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Commissioner
NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

*By email: nsw-lrc@dcj.nsw.gov.au*

Dear Commissioner,

**Review of the effectiveness of s 93Z of the *Crimes Act 1900* (NSW)**

We write this submission in our capacity as academics and a student intern engaged by the Criminal Justice Cluster at the Faculty of Law, University of Technology Sydney. We welcome the opportunity to submit to the review on the effectiveness of s 93Z of the *Crimes Act 1900* (NSW).

**Terms of reference**

The enclosed submission relates to the following terms of reference:

- the impact of racial and religious vilification on all parts of the NSW community;
- criminal vilification offences in other Australian and international jurisdictions, and the desirability of harmonisation and consistency between New South Wales, the Commonwealth and other Australian States or Territories;
- the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW);

- the impacts on freedoms, including freedom of speech, association and religion; and
- the need to promote community cohesion and inclusion.

**Recommendations and findings**

We submit that:

1. Serious vilification of minority and subjugated groups is a prevalent problem in Australian society.
2. The criminal law is a blunt instrument with which to combat serious vilification. More impactful ways to combat serious vilification include public statements by leaders that counter hate speech; investment in marginalised communities; education that promotes cross-cultural dialogue and understanding; and addressing conscious and unconscious bias in individuals and institutions.
3. Subjugated groups are likely to be reticent to report hate crimes to police when they are also overpoliced and over-criminalised; and when police provide them with inadequate protections as victims.
4. Comprehensive police training and education is needed on the elements of s 93Z, including instances in which this provision should be used instead of alternative charges (such as offensive behaviour, offensive language, intimidation or common assault).
5. Comprehensive police training and education is needed on how conscious and unconscious bias affects police investigations and decision-making in relation to hate crimes, informed by consultation with marginalised groups and academic literature on racism and hate crimes.
6. The overarching purpose of s 93Z should be to protect subjugated groups who face prejudice-related threats and violence.
7. The NSW Government should repeal s 4A of the *Summary Offences Act 1988* (NSW) because it targets a broad range of speech that commonly falls below the threshold of seriousness required for criminalisation and disproportionately criminalises the speech of marginalised groups, including First Nations Australians.
8. It is unclear whether the requirement for DPP approval was the main impediment to successful prosecutions under s 93Z. Instead, a range of factors have hindered the obtaining of s 93Z convictions. These include community reluctance to report hate

crime; police attitudes, education and culture; the complex elements of s 93Z; and the existence of other offences that police are more familiar with, and/or for which there is established criminal jurisprudence.

9. The NSW Government should consider the implementation of a well-resourced body that has independent oversight over the investigation, intelligence-gathering, charging and prosecution of hate crimes. This body should have the capacity to independently review and advise on police decisions and should incorporate an advisory group that engages community groups to advise on hate crimes.
10. Current Australian and NSW provisions that criminalise or prohibit serious vilification should be reviewed to discern their consistency with Australia's international law obligations.

Our reasoning for these findings and recommendations is provided within the enclosed submission. Should you have any questions in relation to our submission, please contact the corresponding author, Dr Elyse Methven, by email to Elyse.Methven@uts.edu.au .

Yours sincerely,

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Dr Elyse Methven, Senior Lecturer
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Encls.

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# Submission

## 1. Introduction

The criminalisation of serious vilification serves a symbolic function — to declare that hate and prejudice are wrong and against the values of Australian society. However, 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.

### Defining hate speech

While there is no settled definition of hate speech,[1] leading Australian expert on hate speech and the law, Professor Katharine Gelber, defines hate speech as 'prejudice enacted through speech'.[2] Hate speech is used to express hatred of, contempt for, or encourage violence against, an individual or a group of individuals on the basis of a particular feature or set of features.[3] As we note below, s 93Z of the *Crimes Act 1900* (NSW) criminalises a narrower form of conduct than this definition of hate speech — it is restricted to public acts that threaten or incite violence against individuals or groups based on their perceived membership of an exhaustive list of categories.

### The harms of hate speech

Hate speech has been associated with several individual and social harms. It can instil fear in its target(s); cause lasting psychological harm; impact freedom of expression, association and movement; and encourage 'other members of society to view the targets as undesirable, and as legitimate objects of hostility.'[4] At a societal level, hate speech has the capacity to 'exclude its targets from participating in the broader deliberative processes required for democracy to

[1] Tanya D'Souza et al, 'Harming women with words: The failure of Australian law to prohibit gendered hate speech' (2018) 41(3) *University of New South Wales Law Journal* 939.
[2] Katharine Gelber, *Speech Matters: Getting Free Speech Right* (University of Queensland Press, 2011), 83.
[3] Ibid.
[4] Tanya D'Souza et al (n 1) 943; citing Bhikhu Parekh, 'Is There a Case for Banning Hate Speech?' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012), 41.

happen, by rendering them unworthy of participation and limiting the likelihood of others recognising them as legitimate participants in speech'.[5]

Hate speech can lay the foundation for violence,[6] including fatal violence. Justin Ellis, for example, identifies the Christchurch terrorist attack that took place in New Zealand in 2019, in which 51 people were murdered by a white Australian man in two mosques, as 'the starkest example of the intersection of hate rhetoric, right-wing extremism and the use of social media to amplify messages of hate and their translation into in-person violence'.[7]

**Prevalence of hate speech in Australia**

Hate speech remains a prevalent problem in Australian society, as demonstrated by recent reports of right-wing extremism, threats against members of the LGBTIQ community, anti-Semitism and Islamophobia.[8] For instance, the report Islamophobia in Australia (2014-2021) revealed information about targets of violent or hateful Islamophobic rhetoric and physical attacks:

> Vulnerable victims were the most convenient targets of Islamophobia and were exposed to more physical attacks. Women and children continued to bear the brunt of Islamophobia where two in ten children and three in ten vulnerable victims (other than children) were exposed to a physical attack. Half the female victims were alone while one in five women were with children. Women with a male companion were rarely abused (4%) while the abuse of children with a male was almost non-existent (2%).

[5] Katharine Gelber (n 2) 84.
[6] Antonio Guterres, 'United Nations Strategy and Plan of Action on Hate Speech' (UN Office on Genocide Prevention and the Responsibility to Protect, 18 June 2019) ('Strategy and Plan of Action').
[7] Justin Ellis, 'A Fairy Tale Gone Wrong: Social media, Recursive Hate and the Politicisation of Drag Queen Storytime' (2022) 86(2) *The Journal of Criminal Law* 94, 101.
[8] See, eg, Josh, Butler, 'Rise in activity from rightwing extremists who want to trigger 'race war' in Australia, Asio warns' (The Guardian Australia, online, 9 April 2024) <https://www.theguardian.com/australia-news/2024/apr/10/rise-in-activity-from-right-wing-extremists-who-want-to-trigger-race-war-in-australia-asio-warns>; Cait Kelly, 'Victorian government urged to act as more drag events cancelled in wake of threats from far-right' (The Guardian Australia, online, 6 May 2023) <https://www.theguardian.com/world/2023/may/06/victorian-government-urged-to-act-as-more-drag-events-cancelled-in-wake-of-threats-from-far-right>; Zena Chamas and Mazoe Ford, 'Islamophobic and anti-Semitic incidents in Australia at unprecedented levels as the Israel-Gaza war rages' (ABC News, online, 2 December 2023) <https://www.abc.net.au/news/2023-12-02/rise-in-islamophobia-antisemitism-amid-israel-gaza-war/103088666>.

