v Collier (No 2)*: "For the public act to be reasonable … it must bear a rational relationship to the protected activity [here religious discussion or instruction purposes] and not be disproportionate to what is necessary to carry it out."[12] In *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[13] *(Catch the Fire Ministries)* Nettle JA stated "objective standards will be brought to bear in determining what is reasonable" under the exception. Justice Nettle formulated the test as follows:

> (W)here as here the conduct in question consists in the making of statements for a religious purpose, the question of whether it was engaged in reasonably for that purpose must be decided according to whether it would be so regarded by reasonable persons in general judged by the standards of an open and just multicultural [moderately intelligent…tolerant] society.[14]

According to Nettle JA, unlike the requirement to have reference to the effect on "the member of the class to whom it is directed" (being the hearer of the alleged vilification) contained in the vilification prohibition (the equivalent of which is proposed section 49ZE(1) in the Act), the standard for determining the exception (the equivalent of subsection 49ZE(2) in the Act) is the view of "reasonable persons in general".

27. However, as Hayne J stated in *Monis v The Queen*:[15]

> The very purpose of the freedom [of implied political communication] is to permit the expression of unpopular or minority points of view. Adoption of some quantitative test inevitably leads to reference to the "mainstream" of political discourse. This in turn rapidly merges into, and becomes indistinguishable from, the identification of what is an "orthodox" view held by the "right-thinking" members of society. And if the quantity or even permitted nature of political discourse is identified by reference to what most, or most "right-thinking", members of society would consider appropriate, the voice of the minority will soon be stilled. This is not and cannot be right.

28. As Justice Morris stated in *Fletcher v Salvation Army,* a "genuine religious purpose may include asserting that a particular religion is the true way, and that any way but the true way is false."[16] As His Honour recognised, "criticism of a religion or religious practice is not a breach of the Act; the Act is concerned with inciting hatred of people on the basis of race or religion."[17]

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[11] Amir Butler, 'Why I've changed my mind on vilification laws', *The Age* (Melbourne), 4 June 2004 https://www.theage.com.au/national/why-ive-changed-my-mind-on-vilification-laws-20040604-gdxz1s.html
[12] *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) [41].
[13] *Catch the Fire Ministries* (n 1) (Nettle, Neave and Ashley JJA).
[14] Ibid [94] (Nettle JA).
[15] (2013) 249 CLR 92 [122] (Hayne J).
[16] *Fletcher v Salvation Army Australia* (Anti-Discrimination) [2005] VCAT 1523 [18] (*Fletcher*) [9].
[17] Ibid [14].

29. In light of this judicial consideration, there is uncertainty as to whether the reasonableness test addresses whether the statements were ***made reasonably*** *for a religious discussion or instruction purpose*, or whether the religious belief statements are ***themselves reasonable*** according to general community standards. The latter approach makes secular courts the arbiter of whether religious beliefs are reasonable and will have the unintended consequence of restricting debate about religious belief. However, the endeavour to draw a distinction whereby the law only regulates whether statements of belief were made in a reasonable manner, as opposed to whether they are reasonable in themselves is a highly improbable one when applied to the realm of the criminal law. This is because some religious beliefs may well in themselves incite violence, regardless of the manner in which they are conveyed. Religious beliefs that condone violence cannot receive sanction simply because they are religious beliefs and should remain subject to the criminal law. The above analysis of the law concerning civil religious vilification provisions does however demonstrate the important role that an exception provided to religious bodies plays in maintaining religious freedom in respect of civil vilification provisions (as is provided at section 56 of the ADA, and also in Queensland and in the civil vilification provisions introduced in the Northern Territory last year). That exception also plays an important role given the difficulties in distinguishing between whether statements of belief were made in a reasonable manner and whether they are reasonable in themselves.

30. Subject to the clarification as to the extent of the "religious purpose" exception in subsection 49ZE(2), our view is that the current balance between the criminal and civil religious vilification in NSW provisions is appropriate.

Recommendations

31. In light of the foregoing, we do not recommend any substantive reforms to section 93Z with respect to racial and religious vilification. These provisions sit alongside, and complement, criminal offences of common assault, affray, threatening to destroy or damage property and intimidation or annoyance by violence or otherwise and being an accessory before the commission of a crime. If an offence is motivated by hatred or prejudice against a group of people to which an offender believes any victim belongs, that is an aggravating factor for the purpose of sentencing under section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*. Apprehended violence laws already also cover some of the territory covered by section 93Z.[18] The criminal law has an important educative purpose. The fact that there have been no convictions under section 93Z does not negate, and may in fact suggest it is fulfilling, that purpose.

32. It would appear that the scope of the law is already appropriate to address serious racial or religious vilification, notwithstanding the fact that there has not yet been any successful criminal prosecution under section 93Z. In *R v Bayda (No 8)*[19] Fagan J confirmed that the actions of the operators of a bookstore and prayer meeting room in counselling younger men to undertake violent acts would now be caught by section 93Z.

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[18] Standing Committee on Law and Justice, Parliament of New South Wales, *Racial Vilification Law in New South Wales* (Report, 2013), (*'Report')* 61, 66.
[19] [2019] NSWSC 24.

The facts in question in that matter arose prior to the commencement of section 93Z. In *obiter* Fagan J stated:

> 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. Although Australian citizens are not subject to penalty for their choice of belief by which to relate to God, teaching a divine duty of violence against non-Muslims is not within the law's protection. It goes beyond personal religious experience and counsels criminal breaches of the peace. The whole concept of inclusive tolerance would be destroyed if respect and protection were accorded to beliefs that are themselves violently intolerant and that conflict with secular laws designed to secure diverse freedom of worship for all.[20]

33. However, in light of the recent amendments to subsection 93Z(4), which allow police officers to initiate prosecution, we recommend further training for police. In 2009 the then DPP, Mr Nicholas Cowdery AM QC recommended that police should receive training about vilification if they are to be involved in the investigation of potential serious racial vilification offences. The Anti-Discrimination Board of NSW told the 2013 Committee Inquiry:

    > There have been many criticisms of the police in the past as having been insensitive to issues of discrimination and these could no doubt be extended to vilification. Concern expressed in the past about locating law enforcement authority and prosecutorial discretion for prosecution for serious vilification in the hands of the police may be well-founded. Consideration should be given in a review of the effectiveness of implementation of anti-vilification laws, as to whether additional training should be provided to police at intake and on a "refresher" basis for existing police officers in the area of vilification.[21]

    The 2013 Committee recommended "that the NSW Police Force provide additional training to its members about its powers under the Anti-Discrimination Act to address any concerns about tensions with certain community groups, as well as to address any perceived view that the police may not be sufficiently aware of their responsibilities."[22]

34. Such training should also make police aware of the scope of the civil prohibition of Religious Vilification now available through s49ZE of the *NSW Anti-Discrimination Act* 1977. This will enable them to advise those who have experienced religious vilification below the criminal threshold about other avenues of redress.

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21 April 2024

[20] Ibid [75]-[76] (Fagan J).
[21] Anti-Discrimination Board of NSW, Submission No 10 to Standing Committee on Law and Justice, Parliament of New South Wales, *Racial Vilification Law in New South Wales* (22 April 2013) cited in Report (n 6) 90.
[22] Report (n 6) 93.