

NSW Law Reform Commission review of the *Anti-Discrimination Act 1977* (NSW)

**Submission by the
Australian National Imams Council**

28 September 2023

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INTRODUCTION

1. This submission is made on behalf of the Australian National Imams Council (**ANIC**) for the purposes of the review to be undertaken by the NSW Law Reform Commission of the *Anti-Discrimination Act 1977* (NSW) (**Act**). It addresses a number of the questions outlined in the Terms of Reference (**TOR**).
2. By way of background, ANIC is an umbrella organisation consisting of over 200 Muslim imams, clerics and Islamic scholars representing each Australian State and Territory. ANIC represents the wider interests of the Australian Muslim community. ANIC regularly facilitates collaborative initiatives with other community-based organisations.
3. ANIC has also played a leading role in relation to the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023*, which amended the Act to make it unlawful to vilify a person or group of persons on the ground of religious belief or affiliation or religious activity. In advocating for such a change, ANIC is familiar with the structure and operation of the Act.
4. In making the submission, ANIC has conferred with various Muslim community organisations which are focussed on providing community services and support throughout Australia. ANIC has also had the benefit of feedback provided by Australian Muslims to its various members. Accordingly, the issues raised in this submission are reflective of the views prevalent in the Australian Muslim community, including among other Muslim organisations.
5. In modern day Australia, religious belief and practices are as important and inherent to the identity of people as their race, gender, culture and family and parental responsibilities. Accordingly, people should be free to manifest their religious belief not merely in thought or prayer but in practice and their day to day lives. Australian Muslims continue to be readily identifiable by their names, appearance, dress and attendance at places of worship. Yet, inexplicably, if Australian Muslims are discriminated against based on their religious identity, there is little to no legal recourse in NSW (or, for that matter, federally).
6. The discrimination which Australian Muslims have experienced threatens their freedom to express their religious identity, creates significant stress for their children and youth, and erodes their sense of security and belonging. The psychological impacts are lasting.

7. The review of the Act is timely and overdue. It offers a critical opportunity to address an urgent and pressing concern held by Australian Muslims and persons of other faiths in a context where there is no legislative protection against discrimination directed at a person based on their religious belief, affiliation, or activity.
8. We appreciate the opportunity to make this submission and look forward to further engaging on the review of the Act.

SUBMISONS IN RELATION TO TERMS OF REFERENCE (TOR)

TOR 1: whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

9. The existing legislative framework provided by the prohibits unlawful discrimination on various grounds. In summary, the grounds of unlawful discrimination are:
 - (a) race, colour, descent or national or ethnic origin;
 - (b) sex;
 - (c) gender identity;
 - (d) marital or domestic status;
 - (e) disability;
 - (f) carer responsibilities;
 - (g) homosexuality; and
 - (h) age.
10. The definition of race in the Act includes ethno-religious or national origin. The term 'ethno-religious origin' has previously been held to signify a strong association between a person's or a group's nationality or ethnicity, culture, history and his, her or its religious beliefs and practices. It has been found to include Jewish or Sikh people. However, it has been found not to include Australian Muslims.¹
11. Notwithstanding the breadth and range of the protected attributes, there is no protection against discrimination on the grounds of a person's religious identity and belief.
12. Hence, as it stands, in NSW, Australian Muslims do not have any legislative protections against religious discrimination, including in the workplace.

¹ *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 (15 February 2019) and *Khan v Commissioner, Department of Corrective Services and Anor* [2002] NSWADT 131

13. In the above context, it is a fundamental deficiency in the discrimination legislative regime operating in NSW that there is no protection against discrimination on the grounds of a person's religious belief and practices. This puts it at odds with contemporary community standards such that it does not promote the equal enjoyment of rights. To the contrary it, at best, ignores, and at worst, makes permissible, discrimination on the grounds of a person's religious belief and practice. For instance, it has the effect of making inoperative the protection against religious discrimination provided by the *Fair Work Act 2009* (Cth) in an employment context.
14. The absence of protection against discrimination because of a person's religious belief and practices affects people of all faiths and not just Australian Muslims. It has a more significant impact of people of minority faiths.
15. In the March 2021 Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, following a wide-ranging review comprising of 192 submissions, 19,502 responses to the online questionnaire and evidence from 57 witnesses across 47 organisations at the public hearings, the Committee formed the view that there was a strong need to protect people from discrimination on the grounds of religious beliefs and activities.
16. The Committee stated²:

The inquiry raised important and complex issues. Religious beliefs and activities go to the core of who we are and what we do as people and can provide a whole-of-life moral code. Religious organisations have provided longstanding and invaluable education, healthcare and welfare services across the State. Despite the significance of religious beliefs and activities in our community, the Anti-Discrimination Act 1977 (NSW) (the Act) does not currently protect against religious discrimination, as it does against discrimination on the basis of age, race and sex.
17. The Committee also expressed urgency about the need to amend the Act to insert discrimination on the grounds of religious beliefs or activities as a protected

² Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 , March 2021, at iii.

attribute in the Act by the end of 2021 and that there should not be any “further delay”.³

18. More generally, as noted by the Human Rights and Equal Opportunity Commission:⁴

Despite the legal protections that apply in different jurisdictions, many Australians suffer discrimination on the basis of religious belief or non-belief, including members of both mainstream and non-mainstream religions and those of no religious persuasion.

