Serious racial and religious vilification

151

REPORT

September 2024

NSW Law Reform Commission

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Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Serious racial and religious vilification

We make this report – Report 151: *Serious racial and religious vilification* – pursuant to the reference to this Commission received on 14 February 2024.

Yours sincerely,

The Hon Tom Bathurst AC KC

Chairperson

27 September 2024

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the NSW Law Reform Commission is asked to expeditiously review and report on the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) in addressing serious racial and religious vilification in NSW.

In undertaking this review, the Commission should have regard to:

1. the impact of racial and religious vilification on all parts of the NSW community;
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;
3. the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW);
4. the impacts on freedoms, including freedom of speech, association and religion;
5. the need to promote community cohesion and inclusion;
6. the views of relevant stakeholders as determined by the Commission; and
7. any other matter that the Commission considers relevant.

[Received 14 February 2024]

Recommendations

8. Sentencing and penalties

Recommendation 8.1: Review s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW)

The NSW Government should consider commissioning a review of the effectiveness of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Recommendation 8.2: Measures to improve data collection

The NSW Government should consider measures, such as a new Law Part Code, to improve the collection of data on hate crimes when offences other than s 93Z are charged for hate-related incidents.

1. Introduction

In brief

While acknowledging the legitimate community concerns about the impact of vilification, including racial and religious hatred, we do not recommend changes to s 93Z of the *Crimes Act 1900* (NSW) in response to these terms of reference. This chapter outlines the scope of the review, our review process and summarises the key reasons for our conclusion.

1.1 On 14 February 2024, the NSW Attorney General asked us to expeditiously review and report on the effectiveness of s 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*) in addressing serious racial and religious vilification in NSW.[1]

1.2 Throughout this review, we heard about the significant impact that hate-based conduct has on individuals, groups and our wider community, historically and at the present time. We acknowledge public interest in the operation of s 93Z has increased following the events in Israel and Gaza on and after 7 October 2023.[2] However, after consulting widely, we have concluded that s 93Z should not be amended in response to the specific issues raised by the terms of reference.

1.3 Based on the concerns raised with us, we recommend the NSW Government consider:

- commissioning a separate review of the effectiveness s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (*Sentencing Procedure Act*), which enables motivations of hatred and prejudice to be considered as aggravating factors on sentence, and

1. The full terms of reference for this review are set out at ix.
2. See, eg, M Koziol, "Minns Targets Hate Speech Laws", *The Sydney Morning Herald* (14 November 2023) 1, 5.

- measures to improve the collection of data on hate crimes when offences other than s 93Z are charged for hate-related incidents.

1.4 In this report, we explain why we have reached this conclusion. We also respond to options for reforms, relevant to the terms of reference, that were suggested to us during this review.

1.5 Our terms of reference are limited to considering the effectiveness of s 93Z in addressing serious racial and religious vilification. Accordingly, this report does not comment on other issues relating to s 93Z. These may be considered as part of our wider, ongoing review of the *Anti-Discrimination Act 1997* (NSW) (*ADA*).[3]

The background to this review

1.6 On 19 January 2024, the Premier of NSW, the Hon Chris Minns MP, announced that a review of s 93Z would be conducted "in the wake of concerns raised by some community groups about [its] effectiveness".[4]

1.7 The announcement responded, in part, to concerns expressed by some community groups about the low number of prosecutions under s 93Z. In particular, some were dissatisfied at the criminal justice response to the experiences of individuals and groups when allegations of vilification and hate-based conduct have been reported.[5]

1.8 Data from the Bureau of Crime Statistics and Research (BOCSAR) shows that, as at July 2024, 7 people had charges under s 93Z finalised. Of these people:

- 2 were found guilty of an offence under s 93Z, and
- 5 had the charge(s) under s 93Z withdrawn.[6]

1.9 Both convictions were appealed before the District Court. Out of the 2 convictions:

- 1 was quashed on 6 February 2024 after a successful appeal,[7] and

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3. NSW Law Reform Commission, "Anti-Discrimination Act review: Terms of reference" (29 August 2023) *NSW Law Reform Commission* <https://lawreform.nsw.gov.au/current-projects/anti-discrimination-act-review/anti-discrimination-act-review-terms-of-reference.html> (retrieved 4 September 2024).
4. C Minns and R Hoenig, "Review of State's Laws on Threats and Incitement to Violence" (Media Release, 19 January 2024) <www.nsw.gov.au/media-releases/review-of-states-laws-on-threats-and-incitement-to-violence> (retrieved 17 September 2024).
5. See, eg, NSW Jewish Board of Deputies, *Submission SV12,* 3–5.
6. NSW Bureau of Crime Statistics and Research, *CourtSection93ZCharges_202407* (ref ac24-24016).
7. Transcript of Proceedings, *Thukral v R* (NSWDC, Culver DCJ, 2020/00253545, 6 February 2024).

- 1 was upheld on appeal by the District Court on 7 June 2024 (that is, after this review commenced).[8]

1.10 There were 2 further convictions in 2020. However, they were annulled because the NSW Police Force commenced prosecutions without the consent of the Director of Public Prosecutions (DPP), which was required at the time.[9]

1.11 The requirement to obtain DPP consent before commencing a prosecution was removed from s 93Z in January 2024.[10] This was intended to streamline the prosecution process.[11]

How we conducted this review

1.12 The terms of reference required us to conduct this review expeditiously. While respecting this request, we have sought to consult widely in recognition of the potentially far-reaching implications of law reform in this area.

1.13 On 8 March 2024, we published a concise background note.[12] We also invited submissions on issues relevant to the terms of reference. We received 42 submissions.

1.14 We conducted 24 consultation meetings, in person and online, with a wide range of individual and groups. This included judicial officers, bodies that represent the legal profession, community legal centres, police and prosecutors, academic experts, groups representing Aboriginal people, religious groups, multicultural groups, and groups advocating on behalf of members of LGBTQIA+ communities and people living with HIV/AIDS.

1.15 We released an Options Paper on 7 June 2024 to give the public another opportunity to participate in the review.[13]

1.16 In the Options Paper, we invited submissions on seven potential reform options that were raised with us in consultations and in submissions. We asked for feedback on whether:

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8. *Kanwal v R* (NSWDC, Culver DCJ, 2020/00257129, 28 March 2024).
9. Evidence to Legislative Council, Portfolio Committee No 5, Justice and Communities, Parliament of NSW, 4 September 2024, 70 (S Dowling, Director of Public Prosecutions).
10. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1[1].
11. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2023, 25.
12. NSW Law Reform Commission, "Background note on section 93Z" <https://lawreform.nsw.gov.au/current-projects/section-93z/background-note-on-section-93z-of-the-crimes-act.html> (retrieved 9 September 2024)
13. NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Options Paper (2024).

- the definition of "public act" should change
- the mental element of "recklessness" should be removed
- the word "incite" should be replaced or supplemented with other terms
- there should be an offence of inciting hatred
- the maximum penalty for an offence against s 93Z should increase
- NSW should introduce aggravated versions of other existing offences, applicable when the conduct in question is motivated by hatred, and
- an objective harm-based test should be introduced into s 93Z.

1.17 We received an additional 27 submissions in response to the Options Paper.

1.18 Appendices A and B to this report list the submissions we received and the consultations we conducted.

1.19 We also researched criminal vilification offences across Australia and in other countries. This helped us consider potential options for reform. Appendix C to this report contains a summary of criminal vilification provisions in Australia and other jurisdictions.

1.20 We thank everyone who took the time to meet with us and to provide submissions. In particular, we are grateful to everyone who shared their lived experiences of vilification, prejudice and discrimination. We recognise that it can be difficult and even retraumatising to do this.

1.21 We also thank BOCSAR, Anti-Discrimination NSW and the Western Australian Office of Crime Statistics and Research for their assistance in compiling statistics to assist our research.

Comments on the scope of this review

1.22 Before outlining our key reasons, we wish to clarify our understanding of the scope of this review.

All groups protected by s 93Z should be consulted

1.23 Section 93Z does not only criminalise serious racial and religious vilification. The section also covers threats of, or incitement to, violence on the grounds of sexual orientation, gender identity, intersex status, and having HIV or AIDS.[14]

14. *Crimes Act 1900* (NSW) s 93Z(1)(c)–(f).

1.24 Many submissions expressed concern that the terms of reference focus on racial and religious vilification, to the exclusion of other groups covered by s 93Z.[15] We were encouraged not to recommend a hierarchical, two-tier model of protection that differentiates between the attributes protected by s 93Z.[16]

1.25 We emphasise that we do not support such a model. It would be a backwards step for NSW to differentiate between the attributes currently protected by s 93Z.

1.26 In addition to consulting with religious and multicultural groups, we met with representatives of other groups protected by s 93Z. We also welcomed their submissions. We strongly encourage the NSW Government to consult comprehensively with all groups protected by s 93Z if, contrary to our conclusion, it forms the view that s 93Z requires amendment.

1.27 We also specifically encourage the NSW Government to ensure that Aboriginal and Torres Strait Islander peoples are fully consulted about any proposed reform to s 93Z. In chapter 3, we outline the concerns raised with us about the potential disproportionate impact of such reforms on Aboriginal and Torres Strait Islander peoples. In this regard, we note the government commitments in the *Closing the Gap National Agreement* to reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples in the justice system.[17]

This report does not make recommendations about the *ADA*

1.28 As we explain in chapter 2, s 93Z operates alongside the civil anti-vilification protections in the *ADA*. These cover other forms of vilification, that is, public acts that incite hatred, serious contempt or severe revulsion on the basis of:

- race
- transgender status
- HIV/AIDS status
- homosexuality, or
- religious belief, affiliation or activity (or lack of such belief, affiliation or activity).[18]

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15. See, eg, Anti-Discrimination NSW, *Submission SV04*, 1; ACON and HIV/AIDS Legal Centre, *Submission SV08,* 1; Inner City Legal Centre, *Submission SV13*, 2; J Leong, *Submission SV17,* 1; M Hawila and N Asquith, *Submission SV21*, 4–5; NSW Bar Association, *Submission SV39* [15].
16. See, eg, Equality Australia, *Submission SV18,* 1; Equality Australia, *Submission SV57*, 1.
17. Closing the Gap, "Closing the Gap Targets and Outcomes" (July 2020) <www.closingthegap.gov.au/national-agreement/targets> (retrieved 4 September 2024).
18. *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZE, s 49ZT, s 49ZXB.

1.29 A range of organisations argued that the civil and the criminal frameworks should be reviewed holistically, as part of our ongoing review of the *ADA*.[19] Additionally, some suggested it was premature to consider reforms to s 93Z while the *ADA* was under review. For instance, the NSW Bar Association suggested that concerns about the operation of the criminal law may be addressed if the civil vilification regime was improved.[20]

1.30 We acknowledge the relationship between the vilification protections, and there are good arguments for considering them together in a holistic review. However, we are bound by our terms of reference which focus, in this instance, on the criminal law response to serious racial and religious vilification in s 93Z.

1.31 Accordingly, this report does not consider several issues raised with us in submissions and consultations. These include whether:

- the list of protected attributes in either s 93Z or the *ADA* should be expanded, including to recognise intersectional experiences of vilification[21]
- the terminology used to describe the attributes currently protected by s 93Z or the *ADA* should change[22]
- s 93Z and the *ADA* should be aligned in terms of the attributes protected and/or the way common elements are defined[23]
- the civil protection against religious vilification, introduced into the *ADA* in 2023, could be improved,[24] and
- the civil complaints mechanisms, and the framework for civil remedies, should be reformed.[25]

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19. See, eg, Law Society of NSW, *Submission SV03*, 2; Public Interest Advocacy Centre, *Submission SV10*, 6; Australian National Imams Council, *Submission SV26* [6]–[7]; NSW Bar Association, *Submission SV39* [16]–[19], [27]. The organisation formerly known as the Public Interest Advocacy Centre has recently changed its name to the Justice and Equity Centre. Throughout this report, we refer to the name of the organisation as it was at the date of its submissions.
20. NSW Bar Association, *Submission SV39* [49]. See also Public Interest Advocacy Centre, *Submission SV10*, 6.
21. See, eg, Inner City Legal Centre, *Submission SV13,* 3–4; Legal Aid NSW, *Submission SV23,* 5; Kingsford Legal Centre, *Submission SV27,* 2, 25–26; Periyar Ambedkar Thoughts Circle, *Submission SV06,* 7.
22. See, eg, Equality Australia, *Submission SV18,* 8; Public Interest Advocacy Centre, *Submission SV10*, rec 4.
23. See, eg, Anti-Discrimination NSW, *Submission SV04,* 10; Australian Education Union, NSW Teachers Federation Branch, *Submission SV30,* 9; Kingsford Legal Centre, *Submission SV27,* 2 ACON and HIV/AIDS Legal Centre, *Submission SV08*, 2.
24. *Anti-Discrimination Act 1977* (NSW) s 49ZE. See, eg, Public Interest Advocacy Centre, *Submission SV10*, rec 1; Legal Aid NSW, *Submission SV23*, 5.
25. See, eg, Anti-Discrimination NSW, *Submission SV04*, 8; Inner City Legal Centre, *Submission SV13*, 4; Australian Muslim Advocacy Network, *Submission SV19*, 4.

1.32 We are grateful to the groups and individuals that raised these issues with us. However, these issues may be better considered as part of our wider review of the *ADA*.

This report does not consider recent amendments

1.33 Until January 2024, the DPP's approval was required to commence prosecutions under s 93Z.[26]

1.34 We received submissions regarding the removal of this requirement. There was some support for the change.[27] Several others criticised the reform, arguing that the requirement was an important safeguard.[28] We also heard concerns about the speed with which s 93Z was amended.[29]

1.35 Some submissions considered it was premature to consider further changes to s 93Z until there has been sufficient time to assess the impact of removing the requirement for DPP approval.[30]

1.36 We cannot comment on this change within the scope of the current terms of reference. We note that the Attorney General must review the effect of the amendment and table a report in Parliament by 1 January 2025.[31]

Summary of our key reasons

1.37 Throughout this review, we heard about the significant and increasing effect that vilification has on our community. We outline these concerns in chapter 3. While we acknowledge these concerns, we do not recommend reform to s 93Z to address the issues raised by our terms of reference.

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26. *Crimes Act 1900* (NSW) s 93Z(4), as amended by *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 [1].
27. Kingsford Legal Centre, *Submission SV27*, 1. But see Muslim Legal Network NSW, *Submission SV25* [20].
28. See, eg, Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 17–18; Shia Muslim Council of Australia, *Submission SV53*, 14; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2; Australian Education Union, NSW Teachers Federation Branch, *Submission SV30,* 8–9.
29. M Hawila and N Asquith, *Submission SV21*, 2; Muslim Legal Network NSW, *Submission SV25* [20]–[21]; Australian National Imams Council, *Submission SV26* [6]–[7]; Australian Federation of Islamic Councils, *Submission SV511*, 5–6.
30. Legal Aid NSW, *Submission SV23*, 2; Confidential, *Submission SV38*, 1; NSW Bar Association, *Submission SV39* [49]; Australian National Imams Council, *Submission SV52*, 3.
31. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 [3].

1.38 Section 93Z needs to be understood as part of the broader legal system in which it operates. This includes other, general criminal offences and the civil vilification framework (outlined in chapter 2).

1.39 Section 93Z has a protective purpose, in that it aims to protect identified groups from threats of or incitements to violence. It also has a symbolic purpose, signifying that the community does not condone this conduct.[32] There was widespread support for criminalising this conduct in a specific vilification offence, as s 93Z currently does.[33]

1.40 One of the factors that led to this review was the low number of prosecutions under s 93Z. However, the low number does not, of itself, make the case for reform. The fact that an appeal against a conviction under s 93Z has been dismissed demonstrates that the section is operable and has a role to play in appropriate circumstances.[34]

1.41 As we discuss in chapter 3, the low numbers of prosecutions may be due to a range of factors other than the elements of the offence. The factor most often raised with us is that police may prefer to charge general offences. In many cases, these offences are more familiar to police, are easier to prove and have higher maximum penalties.

1.42 There is no clear community consensus, even among religious and multicultural groups, that s 93Z requires reform in response to the issues raised by our terms of reference. Indeed, many cautioned against such reforms.[35]

1.43 Expanded criminalisation comes with risks and is not always the best tool to achieve social policy aims. In particular, we are aware that extending the criminal law can have unintended consequences, especially for those groups already

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32. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.
33. See, eg, Legal Aid NSW, *Submission SV23*, 1; Australian Bahá'í Community, *Submission SV32,* 1; NSW Council for Civil Liberties, *Submission SV09* [4.3]; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 1.
34. Faith NSW and Better Balanced Futures, *Submission SV65*, 3. See also Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 4.
35. See, eg, Anglican Church Diocese of Sydney, *Submission SV49*. The submission was endorsed by representatives of the Seventh-day Adventist Church, the Council of the Ministers of Korean Churches in Sydney, NSW/ACT Australian Christian Churches, NSW Council of Churches and Freedom for Faith: Anglican Church Diocese of Sydney, *Submission SV49,* 12. The submission was also supported by Australian National Imams Council, *Submission SV52*, 1; Islamic Schools Association of Australia (NSW), *Submission SV61*, 1; Faith NSW and Better Balanced Futures, *Submission SV65,* 5.

overrepresented in the criminal justice system. Specific concerns were expressed about the potential impact on Aboriginal people.[36]

1.44 There is also a need to be cautious of any reforms that might over-complicate the law and cause further uncertainty or litigation.

1.45 In the following chapters, we detail the responses to the various options suggested in our Options Paper. While views differed in relation to various options, the weight of opinion was that none of these options should be pursued.

1.46 The exception was the potential removal of recklessness as a mental element. Opinions in submissions divided more evenly on this issue. However, this change would not strengthen s 93Z or address the concerns that prompted our review.

1.47 Finally, as we further explain in chapter 3, the law is only one part of a wider range of measures necessary to promote social cohesion in NSW. Non-legal measures may be more effective in achieving this aim.

1.48 However, we agree that more could be done to improve the visibility and to track the effectiveness of the wider criminal justice response to hate crime. We recommend that the NSW Government consider commissioning a review of the effectiveness of s 21A(2)(h) of the *Sentencing Procedure Act*.[37] We also recommend that the NSW Government consider measures to improve data collection in relation to the prosecution of general offences in response to hate crime.

Outline of this report

1.49 In this report:

- **Chapter 2** outlines the history, background and context to s 93Z
- **Chapter 3** sets out perspectives on s 93Z that have informed our conclusions
- **Chapter 4** explains why we do not recommend the introduction of new vilification offences, such as an offence of inciting hatred or an offence with an objective harm-based test
- **Chapter 5** explains why we do not recommend that "incite" be replaced or supplemented, and why we do not recommend changes to the definition of "violence"

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36. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 25–28, 33; NSW Bar Association, *Submission SV39* [46]–[48]; Confidential, *Submission SV44*, 2; Law Society of NSW, *Submission SV47,* 2; M Hashimi, *Submission SV55*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.
37. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

- **Chapter 6** explains why we do not recommend changes to the definition of "public act"
- **Chapter 7** explains why we do not recommend that recklessness be removed from s 93Z
- **Chapter 8** considers issues relating to the maximum penalty of s 93Z, and sentencing provisions relevant to other hate-based conduct
- **Appendix A** lists the submissions received
- **Appendix B** lists the consultations conducted as part of this review
- **Appendix C** contains tables that list the criminal vilification offences in Australian jurisdictions, as well as selected overseas jurisdictions.

2. Section 93Z: Background and context

In brief

This chapter introduces s 93Z of the *Crimes Act 1900* (NSW). We outline the history and elements of the offence. We identify the wider legal framework of criminal offences, and civil protections against vilification, within which s 93Z operates. We also summarise key human rights instruments that have informed the development of s 93Z.

The development of s 93Z

2.1 Section 93Z was added to the *Crimes Act 1900* (NSW) (*Crimes Act*) in 2018.[1] It replaced four separate serious vilification offences that, until then, appeared in the *Anti-Discrimination Act 1977* (NSW) (*ADA*).

2.2 Section 93Z was enacted in response to community concerns about the effectiveness of the former offences.[2] NSW Bureau of Crime Statistics and

1. *Crimes Act 1900* (NSW) s 93Z, inserted by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 1.
2. NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 5 June 2018, 42.

Research data shows that three serious vilification charges under these offences were finalised, but all were withdrawn by the prosecution.[3]

2.3 Several reviews, reports and papers guided the development of s 93Z. These included:

- a review of the operation of racial vilification laws in NSW by the Hon James Samios in 1992[4]
- the NSW Law Reform Commission's 1999 report on its review of the *ADA*[5]
- a paper by the then Director of Public Prosecutions (DPP), Nicholas Cowdery AO KC in 2009[6]
- a Legislative Council Standing Committee on Law and Justice inquiry in 2013 into the serious racial vilification offence (which was then contained in s 20D of the *ADA*),[7] and
- a report on community consultation regarding serious vilification laws in NSW, by Stepan Kerkyasharian AO in 2017.[8]

2.4 The Cowdery, Kerkyasharian and Standing Committee reports identified several concerns with the vilification laws in NSW that were seen as barriers to prosecution. The key concerns included that:

- it was difficult to prove "incitement" to the criminal standard,[9] particularly because it was necessary to prove that a third party was actually incited to violence[10]

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3. NSW Bureau of Crime Statistics and Research, *Charge and Outcome for Serious Racial and Religious Vilification* (ref mg24-23902).
4. J Samios, *Report of the Review into the Operation of the Racial Vilification Law of New South Wales: A Report to the Minister for Ethnic Affairs and the Attorney General* (Legislative Council, 1992).
5. NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW),* Report 92 (1999).
6. N Cowdery, "Review of Law of Vilification: Criminal Aspects" (Paper prepared for the Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009).
7. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013).
8. S Kerkyasharian, *Report on Consultation: Serious Vilification Laws in NSW* (2017).
9. N Cowdery, "Review of Law of Vilification: Criminal Aspects" (Paper prepared for the Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009) 4; NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.55], [4.69]–[4.70]; S Kerkyasharian, *Report on Consultation: Serious Vilification Laws in NSW* (2017) 8–10.
10. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.108]–[4.114].

- it was not clear whether intention was required to prove "incitement", or whether recklessness would suffice[11]
- the offence did not cover persons of a presumed race[12]
- expressions of hatred would not be captured by the offence unless accompanied by conduct threatening or inciting others to threaten physical harm, leaving a perceived gap in the legislation[13]
- there was a lack of legislative clarity about what constituted "public" and "private" acts, and it was unclear if the words "public act" would extend to internet communications,[14] and
- the maximum penalty was relatively lenient compared to the penalties for similar offences, which could have led to prosecutors charging other offences.[15]

2.5 Section 93Z consolidated the four former offences into one offence.[16] These former offences were removed from the *ADA* and s 93Z was added to the *Crimes Act*.[17]

2.6 When s 93Z was introduced, the then Attorney General the Hon Mark Speakman SC explained that it would, among other things:

- broaden the characteristics protected against vilification and update the language used to describe them
- provide a consistent maximum penalty (under the old offences, there were differences between maximum penalties for serious vilification of different protected groups), and
- reflect community standards and the seriousness of this conduct through an increased maximum penalty.[18]

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11. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.88]–[4.107].
12. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.122]–[4.136].
13. N Cowdery, "Review of Law of Vilification: Criminal Aspects" (Paper prepared for the Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009) 4; NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [5.2]–[5.3], [5.23].
14. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.40]–[4.51].
15. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [5.37]–[5.57]; S Kerkyasharian, *Report on Consultation: Serious Vilification Laws in NSW* (2017) 12–13.
16. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.
17. *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 1, sch 2 [1]–[4].
18. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.

An overview of s 93Z

2.7 A person commits an offence under s 93Z(1) if, by a public act, they intentionally or recklessly threatened or incited violence towards another person, or a group of persons, on any of the following grounds:

(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.[19]

2.8 In determining whether there has been an offence under s 93Z, it is irrelevant whether the person's assumptions or beliefs about these attributes were correct or incorrect at the time.[20]

Physical elements: public act threatening or inciting violence

2.9 To commit an offence under s 93Z, the person must, by a public act,

- have threatened or incited violence
- towards another person, or group of people,
- on the grounds of any of the attributes protected by s 93Z.

What is a "public act"?

2.10 A "public act" includes:

- any form of communication to the public, including speaking, writing, displaying notices, playing recorded material, broadcasting and communicating through social media or other electronic methods
- any conduct observable by the public, including actions, gestures and wearing or displaying clothing, signs, flags, emblems and insignia, and
- distributing or disseminating any matter to the public.[21]

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19. *Crimes Act 1900* (NSW) s 93Z(1).
20. *Crimes Act 1900* (NSW) s 93Z(2).
21. *Crimes Act 1900* (NSW) s 93Z(5) definition of "public act".

2.11 An act may be a public act even if it occurs on private land.[22]

What does it mean to incite or threaten violence?

2.12 Section 93Z covers public acts that either threaten or incite violence.

2.13 In s 93Z, "violence" is defined to include violent conduct. "Violence towards a person or group of persons" includes violence towards the property of the person or a member of the group, respectively.[23]

2.14 When introducing s 93Z, the NSW Government explained that the offence was directed towards threatening or inciting violence, or "behaviour involving physical force intended to hurt, damage or kill someone or something".[24]

2.15 The courts have decided that inciting violence means to encourage it or spur it on. However, it is not necessary for a person to be incited to violence. The test is whether an ordinary member of the group to which the act is directed (the audience) would be incited to violence.[25] The conduct must reach a relevant audience and be capable of encouraging or spurring others' emotions sufficiently.[26]

2.16 This is reflected in s 93Z, which provides that it is irrelevant whether anyone carried out an act of violence, or formed a state of mind to do so, in response to the relevant public act.[27]

2.17 It is also an offence to threaten violence on the basis of a protected attribute. The element of threatening violence was included as an alternative to incitement, so the prosecution would not need to present evidence that the defendant intentionally or recklessly incited violence.[28]

What attributes are protected by s 93Z?

2.18 Section 93Z protects individuals and groups against vilification based on race, religious belief or affiliation, sexual orientation, gender identity, intersex status and having HIV or AIDS.[29]

2.19 These are defined in s 93Z:

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22. *Crimes Act 1900* (NSW) s 93Z(5) definition of "public act".
23. *Crimes Act 1900* (NSW) s 93Z(5) definition of "violence".
24. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 43.
25. *Sunol v Collier (No 2)* [2012] NSWCA 44 [41].
26. *Sunol v Collier (No 2)* [2012] NSWCA 44 [41].
27. *Crimes Act 1900* (NSW) s 93Z(3).
28. NSW, *Parliamentary Debates,* Legislative Council, Second Reading Speech, 20 June 2018, 906.
29. *Crimes Act 1900* (NSW) s 93Z(1).

