

Review into s.93Z of the Crimes Act 1900 (NSW)

A SUBMISSION TO THE LAW REFORM COMMISSION

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Australian Federation
of Islamic Councils

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Contents

Contents	2
1. Introduction	3
Background	3
Importance of addressing serious racial and religious vilification.	3
Human Rights and Legal Protections.....	3
Social Cohesion and Community Harmony.....	3
Equality and Equal Opportunity	4
Preventing Escalation of Violence	4
Educational and Cultural Benefits	4
2. Purpose.....	4
3. Concerns about the Rushed Approach to Amending Section 93Z.....	5
Concerns about Expedited Amendments	5
4. Challenges in Proving Racial or Religious Motivation	6
Evidentiary Standards	6
Potential Measures to Address These Challenges.....	7
5. Balance between Protecting Against Hate Speech and Preserving Freedoms	8
Safeguarding Freedoms.....	8
Civil Remedies for Addressing Vilification and Hate Speech.....	8
6. Additional Points Consistent with Safeguarding Muslim Community Interests	9
Support for Civil Remedies to Address Vilification and Hate Speech	9
Argument Against Adopting the IHRA Definition.....	10
Addressing the Increase in Anti-Muslim Sentiment and Islamophobia	10
7. Conclusion	11

1. Introduction

Background

The Australian Federation of Islamic Councils (AFIC), established in 1964, is the peak representative body for the Muslim community in Australia. Our organisation is comprised of 9 State & Territory Councils with nearly 150-member organisations across the country. While we are a faith-based body our areas of interest are broad ranging and reflect the significant input that members of the Muslim community have to Australian society generally.

AFIC is committed to promoting the religious, social, and cultural welfare of Muslims in Australia. The organisation aims to build a society free of discrimination, where all individuals can fulfill their potential. AFIC's mission includes advocating for the oppressed, providing opportunities for young Muslims, and educating both Muslims and non-Muslims about the true essence of Islam. AFIC operates under a three-tier structure that includes local Islamic societies, state Islamic councils, and a federal body, ensuring comprehensive representation and effective governance.

Importance of addressing serious racial and religious vilification.

Serious racial and religious vilification is a critical issue that affects the cohesion, harmony, and well-being of societies. Addressing this problem is paramount for several reasons, including protecting human rights, promoting social cohesion, and ensuring equal opportunities for all members of society.

Human Rights and Legal Protections

At the core of addressing racial and religious vilification is the protection of fundamental human rights. International human rights frameworks, such as the Universal Declaration of Human Rights (UDHR)¹ and the International Covenant on Civil and Political Rights (ICCPR), underscore the importance of safeguarding individuals against discrimination based on race, religion, or belief. Article 18 of the UDHR states that everyone has the right to freedom of thought, conscience, and religion, while Article 19 guarantees the right to freedom of expression. However, these freedoms must be balanced with protections against hate speech and incitement to violence to ensure they do not infringe on the rights of others.

National legal frameworks also play a crucial role. For instance, Australia's Racial Discrimination Act 1975² and various state anti-discrimination laws provide legal mechanisms to combat vilification. However, gaps in these laws, particularly regarding religious discrimination, highlight the need for comprehensive legislation that addresses both racial and religious vilification effectively.

Social Cohesion and Community Harmony

Vilification based on race or religion can severely undermine social cohesion and community harmony. It fosters division, mistrust, and hostility between different community groups, which can lead to social unrest and conflict. By addressing vilification, societies can promote a more inclusive and harmonious environment where diversity is respected and valued.

¹ <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

² <https://www.legislation.gov.au/C2004A00274/2015-12-10/text>

Research has shown that experiences of racial and religious vilification can have profound psychological effects on individuals, including increased levels of stress, anxiety, and depression. This, in turn, can impact the overall health and well-being of affected communities. Ensuring robust protections against vilification helps to create a safe and supportive environment where all individuals can thrive.

Equality and Equal Opportunity

Addressing vilification is also essential for ensuring equal opportunities for all members of society. Discrimination and vilification can create significant barriers to education, employment, and social participation for marginalized groups. By tackling these issues head-on, governments and institutions can work towards leveling the playing field and providing equal opportunities for everyone, regardless of their race or religion.

For example, studies have shown that racial discrimination in the workplace can lead to reduced job prospects and career advancement for individuals from minority backgrounds. Addressing these issues through comprehensive anti-vilification laws can help to dismantle systemic barriers and promote fairness and equality in all areas of life.