19. Fundamental to religious freedom is also the ability to manifest that faith and identify one’s religious identity and belief without fear of discrimination, harassment, vilification or violence to oneself or one’s family.
20. Following the tragic events of Christchurch on 15 March 2019 when 51 men, women and children were murdered while they were praying in two mosques, there has also been an increasing experience of anti-Muslim attacks directed at Australian Muslims based on their religious identity. The Act should operate to confirm that their faith is valued and they should not need to hide their religious identity or practices, be it wearing a hijab or attending congregational prayers on a Friday.
21. Importantly, any review of the Act should also take into account the incidence of increasing anti-Muslim sentiment or Islamophobia⁵. In recent times, there has been an increasing experience in anti-Muslim sentiment in the Australian Muslim community.⁶
22. A review of the Act which urges that there be protection based on a person’s religious belief and activity will bring it into line with contemporary community

³ Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 , March 2021, at 1.10 and 1.14.

⁴https://humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf.

⁵ Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, March 2021, at iii.

⁶ *Islamophobia in Australia Report II (2017-2018)*. Sydney: Charles Sturt University and ISRA, 2019. See also: *Islamophobia in Australia 2014-2016*. Sydney: Charles Sturt University and ISRA, 2017.

standards and ensure that the Act promotes the equal enjoyment of rights. Presently, it does not.

TOR 2: whether the range of attributes protected against discrimination requires reform

23. ANIC repeats its submissions above relating to TOR 1. In summary, there is an urgent and pressing need for the range of attributes to be extended to include a person's religious belief, affiliation, or activity.
24. In this regard, NSW, as Australia's first State, has typically led the nation in terms of cultural and economic developments and policy initiatives. It has one of the most diverse populations in terms of ethnicity, cultural background and religious identity. State governments, present and former, have celebrated the diversity of the State and that it embraces people from different backgrounds and cultures.⁷ It is therefore an anomaly and unfortunate predicament that, in NSW, there is no legislative protection against discrimination directed at a person based on their religious belief and activity. In contrast, other States, such as Victoria, have recognised the need for legislative reform and have taken steps to ensure that there is protection against discrimination on the grounds of a person's religious identity and belief.⁸
25. In the *Sonia Kruger* case, the NSW Civil and Administrative Tribunal stated:⁹
- In our view, Ms Kruger could have expressed her comments in a more measured manner to avoid a finding of vilification. For example, she could have referred to the need for Australia to engage in greater security checking of people wishing to migrate to Australia who may happen to be Muslims and the need to prevent a drift towards radicalisation amongst Muslims currently in Australia, rather than simply stating that 500,000 Muslims represents an unacceptable safety risk which justifies stopping all Muslim migration.
26. Incidentally, while the conduct was found to be vilification, it was also found to be lawful. Religion is not a protected attribute in the Act and, as noted above, Australian

⁷ For example, see information about NSW shared at <https://www.nsw.gov.au/about-nsw>

⁸ For example, in Victoria, see *Racial and Religious Tolerance Act 2001*; in Qld, see *Anti-Discrimination Act 1991*.

⁹ *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 (15 February 2019)

Muslims (and persons of other faith communities) are otherwise unable to avail of the protected category of an “ethno-religious” group.

TOR 5: the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

27. The Act was recently amended by the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* to make it unlawful to vilify a person or group of persons on the ground of religious belief or affiliation or religious activity. For the first time in the history of NSW, this provides a level of protection against vilification based on a person’s religious belief, affiliation, or activity.
28. Relevantly, it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for or severe ridicule of a person or group of persons based on religious belief, affiliation, or activity.
29. As can be seen, the proscribed conduct must meet a number of requirements, including that it:
 - (a) involves a public act (as defined);
 - (b) incites hatred towards, serious contempt for or severe ridicule of; and
 - (c) is directed at a person or group of persons based on religious belief, affiliation, or activity.
30. While the amendment is welcome, arguably it does not go far enough. For instance, there is a question as to whether it captures anti-Muslim sentiment online. The scope and effectiveness of the new provision should be considered. Further, a review should be undertaken once there is more information to hand to assess the effectiveness of the provision.
31. If, for instance, the provision does not capture online activity or conduct, then its benefit will be diminished. In this regard, it is to be remembered that much of the perpetrator’s terrorist activities culminating in the Christchurch massacre was planned for an online audience; the gunman streamed live footage and posted a manifesto online before he shot dozens of people at two mosques during Friday prayers. Such online conduct should be picked up.
32. ANIC does not consider that the protections in the Act should be harmonised with the criminal law.