- **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 persons of the same sex, persons of a different sex, or persons of the same sex and persons of a different sex
- **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, and
- **intersex status** means the status of having physical, hormonal or genetic features that are neither wholly female nor wholly male, or a combination of female and male, or neither female nor male.[30]

2.20 Having HIV or AIDS is not defined in s 93Z.

Mental element: intention or recklessness

2.21 A person will be guilty of an offence under s 93Z if they:

- intended to incite or threaten violence by their act, or
- realised that threatening or inciting violence was a possible outcome of their act, but did the act anyway (this is "recklessness").[31]

2.22 None of the predecessor serious vilification offences in the *ADA* expressly specified what mental element was required, and they did not include a recklessness element. Because there were no prosecutions of these offences, this was never confirmed by the courts.[32] However, it appears that the government anticipated the offence of racial vilification under s 20D required intention, to ensure that prosecution and conviction would be "limited to only very serious cases of racial vilification".[33]

2.23 Recklessness was included in s 93Z to remove the uncertainty about the mental element and to address concerns about the difficulty of proving incitement.[34]

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30. *Crimes Act 1900* (NSW) s 93Z(5).
31. *Blackwell v R* [2011] NSWCCA 93, 81 NSWLR 119 [78]; *Aubrey v R* [2017] HCA 18, 260 CLR 305 [46]–[49].
32. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.88]–[4.90], [4.105]–[4.107].
33. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 4 May 1989, 7490.
34. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 43.

A police officer or the DPP can commence a prosecution

2.24 A police officer or the DPP can commence a prosecution under s 93Z.[35]

2.25 Originally, the DPP had to approve any prosecutions under s 93Z before the charge could be laid by a police officer.[36] This requirement was included to ensure the offence was only prosecuted in appropriate cases.[37]

2.26 An amendment was passed in 2023 to remove this requirement.[38] The amendment commenced on 1 January 2024. This change was prompted by concerns that the time taken to refer matters to the DPP, and to obtain approval, was discouraging the police from prosecuting under s 93Z.[39]

2.27 The change was intended to "streamline the process for police to prosecute people who offend against section 93Z".[40] It also made s 93Z consistent with other offences that do not have this requirement, such as the offence of displaying Nazi symbols.[41]

2.28 The Attorney General must review the effect of this change and table a report in Parliament by 1 January 2025.[42] The amendment will expire on 1 January 2026, unless Parliament passes a law to extend it.[43]

The maximum penalty for s 93Z

2.29 The maximum penalty for an offence under s 93Z is:

- for an individual: 3 years' imprisonment and/or 100 penalty units ($11,000), and
- for a corporation: 500 penalty units ($55,000).[44]

2.30 Offences against s 93Z are tried in the Local Court unless the prosecutor or accused person elects for it to be heard in a higher court, such as the District

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35. *Crimes Act 1900* (NSW) s 93Z(4).
36. *Crimes Act 1900* (NSW) s 93Z(4), as inserted by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 1.
37. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.
38. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 [1], amending *Crimes Act 1900* (NSW) s 93Z(4).
39. NSW, *Parliamentary Debates*, Legislative Assembly, 21 November 2023, 12, 25.
40. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2023, 25.
41. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 21 November 2023, 25; *Crimes Act 1900* (NSW) s 93ZA.
42. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1[3], commenced 1 January 2024.
43. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) s 2(2), sch 1[2].
44. *Crimes Act 1900* (NSW) s 93Z(1).

Court.[45] The Local Court has lower sentencing limits than the higher courts. It is unable to sentence more than 2 years' imprisonment for a single offence, or 5 years for multiple offences.[46]

The wider legal framework

2.31 Many submissions emphasised the importance of recognising that s 93Z operates in a wider framework of criminal and civil protections.[47] For instance, the Law Society of NSW observed that these "broader criminal and civil frameworks make available multiple options and remedies for use in responding to various types and levels of vilification in NSW".[48]

Other relevant criminal offences

2.32 Section 93Z is one of a number of provisions available to charge a person who engages in criminal conduct that involves hatred or prejudice. A range of other NSW and Commonwealth offences may be used, depending on the circumstances.

2.33 Many of these are general offences that do not involve hatred or prejudice as a separate element that needs to be proven by the prosecution for the offence to be made out.

NSW offences

2.34 NSW has one other offence that prohibits acts that involve hatred. This is the offence of knowingly displaying a Nazi symbol, by a public act and without a reasonable excuse, which was introduced in 2022. The maximum penalty for this offence is:

- for an individual: 100 penalty units ($11,000) and/or 12 months' imprisonment, and
- for a corporation: 500 penalty units ($55,000).[49]

2.35 Conduct motivated by hatred or prejudice may also be covered by other, general offences. Many of these offences have higher maximum penalties than s 93Z.

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45. *Criminal Procedure Act 1986* (NSW) sch 1, table 1.
46. *Criminal Procedure Act 1986* (NSW) s 267(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53B.
47. See, eg, Law Society of NSW, *Submission SV03,* 1–3; Australian National Imams Council, *Submission SV26* [7]; Shia Muslim Council of Australia, *Submission SV53,* 20; NSW Bar Association, *Submission SV39* [4]; Equality Australia, *Submission SV57,* 1.
48. Law Society of NSW, *Submission SV03,* 3.
49. *Crimes Act 1900* (NSW) s 93ZA.

2.36 Examples include:

Offence	Maximum penalty
Offensive language: using offensive language in, near or within hearing from a public place or school[50]	6 penalty units ($660)
Common assault: intentionally or recklessly causing another person to apprehend immediate and unlawful violence, or inflicting unlawful force on another person[51]	2 years' imprisonment
Stalking or intimidating another person, with intent to cause them physical or mental harm[52]	5 years' imprisonment and/or 50 penalty units ($5,500)
Assault occasioning actual bodily harm[53]	5 years' imprisonment
Destroying or damaging property: intentionally or recklessly destroying or damaging property that belongs to another person[54]	5 years' imprisonment, or 7 years if during a public disorder
Threatening to destroy or damage the property of another person with intent to cause a person to fear the threat would be carried out[55]	5 years' imprisonment, or 7 years if during a public disorder
Sending or delivering a document containing threats: intentionally or recklessly sending or delivering, or directly or indirectly causing to be received, any document that threatens to kill or inflict bodily harm on any person, with knowledge of the contents[56]	10 years' imprisonment
Affray: using or threatening violence towards another person using more than just words, where that conduct would cause a reasonable person present to fear for their personal safety[57]	10 years' imprisonment

50. *Summary Offences Act 1988* (NSW) s 4A(1).
51. *Crimes Act 1900* (NSW) s 61.
52. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
53. *Crimes Act 1900* (NSW) s 59.
54. *Crimes Act 1900* (NSW) s 195(1)(a), s 195(2)(a).
55. *Crimes Act 1900* (NSW) s 199(1)(a), s 199(2)(a).
56. *Crimes Act 1900* (NSW) s 31(1).
57. *Crimes Act 1900* (NSW) s 93C(1).

Offence	Maximum penalty
Riot: where 12 or more people are present together and use or threaten unlawful violence for a common purpose, and their conduct would cause a reasonable person present to fear for their personal safety[58]	15 years' imprisonment

2.37 These general offences may provide simpler charging alternatives to s 93Z in some situations. As discussed in chapter 3, this may be one reason for the low numbers of prosecutions of s 93Z.

2.38 It can, however, be difficult to track how many of these general offences are prosecuted in situations involving hatred or prejudice. We consider options to address this issue in chapter 8.

Commonwealth offences

2.39 Some Commonwealth offences may also be available, depending on the circumstances. These include:

Offence	Maximum penalty
Urging violence against groups: intentionally urging another to use force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, with intent for the force or violence to take place[59]	5 years' imprisonment, or 7 years where the force or violence would threaten the peace, order and good government of the Commonwealth
Urging violence against members of a group: this is similar to the above offence, but is targeted at a particular person[60]	5 years' imprisonment, or 7 years where the force or violence would threaten the peace, order and good government of the Commonwealth
Advocating terrorism: advocating the doing of a terrorist act or the commission of a terrorism offence, and being reckless as to whether another person will carry out the act or offence[61]	5 years' imprisonment, or the maximum penalty of the terrorism offence advocated, whichever is lesser
Advocating genocide and being reckless as to whether another person will engage in genocide[62]	7 years' imprisonment

58. *Crimes Act 1900* (NSW) s 93B(1).
59. *Criminal Code* (Cth) s 80.2A.
60. *Criminal Code* (Cth) s 80.2B.
61. *Criminal Code* (Cth) s 80.2C.
62. *Criminal Code* (Cth) s 80.2D.

Offence	Maximum penalty
Public display of prohibited Nazi symbols or giving Nazi salute in a public place[63]	12 months' imprisonment

2.40 Some Commonwealth offences that target conduct while using a "carriage service" may also be relevant. These offences capture conduct involving the internet, mobile phones or other telecommunication services. Examples include:

- **using a carriage service to menace, harass or cause offence** (maximum penalty: 5 years' imprisonment),[64] and
- **using a carriage service to make a threat** to kill or cause serious harm to another person, intending that the person will fear the threat will be carried out (maximum penalty: 10 years' imprisonment for threats to kill, or 7 years for threats to cause serious harm).[65]

Hatred or prejudice can be an aggravating factor on sentence

2.41 If an offender has committed a general offence, and they were motivated by hatred or prejudice, they may receive a harsher sentence than they otherwise would have.

2.42 When a person is found guilty of an offence such as assault or intimidation for conduct that involves hatred or prejudice, the conduct can be recognised by a sentencing court as:

- an aggravating factor on sentence,[66] or
- a factor informing the assessment of the objective seriousness of the offence.

2.43 Courts must consider a wide range of factors when sentencing an offender. One important consideration is whether there are any relevant aggravating or mitigating factors that affect the seriousness of the crime committed.

2.44 Section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out a list of aggravating and mitigating factors. An aggravating factor increases the seriousness of an offence and may increase the severity of the penalty imposed.

2.45 The prosecution must prove an aggravating factor beyond a reasonable doubt before it can be taken into account by the court.[67] If an aggravating factor is relevant and known to the court, the court must take it into account in determining

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63. *Criminal Code* (Cth) s 80.2H.
64. *Criminal Code* (Cth) s 474.17.
65. *Criminal Code* (Cth) s 474.15.
66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).
67. *R v Olbrich* [1999] HCA 54, 199 CLR 270 [27].

the appropriate sentence.[68] However, it cannot do so if the factor is an element of the offence in question.[69]

2.46 A court is not required to increase or reduce the sentence just because an aggravating or mitigating factor is relevant and known.[70] However, it may do so.

2.47 One aggravating factor applies where an offence is motivated by hatred or prejudice. Section 21A(2)(h) provides it is an aggravating factor if:

> 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, language, sexual orientation or age, or having a particular disability).

2.48 This means that the motivation of the offender in committing a general offence, such as those set out above, can be taken into account by a court in determining an appropriate sentence.

2.49 However, some submissions expressed concerns that this factor is underused and that its use is difficult to track.[71] We explore this in chapter 8.

Civil protections

2.50 Civil law protections also operate alongside the criminal law.

2.51 The *ADA* prohibits other forms of vilification. Under the *ADA*, it is unlawful for a person to incite hatred towards, serious contempt for, or severe ridicule of a person or persons on the grounds of:

- race
- being a transgender person or persons
- homosexuality
- religious belief, affiliation or activity (or lack of religious belief, affiliation or activity), and
- having HIV/AIDS.[72]

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68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(1)(a).
69. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).
70. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).
71. Australian Education Union, NSW Teachers Federation Branch, *Submission SV30,* 5; Equality Australia, *Submission SV57,* 4–5; Australian Muslim Advocacy Network, *Submission SV19*, 10; Muslim Legal Network, *Submission SV25* [16]; Australian National Imams Council, *Submission SV52*, 4–5; Equality Australia, *Submission SV18*, 6.
72. *Anti-Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZT, s 49ZE, s 49ZXB.

2.52 Civil protections against religious vilification were added to the *ADA* in 2023.[73] We heard a range of views about this amendment, which may be more suitable for consideration in our wider review of the *ADA*. However, we note that some argued this amendment "lessens the need to expand the scope of s 93Z".[74]

2.53 Unlike s 93Z, the *ADA* does not include criminal vilification offences. Complaints under the *ADA* are brought by individuals, rather than criminal prosecutions brought by the Police or DPP. An individual who thinks civil vilification has taken place can make a complaint to Anti-Discrimination NSW (ADNSW).[75] If it accepts the complaint, ADNSW can help resolve complaints through conciliation, where the parties discuss the issues and try to reach an agreement.

2.54 In some circumstances, such as where the complaint is not able to be resolved by conciliation, ADNSW may refer the complaint to the NSW Civil and Administrative Tribunal (NCAT).[76] If it finds the complaint to be made out, in whole or in part, NCAT may make orders such as:

- damages up to $100,000 for any loss or damage suffered because of the vilification
- orders restraining the respondent from continuing or repeating their conduct, or
- orders requiring the respondent to publicly apologise to the complainant.[77]

2.55 In NCAT, complainants do not have to meet the onerous criminal standard of beyond reasonable doubt to establish that civil vilification has taken place. Instead, they only need to meet the civil standard: "on the balance of probabilities", or more likely than not. The rules of evidence do not apply.

2.56 Consistent with our terms of reference, throughout this report we mention the availability of civil vilification protections where relevant. However, our ongoing review of the *ADA* will provide further opportunities to consider the effectiveness of the civil vilification regime.

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73. *Anti-Discrimination Act 1977* (NSW) s 49ZE, inserted by *Anti-Discrimination Amendment (Religious Vilification) Act 2023* (NSW) sch 1.
74. Australian National Imams Council, *Submission SV26* [23]–[25]. See also Anglican Church Diocese of Sydney, *Submission SV22* [18].
75. *Anti-Discrimination Act 1977* (NSW) s 87A, s 88.
76. *Anti-Discrimination Act 1977* (NSW) s 93A, s 93B, s 93C.
77. *Anti-Discrimination Act 1977* (NSW) s 108(2)(a)–(d).

The human rights context

2.57 Human rights are universal, indivisible, interdependent and interrelated.[78] However, the rights to freedom of expression, freedom of conscience and religion, and freedom from discrimination on the basis of race are particularly relevant to this review.[79]

2.58 These freedoms may be subject to restrictions that are both provided by law and meet the necessity tests elaborated in the *International Covenant on Civil and Political Rights* (*ICCPR*), and other human rights instruments as relevant.[80] The United Nations Human Rights Committee has explained that any limitations to the right to freedom of expression:

- must be set out in law
- can only be imposed for in relation to "respect of the rights or reputations of others" or for the protection of national security, public order, or public health or morals
- must conform to the test of necessity and proportionality, and
- must be directly related to the specific need on which they are predicated.[81]

2.59 The *ICCPR* also recognises that the right to freedom of expression "carries with it special duties and responsibilities".[82] Relevantly, international human rights law requires the prohibition of incitement to violence on national, racial or religious grounds.[83] Article 20(2) of the *ICCPR* provides that:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[84]

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78. World Conference on Human Rights, *Vienna Declaration and Programme of Action,* UN Doc A/CONF.157/23 (25 June 1993) [5].
79. See, eg *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 2, art 18, art 19, art 20; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4.
80. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(3), art 22(2).
81. See Human Rights Committee, *General Comment No.34 on Article 19: Freedoms of Opinion and Expression,* CCPR/C/GC/34 (29 July 2011) [21]–[22].
82. *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) art 19(3).
83. *International Covenant on Civil and Political Rights,* 999 UNTS 171 (entered into force 23 March 1976) art 20(2); *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4.
84. *International Covenant on Civil and Political Rights,* 999 UNTS 171 (entered into force 23 March 1976) art 20(2). Australia made a reservation with respect to art 20 upon ratifying the *ICCPR*: *International Covenant on Civil and Political Rights* [1980] ATS 23 (entered into force for Australia 13 November 1980).

2.60 Similarly, article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (*ICERD*) requires states parties to take "immediate and positive measures" designed to eradicate all incitement to racial hatred and discrimination.[85]

2.61 Treaty bodies have emphasised that the requirement to prohibit incitement to violence is compatible with, and complementary to, the right to freedom of expression.[86]

2.62 The *ICCPR* does not expressly require the creation of criminal offences to prohibit incitement to discrimination, hostility or violence. The *ICCPR* simply requires that such incitement be "prohibited".[87]

2.63 The *ICERD* requires countries to declare an offence, punishable by law:

- all dissemination of ideas based on racial superiority or hatred
- incitement to racial discrimination
- acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and
- the provision of any assistance to (including financing of) racist activities.

2.64 They must also declare illegal, and prohibit organisations and propaganda activities, which promote and incite racial discrimination, and make participation in such organisations or activities an offence punishable by law.[88]

2.65 In 2013, a group of experts convened in Rabat by the Office of the United Nations High Commissioner for Human Rights concluded that different forms of expression

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85. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4. Australia made a reservation with respect to article 4 of *ICERD*: *International Convention on the Elimination of All Forms of Racial Discrimination* [1975] ATS 40 (entered into force for Australia 30 October 1975).
86. Human Rights Committee, *General Comment No 11 on Article 20, Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred*, UN Doc HRI/GEN/1/Rev 9 (Vol I) 182 (29 July 1983) [2]; Human Rights Committee, *General Comment No 34 on Article 19, Freedoms of Opinion and Expression,* UN Doc CCPR/C/GC/34 (29 July 2011) [50]; Committee on the Elimination of Racial Discrimination, *General Recommendation No 35, Combating Racist Hate Speech,* UN Doc CERD/C/GC/35 (26 September 2013) [19], [28], [29], [45]; Committee on the Elimination of Racial Discrimination, *General Recommendation No 15 on Article 4 of the Convention*, 1993 [4].
87. F La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/67/357 (7 September 2012) [47]; D Kaye, *Report Prepared by the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/74/486 (9 October 2019) [8].
88. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4(a)–(b). See also Committee on the Elimination of Racial Discrimination, *General Recommendation No 35, Combating Racist Hate Speech*, UN Doc CERD/C/GC/35 (26 September 2013) [13].

may require different responses. The Rabat Plan of Action recommended that states should distinguish between:

- expression that constitutes a criminal offence
- expression that is not criminally punishable, but may justify a civil penalty or administrative sanction, and
- expression that does not give rise to criminal, civil or administrative sanctions, but still raises concern in terms of tolerance and respect for others' rights.[89]

2.66 The Rabat Plan of Action considered that criminal sanction should be a "last resort" and only applied in "strictly justifiable situations".[90]

2.67 Similarly, the Committee on the Elimination of Racial Discrimination commented that criminalisation should only apply to serious cases. It wrote:

> the criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups. The application of criminal sanctions should be governed by principles of legality, proportionality and necessity.[91]

2.68 International human rights law was considered in the development of the original serious racial vilification offence in s 20D of the *ADA*. The then Attorney General, the Hon John Dowd AO KC, recognised that the NSW Government introduced the offence "in the spirit" of the *ICCPR* and referred specifically to articles 19 and 20.[92]

2.69 It was also understood that a policy response to vilification required a "balancing" of rights. When introducing the offence, the Attorney General recognised that:

> Legislation against racial vilification must involve a balancing of the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification.[93]

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89. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [20], [29].
90. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [34]. See also F La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/67/357 (7 September 2012) [47].
91. Committee on the Elimination of Racial Discrimination, *General Recommendation No 35, Combating Racist Hate Speech*, UN Doc CERD/C/GC/35 (26 September 2013) [12].
92. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 4 May 1989, 7488–7489.
93. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 4 May 1989, 7488.

2.70 In introducing s 93Z, the then Attorney General similarly expressed the view that the offence struck:

> the right balance between community safety and freedom of speech. Freedom of speech is a fundamental tenet of liberal democracy. But so too is freedom from fear.[94]

2.71 We refer to these human rights obligations, and the views expressed in submissions about their relevance to s 93Z, throughout this report in accordance with our terms of reference.

2.72 While there is no Human Rights Act in NSW or federally, the High Court of Australia has found that the Australian Constitution contains an implied freedom of political communication.[95] This does not create personal rights and it is not absolute. Rather, the implied freedom is limited to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution.[96]

2.73 In 2012, the NSW Court of Appeal considered the implied freedom in the context of the protections against "homosexual vilification" in s 49ZT of the *ADA*.[97] The Court found that this section burdened the implied freedom.[98] However, it found that the aim of preventing this form of vilification was a legitimate end of government, which was compatible with the maintenance of the constitutionally provided system of government. The section was held to be reasonably appropriate and adapted to serve this end.[99]

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94. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 44.
95. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–560.
96. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559–561.
97. *Sunol v Collier (No 2)* [2012] NSWCA 44.
98. *Sunol v Collier (No 2)* [2012] NSWCA 44 [42]–[45].
99. *Sunol v Collier (No 2)* [2012] NSWCA 44 [46]–[53].

3. Perspectives on s 93Z

In brief

This chapter outlines perspectives on whether s 93Z of the *Crimes Act 1900* (NSW) requires amendment to respond to racial and religious vilification. It sets out key considerations that have informed our decision not to recommend changes to s 93Z in this review.

3.1 This chapter outlines key considerations that have informed our decision not to recommend changes to s 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*) in response to the specific issues raised by our terms of reference. It draws on the views of a wide range of individuals, legal groups and community groups that we heard in consultations and submissions.[1]

3.2 The question for this review is whether s 93Z of the *Crimes Act* requires reform to better address racial and religious vilification. This is a difficult and contested issue.

3.3 Many groups shared their experiences of vilification, prejudice and discrimination, and their concerns that this conduct is increasing. In light of this, some groups advocated for reforms to strengthen or expand s 93Z. Suggestions included bringing other forms of conduct within the scope of this offence (we discuss this further in chapter 4).

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1. Appendices A and B list the submissions we received and the consultations we conducted.

3.4 However, many other submissions from a wide range of community and legal groups cautioned against such reforms.

3.5 In this chapter, we explain our view that the low number of prosecutions of s 93Z cannot alone justify legislative reform. Concerns raised about the limits of the criminal law in achieving and maintaining social cohesion have also informed our decision not to recommend change to s 93Z. Additionally, we have taken into account the potential undesirable consequences of amending s 93Z to criminalise a wider range of conduct.

The impact of hate-based conduct in NSW

3.6 Throughout this review, it was made clear to us that vilification, discrimination and other hate-based conduct causes significant harm to victims and to our community. As the Australian Federation of Islamic Councils stated:

> Serious racial and religious vilification is a critical issue that affects the cohesion, harmony, and wellbeing of societies. Addressing this problem is paramount for several reasons, including protecting human rights, promoting social cohesion, and ensuring equal opportunities for all members of society.[2]

3.7 In this section, we outline what we have heard about vilification in NSW: who experiences it, its impact, and concerns that hate-based conduct is increasing.

Hate-based conduct affects many groups in NSW

3.8 Throughout this review, we heard that some members of the NSW community experience religious and racial vilification at alarming rates. This includes, but is not limited to, members of the wide range of religious, cultural and Aboriginal communities that we met with and/or received submissions from. We also received submissions regarding the experiences of non-religious and ex-religious people.[3]

3.9 However, while our terms of reference are limited to serious racial and religious vilification, s 93Z also covers a range of other protected attributes. In light of this, we also considered it important to listen to the experiences of other groups affected by vilification. For instance, we heard that hate-based and prejudicial conduct also has a significant impact on, among others:

- members of LGBTQIA+ communities[4]
- people with HIV/AIDS[5]

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2. Australian Federation of Islamic Councils, *Submission SV51,* 3.
3. See, eg, Rationalist Society of Australia, *Submission SV16*.
4. See, eg, ACON and HIV/AIDS Legal Centre, *Submission SV08*, 2–4; Equality Australia, *Submission SV18*, 2–4; Public Interest Advocacy Centre, *Submission SV10,* 4–7.
5. See, eg, ACON and HIV/AIDS Legal Centre, *Submission SV08*, 5.

- people with disability[6]
- caste-oppressed communities[7]
- women,[8] and
- sex workers.[9]

3.10 Submissions also emphasised that vilification can be intersectional and experienced based on multiple attributes, placing some people at heightened risk of harm.[10] For example, culturally and linguistically diverse people and Aboriginal people with disability experience discrimination and vilification that exists "at the intersections of ableism and racism".[11]

3.11 Research by the Advocate for Children and Young People (ACYP) indicated that children and young people experience discrimination and hate speech at a significant rate. In one survey conducted by ACYP, three in five respondents reported experiences of hate speech either directed at them or a group of people they identify with, regularly or occasionally.[12]

Hate-based conduct has a significant impact on our community

3.12 Throughout our review, it was made clear to us that these experiences affect the wellbeing of individuals, the groups they belong to, and the whole community.

Harms to individuals and groups

3.13 Several submissions emphasised that conduct involving prejudice or hatred can have a lasting psychological impact on victims.[13] Effects can include increased stress, anxiety, depression and mental illness.[14]

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6. See, eg, Public Interest Advocacy Centre, *Submission SV10*, 7–10; Inner City Legal Centre, *Submission SV13*, 2; M Hawila and N Asquith, *Submission SV21*, 5; Autism Self Advocacy Network of Australia and New Zealand and Australian Autism Alliance, *Submission SV28*.
7. Periyar Ambedkar Thoughts Circle, *Submission SV06*, 2.
8. Inner City Legal Centre, *Submission SV13*, 2.
9. Inner City Legal Centre, *Submission SV13*, 2–3.
10. See, eg, ACON and HIV/AIDS Legal Centre, *Submission SV08*, 1–2; Inner City Legal Centre, *Submission SV13*, 2, 3; Autism Self Advocacy Network of Australia and New Zealand and Australian Autism Alliance, *Submission SV28*, 3.
11. Autism Self Advocacy Network of Australia and New Zealand and Australian Autism Alliance, *Submission SV28*, 3.
12. Advocate for Children and Young People, *Submission SV14*, 1.
13. See, eg, Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 3, ACON and HIV/AIDS Legal Centre, *Submission SV08*, 2–4; Australian Federation of Islamic Councils, *Submission SV51*, 4.
14. See, eg, Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 4; ACON and HIV/AIDS Legal Centre, *Submission SV08*, 3; Equality Australia, *Submission SV18*, 3; Australian Federation of Islamic Councils, *Submission SV51*, 4.

3.14 As the Jumbunna Institute for Indigenous Education and Research and the National Justice Project (Jumbunna Institute) observed:

> the impacts of racist speech and incitement (including via digital platforms) are significant and severe, leading to feelings of disempowerment and fear that can give rise to hopelessness and frustration and have negative impacts on health and wellbeing.[15]

3.15 Submissions stated that individuals and groups affected by vilification are often left feeling silenced and isolated.[16] Hate crime and vilification can diminish a victim's sense of security and social belonging.[17]

3.16 This conduct can also create structural barriers to health and wellbeing. For instance, the effects of HIV vilification include "increased stigma and discrimination … and drastic flow on effects for HIV testing and treatment uptake".[18] Discrimination and vilification can also affect education and employment outcomes.[19]

Harms to the community

3.17 We also heard of the damaging effect that hate-based conduct has on social cohesion. The Anglican Church Dioceses of Sydney observed that "[r]eligious vilification is destructive of social cohesion and polarises communities into 'us' and 'them'".[20] The Australian Federation of Islamic Councils similarly noted that vilification based on race or religion "fosters division, mistrust, and hostility between different community groups, which can lead to social unrest and conflict".[21]

3.18 By reducing the participation of individuals and groups in society, hate-based conduct can also damage the free exchange of ideas.[22] It can reduce freedom of expression, association, and movement.[23]

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15. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 1.
16. See, eg, Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07,* 9; ACON and HIV/AIDS Legal Centre, *Submission SV08,* 4; NSW Bar Association, *Submission SV39* [8].
17. NSW Council for Civil Liberties Inc, *Submission SV09* [3.3]; ACON and HIV/AIDS Legal Centre, *Submission SV08,* 4; Australian Human Rights Commission, *Submission SV42,* 2.
18. ACON and HIV/AIDS Legal Centre, *Submission SV08,* 5.
19. ACON and HIV/AIDS Legal Centre, *Submission SV08,* 4; Australian Federation of Islamic Councils, *Submission SV51,* 4.
20. Anglican Church Diocese of Sydney, *Submission SV22* [6].
21. Australian Federation of Islamic Councils, *Submission SV51,* 3.
22. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07,* 9.
23. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 6.

