# Anglican Church Diocese of Sydney

06 August 2025

**Submission to the Review of criminal law protections against the incitement of hatred – Response to the Issues Paper**

This submission is made in response to the Options Paper for the Review of Criminal Law Protections against the Incitement of Hatred released by John Sackar AM KC (the Reviewer), and is made on behalf of Anglican Church Diocese of Sydney (the **Diocese**). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 260 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 38 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

We welcome the opportunity to participate in this important review process and would be pleased to provide any further feedback that the Reviewer might request. Our contact details are:

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## Introduction

1. We are concerned at the growing incidence of expressions of hatred towards vulnerable groups on the basis of religious belief or activity, particularly at those of the Islamic or Jewish faith. In 2023, we supported the amendments to the *NSW Anti-Discrimination Act* 1977 to prohibit religious vilification not for our own sake, but for the sake of other faiths, in the hope that this would help to address what appears to be a rising tide of islamophobia and antisemitism. Such hatred is destructive of social cohesion and polarises communities into 'us' and 'them'.

2. However, we do not think that introducing laws that control and suppress religious speech is a pathway to healing this division.

3. This submission addresses the six Focus Questions put forward in the Issues Paper. Any omission of details concerning other issues with proposed reforms should not be taken as support or general assent for elements of the proposal that are not addressed in the Issues Paper or in this submission.

4. The Terms of Reference for the Reviewer are as follows:

> The Reviewer is asked to review and report on the criminal law protections against the incitement of hatred following the introduction of the *Crimes Amendment (Inciting Racial Hatred) Act 2025* (Inciting Racial Hatred Act).
>
> In particular, the Review should consider:
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> - the sufficiency of criminal law protections against hatred for vulnerable groups in the NSW community, including any improvements that could be made
> - the interaction between these protections and existing rights and freedoms, including the implied freedom of political communication and freedom of religion
> - any other matters related to criminal law reform that the Government could consider to enhance social cohesion.

5. Importantly, the Review's Terms of Reference do not include consideration of potential reforms to:

   - Section 93Z of the Crimes Act, which criminalises threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.
   - Civil vilification protections in the *Anti-Discrimination Act 1977* (ADA) that protect against public acts that incite hatred, serious contempt or severe ridicule towards a person or group, based on specific protected attributes.

## Executive Summary

6. As highlighted by the Issues Paper,[1] a myriad of existing offences and sentencing considerations provide criminal law remedies against hatred towards vulnerable groups. We are of the view that the promotion of social cohesion will not be advanced by either section 93ZAA or by expanding the attributes referenced at section 93ZAA. We have previously indicated our support for section 93Z to remain in its present form, and consistent with our submission to the September 2024 Report *Serious Racial and Religious Vilification* ('the NSWLRC Bathurst Review') we do not recommend the continuation of section 93ZAA.

[1] The Options Paper for the Review of Criminal Law Protections against the Incitement of Hatred released by John Sackar AM KC ('Issues Paper'), pp. 6-7.

7. Instead, we submit that section 93ZAA should be repealed or amended to account for the serious effect that such laws can have on fundamental religious freedoms of preaching, teaching, proselytising and authentically living out religious faith in community with fellow believers. We follow the NSWLRC's finding in its September 2024 Report *Serious Racial and Religious Vilification* ('the NSWLRC Bathurst Review') that the protection of vulnerable groups would be better served by the enforcement of existing criminal offences rather than the creation of new ones.

# Submissions

## Criminal law protections against hatred for vulnerable groups

*Focus Question 1: What is the extent and impact of hatred towards vulnerable groups in the NSW community?*

8. As noted above, we are concerned at the growing incidence of expressions of hatred towards vulnerable groups, particularly where such hatred is directed at those of the Islamic or Jewish faith on the basis of religious belief or activity. Such hatred is destructive of social cohesion and polarises communities into 'us' and 'them'. Section 93ZAA was introduced in response to an unprecedented (in NSW) series of acts of hatred directed against the Jewish community. The extent and impact of hatred directed towards those with other protected attributes is not of this character, and does not warrant extending section 93ZAA to cover a wider range of attributes.

