

Review into the effectiveness of Section 93Z of the *Crimes Act 1900* (NSW)

Submission to the [NSW Law Reform Commission](#) April 2024

About Autistic Self Advocacy Network ('ASAN') of Australia and New Zealand:

ASAN AUNZ is run by Australian and New Zealander Autistic people, for Autistic people. We are the peak body for Autistic Self-Advocacy in Australia and New Zealand. We are associated with ASAN USA making us a part of an international Autism Self-Advocacy Network.”

About the Australian Autism Alliance ('the Alliance')

The Alliance aims to provide 'A United Voice for Autism'. It is a national consortium of diverse key autism organisations represented and led by Autistic people, advocacy groups, peak bodies, service providers, and researchers. Reaching over half a million people through its communication channels, the Alliance's work is informed by Autistic people and their families and carers.



Language:

There is a mix of person-first language (e.g. '*person with disability*' / '*person with ASD*') and identity-first language (e.g. '*disabled person*' / '*Autistic person*') throughout this written paper to reflect author preference and the diversity of preference in the disability community so as to acknowledge lived experience & neurodiversity.

Acknowledgment:

We acknowledge the First Nations and Traditional Owners of the land, sea and waterways and pay respects to Elders past, present and recognise those whose ongoing effort to protect and promote Aboriginal and Torres Strait Islander cultures will leave a lasting legacy for future Elders and leaders.

We recognise and thank emphatically all the Autistic and disabled people who contributed to this submission. We recognise their vital contribution and value the courage of those who share this unique perspective for the purpose of learning and growing together to achieve better outcomes for all.



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Executive Summary:

The Alliance and ASAN welcome the opportunity to consult on and provide a submission to the NSW Law Reform Commission's [review of the effectiveness of Section 93Z of the *Crimes Act 1900* \(NSW\)](#). We commend this initiative taken by the NSW Law Reform Commission to explore the impact of vilification experienced by multicultural and diasporic communities in NSW, including those with people from immigrant and refugee backgrounds.

Arising from various interactions and information of CALD people with lived experience — including lived experience of mental ill-health and discrimination, this written submission complements and supplements any views which we are willing to express verbally to the Law Reform Commission. We firmly believe that people with disability including *all* First Nations people and CALD people, should be protected from serious vilification.

- **Recommendation 1:** That the NSW Law Reform Commission — in line with [Volume 4 of the DRC Final Report](#), especially **Recommendation 4.29** and **Recommendation 4.30** — recommend that the *Crimes Act 1900* (NSW) be amended to include **disability**, alongside race, in the protected characteristics listed in Section 93Z.
- **Recommendation 2:** That the NSW Law Reform Commission — in line with [Volume 4 of the DRC Final Report](#), especially **Recommendation 4.29** and **Recommendation 4.30** — consider recommending harmonising the current tests for vilification under the *Crimes Act 1900* (NSW) and *Anti-Discrimination Act 1977* (NSW) with the tests for vilification in the *Racial Discrimination Act 1975* (Cth).
- **Recommendation 3:** That the NSW Law Reform Commission — in line with recommendations from the DRC Final Report and the Senate Select Committee on Autism Final Report — adopt principles of co-design and disability-inclusive policy reform when reviewing both the *Crimes Act 1900* (NSW) and the *Anti-Discrimination Act 1977* (NSW), consulting about both pieces of legislation with the Autistic and autism community, especially those from especially CALD, and First Nations backgrounds.

Content Warning: Ableism, racism, vilification, sexual assault, and sexual harassment ('**SASH**'), and suicide.



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Terms of Reference:

I. The impact of racial and religious vilification

1. We emphasise that the adequacy and effectiveness of Section 93Z — in deterring and prohibiting vilification towards disability, is of paramount importance for minoritised stakeholders, such as CALD and First Nations people with disability in multiracial, multicultural, and multiethnic communities — .
2. Autistic people are encountering the criminal justice system at such high rates as witnesses and victims, including **Autistic victims of childhood sexual abuse**,¹ with one study noting that First Nations and **BIPOC** — the acronym for 'black, indigenous, and other people of colour' — communities are 'likely at increased risk of police violence, particularly when law enforcement is unaware of ASD and implicit biases lead officers to views autistic behaviours as troubling or even dangerous'.² Arguably, the justice system is harming, not helping, people with disability — especially Autistic people from First Nations and CALD communities.³
3. Currently, CALD and First Nations people with disability are experiencing systemic discrimination and vilification which exists at the intersections of ableism and racism.⁴ For example, the final report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission' — or 'DRC') specifies that First Nations women with disability are not only more likely to be injured by deliberate physical harm (**78%**) compared to First Nations women without disability (**63%**) but also are a significant portion of First Nations communities.⁵

¹ The Royal Australian & New Zealand College of Psychiatrists, 'Improve the mental health of communities', (Report and National Autism Strategy Submission prepared for the Department of Social Services, the Royal Australian & New Zealand College of Psychiatrists, October 2023) 4 <https://engage.dss.gov.au/wp-content/uploads/2024/04/Public-Submission-Royal-Australian-NZ-College-of-Psychiatrists_Redacted.pdf>.