3.19 Vilification that is not addressed can empower others to engage in hateful conduct.[24] This has been described as providing a "permission to hate".[25] It may even escalate to violence.[26] As the Jumbunna Institute explained:

> hate speech creates and fosters an environment where it is acceptable to subordinate and oppress minorities, and makes it easier for people to engage, or be incited to engage in violent conduct, or to escalate violence because of who it directed at.[27]

There are concerns that hate-based conduct is increasing

3.20 Disturbingly, many of the groups who participated in our review reported that their communities have faced increasing levels of discrimination, vilification and other hate-based conduct.[28]

3.21 There has been a significant and sustained increase in vilification complaints received by Anti-Discrimination NSW (ADNSW):

> In FY22/23, ADNSW received almost four times the amount of racial vilification complaints and five times the amount of homosexual vilification complaints than in each of the previous three years.[29]

3.22 However, only a small proportion of individuals affected by vilification make a formal complaint. Accordingly, ADNSW warns it is very unlikely that the complaint statistics reflect the actual level of this behaviour in the community.[30]

3.23 Jewish groups submitted that antisemitism has increased and become normalised, resulting in threats, harassment, intimidation and violence.[31] For instance, the NSW Jewish Board of Deputies (NSWJBD) referred to the rise in antisemitic incidents reported to the Executive Council of Australian Jewry:

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24. NSW Council for Civil Liberties Inc, *Submission SV09* [3.3]; Australian Council of Jewish School, *Submission SV15*, 1.
25. N Asquith and M Hawila, *Submission SV21,* 1.
26. Union for Progressive Judaism, *Submission SV11,* 2; E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 7; N Asquith and M Hawila, *Submission SV21,* 1; Australian Federation of Islamic Councils, *Submission SV51,* 4; Equality Australia, *Submission SV57*, 2–3.
27. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07,* 9.
28. See, eg, ACON and HIV/AIDS Legal Centre, *Submission SV08,* 3; NSW Jewish Board of Deputies, *Submission SV12,* 2; Australian Federation of Islamic Councils, *Submission SV51,* 10; Australian National Imams Council, *Submission SV52,* 2; Shia Muslim Council of Australia, *Submission SV53,* 5; Equality Australia, *Submission SV18,* 2–3; Public Interest Advocacy Centre, *Submission SV10*, 4. See also NSW Bar Association, *Submission SV39* [7].
29. Anti-Discrimination NSW, *Submission SV04,* 4.
30. Anti-Discrimination NSW, *Submission SV04,* 5.
31. See, eg, NSW Jewish Board of Deputies, *Submission SV12*, 1, 5; Australian Council of Jewish Schools, *Submission SV15*, 1.

> There was an unprecedented 738% increase in the number of reported antisemitic incidents in Australia in October and November 2023 compared to the number for the same two months in 2022.[32]

3.24 We also heard that Islamophobic hate speech and attacks have risen significantly.[33] We were referred to the Islamophobia Register Australia, which reported a thirteen-fold increase in Islamophobic incidents in first seven weeks after the events of 7 October 2023.[34]

3.25 Racial hatred towards Aboriginal and Torres Strait Islander peoples also appears to be increasing. The NSW Bar Association (Bar Association) pointed to a 2022 survey by Reconciliation Australia, which found that more First Nations people reported experiencing racial prejudice in a six-month period in 2022, compared with the same period in any year since 2014.[35] Submissions also noted the rise in racist behaviours and threats directed towards Aboriginal and Torres Strait Islander peoples during the 2023 Voice referendum.[36]

3.26 Similarly, LGBTQIA+ groups reported increasing incidence of harassment, intimidation and violence. This has included the targeting of community events, some of which were cancelled for safety reasons.[37]

3.27 Concerns were raised, in particular, about an increase in online vilification. For example, the Shia Muslim Council of Australia noted a "normalisation of anti-Muslim violence in media and social media".[38]

3.28 We also heard that members of the LGBTQIA+ community experience online hate at more than double the Australian national average.[39] Trans people face particularly high levels of vilification online. ACON and the HIV/AIDS Legal Centre submitted that:

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32. NSW Jewish Board of Deputies, *Submission SV12*, 2. See also NSW Bar Association, *Submission SV39* [7].
33. Muslim Legal Network, *Submission SV25* [8]; Australian National Imams Council, *Submission SV26* [12]–[13]; NSW Bar Association, *Submission SV39* [7]; Australian Federation of Islamic Councils, *Submission SV51,* 10; Shia Muslim Council of Australia, *Submission SV53*, 6.
34. Muslim Legal Network NSW, *Submission SV25* [8]; Australian National Imams Council, *Submission SV26* [13]; Shia Muslim Council of Australia, *Submission SV53,* 5.
35. NSW Bar Association, *Submission SV39* [7(a)].
36. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 7; NSW Bar Association, *Submission SV39* [6].
37. ACON and HIV/AIDS Legal Centre, *Submission SV08*, 3; Equality Australia, *Submission SV18*, 3. See also Public Interest Advocacy Centre, *Submission SV10*, 4.
38. Shia Muslim Council of Australia, *Submission SV53*, 6. See also E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 8.
39. ACON and HIV/AIDS Legal Centre, *Submission SV08*, 3. See also Equality Australia, *Submission SV18*, 3.

A recent study on anti-trans hate in Australia found that 94% of participants had witnessed online anti-trans abuse, harassment, or vilification, and 49% had experienced such vilification.[40]

3.29 The Jumbunna Institute also noted a rise in cyber abuse, threats and harassment during the 2023 Voice referendum.[41]

The question raised by this review

3.30 Against this backdrop, we have been asked to consider the effectiveness of s 93Z in addressing serious racial and religious vilification in NSW.

3.31 Vilification and other hate-based conduct evidently has a significant impact on our community. Preventing and addressing vilification and other forms of hate-based conduct may require a holistic response and concerted efforts from all levels of government, individuals and the wider community.

3.32 The question posed by this review, however, is narrower — that is, whether s 93Z requires reform in relation to the issues raised by the terms of reference. This has generated much public debate, and we have heard different perspectives in submissions and consultations.

3.33 Throughout this review, we heard widespread support for specifically criminalising the conduct presently covered by s 93Z — that is, threats to, and the incitement of, violence. This conduct was considered sufficiently serious to be covered by a specific vilification offence.[42]

3.34 However, some groups argued that s 93Z, as presently worded, has been ineffective in addressing the issues their communities face.[43] The NSWJBD stated that the current law has not "restrained, impeded or deterred" antisemitic threats,

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40. ACON and HIV/AIDS Legal Centre, *Submission SV08*, 3.
41. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 7.
42. See, eg, Legal Aid NSW, *Submission SV23*, 1; Australian Bahá'í Community, *Submission SV32,* 1; NSW Council for Civil Liberties Inc, *Submission SV09* [4.3]; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 1.
43. NSW Jewish Board of Deputies, *Submission SV12*, 1; Union for Progressive Judaism, *Submission SV11*, 1; Equality Australia, *Submission SV18*, 4–6; Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 7.

harassment, intimidation and violence.[44] It detailed examples of hate-based incidents that had not, as far as it was aware, resulted in charges or prosecutions.[45]

3.35 Indeed, as we discuss in chapter 1, there have been few prosecutions of s 93Z. Only one conviction of an offence against s 93Z has withstood appeal.[46] Another conviction was dismissed on appeal.[47] Two others were annulled due to a failure to obtain the Director of Public Prosecution's consent for prosecution (as required at the time).[48]

3.36 In light of this, some groups argued that s 93Z requires reform to respond effectively to serious vilification and other hate-based conduct.[49] For instance, the Union for Progressive Judaism argued that recent experience demonstrates that s 93Z needs "substantial revision" and "there also is need to overcome prosecutorial reluctance".[50]

3.37 Those who supported change argued that the wider community would benefit. The Union for Progressive Judaism emphasised that reform to s 93Z would not only assist their community — other racial and ethical minorities, and Aboriginal peoples, would benefit too.[51] It considered that improving the effectiveness of s 93Z, such as by introducing an offence of "inciting hatred", would strengthen interfaith relationships.[52]

3.38 The NSWJBD also argued:

> Reform is needed to protect all citizens' basic right to go about their daily lives free from racial hatred and the diminished capacity of those affected to participate in society which has occurred as expressions of racial hatred, including Jew-hatred, go unpunished.[53]

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44. NSW Jewish Board of Deputies, *Submission SV12*, 1. This submission was endorsed by the Australian Council of Jewish Schools, *Submission SV15* and the Union for Progressive Judaism, *Submission SV11*.
45. NSW Jewish Board of Deputies, *Submission SV12*, 3–5. See also R Fox, *Submission SV69*, 1; Equality Australia, *Submission SV18*, 4–6; Australian National Imams Council, *Submission SV26* [32].
46. *Kanwal v R* (NSWDC, Culver DCJ, 2020/00257129, 28 March 2024).
47. Transcript of Proceedings, *Thukral v R* (NSWDC, Culver DCJ, 2020/00253545, 6 February 2024).
48. See also Evidence to Legislative Council, Portfolio Committee No 5, Justice and Communities, Parliament of NSW, 4 September 2024, 70 (S Dowling, Director of Public Prosecutions).
49. See especially NSW Jewish Board of Deputies, *Submission SV12*, 1; Union for Progressive Judaism, *Submission SV11*, 1; Equality Australia, *Submission SV18*, 4–6; Equality Australia, *Submission SV57*, 2–5.
50. Union for Progressive Judaism, *Submission SV11*, 1.
51. Union for Progressive Judaism, *Submission SV11*, 2.
52. Union for Progressive Judaism, *Submission SV43*, 1.
53. NSW Jewish Board of Deputies, *Submission SV12*, 8.

3.39 However, other submissions considered s 93Z to be clear and workable.[54] For instance, the Law Society of NSW (Law Society) submitted that the section was already broad and capable of capturing a wide range of conduct.[55] Although it advocated for change to the mental element, Legal Aid NSW (Legal Aid) also considered s 93Z to be "otherwise fit for purpose, considering the range of other related well-established offences".[56]

3.40 In addition to comments on specific options, which we discuss in the following chapters, two key arguments against reform were raised with us. The first is that the low number of prosecutions does not, without more, justify reform to s 93Z. The second is that governments should exercise caution before extending the reach of vilification offences.[57] Submissions raised both the limits of the criminal law in addressing such behaviour and the potential risks of expanding s 93Z. We turn to these issues below.

Low prosecutions alone do not justify reform

3.41 As the community perspectives outlined above suggest, it is unlikely that the low number of prosecutions under s 93Z accurately reflect the prevalence of hate-based conduct in NSW.[58]

3.42 We can understand why this has given rise to community concern. The low numbers can give the impression that the law is ineffective in addressing hate crime. It may also reduce community awareness of the vilification offences, diminishing their educative and deterrent effect.[59]

3.43 However, the fact that s 93Z is not prosecuted often does not, of itself, indicate that the offence requires amendment.[60] It is important to consider the broader context of criminal offences in which s 93Z operates, many of which may be charged in preference to s 93Z. We have also heard that other, non-legal factors influence the prosecution numbers.

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54. See, eg, Anglican Church Diocese of Sydney, *Submission SV22* [32]; Confidential, *Submission SV29*, 2; Confidential, *Submission SV34*, 1; Confidential, *Submission SV44*, 1.
55. Law Society of NSW, *Submission SV03*, 2–3. See also Local Court of NSW, *Submission SV33*, 1, 3.
56. Legal Aid NSW, *Submission SV23*, 2.
57. See, eg, Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.
58. NSW Council for Civil Liberties Inc, *Submission SV09* [3.5]. See also Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 2, 6–7.
59. NSW Council for Civil Liberties Inc, *Submission SV09* [3.12]. See also Equality Australia, *Submission SV18*, 4–6; Muslim Legal Network NSW, *Submission SV25* [11].
60. See, eg, Shia Muslim Council of Australia, *Submission SV53*, 16,

Other offences can cover hate-based conduct

3.44 Throughout this review, we were encouraged not to review s 93Z in isolation. Rather, we were urged to consider it alongside other relevant criminal offences and the civil protections against vilification in the *Anti-Discrimination Act 1977* (NSW).[61] The Law Society, for instance, stated that:

> 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.[62]

3.45 As we explain in chapter 2, a range of other offences may cover hate-based conduct. These include the offences of intimidation, assault, and the Commonwealth carriage service offences. As the Aboriginal Legal Service (ALS) observed:

> Section 93Z is one of a number of charging options available to police to deal with relevant conduct … This spectrum of offences adequately covers the range of criminality for conduct in this area, with s 93Z operating at the lower end of the scale.[63]

3.46 These other offences provide options for addressing crime that involves hatred or prejudice, and may provide an explanation for the low number of s 93Z prosecutions. Police may charge these other offences in preference to s 93Z.[64] This can occur where there are no reasonable prospects of a successful s 93Z prosecution.[65]

3.47 Submissions also emphasised that police may prefer other offences because, compared to s 93Z, they:

- can have a higher maximum penalty
- may be more familiar, and
- may be simpler to prove.[66]

3.48 If an offender is found guilty of one of the general offences, the fact that they were motivated by hatred or prejudice when committing the offence may be taken into

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61. See, eg, Law Society of NSW, *Submission SV03*, 2; Australian National Imams Council, Submission SV26 [7]; NSW Bar Association, *Submission SV39* [4], [42].
62. Law Society of NSW, *Submission SV03*, 2.
63. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.
64. See, eg, Anti-Discrimination NSW, *Submission SV04*, 3; M Hawila and N L Asquith, *Submission SV21,* 3; Legal Aid NSW, *Submission SV23,* 2.
65. NSW Bar Association, *Submission SV39* [42], [44].
66. See, eg, E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 24; M Hawila and N L Asquith, *Submission SV21,* 3; NSW Bar Association, *Submission SV39* [44]; Shia Muslim Council of Australia, *Submission SV53*, 15–16; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.

account as an aggravating factor in sentence.[67] We consider this further in chapters 2 and 8.

Non-legal factors can also influence the prosecution numbers

3.49 We also heard that several non-legal factors influence the prosecution numbers. One reason, raised in several submissions, is that victims of hate crime may be reluctant to report it to police. For some victims of vilification, the burden of reporting the incident and engaging with police may be high.[68]

3.50 We heard that victims may fear they will not be taken seriously or will be further victimised, or both. For many victims, including those from Aboriginal and/or LGBTQIA+ communities, these fears are grounded in long-standing experiences of marginalisation and discrimination from law enforcement authorities.[69] The Muslim Legal Network explained that the normalisation of hate can also make targeted groups reluctant to report hate-based incidents.[70]

3.51 Other contributing factors suggested to us include:

- a lack of public education and awareness about hate crime,[71] and
- inadequate training for police officers to recognise, record and investigate potential instances of serious vilification.[72]

3.52 In addition to contributing to the current prosecution numbers, these non-legal factors suggest that any reforms to s 93Z may not themselves lead to a significant increase in prosecutions or convictions.

3.53 With a range of legal and non-legal factors influencing the prosecution numbers, our view is that the low prosecutions and convictions for s 93Z does not provide sufficient justification for legislative reform. This is particularly the case where, as outline below, there are significant concerns about the potential effects of expanding s 93Z.

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67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).
68. M Hawila and N L Asquith, *Submission SV21*, 3.
69. See, eg, E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 2–3; Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 8; Inner City Legal Centre, *Submission SV13*, 3–4; Muslim Legal Network, *Submission SV25* [70]–[71]; Kingsford Legal Centre, *Submission SV27*, 4; Shia Muslim Council of Australia, *Submission SV53*, 13–14.
70. Muslim Legal Network NSW, *Submission SV25* [10].
71. M Hawila and N L Asquith, *Submission SV21*, 3.
72. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 16; M Hawila and N L Asquith, *Submission SV21*, 3; Anglican Church Diocese of Sydney, *Submission SV22* [33].

The role of the criminal law

3.54 Criminal vilification offences can play an important role as part of a wider strategy for maintaining social cohesion. However, we heard throughout this review that they are not the only tool – and their significance should not be overstated.

3.55 We also heard concerns that expanding s 93Z could potentially threaten social cohesion, rather than promote it. In particular, it may have undesirable and unintended consequences.

Vilification offences have an important role

3.56 Vilification offences are an important part of the community's response to hate-based conduct. In introducing s 93Z, the then Attorney General emphasised that:

- laws protecting identified groups from threats of violence are important to secure the safety of the NSW community, and
- the new offence would demonstrate that the NSW Government does not tolerate threats of violence or incitement to violence. [73]

3.57 Vilification offences can have a symbolic, educative and deterrent function.[74] As we were advised in consultations, the importance of s 93Z in "drawing a line in the sand" should not be overlooked.[75]

3.58 The fact that other general criminal offences may apply to such conduct does not diminish the importance of vilification offences. There are, as the Bar Association points out, factors that distinguish s 93Z from other offences. In particular:

> Section 93Z seeks to maintain social cohesion by deterring actions that may have a negative effect on the conduct of third parties and provides for circumstances where the victim is not necessarily targeted individually, but is part of a broader group, which is harmed as a whole.[76]

3.59 Legal Aid also observed that, while inciting violence is largely captured by other criminal offences, s 93Z sends a message "that this form of behaviour is unacceptable".[77]

3.60 Some submissions emphasised that this symbolic function gives s 93Z value, even if the offence is not prosecuted often. Professors Sarah Sorial and Kath Gelber observed that:

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73. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 42.
74. See, eg, NSW Council for Civil Liberties Inc, *Submission SV09* [3.8]; Kingsford Legal Centre, *Submission SV27*, 4; Australian Education Union, NSW Teachers Federation Branch, *Submission SV30*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.
75. Academics, *Consultation SVC20*.
76. NSW Bar Association, *Submission SV39* [43].
77. Legal Aid NSW, *Submission SV23*, 1.

> Laws such as s93Z are effective in more than one way. For target communities and their members, they provide an assurance that the society in which they live deems them worthy of dignity by seeking to prevent the harms of serious vilification. Such laws can also be used educatively by target communities themselves. The law is therefore of use even in the absence of prosecutions.[78]

There are limits to the criminal law's role

3.61 However, there are limits to the role of the criminal law. A common theme in consultations and submissions was that the criminal law is a "blunt instrument" for combatting vilification and for achieving or maintaining social cohesion.[79]

3.62 Many submissions emphasised the importance of other, non-legal mechanisms for preventing and addressing serious vilification. For instance, members of the UTS Law Criminal Justice Cluster submitted that:

> the criminal law is limited in its ability to generate positive social change. In respect of serious vilification, there are other more important social, cultural and political factors that affect its prevalence and the forms it takes.[80]

3.63 Some, like the Shia Muslim Council of Australia, urged governments to "consider 'soft' measures rather than 'hard law' to address concerns relating to hate speech".[81] Some groups suggested this might include:

- media regulation and social media regulation[82]
- community education and engagement[83]
- government investment in anti-racism strategies[84]

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78. S Sorial and K Gelber, *Submission SV45*, 3. See also Australian Education Union, NSW Teachers Federation Branch, *Submission SV30*, 7.
79. NSW Council for Civil Liberties Inc, *Submission SV09* [3.15]; E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 2; Presbyterian Church of Australia in NSW, *Submission SV36*, 2; NSW Bar Association, *Submission SV39* [50]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 4.
80. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 6.
81. Shia Muslim Council of Australia, *Submission SV53*, 20.
82. Australian Human Rights Commission, *Consultation SVC17*.
83. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 17; E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 2; Australian Bahá'í Community, *Submission SV32*, 2; Kingsford Legal Centre, *Submission SV27*, 4; NSW Bar Association, *Submission SV39* [51]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2; Faith NSW and Better Balanced Futures, *Submission SV35*, 4; Australian Education Union, NSW Teachers Federation Branch, *Submission SV30*, 7; Catholic Archdiocese of Sydney, *Submission SV50*, 3; Advocate for Children and Young People, *Submission SV14*, 3; NSW Council for Civil Liberties Inc, *Submission SV09* [3.15].
84. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 20; NSW Bar Association, *Submission SV39* [51]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.

- police training and education on hate crime, vilification and the existing elements of s 93Z[85]
- structural reforms to the NSW Police Force, such as a standalone police unit to deal with vilification, an independent body to monitor police responses to hate crime, and/or the creation of hate crime scrutiny panels,[86] and
- bench books on vilification for judicial officers.[87]

Expanding s 93Z may lead to undesirable outcomes

3.64 Not only are there limits to the role of the criminal law in achieving social cohesion, expanding vilification offences could potentially have negative consequences.

Expanding s 93Z could upset "the balance" of rights

3.65 The challenge of using the criminal law to protect against vilification, without unjustifiably infringing other fundamental rights, was raised with us frequently. We heard concerns that expanding s 93Z could limit fundamental freedoms, particularly the freedom of expression and the freedom of religion.[88]

3.66 For instance, the NSW Council for Civil Liberties noted the potential impact of vilification offences on the freedom of expression. Because of this impact, it considered that a high threshold for prosecution under s 93Z is necessary.[89]

3.67 We heard that criminalisation should be a "last resort", reserved for the most serious instances of vilification.[90] Some referred to international human rights law, and guidance from United Nations human rights bodies and experts, to support this view.[91]

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85. See, eg, E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 2; Anglican Church Diocese of Sydney, *Submission SV22* [33]; Muslim Legal Network NSW, *Submission SV25* [10]–[12]; Australian Federation of Islamic Councils, *Submission SV51*, 5; Kingsford Legal Centre, *Submission SV27*, 4.
86. Australian Muslim Advocacy Network, *Submission SV19*, 2; Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07*, 20; E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 44; Shia Muslim Council of Australia, *Submission SV53*, 14.
87. Confidential, *Submission SV37*, 7–8.
88. See, eg, Human Rights Law Alliance, *Submission SV01* [2]–[4]; Presbyterian Church of Australia in NSW, *Submission SV36*, 2–4; Anglican Church Diocese of Sydney, *Submission SV49* [5]; Catholic Archdiocese of Sydney, *Submission SV50*, 3; Shia Muslim Council of Australia, *Submission SV53*, 20; Catholic Women's League Australia, NSW Inc, Submission SV59, 2.
89. NSW Council for Civil Liberties Inc, *Submission SV09* [6.12]–[6.14].
90. NSW Council for Civil Liberties Inc, *Submission SV09* [4.1]; Equality Australia, *Submission SV18*, 9; Shia Muslim Council of Australia, *Submission SV53*, 15.
91. Shia Muslim Council of Australia, *Submission SV53*, 15. See also Australian Christian Lobby, *Submission SV02*, 2–3, appendix.

3.68 The Anglican Church Diocese of Sydney acknowledged the growing incidence of religious vilification, particularly directed towards those of the Islamic or Jewish faith. However, it did "not think that introducing laws that control and suppress religious speech is a pathway to healing this division".[92] The Diocese's submission was supported by several other religious groups.[93]

3.69 The Australian Federation of Islamic Councils similarly argued that "overly broad criminal laws against hate speech can inadvertently suppress legitimate discourse and criticism, stifling free expression and open debate".[94] Others cautioned that "extending criminal sanctions would increase societal mistrust".[95]

Law reform may disproportionately affect certain groups

3.70 Many submissions were concerned that changes to s 93Z could have a disproportionate, negative effect on some individuals and communities that the offence was designed to protect.[96]

3.71 For instance, members of the UTS Law Criminal Justice Cluster submitted that racial discrimination laws "are routinely used by culturally dominant groups to litigate against culturally marginalised groups".[97] They highlighted examples of this happening where the conduct in question was directed at white people, by Aboriginal people.[98] Professor Asquith's 2013 research into the United Kingdom's hate speech laws also found a "disproportionate application of the laws to members of minority communities, for whom hate crime provisions were initially created".[99]

3.72 The potential impact of expanding s 93Z on Aboriginal peoples was raised with us specifically. The ALS urged:

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92. Anglican Church Diocese of Sydney, *Submission SV49* [1]–[2].
93. The submission was endorsed by representatives of the Seventh-day Adventist Church, the Council of the Ministers of Korean Churches in Sydney, NSW/ACT Australian Christian Churches, NSW Council of Churches and Freedom for Faith: Anglican Church Diocese of Sydney, *Submission SV49*, 12. The submission was also supported by Australian National Imams Council, *Submission SV52*, 1; Islamic Schools Association of Australia (NSW), *Submission SV61*, 1; Faith NSW and Better Balanced Futures, *Submission SV65*. 5.
94. Australian Federation of Islamic Councils, *Submission SV51*, 8.
95. Catholic Women's League Australia, NSW Inc, *Submission SV59*, 2. See also Presbyterian Church of Australia in NSW, *Submission SV36*, 2.
96. NSW Bar Association, *Submission SV39* [46]; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2. See also Equality Australia, *Submission SV18*, 9.
97. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 25.
98. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 25, citing *McLeod v Power* [2003] FMCA 2; *Gibbs v Wanganeen* [2001] FMCA 14; Australian Human Rights Commission, *Voices of Australia: Case Study 1 - rightsED* (2006) <https://humanrights.gov.au/our-work/voices-australia-case-study-1-rightsed> (retrieved 9 August 2024).
99. M Hawila and N L Asquith, *Submission SV21*, 5.

> caution about use of criminalisation as a tool for achieving social policy objectives generally, because of the disproportionate harms that flow to the communities we service in the form of policing and imprisonment.[100]

3.73 There is a particular risk that expanded vilification offences could capture interactions between Aboriginal people and the police. Analogies were drawn with the disproportionate impact of offensive language offences. We were referred to research and inquiries indicating that these offences are used excessively against Aboriginal people.[101]

3.74 Concerns were also raised that expanded vilification offences may disproportionately affect some people with disability, including in their interactions with police.[102] People with cognitive and/or psychosocial disabilities are significantly overrepresented in the criminal justice system.[103] The nature of police responses can result in minor issues escalating, leading to criminal charges.[104]

Conclusion

3.75 Vilification and other forms of hate-based conduct have a significant impact on the wellbeing of individuals and our community. We acknowledge the community concern at the increase in such incidents, and the low number of prosecutions of s 93Z, which led to this review.

3.76 However, as outlined in this chapter, we received submissions from a range of community and legal groups that weigh against reforms to s 93Z. These have informed our view that s 93Z does not require reform in response to the issues raised by the terms of reference.

3.77 The considerations expressed in this chapter have also informed our analysis of the options for reform that were suggested to us during this review. In the following chapters, we explain our views in response to these options.

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100. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.
101. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 26. See also M Hashimi, *Submission SV55*, 2–3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.
102. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.
103. L Dowse and others, "Police responses to people with disability" (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, October 2021) 111. See also *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, Final Report (2023) vol 8 "Criminal Justice and People with Disability", 31.
104. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.

