

28 June 2024

NSW Law Reform Commission
Locked Bag 5000
PARRAMATTA NSW 2124

To the Commission

Serious racial and religious vilification options paper

The Public Interest Advocacy Centre (PIAC) welcomes the opportunity to respond to the NSW Law Reform Commission's Option Paper re Serious racial and religious vilification, as prohibited by s93Z of the *Crimes Act 1900* (NSW).

This submission builds on our earlier April 2024 submission,¹ as well as the feedback we provided at the stakeholder consultation held by the Commission in early May. We address each of the seven options provided by the Commission in turn.

Option 1: Definition of 'public act'

We are open to amendments to the definition of 'public act' in s93Z to ensure this offence is able to be applied in all relevant situations.

This could incorporate elements of either or both the definitions in the *Summary Offences Act 1988* (NSW) and *Criminal Code* (Cth). We do not express a preference for which approach should ultimately be adopted.

Option 2: Mental element of recklessness

We do not support removing the mental element of recklessness from s93Z.

This element is common and well-established in law, and we believe is set at an appropriate level given the seriousness of this offence. As noted at 3.4 in the Options Paper, 'the low number of prosecutions... may suggest that the element of recklessness has not resulted in inappropriate prosecutions.'

Option 3: Incitement to violence

We do not support replacement (or supplementation) of the term incite with other terms such as promote, advocate, glorify, stir up or urge.

¹ PIAC, *Submission to the NSW Law Reform Commission inquiry into Serious racial and religious vilification*, 19 April 2024, available at: <https://piac.asn.au/2024/04/19/submission-to-the-nsw-law-reform-commission-inquiry-into-serious-racial-and-religious-vilification/>

Similar to our response to option 2, the term ‘incite’ is well established and we believe reflects the seriousness of this offence. We also have concerns that the introduction of vague and broad terms like ‘promote’ could lead to uncertainty in the application of this provision, with the potential for it to be misused.

Option 4: An offence of inciting hatred

We do not support the introduction of a criminal offence of inciting hatred on the ground of a protected attribute.

We believe that this broader category of activity remains more appropriately captured by the civil vilification provisions contained in the *Anti-Discrimination Act 1977* (NSW).²

This reinforces the need, through the current NSWLRC review of the *Anti-Discrimination Act*, to ensure that those civil vilification provisions are operating effectively, including consideration of alternative pathways for enforcement beyond a solely complaint-driven model.

Option 5: Increase maximum penalty for s 93Z

We do not support an increase in the maximum penalty for s93Z.

We believe the current maximum penalty (3 years’ imprisonment) is set at an appropriate level. We are also unconvinced an increased maximum penalty would be more effective in preventing hate-speech.

While we note concerns about a lack of prosecutions under s93Z specifically, we do not believe it is necessarily a problem where the same course of conduct may be in breach of multiple provisions, and a choice is made to prosecute the person for other offences (including where those offences are more likely to be proven and/or carry a more appropriate penalty in the circumstances).

Option 6: Introduce aggravated offences

We do not support the introduction of aggravated offences where the offence is motivated by hatred.

The status quo – where, as the options paper points out ‘courts are required to take into account as an aggravating factor on sentence, that an offence is motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged’ – should continue to apply.

Option 7: Introduce a harm-based test

We do not support the introduction of an objective harm-based test.

² Which, as noted in the Options Paper, makes it unlawful to ‘incite hatred towards, serious contempt for, or severe ridicule of, a person on the grounds of race or another protected attribute.’

Similar to our response to option 4, above, we believe this broader category of activity would be more appropriately captured by the civil vilification provisions contained in the *Anti-Discrimination Act*.

Thank you in advance for your consideration of the issues raised in this short submission. Should the Commission require additional information, please do not hesitate to contact us at the details below.

Yours sincerely

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