

Anti-Discrimination NSW

Submission on the Criminal Code Amendment (Hate Crimes) Bill 2024

Submission to the Senate Legal and Constitutional Affairs Legislation
Committee

5 November 2024

Acknowledgement of Country

Anti-Discrimination NSW acknowledges the Traditional Custodians of the lands where we work and live. We celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of NSW.

We pay our respects to Elders past, present and emerging and acknowledge the Aboriginal and Torres Strait Islander people that contributed to the development of this document.

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Introduction

Anti-Discrimination NSW (**ADNSW**) welcomes the opportunity to make a submission in relation to the Criminal Code Amendment (Hate Crimes) Bill 2024 (the **Bill**).

ADNSW recognises the serious harm that threats of force or violence can have on the safety, health and wellbeing of targeted individuals, groups and the wider community. We strongly support effective and coordinated mechanisms in the state and federal civil and criminal law to help deter, prevent and respond to such conduct.

About ADNSW

ADNSW is responsible for administering the *Anti-Discrimination Act 1977* (the **NSW Act**). ADNSW answers enquiries, resolves individual complaints through conciliation, raises awareness about discrimination and its impacts, manages exemptions and advises the government about discrimination issues.

The NSW Act includes civil provisions for addressing unlawful vilification – defined as a public act that could incite hatred, serious contempt or severe ridicule towards a person or group on the grounds of race, religion, homosexuality, being transgender or having HIV or AIDS.

Our review of the Bill is informed by the experiences of our Enquiries and Conciliation and Community Engagement teams, and the research and expertise of our Governance and Advice team.

ADNSW strongly supports the broad aims of the Bill. We welcome the move to:

- extend protection to an expanded list of groups by including, sexual orientation, gender identity, intersex status and disability,
- recognise intersectionality,
- recognise that some conduct can never be “in good faith,” and
- take into account the experience of “a reasonable member of the targeted group”.

NSW context

ADNSW believes it is vital for state and federal laws in this area to work together to provide clarity and consistency for all. We do not see any particular issues in the coexistence of the proposed federal legislation and the current NSW laws in this area.

We note however that the NSW Law Reform Commission is currently reviewing the:

1. *Anti-Discrimination Act 1977* (NSW) to consider how it could be updated and made more simple, effective and consistent with best practice in other jurisdictions, and
2. effectiveness of section 93Z of the *Crimes Act 1900* (NSW) in addressing serious vilification based on “race, religion, sexual orientation, gender identity, intersex status and HIV/AIDS status”.

ADNSW has made submissions to the NSW Law Reform Commission for both reviews (available at lawreform.nsw.gov.au). The Bill is largely consistent with our relevant recommendations regarding updated terminology and strengthening of offences in NSW.

ADNSW hopes to see changes to the NSW Act in due course that further harmonise the grounds in state civil and criminal legislation and federal legislation.

Intersex status or sex characteristics

ADNSW is pleased to note the intention of the Bill to protect all people against being targeted because of their identity or beliefs, and to carefully choose the wording of the targeted groups in relation to **“sex, sexual orientation, gender identity, intersex status”**.

This avoids the problem with the current NSW Act, which confuses and conflates the concepts of sex, gender identity and gender expression and assumes that gender is binary (through references to “the opposite sex”). We hope to see the NSW Act updated in due course to include sexual orientation, gender identity and intersex or sex characteristics.

ADNSW acknowledges that terminology is contested in this area. While the Explanatory Memorandum explains the efforts to choose the best wording for the Bill, and the decision to use “intersex status” consistent with the *Sex Discrimination Act 1984* (Cth) and various state laws, ADNSW notes that including **“sex characteristics” may be preferable to “intersex status”**.

The Justice and Equity Centre¹ has recommended that the protected attribute of intersex status in relation to the *Sex Discrimination Act* should be replaced with ‘sex characteristics’ which is supported by the definition in the Yogyakarta Principles plus 10² and definitions used by the United Nations.

Intention versus recklessness

ADNSW notes the Bill’s intention to change the fault element from ‘intention’ to ‘recklessness’ in sections 80.2A and 80.2B of the *Criminal Code Act 1995* (Cth) and to introduce new criminal offences using the fault element of ‘recklessness’.

The NSW experience shows historical difficulties in successfully prosecuting offenders under historic serious vilification provisions. The high bar set by the requirement for proving intention is understood to be one of the reasons.

Between 1989 and 2018, the NSW Act contained a criminal offence of serious racial vilification (s20D)³. When the provision was introduced to Parliament, the Minister’s second reading

¹ [From Leader to Laggard: the case for modernising the NSW Anti-Discrimination Act](#), Public Interest Advocacy Centre, 6 August 2021, p. 4.

² <http://yogyakartaprinciples.org/principles-en/yp10/>.

³ Introduced in the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW), repealed by the *Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018* (NSW).

speech indicated that intention would be required for an offence and that “prosecution and conviction will be limited to only very serious cases of racial vilification.”⁴

No case involving s20D was ever prosecuted, although ADNSW referred 34 complaints of serious vilification to the Director of Public Prosecutions (DPP) between 1998 and 2018⁵. The lack of prosecutions is believed to be largely because the DPP considered that elements of the offence could not be made out to a criminal standard of proof based on the material provided.

Section 93Z was added to the *Crimes Act 1900* in 2018, replacing the serious racial and religious vilification offences in the NSW Act. A person can be guilty of an offence under s93Z if they:

- intend to incite or threaten violence by their act, or
- know that inciting or threatening violence is a possible outcome of their act, but they do the act anyway.

There have still been very few successful prosecutions under this legislation⁶, although one important reason is thought to be the fact that, until 1 January 2024, any prosecutions under s93Z needed to be approved by the DPP, which meant unfortunate delays and a tendency for police to prosecute using other offences instead.

Thank you again for the opportunity to provide a submission. If you have any questions or would like to discuss this matter further, please contact Jackie Lyne ([REDACTED]) or Alex Benn ([REDACTED]).

Yours sincerely,



Helen McKenzie
President
Anti-Discrimination NSW

Date: 5 November 2024

⁴ Hansard, 10 May 1989, Legislative Council.

⁵ The period for which records are available.

⁶ In 2022, the New South Wales Attorney General reported that six persons had been charged with committing an offence under section 93Z since it was introduced. Of these, two convictions in 2020 were annulled in 2021; two had charges withdrawn in 2021; and two ongoing prosecutions had been adjourned to 2023 (See: [NSW Parliament, 8694 - PROSECUTIONS UNDER S93Z OF THE CRIMES ACT](#)).

We are committed to eliminating discrimination and promoting equality and equal treatment for everyone in New South Wales, including by resolving enquiries and complaints, raising awareness about discrimination and its impacts, and taking action to influence change.

Enquiries and complaints

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