*Focus Question 2: Does the criminal law adequately protect against the incitement of hatred towards all vulnerable groups in NSW? If not, how could the criminal law better protect against the incitement of hatred towards these groups?*

9. Apart from sections 77 and 78 of the Western Australian *Criminal Code* and the yet to commence section 195N of the Victorian *Crimes Act 1958,* section 93ZAA is the only Australian criminal offence prohibiting inciting hatred without accompanying threats of violence. As highlighted by the Issues Paper,[2] a myriad of existing offences and sentencing considerations provide criminal law remedies against hatred towards vulnerable groups. We are of the view that the promotion of social cohesion and the protection of vulnerable groups will not be advanced by the expansion of the attributes listed at section 93ZAA. We follow the NSWLRC's finding in its September 2024 Report *Serious Racial and Religious Vilification* ('the NSWLRC Bathurst Review') that the protection of vulnerable groups would be better served by the enforcement of existing criminal offences rather than the creation of new ones (we address such measures in out reply to question 6). Further, we believe that the 93ZAA offence as drafted risks infringing upon fundamental religious freedoms.

10. Furthermore, we note that there has recently been a successful prosecution under section 93Z, where the accused was found to have instigated a violent brawl on the basis of ethno-

[2] Issues Paper, pp. 6-7.

religious/racial differences.[3] It should be noted that section 93Z also has an important educative purpose. The fact that there have been no convictions under the section until this recent decision does not negate, but may in fact suggest, that the section is fulfilling its educative purpose. Now that there has been a successful conviction under the section it is also clear that it is capable of dealing with the issues it was designed to address.

11. It would therefore appear that the scope of the law is already appropriate to address serious racial vilification. This recent successful prosecution in NSW is in addition to *R v Bayda (No 8)*,[4] where Fagan J confirmed that the actions of the operators of a bookstore and prayer meeting room in counselling younger men to undertake violent acts would now be caught by section 93Z. The facts in question in that matter arose prior to the commencement of section 93Z. In *obiter* Fagan J stated:

> 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 within the law's protection. It goes beyond personal religious experience and counsels criminal breaches of the peace. The whole concept of inclusive tolerance would be destroyed if respect and protection were accorded to beliefs that are themselves violently intolerant and that conflict with secular laws designed to secure diverse freedom of worship for all.[5]

## Interaction between criminal law protections against hatred and relevant rights and freedoms

*Focus Question 3: How can the criminal law strike an appropriate balance between protecting against the incitement of hatred towards vulnerable groups and protecting other important freedoms, including the implied freedom of political communication and freedom of religion?*

12. For reasons discussed above, we oppose the expansion of the attributes to which section 93ZAA applies. As stated by the Law Reform Commission in its *Serious Racial And Religious Vilification Report 151* dated September 2024 (**Report**) at 1.43, '(E)xpanded 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 ...'.

[3] Alexi Demetriadi, "NSW breaks judicial ground with first successful hate-speech conviction under section 93Z, *The Australian,* 9 June 2024, <https://www.theaustralian.com.au/nation/nsw-breaks-judicial-ground-with-first-successful-hatespeech-conviction-under-section-93z/news-story/17148ad3fe1accee517f612d9b140601>.
[4] [2019] NSWSC 24.
[5] Ibid [75]-[76] (Fagan J).

13. Further, we believe that the current drafting of the 'religious text' exemption in section 93ZAA(2) does not adequately preserve the religious freedoms of believers to communicate genuine religious teaching or discussion or proselytise to members of a religious community.

14. The exception in s.93ZAA(2) has a limited scope. It only covers 'directly quoting from or otherwise referencing a religious text for the purpose of religious teaching'. Paraphrasing or summarising a religious teaching is not covered. Neither are statements based on teachings contained in religious texts.

15. By way of example, many religions make the exclusive claim that their religion is the only way to salvation, and that other followers of other religions face eternal damnation. The Christian preacher who quotes the exclusive claim of Jesus in John 14:6, 'I am the way, and the truth, and the life. No one comes to the Father except through me', would be able to rely on the exemption in s.93ZAA(2), but suppose they go on to express the logical outworking of this claim – saying, for example, 'This means that no other religion can save you. Muslims are going to Hell. Jews are going to hell. Sikhs are going to hell. Hindus are going to hell. You must take every opportunity to preach the gospel to your Muslim neighbour, your Jewish neighbour, your Sikh neighbour and your Hindu neighbour.' If a reasonable Jewish or Sikh person (but not a Muslim or Hindu, since they are not covered by s.93ZAA) would fear that they were going to be 'badgered' or 'distressed' (i.e., harassed or intimidated in a low-bar sense) by Christians telling them they are going to hell unless they believe in Jesus, then the preacher has committed an offence punishable by 2 years in prison.