> The most intense hate level (i.e. wanting to kill) was also mostly directed at women alone or those with a child. Women in religious attire experienced a higher proportion of physical attacks than men in religious attire, yet no difference emerged over the type of verbal insult experienced between females and males wearing religious attire.[9]

The report also identified demographic information about perpetrators and victims of Islamophobia in Australia during this period:

> Most perpetrators (85%) were seemingly Anglo/European while most victims were from Middle Eastern or Arab backgrounds (47%), followed by the Subcontinent (18%) and then Asia-Pacific (13%) and Anglo/European converts to Islam (13%).[10]

Notably, the Report identified a significantly increased level of hate being expressed online when compared to offline.[11]

**Combating hate speech**

The UN Special Rapporteur on the promotion and protection on the right to freedom of opinion and expression, David Kaye, has suggested that criminalisation should be reserved for serious instances of vilification.[12] Approaches other than criminalisation to combat hate speech may include:

> public statements by leaders in society that counter hate speech and foster tolerance and intercommunity respect; education and intercultural dialogue; expanding access to information and ideas that counter hateful messages; and the promotion of and training in human rights principles and standards.[13]

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[9] Derya Iner, Ron Mason and Chloe Smith, *Islamophobia in Australia - IV* (2014-2021) <https://researchoutput.csu.edu.au/ws/portalfiles/portal/313346505/UPDATED_IslamophobiaInAustralia_ReportIV_digital_lowres_spread_update.pdf> 3.
[10] Ibid, 4.
[11] Ibid, 9. The Report used an emotional intensity scale of: hostility, contempt, dehumanisation, disgust and a desire to harm/kill, in order of seriousness.
[12] David Kaye, *Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression*, Un Doc A/74/486 (9 October 2019) <https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/A_74_486.pdf>.
[13] Ibid.

We address the limits of a criminal justice-oriented approach to combatting hate speech in Part 7 of this submission.

## 2. Doctrinal analysis of s 93Z

### The offence provision

Section 93Z(1) of the *Crimes Act 1900* makes it an offence for:

> [a] person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds …:
>
> (a) the *race* of the other person or one or more of the members of the group,[14]
> (b) that the other person has, or one or more of the members of the group have, a specific *religious belief or affiliation*,[15]
> (c) the *sexual orientation* of the other person or one or more of the members of the group,[16]
> (d) the *gender identity* of the other person or one or more of the members of the group,[17]
> (e) that the other person is, or one or more of the members of the group are, of *intersex status*,[18]
> (f) that the other person has, or one or more of the members of the group have, *HIV or AIDS.* (emphasis added)

The section does not cover acts which threaten or incite violence on the basis of attributes outside this list, such as age, disability or political affiliation.

[14] Section 93Z(5) defines *race* as including 'colour, nationality, descent and ethnic, ethno-religious or national origin.'
[15] Section 93Z(5) defines *religious belief or affiliation* as 'holding or not holding a religious belief or view'.
[16] Section 93Z(5) defines *sexual orientation* as 'a person's sexual orientation towards—
(a) persons of the same sex, or
(b) persons of a different sex, or
(c) persons of the same sex and persons of a different sex.'
[17] Section 93Z(5) defines *gender identity* as '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.'
[18] Section 93Z(5) defines *intersex status* as 'the status of having physical, hormonal or genetic features that are—
(a) neither wholly female nor wholly male, or
(b) a combination of female and male, or
(c) neither female nor male.'

Another restriction of s 93Z is that it is limited to threats or incitement of *violence*. It does not extend to other forms of hate speech — for example, the incitement of contempt for, hatred of, racial superiority over, or discrimination against certain groups. Other jurisdictions' criminal models are discussed in Part 8 of this submission.

There has been some criticism of incorporating broad categories into serious vilification provisions that criminalise hate speech towards both minority and majority groups (e.g. homosexuality vs sexual orientation). This is on the basis that broad categories can 'undermine the real purpose of hate crime laws which is to protect subjugated groups in the face of long-standing and disproportionate problems of prejudice-related crime and violence.'[19] We discuss how this applies to the recent charging of Matildas Captain Sam Kerr over alleged 'racial' comments made in the UK in Part 8 of the submission.

**Mens rea**

To establish the mens rea for the offence of serious racial etc. vilification, the prosecution must prove beyond reasonable doubt that the accused either:

- intentionally threatened or incited violence; or
- recklessly threatened or incited violence.

Both intention and recklessness are subjective mental states; in other words, the criminal law is concerned with what *the accused* intended or foresaw as a possibility (recklessness) at the time of the public act.[20] The law is not concerned with what the reasonable or ordinary person would/ should have intended or foreseen at the time. Intention has been defined in case law as having a particular result 'as [the defendant's] purpose or object at the time of engaging in the conduct'.[21] By contrast, recklessness can be understood as the defendant having foresight of the possibility of a particular result and continuing to act regardless.[22]

[19] Gail Mason, 'Hate crime laws in Australia: Are they achieving their goals?' (2009) 33 *Criminal Law Journal* 326, 328.
[20] *Zaburoni v The Queen* [2016] HCA 12.
[21] Ibid.
[22] While reckless indifference for murder requires proof of foresight of probability, most other criminal provisions that include an element of recklessness require proof of subjective foresight of possibility. For further discussion, see David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (The Federation Press, 7th ed, 2020), 172-3.

Section 93Z(3) further provides that: 'In determining whether an alleged offender has committed an offence against this section of intentionally or recklessly inciting violence, it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence.' In other words, the prosecution need not prove that an act of violence was actually perpetrated, or a person was motivated to commit violence, as a result of the defendant's public act.

*Violence* is defined inclusively in s 93Z(5) as 'includ[ing] violent conduct and violence towards a person or a group of persons includ[ing] violence towards property of the person or a member of the group, respectively.'

**Meaning of incitement**

The NSW Court of Appeal in *Sunol v Collier (No 2),*[23] considered the meaning of the word 'incite' in the context of the civil law prohibition against homosexual vilification in s 49ZT of the *Anti-Discrimination Act 1977* (NSW). The Court construed incite as meaning to 'encourage' or 'spur' others to do a certain action.[24]

Section 93Z has also been considered by the NSW Supreme Court in obiter in *R v Bayda; R v Namoa (No 8*),[25] where the court stated that:

> Publicly disseminating in Australia the religious belief that Muslims are under a duty to attack non-believers (as taught by the online propagandists and by Bayda's Islamic mentors in Sydney in 2013) is an incitement to communal violence. Since the commencement of s 93Z(1)(b) of the *Crimes Act* it would constitute an offence in this State, not excused by the reference to scripture.
>
> Although Australian citizens are not subject to penalty for their choice of belief by which to relate to God, teaching a divine duty of violence against non-Muslims is not

[23] [2012] NSWCA 44.
[24] Ibid, [28].
[25] [2019] NSWSC 24.

> within the law's protection. It goes beyond personal religious experience and counsels criminal breaches of the peace.

The UN Committee on the Elimination of Racial Discrimination (CERD) has commented that 'incitement':

> characteristically seeks to influence others to engage in certain forms of conduct, including the commission of crime, through advocacy or threats. Incitement may be express or implied, through actions such as displays of racist symbols or distribution of materials as well as words. The notion of incitement as an inchoate crime does not require that the incitement has been acted upon, but in regulating the forms of incitement referred to in article 4, States parties should take into account, as important elements in the incitement offences, in addition to [the content and form of speech; the economic, social and political climate; the position or status of the speaker; the reach of the speech; the objectives of the speech], the intention of the speaker, and the imminent risk or likelihood that the conduct desired or intended by the speaker will result from the speech in question.[26]

**Inaccurate beliefs about the target's attributes not a defence**

Section 93Z(2) provides that '… it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons referred to in subsection (1) (a)–(f) were correct or incorrect at the time that the offence is alleged to have been committed.' This means that the target does not have to actually belong to one of the enumerated groups for the offence to be made out.

A 'public act' is defined inclusively in s 93Z(5), and includes—

> (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and

[26] Committee on the Elimination of Racial Discrimination, *General Recommendation No 35 (2013), Combating Racist Hate Speech*, UN Doc CERD/C/GC/35 (26 September 2-13) quoted in Nicholas Aroney and Paul Taylor, 'Building Tolerance into Hate Speech Laws: State and Territory Anti-Vilification Legislation Reviewed Against International Law Standards' (2023) *Queensland University of Law Journal* 317, 330.

(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.

**Punishment**

Both individuals and corporations can be prosecuted for the offence, with the former liable to a punishment of a fine of up to 100 penalty units or 3 years imprisonment, and the latter liable to a fine of up to 500 penalty units.[27]

[27] Section 93Z(1).