Preventing Escalation of Violence

History has shown that unchecked vilification can escalate into more severe forms of violence, including hate crimes and even genocide. The Holocaust, the Rwandan Genocide, and more recent atrocities highlight the dangers of allowing hate speech and vilification to go unchallenged. By addressing these issues early and decisively, societies can prevent the escalation of hate and protect vulnerable communities from harm.

Educational and Cultural Benefits

Addressing racial and religious vilification also has significant educational and cultural benefits. It provides an opportunity to educate the broader public about the values of diversity, tolerance, and mutual respect. Educational initiatives can help to dispel myths and stereotypes, foster intercultural understanding, and promote a culture of respect and inclusion.

2. Purpose

The purpose of this submission is to provide a thorough and considered response to the NSW Law Reform Commission's review of section 93Z of the Crimes Act 1900 (NSW). This review is critical in addressing the pervasive issues of racial and religious vilification, which significantly impact the safety, dignity, and well-being of the Muslim community and other minority groups in New South Wales.

AFIC seeks to ensure that any amendments to section 93Z effectively combat serious vilification while safeguarding fundamental freedoms, such as freedom of speech, association, and religion. The submission aims to advocate for legislative changes that balance these freedoms with the need to protect individuals and communities from hate speech and incitement to violence.

Key points of this submission include advocating for inclusive consultation processes to ensure that the voices of all affected communities are heard and considered. It also emphasizes the necessity for comprehensive protections against discrimination based on religion, reflecting the diverse needs and experiences of the Muslim community.

Additionally, AFIC highlights the importance of addressing the underreporting of hate crimes, improving police capacity, and training, and fostering a culture of mutual respect and understanding. The submission underscores the need for a legal framework that not only deters vilification but also promotes social cohesion and protects the rights and dignity of all individuals in a multicultural society.

Through this submission, AFIC aims to contribute constructively to the review process, ensuring that the resulting legislation is effective, fair, and supportive of an inclusive and harmonious society in New South Wales.

3. Concerns about the Rushed Approach to Amending Section 93Z

Concerns about Expedited Amendments

In late 2023, amendments to section 93Z of the Crimes Act 1900 (NSW) were rushed through without adequate consultation with affected communities and stakeholders. This expedited process has raised significant concerns about the transparency, inclusiveness, and overall effectiveness of the legislative changes. The Australian Federation of Islamic Councils (AFIC), representing the interests of the Australian Muslim community, highlights that such a hasty approach risks undermining the legitimacy and efficacy of the law.

One of the primary issues with the expedited amendments is the lack of thorough engagement with communities that are most affected by racial and religious vilification. These communities, including Muslims, have unique insights and lived experiences that are crucial for shaping effective and just legislation. Without their input, there is a risk that the amendments may not fully address the complexities and nuances of vilification, leading to laws that are either too broad or too narrow in scope.

Moreover, the absence of broad consultation raises questions about the democratic process. Laws that impact fundamental freedoms and rights must be developed transparently and inclusively to ensure they reflect the values and needs of the entire society. By bypassing extensive consultation, the government not only disregards the voices of minority communities but also risks creating legislation that lacks public trust and support.

Importance of a Thorough and Inclusive Review Process

AFIC emphasises the critical need for a thorough and inclusive review process for any legislative changes to section 93Z. An effective review process should involve multiple stages of consultation, including public submissions, community forums, and expert panels, to gather a wide range of perspectives and insights.

Firstly, public submissions allow individuals and organisations to provide detailed feedback and suggestions based on their experiences and expertise. This method ensures that the review process captures diverse viewpoints and considers the practical implications of proposed changes.

Community forums offer a platform for direct engagement with affected groups, facilitating open dialogue and discussion. These forums are particularly important for minority communities, such as Australian Muslims, who may have specific concerns and experiences with vilification that are not well understood by the broader public.

Involving expert panels composed of legal scholars, human rights advocates, and community leaders can provide a balanced and informed perspective on the legislative changes. These experts can help identify potential pitfalls and recommend best practices based on evidence and comparative analysis with other jurisdictions.

A thorough and inclusive review process also helps to build consensus and support for the legislation. When communities feel heard and their contributions are reflected in the final law, they are more likely to trust and comply with the legislation. This trust is essential for the effective implementation and enforcement of the law.

Furthermore, inclusive consultation helps to identify unintended consequences of the legislation. For example, overly broad definitions of vilification could potentially stifle legitimate free speech and debate, which are vital for a healthy democracy. By carefully considering these aspects, lawmakers can craft a balanced and nuanced law that protects individuals from harm while upholding essential freedoms.