4. New vilification offences

In brief

We do not recommend introducing new vilification offences, or expanding s 93Z of the *Crimes Act 1900* (NSW), to criminalise inciting hatred or other vilifying conduct that is not already covered by s 93Z.

4.1 Against the backdrop of the high levels of vilification experienced in the NSW community (discussed in chapter 3), there are concerns that s 93Z, and criminal laws more generally, do not do enough to prevent or address this conduct.[1]

4.2 The civil regime provides broader coverage than s 93Z of the *Crimes Act 1900* (NSW) (*Crimes Act*). The *Anti-Discrimination Act 1977* (NSW) (*ADA*) makes acts that incite hatred, serious contempt or severe ridicule, on the basis of a protected attribute, unlawful.[2]

4.3 However, some groups have suggested s 93Z needs to cover other forms of hate-based conduct, beyond acts that threaten or incite violence. We received proposals to:

- broaden s 93Z, or introduce new offences, to cover public acts that incite or promote hatred or other conduct (such as hate-based harassment and intimidation), and
- replace or supplement the incitement-based test in s 93Z with an objective, harm-based test.

4.4 Given the serious harm caused by vilification, we understand the calls to criminalise a wider range of hate-based conduct. However, we do not recommend either option.

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1. NSW Jewish Board of Deputies, *Submission SV62*, 2; Union for Progressive Judaism, *Submission SV43*, 1; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67*, 4; Equality Australia, *Submission SV57*, 2–3.
2. *Anti–Discrimination Act 1977* (NSW) s 20C, s 38S, s 49ZE, s 49ZT, s 49ZXB.

An offence of "inciting hatred" or other conduct

4.5 Some submissions suggested that s 93Z should be expanded to cover conduct such as inciting hatred, promoting animosity or hatred, or hate-based harassment and intimidation.[3] One submission argued that new vilification offences could capture more experiences of hate-based conduct and target the spreading of hatred.[4]

4.6 However, many other submissions from a wide range of religious and legal groups expressed a strong opposing view.[5] Several submissions argued that the civil law, and not the criminal law, is appropriate for dealing with inciting hatred or other vilification falling short of threatening or inciting violence.[6] For the reasons we outline below, we agree that s 93Z should not be expanded. Nor should new criminal vilification offences be introduced.

Potential models for new hate-based vilification offences

4.7 While some submissions argued that new vilification offences were necessary, views differed on the conduct these offences should target. Some groups advocated for a new a criminal offence of inciting hatred, while others sought other, broader vilification offences.

Support for expanding s 93Z

4.8 Some submissions argued that s 93Z should be expanded to cover acts that incite hatred. They argued this would improve social cohesion, which hate-based conduct can damage well before violence is threatened.[7] One submission observed that hate speech can lay the foundation for hate-based violence.[8] Another said an offence of

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3. Confidential, *Submission SV37*, 2; NSW Jewish Board of Deputies, *Submission SV12*, 8–9; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 3.
4. Equality Australia, *Submission SV18*, 7.
5. Confidential, *Submission SV44*, 2; Anglican Church Diocese of Sydney, *Submission SV49* [46]; Catholic Archdiocese of Sydney, *Submission SV50,* 5; Australian National Imams Council, *Submission SV52*, 4; Shia Muslim Council of Australia, *Submission SV53*, 22–23; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3; Faith NSW and Better Balanced Futures, *Submission SV65*, 3; Legal Aid NSW, *Submission SV68,* 3.
6. Presbyterian Church of Australia in NSW, *Submission SV36*, 2; S Sorial and K Gelber, *Submission SV45*, 3; Law Society of NSW, *Submission SV47*, 2; Australian Federation of Islamic Councils, *Submission SV51,* 8–9; Shia Muslim Council of Australia, *Submission SV53,* 22–23; M Hashimi, *Submission SV55*, 3. Also see Public Interest Advocacy Centre, *Submission SV60*, 2; Legal Aid NSW, *Submission SV68,* 3.
7. NSW Jewish Board of Deputies, *Submission SV62*, 2; Union for Progressive Judaism, *Submission SV43*, 1; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67*, 4.
8. Equality Australia, *Submission SV57*, 2–3.

inciting hatred would better align with community expectations, and provide better protection for victims of hate speech.[9]

4.9 Submissions argued that this could have other benefits, including:

- strengthening interfaith relations, by communicating the boundaries of dialogue,[10] and
- targeting misinformation or disinformation spread about LGBTQIA+ people, which has led to threats to violence and cancelled LGBTQIA+ events.[11]

4.10 It could be argued that criminalising acts that incite hatred could lessen the burden on individuals. Currently, individual victims of vilification must bring a complaint, have this accepted by Anti-Discrimination NSW (ADNSW), and undergo conciliation to pursue a civil remedy for inciting hatred under the *ADA*.[12] ADNSW may in some circumstances refer the complaint to the NSW Civil and Administrative Tribunal (NCAT), where the complainant will be a party to the proceedings.[13] Some considered that victims of vilification should not have to bear this heavy burden.[14]

4.11 However, other submissions commented that the civil complaints framework could be improved.[15] This could go some way to addressing that concern. While this is beyond the scope of this review, we may consider it in our wider review of the *ADA*.

4.12 Two submissions supported expanding s 93Z to capture other conduct. The NSW Jewish Board of Deputies (NSWJBD) argued that s 93Z should criminalise the harassment or intimidation of a person or group based on one of the protected attributes.[16]

4.13 Another submission argued that s 93Z should cover speech that is "so inflammatory that it is capable of leading to violence, including group defamation".[17]

Support for a separate, lesser offence

4.14 The NSWJBD also proposed a separate, lesser offence. This offence would cover engaging in public conduct that promotes "hatred or animosity towards, contempt

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9. N C Wright, *Submission SV66*, 2.
10. Union for Progressive Judaism, *Submission SV43*, 1.
11. Equality Australia, *Submission SV57*, 3.
12. Anti–Discrimination NSW, *Submission SV04*, 5; *Anti–Discrimination Act 1977* (NSW) s 87A, s 88.
13. *Anti–Discrimination Act 1977* (NSW) s 93A, s 93B, s 93C.
14. See, eg, Public Interest Advocacy Centre, *Submission SV40*, 2.
15. See, eg, Australian Muslim Advocacy Network, *Submission SV19*, 3–4; Inner City Legal Centre, *Submission SV13*, 4. See also Legal Aid NSW, *Submission SV23*, 5; Public Interest Advocacy Centre, *Submission SV40*, 1–2; Public Interest Advocacy Centre, *Submission SV60*, 2.
16. NSW Jewish Board of Deputies, *Submission SV12*, 8–9.
17. Confidential, *Submission SV37*, 2.

for, or ridicule of" another person or group based on an actual or presumed protected attribute.[18]

4.15 The NSWJBD argued that this offence would be justified, because of the impact this conduct has on individuals' sense of safety and security, and democratic rights.[19] In its view, concerns about any potential overreach could be addressed by limiting the mental element of the offence to intention.[20]

Support for models from other jurisdictions

4.16 Some submissions identified models in other jurisdictions that NSW could follow. These included offences in Western Australia (WA), Victoria, the United Kingdom (UK) and Canada.

4.17 In Australia, only Victoria and WA have criminal vilification offences that do not have an element that requires proof of a threat of violence or physical force.[21] We discuss these offences below. While Queensland, South Australia, and the Australian Capital Territory incorporate an element of "inciting hatred" in their vilification offences, they still require proof that the accused person threatened or incited physical harm to people or property.[22] With these multiple elements, some argue that these offences are harder to prove than s 93Z.[23]

4.18 The WA vilification offences have less restrictive elements, and are likely to be easier to prove, than s 93Z.[24] These are the broadest vilification offences in Australia. Two submissions supported the WA approach, arguing that its vilification offences are effective and have been successfully prosecuted.[25] The below table shows the volume of proven charges for selected WA offences since they commenced to 31 July 2024:

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18. NSW Jewish Board of Deputies, *Submission SV12*, 9.
19. NSW Jewish Board of Deputies, *Submission SV12*, 7.
20. NSW Jewish Board of Deputies, *Submission SV62*, 2.
21. *Racial and Religious Tolerance Act 2001* (Vic) s 24(2), s 25(2); *Criminal Code* (WA) s 77, s 78, s 80A, s 80B.
22. *Criminal Code* (Qld) s 52A(1); *Racial Vilification Act 1996* (SA) s 4; *Criminal Code 2002* (ACT) s 750(1), s 750(2) definition of "threatening act".
23. Shia Muslim Council of Australia, *Submission SV53,* 17.
24. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 34.
25. Union for Progressive Judaism, *Submission SV11*, 2; Confidential, *Submission SV37*, 4.

Table 4.1: Volume of proven charges, select WA vilification offences (8 December 2004 — 31 July 2024)

Criminal Code (WA) section	Offence	Proven charges
77	Carried out conduct intended to incite racial animosity or racist harassment	5
78	Engaged in conduct likely to incite racial animosity or racial hatred	1
80A	Conduct intended to racially harass	17
80B	Conduct likely to racially harass	29

Source: Western Australian Office of Crime Statistics and Research, email dated 24 September 2024

4.19 One of these offences covers engaging in conduct, other than in private, with intention to create, promote, or increase animosity towards, or harassment of a racial group or a member of a racial group (this offence is called "intentional incitement of racial animosity or harassment").[26] These terms are defined as follows:

- "animosity towards" means "hatred of or serious contempt for", and
- "harass" includes "to threaten, seriously and substantially abuse or severely ridicule".[27]

4.20 The maximum penalty for this offence is 14 years' imprisonment.[28] There is a lesser form of the offence without any mental element, which has a lower maximum penalty of 5 years' imprisonment.[29]

4.21 While not as wide as WA, some of Victoria's criminal vilification offences are broader than s 93Z. For example, in Victoria, it is an offence to intentionally engage in conduct, knowing that it is likely to incite hatred against, serious contempt for, revulsion or severe ridicule of another person or group on the grounds of race or religion.[30]

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26. *Criminal Code* (WA) s 77.
27. *Criminal Code* (WA) s 76 definition of "animosity towards", definition of "harass".
28. *Criminal Code* (WA) s 77.
29. *Criminal Code* (WA) s 78.
30. *Racial and Religious Tolerance Act 2001* (Vic) s 24(2), s 25(2).

4.22 These Victorian offences have a maximum penalty of 6 months' imprisonment and/or 60 penalty units ($11,855.40) in the case of an individual, or 300 penalty units ($59,277) in the case of a corporation.[31]

4.23 However, there are also offences in Victoria that require proof that the accused intentionally engaged in conduct that they knew was likely to:

- incite hatred against a person or group, and
- threaten or incite others to threaten physical harm towards that person or group, or their property.[32]

4.24 A recent Victorian parliamentary inquiry concluded that it was undesirable to restrict its criminal vilification laws to threats or incitement to violence, as in NSW. Concerns were raised in that review that the existing criminal offences were already too stringent, which had led to their underuse.[33]

4.25 Another submission supported the models in England, Wales and Canada.[34] One vilification offence in England and Wales covers using threatening, abusive or insulting words or behaviour (or displaying written material) with intention to stir up racial hatred, or where racial hatred is likely to be stirred up.[35] Other international jurisdictions also have offences with this formulation.[36]

4.26 Canada criminalises inciting hatred. For instance, two relevant offences cover:

- publicly inciting hatred where this is likely to lead to a breach of the peace,[37] and
- wilfully promoting hatred, other than in private conversation (defences include the good faith expression of opinions based on religious beliefs).[38]

NSW should not adopt new vilification offences

4.27 While we acknowledge the serious harm caused by hate speech and other vilifying conduct, we do not recommend the creation of new vilification offences, or otherwise expanding s 93Z.

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31. *Racial and Religious Tolerance Act 2001* (Vic) s 24(2), s 25(2); *Victoria Government Gazette: Special,* No S 225, 7 May 2024, 1.
32. *Racial and Religious Tolerance Act 2001* (Vic) s 24(1), s 25(1).
33. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti–Vilification Protections* (2021) 164.
34. Confidential, *Submission SV37*, 4.
35. See, eg, *Public Order Act 1986* (UK) s 18(1).
36. See, eg, *Prohibition of Incitement to Hatred Act 1989* (Ireland) s 2(1); *Public Order (Northern Ireland) Order 1987* (NI) art 9(1); *Hate Crime and Public Order (Scotland) Act 2021* (Scot) s 4(1)(b).
37. *Criminal Code* (Canada) s 319(1).
38. *Criminal Code* (Canada) s 319(2), s 319(3)(b).

4.28 We are aware that WA and Victoria criminalise incitement to hatred, and other forms of vilification. Some may argue that, in the interests of harmonising criminal vilification offences across Australia, it would be desirable for NSW to follow these models.

4.29 However, we agree with the NSW Bar Association that legislation should not be reformed "simply for the sake of consistency".[39] The Australian Education Union, NSW Teachers Federation Branch similarly observed:

> Harmonisation across Australian jurisdictions should not be a reason for changes to NSW legislation simply to ensure consistency, but rather should be considered where the harmonisation process will result in real improvements in protections for people subjected to racial and religious vilification. Legislative change should only be made when it is in the interest of the wider community.[40]

"Hatred" and other terms may be too imprecise

4.30 We acknowledge that vilification offences in some other jurisdictions cover a wider range of conduct than NSW. However, amending s 93Z or introducing vilification offences that include hatred, animosity, contempt and/or ridicule would introduce imprecision and subjectivity into the criminal law. This concern applies regardless of whether s 93Z is expanded, or a lesser offence with a mental element of intention only, is introduced.

4.31 Criminal offences carry serious penalties, including the possible deprivation of a person's liberty. It is therefore important that criminal offences are clear and can be consistently understood across the community.[41]

4.32 Many of the terms proposed to be included as criminal elements are difficult to define precisely. They can mean different things to different people. For instance, there are differences of opinion in the community about what hatred means.[42] As several submissions observed, this ambiguity makes hatred an inappropriate standard for the criminal law.[43]

4.33 Civil vilification law provides guidance on the meaning of hatred, contempt and ridicule in NSW:

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39. NSW Bar Association, *Submission SV39* [31].
40. Australian Education Union, NSW Teachers Federation Branch, *Submission SV30*, 5.
41. Catholic Archdiocese of Sydney, *Submission SV50,* 5; Shia Muslim Council of Australia, *Submission SC53,* 23; Anglican Church Diocese of Sydney, *Submission SV49* [43]; Human Rights Law Alliance, *Submission SV01* [6]; Australian Human Rights Commission, *Submission SV42*, 3.
42. S Sorial and K Gelber, *Submission SV45*, 2; Catholic Archdiocese of Sydney, *Submission SV50,* 5; Australian Christian Lobby, *Submission SV56*, 4; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; T Clarke, *Submission SV63* [4.2]. See also D A W Miller, *Submission SV54*, 2.
43. Catholic Archdiocese of Sydney, *Submission SV50*, 5; Australian Christian Lobby, *Submission SV56*, 4; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3. See also S Sorial and K Gelber, *Submission SV45*, 2; D A W Miller, *Submission SV54*, 2.

- "hatred" means intense or violent dislike, detestation, hostility or strong aversion
- "contempt" means scorning, despising or considering someone vile or worthless, and
- "ridicule" means to mock, make fun of, deride or laugh at with contempt.[44]

4.34 In one NSW Court of Appeal judgment, Basten JA commented that "mere insults, invective or abuse" will not meet the civil threshold.[45]

4.35 Despite this guidance, the subjectivity of these terms can still cause difficulties when applying the test in the civil context. NCAT has commented that the test for inciting hatred, serious contempt or severe ridicule involves impressionistic, rather than empirical assessments.[46]

4.36 The Queensland Civil and Administrative Tribunal also commented that the subjectivity of the test of inciting hatred, serious contempt or severe ridicule can make it difficult for lawyers to assess the merits of vilification cases. Views can differ about whether the test has been met.[47]

4.37 As one submission observed, if assessing this test is difficult for lawyers, it would be very hard for individuals to understand and comply with it as part of the criminal law.[48]

4.38 The difficulties with the test would be heightened in a criminal context, where there is a higher standard of proof. We are concerned that it could be difficult to prove terms like hatred to the criminal standard. One submission suggested that proving hatred beyond reasonable doubt may be more difficult than proving s 93Z in its current form.[49]

4.39 Issues have also arisen internationally. In Ireland, definitional difficulties with the term "hatred" were found to be a key reason for the underuse of hate crime laws. There were also difficulties in proving that an act had "stirred up hatred" or was intended to stir up hatred (for example, if it was directed at one person, or said in connection with another offence).[50]

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44. *Collier v Sunol* [2005] NSWADT 261 [40]; *Burns v Sunol* [2018] NSWCATAD 10 [39]–[40]; *Burns v Dye* [2002] NSWADT 32 [23].
45. *Sunol v Collier (No 2)* [2012] NSWCA 44 [79] (Basten JA).
46. *Burns v Sunol (No 2)* [2017] NSWCATAD 236 [62].
47. *Valkyrie and Hill v Shelton* [2023] QCAT 302 [61].
48. Anglican Church Diocese of Sydney, *Submission SV49* [43].
49. S Sorial and K Gelber, *Submission SV45*, 2.
50. J Schweppe and D Walsh, *Combating Racism and Xenophobia through the Criminal Law: A Report Commissioned by the National Action Plan Against Racism* (University of Limerick, 2008) 101.

4.40 United Nations guidance on the application of international human rights standards reinforces our concern. The Committee on the Elimination of Racial Discrimination has warned that restrictions on freedom of speech should not be "broad or vague", since these could be used to the detriment of protected groups.[51] Similarly, the Human Rights Committee has observed that laws that are too broad could excessively impede on the right to freedom of expression.[52]

Hate-based conduct can be covered by other offences

4.41 It is important to recognise that s 93Z operates alongside other general offences, that can cover hate-based conduct.[53] This includes the offence of intimidation with intent to cause fear of physical or mental harm.[54] In this offence, "intimidation" is defined to include conduct amounting to harassment (among other things).[55] This offence carries a maximum penalty of 5 years' imprisonment or 50 penalty units ($5,500), or both.[56]

4.42 Other offences that may capture hate-based conduct include:

- offensive language[57]
- offensive conduct,[58] and
- assault.[59]

4.43 As we discuss in chapters 2 and 8, hatred or prejudice may also be considered in sentencing for these general offences.[60]

There could be potential unintended consequences

4.44 As discussed in chapter 3, the potential for unintended consequences is one of our overarching concerns with proposals to extend s 93Z. We share the concern, raised by a range of submissions, that new vilification offences could disproportionately impact disadvantaged groups, including Aboriginal and Torres Strait Islander

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51. Committee on the Elimination of Racial Discrimination, *General Recommendation No 35, Combating Racist Hate Speech*, UN Doc CERD/C/GC/35 (26 September 2013) [20].
52. Human Rights Committee, *General Comment No 34 on Article 19: Freedoms of Opinion and Expression,* UN Doc CCPR/C/GC/34 (29 July 2011) [46].
53. NSW Bar Association, *Submission SV39* [42]; Australian National Imams Council, *Submission SV52*, 2.
54. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
55. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7(1)(a).
56. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
57. *Summary Offences Act 1988* (NSW) s 4A(1).
58. *Summary Offences Act 1988* (NSW) s 4(1).
59. *Crimes Act 1900* (NSW) s 61.
60. NSW Bar Association, *Submission SV39* [45]; Legal Aid NSW, *Submission SV23,* 2; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

peoples, people with disability and young people.[61] The impact of expanding the criminal law on other freedoms, including freedom of expression, also needs to be given weight.

4.45 Specific issues have been raised about the WA and the UK offences. As noted above, some submissions supported the WA offences as models for reform in NSW. However, another submission argued such offences would have a greater impact on certain groups, including Aboriginal and Torres Strait Islander peoples.[62] A recent Victorian parliamentary inquiry also concluded that offences modelled on WA would be likely to "unreasonably infringe on freedom of expression".[63]

4.46 Indeed, when introducing these offences, the WA Government noted that they had "the potential to catch circumstances that are beyond the intention of the legislation". For that reason, the consent of the WA Director of Public Prosecutions is required before commencing any prosecution.[64] The equivalent requirement was recently removed from s 93Z, although the change is subject to review.[65]

4.47 Other submissions argued that the bar in the UK is too low. The Anglican Church Diocese of Sydney, for instance, observed that the subjective and broad terms used in England and Wales are inappropriate for a criminal offence, and have led to significant litigation.[66] The NSW Council for Civil Liberties suggested criminalising threatening or abusive behaviour that "stirs up hatred", as Scotland has done, could criminalise legitimate free speech, which would impact democracy in NSW.[67]

4.48 We accept there may be ways of mitigating the risk of over-criminalisation.[68] However, in our view, the potential for overreach is still too high, particularly when combined with the other considerations we outline in this chapter.

"Inciting hatred" as a criminal offence

4.49 As we discuss in chapter 3, there are limits to the role of the criminal law in achieving and maintaining social cohesion. Expanding criminal vilification offences to cover the incitement of hatred (or similar conduct) could have negative

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61. Confidential, *Submission SV44*, 2; M Hashimi, *Submission SV55*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3; Law Society of NSW, *Submission SV47,* 2; NSW Bar Association, *Submission SV39* [46].
62. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 33.
63. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti–Vilification Protections* (2021) 164.
64. Western Australia, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 18 August 2004, 5160; *Criminal Code* (WA) s 80H.
65. *Crimes Amendment (Prosecution of Certain Offences) Act 2023* (NSW) sch 1 [1]–[3].
66. Anglican Church Diocese, *Submission SV22* [13]–[15].
67. NSW Council for Civil Liberties Inc, *Submission SV09* [5.7].
68. Equality Australia, *Submission SV57*, 3.

consequences, including upsetting the "balance" of rights and disproportionately impacting certain groups.

4.50 Many submissions argued that this conduct should be dealt with in the civil law, rather than the criminal law.[69] For instance, in the Australian National Imams Council's view, civil laws are a more effective mechanism for promoting dialogue. They also maintain a balance between protecting against hate-based conduct and other important freedoms, such as freedom of speech and religion.[70]

4.51 Some submissions cited international human rights law guidance to support their views.[71] As discussed in chapter 2, the Rabat Plan of Action recommended that criminal sanctions should be a "last resort" that are only applied in "strictly justifiable situations".[72]

4.52 The Rabat Plan of Action outlined a test for when expression should be criminalised. One aspect of that test was that there should be a reasonable probability that the speech would succeed in inciting actual action against the target group.[73] The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression stated that, under this test, there should be a real and imminent danger of violence resulting from the expression.[74]

4.53 Citing such guidance, the Aboriginal Legal Service considered "the criminal law to be an unsuitable mechanism for prohibition on 'hate' speech which does not involve an intent to incite or threaten violence against a person or group of persons".[75]

4.54 We note that the Commonwealth recently proposed new vilification offences that would apply when a person threatens the use of force or violence against a

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69. Presbyterian Church of Australia in NSW, *Submission SC36*, 2; Public Interest Advocacy Centre, *Submission SV40*, 1; S Sorial and K Gelber, *Submission SV45*, 3; Law Society of NSW, *Submission SV47*, 2; Shia Muslim Council of Australia, *Submission SC53,* 22–23; M Hashimi, *Submission SV55*, 3; Public Interest Advocacy Centre, *Submission SV60*, 2; Legal Aid NSW, *Submission SV68,* 3.
70. Australian National Imams Council, *Submission SV26* [34], [37]. See also Australian Federation of Islamic Councils, *Submission SV51*, 8–9.
71. Australian Christian Lobby, *Submission SV56*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3; NSW Council for Civil Liberties Inc, *Submission SV09* [2.1]–[2.2].
72. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [34].
73. "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) [29].
74. F La Rue, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/67/357 (7 September 2012) [46].
75. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3.

protected group or member of a protected group.[76] If enacted, these offences would not criminalise inciting hatred, or other forms of hate-based conduct, falling short of a direct threat. Existing Commonwealth vilification offences cover urging the use of physical force or violence.[77] The Commonwealth does not propose to extend these existing offences to other forms of conduct.

A harm-based test

4.55 We also consider whether NSW should replace or supplement the test in s 93Z with an objective "harm-based" test.

4.56 Currently, s 93Z asks if the act in question threatens or incites hate-based violence. In contrast, a harm-based test focuses on the act's likely effect on targeted individuals and groups (for example, it may ask whether the act is reasonably likely to cause offence).

4.57 Two submissions supported introducing a harm-based test into s 93Z. They argued it would appropriately recognise the harm caused by hate-based conduct and better protect against it.[78] Equality Australia stated that a harm-based test would "lower the threshold [of s 93Z], making it easier to capture conduct that amounts to vilification", but suggested there be a defence for legitimate forms of expression.[79]

4.58 However, most submissions opposed introducing this test into the criminal law.[80] There was some support for amending the *ADA* to introduce a harm-based test in NSW's civil vilification laws.[81] This is outside the scope of this review, but may be considered as part of our ongoing review of the *ADA*.

4.59 Given the serious and lasting consequences of hate-based conduct, we understand the appeal of a harm-based vilification offence. However, we do not recommend such an offence.

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76. Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) sch 1 cl 19.
77. *Criminal Code* (Cth) s 80.2A, s 80.2B.
78. Equality Australia, *Submission SV57*, 5; N C Wright, *Submission SV66*, 2.
79. Equality Australia, *Submission SV18*, 8.
80. Confidential, *Submission SV44,* 3; S Sorial and K Gelber, *Submission SV45*, 3; Anglican Church Diocese of Sydney, *Submission SV49* [53]–[54]; Catholic Archdiocese of Sydney, *Submission SV50*, 6; Australian National Imams Council, *Submission SV52*, 5; Shia Muslim Council of Australia, *Submission SV53*, 23–24; Australian Christian Lobby, *Submission SV56*, 2; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 4; Public Interest Advocacy Centre, *Submission SV60*, 2–3; NSW Jewish Board of Deputies, *Submission SV62*, 4; Faith NSW and Better Balanced Futures, *Submission SV65*, 4–5; Legal Aid NSW, *Submission SV68,* 4.
81. See, eg, Public Interest Advocacy Centre, *Submission SV60*, 3; Legal Aid NSW, *Submission SV68,* 4.

Harm-based tests have a different focus

4.60 A harm-based test can capture vilification that falls short of threatening or inciting violence. Options might include covering conduct that:

- is reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute,[82] or
- a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or group.[83]

4.61 Harm-based tests are often objective, which means they do not have any mental element. Rather, they are assessed based on the standard of reasonableness (in other words, whether the conduct is reasonably likely to have that result).

4.62 Another difference is that harm-based tests do not consider the impact of the conduct on any third-party audience. This is different to incitement-based tests, which focus on the impact of the conduct on an ordinary member of the audience the act was directed towards.[84] By contrast, harm-based tests focus on the likely impact of the conduct on the target group. They ask whether, objectively, the conduct would affect the person or group it was directed towards.