## 3. Changing requirements for consent to prosecution

Section 93Z was inserted into the *Crimes Act 1900* by the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* and came into force on 13 August 2018. Section 93Z consolidated multiple serious vilification offences previously contained in the *Anti-Discrimination Act 1977* into a single offence. The new section provided that approval would need to be obtained from the NSW Director of Public Prosecutions to commence prosecutions under s 93Z, whereas previously, consent was required to be obtained from the NSW Attorney General.[28]

On 11 December 2023, sub-section 4 of s 93Z was amended by the *Crimes Amendment (Prosecution of Certain Offences) Act 2023* to provide that 'A prosecution for an offence against this section may be commenced only by—

(a) the Director of Public Prosecutions, or

(b) a police officer.'

In the Second Reading Speech to the *Crimes Amendment (Prosecution of Certain Offences) Bill*, the Attorney General stated that the amendment was necessary because:

> concerns have been raised about the operational effects of this requirement [for DPP approval]. The time taken to refer matters to the DPP and obtain approval to charge may act as a disincentive for laying charges under section 93Z that relate to conduct otherwise appropriate to be prosecuted under this provision.[29]

The Attorney General noted that s 93Z offences are typically prosecuted by NSW Police in the Local Court. Members of Parliament identified potential practical inconveniences and 'administrative delay' resulting from the requirement for DPP approval; for instance, that police could not take immediate action against a suspect in the form of arrest or issuing a court attendance notice as they first had to obtain DPP consent.[30] The Attorney General also stated that 'the overwhelming majority' of offences in the *Crimes Act 1900* were prosecuted without

[28] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2023 (Michael Daley, Attorney General).
[29] Ibid.
[30] New South Wales, *Parliamentary Debates*, Legislative Council, 30 November 2023 (Stephen Lawrence).

a requirement for the DPP's approval, including the new s 93ZA offence of displaying a Nazi symbol.[31]

During the debate on the original text of the *Crimes Amendment (Prosecution of Certain Offences) Bill 2023* in the NSW Legislative Council, the Opposition noted the possibility for private prosecutions should the requirement for DPP consent be removed without further amendment.[32] Further amendments were therefore passed to restrict the commencement of prosecutions under s 93Z to either the DPP or NSW Police.

The Australian National Imans Council and the NSW Council for Civil Liberties voiced their disapproval of the rushed approach taken by the NSW Parliament to amending s 93Z in 2023 to remove the requirement for DPP consent.[33]

**Was the procedural change necessary?**

It is unclear whether the requirement for DPP consent was a barrier, or a significant barrier, to successful prosecutions under s 93Z. Before the 2023 amendment, all eight charges laid under s 93Z since its introduction in 2018 to June 2023 — two on race grounds, two on religion and four on gender identity — were withdrawn. The *Guardian Australia* reported in 2021 that the NSW Police 'botched the only two race hate prosecutions attempted in the three years since new laws were introduced' through administrative error, by failing to obtain prior DPP approval for the charges.[34] While DPP approval may delay charges being laid, additional factors contribute to the number and success of s 93Z prosecutions and convictions. They include the underreporting of hate crimes;[35] the narrow and complex elements of the offence; insufficient police training on how to identify hate crimes[36] and on the elements of an offence under s 93Z; police attitudes, culture and bias; and the availability of other provisions that

[31] New South Wales, *Parliamentary Debates* (n 28).
[32] See *Criminal Procedure Act 1987* (NSW) s 14; Susan Carter, NSW Legislative Council, 30 November 2023.
[33] 'ANIC Concerned About Rushed Approach to Amending Section 93Z of the Crimes Act (NSW)' (30 November 2023) <https://www.anic.org.au/wp-content/uploads/2023/11/ANIC-Concerned-About-Rushed-Approach-to-Amending-Section-93z-of-the-Crimes-Act-NSW.pdf>; New South Wales Council for Civil Liberties, 'Media Statement: S.93Z Amendments Should Be Referred to the Standing Issues Committee' (30 November 2023) <https://www.nswccl.org.au/media_statement_s93z_amendments_referred_standing_issues_committee>.
[34] Christopher Knaus and Michael McGowan, 'NSW police botch the only two race hate prosecutions under new laws' (The Guardian Australia, online, 2 March 2021) <https://theguardian.com/australia-news/2021/mar/02/nsw-police-botch-the-only-two-race-hate-prosecutions-under-new-laws>.
[35] Mahmud Hawila, 'The need to criminalise hate crimes' (2021) *Bar News* 23.
[36] 'Special Commission of Inquiry into LGBTIQ hate crimes - Volume 3' (Report, 19 December 2023).

police more frequently employ to target offensive speech, threats or incitements of violence. Further discussion of these factors and statistical analysis is provided in Parts 4, 6 and 7 of this submission.

**Do concerns remain about unjustified or improper prosecutions?**

The literature raises concerns about how tensions between police and targeted groups, police attitudes and police knowledge about hate crime might affect decisions to prosecute, as well as the appropriateness of a criminal response to instances of vilification (see Part 7 for discussion). As a result, it may be inappropriate for any police officer to charge a person with serious vilification without appropriate information, supervision and oversight of their decision-making. The requirement for DPP consent also acts as a safeguard to ensure that the decision-maker is familiar with the NSW Office of the Director of Public Prosecutions (ODPP) Guidelines for Prosecution, which include requirements for decisions to be made in the public interest, and to not be affected by such factors as political pressure, political consequences or the political associations of the accused and persons involved.[37]

[37] See '1.5 Factors not relevant to the prosecution decision' in ODPP NSW Prosecution Guidelines <https://www.odpp.nsw.gov.au/prosecution-guidance/prosecution-guidelines/chapter-1#guidelineanchor269>.

## 4. Overlap of s 93Z with other criminal offences

Acts that might constitute serious vilification may instead be being charged under more established offences in the NSW and Commonwealth criminal law.[38] These include the crimes of:

- offensive language (*Summary Offences Act 1988* (NSW) s 4A)
- offensive conduct (*Summary Offences Act 1988* (NSW) s 4)
- using a carriage service to menace, harass or cause offence (*Criminal Code Act 1995* (Cth) s 474.17)
- common assault (which includes psychic assault i.e. threats of physical contact: *Crimes Act 1900* (NSW) s 61)
- intimidation or annoyance by violence or otherwise (*Crimes Act 1900* (NSW) s 545B)
- stalking or intimidation with intent to cause fear of physical or mental harm (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13)

The punishments attached to many of these provisions are lower than the punishment of 3 years imprisonment attached to s 93Z.

The popularity of alternative criminal charges over s 93Z is likely due to a range of factors. These include a lack of police familiarity with the elements of s 93Z when compared to the other charges, and the difficulty of establishing the elements of s 93Z, including that the act threatened or incited violence, subjective mens rea and a motive for the threat (i.e. that it was on racist or other enumerated grounds).

By contrast, the common law defines 'offensive' language/conduct broadly as evoking a significant emotional reaction of resentment, outrage, disgust or hatred in the mind of a

[38] For example, the NSW Bureau of Crime Statistics and Research documents that in the NSW Higher, Local and Children's Criminal Courts in the year from June 2022 to June 2023, there were 648 defendants with a finalised charge of offensive language, and 1,367 defendants with a finalised charge of offensive behaviour. There were 23,372 defendants with a finalised charge of common assault. The statistics do not reveal what language or conduct comprised the charges, but demonstrate their relative prevalence: NSW Bureau of Crime Statistics and Research, 'NSW Criminal Courts Statistics June 2018-June 2023' (December 2023) <https://www.bocsar.nsw.gov.au/Pages/bocsar_publication/Pub_Summary/CCS-Annual/Criminal-Court-Statistics-Jun-2023.aspx>.

reasonable person.[39] This is an objective standard that is assessed with regard to contemporary community standards.[40] An example of the crime of offensive language being applied to racist language was when 55 year old Karen Bailey was charged with offensive language following a racist rant on a train from the Central Coast to Sydney. Bailey had used the word 'gook' to refer to a woman and said the words 'Why did you come to this country? This is our country. People with slinky eyes don't belong.'[41] For an example of the charge of offensive conduct being used against allegedly racist activity, it was reported that on 26 January 2024, police arrested six people and issued 55 infringement notices for offensive conduct at a Sydney train station. The men were said to be wearing balaclavas and the behaviour they were allegedly engaged in was described as 'neo-Nazi activity'.[42]