4. Challenges in Proving Racial or Religious Motivation

Evidentiary Standards

Proving racial or religious motivation in crimes presents significant challenges that hinder successful prosecutions. The complexities inherent in demonstrating the intent behind a perpetrator's actions require robust and nuanced approaches to evidence collection and interpretation. Understanding these challenges is crucial for formulating effective legal responses that both uphold justice and protect the rights of victims.

One of the primary difficulties in proving racial or religious motivation lies in the subjective nature of intent. Unlike crimes where physical evidence can clearly establish culpability, hate crimes require proving that the perpetrator was motivated by bias against the victim's race or religion. This often necessitates uncovering the perpetrator's thoughts and beliefs, which are not always overtly expressed. For instance, in cases of hate speech or vandalism, the content of the act itself might not explicitly state the bias, requiring prosecutors to rely on circumstantial evidence such as previous statements, affiliations, or patterns of behaviour.

Furthermore, the high standard of proof in criminal cases—beyond a reasonable doubt—adds another layer of complexity. Prosecutors must demonstrate that the crime would not have occurred but for the perpetrator's racial or religious bias. This causal link can be challenging to establish, especially when the crime could have multiple motives. The ambiguity of human behaviour and the potential for defendants to offer alternative explanations for their actions complicate the prosecution's task.

Potential Measures to Address These Challenges

To address the challenges in proving racial or religious motivation, several measures can be implemented to enhance the effectiveness of investigations and prosecutions. These include clearer guidelines for evidence, better training for law enforcement, and legislative reforms.

1. Clearer Guidelines for Evidence:

- Developing comprehensive guidelines that outline the types of evidence that can be used to establish racial or religious motivation is essential. This could include explicit hate speech or symbols, previous incidents of similar behaviour, social media activity, and affiliations with hate groups. By providing a detailed framework, these guidelines would help law enforcement officers and prosecutors identify and gather relevant evidence more systematically.
- Additionally, legal definitions of hate crimes and their motivations should be clarified to reduce ambiguity. Clearer definitions can guide the collection of evidence and the presentation of cases in court, ensuring that all relevant factors are considered and appropriately weighted.

2. Better Training for Law Enforcement:

- Enhanced training programs for law enforcement officers are crucial. These programs should focus on recognizing and interpreting signs of racial or religious bias, understanding the legal standards for hate crimes, and employing effective investigation techniques. Training should also address the importance of cultural competence and sensitivity when interacting with victims and communities affected by hate crimes.
- Workshops and continuing education sessions can keep officers updated on the latest developments in hate crime legislation and investigative practices. Collaboration with community organizations can provide practical insights and improve trust between law enforcement and minority communities.

3. Legislative Reforms:

- Introducing statutory aggravation for crimes motivated by racial or religious bias can provide clearer legal grounds for prosecution. Such provisions would allow courts to impose harsher penalties for crimes proven to be motivated by hate, thereby emphasizing the seriousness of these offenses, and deterring potential perpetrators.
- Legislative reforms could also include provisions for victim impact statements that specifically address the emotional and psychological harm caused by hate crimes. This would ensure that the broader impact of such crimes on victims and communities is recognized and considered in sentencing.

The challenges in proving racial or religious motivation for crimes are significant, but they can be addressed through a combination of clearer guidelines for evidence, better training for law enforcement, and thoughtful legislative reforms. By adopting these measures, the legal system can improve its capacity to prosecute hate crimes effectively, thereby enhancing justice and protection for all communities.

5. Balance between Protecting Against Hate Speech and Preserving Freedoms

Safeguarding Freedoms

The balance between protecting individuals from hate speech and preserving fundamental freedoms such as speech, association, and religion is a delicate and critical task in a democratic society. Safeguarding these freedoms while ensuring that hate speech does not incite violence or discrimination requires nuanced and well-considered legislative frameworks.

Freedom of speech is a cornerstone of democratic societies, enabling open discourse, the exchange of ideas, and the ability to criticise and hold governments accountable. Similarly, freedoms of association and religion are essential for individuals to congregate, share beliefs, and practice their faith without fear of persecution. However, these freedoms are not absolute and must be balanced against the need to protect individuals and communities from speech that incites hatred, violence, or discrimination.

Legislation against hate speech aims to curb expressions that could harm the social fabric by inciting hostility against particular groups based on race, religion, ethnicity, or other characteristics. Yet, overly broad criminal laws against hate speech can inadvertently suppress legitimate discourse and criticism, stifling free expression and open debate. Therefore, it is essential to strike a balance that prevents harm while safeguarding freedoms.