16. Consistent with our submission to the NSWLRC Bathurst Review, an offence of inciting hatred needs strong protections for religious activity and statements of religious belief:

    (a) An exception for religious bodies should operate so that the teaching and practices of religious bodies and schools are not regulated. This exception should retain the following phrase from the proposed Religious Discrimination Bill 2022 (Cth): 'For the purpose of subsection (2)(c), a religious discussion or instruction purpose includes, but is not limited to, conveying or teaching a religion or proselytising';

    (b) A general exception for 'a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter', should be included, which operates according to words equivalent to the existing exception at section 18D of the *Racial Discrimination act 1975* (Cth).

    (c) The legislation should clarify that it is to be interpreted consistent with the principle that, freedom of religion and expression is an essential component of a tolerant and pluralistic democracy;

    (d) It should somehow be made clear in the exceptions section that the key question within the reasonableness test outlined at subpoint (b) above is whether the statement was made reasonably for a religious discussion or instruction purpose, and **not** whether the religious belief statements themselves are reasonable

according to general community standards. It should be clear that nothing is intended in the new offence that would limit a religious claim that a religion offers the ultimate and exclusive form of truth, or that immoral behaviour can have eternal consequences.

(e) It should be made clear that the 'good faith' exception test is to be interpreted according to the understanding applied by Nettle JA in *Catch the Fire Ministries*, as opposed to French J in *Bropho v Human Rights & Equal Opportunity Commission*.[6]

17. There should also be particular examples provided to clarify the scope of the prohibition and that will clearly show the kinds of religious teaching that won't be subject to prosecution under the offence.

## Promoting social cohesion

*Focus Question 4: Would reforming criminal law protections against the incitement of hatred towards vulnerable groups assist with promoting social cohesion in NSW?*

18. For the reasons we set out in our reply to question 5 under the heading 'judging the standard by the reasonable member of the group is divisive', we are concerned about the breadth of a vilification provision based on the incitement of hatred because it could become a 'blasphemy law' by another name, criminalising criticism of one religion against another. We fear that the insertion of the criminal law as an arbiter of inter-religious or sectarian disputes can only inflame tensions that fuel the erosion of social cohesion.

19. There is also a serious concern that legislation is not going to address the underlying issue. As noted by the NSWLRC Bathurst Review, the criminal law is not an effective, nor desirable, tool to achieve social policy objectives. Instead, the focus should be on education, awareness and organisations working collaboratively and with their respective communities.

20. The government should give consideration to the other recommendations of the NSWLRC Bathurst Review. It should also address whether these recommendations have been considered and, if not implemented, why not. Given the time and resources which went into the review by the Law Reform Commission, it is only proper that consideration be given to the observations and recommendations contained in the Report.

*Focus Question 5: Could reforming criminal law protections against the incitement of hatred towards vulnerable groups have potentially negative or unintended consequences? If so, are there any further safeguards that could reduce this risk?*

21. We have a number of concerns in relation to the negative consequences of the section 93ZAA offence, particularly upon religious freedoms. These include that:

[6] (2004) 135 FCR 105.

(a) the application of the definition of 'public act' to section 93ZAA sees the prohibition extend to acts on private land, including places of worship, bringing prayer, preaching, and religious teaching within the scope of the section 93ZAA offence;

(b) judging whether vilification has occurred by the view of the reasonable member of the group is divisive;

(c) 'harassment, intimidation or violence' could be interpreted to limit the teaching of Scripture; and

(d) introducing a broad offence with limited defences will have the unintended consequence of criminalising criticism of and debate between different religions, and risks becoming a 'blasphemy law' by another name.

*We turn to address each of the above concerns in turn.*

*Definition of 'public act'*

22. We believe that the application of the definition of 'public act' found in section 93Z to section 93ZAA is problematic. It is already broad in its scope within the context of section 93Z, which proscribes incitement to violence. When applied to the lower threshold of inciting hatred, the definition of 'public act' only increases the risk of restricting legitimate religious activity, such as preaching, teaching and pastoral counsel.