4.63 No Australian criminal vilification offence has an objective harm-based test and, to our knowledge, no recent law reform inquiries have recommended introducing one. However, some Australian civil vilification laws include this test.[85] As well, recent law reform inquiries into vilification in other states and territories have recommended introducing the harm-based test in their civil vilification laws.[86]

The test may be too uncertain for the criminal law

4.64 We are concerned that the elements of the harm-based test are not sufficiently certain for the criminal law. As we discuss above, it is important for criminal

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82. See, eg, *Racial Discrimination Act 1975* (Cth) s 18C(1)(a); *Anti–Discrimination Act 1998* (Tas) s 17(1).
83. See, eg, Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti–Vilification Protections* (2021) rec 10.
84. *Sunol v Collier (No 2)* [2012] NSWCA 44 [34]; *Margan v Manias* [2015] NSWSC 307 [82]–[85].
85. *Racial Discrimination Act 1975* (Cth) s 18C(1); *Anti-Discrimination Act 1992* (NT) s 20A(1); *Anti-Discrimination Act 1998* (Tas) s 17(1).
86. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 120, 123, rec 9, rec 10; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report (2022) [6.5.1] rec 111; Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 45, rec 5; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 17.1, rec 17.2.

offences to be clear, so they can be understood across the community and applied predictably.[87]

4.65 It is not always possible to objectively determine whether conduct is reasonably likely to insult, humiliate, intimidate and/or ridicule.[88] Similar to "hatred", these terms can be subject to interpretation, and community members do not always agree on their meaning. This uncertainty could make it difficult to determine a reasonable person's view to the criminal standard (that is, beyond reasonable doubt) and apply it to the circumstances of the offence.

There could be potential unintended consequences

4.66 We are concerned that a harm-based offence risks over-criminalising disadvantaged groups, including Aboriginal and Torres Strait Islander peoples, young people and people with disability.[89] As we discuss in chapter 3, broadening criminal vilification law could disproportionately affect some groups.

4.67 Some submissions expressed concerns that it would unjustifiably impact important freedoms, including freedom of expression and freedom of religion.[90]

4.68 In addition, we heard concerns that the conduct potentially captured by a harm-based test is not sufficiently serious to be a criminal vilification offence.[91] Another considered that the criminality of this conduct does not rise to the level that is ordinarily associated with an indictable offence in the *Crimes Act*.[92]

4.69 We would be particularly concerned if the harm-based test had an "objective" focus. Generally, an accused person's state of mind is a key aspect of criminal responsibility. Offences without any mental element are rare, and may involve less serious conduct or have other policy justifications.

4.70 We are concerned it would be an overreach to criminalise hate-based conduct without any mental element. Without a mental element, the offence could capture

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87. Catholic Archdiocese of Sydney, *Submission SV50,* 5; Shia Muslim Council of Australia, *Submission SV53,* 23; Human Rights Law Alliance, *Submission SV01* [6]; Australian Human Rights Commission, *Submission SV42*, 3.
88. Catholic Women's League Australia, NSW Inc, *Submission SV59*, 4.
89. Confidential, *Submission SV44,* 2, 3; Legal Aid NSW, *Submission SV68,* 5; E Methven, D Luong, D Kemp and T Anthony, *Submission SV20*, 33.
90. Anglican Church Diocese of Sydney, *Submission SV49* [54]; Australian National Imams Council, *Submission SV52*, 5; Shia Muslim Council of Australia, *Submission SV53*, 17; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 4; Catholic Archdiocese of Sydney, *Submission SV50*, 6.
91. S Sorial and K Gelber, *Submission SV45*, 3; Shia Muslim Council of Australia, *Submission SV53*, 23–24.
92. Confidential, *Submission SV44,* 3.

people who may not appreciate the significance of their words, such as some young people.

5. Definitions of "incite" and "violence"

In brief

We do not recommend any changes to the terms "incite" or "violence" as used in s 93Z of the *Crimes Act 1900* (NSW).

5.1 A person commits an offence against s 93Z if, by public act, they either threaten or incite violence.[1] We considered options to expand or change the term "incite", and to clarify the definition of "violence". However, for the reasons expressed below, we do not recommend changes to either term.

Should the the term "incite" be changed?

5.2 Although we heard that it may be difficult to prove incitement, the term "incite" should not be replaced, amended, defined or expanded.

5.3 The term "incite" is clear and appropriate.[2] In addition to being well-known in NSW, the term is consistent with other Australian jurisdictions and international human rights law instruments.[3]

Support for changing "incite"

5.4 There are some concerns that incitement to violence is difficult to prove. Commentary on s 93Z has observed that the "essential ingredient of 'threat or incite to violence' has a high legal threshold and is notoriously difficult to prove beyond reasonable doubt".[4]

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1. *Crimes Act 1900* (NSW) s 93Z(1).
2. Law Society of NSW, *Submission SV47,* 2.
3. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4; *International Covenant on Civil and Political Rights,* 999 UNTS 171 (entered into force 23 March 1976) art 20(2).
4. M Hawila, "The Need to Criminalise Hate Crimes" (2021) (Summer) *Bar News* 23, 25.

5.5 It could be argued that the restrictive nature of the term "incite" contributes to this high threshold. Concerns include that, while some speech may stir up violent emotions or be vilifying, it may not reach the threshold of inciting someone to commit an act of violence.[5]

5.6 No submissions supported replacing the term entirely. However, some supported supplementing it.[6] For instance, Anti-Discrimination NSW supported expanding or adding to the definition rather than replacing it, given the meaning of "incite" is already well understood. It suggested the definition could incorporate the terms "promote", "advocate", "glorify", "stir up", or "urge".[7] Others also supported expanding the definition in various forms.[8]

5.7 Legal Aid NSW submitted that the word "incite" was well understood and considered there were other reasons for the low number of prosecutions. However, it was not opposed to the use of other, similar terms such as "promote" or "urge".[9]

It is not necessary to change "incite"

There is no requirement for another person to be incited

5.8 The NSW Jewish Board of Deputies (NSWJBD) also supported keeping "incite" but adding other words, such as urges, promotes, advocates or glorifies. In its view, the purpose of this change would be to avoid any suggestion that s 93Z requires prosecutors to prove an impact on an audience. This could reduce reluctance to charge this offence.[10]

5.9 However, it is important to note that s 93Z does not require proof that a third person was actually incited to violence by the public act.[11] Section 93Z(3) provides that "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".[12]

5.10 This was added to address concerns that it was difficult to prove incitement under the previous serious vilification offences, which were contained in the *Anti-*

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5. M Hashimi, *Submission SV55,* 2; M Koziol, "Minns Targets Hate Speech Laws", *The Sydney Morning Herald* (14 November 2023) 1.
6. Equality Australia, *Submission SV57,* 2; Anti-Discrimination NSW, *Submission SV58* [3.1]; NSW Jewish Board of Deputies, *Submission SV62,* 2; N C Wright, *Submission SV66,* 2.
7. Anti-Discrimination NSW, *Submission SV58* [3.1].
8. NSW Jewish Board of Deputies, *Submission SV62*, 2; Equality Australia, *Submission SV57*, 2; N C Wright, Submission SV66, 2; S Sorial and K Gelber, Submission SV45, 1.
9. Legal Aid NSW, Submission SV68, 3.
10. NSW Jewish Board of Deputies, *Submission SV62*, 2.
11. *Crimes Act 1900* (NSW) s 93Z(3).
12. *Crimes Act 1900* (NSW) s 93Z(3).

Discrimination Act 1977 (NSW) (*ADA*).[13] These offences did not include this clarifying provision, which meant that the prosecution had to prove that the public act actually incited a third party to hatred towards, serious contempt for, or severe ridicule of an individual or group.[14] In a 2009 review, the then Director of Public Prosecutions, Nicholas Cowdery AO KC, reported that the inability to prove incitement to the criminal standard was the most common reason that prosecutions were not commenced under the *ADA* offences.[15]

"Incite" is a well-known and well understood term

5.11 The word "incite" is well-known in NSW and in other jurisdictions. When introducing s 93Z, the then Attorney General observed that "[i]ncitement is already well understood judicially and has an established body of case law".[16]

5.12 Section 93Z adopted "incite" from the four serious vilification offences in the *ADA* that it replaced. For example, under s 20D of the *ADA* it was an offence to:

> by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
>
> (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
>
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.[17]

5.13 The term is still used in the *ADA* civil vilification provisions.[18]

5.14 As observed by Professors Sorial and Gelber, incitement is also "an established category of offence in criminal law".[19] There are a range of other offences in NSW with "incitement" as an element, including sexual, firearms, and drug offences.[20]

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13. *Anti-Discrimination Act 1977* (NSW) s 20D, s 38T, s 49ZTA, s 49ZXC, as repealed by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 2; NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 5 June 2018, 43.
14. *Anti-Discrimination Act 1977* (NSW) s 20D, as repealed by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 2; NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.108]–[4.114].
15. N Cowdery, "Review of Law of Vilification: Criminal Aspects" (Paper prepared for the Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009) 4.
16. NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 5 June 2018, 43.
17. *Anti-Discrimination Act 1977* (NSW) s 20D, as repealed by *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW) sch 2.
18. *Anti-Discrimination Act 1977* (NSW) s 20C(1), s 38S(1), s 49ZE(1), s 49ZT(1), s 49ZXB(1).
19. S Sorial and K Gelber*, Submission SV45*, 1.
20. See, eg, *Crimes Act 1900* (NSW) s 31C(2), s 61KC–s 61KF; *Firearms Act 1996* (NSW) s 51C(b); *Drug Misuse and Trafficking Act 1985* (NSW) s 27, s 28.

5.15 As mentioned above, some submissions suggested adding other words to s 93Z alongside the term "incite". However, an amendment may have little practical effect. This is because the suggested additional words overlap with the meaning of incitement as it has been interpreted by the courts.[21]

5.16 The term "incite" is not defined in s 93Z, or anywhere else in the *Crimes Act.* Instead, an understanding of its meaning comes from case law. For instance, this term has been considered in the context of the *ADA* civil provisions.[22] The NSW Court of Appeal has found that "incite" means "to rouse, to stimulate, to urge, to spur on, to stir up or to animate, and covers conduct involving commands, requests, proposals, actions or encouragement".[23]

5.17 The appropriateness of the term "incite" was considered by the parliamentary committee inquiry that preceded the introduction of s 93Z. In its 2013 report, this committee considered whether it would be appropriate to change "incite" in s 20D of the *ADA* to "promote or express".[24] Some legal groups advocated for a change to "promote or express" to increase the scope of the offence and make it easier to understand.[25]

5.18 However, at that stage, the NSWJBD cautioned that changing the terminology would lose the body of case law on the meaning of incitement.[26] The committee acknowledged the difficulty of proving incitement. However, with no clear consensus on an alternative, the committee concluded there should be no change.[27]

5.19 When Stepan Kerkyasharian AO consulted on the issue in 2017, many legal professionals were hesitant to support a change in the language. Others suggested that "promote" or "advocate" may make the offence more accessible and easier to prosecute. However, there appeared to be more concerns about the difficulty of

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21. *Sunol v Collier (No 2)* [2012] NSWCA 44 [26]–[34].
22. *Sunol v Collier (No 2)* [2012] NSWCA 44.
23. *Sunol v Collier (No 2)* [2012] NSWCA 44 [41]. See also *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284, 15 VR 207 [12]–[14].
24. NSW, Legislative Council Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.59]–[4.70]; *Anti-Discrimination Act 1977* (NSW) s 20D.
25. NSW, Legislative Council Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.61]–[4.63], referring to submission 12, Law Society of NSW, 4. See also Evidence to Legislative Council, Standing Committee on Law and Justice, Parliament of NSW, 8 April 2013, 9 (S Blanks, Secretary, NSW Council for Civil Liberties); Evidence to Legislative Council, Standing Committee on Law and Justice, Parliament of NSW, 5 April 2013, 37–38 (J Dale, Chair Sub-Committee on Human Rights Australian Lawyers Alliance).
26. NSW, Legislative Council Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.64].
27. NSW, Legislative Council Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.69]–[4.70].

proving another person was incited, rather than simply the language.[28] The NSW Government retained the term "incite" when introducing s 93Z.

5.20 Given the term "incite" is well understood and well-established, replacing or expanding the term may increase uncertainty, rather than clarify s 93Z.[29] If "incite" is replaced with different terms, each new term will need to be defined.[30] The change could invite legal argument on the interpretation of the new terms, require a new body of law, increase contested matters, and further complicate the law.

"Incite" is used elsewhere in Australia and in human rights law

5.21 Preserving the current wording would also maintain consistency with vilification law domestically and in international human rights law.

5.22 Criminal vilification offences in some other countries use a variety of terms. For example:

- "stir up" hatred[31]
- "stir up" hatred or "arouse" fear[32]
- "excite" hostility or ill-will,[33] and
- "incite" or "wilfully promote" hatred.[34]

5.23 However, the term "incite" is widely used in other criminal vilification offences in Australia, including in Victoria, Queensland, South Australia, and the Australian Capital Territory.[35] Like NSW, "incite" is not expanded on or defined in these offences.

5.24 We acknowledge that some jurisdictions do not use the term "incite" in their vilification offences. For instance, while offences in Western Australia use the term "incite" in their titles, the text of each section omits the term. The text instead provides that it is an offence to "create, promote or increase animosity towards, or harassment of …".[36] Similarly, the Commonwealth does not use the term "incite".

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28. S Kerkyasharian, *Report on Consultation: Serious Vilification Laws in NSW* (2017) 8–10.
29. Public Interest Advocacy Centre, *Submission SV60*, 2.
30. S Sorial and K Gelber, *Submission SV45,* 1.
31. *Prohibition of Incitement to Hatred Act 1989* (Ireland) s 2–s 4; *Hate Crime and Public Order (Scotland) Act 2021* (Scot) s 4; *Public Order Act 1986* (UK) s 18–s 23, s 29B–s 29G.
32. *Public Order (Northern Ireland) Order 1987* (NI) art 9–art 13.
33. *Human Rights Act 1993 (*NZ) s 131(1).
34. *Criminal Code* (Canada) s 319(2), s 319(2.1).
35. *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25; *Criminal Code 2002 (*ACT) s 750; *Criminal Code* (Qld) s 52A; *Racial Vilification Act 1996* (SA) s 4.
36. *Criminal Code* (WA) s 77–s 80.

Rather, s 80.2A and s 80.2B of the *Criminal Code* (Cth) use the term "urges". No submissions suggested that NSW follow these models.

5.25 The term "incite" also aligns with the language of the *International Convention on the Elimination of All Forms of Racial Discrimination* (*ICERD*), and the *International Covenant on Civil and Political Rights* (*ICCPR*).[37] For instance:

- the *ICERD* requires states parties to take "immediate and positive measures" designed to eradicate all incitement to racial hatred and discrimination,[38] and
- the *ICCPR* provides "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".[39]

5.26 Consistency with international instruments was recognised as a reason to retain the term "incite" when s 93Z was introduced.[40] We see no reason to change it.

"Incite" is sufficiently serious

5.27 Some submissions opposed replacing or supplementing "incite" because it appropriately reflects the seriousness of the offence.[41] Some were concerned that terms such as "promote", "glorify", "stir up" or "urge" could lower the threshold and broaden the scope of s 93Z.[42] It could capture conduct that is insufficiently serious for criminal prosecution and arguably could be more appropriately dealt in the civil system.[43]

5.28 We agree that "incite" is a sufficiently serious expression. However, we are less concerned at the potential expansionary effect of the other suggested terms. This is because such terms already form part of "incite" as defined by the courts. Regardless, we do not think these terms should be expressly added to s 93Z, for the reasons set out above.

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37. Law Society of NSW, *Submission SV47,* 2.
38. *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 UNTS 195 (entered into force 4 January 1969) art 4.
39. *International Covenant on Civil and Political Rights,* 999 UNTS 171 (entered into force 23 March 1976) art 20(2).
40. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 43.
41. Public Interest Advocacy Centre, *Submission SV60,* 1–2, Shia Muslim Council of Australia, *Submission SV53,* 22. See also S Sorial and K Gelber, *Submission SV45,* 1–2.
42. Australian National Imams Council, *Submission SV52,* 3–4; Public Interest Advocacy Centre, *Submission SV60,* 1–2; Australian Christian Lobby, *Submission SV56,* 3; Shia Muslim Council of Australia, *Submission SV53,* 22.
43. Australian National Imams Council, *Submission SV52,* 3–4; Shia Muslim Council of Australia, *Submission SV53,* 22.

Should s 93Z be confined to "physical violence"?

5.29 Section 93Z criminalises threats of violence and incitement to violence. The term "violence" is defined as including violent conduct, and "violence towards a person or a group of persons" includes violence towards the property of the person or a member of the group.[44]

5.30 The section does not expressly refer to "physical violence". However, when s 93Z was introduced, the then Attorney General stated:

> The focus of the bill is on conduct threatening or inciting violence, in other words, behaviour involving physical force intended to hurt, damage or kill someone or something.[45]

5.31 Unlike NSW, some other Australian jurisdictions expressly refer to physical violence or harm in their vilification offences.[46]

5.32 Two submissions proposed widening the definition of violence to capture other forms of conduct.[47] They proposed expanding the definition of violence to include psychological violence, including acts that inflict mental trauma, emotional abuse and coercive control. In their view, this would recognise the "severe and long-lasting impacts on victims" of these forms of violence and provide more comprehensive protection against them.[48]

5.33 One submission also proposed including conduct that "seriously impairs another person's physiological integrity through coercion and threats". In their view, this would reflect contemporary understandings of the meaning of violence.[49]

5.34 Some religious groups opposed any change to the current definition. These groups cautioned against expanding the definition to include non-physical behaviours, such as psychological or verbal violence.[50] They argued that these terms are uncertain, subjective, and open to wide interpretation.[51]

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44. *Crimes Act 1900* (NSW) s 93Z(5).
45. NSW, *Parliamentary Debates,* Legislative Assembly, Second Reading Speech, 5 June 2018, 43.
46. *Criminal Code 2002* (ACT) s 750(2); *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25; *Criminal Code* (Qld) s 52A(1).
47. R Carter, *Submission SV48,* 2; N C Wright, *Submission SV66,* 1.
48. N C Wright, *Submission SV66*, 1.
49. R Carter, *Submission SV48,* 2.
50. Presbyterian Church of NSW, *Submission SV36*, 3–4; Australian Christian Lobby, *Submission SV56*, 3; Catholic Women's League Australia, NSW Inc, *Submission SV59,* 2, 5.
51. Australian Christian Lobby, *Submission SV56,* 3; Catholic Women's League Australia, NSW Inc, *Submission SV59,* 4–5.

5.35 In their view, the change would set the threshold for criminalisation too low.[52] They argued it could have negative effects, including that it could:

- be unforeseeable what speech or conduct could be captured[53]
- impinge on the freedoms of religion, speech, and association,[54] and
- diminish "trust and collaboration" in the community.[55]

5.36 These groups submitted that this conduct is more appropriately dealt with through the civil framework.[56]

5.37 The Australian Christian Lobby submitted that recklessness should be removed from s 93Z if psychological violence is included. It argued this would ensure that the mental element of s 93Z is objectively certain, and that the offence only applies to the most serious cases, consistent with international law.[57]

5.38 We recognise that psychological or verbal violence can have devastating consequences on individuals. However, there is only limited support for a recommendation that the definition of violence in s 93Z should be widened.

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52. Australian Christian Lobby, *Submission SV56,* 2.
53. Australian Christian Lobby, *Submission SV56*, 2.
54. Australian Christian Lobby, *Submission SV56,* 2–3; Presbyterian Church of NSW, *Submission SV36, 2;* Catholic Women's League Australia, NSW Inc, *Submission SV59,* 5.
55. Catholic Women's League Australia, NSW Inc, *Submission SV59,* 5.
56. Presbyterian Church of NSW, *Submission SV36, 2;* Catholic Women's League Australia, NSW Inc, *Submission SV59,* 5.
57. Australian Christian Lobby, *Submission SV56*, 4.

6. The definition of "public act"

In brief

We do not think the definition of "public act" in s 93Z of the *Crimes Act 1900* (NSW) needs to change. In our view, the definition is sufficiently broad and flexible to capture appropriate public acts.

6.1 Another issue is whether the definition of "public act" in s 93Z is sufficiently broad and flexible. During the review, some groups supported extending or clarifying the definition to strengthen the protections offered by s 93Z.[1] However, views differed on the preferred model.

6.2 Others opposed any change. They argued the definition is broad enough and expressed concern about unintended consequences of reform.[2]

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1. S Sorial and K Gelber, *Submission SV45*, 1; NSW Jewish Board of Deputies, *Submission SV62*, 1–2; T Clarke, *Submission SV63*, 1; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67*, 3; Equality Australia, *Submission SV57*, 2; Kingsford Legal Centre, *Submission SV27*, 2–3; Confidential, *Submission SV37*, 2. See also Public Interest Advocacy Centre, *Submission SV60*, 1.
2. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2; Anglican Church Diocese of Sydney, *Submission SV49* [6]–[15]; Australian National Imams Council, *Submission SV52*, 3; Shia

6.3 It is important that s 93Z can apply in all appropriate cases. However, the current definition of "public act" is broad and flexible, and amending it would not address concerns about the low numbers of prosecutions. We do not recommend change.

Arguments in favour of change

6.4 Currently, "public act" is defined as including:

> (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.[3]

6.5 There is support for a broad and clear definition "that is capable of capturing a wide range of 'partially public' scenarios … including livestreamed events or conferences".[4]

6.6 Some submissions argued that the current definition should be amended to clearly cover restricted spaces or groups.[5] These include conferences or events with admission fees or that are only open to some people (for example, restricted meetings, schools or places of worship).[6]

6.7 For instance, the NSW Jewish Board of Deputies (NSWJBD) argued that statements made to limited numbers of people should not be excluded from the offence. This included meetings that are only open to sections of faith communities, where exclusion may be subtle.[7]

6.8 Some groups considered that amending the definition to capture these kinds of spaces would improve the effectiveness of s 93Z, and better address the serious harm caused by inciting or threatening hate-based violence.[8] One submission

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Muslim Council of Australia, *Submission SV53*, 21; Faith NSW and Better Balanced Futures, *Submission SV65*, 2; Catholic Archdiocese of Sydney, *Submission SV50,* 4; Catholic Women's League Australia (NSW), *Submission SV59*, 2; Confidential, *Submission SV44*, 1; Confidential, *Submission SV46*, 1–2.

3. *Crimes Act 1900* (NSW) s 93Z(5) definition of "public act".
4. See, eg, Anti-Discrimination NSW, *Submission SV58* [2.3].
5. S Sorial and K Gelber, *Submission SV45*, 1; NSW Jewish Board of Deputies, *Submission SV62*, 1–2; Confidential, *Submission SV37*, 2.
6. Confidential, *Submission SV37*, 2; NSW Jewish Board of Deputies, *Submission SV62*, 1–2.
7. NSW Jewish Board of Deputies, *Submission SV62*, 1–2.
8. NSW Jewish Board of Deputies, *Submission SV62*, 1–2; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 3.

suggested that increasing the reach of s 93Z in this way would strengthen the law and deter acts that contribute to broader, more significant hate-based issues.[9]

Potential reform options

6.9 We received several reform proposals to address these concerns.

Adopting the definition of "public place" from other legislation

6.10 One option is for s 93Z to adopt parts of the definitions of "public place" from other NSW and Commonwealth legislation.[10] These define public place to include:

- places that are open to the public, regardless of whether the public to whom it is open consists of only a limited class of persons,[11] and
- any place to which the public, or a section of the public, have access as of right or by invitation, whether express or implied, and whether or not a charge is made for admission.[12]

6.11 There was some support for adapting elements of one, or both, of these definitions in s 93Z.[13] The Public Interest Advocacy Centre provided more general support. It was open to the idea of adopting elements of the definition of public place from other Acts, if it meant s 93Z could be applied in all relevant situations.[14]

6.12 Another approach might be to only introduce the words "section of the public" into the definition of public act in s 93Z.[15] This might capture scenarios where access to a communication is limited.[16]

6.13 One submission proposed that it could be helpful to include this in the "avoidance of doubt" aspect of the definition in s 93Z(5).[17] This provision would then read (with the potential addition in bold):

> For the avoidance of doubt, an act may be a public act even if it occurs on private land **and the public includes any section of the public**.

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9. Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 3.
10. *Summary Offences Act 1988* (NSW) s 3(1) definition of "public place"; *Criminal Code* (Cth) dictionary, definition of "public place". See also NSW Law Reform Commission, *Serious Racial and Religious Vilification*, Options Paper (2024) chapter 2.
11. *Summary Offences Act 1988* (NSW) s 3(1) definition of "public place".
12. *Criminal Code* (Cth) dictionary, definition of "public place".
13. S Sorial and K Gelber, *Submission SV45*, 1; T Clarke, *Submission SV63*, 1; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 3.
14. Public Interest Advocacy Centre, *Submission SV60*, 1.
15. T Clarke, *Submission SV63*, 2.
16. T Clarke, *Submission SV63*, 2.
17. T Clarke, *Submission SV63*, 2.

6.14 The submission explained that the concept of a "section of the public" came from corporate law, where it was used to clarify that offers aimed at limited groups, such as attendees of a paid conference, could still be public offers.[18]

6.15 The Law Society of NSW pointed out that the concept also appears in the *Children (Criminal Proceedings) Act 1987* (NSW). In the Law Society's view, this could be adopted if there were concerns that s 93Z did not adequately capture circumstances where public access to a communication is limited (such as livestreaming to subscribers).[19]

Adding "within hearing" of the public

6.16 The Kingsford Legal Centre proposed expanding the definition of public act to expressly include comments that can be heard by general members of the public, even if they were not intended to be public.[20] This would mean s 93Z would cover (with the potential addition in bold):

> any conduct … observable by the public, or **within hearing of a public place or general members of the public.**

A test of reasonable foreseeability, with exclusions

6.17 Professors Sorial and Gelber proposed an expanded definition that could avoid capturing genuinely private conversations.[21]

6.18 In their view, "public act" should be defined as an act where it is reasonably foreseeable that a member of the public could have seen or heard it (without requiring that a member of the public actually did see or hear it). Appropriate exclusions, such as for conversations that take place between family members in homes, would apply under their proposed model.[22]

Changing the definition to "other than in private"

6.19 The NSWJBD proposed amending s 93Z to reflect s 18C of the *Racial Discrimination Act 1975* (Cth). In its view this would promote consistency between state and federal laws.[23]

6.20 Section 18C is a civil vilification law. It applies to an act "otherwise than in private", being an act that:

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18. T Clarke, *Submission SV63*, 2.
19. Law Society of NSW, *Submission SV47*. 1. See also *Children (Criminal Proceedings) Act 1987* (NSW) s 15A(3).
20. Kingsford Legal Centre, *Submission SV27*, 2.
21. S Sorial and K Gelber, *Submission SV45*, 1.
22. S Sorial and K Gelber, *Submission SV45*, 1.
23. NSW Jewish Board of Deputies, *Submission SV62*, 1.