Civil Remedies for Addressing Vilification and Hate Speech

Civil remedies can play a crucial role in addressing vilification and hate speech, offering a more flexible and context-sensitive approach compared to criminal laws. Civil remedies focus on redress and reconciliation rather than punishment, making them particularly suited for addressing non-violent hate speech and vilification.

1. Flexibility and Context-Sensitivity:
 - Civil remedies allow for a nuanced response to hate speech, considering the context and the impact on the victim and the community. For instance, mediation and conciliation processes can help resolve conflicts, promote understanding, and prevent future incidents. This approach is particularly effective in cases where education and dialogue can address underlying prejudices.
2. Reduced Risk of Overreach:
 - Civil laws are less likely to infringe on freedom of speech compared to criminal laws, as they typically involve lower standards of proof and less severe consequences. This reduces the risk of overreach and the potential for laws to be used to suppress legitimate speech. By focusing on harm and impact rather than intent, civil remedies can provide a balanced approach that addresses the effects of hate speech without unduly restricting expression.
3. Focus on Redress and Rehabilitation:
 - Civil remedies can include orders to cease and desist, apologies, retractions, or participation in educational programs. These measures aim to repair the harm caused and rehabilitate the offender, promoting long-term social cohesion. Financial

compensation for victims can also be a component, addressing the personal impact of vilification.

4. Examples from Other Jurisdictions:
 - Other jurisdictions have successfully implemented civil remedies to address hate speech. For example, in the United Kingdom, the Equality Act 2010³ provides a robust framework for addressing discrimination and vilification through civil courts. This act includes provisions for harassment and victimization, offering protections without resorting to criminal prosecution unless necessary.
5. Strengthening Existing Frameworks:
 - Enhancing existing civil frameworks, such as the Anti-Discrimination Act in New South Wales, to include comprehensive protections against religious discrimination can provide a robust mechanism for addressing vilification. This can be complemented by public education campaigns to raise awareness about the impact of hate speech and the importance of respectful discourse.

6. Additional Points Consistent with Safeguarding Muslim Community Interests

The Anti-Discrimination Act (AD Act) currently lacks comprehensive protections against discrimination based on religion, a gap that significantly affects the Muslim community. Advocacy for the inclusion of religious discrimination protections in the AD Act is crucial to ensure that individuals are not marginalized or treated unfairly due to their faith. By introducing these protections, the AD Act would align more closely with international human rights standards, such as those outlined in the International Covenant on Civil and Political Rights (ICCPR).

The absence of specific protections against religious discrimination leaves Muslim individuals vulnerable to unfair treatment in various sectors, including employment, education, and public services. For instance, there have been numerous reports of Muslims facing discrimination in the workplace, where their religious practices, such as wearing hijab or taking time for prayers, are not accommodated. This lack of protection can lead to systemic exclusion and reinforce negative stereotypes.

Addressing this gap in the AD Act would not only protect Muslims but also promote a more inclusive and respectful society. Implementing these changes can reduce instances of discrimination and provide a legal recourse for those who experience unfair treatment based on their religious beliefs.

Support for Civil Remedies to Address Vilification and Hate Speech

Civil remedies are a vital tool in addressing vilification and hate speech, providing victims with accessible and flexible means of redress. Unlike criminal prosecutions, which can be lengthy and complex, civil remedies allow for quicker resolutions and a focus on reconciliation and education

³ <https://www.gov.uk/guidance/equality-act-2010-guidance#:~:text=The%20Equality%20Act%202010%20legally,strengthening%20protection%20in%20some%20situations.>

rather than punishment. This approach can be particularly effective in addressing non-violent hate speech and vilification, which may not meet the high threshold required for criminal prosecution.

To enhance their effectiveness, civil remedies should be expanded and strengthened. This can include broader definitions of vilification and hate speech to capture more subtle forms of discrimination, such as microaggressions or implicit biases. Additionally, the establishment of specialized tribunals or panels to handle these cases can ensure that they are addressed by individuals with the necessary expertise and sensitivity.

Providing legal aid and support services for victims can also improve access to civil remedies. This ensures that those affected by vilification and hate speech have the resources and support needed to pursue their cases and achieve justice.

Argument Against Adopting the IHRA Definition

While the fight against antisemitism is crucial, adopting the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism can inadvertently stifle legitimate criticism of the state of Israel. This definition conflates criticism of Israeli policies with antisemitism, potentially limiting free speech and political discourse. It is important to maintain a clear distinction between hate speech and legitimate criticism to ensure that the principles of free speech are upheld.

