

CRIMES AMENDMENT (PROSECUTION OF CERTAIN OFFENCES) BILL 2023

STATEMENT OF PUBLIC INTEREST

Need: Why is the policy needed based on factual evidence and stakeholder input?

Section 93Z(1) of the *Crimes Act 1900* states that 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 is guilty of an offence:

- race
- a specific religious belief or affiliation
- sexual orientation
- gender identity
- intersex status, or
- HIV or AIDS status.

Where the offence is committed by an individual, the offence is punishable by a fine of up to \$11,000 or up to three years imprisonment, or both.

The Crimes Amendment (Prosecution of Certain Offences) Bill 2023 will streamline the process for police to prosecute people who offend against section 93Z.

The Bill will achieve this by amending the *Crimes Act 1900* to omit subsection (4) from section 93Z. Subsection 93Z(4) currently provides that a prosecution for a section 93Z offence is not to be commenced without the approval of the Director of Public Prosecutions (DPP).

Section 93Z is a Table 1 offence, meaning although it carries a maximum penalty of three years' imprisonment, it is to be tried summarily unless the prosecutor or accused person elects otherwise. This means that charges under section 93Z would typically be prosecuted by the NSW Police Force in the Local Court.

Concerns have been expressed that limited use has been made of the offence under section 93Z since its introduction in 2018.

In particular, concerns have been raised that 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.

Objectives: What is the policy's objective couched in terms of the public interest?

It is in the public interest that offences are appropriately prosecuted and prosecutions are commenced in a timely manner.

Victims and the community expect offenders to be charged and dealt with swiftly, and charging delays may undermine public confidence in the criminal justice system's response to unacceptable hate speech. It is therefore in the public interest that the DPP approval requirement be removed to make this offence consistent with the overwhelming majority of other offences in New South Wales, including the offence of displaying Nazi symbols contained in section 93ZA, which includes no such requirement despite capturing thematically similar offending.

Options: What alternative policies and mechanisms were considered in advance of the bill?

Only legislative amendment can address these issues.

Analysis: What were the pros/cons and benefits/costs of each option considered?

The requirement for the DPP to approve a prosecution was introduced in 2018 by the Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018, which consolidated serious vilification offences previously contained in the *Anti-Discrimination Act 1977* under a single offence in the *Crimes Act 1900* and transferred the responsibility for approving prosecutions from the Attorney General under the pre-existing serious racial vilification offence, to the DPP under the new offence in the *Crimes Act 1900*.

The requirement for DPP approval was considered necessary at that time to ensure that a balance was maintained between the public interest in protecting free speech, and criminalising unacceptable hate speech. As an offence that polices the acceptable limits of public debate and communication, it is important that careful consideration is given before commencing a prosecution under section 93Z.

However, where a provision that seeks to ensure that appropriate consideration is given to public interest concerns before commencing a prosecution may be contributing to charges rarely being considered at all, this should be addressed. The NSW Government considers that removing the requirement for DPP approval to commence prosecutions under section 93Z strikes the right balance between protecting freedom of expression and preventing public acts that threaten or incite violence.

Pathway: What are the timetable and steps for the policy's rollout and who will administer it?

The Bill will commence upon proclamation. This will enable frontline and investigating police to receive training to ensure that they have a thorough understanding of the circumstances in which it is appropriate to charge under section 93Z.

Consultation: Were the views of affected stakeholders sought and considered in making the policy?

The NSW Police Force and the Director of Public Prosecutions were consulted.