**Hate speech should not be policed through offensive language charges**

Academic research and successive government inquiries have found offensive language charges or criminal infringement notices to be disproportionately used against First Nations Australians.[43] The offence of offensive language has also been criticised for being too broad, so that people are unable to easily anticipate whether their language will be criminalised, and out of step with community standards because swearing is prevalent in Australian society.[44] For these and other reasons, successive inquiries have recommended the repeal of s 4A of the *Summary Offences Act 1988* or its restriction in scope.[45] Most recently, the NSW Select

[39] *Monis v The Queen* (2013) [2013] HCA 4, [303] per Crennan, Kiefel and Bell JJ.
[40] For discussion on the law of offensive language, see: Elyse Methven, 'It might be powerful; but is it offensive? Unpacking judicial views on the c-word' (forthcoming) *Current Issues in Criminal Justice*; Luke McNamara and Julia Quilter, 'Time to Define the Cornerstone of Public Order Legislation: The Elements of Offensive Conduct and Language under the Summary Offences Act 1988 (NSW).' (2013) *University of New South Wales Law Journal* 36: 534; Elyse Methven, 'Weeds of Our Own Making: Language Ideologies, Swearing and the Criminal Law (2016) 34 *Law Context: A Socio-Legal Journal* 117; Elyse Methven, 'A Little Respect: Swearing, Police and Criminal Justice Discourse' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 58.
[41] Elyse Methven, 'Racist rants and viral videos: why the law alone can't end racism' (The Conversation, online, 6 August 2014) <https://theconversation.com/racist-rants-and-viral-videos-why-the-law-alone-cant-end-racism-30107>.
[42] Australian Associated Press and Jordyn Beazley 'Albanese condemns actions of balaclava-clad neo-Nazis arrested by police after swarming Sydney train' (The Guardian Australia, online, 27 January 2024) < https://www.theguardian.com/australia-news/2024/jan/26/balaclava-clad-neo-nazis-held-by-police-after-swarming-sydney-train>.
[43] See, eg, NSW Ombudsman, 'Impact of Criminal Infringement Notices on Aboriginal communities Review' (Report, 2009); Australian Law Reform Commission, 'Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (Report 133, 2018).
[44] See NSW Law Reform Commission (Penalty Notices Report 132, 2012).
[45] Discussed in Elyse Methven, *Dirty Talk: A critical discourse analysis of offensive language crimes* (PhD Thesis, UTS, 2017); see, eg, Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018).

Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody recommended in 2021 that:

> the NSW Government amend section 4A of the *Summary Offences Act 1988* to ensure that the offence only captures a situation where there is intimidation and/or an actual threat of harm, except if the offensive language is used in or near or within hearing of a school.[46]

The NSW Government has not implemented this recommendation. We urge the NSW Government to either repeal s 4A or limit the scope of the crime of offensive language so that it is limited to threats of harm or intimidation. It is perverse that Australians, including minority groups, are still having their language — predominantly their use of swear words *fuck* and *cunt*[47] — policed by this broad provision while acts of serious vilification are ostensibly under-policed.

**Other Commonwealth offences**

Section 80.2A of the *Criminal Code Act 1995* (Cth) contains offence provisions relating to 'Urging violence against groups'. Section 80.2A(1) makes it an offence to urge another person or group to use force or violence against the targeted group. Multiple elements must be proved to establish this offence, including proof of intention towards both the urging of force or violence and that the force/violence will occur. In addition, the targeted group must be 'distinguished by race, religion, nationality, national or ethnic origin or political opinion', the accused must have been reckless towards that fact, and 'the use of the force or violence' must 'threaten the peace, order and good government of the Commonwealth.' The offence attracts a maximum of seven years imprisonment.

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[46] [1] Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (NSW Legislative Council, 15 April 2021) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf> (Recommendation 10).

[47] Trollip, Hannah, Luke McNamara, and Helen Gibbon. 2019. "The Factors Associated with the Policing of Offensive Language: A Qualitative Study of Three Sydney Local Area Commands." *Current Issues in Criminal Justice* 31 (4): 493.

Section 80.2A(2) of the *Criminal Code Act 1995* (Cth) contains an offence with similar elements, punishable by 5 years imprisonment. For this offence, the prosecution is not required to also prove that the force or violence threatens the peace, order and good government of the Commonwealth.

Additional offences exist in s 80.2B, which relate to the 'urging of violence against *members* of groups'. These offences contain similarly complex and narrowly-drafted elements that require subjective mens rea for multiple elements.

## 5. Civil provisions in NSW

Aside from the criminal provisions discussed above, individuals and communities who are the targets of serious vilification may 'rely on the modest protection afforded by the civil provisions in the ADA [*Anti-Discrimination Act 1977* (NSW)] (and s 18C of the RDA [*Racial Discrimination Act 1975* (Cth)]).'[48]

Several provisions in the *Anti-Discrimination Act 1977* (NSW) make it unlawful (i.e. they provide civil remedies, not criminal punishment) to 'incite hatred towards, serious contempt for, or severe ridicule of' a person or group of people on the grounds of race (s 20C); transgender status (s 38S); religious belief/affiliation or activity (s 49ZE); homosexuality (s 49ZT) or infection with HIV/ AIDS. As identified by the Report of the Special Commission of Inquiry into LGBTIQ hate crimes, the terminology used in a number of these provisions needs to be updated so that greater protections are afforded to certain categories, as is the case under Victorian anti-discrimination legislation.[49]

A federal provision, s 18C of the *Racial Discrimination Act 1975* (Cth), renders it unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

[48] David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 7th ed, 2020); see also Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488.
[49] Special Commission of Inquiry into LGBTIQ hate crimes (Report, 2023) Vol 1, 127.

## 6. Effectiveness of s 93Z: charges and convictions

The effectiveness of s 93Z can to an extent be measured by the prosecutions made under the section.[50] Unfortunately, in this regard, the Bureau of Crime Statistics and Research (BOCSAR) only holds data from its last data collection period ending in December 2023. Accordingly, the current data does not include the prosecutions made following the removal of the requirement for DPP consent.

As of December 2023, seven distinct people had charges under s 93Z finalised at seven court appearances. Two of those seven people were found guilty of an offence under s 93Z, and five of those seven people had a charge under s 93Z withdrawn.[51]

Nine s 93Z charges were finalised at the seven court appearances, where four finalised charges were made under s 93Z(1)(a), two were made under s 93ZA (b), and three finalised charges were made under s 93ZA(d).[52]

Those two individuals who were found guilty of an offence under s 93Z(1)(a) were co-offenders, and were sentenced in the NSW Local Court on 11 August 2023. They both received a Community Correction Order for six months.[53]

The introduction of s 93Z in 2018 was largely a result of the ineffectiveness of the previous legislation, which were varying provisions under the *Anti-Discrimination Act 1977* (NSW), namely: s 20D (offence of serious racial vilification), s 38T (offence of serious transgender vilification), s 49ZTA (offence of serious homosexual vilification), and s 49ZXC (offence of serious HIV/AIDS vilification).[54]

The BOCSAR statistics on prosecutions made under these provisions show that there were three charges made under s 20D(1)(a) of the *Anti-Discrimination Act 1977* (NSW) from the introduction of the provision until August 2018. One of these occurred in February 2012, while

[50] *Crimes Act 1900* (NSW) s 93Z.
[51] Email from the Bureau of Crime Statistics and Research (BOCSAR) to the writer, 10 April 2024.
[52] Ibid.
[53] Email from the Principal Research Officer (Statistics) at the Judicial Commission of New South Wales to the writer, 18 April 2024.
[54] *Anti-Discrimination Act 1977* (NSW) ss 20D, 38T, 49ZTA, 49ZXC.

two were made in January 2015. Each of these charges were withdrawn by the prosecution. It must be noted that BOCSAR only holds data from 1995 onwards and some of the sections of the *Anti-Discrimination Act 1977* (NSW) were in force before this time — s 20D was valid from 1 October 1989, s 49ZTA was valid from 2 March 1994, and s 49ZXC was valid from 8 August 1994.[55]

Interestingly, the newer offence of s 93ZA of the *Crimes Act*, which renders it an offence to knowingly display a Nazi symbol by a public act without a reasonable excuse, has shown to be *relatively* more effective (in terms of prosecution numbers) than s 93Z and its antecedent provisions in the *Anti-Discrimination Act 1977* (NSW). Section 93ZA has yielded eight successful prosecutions since its introduction in August 2022. Of note is the fact that there have been eight finalised charges under s 93ZA, meaning that every charge was successfully prosecuted. Of these eight prosecutions, six occurred in March 2023, while there was one in both July 2023 and November 2023.[56]

This is likely a result of the fact that the elements of the s 93ZA offence are much easier to prove and discern — the mens rea of knowledge need only extend to the display of the Nazi symbol. Further, the prosecution does not need to establish a motive for the display of the symbol to establish the offence.

