



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC/PuLC:BMcd170424

17 April 2024

The Hon Tom Bathurst AC KC
Chairperson
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Mr Bathurst,

Serious racial and religious vilification

The Law Society supports consideration of measures to better prevent, and respond to, instances of serious racial and religious vilification in NSW. We welcome the opportunity to provide a submission to the Law Reform Commission's review of section 93Z of the *Crimes Act 1900* to assist in developing informed and effective law reform that promotes community cohesion and inclusion. Thank you also for the opportunity to meet with you in March for a preliminary discussion of these issues. We offer the following comments relevant to the Terms of Reference for consideration.

Contextualising section 93Z of the *Crimes Act 1900*

We consider it important for section 93Z of the *Crimes Act 1900* to be assessed in view of its place within the broader framework of criminal and civil provisions that are designed to address vilification in NSW.

The broader framework aims to ensure that the law provides comprehensive coverage in respect of vilification, including by providing a variety of meaningful options to respond flexibly and adroitly to different forms and levels of vilification on the basis of a range of protected attributes, including race and religion. As section 93Z forms an intrinsic and integral part of this broader framework, we consider it essential that any proposed law reform of section 93Z be developed with contemplation of the role and impact of section 93Z in the broader framework, as explored below.

The broader criminal law framework

In respect of the criminal law framework, we note that section 93Z is not the only provision available for use in prosecuting serious racial and religious vilification in NSW. Rather, it is one offence that forms part of a broader framework of criminal offences that are available to respond to conduct involving serious racial and religious vilification, as well as other forms of vilification. Other offences that form part of this broader framework include, for example,

offences of intimidation,¹ affray,² assault occasioning actual bodily harm,³ urging violence against groups,⁴ urging violence against members of groups,⁵ advocating terrorism,⁶ using a carriage service to make a threat,⁷ using a carriage service to menace and harass or cause offence⁸ which all carry higher maximum penalties than section 93Z.

We also note that in sentencing for these, and other, offences, a Court is empowered to take into account as an aggravating factor that '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...)'.⁹ Such provisions operate to facilitate specific consideration and recognition of vilification in sentence proceedings, and to support just sentence outcomes.

Considering section 93Z in this context, rather than in isolation, is in our view necessary to developing a real understanding of the effectiveness of section 93Z, and to meaningfully identify any shortcomings and/or opportunities for improvement. Simply considering the use of the section itself, and any convictions recorded, will fail to appreciate the role the offence plays. A contextualised approach will also serve to ensure that any proposed amendments are indeed necessary and, insofar as possible, do not inappropriately overlap or conflict with the operation of other offence provisions.

The broader civil law framework

We also consider it important for section 93Z to be considered with regard to the broader civil regime that is also designed to protect against, and respond to, various types of vilification, including serious racial and religious vilification. This includes consideration of how section 93Z may best interact with and/or complement provisions designed to address and provide remedies for serious racial and religious vilification under the *Anti-Discrimination Act 1977*.

We are of the view that it is essential for potential law reform of section 93Z to be considered in this context, as section 93Z would best operate in tandem with, and in a way complementary to, the civil framework. Indeed, the ongoing review of the *Anti-Discrimination Act 1977* (NSW) by the Law Reform Commission may provide a valuable opportunity to consider the efficacy of section 93Z in the broader civil context, and ensure that the civil framework continues to operate effectively alongside any reforms to section 93Z. We consider it important for any reforms to section 93Z to be consistent with the themes of, and any suggested reforms to, the civil scheme arising from the review of the *Anti-Discrimination Act 1977*.

Potential reform of section 93Z

The scope of section 93Z

We consider it unnecessary to lower the threshold, or widen the scope, for prosecutions to be brought under section 93Z. The offence is already very broad, particularly as it includes recklessness as an intent element, meaning that to be convicted under section 93Z, a person need only recognise that inciting or threatening violence is a possible outcome of their public

¹ *Crimes (Domestic and Personal Violence) Act 2007*, s 13.

² *Crimes Act 1900*, s 93C.

³ *Crimes Act 1900*, s 59.

⁴ *Criminal Code Act 1995*, s 80.2A.