- causes words, sounds, images or writing to be communicated to the public
- is done in a public place, or
- is done within sight or hearing of people who are in a public place.[24]

6.21 "Public place" includes any place to which the public has access by right or invitation, whether express or implied, and whether or not a charge is made for admission.[25]

6.22 Some other civil vilification laws also apply to acts other than in private.[26] Two recent law reform inquiries have recommended new civil vilification laws that apply to acts "otherwise than in private".[27]

6.23 The Australian Capital Territory (ACT) and Western Australia also take this approach in their criminal vilification offences.[28]

6.24 The ACT vilification laws previously used the expression "public act".[29] The ACT introduced civil and criminal vilification provisions that applied to acts "other than in private" in 2016.[30]

6.25 The change was intended to remove uncertainty about the meaning of "public", reduce doubt about what was caught by it, and widen the scope of vilification laws.[31] The ACT Law Reform Advisory Council recommended this reform due to concerns that "public acts" could be interpreted restrictively, and exclude conduct that should be covered.[32]

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24. *Racial Discrimination Act 1975* (Cth) s 18C(2).
25. *Racial Discrimination Act 1975* (Cth) s 18C(3).
26. *Anti-Discrimination Act 1992* (NT) s 20A(3); *Discrimination Act 1991* (ACT) s 67A(1).
27. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability,* Final Report (2023) vol 4 "Realising the Human Rights of People with Disability", rec 4.29, rec 4.30; Law Reform Commission of Western Australia*, Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) rec 113.
28. *Criminal Code 2002* (ACT) s 750; *Criminal Code* (WA) s 77, s 78, s 80A, s 80B.
29. *Discrimination Act 1991* (ACT) s 66, s 67, as enacted.
30. *Discrimination Act 1991* (ACT) s 67A(1), as inserted by *Discrimination Amendment Act 2016* (ACT) s 9; *Criminal Code 2002* (ACT) s 750(1)(d), as inserted by *Discrimination Amendment Act 2016* (ACT) sch 1 [1.1].
31. Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, Agreement in Principle Speech, 8 June 2016, 1874; *Bottrill v Sunol* [2017] ACAT 81 [54].
32. ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) 93.

It is unnecessary to amend the definition

6.26 We understand concerns about the reach of the definition of "public act" and agree that s 93Z should apply in all appropriate cases. However, for the reasons below, we have concluded that the definition does not need to change.

The definition is appropriately broad and flexible

6.27 As a range of submissions argued, the current definition is sufficiently broad.[33] The definition is inclusive and non-exhaustive.[34] It can be applied flexibly on a case-by-case basis, with scope for argument about scenarios on the margins. For instance, the Local Court of NSW said that the inclusive definition gives enough scope for the Court to determine whether conduct falls within s 93Z, and to allow for the assessment to be in keeping with community standards.[35]

6.28 The definition in s 93Z expressly refers to a wide range of scenarios, including:

- social media communication and communication by other electronic methods
- acts that occur on private land, and
- distributing or disseminating any matter to the public, even where the person does not have knowledge that the material promotes or expresses vilification.[36]

6.29 Because of these express inclusions, recent inquiries in Victoria and Queensland recommended adopting the s 93Z definition in their vilification frameworks.[37] The Victorian Government supported these recommendations in principle.[38] It has consulted on the issue.[39] The Queensland Parliament recently passed amendments

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33. Law Society of NSW, *Submission SV03*, 3; Anglican Church Diocese of Sydney, *Submission SV49* [6], [8]; Australian National Imams Council, *Submission SV52*, 3; Shia Muslim Council of Australia, *Submission SV53*, 21; Faith NSW and Better Balanced Futures, *Submission SV65*, 2.
34. Local Court of NSW, *Submission SV33*, 3; Catholic Archdiocese of Sydney, *Submission SV50,* 4; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 2.
35. Local Court of NSW, *Submission SV33*, 3.
36. *Crimes Act 1900* (NSW) s 93Z(5) definition of "public act".
37. Queensland Parliament, Legal Affairs and Safety Committee, *Inquiry into Serious Vilification and Hate Crimes*, Report 22 (2022) 47, rec 6; Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 127–128, rec 13.
38. Queensland Government, *Response to the Legal Affairs and Safety Committee Report No 22: Inquiry into Serious Vilification and Hate Crimes* (2022) 2–3; Victorian Government, *Response to the Recommendations of the Legislative Assembly Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections* (2021) 7.
39. Victoria, Department of Justice and Community Safety, *Strengthening Civil Anti-Vilification Protections for all Victorians: Implementing the Legislative Recommendations of the Victorian Inquiry into Anti-Vilification Protections*, Consultation Paper 3 (2023) 16–17.

that, upon commencement, will adopt this definition in its criminal and civil vilification laws.[40]

6.30 The s 93Z definition is based on the definition used in the *Anti-Discrimination Act 1977* (NSW) (*ADA*). This definition was updated and broadened when s 93Z was enacted and the former serious vilification offences were removed from the *ADA*.[41]

6.31 Even without the same express inclusions as s 93Z, the civil definition has been interpreted broadly. As we discuss below, the civil definition has been found to cover several scenarios that could be considered "partially public". It is likely that the criminal definition is also capable of extending to such scenarios.[42]

6.32 However, the definition of "public act" is not unlimited in NSW. Section 93Z does not apply to private acts. The *ADA* vilification protections have been found not to apply to private conversations (even on public land).[43]

6.33 Some criminal vilification offences in other jurisdictions take a broader approach, by not distinguishing between public and private acts.[44] No submissions suggested that s 93Z should intrude on private spaces. Indeed, some submissions were concerned that changing the definition could criminalise genuinely private conversations or spaces.[45] Religious groups, in particular, raised issues regarding the potential impact on their freedoms and activities.[46]

The definition already applies to online spaces

6.34 Many of the concerns we heard about "public act" centred on its application to online activity. However, these activities may already be captured in appropriate situations.

6.35 As we mention above, s 93Z expressly includes social media. The only conviction under s 93Z from which an appeal was brought and dismissed involved online acts. The offender posted TikTok videos to an audience of 18,000.[47]

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40. *Respect at Work and Other Matters Amendment Bill 2024* (Qld) cl 21, cl 57 (not yet commenced).
41. *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW).
42. Confidential, *Submission SV44*, 1; Australian National Imams Council, *Submission SV52*, 3.
43. *Barry v Futter* [2011] NSWADT 205 [74]–[76], [78].
44. *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25; *Criminal Code* (Cth) s 80.2A, s 802B. See also Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) sch 1 cl 19.
45. Confidential, *Submission SV44*, 1; Confidential, *Submission SV46*, 2; Faith NSW and Better Balanced Futures, *Submission SV65*, 2.
46. Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; Faith NSW and Better Balanced Futures, *Submission SV65*, 2; Anglican Church Diocese of Sydney, *Submission SV49* [6], [12]–[14]; Australian National Imams Council, *Submission SV52*, 3; Shia Muslim Council of Australia, *Submission SV53*, 21.
47. Transcript of Proceedings, *R v Kanwal* (Local Court of NSW, 2020/257129, Quinn LCM, 14 February 2022) 14.

6.36 The civil definition has also been applied to online acts, including:

- posting written text on a website that is not password protected[48]
- posting written text on a public Facebook page or one that has an audience of "a number of people",[49] and
- posting a link on a public website to another website that contained vilifying material, with an express invitation to access that link.[50]

6.37 It is possible that s 93Z, and the civil definition, does not apply to all online acts. For instance, posting a link to a website that contains vilifying material on a private Facebook page will not, in and of itself, be a public act in the context of the civil definition.[51]

6.38 However, we think the definition is still sufficiently flexible and broad to allow case-by-case application in appropriate circumstances, with scope for argument in novel scenarios.

Conversations within hearing of the public may be covered

6.39 As noted above, some submissions suggested amending the definition to cover:

- comments that can be heard by general members of the public, even if they were not intended to be public,[52] or
- acts where it is reasonably foreseeable that a member of the public could have seen or heard it.[53]

6.40 However, it is likely that the current definition can already capture these scenarios, where appropriate.

6.41 The civil definition has been interpreted and applied in this way. In the civil context, "public act" has been interpreted broadly to include conduct or communication that is "capable of being seen or heard, without undue intrusion, by a non-participant".[54]

6.42 The following scenarios have been found to be public acts in civil vilification cases:

- words shouted in the stairwell of an apartment block with such force that they were overheard by two people in separate apartments[55]

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48. *Collier v Sunol* [2005] NSWADT 261 [33].
49. *Burns v Smith* [2019] NSWCATAD 56 [34]–[35].
50. *Burns v Sunol* [2016] NSWCATAD 16 [35]–[36].
51. *Burns v McKee* [2017] NSWCATAD 66 [62].
52. Kingsford Legal Centre, *Submission SV27*, 2–3.
53. S Sorial and K Gelber, *Submission SV45*, 1.
54. *Z v University of A (No 7)* [2004] NSWADT 81 [100].
55. *Anderson v Thompson* [2001] NSWADT 11 [25].

- words shouted from private property into a public street, when observed by three members of the public,[56] and
- a police exercise involving 200 people at a public train station that was closed to the general public.[57]

Acts directed at sections of the public may be covered

6.43 We do not think it is necessary to clarify that a public act can include an act directed towards a section of the public, or places that are only open to some people. Many such acts may be covered by the current definition.[58]

6.44 The NSW Civil and Administrative Tribunal has observed that the following factors may be helpful in determining if there has been a public act under the *ADA*:

- whether there is an audience (where a speaker addresses an audience, it is more likely to be public)
- the size of any audience (where a speaker addresses a group, it is more likely to be public)
- the nature of the communication
- the intention of the person or people communicating, and
- the circumstances that led to the communication.[59]

6.45 These factors can assist to determine if acts directed at sections of the public, or limited classes of people, are public acts. For instance, the civil definition has been found to cover a teacher's communications to a high school class. This involved a spoken communication to an audience.[60]

6.46 These factors could also be applied to determine if invitation-only events or events with an admission fee are public acts. For example, it is arguable that a ticketed conference where speakers direct communications to reasonably-sized audiences could be a public act, based on the factors outlined above.

6.47 It is possible that the current definition does not capture all acts directed towards particular groups. For instance, a statement made in a school staff muster meeting was found not be a public act under the *ADA*. This was because the meetings were not open to the general public.[61] However, the definition is flexible enough to allow for interpretation and application to groups in appropriate circumstances.

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56. *Lamb v Campbell* [2021] NSWCATAD 103 [23]–[28].
57. *Ekermawi v NSW Police Force* [2019] NSWCATAD 79 [42]–[46].
58. Confidential, *Submission SV44*, 1.
59. *Barry v Futter* [2011] NSWADT 205 [74]–[76].
60. *Wolf v NSW Department of Education* [2023] NSWCATAD 202 [44]–[45].
61. *Riley v NSW Department of Education* [2019] NSWCATAD 223 [118].

Amending the definition may cause unnecessary complications

6.48 Given that the definition is broad, flexible and well-established in NSW, we are concerned that any attempt to amend it might lead to unnecessary complications.

6.49 If a definition is too specific, it risks being interpreted restrictively to exclude scenarios that do not fall within its parameters. A broad definition allows for appropriate flexibility. It also allows for debate about scenarios that do not fit neatly into the public/private distinction, which can be determined by the courts on a case-by-case basis. In our view, this scope for argument is desirable and appropriate.

6.50 As we mention above, some other criminal and/or civil vilification laws elsewhere apply to acts "other than in private" and do not use the expression "public act".[62] This formula has been recommended by recent law reform inquiries.[63]

6.51 However, the current definition in NSW is working well. It has the benefit of existing civil and criminal case law to guide it, and we do not see a need to change it. Such a change could lead to unnecessary complexity and require further judicial consideration. It may simply shift the argument away from considering what is a "public act" to considering what is "in private".

6.52 As well, there may be limited practical difference between acts "other than in private" and public acts. Our review of the case law for civil and criminal vilification laws that apply to acts "other than in private" shows that they are applied in broadly similar circumstances to NSW's vilification laws.[64]

Other offences are available if an act is not covered by s 93Z

6.53 The availability of other offences in NSW and Commonwealth law also suggests that it is unnecessary to expand the definition of public act in s 93Z.

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62. *Criminal Code 2002* (ACT) s 750; *Criminal Code* (WA) s 77, s 78, s 80A, s 80B; *Racial Discrimination Act 1975* (Cth) s 18C; *Anti-Discrimination Act 1992* (NT) s 20A(3); *Discrimination Act 1991* (ACT) s 67A(1).

63. *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability,* Final Report (2023) vol 4 "Realising the Human Rights of People with Disability", rec 4.29, rec 4.30; Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA),* Project 111, Final Report (2022) rec 113; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT)*, Final Report (2015) rec 17.1.

64. See, eg, *Mulhall v Baker* [2010] WASC 359 [4]; *O'Connell v Western Australia* [2012] WASCA 96 [53]; *Re ETE* [2023] WADC 137 [63]; *Kerslake v Sunol* [2022] ACAT 40 [105]; *Rep v Clinch* [2021] ACAT 106 [63]; *Jones v Toben* [2002] FCA 1150 [73]; *McMahon v Bowman* [2000] FCMA 3 [26]; *Bharatiya v Antonia* [2022] FCA 428 [35]–[36]; *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 [63]; *Jones v Scully* [2002] FCA 1080 [97]; *Kelly-Country v Beers* [2004] FMCA 336 [82]; *McLeod v Power* [2003] FMCA 2 [71]–[73]; *Kitoko v University of Technology Sydney* [2018] FCCA 699 [232].

6.54 As the Aboriginal Legal Service and Legal Aid NSW observed, other offences may be available where there is doubt as to whether the definition of "public act" is met.[65] This may include the offences of:

- using a carriage service to menace, harass or cause offence,[66] or
- stalking or intimidation with intent to cause physical or mental harm.[67]

6.55 If an offence was motivated by hatred or prejudice, this could be taken into account on sentence.[68]

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65. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2; Legal Aid NSW, *Submission SV68,* 2.
66. *Criminal Code* (Cth) s 474.17.
67. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13.
68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

7. The mental element

In brief

The mental element of recklessness should not be removed from s 93Z of the *Crimes Act 1900* (NSW). This means the mental elements of the offence should remain as "intention" and "recklessness".

7.1 In addition to proving the physical elements of s 93Z, the prosecution must prove that the accused person had a particular mental state, or "mens rea". Under s 93Z, the prosecution must prove that the accused either:

- **intentionally** threatened or incited violence, or
- **recklessly** threatened or incited violence.[1]

7.2 A person commits a s 93Z offence "recklessly" if they realise that a possible outcome of their act is that violence could be incited, or threatened, but goes ahead and does the act anyway.[2]

7.3 We have considered whether the element of recklessness should be removed from s 93Z. If it is removed, the prosecution would need to prove that the accused intentionally threatened or incited violence.

7.4 We conclude that no changes should be made to the mental element of s 93Z. In particular, we do not consider that s 93Z should be confined to intentional acts. For

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1. *Crimes Act 1900* (NSW) s 93Z(1).
2. *Blackwell v R* [2011] NSWCCA 93, 81 NSWLR 119 [78]; *Aubrey v R* [2017] HCA 18, 260 CLR 305 [46]–[49].

the reasons expressed in this chapter, recklessness should remain an element of s 93Z.

Some supported removing recklessness

7.5 In submissions, some groups argued that recklessness should be removed from s 93Z. This was proposed by a range of legal groups and some religious groups.[3]

7.6 The key arguments in favour of removing recklessness were that:

- an offence against s 93Z is so serious that it should only cover intentional acts, and
- there is a risk that a recklessness element can capture conduct that should not be criminalised.

Section 93Z is too serious to include recklessness

7.7 A conviction under s 93Z has serious consequences. The maximum term of imprisonment is 3 years.[4] A conviction can also carry serious stigma.[5]

7.8 There is a view that criminalisation and criminal penalties, including imprisonment, should be reserved for the most serious cases of vilification that involve intentional acts.[6] Some submissions argued this concern is now heightened, as charges can be laid by police without requiring approval from the Director of Public Prosecutions.[7]

7.9 Considering the seriousness of a criminal conviction, the Aboriginal Legal Service observed the broad civil prohibitions in the *Anti-Discrimination Act 1977* (NSW) (*ADA*) are more appropriate where intent cannot be proved.[8] While the Law Society of NSW (Law Society) considered that removing recklessness could "streamline and

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3. Human Rights Law Alliance, *Submission SV01* [6]; Law Society of NSW, *Submission SV03*, 3; Legal Aid NSW, *Submission SV23*, 3; Legal Aid NSW, *Submission SV68,* 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64,* 2; Anglican Church Diocese of Sydney, *Submission SV49* [16]–[24]; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; Faith NSW and Better Balanced Futures, *Submission SV65,* 3.
4. Human Rights Law Alliance, *Submission SV01* [6]; Law Society of NSW, *Submission SV03,* 3; Legal Aid NSW, *Submission SV23*, 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; Legal Aid NSW, *Submission SV68,* 2.
5. Australian Christian Lobby, *Submission SV56*, 3.
6. Human Rights Law Alliance, *Submission SV01* [6]; Law Society of NSW, *Submission SV03*, 3.
7. Law Society of NSW, *Submission SV03,* 3; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64,* 2.
8. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 2.

simplify" s 93Z, it cautioned that civil remedies must be adequate before this is done.[9]

There is a risk of unintended consequences

7.10 Another argument in favour of this reform is that confining s 93Z to intentional acts would reduce the risk of overreach. For instance, the Law Society argued that removing recklessness "may be one way to reduce the risk of deterring or criminalising non-malicious communication".[10] Some groups expressed concern that the element of recklessness could lead to s 93Z applying to conduct that should not be criminalised. This might include expressions of orthodox religious teachings and strong convictions.[11]

7.11 Others argued that recklessness places an unjustified limitation on the freedom of expression and religion. Legal Aid NSW observed that international law principles recognise that to protect the right to freedom of expression, speech should only be criminalised when accompanied by an intention to threaten or incite violence.[12]

7.12 Another view was that removing recklessness might reduce the potential for s 93Z to affect certain communities disproportionately and adversely. As discussed in chapter 3, throughout this review we heard broad concerns that s 93Z may be used to target certain groups such as young people or Aboriginal and Torres Strait Islander peoples.

7.13 For instance, academics from the UTS Law Criminal Justice Cluster referred to public order offences and offences targeting racial discrimination being used against marginalised groups. There is a risk that the law may criminalise the same groups that it is meant to protect.[13] This concern was shared by several submissions.[14] Removing recklessness would reduce the scope of s 93Z and may limit the impact on these groups.

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9. Law Society of NSW, *Submission SV03*, 3
10. Law Society of NSW, *Submission SV03*, 3.
11. Catholic Women's League Australia, NSW Inc, *Submission SV59*, 3; Australian Christian Lobby, *Submission SV56*, 3.
12. Legal Aid NSW, *Submission SV23,* 3, citing "Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence" in Human Rights Committee, *Annual Report of the United Nations High Commissioner for Human Rights*, UN Doc A/HRC/22/17/Add 4 (11 January 2013) appendix [34].
13. E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 25–28; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64,* 2, 4.
14. NSW Bar Association, *Submission SV39* [46]–[48]; Equality Australia, *Submission SV18,* 9.

Recklessness should remain in s 93Z

7.14 We acknowledge that s 93Z is an offence with serious consequences, including the possibility of imprisonment. It is important that criminal sanctions are only applied to sufficiently serious conduct and do not apply disproportionately to certain groups.

7.15 However, a wide range of submissions including those from academics, Equality Australia and various religious groups argued that recklessness is an appropriate element for s 93Z and should be retained.[15]

7.16 For the reasons discussed below, we do not recommend the removal of recklessness.

Removing recklessness could reduce protections

7.17 The element of recklessness plays an important role within s 93Z. Removing this element could decrease the protection offered by s 93Z at a time when some community groups are reporting widespread, and increasing, incidents of vilification (as discussed in chapter 3).

7.18 Removing recklessness would not address any concerns about the low prosecution rate. The element was included in s 93Z in response to concerns about the lack of prosecutions of the predecessor *ADA* offences. A 2013 parliamentary committee recommended those offences be extended to cover reckless acts, noting concerns that the difficulty of proving intention contributed to the lack of prosecutions.[16]

7.19 In addition, as some submissions observed, even conduct that is done recklessly can cause significant harm — particularly if the conduct threatens or incites violence. If a person acts with a disregard for foreseeable consequences, arguably these acts should be captured by the offence.[17]

7.20 We are also aware of the deterrent and educative effect of the criminal law. As some religious groups emphasised to us, recklessness places an onus on people to

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15. S Sorial and K Gelber, *Submission SV45,* 1; Anglican Church Diocese of Sydney, *Submission SV22* [16]–[18]; Australian National Imams Council, *Submission SV52,* 3; Shia Muslim Council of Australia, *Submission SV53, 22*; Equality Australia, *Submission SV57,* 2; Public Interest Advocacy Centre, *Submission SV60,* 1; NSW Jewish Board of Deputies, *Submission SV62*, 2; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 3.
16. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [4.95]–[4.107], rec 3.
17. Australian National Imams Council, *Submission SV52*, 3; Equality Australia, *Submission SV57*, 2; N C Wright, *Submission SV66*, 2.

be mindful of their influence on the community, particularly when they are in a position of status, power, or influence.[18]

7.21 If s 93Z is confined to intentional acts, an accused person may defend a charge by arguing that they did not have an intention to incite or threaten violence. Removing recklessness may limit the educative and deterrent effect of s 93Z.[19]

Recklessness does not set the bar too low

7.22 We acknowledge concerns that s 93Z might capture a wider range of conduct with recklessness as an element, than without it. Recklessness is generally considered to be a lower threshold, with a lower level of culpability than intention.[20]

7.23 However, we are not aware of concerns that the recklessness element has resulted in inappropriate charges or prosecutions. Arguably, the small number of prosecutions under s 93Z may suggest that the inclusion of recklessness has not set the bar too low.[21]

7.24 We also note that s 93Z is unlikely to criminalise threats or incitement to violence where an accused could not have foreseen the possible consequences.[22] To establish that an accused person committed an offence under s 93Z recklessly, a prosecutor must prove beyond reasonable doubt that the person had foresight of the possibility of incitement or threat.[23] This means that the prosecution must prove that the accused "actually thought about the consequences of his or her act".[24] This does not set the bar too low.

7.25 Nevertheless, the NSW Government should continue to monitor the impact of s 93Z. If it is shown that the inclusion of "recklessness" is resulting in inappropriate charges or disproportionately affecting certain marginalised groups, it may require further consideration.

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18. NSW Faith Affairs Council, *Consultation SVC10*; Hindu group representatives, *Consultation SVC12*.
19. N Cowdery, "Review of Law of Vilification: Criminal Aspects" (Paper prepared for the Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009) 5.
20. Victorian Law Reform Commission, *Recklessness,* Report (2024) [2.21].
21. S Sorial and K Gelber*, Submission SV45*, 1.
22. S Sorial and K Gelber*, Submission SV45,* 1.
23. *Blackwell v R* [2011] NSWCCA 93, 81 NSWLR 119 [76]–[78].
24. Judicial Commission of NSW, *Criminal Trial Courts Bench Book* <www.judcom.nsw.gov.au/publications/benchbks/criminal/recklessness.html#p4-090> (retrieved 10 September 2024) [4–092].

Recklessness forms part of vilification laws across Australia

7.26 The Law Society advocated for removing recklessness to make NSW consistent with other Australian jurisdictions that only criminalise intentional acts of vilification.[25] This includes the Commonwealth, Victoria and South Australia.[26]

7.27 However, NSW is not alone in criminalising reckless incitement or threats of violence. For instance, in Queensland, it is an offence to knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of a person or a group on the basis of a protected attribute.[27]

7.28 In the Australian Capital Territory, it is an offence to intentionally carry out a threatening act in public being reckless to whether it incites hatred, revulsion, serious contempt or severe ridicule of a person of group on the basis of a protected attribute.[28]

7.29 Western Australia (WA) has two strict liability incitement offences that do not require the prosecution to prove the accused intended to incite racial animosity or racist harassment, or that the accused was reckless. There is no mental element for this part of the offence.[29] While reckless incitement is not specifically criminalised in WA, these two strict liability offences capture reckless incitement.

7.30 While the Victorian legislation focuses on intentional incitement, a 2021 parliamentary inquiry recommended that recklessness be added to the criminal vilification offence.[30] This recommendation was made to "simplify and lower the thresholds" in response to concerns that the offences were difficult to prove.[31] The Victorian Government supported the recommendation in principle.[32]

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25. Law Society of NSW, *Submission SV03*, 3; Law Society of NSW, *Submission SV47,* 2
26. *Criminal Code* (Cth) s 80.2A, s 80.2B; *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25; *Racial Vilification Act 1996* (SA) s 4.
27. *Criminal Code* (Qld) s 52A(1).
28. *Criminal Code 2002* (ACT) s 750.
29. *Criminal Code* (WA) s 78, s 80. Intentional incitement is criminalised in *Criminal Code* (WA) s 77, s 79.
30. *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25; Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti–Vilification Protections* (2021) 164–166, rec 20.
31. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti–Vilification Protections* (2021) 164, rec 20.
32. *Victorian Government Response to the Recommendations of the Legislative Assembly Legal and Social Issues Committee's Inquiry into Anti–Vilification Protections* (2021) 9.

7.31 The Commonwealth offences currently only criminalise acts where an accused person intentionally urges another person or group to use force or violence against a target, and does so intending that force or violence will occur.[33]

7.32 The Commonwealth has proposed an amendment that, if enacted, would also criminalise instances where an accused was reckless as to whether force or violence would occur.[34] This is intended to address concerns that the current legislation "sets the bar so high that conduct which is reprehensible enough to appropriately attract criminal liability is not captured by the offences".[35]

Recklessness is a well-established concept in NSW criminal law

7.33 As the Public Interest Advocacy Centre noted, recklessness is "common and well-established in law".[36] Many other serious offences in the *Crimes Act 1900* (NSW) (*Crimes Act*) contain both intention and recklessness as elements. These include, for example, wounding, damage, and sexual offences.[37] Often recklessness is included as an alternative *mens rea* to intention.

7.34 Several of these offences have a higher maximum penalty than s 93Z. For example, an offence of intentionally or recklessly destroying property carries a maximum penalty of 5 years' imprisonment, or 10 years if the damage is caused by fire.[38]

A tiered offence is unnecessary

7.35 Currently, the same maximum penalty (3 years' imprisonment) applies to intentional and reckless acts under s 93Z. The Law Society argued that a lower maximum penalty should apply if recklessness remains in s 93Z.[39] It submitted that this would clearly differentiate the objective seriousness of reckless conduct from that of intentional conduct.

7.36 While some offences in NSW take this approach, we do not consider that such a reform is necessary for s 93Z. It is not unusual for an offence to contain the same maximum penalty for intentional and reckless acts.

7.37 Many *Crimes Act* offences do not distinguish between intention and recklessness when providing the maximum penalty. For example, the offence of intentionally or recklessly destroying or damaging property carries a maximum penalty of 5 years.

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33. *Criminal Code* (Cth) s 80.2A, s 80.2B.
34. Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) sch 1 cl 3, cl 6, cl 11, cl 14. See also *Criminal Code* (Cth) s 5.4 definition of "recklessness".
35. Explanatory Memorandum, Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) [8].
36. Public Interest Advocacy Centre, *Submission SV60,* 1.
37. See, eg, *Crimes Act 1900* (NSW) s 33, s 35, s 37(1), s 61, s 61HK(1), s 195(1).
38. *Crimes Act 1900* (NSW) s 195(1)(a) s 195(1)(b).
39. Law Society of NSW, *Submission SV47,* 2.

This applies regardless of whether the mental element is intention or recklessness.[40]

7.38 Sentencing courts are capable of distinguishing between offences. The fact that the same maximum penalty applies does not mean that the sentence will be the same for a reckless offence and an intentional offence. A sentencing court considers the fault element and criminality of the offender, among a range of other factors.[41] The mental state of the offender is one factor that a court considers on sentence.

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40. *Crimes Act 1900* (NSW) s 195(1)(a).