23. The definition of 'public act' in s93Z of the Code is:

> ***public act*** includes –
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> (a) any form of communication (including speaking, writing, displaying notices, graffiti, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and
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> (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.[7]

24. As is clear from the definition, the concept of a 'public act' is sufficiently broad to capture many different kinds of communication to the public, even if that communication takes place on private land.

25. Given that the prohibition against publicly inciting hatred in the section 93ZAA offence carries significant criminal penalties while having a lower threshold than the section 93Z offence, we strongly caution against using the 93Z definition of 'public act' for section 93ZAA which encroaches upon private spaces, relationships and contexts that the law has

[7] *Crimes Act 1900* (NSW), s93Z(5).

historically respected as beyond its scope of interference, particularly when it comes to speech and communication.[8]

26. The scope of this definition of 'public act' would include private communications in a context where the public may have access, such as a Church, a Mosque, or a Synagogue. As outlined above, this could have the consequence of restricting genuine religious teaching or discussion or proselytising to members of a religious community. Religious teaching that is conducted in the context of private or semi-private religious spaces, in good faith, amongst religious group members that is not inciting violence against others should not be unduly subjected to possible prosecution under section 93ZAA for failure of a member of the public to understand the context, doctrine, or meaning of that teaching.

27. The application of the scope of the definition of 'public act' to section 93ZAA could also have the unfortunate effect of 'chilling' legitimate religious speech and activity amongst religious communities who do not understand the nuances of the offence in section 93ZAA but are overly cautious for fear of criminal prosecution that could reach into their Church gathering and pulpit.

*Judging the Standard by the Reasonable Member of the Group is Divisive*

28. Furthermore, under 93ZAA the test for determining whether an offence has occurred is whether the incitement to hatred causes '…a reasonable person who was the target of the incitement of hatred, or a reasonable person who was a member of a group of persons that was the target of the incitement of hatred' to 'fear harassment, intimidation or violence' or 'fear for the reasonable person's safety'.

29. The definition of a 'reasonable person' is shifted to only include members of the affected category. This is a significant change from the existing test under section 93Z and it represents a significantly novel proposition for existing Australian vilification law. Only in Victoria and the Commonwealth has such a test been applied. The Queensland Parliament passed such a test applied in September 2024, however the provision has been delayed pending further consultation in response to concerns raised by religious institutions. The Commonwealth provisions have taken effect and the Victorian provisions are yet to take effect. What an average Australian, or even a judge, may find 'reasonable' is not relevant. Only the offended category gets to decide what is 'reasonable'. The reasonable person test in paragraph 93ZAA(1)(2)(b) means that it would not be necessary for the prosecution to prove that the threat actually had the effect of causing a specific member of the targeted group to fear 'harassment, intimidation or violence' or 'fear for their safety'. The fact that the threat would have this effect on a reasonable member of a targeted group would be sufficient.

30. It is enough that a 'reasonable' member of the category would consider the conduct threatening. The scope of what is considered to be threatening varies dramatically between

[8] A good example of such respect of private spaces is anti-discrimination law stopping at the threshold of the family home; see exceptions for residential care roles in the Commonwealth *Sex Discrimination Act 1984*.

sections of society. The provisions capture not only express conduct, but also implied conduct.

31. The proposed prohibition puts the power entirely in the hands of the group claiming offence. This fundamentally alters the meaning of the 'reasonable person' test in other laws, which was created to ensure that neither side in a dispute is favoured and to ensure that the law will operate as fairly and objectively as possible between two parties. This clause poses real risks of being weaponized by one minority group against another. Would a reasonable Christian person consider a Muslim teaching that 'Christians are wrong and risk going to hell' to be 'threatening' psychological injury – or vice versa? A judge will have to determine the answer, leaving faith groups uncertain as to what is permitted religious speech. On that analysis, the breadth of this provision could become a 'blasphemy law' by another name, by criminalising criticism of one religion against another. This law will not be a protection for minorities. Instead of being a shield, it creates a sword for one group to use against another.

