



Submission

Submission date:

19 April 2024

Submission Topic:

Serious racial and religious vilification review

Expressions called for by:

NSW Law Reform Commission

Closing date:

19 April 2024

Submission by:

Local Court of NSW

Submission:

The Local Court of NSW has been invited to provide submissions on issues relevant to the NSW Law Reform Commission's review of the effectiveness of s.93Z of the *Crimes Act 1900* (NSW).

Using the headings outlined in the Terms of Reference, the Local Court provides the following submissions: -

1. The impact of racial and religious vilification on all parts of the NSW community

The Local Court acknowledges that racial and religious vilification requires legislation which is fit for purpose, adaptable, keeps pace with community standards and criminalises only specified conduct that transcends the boundaries of propriety. Importantly, it ought not capture public discourse which falls within the purview of free speech.

The Local Court further acknowledges that there are a number of differential effects of racial and religious vilification are wide and varied, and extend to both physical and psychological injury to individuals and classes of persons, particularly those within minority groups in a multicultural society.

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

The Local Court acknowledges that where both state and federal legislation seeks to address certain criminal behaviour, greater harmonisation would be welcome. To the extent that the principal conduct sought to be criminalised is found in a NSW statutory provision, the Local Court's view is that s.93Z of the *Crimes Act 1900* (NSW) goes to painstaking lengths to cover the field.

Section 93Z provides as follows: -

93Z Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status

(1) A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence—

(a) the race of the other person or one or more of the members of the group,



- (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation,
- (c) the sexual orientation of the other person or one or more of the members of the group,
- (d) the gender identity of the other person or one or more of the members of the group,
- (e) that the other person is, or one or more of the members of the group are, of intersex status,
- (f) that the other person has, or one or more of the members of the group have, HIV or AIDS.

Maximum penalty—

- (a) in the case of an individual—100 penalty units or imprisonment for 3 years (or both), or
 - (b) in the case of a corporation—500 penalty units.
- (2) In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons referred to in subsection (1) (a)–(f) were correct or incorrect at the time that the offence is alleged to have been committed.
- (3) In determining whether an alleged offender has committed an offence against this section of intentionally or recklessly inciting violence, 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.
- (4) A prosecution for an offence against this section may be commenced only by—
- (a) the Director of Public Prosecutions, or
 - (b) a police officer.
- (5) In this section—

gender identity means the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

intersex status means the status of having physical, hormonal or genetic features that are—

- (a) neither wholly female nor wholly male, or
- (b) a combination of female and male, or
- (c) neither female nor male.

public act includes—

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



- (c) the distribution or dissemination of any matter to the public.

For the avoidance of doubt, an act may be a public act even if it occurs on private land.

race includes colour, nationality, descent and ethnic, ethno-religious or national origin.

religious belief or *affiliation* means holding or not holding a religious belief or view.

sexual orientation means a person's sexual orientation towards—

- (a) persons of the same sex, or
(b) persons of a different sex, or
(c) persons of the same sex and persons of a different sex.

violence includes violent conduct and violence towards a person or a group of persons includes violence towards property of the person or a member of the group, respectively.

Section 93Z is wholly encompassing, not only as to intentional or reckless acts of threatening or inciting violence on a suite of different grounds, including race, religion, sexual orientation, gender, or HIV/AIDS status, but also directed to individuals and corporations, with substantial maximum monetary penalties, including imprisonment in the case of an individual.

Sections 93Z(2) and (3) outline facilitation of proof provisions which aptly assist in deconstructing any barriers to proof beyond reasonable doubt, in circumstances where the core aspects of the public threat or incitement of violence are present.

Section 93Z(4) appropriately limits prosecutions for offences of this kind to be commenced only by the Director of Public Prosecutions or NSW Police. The Local Court submits that the preclusion of private prosecutions for offences captured by s.93Z strikes an appropriate balance given the importance of the issues likely to be raised in proceedings of this kind, and the necessary investigative and forensic legal judgment that a prosecuting authority would be required to bring to bear.