41. *R v Dean* [2013] NSWSC 1027 [58]; *Subramaniam v R* [2013] NSWCCA 159 [57].

8. Maximum penalties and sentencing

In brief

We do not recommend increasing the maximum penalty for s 93Z of the *Crimes Act 1900* (NSW) or introducing a penalty enhancement model to existing general offences. We recommend the NSW Government consider commissioning a review of the effectiveness of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and consider measures to improve data collection of hate crime charged under offences other than s 93Z.

8.1 In this chapter, we consider the adequacy of the maximum penalty for s 93Z of the *Crimes Act 1900* (NSW). We also consider two other issues relevant to penalties for hate crime offences:

- the aggravating factor that applies on sentencing in NSW where general offences are motivated by hatred or prejudice,[42] and
- the "penalty enhancement model" that applies in some other jurisdictions, under which aggravated versions of general offences apply when hatred or prejudice is involved.

8.2 It is important to ensure the criminal framework can properly address all instances of hate-based conduct, given the serious harm it causes to the community. However, we do not recommend increasing the maximum penalty for s 93Z. Nor do

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42. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

we recommend new aggravated offences in the scope of this review. Rather, further review of the sentence aggravation provision and improving data collection may be more appropriate responses.

The maximum penalty for s 93Z

8.3 The maximum penalty for an offence under s 93Z is:

- for an individual: imprisonment for 3 years, or 100 penalty units ($11,000), or both
- for a coroporation: 500 penalty units ($55,000).[43]

8.4 The maximum penalty has not changed since s 93Z was introduced in 2018. It was was a considerable increase from the 6-month maximum penalty under the predecessor offences in the *Anti-Discrimination Act 1977* (NSW) (*ADA*). In introducing s 93Z, the then Attorney General, the Hon Mark Speakman SC, said "[t]he increased maximum penalties will better reflect community standards, and the seriousness of the criminal conduct".[44]

8.5 As indicated in chapter 2, a range of other offences might also cover hate-based conduct. The maximum penalties for some of these alternative offences are higher than those available under s 93Z. This raises the question of whether the maximum penalty for s 93Z is sufficient.

8.6 There was some support in submissions for increasing the maximum penalty.[45] However, most argued that the current maximum penalty should not change.[46] One submission supported increasing the maximum penalty for corporations but not for individuals.[47] For the reasons discussed below, we do not recommend that the maximum penalty should increase.

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43. *Crimes Act 1900* (NSW) s 93Z(1).
44. NSW, *Parliamentary Debates*, Legislative Assembly, Second Reading Speech, 5 June 2018, 44.
45. Australian Education Union, NSW Teachers Federation Branch, *Submission SV67*, 4; N C Wright, *Submission SV66*, 2; Equality Australia, *Submission SV57*, 4; NSW Jewish Board of Deputies, *Submission SV62*, 3.
46. Shia Muslim Council of Australia, *Submission SV53*, 23; Legal Aid NSW, *Submission SV68,* 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 3; S Sorial and K Gelber, *Submission SV45*, 3; Catholic Archdiocese of Sydney, *Submission SV50,* 5; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 4; Anglican Church Diocese of Sydney, *Submission SV49* [47]; Australian National Imams Council, *Submission SV52*, 4; Faith NSW and Better Balanced Futures, *Submission SV65*, 3; Public Interest Advocacy Centre, *Submission SV60*, 2; M Hashimi, *Submission SV55*, 4.
47. Law Society of NSW, *Submission SV47,* 3.

Concerns that the maximum penalty is too low

8.7 Equality Australia, the NSW Jewish Board of Deputies (NSWJBD), the Australian Education Union, NSW Teachers Federation Branch, and an individual submission supported an increase to the maximum penalty.[48] Two main reasons were offered in support of an increase.

The penalty should be consistent with other offences

8.8 One argument is that the maximum penalty for s 93Z should be consistent with penalties for offences that could be charged instead of s 93Z.[49] For instance, this might include the offences of:

- a threat to kill or harm (maximum penalty of 10 years' imprisonment)[50]
- destroy or damage property (maximum penalty of 5 years' imprisonment),[51] and
- intimidation (maximum penalty of 5 years' imprisonment).[52]

8.9 As discussed in chapter 3, the higher maximum penalties might be one reason why police charge these offences in preference to s 93Z.[53] This could contribute to the low number of prosecutions of s 93Z.

8.10 It could be argued that increasing the maximum penalty for s 93Z would provide an incentive for police to charge s 93Z rather than these other offences. This may increase both the number of charges and the visibility of hate crime prosecutions.

8.11 A similar issue was identified in Victoria, where the maximum penalty for serious vilification is 6 months' imprisonment.[54] A parliamentary committee recently recommended that the Victorian Government review the current maximum penalty, to incentivise police to charge serious vilification offences by increasing consistency with comparable offences.[55]

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48. Equality Australia, *Submission SV57*, 4; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 4; NSW Jewish Board of Deputies, *Submission SV62*, 3; N C Wright, *Submission SV66*, 2.
49. Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 4; Equality Australia, *Submission SV57*, 4; NSW Jewish Board of Deputies, *Submission SV62*, 3.
50. *Crimes Act 1900* (NSW) s 31(1).
51. *Crimes Act 1900* (NSW) s 199(1).
52. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13(1).
53. Legal Aid NSW, *Submission SV23,* 2.
54. *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25.
55. Parliament of Victoria, Legislative Assembly Legal and Social Issues Committee, *Inquiry into Anti-Vilification Protections* (2021) 170.

A higher penalty may send strong message that vilification is not tolerated

8.12 A maximum penalty is, among other things, an expression of the parliament's views about how serious the offence is.[56]

8.13 One view is that the disparity in the maximum penalties between s 93Z and other offences that could be charged may create a "hierarchy of harm".[57] It could be perceived that the government views conduct under s 93Z as less harmful than that of other offences.[58]

8.14 As outlined in chapter 3, serious vilification produces wide social harms. The maximum penalty may not reflect that the offending affects the wider community, beyond the individual or group that is directly impacted.

8.15 Increasing the maximum penalty may send a clear message that this conduct is contrary to community standards and instil confidence in protected groups that they are supported by the law. [59]

The current maximum penalty should not change

8.16 We acknowledge the need to ensure the maximum penalty adequately reflects the seriousness of vilification, including the significant negative effect on the wider community. For the following reasons, we do not recommend a change to the maximum penalty.

There is no indication the current penalty is inadequate

8.17 There is currently no evidence that the courts lack scope to sentence offenders for s 93Z offences appropriately.

8.18 A maximum penalty is the highest penalty that a court may impose when sentencing an offender for a particular offence. The maximum penalty for an offence is a guidepost for sentencing courts. [60] However, it is only one factor that a court considers when sentencing an offender.

8.19 The maximum penalty is reserved for cases where the circumstances of the offender and the nature of the crime are so grave that they warrant imposition of the maximum penalty that is available.[61] Courts can impose a penalty that is less

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56. *R v H* (1980) 3 A Crim R 53, 65; *R v Moon* [2000] NSWCCA 534 [67].
57. M Hawila and N L Asquith, *Submission SV21,* 2.
58. M Hawila and N L Asquith, *Submission SV21,* 2.
59. Australian Education Union, NSW Teachers Federation Branch, *Submission SV67,* 4.
60. *Muldrock v R* [2011] HCA 39, 244 CLR 120 [27].
61. *R v Kilic* [2016] HCA 48, 259 CLR 256 [18].

than the maximum.[62] When deciding what penalty to impose, a court should consider where the case falls on a "spectrum" — from least serious instances to the worst category of that particular offence.[63]

8.20 Reasons for increasing a maximum penalty might include that:

- there are concerns that the courts are imposing sentences that are too lenient, or
- there is evidence that it is not high enough to allow courts to sentence a person for the worst example of the offence.[64]

8.21 To assess the appropriateness of the current penalty, it is important to understand how offenders are being sentenced for s 93Z offences. Without more prosecutions, it is difficult to comment on the sentencing trends and appropriateness of penalties.

8.22 The limited evidence suggests that courts have not been constrained by the maximum penalty in imposing an appropriate penalty.

8.23 The two defendants who were found guilty of s 93Z offences were both sentenced to six-month community correction orders in the Local Court.[65] Both defendants appealed their convictions. One appeal was upheld, and the conviction was set aside. The other appeal was dismissed.[66]

8.24 These sentences were initially imposed in the Local Court, which can only impose a maximum of 2 years' imprisonment if dealing with a single offence, and 5 years' imprisonment for multiple offences.[67]

8.25 The fact that the sentences were substantially below both the maximum penalty, and the jurisdictional limit of the Local Court, may suggest that courts have not been constrained by the 3-year maximum. Based on the limited number of prosecutions to date, the maximum penalty has allowed adequate scope for sentencing.

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62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21.
63. *R v Kilic* [2016] HCA 48, 259 CLR 256 [19].
64. Victoria, Sentencing Advisory Council, *Maximum Penalties: Principles and Purposes*, Preliminary Issues Paper (2010) [3.1].
65. NSW Bureau of Crime Statistics and Research, *CourtSection93ZCharges_202407* (ref ac24-24016); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.
66. Transcript of Proceedings, *Thukral v R* (NSWDC, Culver DCJ, 2020/00253545, 6 February 2024); *Kanwal v R* (NSWDC, Culver DCJ, 2020/00257129, 7 June 2024).
67. *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A); *Crimes (Sentencing Procedure Act) 1999* (NSW) s 53B.

The maximum penalty is not unduly low in general comparisons

8.26 Comparisons with other Australian jurisdictions do not make a clear case for an increase. There is significant diversity in maximum penalties across Australian jurisdictions.

8.27 The Commonwealth and Western Australia (WA) are the only jurisdictions with higher maximum penalties than NSW.[68] Commonwealth offences carry maximum penalties of 5 or 7 years' imprisonment.[69] The new offences of threatening violence proposed by the Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) currently contain the same maximum penalties as the existing offences.[70] In WA, maximum penalties on indictment range from 3 to 14 years' imprisonment. Some offences may be dealt with summarily, in which case a lower maximum penalty applies.[71] As described in chapter 4, concerns have been raised about the breadth of the WA offences.

8.28 However, across Australia, the 3-year maximum penalty in NSW falls in the middle of the range. It is comparable with the penalties in South Australia and Queensland.[72] It is a significantly higher than that in the Australian Capital Territory (a fine only) and Victoria (6 months' imprisonment).[73]

It is not necessary to match other offences

8.29 We do not consider that there is a need to increase the maximum penalty to match other offences that may be charged as alternatives to s 93Z.

8.30 Concerns about the disparity in penalties have featured in the legislative history of vilification offences in NSW. This issue was considered in a NSW parliamentary committee review of one of the predecessor offences to s 93Z. The committee noted concerns that the 6-month maximum penalty in s 20D of the *ADA* may have been contributing to a lack of charges.[74] The penalty was lenient in comparison with other offences such as common assault or affray.[75]

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68. *Criminal Code* (Cth) s 80.2A(1), s 80.2A(2), s 80.2B(1), s 80.2B(2); *Criminal Code* (WA) s 77–s 80D.
69. *Criminal Code* (Cth) s 80.2A(1), s 80.2A(2), s 80.2B(1), s 80.2B(2).
70. Criminal Code Amendment (Hate Crimes) Bill 2024 (Cth) sch 1 cl 19; see *Criminal Code* (Cth) s 80.2A(1), s 80.2A(2), s 80.2B(1), s 80.2B(2).
71. *Criminal Code* (WA) s77–s 80D.
72. *Racial Vilification Act 1996* (SA) s 4; *Criminal Code* (Qld) s 52A(1).
73. *Criminal Code 2002* (ACT) s 750(1); *Racial and Religious Tolerance Act 2001* (Vic) s 24, s 25.
74. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [5.55].
75. NSW, Legislative Council, Standing Committee on Law and Justice, *Racial Vilification Law in New South Wales*, Report 50 (2013) [5.39]–[5.40].

8.31 However, increasing the maximum penalty from 3 years may not necessarily increase the numbers of prosecutions. While the maximum penalty may be one factor that informs charging decisions, other factors may also influence police discretion. This might include that the other offences are considered easier to prove, or police may be more familiar with them.[76]

A risk of disadvantaging certain groups without increasing protections

8.32 While there may be symbolic reasons for increasing the maximum penalty, it is unclear whether doing so would be more effective at preventing hate crime.[77] A range of groups told us that the current maximum penalty may already be sufficient to have an educative and deterrent effect.[78]

8.33 Proving the actual deterrent effect of any criminal offence or penalty is difficult. However, studies suggest that increasing a maximum penalty does not generally increase the deterrent effect.[79] This is particularly the case for offences that are not planned or are impulsive.[80]

8.34 Increasing the maximum penalty may disproportionately impact disadvantaged or vulnerable sections of the community, without providing any positive effect on deterrence or prosecutions.[81] It could lead to higher incarceration rates for some groups in the community, particularly Aboriginal and Torres Strait Islander peoples, that are disproportionately affected by public order offences (we discuss this in chapter 3).

8.35 One view is that increasing the maximum penalty may be counterproductive and reduce social cohesion rather than improve it. As one submission observed, less punitive approaches may be better at promoting education and maintaining "peace and order".[82] It may also reduce the risk unintended consequences impacting already disadvantaged members of our community.[83]

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76. See, eg, E Methven, D Luong, D Kemp and T Anthony, *Submission SV20,* 18; M Hawila and N L Asquith, *Submission SV21,* 3; Anti-Discrimination NSW, *Submission SV04*, 3.
77. Public Interest Advocacy Centre, *Submission SV60*, 2; Multicultural Group Representatives, *Consultation SVC15.*
78. Anglican Church Diocese of Sydney, *Submission SV49* [48]; Australian National Imams Council, *Submission SV52,* 4; Faith NSW and Better Balanced Futures, *Submission SV65,* 3.
79. D Ritchie, *Does Imprisonment Deter? A Review of the Evidence*, Sentencing Matters (Sentencing Advisory Council, 2011) 2; P Menendez and D J Weatherburn, "Does the Threat of Longer Prison Terms Reduce the Incidence of Assault?" (2016) 49 *Australian and New Zealand Journal of Criminology* 389, 398–400.
80. P Menendez and D J Weatherburn, "Does the Threat of Longer Prison Terms Reduce the Incidence of Assault?" (2016) 49 *Australian and New Zealand Journal of Criminology* 389, 400.
81. M Hashimi, *Submission SV55*, 4.
82. M Hashimi, *Submission SV55*, 4.
83. M Hashimi, *Submission SV55*, 4.

Aggravating factors on sentence

Recommendation 8.1: Review s 21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999 (NSW)

The NSW Government should consider commissioning a review of the effectiveness of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

8.36 As discussed in chapter 3, one reason for the low level of s 93Z prosecutions may be that police prefer to charge other general offences. These offences may be simpler to prove, and have a higher maximum penalty, than s 93Z.

8.37 When an offender is sentenced for a general offence, such as assault or intimidation, a sentencing court can consider the fact that the offence was motivated by hatred or prejudice. As explained in chapter 2, this can be taken into account either as:

- an aggravating factor on sentence under s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), or
- a factor informing the assessment of the objective seriousness of the offence.

8.38 Some submissions considered that s 21A(2)(h) adequately addresses offences motivated by hate.[84] However, others argued that it has limited scope, is difficult to prove and is either unused or its use is difficult to track.[85]

8.39 It is important to ensure that s 21A(2)(h) is operating effectively. It is an integral part of the criminal justice response to hate-based offending. It can apply across all offences. Because it is a factor relevant on sentence, and not an offence, it is not affected by plea negotiations.

8.40 Ensuring its effectiveness may also decrease the need for other, more extensive amendments.[86] It could, for instance, reduce the need to introduce aggravated versions of general offences (which we discuss below).

8.41 Properly evaluating the effectiveness of s 21A(2)(h), and other relevant sentencing principles, requires consideration of the wider sentencing framework. This is beyond the scope of our terms of reference. It requires more detailed consultation

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84. Anglican Church Diocese of Sydney, *Submission SV49* [52]; Australian National Imams Council, *Submission SV52*, 5; Catholic Women's League Australia, NSW Inc, *Submission SV59*, 4; Public Interest Advocacy Centre, *Submission SV60*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 4; Legal Aid NSW, *Submission SV68*, 4.
85. Australian Education Union, NSW Teachers Federation Branch, *Submission SV30*, 5; Equality Australia, *Submission SV57*, 5; Muslim Legal Network NSW, *Submission SV25* [16]; Equality Australia, *Submission SV18*, 6.
86. See NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [4.179].

and research (potentially including a transcript analysis) than we are able to conduct in this review.

8.42 However, given the concerns we heard about its operation and use, we recommend the Government commission a separate review of the effectiveness of s 21A(2)(h). We set out below some considerations that might inform such a review.

Concerns about the aggravating factor relating to hatred

8.43 We heard concerns that certain factors hinder the use of s 21A(2)(h). For instance, one submission pointed out that there is often a lack of evidence to support the aggravating factor at the time of sentence, and it may not be raised.[87]

8.44 Even if there is available evidence of hatred or prejudice, this does not mean that the aggravating factor can be proved. For a court to take this factor into account, the prosecution must establish beyond a reasonable doubt that the offending "was *motivated* by hate or prejudice" (emphasis added). Submissions observed that this could cause difficulties where an offence is accompanied by hate, but is not solely motivated by it.[88]

8.45 In addition, it is not always clear to the public when a court relies on s 21A(2)(h) when sentencing for general offences.[89] With no statistics tracking its use, there is no simple way of knowing exactly how often s 21A(2)(h) is raised or taken into account by a court.[90] This lack of visibility may contribute to a perception that serious vilification is not being adequately addressed.

Other jurisdictions use broader wording than s 21A(2)(h)

8.46 In some other jurisdictions, sentencing principles cover cases with mixed motivation, or focus on the outward expression of hate rather than the offender's motivation. For example:

- in England and Wales, Scotland, and Northern Ireland, an offence can be aggravated if it was "motivated wholly or partly by hostility toward members of a particular group" or "at the time of committing the offence, or immediately before or after doing so", the offender demonstrated hostility toward the victim[91]

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87. Muslim Legal Network, *Submission SV25* [16].
88. Australian Muslim Advocacy Network, *Submission SV19*, 11; Muslim Legal Network, *Submission SV25* [16].
89. Equality Australia, *Submission SV18*, 6.
90. Jumbunna Institute for Indigenous Education and Research and the National Justice Project, *Submission SV07,* 2.
91. *Sentencing Act 2020* (UK) s 66(4)(a)–(b); *Hate Crime and Public Order (Scotland) Act 2021* (Scot) s 1; *Criminal Justice (No. 2) (Northern Ireland) Order 2004* (NI) s 2.

- in Victoria and New Zealand, the offence can be aggravated by proving it was "motivated wholly or partly by" hatred or prejudice,[92] and
- in Tasmania, the factor can be proved if the offending was "motivated to any degree" by hatred or prejudice.[93]

Law reform inquiries have recommended reforms

8.47 Other law reform inquiries have recommended changes to aggravating factors to deal with hate-related offending more effectively.

8.48 The Tasmanian Sentencing Advisory Council recently recommended that the *Sentencing Act 1997* (Tas) be further broadened to:

- extend the existing aggravating factor to include a further type of prejudicial offending, that is "offending that is accompanied, either immediately before or after, by demonstrated hostility towards the group to which the offender belongs or is perceived to belong", and
- include a separate aggravating factor, where the offending "demonstrates targeted discrimination".[94]

8.49 In NSW, the aggravating factor was previously considered by the NSW Law Reform Commission (NSWLRC). In 2013, the NSWLRC recommended a new, standalone provision to replace s 21A(2)(h).[95] This would apply where an offence was motivated wholly or partly by hatred or prejudice against a group of people to which the offender believed the victim belonged or was associated with. One reason for this recommendation was so courts could apply the factor where there may have been a mixed motivation for the offence.[96]

8.50 This recommendation was not implemented. Given the continued difficulty and concerns we heard about the scope of s 21A(2)(h) during this review, it may be time for a fresh examination of the section.

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92. *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Sentencing Act 2002* (NZ) s 9(1)(h).
93. *Sentencing Act 1997* (Tas) s 11B.
94. Tasmania, Sentencing Advisory Council, *Prejudice and Discrimination as Aggravating Factors in Sentencing*, Final Report (2024) rec 3, rec 4.
95. NSW Law Reform Commission, *Sentencing,* Report No 139 (2013) rec 4.8.
96. NSW Law Reform Commission, *Sentencing,* Report No 139 (2013) [4.184]–[4.185].

Should there be aggravated offences?

Recommendation 8.2: Measures to improve data collection

The NSW Government should consider measures, such as a new Law Part Code, to improve the collection of data on hate crimes when offences other than s 93Z are charged for hate-related incidents.

8.51 Charging general offences is one way of responding to hate crime. However, some may say it does not send a strong statement about the community's views of such conduct or hold the offender sufficiently accountable. It also means the criminal justice response to hate crime is less visible than it may be if the conduct was charged under a specific hate-based offence.

8.52 One option to improve accountability, and to enhance the educative and symbolic effect of the criminal law, might be to introduce more serious (or "aggravated") versions of general offences. This might include assault or intimidation. Higher maximum penalties could apply where these general offences involve hatred or prejudice.

8.53 To establish an aggravated offence, and apply a higher maximum penalty, the prosecution would need to prove:

- the elements of the general offence, and
- the aggravating circumstance, for example, that the offence was motivated by or involved demonstration of hatred or hostility.

8.54 This is sometimes known as the "penalty enhancement model".[97] It has been introduced in Queensland, WA, England and Wales in relation to hate-based crime.[98] This general framework of aggravated offences is used in other contexts in NSW. For example, an offence of break and enter can be aggravated by a range of factors.[99]

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97. G Mason, "Penalty Enhancement Laws: A Model for Regulating Hate Crime in Australia?" (2021) 48 *University of Western Australia Law Review* 470, 472.
98. *Criminal Code* (Qld) s 52B, s 69, s 75, s 207, s 335, s 339, s 359, s 359E, s 469; *Summary Offences Act 2005* (Qld) s 6(6), s 11(4); *Criminal Code* (WA) s 80I, s 313(1)(a), s 317(1)(a), s 317A(d), s 338B(1)(b), s 444(1)(b); *Crime and Disorder Act 1998* (UK) s 29.
99. *Crimes Act 1900* (NSW) s 105A(1).

8.55 Some submissions supported such a model for NSW.[100] However, others (including some legal groups and religious groups) did not.[101]

8.56 We conclude that the development of a "penalty enhancement model" for hate crime would require in-depth consideration, research and consultation. It is not possible to do this within the scope of the present terms of reference.

8.57 However, we set out some observations below. These include concerns that the model may not have the desired effect and may instead present further problems. To improve the visibility of the criminal justice response, it may be preferable to instead consider ways to improve the collection of data on hate-related crime.

Potential models for new aggravated offences

8.58 Aggravated hate-based offences are available in other jurisdictions where, for instance:

- the offence was wholly or partly motivated by hatred,[102] or
- the offender demonstrated hostility towards the victim based on the victim being a member of a particular protected group.[103]

8.59 In Queensland, an aggravated offence may be committed where an offender:

- commits a prescribed general offence, such as assault
- the offender was wholly or partly motivated by hatred or serious contempt toward a person or group of persons, and
- the hatred or serious contempt was based on a characteristic or presumed characteristic of the person or group, including their race, religion, sexuality, sex characteristics, or gender identity.[104]

8.60 A range of Queensland offences can be aggravated by hatred or serious contempt, including assault, intimidation, property, and public order offences.[105] For example,

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100. Australian Muslim Advocacy Network, *Submission SV19,* 2; Equality Australia, *Submission SV57,* 4; Muslim Legal Network, *Submission SV25* [19].
101. Anglican Church Diocese of Sydney, *Submission SV49* [49]; Australian National Imams Council, *Submission SV52*, 5; Catholic Women's League Australia, NSW Inc, *Submission SV59,* 4; Public Interest Advocacy Centre, *Submission SV60*, 2; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission SV64*, 4; Legal Aid NSW, *Submission SV68,* 4; Catholic Archdiocese of Sydney, *Submission SV50*, 6.
102. See, eg, *Criminal Code* (Qld) s 52B(1); *Criminal Code* (WA) s 80I(b).
103. See, eg, *Criminal Code* (WA) s 80I(a).
104. *Criminal Code* (Qld) s 52B.
105. *Criminal Code* (Qld) s 52B, s 69, s 75, s 207, s 335, s 339, s 359, s 359E, s 469; *Summary Offences Act 2005* (Qld) s 6, s 11.

the maximum penalty for assault occasioning actual bodily harm increases by 3 years if the circumstance of aggravation applies.[106]

8.61 A similar model applies to various offences in England, Wales and WA, although the WA laws apply to only racial hatred.[107] In WA, the maximum penalty for an offence of making a threat is doubled if the offence is committed in circumstances of racial aggravation.[108]

8.62 In England and Wales, the test is wider. An offence can be racially or religiously aggravated if either motivated by racial or religious hostility, or if the offender demonstrates hostility to the victim at the time of committing the offence, or immediately before or after the offence.[109]

Arguments in support of new aggravated offences

8.63 A range of submissions considered that introducing aggravated offences would have desirable symbolic effects. For instance, it could:

- send a message that hate-based conduct is not acceptable or tolerated[110]
- protect social cohesion[111]
- deter offending[112]
- recognise that offending motivated by hate causes unique social and emotional harm and acknowledge its effect on the victim and community[113]
- hold offenders accountable for this additional harm,[114] and
- emphasise the seriousness of the offences by allowing courts to impose harsher penalties.[115]

8.64 Some submissions argued that aggravated versions of common offences could be easier to prosecute than s 93Z and may be more likely to be used.[116] For instance:

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106. See, eg, *Criminal Code* (Qld) s 339(5).
107. See, eg, *Offences against the Person Act 1861* (UK) s 20; *Crime and Disorder Act 1998* (UK) s 28, s 29(1)(a); *Criminal Code* (WA) s 80I, s 313(1)(a), s 317(1)(a), s 317A(d), s 338B(b), s 444(1)(b).
108. *Criminal Code* (WA) s 338B(1)(a).
109. *Crime and Disorder Act 1998* (UK) s 28(1).
110. Equality Australia, *Submission SV18*, 9; Australian Education Union, NSW Teachers Federation Branch, *Submission SV67*, 4–5.
111. Muslim Legal Network, *Submission SV25* [19].
112. Australian Federation of Islamic Councils, *Submission SV51*, 7.
113. Equality Australia, *Submission SV18*, 9; Muslim Legal Network, *Submission SV25* [17]; Australian Muslim Advocacy Network, *Submission SV19*, 12.
114. N C Wright, *Submission SV66*, 2.
115. Australian Federation of Islamic Councils, *Submission SV51*, 7.
116. Australian Federation of Islamic Councils, *Submission SV51*, 7.

- common offences, such as offences against property or the person, have better known elements, which can be adapted and added to the aggravated offences,[117] and
- it would not be necessary to establish a threat or incitement to violence under an aggravated version of a general offence.[118]

8.65 Equality Australia also noted that aggravated offences could exist alongside s 21A(2)(h). This is because, in sentencing, courts should not have additional regard to any aggravating factor that is an element of the offence.[119] This means there would be no double counting.

