THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/HRC:BMcd270624

27 June 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

Thank you for the opportunity to provide a submission to the Law Reform Commission in respect of the Serious racial and religious vilification Options Paper (**Options Paper**). The Law Society supports appropriate measures to better prevent and respond to instances of serious racial and religious vilification in NSW, and, to this end, welcomes consideration of options to improve the operation of section 93Z of the *Crimes Act 1900* (NSW).

We offer the following comments in respect of each option set out in the Options Paper in turn, for your consideration.

1. **Should the definition of "public act" be changed in s 93Z? If so, should it incorporate the approach of the definitions of "public place" in the *Summary Offences Act 1988* (NSW) and the *Criminal Code* (Cth) to capture communications made to limited numbers of people? Are there any other changes that should be made?**

We do not consider it necessary to change the definition of "public act" under section 93Z. We note that the current definition is, and in our view should remain, consistent with the definition of "public act" under section 20B of the *Anti-Discrimination Act 1977* (NSW).

If there is concern that the current definition of "public act" under section 93Z does not adequately capture circumstances where public access to the communication is limited, such as livestreaming to subscribers, the Law Reform Commission may wish to consider adopting language used in Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW), rather than language contained in the *Summary Offences Act 1988* (NSW) or the *Criminal Code Act 1995* (Cth). Section 15A(3) of the *Children (Criminal Proceedings) Act 1987* (NSW), for example, refers to publication or broadcast 'to the public or a section of the public', which may be more useful in clarifying that section 93Z applies to incitement directed to part of the public, as well as to the general public more broadly.

2. **Should the mental element of recklessness be removed from s 93Z?**

Our view on whether the mental element of recklessness should be removed from section 93Z depends on whether the civil scheme will be amended to ensure that adequate civil remedies

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for conduct that would otherwise constitute reckless incitement to violence are available and accessible. In our view, it is essential that redress is available in circumstances involving reckless incitement to violence and that, ultimately, the civil and criminal law should work effectively together to provide comprehensive coverage and redress options for vilification in NSW.

If adequate redress becomes available under the civil scheme, we would support removing the mental element of recklessness from section 93Z. We are of the view that it would be of benefit for section 93Z to be consistent with comparable offence provisions in other Australian jurisdictions where recklessness is not included as a mental element. Examples include sections 80.2A and 80.2B of the *Criminal Code Act 1995* (Cth) and section 321G of the *Crimes Act 1958* (Vic), both of which require intention on the part of the offender, rather than recklessness. In this sense, removing 'recklessness' as an element of the offence may serve to increase consistency between the criminal law response to vilification in NSW and other Australian jurisdictions.

In our view, removing the 'recklessness' element would also ensure that criminal sanctions are only engaged in respect of more serious instances of vilification involving intentional incitement to violence. Such reform may also reduce the risk of inappropriate infringement on the freedom of political communication, as noted in our previous submission (**enclosed** for convenience).

If recklessness is to be retained as an element, we would support consideration of introducing a separate, lesser maximum penalty for reckless conduct under section 93Z, to more clearly differentiate the objective seriousness of reckless conduct, as opposed to intentional conduct, under the law.

3. Should the term "incite" in s 93Z be replaced with terms such as "promote", "advocate", "glorify", "stir up" or "urge"? Should s 93Z be amended to provide that the meaning of "incite" incorporates these terms? Should any other amendments be made to address this issue?

We are of the view that the term "incite" is clear, appropriate, and should not be replaced. We also note that case law, including *Sunol v Collier (No 2)* [2012] NSWCA 44*,* is already available to assist in understanding the meaning of the term "incite". The terminology of "incite" and "incitement" is also consistent with international law, including Article 4 of Convention on the Elimination of All Forms of Racial Discrimination and Article 20 of the International Covenant on Civil and Political Rights.

4. Should an offence of inciting hatred on the ground of a protected attribute be introduced?

We consider the civil vilification legislation, including section 20C(1) of the *Anti-Discrimination Act 1977* (NSW), more appropriate than the criminal law to govern and respond to instances of inciting hatred on the ground of a protected attribute.

We agree with the concerns expressed in the Options Paper that expanding the criminal law in this way may be a potential "over-reach" and result in unintended adverse outcomes for vulnerable groups, including children and Indigenous people.

5. Should the maximum penalty for s 93Z be increased? If so, what should be the new maximum penalty?

We would not be opposed to consideration of increasing the maximum penalty in respect of corporations that offend against section 93Z. The current maximum penalty of 500 penalty

units ($55,000) may not be a sufficient disincentive to large corporations that may, for example, publish racist material to incite violence.

In respect of individual offenders, we do not consider the maximum penalty under section 93Z should be increased from three years imprisonment. We note that the current maximum penalty is already higher than the maximum penalties for the equivalent serious vilification offences formerly under the *Anti-Discrimination Act 1977* (NSW), and share concerns expressed in the Options Paper that 'increasing the maximum penalty carries risks of unintended consequences on disadvantaged groups, including young people and Aboriginal people.'[1]

In our view, aligning the maximum penalty for section 93Z with the maximum penalty available for intimidation as a comparable offence is not an appropriate course, as section 13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (intimidation) covers a wider range of offending conduct, including more egregious conduct, than the scope of section 93Z.

6. Should there be aggravated versions of offences where the offence is motivated by hatred, which attract a higher penalty?

We consider section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sufficient in accounting for offences motivated by hatred for, or prejudice against, a group of people as an aggravating factor.

We share concerns raised in the Options Paper that, if an aggravated version of the offence were to be created, it may result in unintended adverse consequences, including disproportionate and adverse impacts on vulnerable groups.

7. Should an objective harm-based test be introduced into s 93Z?

We agree with the concerns raised in the Options Paper in respect of introducing a harm-based test, including ultimately that it may not be appropriate for the criminal context, given the seriousness of the penalties involved. In our view, the current test is appropriate, with no need to introduce a harm-based test as an additional safeguard. If a harm-based test were to be introduced instead of the current test, we are concerned that this would broaden the scope of section 93Z inappropriately.

We appreciate the opportunity to provide feedback on the Options Paper 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

Encl.

[1] Law Reform Commission, Options Paper, June 2024, p. 9.

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Our ref: CLC/HRC/PuLC:BMcd170424

17 April 2024

The Hon Tom Bathurst AC KC
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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,

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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 offence[8] 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*.

<u>Potential reform of section 93Z</u>

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).