⁵ *Criminal Code Act 1995*, s 80.2B.

⁶ *Criminal Code Act 1995*, s 80.2C.

⁷ *Criminal Code Act 1995*, s 474.15.

⁸ *Criminal Code Act 1995*, s 474.17.

⁹ *Crimes (Sentencing Procedure) Act 1999*, s 21A(2)(h).

act. 'Public act' is broadly defined and includes acts on private land.¹⁰ 'Violence' is also broadly defined and extends to 'violence towards property.'¹¹

Further, we note that the broader criminal and civil frameworks make available multiple options and remedies for use in responding to various types and levels of vilification in NSW. In view of both the breadth of the offence and the availability of other means for redress outside section 93Z, we consider it unnecessary to broaden the scope of section 93Z.

In fact, we are of the view that it may instead be beneficial for the Law Reform Commission to consider potential ways to focus and streamline the offence provision. Focusing the provision, for example by reforming the intent element, could assist to ensure that the section is clear and workable in practice, and to ensure that criminal sanctions are reserved for serious instances of racial and religious vilification.

Reforming the intent element

One way to streamline and simplify the offence provision may be to reform section 93Z to focus only on intentional, rather than both intentional and reckless, incitement or threats of violence.

Currently, section 93Z covers both intentional and reckless incitement of violence. As such, a person may be charged under section 93Z in circumstances where they either intend for their public act to threaten or incite violence against a protected person or group, or in circumstances where they simply recognise the possibility that their public act may threaten or incite violence toward a protected person or group, and proceed to act regardless.

In addition to streamlining and focussing the offence provision, removing the 'recklessness' element may reduce the risk of inappropriate infringement on the freedom of political communication. We note that there is, to some degree, a conflict between section 93Z and the implied freedom of political communication in the Australian Constitution. Indeed, this tension may be a factor affecting the number of prosecutions brought under the section. Removing the 'recklessness' element may be one way to reduce the risk of deterring or criminalising non-malicious communication, as the provision would then capture intentional acts only.

Removing the 'recklessness' element would also ensure that criminal sanctions are only engaged in circumstances involving more serious instances of vilification involving intentional incitement to violence, particularly in light of the recent reform, which enables police officers to commence proceedings under section 93Z.

Further, we note that similar offences in comparable jurisdictions such as sections 80.2A and B of the *Criminal Code Act 1995* (Cth) and section 321G of the *Crimes Act 1958* (Vic) require intention on the part of the offender, rather than recklessness. In this sense, removing 'recklessness' as an element of the offence may also serve to increase consistency between the criminal law response to vilification in NSW and other Australian jurisdictions.

Before reforming section 93Z in this way, it would be necessary to ensure that civil remedies for conduct that would constitute reckless incitement to violence are adequate. In our view, this would ensure that the civil and criminal law would continue to work effectively together to provide comprehensive coverage and redress options for vilification in NSW. Again, this issue may be best considered by the Law Reform Commission as part of the review of the *Anti-Discrimination Act 1977*.

¹⁰ *Crimes Act 1900*, s93Z(5).

¹¹ *Crimes Act 1900*, s93Z(5).

Expansion of protected groups

We understand that the focus of this review of section 93Z is on the provision's operation with respect to racial and religious vilification. Notwithstanding this focus, in assessing section 93Z effectively, we consider it important to bear in mind that the offence provision relates to a range of protected groups.

We are of the view that it would be beneficial for the Law Reform Commission to consider the effect of any proposed amendments to section 93Z on all the listed protected groups in subsection (1), rather than considering the effect of potential reforms on instances of racial and religious vilification alone.

We would also like to take this opportunity to express our support for consideration of expanding the categories of protected groups under the section. This includes ensuring that persons with disability are also protected from vilification, in line with the recommendation of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.¹²

We appreciate the opportunity to provide a submission to the Review and look forward to further opportunities to provide input as part of the law reform process. If you have any questions in relation to this letter, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: claudia.daly@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President

¹² *Realising the human rights of people with disability* (Final Report, Volume 4, September 2023) p 32, Recommendation 4.30(b).