33. It is important that there are civil remedies to address discrimination. There are many benefits to providing a civil remedy which offers some protection to religious communities at risk of discrimination (and vilification).
34. First, it does not rely solely on criminal legislation, which is limited to acts of, or incitement to, violence; is rarely used; has many prosecutorial challenges, not the least of which is the lengthy time which can be taken to prosecute a matter to finality.
35. Second, through the practice of pre-conferencing (done separately with each party) and the conciliation meeting (done together), there is an opportunity for both parties to express their grievances and concerns, and gain insight into the other side's perspective.
36. A conciliator will generally make a decision about how the conciliation will run (in person, or via shuttle/teleconference) taking into account individual circumstances, including safety concerns of either party.
37. As a matter of procedure, following opening statements, there is exploration, where each party is given the opportunity to say everything that they need to say without interruption. Private sessions follow immediately after, where each party considers the stakes of not reaching an agreement, through reality testing their position.
38. The goal of conciliation is to achieve an enforceable legal agreement and it is up to the complainant to articulate the terms on which they would like to settle first, before negotiation begins.
39. Anything said in that conciliation meeting is privileged, private and confidential.
40. The conciliatory approach allows for a broader scope of outcomes. Outcomes could include:
 - (a) having material taken down and not put back up;
 - (b) an undertaking not to repeat that particular conduct;
 - (c) a statement of apology/regret; and/or
 - (d) compensation or donation to community project.
41. Third, vilification has spread widely across mainstream social media. While it is not possible to counteract every instance of vilification, it is still important to set a standard and curtail the 'environment of impunity'. Accordingly, it is essential for

Australia's security and social cohesion, that there be civil recourse available to demarcate the line between slander and vilification and criminal conduct which operates at a much higher threshold and is more difficult to access.

42. A lack of any legal consequence to minimise the vilification of Muslims as individuals or a community has contributed to the increased victimisation of Muslims on the basis of their religion. This also goes to the heart of issues around the under-reporting of incidents perpetrated against Australian Muslims namely due to the fact that Australian Muslims feel an element of disappointment from a legislative perspective in affording them the same level of protections offered to other minorities.

TOR 6: the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes

43. For the reasons outlined above, the Act should also cover harassment based on a person's religious belief, affiliation, or activity.
44. Having regard to the available data and anecdotally, there has been an increase in the incidence of harassment experienced by people based on their religious belief, affiliation, or activity and much of the Islamophobic conduct has been verbal¹⁰. This also supports the need for a broader scope in the laws directed at harassment.

TOR 7: whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

45. The Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life. For instance, there may be reasonable accommodations which can be made to facilitate a person attending for mandatory congregational prayer on a Friday, or a female wearing the hijab or head covering in a workplace.
46. ANIC encourages a positive duty on organisations and workplaces or businesses to raise awareness on Islamophobia and anti-Muslim conduct, particularly where there are Australian Muslims present in the workplace. Taking preventative action seeks to create safe, respectful and inclusive workplaces and will help to shift require

¹⁰ *Islamophobia in Australia Report Iv* (2014-2021), Sydney: Charles Sturt University and ISRA

organisations and businesses to shift the focus from responding to an incident after it occurs to actively preventing an incident.

TOR 9: the adequacy and accessibility of complaints procedures and remedies

47. ANIC repeats its submissions above relating to TOR 5. In summary, it is important that there are civil remedies to address discrimination. There are many benefits to providing a civil remedy which offers some protection to religious communities at risk of discrimination (and vilification).