32. The NSWLRC Bathurst Review recommended that a harms-based test not be applied in NSW, at the time correctly noting that such would be the first time in Australian criminal law that this test has been applied in vilification prohibitions. The Review report contains the following apposite statements:

> 4.58 … most submissions opposed introducing this test into the criminal law. There was some support for amending the *ADA* to introduce a harm-based test in NSW's civil vilification laws. This is outside the scope of this review, but may be considered as part of our ongoing review of the *ADA*.
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> 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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> **Harm-based tests have a different focus**
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> 4.60 A harm-based test can capture vilification that falls short of threatening or inciting violence. Options might include covering conduct that:
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> • is reasonably likely to offend, insult, humiliate, intimidate and/or ridicule a person with a protected attribute, or
>
> • a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or group.
>
> 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. 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. 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.

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

4.65 It is not always possible to objectively determine whether conduct is reasonably likely to insult, humiliate, intimidate and/or ridicule. 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.

33. The Review went on to state:

**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. 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.

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. 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*.

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

### *The Test for 'Harassment, Intimidation or Violence' Could Capture Traditional Religious Teaching*

34. There is a lack of clarity around what might constitute the incitement of hatred under section 93ZAA because this is based on the emotional response of a reasonable person of the target group. This imports subjective definitions of hate, making the criminal laws something which can be readily weaponised and misused. This would be the only Australian criminal offence for inciting hatred without any accompanying violence, apart from WA and the Victorian provisions which are yet to commence.

35. The offence requires a public act that *could* encourage or spur others to harbour the emotion of hatred, and was intended to do so. It also requires that this public act would cause a reasonable person of the target group to fear harassment, intimidation or violence, or fear for their personal safety. That is, the focus is not on whether the public act itself was perceived as 'harassment, intimidation or violence', but whether that person would fear that they would be subject to 'harassment, intimidation or violence' by third parties as a result of the public act.

36. The breadth of 'harassment, intimidation or violence' needs to be clarified, to ensure that this does not include subjective psychological states or feelings – e.g., 'I felt intimidated' or 'I felt harassed'.

37. The Federal Court has provided the following definition of harassment (*Re Susan Hall; Dianne Susan Oliver and Karyn Reid v A & A Sheiban Pty Ltd; Dr Atallah Sheiban and Human Rights and Equal Opportunity Commission* (1989) 85 ALR 503, 531; [1989] FCA 72; 20 FCR 217 (15 March 1989) [9]):

> The word 'harass' implies the instillation of fear or the infliction of damage; as is indicated by the definition of the term in the Macquarie Dictionary: '1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.'

38. On the second limb of the definition, it would be an offence if a public act led to fear that a person would be 'disturbed persistently'. A preacher who said 'we must preach the gospel to our Jewish neighbours and never give up' could be guilty of a criminal offence under this definition.

39. This issue can be addressed by clarifying that harassment, intimidation or violence did not extend to psychological states of mind or feelings.

40. As also noted in our submission to the NSWLRC Bathurst Review, our concern that the concept of 'violence' in section 93ZAA could be interpreted to include psychological injury is also grounded in the existing law. Courts have upheld the proposition that criminally unlawful violence against a person can include actions that give rise to psychological injury.

41. An example of this is in New South Wales, where 'actual bodily harm', which has historically been understood to result from physical force or violence, can now include harm that is the result of violence to a person's mental health. The New South Wales Criminal Court of Appeal stated in *Shu Qiang Li v R*:

> A further matter is that, if the victim had been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would be likely to have amounted to 'actual bodily harm' (see *R v Lardner*, unreported, NSWCCA, 10 September 1998.)[9]

[9] *Shu Qiang Li v R* [2005] NSWCCA 442 [45].

42. The concepts of physical and psychological harm are treated as synonymous, with no material distinction between the concepts. This could lead to a finding that 'violence' includes actions that lead to psychological injury.

43. A religious teacher should not be at risk of prosecution under this section for teaching orthodox religious doctrine with no intention to incite violence or hatred, but with the knowledge that some members of the community may take such offence at his words that there is a substantial risk that they could suffer mental distress if they felt harassed, intimidated by the teaching, or if it caused them to fear violence, understood as psychological injury.

44. Religious institutions must be able to continue to teach and encourage adherence to their beliefs. For this reason, we continue to hold the view that both section 93Z and 93ZAA should clarify that harm inflicted by violence only includes physical harm.