[55] Email from the Bureau of Crime Statistics and Research (BOCSAR) to the writer, 17 April 2024.
[56] Ibid.

## 7. Policing hate speech while over-policing minority groups

In this part, we identify how institutional and policing practices may dissuade subjugated groups from reporting hate crimes or thwart access to justice by victims of serious vilification.

Provisions that seek to prevent and punish or redress racial discrimination are routinely used by culturally dominant groups to litigate against culturally marginalised groups. University of Technology Law Professor Karen O'Connell, who specialises in discrimination law, points to the case of *McLeod v Power*,[57] in which an Aboriginal woman called a white prison guard at Yalata Prison a 'white piece of s—'. This followed on from the case of *Gibbs v Wanganeen*,[58] in which another white prison guard from Yalata Prison complained of racial discrimination when an Aboriginal person called him 'f–ing white c–' and 'white trash'.[59] Following that case, Yalata Prison encouraged prison officers to report racial vilification. Professor O'Connell says that such language cannot be characterised as racist because 'it is not prescriptive of any particular ethnic, national or racial group'.[60] She goes on to state that 'white people are the dominant people historically and culturally within Australia. They are not in any sense an oppressed group whose political and civil rights are under threat'.[61]

In the criminal jurisdiction, police have also brought charges against Aboriginal people for racial vilification crimes against Anglo Saxon people. In 2006, a 15 year old Aboriginal girl was charged in Kalgoorlie with such a crime for calling an Anglo Saxon woman a 'white s—' (in contravention of the *Criminal Code* (WA) Chapter XI).[62]

Australian offensive language and public nuisance provisions have been used in a similar fashion by police to oppress the speech of minority Australians who object to police racism or white authority. For instance, in the case of *Green v Ashton*,[63] an Aboriginal woman was convicted for telling a police officer 'I don't care, you are all racist cunts'. Methven writes that:

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[57] [2003] FMCA 93.
[58] [2001] FMCA 14.
[59] Also see *Power v Hyllus Maris Aboriginal Community School Inc* [1994] HREOCA 10; *Carr v Boree Aboriginal Corp & Ors* [2003] FMCA 408, at [9].
[60] Karen O'Connell, 'Pinned like a Butterfly: Whiteness and Racial Hatred Laws' (2008) 4(2) *ACRAWSA e-Journal* 59.
[61] Ibid.
[62] Australian Human Rights Commission, Voices of Australia: Case study 1 - rightsED (2006) <https://humanrights.gov.au/our-work/voices-australia-case-study-1-rightsed>
[63] [2006] QDC 8.

> Police do not typically use offensive language laws to protect minorities from racism. Instead, studies and inquiries have documented how police have used these laws as an instrument of racism (Wootten, 1991; White, 2002; Feerick, 2004; Anthony et al., 2021). The excessive enforcement of offensive language laws against First Nations Australians has been linked to the fiction of Australia as *terra nullius*, with Watego, Mukandi and Coghill (2018) arguing:
>
> > The presence of Blackfullas exposes the lie of unoccupied land, and offends white sensibilities. Consequently, it is the bodies, acts and speech of Blackfullas that must be regulated, curtailed and caged as a means to contain the lie, or at the very least, rationalize the imperative for lying. (p. 422)
>
> Lacking access to real justice, swearing at white people and their institutions allows First Nations people to 'laugh at their oppressors and exercise their own legal method by using swear words which portray the police and their legal culture as grotesque' (Langton, 1988, pp. 219–20; see also Eades, 2008). It is as the targets of ever-present racism set against the backdrop of illegitimate colonial control that First Nations women deftly deploy *cunt* to 'crack the facades of power', whether it be to express anger at white authority figures such as police (through phrases like *white cunts* or *dog cunts*) or as transgressive humour (such as using *cunt* in the courtroom to mock the idea of white 'justice' (McCullough, 2014; also see Walsh, 2017).[64]

The literature on policing hate speech highlights the problems with police being charged as the agents of stamping out racial prejudice while at the same time being responsible for over-policing targeted racialised communities, such as First Nations, Muslim and Vietnamese communities.[65] In the seminal book by Professor Gail Mason and colleagues, *Policing Hate Crime*, the authors suggest that in the absence of a dedicated police group addressing hate crimes, systematic approaches and organisational leadership, it will be impossible to achieve coherence.[66] Consequently, the discretion placed in the hands of individual officers in the NSW

[64] Elyse Methven, 'It might be powerful; but is it offensive? Unpacking judicial views on the c-word' (forthcoming) *Current Issues in Criminal Justice*.
[65] Gail Mason et al, *Policing Hate Crime: Understanding Communities and Prejudice* (Routledge 2017).
[66] Ibid 55.

Police Force can result in the groups the law seeks to protect becoming criminalised. Certainly with reports of white supremacist attitudes in the NSW Police Force,[67] it is concerning that biases within NSW Police will err towards protecting Anglo Saxon people. On this issue, we note the existence of the Engagement and Hate Crime Unit (EHCU) and the Hate Incident Review Committee (HIRC) within the NSW Police, but also, limitations recognised by the report of the Special Commission of Inquiry into LGBTIQ Hate Crimes with respect to the EHCU and HIRC, including with regard to how hate crimes are brought to the attention of the EHCU and HCRIC, the limited (intelligence only) function of the EHCU, and the lack of independent review mechanisms of police decisions with respect to hate crimes.[68]

Given contemporary reports of racism in Australian police forces, we contend that the police may not be best positioned to determine the quality, motivations and harms of racism. Recently evidence has emerged of racism in the Queensland Police[69] and direct racism in the Northern Territory Police.[70] In NSW, the Law Enforcement Conduct Commission found in 2020 that the great majority of people identified for the Suspect Targeted Management Plan were First Nations.[71] In NSW, First Nations people are also more likely to be subject to the use of police force — 45% of use of force incidents involve First Nations people.[72] Moreover, NSW Police have a reputation for improperly investigating complaints from First Nations victims where white perpetrators are involved, such as in relation to the 1990-91 Bowraville Three Murders[73]

[67] Paul Gregoire, Activists Accuse Police of Heavy-Handed Tactics and Signalling White Supremacist Tendencies (Sydney Criminal Lawyers, online 8 June 2021) <https://www.sydneycriminallawyers.com.au/blog/police-once-again-signal-white-supremacist-tendencies/>, Paul Gregoire, 'Calls on Police Minister to Curb Officers Flaunting Insignia Linked to White Supremacy' (Sydney Criminal Lawyers, online, 15 October 2021) <https://www.sydneycriminallawyers.com.au/blog/police-once-again-signal-white-supremacist-tendencies/>.

[68] 'Special Commission of Inquiry into LGBTIQ hate crimes - Volume 3' (Report, 19 December 2023).

[69] Deborah Richards, Commissioner, A Call for Change: Commission of Inquiry into Queensland Police Service responses to domestic and family violence (Report, 14 November 2022) <https://www.qpsdfvinquiry.qld.gov.au/about/assets/commission-of-inquiry-dpsdfv-report.pdf>.

[70] Nino Bucci, 'Kumanjayi Walker inquest: court releases mock certificates awarded by NT police unit' (The Guardian Australia, online, 18 March 2024) <https://www.theguardian.com/australia-news/2024/mar/18/kumanjayi-walker-inquest-court-releases-mock-certificates-awarded-by-nt-police-unit-ntwnfb>.