TOR 11: the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

TOR 12: the interaction between the Act and Commonwealth anti-discrimination laws

48. ANIC proposes to deal with TOR 11 and 12 together as they are inter-related.
49. NSW is largely out of step with other jurisdictions when considering protected attributes under anti-discrimination legislation. Discrimination related to religion, religious conviction, religious belief, or religious activity can be unlawful under the laws of a majority of States and Territories in Australia¹¹. Yet, in NSW, it remains unaddressed.
50. As to the position in NSW, the March 2021 Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 stated (omitting footnotes)¹²:

1.17 The Act does not currently contain provisions that make it unlawful for discrimination on religious grounds. However, the Act does contain some limited protection for religious discrimination and vilification on the grounds of ethno religious origin. The term 'ethno-religious origin' is intended to cover groups with a common ethnic identity, and has been found to apply to groups such as Sikhs. Groups without a common ethnic identity, such as Christians and Muslims and other

¹¹ *Discrimination Act 1991* (ACT), s 7; *Anti-Discrimination Act 1992* (NT), s 19; *Anti-Discrimination Act 1991* (Qld), s 7; *Anti-Discrimination Act 1998* (Tas), s 16; *Equal Opportunity Act 2010* (Vic), s 6; *Equal Opportunity Act 1984* (WA), s 53.

¹² Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 , March 2021, at iii.

broad-based religions, are unable to seek protection under this provision.

1.18 The Act also contains specific provisions for religious bodies, which exempt them from the Act in relation to the ordaining, appointment or training of religious clergy or of any person in any capacity by a body established to propagate religion. The Act also provides exemptions for any act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

1.19 Given the gap in protection from discrimination on the grounds of religious beliefs and activities, there have been calls for increased protection under the NSW legal framework.

51. ANIC commends the above observations on the need to address the gap in protection from discrimination on the grounds of religious beliefs and activities in NSW.

52. To the extent that some protection is conceivably afforded by section 93Z of the *Crimes Act 1900* (NSW), such a provision has, to ANIC's understanding, not been utilised and no charges have been pursued under it since its enactment on 20 June 2018. In any event, it is confined to public acts which threaten or incite violence towards another person or a group of persons on the grounds of, among other grounds, religious belief or affiliation.

53. As to the position in relation to Commonwealth laws, notwithstanding various attempts to enact legislation by former governments, there exists no law which makes unlawful discrimination based on a person's religious belief or activity.

54. To the extent that the *Fair Work Act 2009* (Cth) provides protection against adverse action in an employment context, including because of the person's religion, it does not operate in jurisdictions such as NSW. In particular, section 351(2) states that:

However, subsection (1) does not apply to action that is:

- (a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or
- (b) taken because of the inherent requirements of the particular position concerned; or

...

55. Consequently, the Act in NSW operates to remove access to a robust and low-cost dispute resolution system under the *Fair Work Act 2009* (Cth) in respect of discrimination in workplaces.
56. Australian Muslims cannot rely on the existing Act for relief, which, as noted above, is silent in respect of protection on the ground of religion. Insofar as it includes the ground of ethnic, national or ethno-religious origin (found to include groups like Jews or Sikhs), this does not extend to Australian Muslims.
57. The *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) is also of little assistance. Independent of the 'unlawful discrimination' jurisdiction under the AHRC Act are the Australian Human Rights Commission's (**AHRC**) functions in relation to 'discrimination' and 'equal opportunity in employment'. These functions give effect to Australia's obligations under the *International Labour Organisation Convention (No 111)* concerning Discrimination in respect of Employment and Occupation.¹³ In exercising its functions, the AHRC may deal with discrimination in respect of religion limited to employment or occupation (as defined in s 3). However, complaints made to the AHRC in this capacity fall within a distinct legal regime. Most notably, complainants cannot seek enforceable remedies from a Court
58. Hence, as it stands, in NSW, Australian Muslims do not have any legislative protections against religious discrimination, including in the workplace, whether under NSW discrimination laws or Commonwealth discrimination laws. This position applies equally to persons of other faith communities who cannot vail of the protected attribute of 'ethno religious'.
59. That such a position has been allowed to endure is, with respect, of grave concern and, in modern day Australia, untenable. It is a position which needs to be remedied as a matter of urgency. Anything less renders the Act as antiquated and inadequate. It fails many segments of the community in NSW who are in need of protection.

¹³ *Convention Concerning Discrimination in respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960).

CONCLUSION

60. The review of the Act is timely and overdue. It offers a critical opportunity to address an urgent and pressing concern held by Australian Muslims and persons of other faiths in a context where there is no legislative protection against discrimination directed at a person based on their religious belief, affiliation, or activity.
61. It is a significant anomaly and position in NSW whereby there is an absence of legislative protection in the Act against discrimination based on a person's religious belief and activity. This position has been allowed to subsist, notwithstanding the urgent recommendations of many organisations and, most recently, the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 in its March 2021 Report.
62. A review of the Act which urges that there be protection based on a person's religious belief and activity will bring it into line with contemporary community standards and ensure that the Act promotes the equal enjoyment of rights.
63. We are grateful for the opportunity to make this submission.
64. If the NSW Law Reform Commission requires further information or has any questions, we would be pleased to address any request.

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