Section 93Z(5) provides a number of definitions, some of which are exhaustive in nature and others of which are inclusive, from a statutory interpretation perspective. Those definitions which are inclusive (in particular 'public act' and 'violence') provide sufficient latitude to a judicial officer in the Local Court, or a jury in the District Court, as the tribunal of fact, to appropriately determine whether the conduct sufficiently falls within the parameters of s.93Z(1), and allows for an assessment of conduct which is in keeping with community standards.

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

It is accepted that the *Anti-Discrimination Act 1977* (NSW) provides for certain conduct to be unlawful, including conduct that is similar to that which s.93Z seeks to criminalise (see e.g. s.20C). However, the consideration of that conduct, and the imposition of any civil penalty, is determined by Anti-Discrimination NSW or the NSW Civil and Administrative Tribunal. It is trite to say that there is a significant difference between, on the one hand, whether conduct can be found to be unlawful under the *Anti-Discrimination Act 1977* (NSW) and consequently subject to a civil penalty, and on the other, a finding beyond reasonable doubt that an offence against s.93Z has been committed, for which the Court is to determine an appropriate criminal sanction. To that extent, the Local Court does not consider it is best placed to comment on the availability of civil vilification provisions in the context of this review.



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

The Local Court is cognisant of the impetus, so far as possible, to preserve civic freedoms and not to have those freedoms unduly burdened by the operation of the criminal law. However, given that proceedings under s 93Z (as amended or otherwise) are likely to proceed in the Local Court's jurisdiction, the Court is content for the legislature to consider and account for any such impacts.

5. The need to promote community cohesion and inclusion

The Local Court similarly considers that any amendments to s.93Z which seek to promote community cohesion and inclusion, and how those ends should be pursued, is a matter for the legislature.

Terms of Reference No.6 and No.7

The Local Court notes that Terms of Reference No.6 and No.7 are matters for the Commission.

General

Our research has revealed that there were only two prosecutions under s.93Z of the *Crimes Act 1900* (NSW) (both heard together as co-accused matters) in the Local Court between October 2019 and September 2023.

The two matters and the results were as follows: -

R v Baljinder Singh THUKRAL (JL Case No: 2020/253545)

Seq	Charge	Local Court Outcome
1	Affray	Not guilty
2	Use carriage service to menace/harass/offend	Guilty - Convicted - Conditional Release Order
3	Publicly threaten etc violence on grounds of religion	Withdrawn and dismissed
4	Publicly threaten etc violence on grounds of religion	Withdrawn and dismissed
5	Publicly threaten etc violence on grounds of religion	Guilty - Convicted - Community Correction Order

R v Avon KANWAL (JL Case No: 2020/257129)

Seq	Charge	Local Court Outcome
1	Use carriage service to menace/harass/offend	Withdrawn and dismissed
2	Incite commission of crimes	Guilty - Convicted - Conditional Release Order
3	Publicly threaten etc violence on grounds of religion	Guilty - Convicted - Community Correction Order

As requested, the transcript for the hearing, the Reasons for Decision, the Remarks on Sentence and, in the case of R v Baljinder Singh THUKRAL (JL Case No: 2020/253545), the remarks of the presiding judge of the District Court on appeal, are attached separately to this submission.

Please note the following: -

1. The transcripts of the hearing, Reasons for Decision (which resulted in a finding of guilt) and the Remarks on Sentence, have not been revised by the presiding magistrate. For this reason, whilst there is no objection to the publication of this submission in any final report prepared by the NSW Law Reform Commission, I would be grateful if the unrevised transcripts were not published.
2. The appeal to the District Court, in respect of R v Baljinder Singh THUKRAL (JL Case No: 2020/253545) was heard on 6 February 2024. Following concessions made by the Crown, the appeal was allowed and, as a consequence, the conviction was quashed.
3. The appeal to the District Court, in respect of R v Avon KANWAL (JL Case No: 2020/257129) is listed for hearing on 7 June 2024.



Conclusion

It is noted that any changes to process, form and substance will require sufficient lead time for preparation and judicial education. For this reason, it will be necessary to include the Judicial Commission of NSW in any consultation phase, as any proposed changes progress towards commencement.

Given the impact any amendments may have on the Local Court, the Chief Magistrate would be grateful for the opportunity to be further consulted and involved, particularly in relation to the implementation of any recommended amendments to, or creation of, offence provisions.

Thank you for the opportunity to comment.



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