45. Consistent with our submission to the NSWLRC Bathurst Review, we therefore oppose the introduction of the new offence of inciting hatred on the ground of race at section 93ZAA. Other jurisdictions include the incitement of hatred as part of their equivalent offence to section 93Z. For example, the ACT, Queensland and South Australia similarly include an essential element of the offence as a threat of physical harm or the inciting of others to threaten physical harm, which incites hatred.[10]

46. On this basis we previously opposed the introduction of the new offence at section 93ZAA that merely requires the incitement of hatred on the basis of race. For the same reason we oppose the expansion of section 93ZAA to include additional attributes. 'This would be an unacceptable inclusion as a criminal offence.

47. There already exists a civil prohibition on the incitement of hatred on the ground of race in section 20C of the *Anti-Discrimination Act 1977* (NSW). Furthermore, a new Part 4BA was added to the *Anti-Discrimination Act* in November 2023 to prohibit religious vilification:

> **49ZE Religious Vilification Unlawful**
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> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of –
>
> (a) a person on the ground the person –
>
> (i) has, or does not have, a religious belief or affiliation, or
>
> (ii) engages, or does not engage, in religious activity, or
>
> …
>
> (2) Nothing in this section render unlawful –
>
> (c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about expositions of an act or matter.

[10] *Criminal Code 2002* (ACT), s750; *Anti-Discrimination Act 1991* (QLD), s131A; *Racial Vilification Act 1996* (SA), s4.

48. The mischief that section 9ZAA's offence of inciting hatred targets is already addressed by the civil provisions in the *Anti-Discrimination Act*, and – unlike s93ZZA – is based on 'religion' not 'race' Conduct that already amounts to a civil offence, inciting or promoting hatred (*absent* a threat of incitement to physical harm) should not be a criminal offence under NSW State law.

49. This is particularly the case because the new criminal offence, like section 93Z, provides no suitable defence for legitimate religious activity and expressions of religious belief and teaching in the public sphere. We are concerned that introducing a broad offence with limited defences will have the unintended consequence of criminalising criticism of and debate between different religions.

50. Turning to the proposal that section 93ZAA should be expanded to include the attributes listed at section 93Z, it is noteworthy that there have been a number of vilification complaints initiated based on claims that traditional or religious teachings on sexuality, gender and marriage promote hatred, severe ridicule or serious contempt of LGBT persons. Most of these complaints have been successfully defended, though at a significant cost in time, money and stress for the defendant. These examples serve to highlight that, without sufficient defences for religious speech, a judge could find that certain religious speech amounted to incitement to hatred, were an expanded list of attributes to be included in section 93ZAA.

51. A principal concern with vilification law is the potential for judicial findings to be influenced by personal philosophical assumptions or beliefs. This concern has been aired in judicial authority. Principal Member Britton in the NCAT has said that applying the test, 'does not lend itself to empirical measurement and involves an impressionistic assessment'.[11] Furthermore, she has said that, 'reasonable minds may differ on whether a particular public act has the capacity to incite'.[12] Gordon M has observed that, 'The difficulty of course is that what I regard as "extreme" will differ from what other decision makers regard as extreme.'[13] Gorden M also stated in the same case that, '[t]he uncertainty about these things must make the task of lawyers trying to assess the merits in these cases very difficult.'[14] If it is difficult for lawyers to assess situations where vilification laws may be applicable, how much more will it be so for religious leaders and the laity, who are the people who will be required to comply with these laws, and at threat of criminal sanction?

52. The NSWLRC Bathurst Review shared these concerns, stating that:

> … 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.

[11] *Burns v Sunol (No2)* [2017] NSWCATAD 236, [62].
[12] *Burns v Sunol* [2015] NSWCATAD 178, [51].
[13] *Valkyrie and Hill v Shelton* [2023] QCAT 302 (18 August 2023) [74].
[14] Ibid, [61].

> 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.
>
> 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.

53. We are also concerned about the breadth of a vilification provision based on the incitement of hatred because it could become a 'blasphemy law' by another name through criminalising criticism of one religion against another. The following summary from Professor Red Adhar of the chief findings of the case *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*[15] reveals the complexities of vilification law applied in this context:

> The Catch the Fire decision valiantly endeavoured to clarify the law but actually generated new uncertainties. We learn that critical and destructive statements about religious beliefs are acceptable, as are statements that offend or insult believers. It is only 'extreme' statements that incite hatred of religious persons or groups in third persons that matter. We also learn that predicting the outcome of this test is difficult, for the judges themselves could not agree that the statements before them were likely to have incited negative emotions. We now know that religious speech does not actually have to result in an audience feeling hatred or contempt, for it is enough that it is capable of stirring up hatred toward a religious group. If the 'natural and ordinary effect' of the words on 'reasonable' or 'ordinary' members of the target audience would be to stimulate hatred towards the believers in question, prima facie liability follows. Statements attacking beliefs but urging respect for the persons holding those beliefs, may be taken into account for their ameliorative effect, but only if they are genuine and not expressions of 'feigned concern'. We learn that the judges did not agree as to whether 'inaccurate' and 'unbalanced' presentations of religious beliefs and practice count against the religious speaker. To claim the statutory defence of conduct engaged in 'reasonably' and in 'good faith' for a genuine religious purpose we learn that the truth per se of the statements made is no defence. The focus instead is whether the hypothetical reasonable citizen in an open and just multicultural society would consider the speech excessive and beyond the bounds of tolerance. If so, then the speech is unlawful. There are more than enough grey areas here to make any religious speaker or writer think twice before launching into the public domain.[16]

54. Commenting on this case, Amir Butler, the Executive Director of the Australian Muslim Public Affairs Committee wrote:

> As someone who once supported their introduction and is a member of one of the minority groups they purport to protect, I can say with some confidence that these laws have served only to undermine the very religious freedoms they intended to protect … If we love God, then it requires us to hate idolatry. If we believe there is such a thing as goodness, then we must also recognise the presence of evil. If we believe our religion is the only way to Heaven, then we must also affirm that all other paths lead to Hell. If

[15] [2006] VCA 284.

[16] Rex Adhar, "Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law" (2007) 26 *University of Queensland Law Journal* 293, 314.

> we believe our religion is true, then it requires us to believe others are false. Yet, this is exactly what this law serves to outlaw and curtail: the right of believers of one faith to passionately argue against or warn against the beliefs of another... All these anti-vilification laws have achieved is to provide a legalistic weapon by which religious groups can silence their ideological opponents, rather than engaging in debate and discussion.[17]

*Focus Question 6: Are there other measures related to criminal law reform that may promote social cohesion?*

55. With respect to international jurisdictions, we strongly oppose any amendments modelled on the *Public Order Act 1986 (UK)*. This Act creates offences that relate to threatening, abusive or insulting words or behaviour, or display of visible representations, which:

    (a) Are likely to cause fear of, or to provoke, immediate violence: section 4;

    (b) Intentionally cause harassment, alarm or distress: section 4A; or

    (c) Are likely to cause harassment, alarm or distress (threatening or abusive words or behaviour only): section 5.

56. It is a defence to section 4A and section 5 for the accused to demonstrate that their conduct was reasonable, which must be interpreted in accordance with the freedom of expression and other freedoms. If these freedoms are engaged, a justification for interference (by prosecution) with them must be convincingly established. A prosecution may only proceed if necessary and proportionate.

57. The scope of the terms 'threaten', 'abusive', 'harassment', alarm and 'distress' accompanied with the vague tests of 'reasonableness' and 'proportionality' have created a plethora of litigation in the UK (including the recent charges laid against Sam Kerr). This litigation has arisen under the offences that don't require incitement to violence or require threats of violence, but regulate threatening or abusive words that that cause harassment, alarm or distress. It has seen police arrest and charge members of the public for statements confirming traditional beliefs of marriage, gender and sexuality and in respect of Biblical claims to exclusive truth.[18] We do not consider that this law provides an acceptable model for reform.

58. In our view, section 93ZAA should not adopt a standard based on 'harassment', or 'intimidation' because of the ill-defined and subjective nature of these terms. For the reasons articulated above, even 'violence' can have an overly broad reach, if it includes fear of psychological injury. These are not appropriate outcomes for an offence with significant criminal sanctions. There are life-long consequences for individuals convicted of a criminal

[17] Amir Butler, 'Why I've changed my mind on vilification laws', *The Age* (Melbourne), 4 June 2004 <https://www.theage.com.au/national/why-ive-changed-my-mind-on-vilification-laws-20040604-gdxz1s.html>.

[18] See, for e.g., https://christianconcern.com/ccpressreleases/police-drop-case-against-tory-councillor-arrested-for-hate-crime-for-supporting-christian-free-speech/; https://www.dailymail.co.uk/news/article-7293257/Police-arrest-preacher-64-grab-Bible-promoting-Christianity.html.

offence, and therefore the scope of this offence should be restricted to the most serious examples of racial vilification.