8.66 However, the NSWJBD did not consider aggravated offences would be necessary if the penalties for s 93Z were aligned with other offences.[120]

Concerns about aggravated offences

8.67 Elsewhere in this report, we express concern about the expansion of criminal offences, including the potential for disproportionate impact on marginalised communities.

8.68 While we do not repeat them here, these concerns apply equally to the creation of aggravated offences. These offences should not be introduced without a thorough analysis of their potential impact, especially on Aboriginal and Torres Strait Islander peoples.

8.69 As discussed below, we are also concerned that new aggravated offences may be less effective in raising the visibility of hate crime than might be hoped. If this is the objective, there are less far-reaching means of achieving it than creating new offences.

The impact of aggravated offences may be diminished in practice

8.70 While aggravated offences may have a symbolic role, their impact may be diminished in practice. For instance, even if aggravated offences are available, police may still choose to lay and proceed with the "base" offence if simpler to prove.

8.71 Plea negotiations may further reduce the reach of aggravated offences. For example, someone charged with an aggravated offence may be hesitant to plead

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117. Equality Australia, *Submission SV18*, 9.
118. Muslim Legal Network, *Submission SV25* [14], [17].
119. Equality Australia, *Submission SV57*, 4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).
120. NSW Jewish Board of Deputies, *Submission SV62*, 3.

guilty if they can negotiate a guilty plea to the base offence instead. A prosecutor may accept a plea of guilty to the base offence to secure a conviction.[121]

8.72 Alternatively, there may be a risk of an increase in trials and hearings if offenders are unwilling to plead guilty to an aggravated offence with a higher penalty. This would increase the demand on the criminal justice system.

Aggravated offences could reduce recognition of hate-related offending

8.73 In some cases, the aggravated offences may not increase the visibility of the criminal justice response to hate crime. This is due to the interaction between aggravated offences and the *De Simoni* principle.[122]

8.74 The *De Simoni* principle provides that when sentencing a person for an offence, a court cannot take into account a circumstance of aggravation under s 21A(2)(h) if it would have warranted conviction for a more serious offence. Though the sentence should take into account all of the circumstances of the offence, an offender should not be punished for an offence of which they have not been convicted. This has been recognised as a "fundamental and important principle".[123]

8.75 A "more serious offence" is generally an offence that carries a higher maximum penalty than the offence for which the offender is being sentenced.[124]

8.76 If new aggravated offences have higher maximum penalties than the base offences, a court could not consider prejudice or hatred an aggravating factor on sentence where:

- an aggravated offence is withdrawn by the prosecution in exchange for a plea of guilty to a base offence
- a court finds an offender guilty of the base offence, but not guilty of the aggravated offence, or
- the offender is charged with a base offence, but the facts and circumstances of the case could have supported an aggravated offence.

8.77 The practical effect is that the interaction between aggravated offences and the *De Simoni* principle could result in serious vilification elements not being reflected in sentencing at all.

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121. See, eg, England and Wales, Law Commission, *Hate Crime: Should the Current Offences be Extended?* Report No 348 (2014) [4.174]–[4.175].
122. *R v De Simoni* (1981) 147 CLR 383.
123. *R v De Simoni* (1981) 147 CLR 383, 389. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(4).
124. See, eg, *R v Booth* (Unreported, NSWCCA, 12 November 1993) 2, 5; *R v Channells* (Unreported, NSWCCA, 30 September 1997) 11; *R v JB* [1999] NSWCCA 93 [28]; *Hector v R* [2003] NSWCCA 196 [16]–[17].

Another option is to collect data on hate crime

8.78 There are less far-reaching ways of improving the visibility of hate crime, and the criminal justice response to it, than to introduce aggravated offences with higher maximum penalties.

8.79 For instance, it may be beneficial for the NSW Government to investigate options for introducing a new Law Part Code to better track incidents of hate crime.[125]

8.80 A Law Part Code is a unique code assigned to all New South Wales and Commonwealth offences. Though a Law Part Code usually refers to a specific offence, it can also be used to differentiate between different types of the same offence; for example, differentiating domestic violence offences from other personal violence offences. The Law Part Code enables the collection of data about the charging and prosecution of offences.[126]

8.81 Some offences have "modifiers" applied that allow data to be recorded about specific circumstances. For example, the offence of common assault has two different Law Part Codes. A different Law Part Code applies if the offence is domestic violence related.[127] Several other offences also have a domestic violence Law Part Code, including intimidation and sexual offences.

8.82 A Law Part Code that applies to general, commonly-charged offences could improve data collection and the visibility of conduct that is motivated or accompanied by hatred or prejudice, where s 93Z is not charged.

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125. Academics, *Consultation SVC20*.

126. Judicial Commission of NSW, "About Law Codes" (2024) <https://lawcodes.judcom.nsw.gov.au/help> (retrieved 24 September 2024).

127. *Crimes Act 1900* (NSW) s 61. See Judicial Commission of NSW, "Law Part Code 244" (2024) <https://lawcodes.judcom.nsw.gov.au/lawcodes/law-part/view/bol_code/1/law_code/86/law_part_code/244> (retrieved 24 September 2024); Judicial Commission of NSW, "Law Part Code 64782" (2024) <https://lawcodes.judcom.nsw.gov.au/lawcodes/law-part/view/bol_code/1/law_code/86/law_part_code/64782> (retrieved 24 September 2024).

Appendix A: Submissions

SV01 Human Rights Law Alliance, 5 April 2024

SV02 Australian Christian Lobby, 5 April 2024

SV03 Law Society of NSW, 17 April 2024

SV04 Anti-Discrimination NSW, 18 April 2024

SV05 Secular Association of NSW Inc, 19 April 2024

SV06 Periyar Ambedkar Thoughts Circle Australia, 19 April 2024

SV07 Jumbunna Institute for Indigenous Education and Research and the National Justice Project, 19 April 2024

SV08 ACON and HIV/AIDS Legal Centre, 19 April 2024

SV09 NSW Council for Civil Liberties Inc, 19 April 2024

SV10 Public Interest Advocacy Centre, 19 April 2024

SV11 Union for Progressive Judaism, 19 April 2024

SV12 NSW Jewish Board of Deputies, 19 April 2024

SV13 Inner City Legal Centre, 19 April 2024

SV14 Advocate for Children and Young People, 19 April 2024

SV15 Australian Council of Jewish Schools, 19 April 2024

SV16 Rationalist Society of Australia, 19 April 2024

SV17 Jenny Leong MP, 19 April 2024

SV18 Equality Australia, 19 April 2024

SV19 Australian Muslim Advocacy Network, 19 April 2024

SV20 Dr Elyse Methven, Derick Luong, Daniel Kemp and Professor Thalia Anthony, 19 April 2024

SV21 Mahmud Hawila and Professor Nicole L Asquith, 20 April 2024

SV22 Anglican Church Diocese of Sydney, 21 April 2024

SV23 Legal Aid NSW, 22 April 2024

SV24 Confidential, 22 April 2024

SV25 Muslim Legal Network NSW, 23 April 2024

SV26 Australian National Imams Council, 23 April 2024

SV27 Kingsford Legal Centre, 23 April 2024

SV28 Autism Self Advocacy Network of Australia and New Zealand and Australian Autism Alliance, 24 April 2024

SV29 Confidential, 26 April 2024

SV30 Australian Education Union, NSW Teachers Federation Branch, 26 April 2024

SV31 Darulfatwa Islamic High Council of Australia, 26 April 2024

SV32 Australian Bahá'í Community, 27 April 2024

SV33 Local Court of NSW, 30 April 2024
SV34 Confidential, 30 April 2024
SV35 Faith NSW and Better Balanced Futures, 30 April 2024
SV36 Presbyterian Church of Australia in NSW, 2 May 2024
SV37 Confidential, 29 April 2024
SV38 Confidential, 26 April 2024
SV39 NSW Bar Association, 10 May 2024
SV40 Public Interest Advocacy Centre, 14 May 2024
SV41 Confidential, 10 May 2024
SV42 Australian Human Rights Commission, 3 June 2024
SV43 Union for Progressive Judaism, 24 June 2024
SV44 Confidential, 26 June 2024
SV45 Professor Sarah Sorial and Professor Katharine Gelber, 27 June 2024
SV46 Confidential, 27 June 2024
SV47 Law Society of NSW, 27 June 2024
SV48 Raymond Carter, 27 June 2024
SV49 Anglican Church Diocese of Sydney, 27 June 2024
SV50 Catholic Archdiocese of Sydney, 27 June 2024
SV51 Australian Federation of Islamic Councils, 27 June 2024
SV52 Australian National Imams Council, 27 June 2024
SV53 Shia Muslim Council of Australia, 27 June 2024
SV54 David A W Miller, 27 June 2024
SV55 Maryam Hashimi, 28 June 2024
SV56 Australian Christian Lobby, 28 June 2024
SV57 Equality Australia, 28 June 2024
SV58 Anti-Discrimination NSW, 28 June 2024
SV59 Catholic Women's League Australia, NSW Inc, 28 June 2024
SV60 Public Interest Advocacy Centre, 28 June 2024
SV61 Islamic Schools Association of Australia (NSW), 28 June 2024
SV62 NSW Jewish Board of Deputies, 28 June 2024
SV63 Dr Tamsin Clarke, 28 June 2024
SV64 Aboriginal Legal Service (NSW/ACT) Ltd, 28 June 2024
SV65 Faith NSW and Better Balanced Futures, 28 June 2024
SV66 Nathan C Wright, 1 July 2024
SV67 Australian Education Union, NSW Teachers Federation Branch, 1 July 2024
SV68 Legal Aid NSW, 5 July 2024
SV69 Ron Fox, 2 August 2024

Appendix B: Consultations

NSW Office of the Director of Public Prosecutions (SVC01)

1 March 2024

Sally Dowling SC, Director of Public Prosecutions

James Dorney, Principal Legal Adviser

Matt Karpin, Principal Legal Adviser

NSW Police Force (SVC02)

14 March 2024

Detective Superintendent Jason Dickinson, Commander, Anti-Terrorism and Intelligence Group

Jane Holden, Director, Legislation and Policy, Office of the Commissioner of Police

Legal Aid NSW (SVC03)

19 March 2024

Rhiannon McMillan, Senior Legal Project Officer, Crime Executive

Brianna Terry, Senior Law Reform Officer, Strategic Law Reform Unit

Jonathon Paff, Senior Law Reform Officer, Local Court Practice Manager (Coffs Harbour)

Ammy Singh, Solicitor (Human Rights)

Law Society of NSW (SVC04)

20 March 2024

Brett McGrath, President

Kenneth Tickle, CEO

Mark Johnstone, Director, Policy and Practice

Ali Mojtahedi, Chair, Human Rights Committee

Jonathon Hall-Spence, Human Rights Committee

Australian Bar Association (SVC05)

22 March 2024

Dr Ruth Higgins SC, President

Simeon Beckett SC, Chair, Human Rights Committee

Harriet Ketley, Director, Policy and Law Reform

Alanna Condon, Senior Policy Lawyer

Local Court of NSW (SVC06)

22 March 2024

Judge Peter Johnstone, Chief Magistrate

Deputy Chief Magistrate Theo Tsavdaridis

Yasmin Hunter, Executive Officer

District Court of NSW (SVC07)

27 March 2024

Judge Tanya Smith SC

Judge Nicole Noman SC

Judge Jane Culver

Commonwealth Director of Public Prosecutions (SVC08)

27 March 2024

David Bahlen, Deputy Director, Organised Crime and National Security

Eliza Amparo, Acting Deputy Director, Human Exploitation and Border Protection

Ellie McDonald, Practice Group Coordinator, Senior Federal Prosecutor, Organised Crime and National Security

Aboriginal Legal Service (NSW/ACT) (SVC09)

4 April 2024

Lauren Stefanou, Principal Solicitor, Justice Projects, Policy and Practice

NSW Faith Affairs Council (SVC10)

22 April 2024

Rt Rev Dr Michael Stead (Co-chair), Anglican Bishop of South Sydney

Surinder Jain (Co-chair), National Vice President and Director, Hindu Council of Australia

Rev Ralph Estherby, National Director of Chaplaincy Australia

Rev Dr Kamal Weerakoon, Gracepoint Presbyterian Church

Yashvi Shah, YST Legal

Ash Agarwal, National Legal Counsel of Hindu Council of Australia

Kate Xavier, Together for Humanity Foundation

Monica Chahoud, Melkite Catholic Eparchy

Anti-Discrimination NSW (SVC11)

22 April 2024

Helen McKenzie, President

Mia Zahra, Executive Manager

Religious group representatives (SVC12)

23 April 2024

Parviz Deamer, Australian Bahá'í Community

Joshua Rowe, State Director (NSW/ACT), Australian Christian Lobby

Elizabeth Stone, General Secretary, National Council of Churches in Australia

David Rose, General Secretary, NSW Ecumenical Council

Hindu group representatives (SVC13)

23 April 2024

Ash Agarwal, Hindu Council of Australia

Pandit Ramachandra Athreiya, Australian Council of Hindu Clergy

Islamic group representatives (SVC14)

23 April 2024

Ramia Abdo Sultan, Australian National Imams Council

Rita Jabri Markwell, Australian Muslim Advocacy Network

Cevdet Osman Basiacik, President, Muslim Legal Network (NSW)

Zaahir Edries, Muslim Legal Network (NSW)

Multicultural group representatives (SVC15)

23 April 2024

Haroon Kasim, Campaign Against Caste Discrimination

Annukina Warda, Executive Officer, Multicultural Youth Affairs Network (NSW)

Carmel La Rocca, Multicultural Council of Griffith

Richard Ogetii, Community Executive Officer, Albury-Wodonga Ethnic Communities Council Inc

Peter Doukas OAM, Chair, Ethnic Communities Council of NSW

Chris Lacey, CEO and Co Secretary, Multicultural Communities Council of the Illawarra

LGBTQIA+ and HIV/AIDS group representatives (SVC16)

24 April 2024

Ghassan Kassiseh, Legal Director, Equality Australia

Gil Beckwith, CEO, Sydney Gay and Lesbian Mardi Gras

Arden Cassie, President, Hunter Gender Alliance

Brent Mackie, Director Policy, Strategy and Research, ACON

Australian Human Rights Commission (SVC17)

29 April 2024

Lorraine Finlay, Human Rights Commissioner

Catherine Duff, Director, Race Discrimination Team

Giridharan Sivaraman, Race Discrimination Commissioner

Jewish Council of Australia (SVC18)

May 2024

Josh Bornstein

Jewish group representatives (SVC19)

2 May 2024

David Ossip, President NSW Jewish Board of Deputies

Natalie Rubenstein, Vice President, NSW Jewish Board of Deputies

Peter Wertheim, Executive Director, Executive Council of Australian Jewry

David Knoll AM, Union for Progressive Judaism

Academics (SVC20)

3 May 2024

Dr Alan Berman, Professor and Dean of Law, Charles Darwin University School of Law

Professor Katherine Gelber, Associate Dean (Academic), University of Queensland

Professor Nicole Asquith, University of Tasmania

Professor Sarah Sorial, Macquarie University

Mahmud Hawila, Barrister

Community legal groups (SVC21)

3 May 2024

Dianne Anagnos, Deputy Director/Solicitor, Kingsford Legal Centre

Katie Green, Managing Principal Solicitor, Inner City Legal Centre

Alastair Lawrie, Director, Policy and Advocacy, Public Interest Advocacy Centre

Sarah Marland, Executive Director, Community Legal Centres NSW

Stephen Blanks, Treasurer, NSW Council for Civil Liberties

Alex Stratigos, Principal Solicitor, HIV/AIDS Legal Centre

Premier's Prevention Panel on Hate and Extremism (SVC22)

4 June 2024

Simon Draper, Secretary, Premier's Department

Kate Meagher, Deputy Secretary, Community Engagement Group, Premier's Department

Shane Hamilton, Deputy Secretary, Aboriginal Affairs, Premier's Department

Gillian White, Deputy Secretary, Social Policy and National Reform, Cabinet Office

Joseph La Posta, CEO, Multicultural NSW

Paul McKnight, Deputy Secretary, Law Reform and Legal Services, Department of Communities and Justice

Dave Hudson, Deputy Commissioner, NSW Police Force

Deborah Wilcox, Deputy Secretary, Health System Strategy and Patient Experience, Ministry of Health

Deborah Summerhayes, Deputy Secretary, Public Schools, Department of Education

Aboriginal group representatives (SVC23)

6 June 2024

Shannon Field, Manager, Closing the Gap Implementation and Planning, Aboriginal Legal Service (NSW/ACT)

Samantha Foster, Link-Up (NSW) Aboriginal Corporation

Lucina Vitek, Senior Policy Officer, Aboriginal Legal Service (NSW/ACT)

Cr Ross Hampton, NSW Aboriginal Land Council

Cr Charles Lynch, NSW Aboriginal Land Council

Theresa Lake, Manager, Community Partnerships and Projects, Aboriginal Legal Service (NSW/ACT)

Sharif Deen, Head, NSW Coalition of Aboriginal Peak Organisations Secretariat

Merv Donovan, Policy Officer, NSW Aboriginal Educational Consultative Group

District Court of NSW (SVC24)

21 June 2024

Judge Tanya Smith SC

Judge Jane Culver

Appendix C: Criminal vilification offences

C.1 This appendix lists criminal vilification offences and "aggravated general offences" in both Australian, and selected overseas jurisidictions. We note that there is presently no criminal vilification offence in either the Northern Territory or Tasmania.

C.2 An "aggravated general offence" is a separate form of a general offence, such as assault, that carries a higher maximum penalty if it is motivated by, or involves, hatred. We have listed these where available, noting that not all jurisdictions have taken this approach. We discuss this model in chapter 8.

Australia

NSW

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Crimes Act 1900* (NSW)	s 93Z(1): offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status	3 years' imprisonment and/or 100 penalty units

Commonwealth[1]

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code* (Cth)	s 80.2A(1): urging violence against groups where the use of force or violence would threaten the peace, order and good government of the Commonwealth	7 years' imprisonment Summary conviction: 2 years' imprisonment and/or 120 penalty units

1. Note that s 4J of the *Crimes Act 1914* (Cth) provides that certain indictable offences may be dealt with summarily, and sets out the maximum penalties applicable in the summary jurisdiction.

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code* (Cth)	s 80.2A(2): urging violence against groups s 4J: certain indictable offences may be dealt with summarily	5 years' imprisonment Summary conviction: 12 months' imprisonment and/or 60 penalty units
Vilification offence	*Criminal Code* (Cth)	s 80.2B(1): urging violence against members of groups, where the use of force or violence that would threaten the peace, order and good government of the Commonwealth	7 years' imprisonment Summary conviction: 2 years' imprisonment and/or 120 penalty units
Vilification offence	*Criminal Code* (Cth)	s 80.2B(2): urging violence against members of groups	5 years' imprisonment Summary conviction: 12 months' imprisonment and/or 60 penalty units

Australian Capital Territory

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code 2002* (ACT)	s 750: serious vilification	50 penalty units

Victoria

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Racial and Religious Tolerance Act 2001* (Vic)	s 24: serious racial vilification	6 months' imprisonment and/or 60 penalty units
Vilification offence	*Racial and Religious Tolerance Act 2001* (Vic)	s 25: serious religious vilification	6 months' imprisonment and/or 60 penalty units

Queensland

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code* (Qld)	s 52A: serious racial, religious, sexuality or gender identity vilification	3 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 69(2): aggravated going armed as to cause fear	3 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 75(2): aggravated threatening violence	3 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 207(2) aggravated disturbing religious worship	6 months' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 335(3)(a): aggravated common assault	4 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 339(4)(a): aggravated assault occasioning bodily harm	10 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 359(3)(a): aggravated threats	7 years' imprisonment
Aggravated general offence	*Criminal Code* (Qld)	s 52B, s 359E(6)(a): aggravated stalking, intimidation, harassment or abuse	7 years' imprisonment

South Australia

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Racial Vilification Act 1996* (SA)	s 4: racial vilification	3 years' imprisonment and/or $5,000

Western Australia

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code* (WA)	s 77: conduct intended to incite racial animosity or racist harassment	14 years' imprisonment
Vilification offence	*Criminal Code* (WA)	s 78: conduct likely to incite racial animosity or racist harassment	5 years' imprisonment Summary conviction: 2 years' imprisonment and $24,000
Vilification offence	*Criminal Code* (WA)	s 79: possession of material for dissemination with intent to incite racial animosity or racist harassment	14 years' imprisonment
Vilification offence	*Criminal Code* (WA)	s 80: possession of material for dissemination that is likely to incite racial animosity or racist harassment	5 years' imprisonment Summary conviction: 2 years' imprisonment and $24,000
Vilification offence	*Criminal Code* (WA)	s 80A: conduct intended to racially harass	5 years' imprisonment Summary conviction: 2 years' imprisonment and $24,000
Vilification offence	*Criminal Code* (WA)	s 80B: conduct likely to racially harass	3 years' imprisonment Summary conviction: 12 months' imprisonment and $12,000
Vilification offence	*Criminal Code* (WA)	s 80C: possession of material for display with intent to racially harass	5 years' imprisonment Summary conviction: 2 years' imprisonment and $24,000

Provision type	Act	Provision	Maximum Penalty (individual)
Vilification offence	*Criminal Code* (WA)	s 80D: possession of material for display that is likely to racially harass	3 years' imprisonment Summary conviction: 12 months' imprisonment and $12,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, 313(1)(a): racially aggravated common assault	3 years' imprisonment and a fine of $36,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, s 317(1)(a): racially aggravated assault occasioning bodily harm	7 years' imprisonment Summary conviction: 3 years' imprisonment and a fine of $36,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, s 317A(d): racially aggravated assault with intent	7 years' imprisonment Summary conviction: 3 years' imprisonment and a fine of $36,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, s 338B(1)(a)(i): racially aggravated threat to kill	14 years' imprisonment Summary conviction: 3 years' imprisonment and a fine of $36,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, s 338B(1)(b)(i): racially aggravated threat	6 years' imprisonment Summary conviction: 18 months' imprisonment and a fine of $18,000
Aggravated general offence	*Criminal Code* (WA)	s 80I, s 444(1)(b): racially aggravated criminal damage	14 years' imprisonment Summary conviction: 3 years' imprisonment and a fine of $36,000 (for injury not exceeding $50,000)

Selected overseas jurisdictions

Ireland

Provision type	Act	Provision	Maximum penalty
Vilification offences	*Prohibition of Incitement to Hatred Act 1989* (Ireland)	s 2: actions likely to stir up hatred s 3: broadcasts likely to stir up hatred s 4: preparation and possession of material likely to stir up hatred	s 6: 2 years' imprisonment and/or fine of £10,000 Summary conviction: 6 months' imprisonment and/or £1,000

Northern Ireland

Provision type	Act	Provision	Maximum penalty
Vilification offences	*Public Order (Northern Ireland) Order 1987* (NI)	Part III: acts intended or likely to stir up hatred or arouse fear art 9: use of words or behaviour or display of written material art 10: publishing or distributing written material art 11: distributing, showing, or playing a recording art 12: broadcasting or including programme in cable programme service art 13: possession of matter intended or likely to stir up hatred or arouse fear	art 16: 7 years' imprisonment and/or a fine Summary conviction: 6 months' imprisonment and/or fine

Scotland

Provision type	Act	Provision	Maximum penalty
Aggravated general offence	*Hate Crime and Public Order (Scotland) Act 2021* (Scot)	s 3: racially aggravated harassment	7 years' imprisonment and/or a fine Summary conviction: 12 months'

			imprisonment and/or fine
Vilification offence	*Hate Crime and Public Order (Scotland) Act 2021* (Scot)	s 4: offences of stirring up hatred	7 years' imprisonment and/or a fine Summary conviction: 12 months' imprisonment and/or fine
Vilification offence	*Public Order Act 1986* (UK)	s 22: broadcasting or including programme in cable programme service s 23: possession of racially inflammatory material	s 27(3): 7 years' imprisonment and/or a fine Summary conviction: 6 months' imprisonment and/or fine

England and Wales

Provision type	Act	Provision	Maximum penalty
Vilification offence	*Public Order Act 1986* (UK)	Part III: racial hatred s 18: use of words or behaviour or display of written material s 19: publishing or distributing written material s 20: public performance of a play s 21: distributing, showing or playing a recording s 22: broadcasting or including programme in cable programme service s 23: possession of racially inflammatory material	s 27(3): 7 years' imprisonment and/or a fine Summary conviction: 6 months' imprisonment and/or fine

Provision type	Act	Provision	Maximum penalty
Vilification offence	*Public Order Act 1986* (UK)	Part 3A: hatred against persons on religious grounds or grounds of sexual orientation s 29B: use of words or behaviour or display of written material s 29C: publishing or distributing written material s 29D: public performance of a play s 29E: distributing, showing or playing a recording s 29F: broadcasting or including programme in programme service s 29G: possession of inflammatory material	s 29L(3): 7 years' imprisonment and/or a fine Summary conviction: 12 months' imprisonment and/or fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	Part II: racially or religiously aggravated offences s 28, s 29(1)(a)–(ba): racially or religiously aggravated assaults (malicious wounding or grievous bodily harm; actual bodily harm; strangulation or suffocation)	7 years' imprisonment and/or fine Summary conviction: 6 months' imprisonment and/or fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 29(1)(c): racially or religiously aggravated common assault	2 years' imprisonment and/or fine Summary conviction: 6 months' imprisonment and/or fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 30: racially or religiously aggravated criminal damage	14 years' imprisonment and/or fine Summary conviction: 6 months' imprisonment and/or fine

Provision type	Act	Provision	Maximum penalty
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 31(1)(a)–(b): racially or religiously aggravated public order offences (fear or provocation of violence; intentional harassment, alarm or distress)	2 years' imprisonment and/or fine Summary conviction: 6 months' imprisonment and/or fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 31(1)(c): racially or religiously aggravated public order offences (harassment, alarm or distress)	Fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 32(1)(a): racially or religiously aggravated harassment and stalking	2 years' imprisonment and/or a fine Summary conviction: 6 months' imprisonment and/or fine
Aggravated general offence	*Crime and Disorder Act 1998* (UK)	s 28, s 32(1)(b): racially or religiously aggravated putting people in fear of violence and stalking involving fear of violence, serious alarm or distress	14 years' imprisonment and/or a fine Summary conviction: 6 months' imprisonment and/or fine

Canada

Provision type	Act	Provision	Maximum penalty
Vilification offence	*Criminal Code* (Canada)	Part VIII: offences against the person and reputation s 318(1): advocating genocide	5 years' imprisonment

Provision type	Act	Provision	Maximum penalty
Vilification offences	*Criminal Code* (Canada)	s 319(1): public incitement of hatred s 319(2): wilful promotion of hatred s 319(2.1): wilful promotion of antisemitism	2 years' imprisonment s 787(1): Summary conviction: 2 years less a day of imprisonment and/or $5,000
Vilification offence	*Criminal Code* (Canada)	Part XI: wilful and forbidden acts in respect of certain property s 430(4.1): mischief relating to religious property, educational institutions, etc	10 years' imprisonment s 787(1): Summary conviction: 2 years less a day of imprisonment and/or $5,000

New Zealand

Provision type	Act	Provision	Maximum penalty
Vilification offence	*Human Rights Act 1993* (NZ)	s 131(1): inciting racial disharmony	3 months' imprisonment or $7,000