Emphasising the importance of distinguishing between antisemitism and legitimate political criticism is vital. This distinction ensures that individuals can engage in robust debate about international policies without fear of being labelled as antisemitic. Protecting this aspect of free speech is essential for a healthy democracy and allows for diverse opinions to be expressed and heard.

Addressing the Increase in Anti-Muslim Sentiment and Islamophobia

The rise in anti-Muslim sentiment and Islamophobia necessitates strong legislative responses to protect affected communities. Legislative measures can include stricter penalties for hate crimes, comprehensive anti-discrimination laws, and targeted initiatives to combat Islamophobia. These measures should be informed by data and research on the prevalence and impact of anti-Muslim discrimination.

Reports from various organisations, such as the Islamophobia Register Australia⁴, have documented significant increases in anti-Muslim incidents, particularly following high-profile international events. These incidents include verbal abuse, physical assaults, and vandalism of mosques. Addressing these issues through legislation not only protects individuals but also signals a societal commitment to combating bigotry and fostering inclusiveness.

The additional points outlined above emphasise the importance of introducing comprehensive protections against religious discrimination, expanding civil remedies for vilification and hate speech, and implementing robust screening and complaint processes within the police. They also highlight the need to avoid conflating legitimate criticism with hate speech, advocate for a Human Rights Act in NSW, address the rise in Islamophobia, and ensure the fair and effective application of laws. By adopting these measures, NSW can create a more inclusive, equitable, and just society that respects and protects the rights of all its citizens.

⁴ <https://islamophobia.com.au/publications/our-reports/>

7. Conclusion

AFIC emphasises the following key recommendations to ensure that Section 93Z effectively addresses serious racial and religious vilification while safeguarding fundamental freedoms:

1. Inclusive Consultation

We stress the necessity for thorough and inclusive consultation processes, including public submissions, community forums, and expert panels. These processes are essential to gather diverse perspectives and ensure the legislation reflects the needs of all affected communities.

2. Protections Against Religious Discrimination

AFIC advocates for the introduction of specific protections against discrimination based on religion within the Anti-Discrimination Act. The current lack of these protections leaves the Muslim community vulnerable to unfair treatment, and it is crucial to address this gap to promote a more inclusive society.

3. Civil Remedies for Vilification and Hate Speech

We support the expansion and strengthening of civil remedies to address vilification and hate speech. Civil remedies provide a flexible and context-sensitive approach, focusing on reconciliation and education rather than punishment, which can be particularly effective for non-violent hate speech.

4. Proper Screening and Complaint Processes in Police

AFIC recommends the implementation of proper screening and internal complaint processes within the police force to counter potential biases and ensure fair treatment. Building trust between law enforcement and minority communities is essential, and these measures can help achieve that.

5. Avoid Adopting the IHRA Definition of Antisemitism

We argue against the adoption of the IHRA definition of antisemitism, as it could inadvertently stifle legitimate criticism of state policies. It is important to distinguish between hate speech and legitimate criticism to protect freedom of speech.

6. Human Rights Act in NSW

AFIC advocates for the introduction of a Human Rights Act in NSW to provide comprehensive protections for religious and other minorities. Such legislation would embed human rights principles into the legal system, promoting a culture of respect and inclusion.

7. Addressing Anti-Muslim Sentiment and Islamophobia

We emphasise the need for legislative responses to address the rise in anti-Muslim sentiment and Islamophobia. Stronger legislative measures are necessary to protect affected communities and signal a commitment to combating bigotry and fostering inclusiveness.

8. Effective and Fair Application of Laws

AFIC stresses the importance of ensuring that any new or amended laws are applied fairly and consistently. Ongoing training and support for law enforcement and judicial officers are crucial for handling cases of vilification and hate crimes effectively.

These recommendations highlight the importance of comprehensive and inclusive legislation that protects minority communities while preserving essential freedoms. By adopting these measures, NSW can create a more inclusive, equitable, and just society.

AFIC is committed to ongoing engagement with the NSW Law Reform Commission and other stakeholders to ensure the legislative process is inclusive and effective. We offer our expertise and resources to provide further information, clarification, and support throughout the review process.

We believe that continuous dialogue and collaboration are essential for developing laws that are just, effective, and reflective of the diverse needs of our society. AFIC looks forward to contributing constructively to this important work and ensuring that the rights and dignity of all individuals are upheld in New South Wales.

Authorised by

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