



AUSTRALIAN NATIONAL IMAMS COUNCIL



27 June 2024

Via email: nsw-lrc@dcj.nsw.gov.au

Submission to the Review of Section 93Z of the NSW Crimes Act 1900 – Serious racial and religious vilification Options Paper

Introduction

The Australian National Imams Council (ANIC) is pleased to make the following submission in response to the Law Reform Commission of NSW's Options Paper dated June 2024.

ANIC also refers to, and relies on, its earlier submission dated 23 April 2024. In making this further submission, ANIC has had the benefit of reviewing the submission of the Anglican Church Diocese of Sydney. It shares the concerns raised in that submission and generally supports it. It also makes the additional observations as contained in this submission.

By way of introduction, ANIC is an umbrella organisation consisting of over 250 Muslim imams, clerics and Islamic scholars representing each Australian State and Territory. ANIC represents the wider interests of the Australian Muslim community and is recognised by the Federal and State Governments, media and various other community and religious groups as being the central representative body of the Australian Muslim community. It also regularly facilitates collaborative initiatives with other community-based and faith organisations. ANIC plays a significant role in engaging with the community across Australia at a grassroots level. In particular, through its member imams and clerics, ANIC is able to engage with their respective congregations which attend at the places of worship, including for religious, community, prayer and personal purposes.

ANIC hopes to be able to provide the Commission with the benefit of its feedback and observations relating to the issues being considered by the Commission.



Overview of Submission

ANIC has for many years expressed concerns about the increase in Islamophobia and anti-Muslim sentiment throughout our society. The most vulnerable people within our society have borne the brunt of such reprehensible conduct towards them on the basis of their religious belief or activity. For instance, women wearing the veil have faced vilification and assault. Such an incident occurred in 2019 at a café in Parramatta when a pregnant woman wearing a veil was punched in the head and body and then stomped on by a stranger who had shouted "*Muslims wrecked my mum*" before the attack. Ultimately, the offender pleaded guilty to assault occasioning actual bodily harm while an additional charge of affray was withdrawn. On ANIC's inquiry, a charge under s.93Z was not considered notwithstanding that, at the sentencing hearing, the prosecution argued that the attack was inspired by Islamophobia.¹

In seeking to address the concerns about the increase in Islamophobia and anti-Muslim sentiment, ANIC has made many recommendations, including in relation to proposed laws and reforms. In this context, ANIC welcomes the review into the operation of s.93Z. However, s.93Z should not be considered in a vacuum or without regard to other protective civil laws. Appropriately drafted civil laws which can most appropriately capture vilification and/or hate speech. Notably, the amendment to the AD Act to address religious vilification has helpfully commenced the process of considering the role and operation of the which amended the *Anti-Discrimination Act 1977 (NSW) (AD Act)*. Section 93Z will work most effectively alongside such appropriately drafted civil laws.

With few exceptions, ANIC does not support, nor consider it desirable, to pursue a number of the amendments which have been proposed. To do so will give rise to other concerns and also take the focus away from appropriately drafted civil laws to capture vilification and/or hate speech (which is not of a criminal nature).

¹ <https://www.abc.net.au/news/2020-09-15/sentencing-for-man-who-bashed-pregnant-sydney-woman/12666120>

Further, given the rushed amendment to s.93Z in December 2023, which removed the bar against commencing a prosecution without the approval of the DPP, it is important to allow time to consider how the provision will be understood and applied by NSW Police. We do not have this data and it is difficult to propose any substantive amendments to the provision without understanding its application in changed circumstances.

Definition of “public act”

In general terms, ANIC supports that the provision should apply to the examples outlined in paragraph 2.4 of the Options Paper.

ANIC considers that the provision is already broad in its scope and does apply to the examples. Therefore, ANIC does not think that the definition of “public act” should be changed in section 93Z because it will likely increase the risk of restricting legitimate religious activity, such as preaching, teaching and pastoral counsel.

Mental element of recklessness

ANIC supports s.93Z remaining in its present form, including retaining recklessness as an element of the offence. It is important to capture conduct which is undertaken with a disregard for the foreseeable consequences of harm flowing from that conduct.

Incitement to violence

The term “incite” should not be replaced with terms such as “promote”, “glorify”, “stir up” or “urge” because the existing term is sufficient to capture the activity that the section was designed to address. As the Options Paper makes clear, the term “incite” is already the subject of judicial interpretation and has already been interpreted to mean “to rouse”, “to stimulate”, “to urge”, “to spur on”, or “to stir up or to animate.”² Furthermore, as the Options

² New South Wales Law Reform Commission, “Serious racial and religious vilification: Options Paper (June 2024), [4.3]; *Sunol v Collier (No.2)* [2012] NSWCA 44, [26].



Paper outlines, the breadth of conduct which the term can cover is broad, including conduct that involves commands, requests, proposals, actions or encouragement.³

Terms such as “promote”, “glorify”, “stir up” or “urge” also significantly lower the threshold and have the effect of bringing into the criminal realm conduct which is most appropriately captured by civil laws of discrimination and vilification. Such a use of criminal laws will likely generate uncertainty and anxiety as to their application and when they are triggered.

An offence of inciting hatred

ANIC opposes the introduction of a new offence of inciting hatred on the ground of a protected attribute. Such a proposal, respectfully, subverts the purpose and focus of the criminal laws and seeks to bring into its scope conduct which is most appropriately captured by civil laws of discrimination and vilification.

The mischief that the proposed introduction of an offence of inciting hatred would target is already addressed by the civil provisions in the AD Act. 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.

ANIC urges the Government to focus on reviewing and revising the AD Act as a vehicle to address issues of hatred based on any of the protected attributes.

Increase maximum penalty

ANIC does not support increasing the maximum penalty for s.93Z. The current maximum penalty is sufficient to provide an educative effect and to dissuade individuals for engaging in behaviour that would constitute the proscribed conduct under the offence.

Aggravated offences

ANIC does not consider that there is a need for the introduction of aggravated offences.

³ Options Paper at [4.3].



As it stands, a court must consider the existence of aggravating factors, including hatred as a motivating factor, by reason of s.21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It is therefore unnecessary to add to the offence what is already available to the court in sentencing procedure. If there is a concern about the reliance on this provision, then it should be separately considered rather than use s.93Z as a vehicle to address concerns about a lack of reliance by prosecution on s.21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

A harm-based test

ANIC opposes the introduction of a harm-based test into section 93Z. As highlighted in the Options Paper, a harm-based test exists in civil vilification laws in other Australian jurisdictions, in Commonwealth, Northern Territory and Tasmania.⁴

It would be inappropriate to include civil standards into a criminal offence, as the criminal penalties and possible deprivation of liberty require the higher standard of proof that exist in the criminal offence. Furthermore, a civil standard applied at a criminal level with no necessary protections for good-faith religious activity, preaching and teaching would be seriously detrimental to religious freedoms in the state of NSW. Such lowering of standards would restrict legitimate religious activity and debate.

ANIC thanks the Law Reform Commission for the opportunity to make submissions on these important issues and will be pleased to address any of the matters raised in this submission if the Commission requires.

Yours sincerely,

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⁴ Options Paper at [8.4].