[71] Diane Nazaroff, 'Strip searches, STMPs: more evidence of excessive police power' (UNSW Newsroom, 14 February 2020) <https://www.unsw.edu.au/newsroom/news/2020/02/strip-searches--stmps--more-evidence-of-excessive-police-power>.

[72] Christopher Knaus,'NSW police use force against Indigenous Australians at drastically disproportionate levels, data shows | Australian police and policing' (The Guardian Australia, online, 30 July 2023) <https://www.theguardian.com/australia-news/2023/jul/31/nsw-police-use-force-against-indigenous-australians-at-drastically-disproportionate-levels-data-shows>.

[73]Sarah Collard, 'NSW police reject suggestion 'racism is rife' in force and say 'lessons learned' after Bowraville murders' (The Guardian Australia, online, 28 July 2023) <https://www.theguardian.com/australia-news/2023/jul/28/nsw-police-reject-suggestion-racism-is-rife-in-force-and-say-lessons-learned-after-bowraville-murders>.

and the 1987 Bourke road crash.[74] The NSW Parliamentary Report into the Bowraville Murders found 'inadequacies' in the homicide investigation due to biased cultural assumptions.[75] More recently, Aboriginal women's advocates have identified the flaws in policing family violence and the consequence of criminalising the women survivors, including where non-Aboriginal men are responsible.[76]

Mason and colleagues explain that when policing is targeted at particular cultural minorities, it is difficult to conduct policing to also protect those cultural minorities. They provide the example of the post 9/11 environment in the United States. While police were aware that 9/11 had precipitated an acceleration of hate violence towards Muslim communities in the United States, and sought to build trust with Muslim communities, the context of the 'war on terror' meant that community policing was undercut by counter-terrorism policing aimed at Muslim communities.[77] This meant that Muslim people who reported hate crimes could become police suspects because of their membership of the Muslim community.[78] Consequently, they suggest that building community-based policing is a better way to protect marginalised communities than criminal and carceral strategies.

[74] Zaarkacha Marlan and Joanna Woodburn, 'NSW Police handling of 1987 death of Aboriginal cousins probed at Bourke inquest' (ABC News, online, 29 November 2023) <https://www.abc.net.au/news/2023-11-29/nsw-police-witnesses-inquest-mona-lisa-jacinta-smith-bourke/103163844>.
[75] NSW Legislative Council, Standard Committee on Law and Justice, 'The family response to the murders in Bowraville' (Report, November 2014) 19, 22 <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2131/Bowraville%20-%20Final%20report.pdf>. .
[76] Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended, but not unanticipated: coercive control laws will disadvantage First Nations women' (The Conversation, online, 26 August 2022) <https://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285>.
[77] Gail Mason, JaneMaree Mather, Jude McCulloch, Sharon Pickering, Rebecca Wickes and Carolyn McKay, *Policing Hate Crime: Understanding Communities and Prejudice*, Routledge 2017, 61.
[78] Ibid.

## 8. Jurisdictional comparisons

### International Law

The International Convention on the Elimination of All Forms of Racial Discrimination ('ICERD') and the International Covenant on Civil and Political Rights ('ICCPR') are the two main international law instruments which place obligations on Australia to enact laws that prohibit hate speech. Australia is bound by both agreements.

Article 20(2) of the ICCPR requires State Parties to prohibit the 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

Article 4(a) of the ICERD requires States Parties to *criminalise* 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.

Regard should also be had to Article 19 of the ICCPR, which requires laws to be implemented in such a way that preserves freedom of expression. However, Article 19(3) states that freedom of expression:

> carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights or reputations of others
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The current assortment of prohibitions found in Australian law do not necessarily prohibit and criminalise the dissemination of the forms of racist ideology or expression captured by Article 20(2) of the ICCPR and Article 4(a) of the ICERD.

### Australia's Other States and Territories

Each Australian state and territory has its own anti-vilification laws. As such, some of the differences which exist across numerous statutes at both Commonwealth and state and territory levels make the Australian hate speech regime one of the most complex in the world. Most Australian states and territories take a 'two-tiered' approach to hate speech laws,[79] comprising both civil and criminal prohibitions.

For a number of these criminal provisions, two general elements need to be satisfied for criminal liability to be made out: first, generally, the intentional incitement of hatred against or towards, or serious contempt for, or severe ridicule of a person or group; second, there generally must also be an aggravating factor where the alleged hate speech involves threats of physical harm or damage to property, or involves incitement of others to such harm or damage.[80] We note that the position is slightly different in NSW — the prosecution is not required to prove incitement of *contempt* or *hatred* towards a group, but instead, must prove that the accused threatened or incited *violence* towards a group based on their perceived membership of a certain group.

As has been cogently summarised by Aroney and Taylor, there are some variations to these two general elements across the Australian states and territories.[81] One of the most noticeable differences is that several jurisdictions elect to have hate speech regulated by civil provisions only. Others use a combination of civil and criminal, whilst Western Australia (WA) regulates hate speech via criminal legislation only. Aroney and Taylor's analysis finds that the states and territories vary as to whether their legislation adopts:

- Both civil and criminal provisions (Australian Capital Territory (ACT)[82], NSW[83], Queensland[84], Victoria[85], South Australia (SA)[86]);
- Civil but not criminal provisions (Tasmania[87] and NT[88]);

[79] Aronery and Taylor (n 26) 324.
[80] Ibid.
[81] Ibid.
[82] *Criminal Code 2002* (ACT) s 750; *Discrimination Act 1991* (ACT) s 67A.
[83] *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1977* (NSW) s 20C.
[84] *Anti-Discrimination Act 1991* (Qld) s 131A; *Criminal Code (Serious Vilification and Hate Crimes) Amendment Act 2023* (Qld). As at the time of writing, the relevant provisions have not yet been incorporated into the Queensland Criminal Code.
[85] *Racial and Religious Tolerance Act 2001* (Vic) ss 24-25.
[86] *Racial Vilification Act 1996* (SA) s 4; *Civil Liability Act 1936* (SA) s 73.
[87] *Anti-Discrimination Act 1998* (Tas) s 17.
[88] *Anti-Discrimination Act 1992* (NT) ss 19-20.

- More than one civil vilification regime (in Tasmania, one section prohibits conduct which offends, humiliates, intimidates, insults or ridicules; the other prohibits 'inciting hatred');
- Criminal but not civil provisions (WA[89]).

Differences also revolve around the use of the terms 'offends', 'insults' and 'ridicules', as opposed to the terms 'hatred', 'serious contempt' and 'severe ridicule' in different state and territory civil and criminal anti-vilification prohibitions.[90]

We do not support Tasmania's or the NT's decision to regulate hate speech via civil provisions only. Instead, NSW's current hybrid approach to anti-vilification is more compatible with the Committee on the Elimination of Racial Discrimination's statement that criminalisation should be reserved for serious vilification only.[91] We agree with Aroney and Taylor's finding that Tasmania's and the NT's laws are 'difficult to characterise', and believe the limitations associated with both provisions mean the response taken is ultimately insufficient in addressing hate speech.

Section 17(1) of the Tasmanian *Anti-Discrimination Act 1998* makes it unlawful to engage in conduct that 'offends, humiliates, intimidates, insults or ridicules' another on the basis of an enumerated attribute in s 16, in circumstances in which a reasonable person would have anticipated would lead to the other person being offended, humiliated, intimidated, insulted or ridiculed. Likewise, for civil liability to be incurred, s 20A of the NT's *Anti-Discrimination Act 1992* examines whether the act 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group' on the basis of an attribute specified in s 19 of that Act.

WA also varies in not requiring threats or incitement of violence to be proved to make out liability under ss 77-80D of the *Criminal Code Act Compilation 1913* (WA). For example, s 77 reads:

[89] *Criminal Code Act Compilation Act 1913* (WA) ss 77-80H.
[90] Aroney and Taylor (n 26).
[91] Committee on the Elimination of Racial Discrimination, general recommendation No. 35 (2013), [12].