59. in light of the recent amendments to subsection 93Z(4), which allow police officers to initiate prosecution, we recommend that further training continue to be provided to police. In 2009 the then DPP, Mr Nicholas Cowdery AM QC recommended that police should receive training about vilification if they are to be involved in the investigation of potential serious racial vilification offences. In 2013 the Anti-Discrimination Board of NSW told the Standing Committee on Law and Justice, Parliament of New South Wales, Racial Vilification Law in New South Wales Committee Inquiry that:

> There have been many criticisms of the police in the past as having been insensitive to issues of discrimination and these could no doubt be extended to vilification. Concern expressed in the past about locating law enforcement authority and prosecutorial discretion for prosecution for serious vilification in the hands of the police may be well-founded. Consideration should be given in a review of the effectiveness of implementation of anti-vilification laws, as to whether additional training should be provided to police at intake and on a 'refresher' basis for existing police officers in the area of vilification.[19]

The 2013 Committee recommended 'that the NSW Police Force provide additional training to its members about its powers under the Anti-Discrimination Act to address any concerns about tensions with certain community groups, as well as to address any perceived view that the police may not be sufficiently aware of their responsibilities.'[20]

60. Such training should also make police aware of the scope of the civil prohibition of Religious Vilification now available through s49ZE of the *NSW Anti-Discrimination Act* 1977. This will enable them to advise those who have experienced religious vilification below the criminal threshold about other avenues of redress.

61. We also note that the 2024 review conducted by Tom Bathurst did not recommend the adoption of section 93ZAA, citing various of the reasons contained in this submission. We endorse the following recommendation of that review:

> 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.

62. We thank the Reviewer for the opportunity to make submissions on these important issues and welcome any future opportunity to participate in this review process.

**Bishop Michael Stead**

6 August 2025

[19] Anti-Discrimination Board of NSW, Submission No 10 to Standing Committee on Law and Justice, Parliament of New South Wales, *Racial Vilification Law in New South Wales* (22 April 2013) cited in Report (n 6) 90.
[20] Report (n 6) 93.

## Annexure A – Inciting Hatred Provisions in Other Jurisdictions

*Western Australia - Criminal Code (WA)*

**77. 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.

Alternative offence: s. 78, 80A or 80B.

*[Section 77 inserted: No. 80 of 2004 s. 6; amended: No. 70 of 2004 s. 38(3).]*

**78. 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.

Alternative offence: s. 80A or 80B.

Summary conviction penalty: imprisonment for 2 years and a fine of $24 000.

*[Section 78 inserted: No. 80 of 2004 s. 6; amended: No. 70 of 2004 s. 38(1) and (3).]*

*Victoria - Crimes Act 1958 (Vic) - Yet to commence*

**195N Incitement on ground of protected attribute**

(1) A person commits an offence if—

(a) the person engages in conduct that is likely to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, another person or a group of persons; and

(b) the person engages in the conduct on the ground of a protected attribute of the other person or the group; and

(c) the person either—

(i) intends that conduct to incite hatred against, serious contempt for, revulsion towards or severe ridicule of, the other person or the group; or

(ii) believes that conduct will probably incite hatred against, serious contempt for, revulsion towards or severe ridicule of, the other person or the group.

(2) A person who commits an offence against subsection (1) is liable to 3 years imprisonment.

(3) For the purposes of subsection (1), the conduct may be constituted by a single occasion or by a number of occasions over a period of time.

(5) If conduct engaged in from outside Victoria is alleged to constitute an offence against subsection (1), every person against whom the offence is alleged to have been committed must have been in Victoria when at least some of the conduct was engaged in for the conduct to constitute that offence.

(6) Conduct that—

(a) is engaged in from outside Victoria; and
(b) is against a group of persons that is defined solely by the possession of a protected attribute—

does not constitute an offence against subsection (1).

**Example**

If a person in another State engages in conduct that is against all people of a certain race, whether or not those people are within Victoria, that conduct does not constitute an offence against subsection (1).

(7) If any of the conduct alleged to constitute an offence against subsection (1) is engaged in from within Victoria, it does not matter whether a person against whom the offence is alleged to have been committed was outside Victoria at that time.