**Conduct intended to incite racial animosity or racist harassment**

Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.

WA also differs in its adoption of a number of offences that do not necessarily require proof that the conduct in question was *intended* to incite racial animosity or harassment. For example, s 78 of the *Criminal Code Act Compilation Act 1913* (WA) reads:

**Conduct likely to incite racial animosity or racist harassment**

Any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years. Summary conviction penalty: imprisonment for 2 years and a fine of $24 000.

Further offences are found in ss 80A and 80B of the *Criminal Code Act Compilation Act 1913* (WA). WA's legislation also provides for a number of defences as outlined in s 80G, including:

(1) It is a defence to a charge under section 78 or 80B to prove that the accused person's conduct was engaged in reasonably and in good faith —
(a) in the performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for —
(i) any genuine academic, artistic, religious or scientific purpose; or
(ii) any purpose that is in the public interest; or
(c) in making or publishing a fair and accurate report or analysis of any event or matter of public interest.

> (2) It is a defence to a charge under section 80 or 80D to prove that the accused person intended the material to be published, distributed or displayed (as the case may be) reasonably and in good faith —
> (a) in the performance, exhibition or distribution of an artistic work; or
> (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for —
> (i) any genuine academic, artistic, religious or scientific purpose; or
> (ii) any purpose that is in the public interest; or
> (c) in making or publishing a fair and accurate report or analysis of any event or matter of public interest.

We would be reluctant to recommend that NSW follows the WA model of enacting broad racial harassment and incitement to racial hatred offences due to the present identified structural problems of policing hate crimes identified in Part 7 of this submission.

**Racist harassment and incitement to racial hatred**

Aroney and Taylor's study finds variance amongst Australian jurisdictions' criminal provisions in the grounds for which the hatred, serious contempt or ridicule must relate, including:[92]

- Race (SA, WA);
- Race and religious belief or activity (Victoria);
- Race, religion, sexuality or gender identity (Queensland);
- Disability, gender identity, HIV/AIDS status, race, religious conviction, sex characteristics or sexuality (ACT).

What is clear from this analysis is that hate speech criminal provisions are primarily but not exclusively made on the grounds of race. NSW and the ACT also take the broadest approach to defining the spectrum of grounds which may fall under the ambit of anti-vilification laws — including HIV/AIDS status. We support the NSW stance in incorporating a wider range of grounds which may form the basis of hate speech. Both Victoria and the ACT also include the additional term of 'revulsion' in the spectrum of conduct which may constitute hate speech.[93]

[92] Aroney and Taylor (n 26) 324.
[93] Ibid, 325.

In terms of the aggravating factor — the second element — it is not necessary to prove the speech involved the incitement or threatening of violence in WA.[94]

There are also differences in the punishments which apply. Most come in the form of fines which vary in severity. Some jurisdictions have no custodial sentencing as a penalty, while others do. Queensland has a maximum custodial sentence of six months (compared to three years maximum in NSW and up to fourteen years for some WA racial hatred provisions).

Overall, from this analysis, although the NSW criminal provision of serious racial etc. vilification under s 93Z covers a broader range of groups than a number of other jurisdictions, it also has restrictive mens rea requirements of intention and recklessness relating to the consequence of the threat or incitement of violence towards particular individuals/groups, which may make s 93Z more difficult to prove than criminal racial hatred provisions that exist in jurisdictions such as WA.

**The United States**

The approach to hate speech taken by the United States (US) must be construed in light of the US First Amendment, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

At first blush, this would suggest that the First Amendment precludes a statutory prohibition on hate speech. However, the right to free speech guaranteed by the First Amendment in the US is not absolute, with the US Supreme Court repeatedly ruling that certain types of speech are not protected by the US Constitution.

A number of American jurisdictions have statutes which criminalise or regulate hate speech, undermining the misconception that the US has no anti-vilification laws. Some of the most

[94] Aroney and Taylor (n 25) 324.

recent hate speech laws were legislated in response to the growth of Anti-Asian hate speech and crime following the COVID-19 pandemic, and are particularly important today following responses to growing conflict in the Middle East. As the *New York Times* reports:

> Antisemitic and Islamophobic hate speech has surged across the internet since the conflict between Israel and Hamas broke out. The increases have been at far greater levels than what academics and researchers who monitor social media say they have seen before, with millions of often explicitly violent posts on X, Facebook, Instagram and TikTok.[95]

New York's recent new hate speech laws, coming into effect after the New York Senate's adoption of *Assembly Bill A7865A*, require social media platforms to actively regulate hate speech on its platforms and establish a 'clear and concise' policy on how they would respond to incidents of hateful conduct.[96] Social media platforms are also required to maintain 'easily accessible' mechanisms for reporting hateful conduct on their platforms.[97]

The 1942 case of *Chaplinsky v New Hampshire* provides a cogent summary of the American case law on regulating speech in light of the First Amendment, with the US Supreme Court stating:

> There are certain well-defined and limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[98]

In this case, Walter Chaplinsky, a Jehovah's Witness, was using a public footpath as a pulpit - handing out pamphlets and denouncing all organised religions as a 'racket'. This caused the congregation of a crowd which blocked public roads, leading to the arrival of the police. It is

[95] Sheera Frenkel and Steven Lee Meyers, 'Antisemitic and Anti-Muslim Hate Speech Surges Across the Internet' *The New York Times* (online, 15 November 2023). <https://www.nytimes.com/2023/11/15/technology/hate-speech-israel-gaza-internet.html>.
[96] New York State Assembly Bill 2021-A7865A.
[97] Ibid.
[98] *Chaplinsky v New Hampshire* (1942) 315 U.S. 568, 10.

alleged that Chaplinsky attacked police officers verbally, calling the police officer ‘a damned racketeer’ and ‘a damned Fascist.’ This led to him being charged and convicted under the Public Law of New Hampshire, which prohibits a person from addressing ‘any offensive, derisive, or annoying word to anyone who is lawfully in any street or public place… or to call him by an offensive or derisive name.’ On appeal, the Supreme Court of the United States found that Chaplinsky’s speech was not protected by the First Amendment. The Court found that the appellations "damned racketeer" and "damned Fascist" were epithets likely to provoke the average person to retaliate, and thereby cause a breach of the peace, making the speech exempt from the protection of the First Amendment.

More recently, the US Supreme Court in *Snyder v Phelps* (2011) has illustrated some of the circumstances in which exceptions to the First Amendment can arise. Specifically, the Court held that hate speech can be criminalised when it directly incites imminent criminal activity or consists of specific threats of violence targeted against a person or group. In this case, the Westboro Baptist Church had been sued via the tort of emotional distress for picketing the military fundal of Lance Corporal Matthew Snyder, a US Marine killed in Iraq, with offensive signs which included “Fags Doom Nations” and “Thank God for Dead Soldiers.” The Westboro Baptist Church praised soldiers' deaths as an alleged sign of God’s anger at what they believed to be liberalised attitudes by the US Army towards members of the LGBTQI+ community. The Supreme Court 8-1 held that the hateful behaviour of the Westboro Baptist Church was protected under the First Amendment from the tortious claim. Importantly, the Court outlined some of the narrow exceptions to the First Amendment, stating unprotected speech can include:

1. Incitement to imminent lawless action (incitement)
2. Speech that threatens serious bodily harm (true threats)
3. Speech that causes an immediate breach of the peace (fighting words).

Ultimately, this analysis shows that US laws may be drafted in such a way as to prohibit hate speech without being ruled unconstitutional under the First Amendment.

**The United Kingdom**

Several laws in the United Kingdom (UK) prohibit hate speech, whether by referring explicitly to racial hatred, or through broad prohibitions on abusive, insulting etc. language. Amongst them is s 4 of the *Public Order Act 1986* (UK), which states:

> (1) A person is guilty of an offence if he—
> (a) uses towards another person threatening, abusive or insulting words or behaviour, or
> (b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

This provision does not require proof that the words or behaviour threatened or provoked violence on the basis of someone's perceived membership of a particular racial, religious or another group. In this way, ss 4 and 4A (extracted below) are more akin to public nuisance or offensive language/ behaviour provisions in Australian jurisdictions.[99] A person found guilty under s 4 is liable to a fine or a term of imprisonment not exceeding six months. Statistics from the UK Sentencing Council indicate that 14% of convicted offenders were sentenced to immediate custody, 35% received community sentences and 23% received fines in 2016. The average length of a custodial sentence was two months imprisonment.[100]

Section 4A also imposes a criminal penalty if it can be proved that the words or behaviour were used with the intent to harass, alarm or distress. That section reads:

[99] However, s 4 of the UK Act contains an additional requirement that there must be provocation of a belief that unlawful violence will be used.
[100] UK Sentencing Council, Public Order Offences Statistical Bulletin <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Order-statistical-bulletin.pdf>.

> (1) A person is guilty of an offence if, with intent to cause a person harassment, alarm or distress, he—
>
> (a) uses threatening, abusive or insulting words or behaviour, or disorderly behaviour, or
>
> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> thereby causing that or another person harassment, alarm or distress.
>
> (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.

Notably, Australian Matildas Captain Sam Kerr was recently charged under s 4A of the *Public Order Act 1986*. Kerr was alleged to have called a UK police officer a 'stupid white bastard.'[101] The racial nature of the slur also led to her charge being racially aggravated within the terms of s 28 of the *Crime and Disorder Act 1998* (UK). Section 28 reads:

> (1) An offence is [racially or religiously aggravated] for the purposes of section 29 to 32 below if —
>
> (a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a [racial or religious group]; or
>
> (b) the offence is motivated (wholly or partly) by hostility towards members of a [racial or religious group] based on their membership of that group.

There has been criticism of the decision to prosecute Sam Kerr for an offence that is racially aggravated. Mario Peucker, for example, notes that:

[101] Vince Rugari, 'The unanswered questions in the Sam Kerr 'racism' scandal' (Sydney Morning Herald, online, 8 March 2024) <https://www.smh.com.au/sport/soccer/the-unanswered-questions-in-the-sam-kerr-racism-scandal-20240307-p5fan8.html>.

> Racism also reflects and manifests as systemic exclusion and marginalisation based on historically rooted power imbalances and racial hierarchies that put white people at the top.
>
> To put it very simply, the scholarly (if not the legal) definition is that 'racism equals power plus prejudice'.
>
> …
>
> This may sound a bit abstract, but if we do not recognise this power dynamic, we trivialise racism as little more than name-calling. We will fail to understand how racism operates and how it continues to affect people from racially marginalised groups in their daily lives.[102]

Peucker points to the fact that in the UK, where Sam Kerr was charged: 'institutional racism – including within the police force – has been recognised since the release of the Macpherson report in 1999. It was reaffirmed in 2023 by the Baroness Casey Review, despite some political pushback.'[103] Powerfully, Peucker argues:

> The issue of power structures should also be seen through an institutional lens. It is difficult to imagine a person on the streets of London with more institutional power than a white police officer.
>
> Being called a "stupid bastard" might hurt someone's feelings. But while I'm in no position to judge whether Sam Kerr's alleged actions have caused "distress" to the officer – as the law would require – labelling the incident as racist is clearly not in line with what racism means.
>
> Such a definition would not align with the concept's institutional and systemic dimensions. It is not what anti-discrimination laws were intended to outlaw.

[102] Mario Peucker, 'Sam Kerr's alleged comments may have had a racial element, but they were not 'racist' (The Conversation, online, 8 March 2024) <https://theconversation.com/sam-kerrs-alleged-comments-may-have-had-a-racial-element-but-they-were-not-racist-225267>.
[103] Ibid.

> Claims of anti-white or "reverse" racism are based on a shallow, misguided and inaccurate understanding of what racism really constitutes.[104]

Aside from ss 4 and 4A, the *Public Order Act 1986* also contains several provisions that criminalise acts that are intended or likely to stir up racial hatred (ss 18-22) and the possession of racially inflammatory material (s 23).

[104] Ibid.

## 9. The limits of free speech protections in Australia and the impact on hate speech criminalisation

There is no Bill of Rights in Australia; nor is there an explicit constitutional recognition of the right to free speech analogous to the US First Amendment. Rather, a 'weak' freedom of political communication, which acts as a constraint on government, has been implied by the High Court of Australia into the Australian Constitution. As such, freedom of speech is not guaranteed as a matter of substantive law — with the constitutionally implied freedom of political communication merely serving as a means to challenge the validity of laws which may impermissibly burden political communication, provided the contested law does not burden political communication for a legitimate, proportionate purpose. As yet, no claim made on this basis has succeeded in impugning Australian anti-vilification laws.

Free speech is also recognised, in part, from Australia's common law tradition.[105] There is the common law notion that 'everybody is free to do anything, subject only to the provisions of the law.' The common law principle of legality also requires courts to presume legislatures do not possess an intention to interfere with fundamental rights and freedoms — including freedom of speech — unless such contrary intention is clearly manifest by way of unmistakable and unambiguous language.

The human rights charters of the ACT[106], Victoria[107] and Queensland[108] can also be argued to be another form of 'weak' free speech safeguards in Australia — where these charters require legislation to be construed in a manner which is compatible with recognised human rights (i.e. the rights found in the ICCPR) — to the extent it is possible to do so consistently with the purpose of the legislation. Australia differs from the UK in this regard. Whilst the UK like Australia does not have a constitutional safeguard equivalent to the US First Amendment, it does have a statutory protection at a national level conferred by way of Article 10 of the *Human Rights Act 1998* (UK), which reads:

[105] Katharine Gelber and Molly Murphy, 'The weaponisation of free speech under the Morrison government' 58(4) (2023) *Australian Journal of Political Science*, 326-342.
[106] *Human Rights Act 2004* (ACT) s 30.
[107] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).
[108] *Human Rights Act 2019* (Qld) s 48.

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Australia, on the other hand, enjoys no form of statutory protection of free speech at a federal level. The current lack of free speech protections in Australia means legislatures have relatively few limits on their ability to legislate anti-vilification laws. Whilst we support the creation of a constitutional or statutory form of free speech protection in Australia, Australia's current lack of free speech protections is opportune for governmental regulation of hate speech.

## 10. Finding and Recommendations

In light of the above analysis, we submit the following recommendations:

1. Serious vilification of minority and subjugated groups is a prevalent problem in Australian society.
2. The criminal law is a blunt instrument with which to combat serious vilification. More impactful ways to combat serious vilification include public statements by leaders that counter hate speech; investment in marginalised communities; education that promotes cross-cultural dialogue and understanding; and addressing conscious and unconscious bias in individuals and institutions.
3. Subjugated groups are likely to be reticent to report hate crimes to police when they are also overpoliced and over-criminalised; and when police provide them with inadequate protections as victims.
4. Comprehensive police training and education is needed on the elements of s 93Z, including instances in which this provision should be used instead of alternative charges (such as offensive behaviour, offensive language, intimidation or common assault).
5. Comprehensive police training and education is needed on how conscious and unconscious bias affects police investigations and decision-making in relation to hate crimes, informed by consultation with marginalised groups and academic literature on racism and hate crimes.
6. The overarching purpose of s 93Z should be to protect subjugated groups who face prejudice-related threats and violence.
7. The NSW Government should repeal s 4A of the *Summary Offences Act 1988* (NSW) because it targets a broad range of speech that commonly falls below the threshold of seriousness required for criminalisation and disproportionately criminalises the speech of marginalised groups, including First Nations Australians.
8. It is unclear whether the requirement for DPP approval was the main impediment to successful prosecutions under s 93Z. Instead, a range of factors have hindered the obtaining of s 93Z convictions. These include community reluctance to report hate crime; police attitudes, education and culture; the complex elements of s 93Z; and the existence of other offences that police are more familiar with, and/or for which there is established criminal jurisprudence.

9. The NSW Government should consider the implementation of a well-resourced body that has independent oversight over the investigation, intelligence-gathering, charging and prosecution of hate crimes. This body should have the capacity to independently review and advise on police decisions, and should incorporate an advisory group that engages community groups to advise on hate crimes.
10. Current Australian and NSW provisions that criminalise or prohibit serious vilification should be reviewed to discern their consistency with Australia's international law obligations.