² Ibid. See also Lindsay Lawer Shea et al, 'Preventing and improving interactions between autistic individuals and the criminal justice system: A roadmap for research' (2021) 14(10) *Autism Research* 2053-2060.

³ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 9.

⁴ See generally Ron McCallum, 'The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance' (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 8 October 2020.

⁵ See especially Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 3.



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4. Indeed, the DRC final report recommends an intersectional, concomitant approach to redressing racial discrimination & vilification insofar as approximately **35%** of First Nations people under 65 in one calendar year have disability, a rate which is **three times higher** than the percentage of people with disability in the general population.⁶ Similarly, the DRC final report recommends an intersectional approach — which would concurrently address both racism and ableism,⁷ aligning with anti-racist principles of disability justice — insofar as CALD people with disability ‘experience more violence and abuse than those without disability’ — at **33%** compared with **23%**.⁸
5. In fact, the spike of anti-Asian hate-crimes during the inception of COVID-19, the very type of violent conduct and rhetoric which racial vilification laws purport to address⁹, had actually disproportionately women with disability and coincided with the reports of abuse and violence experienced by women with disability from migrant and culturally and linguistically diverse backgrounds.¹⁰ The collocation of racism, sexism, and ableism apropos violence, abuse, and discrimination is neither a new phenomenon nor an unproven conjecture.¹¹
6. For Autistic people, the need for **intersectional** legal reform — that is, legal reform which is both anti-ableist and anti-racist — correlates to the high frequency with which Autistic

⁶ Ibid 8. See also Disability Discrimination Legal Service (‘DDLS’), Submission to Australian Human Rights Commission, *Free and Equal: Priorities for federal discrimination law reform* (November 2020) 23-25; The Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Second and Third Combined Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019.

⁷ Ibid. See also Ilias Bantekas, ‘Article 7 Children With Disabilities’, in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 198.

⁸ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 3, 12-14.

⁹ See, eg, Julian Grant et al, ‘Racially minoritized people’s experiences of racism during COVID-19 in Australia: A qualitative study’ (2023) 47(3) *Australian and New Zealand Journal of Public Health* 100033; Jehonathan Ben et al, ‘Racism in Australia: a protocol for a systematic review and meta-analysis’ (2022) 11(1) *Systematic Reviews* 47.

¹⁰ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 3, 119-120; 146.

¹¹ See, eg, The Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Second and Third Combined Reports of Australia*, 22nd sess, UN Doc CRPD/C/AUS/CO/2-3, 15 October 2019; Senate Community Affairs References Committee, Parliament of Australia, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, Report, 25 November 2015, p 279, [10.59].

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people encounter the criminal justice system, especially as victims of crime.¹² For many Autistic people, centering principles of **disability justice** — including the leadership of the most leadership — acknowledges that racial vilification and racial discrimination cannot be effectively addressed without simultaneously addressing disability vilification and disability discrimination, for intersectionality must be adopted as a matter of cultural safety.¹³

7. As **Vanessa***, a D/deaf and Autistic woman from a migrant background, described in her lived experience as a victim-survivor of sexual assault:

*"Why should any of us trust the **police**, the **courts**, or the **legal system**? Why should **Autistic people** do that? Why should **immigrants** do that? The whole justice system consists of **white people** who only see the demographic of my race, the colour of my skin, and the presumption of my disability. When I reported the assault, the police officer told me that I must have **misremembered**. He said that **Autistic** people do that. He said that people like me... are **r*****ed**."*

8. Moreover, criminal and civil laws — including both the *Crimes Act 1900* (NSW) and the *Anti-Discrimination Act 1977* (NSW) — cannot aspire to effectively remediate racial vilification without criminalising vilification on the basis of disability.¹⁴ We note that Tasmania and the ACT are the only jurisdictions which expressly prohibits – under, for example, the *Anti-Discrimination Act 1998* (Tas) and the *Discrimination Act 1991* (ACT)

¹² Senate Select Committee on Autism, Parliament of Australia, Services, support, and life outcomes for autistic Australians (2022) [16.6]-[16.7].

¹³ See, eg, Catherine Jampel, 'Intersections of disability justice, racial justice and environmental justice' (2017) 4(1) *Environmental Sociology* 122; Lissa Ramirez-Stapleton et al, 'Disability Justice, Race, and Education' (2020) 6(1) *Journal Committed to Social Change on Race and Ethnicity* 29; Hailey Love & Margaret Beneke, 'Pursuing Justice-Driven Inclusive Education Research: Disability Critical Race Theory (DisCrit) in Early Childhood' (2021) 41(1) *Topics in Early Childhood Special Education* 31; Deloitte, 'Options to improve service availability and accessibility for First Nations people with disability', (Report prepared for the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability, Deloitte, June 2023) 91
<<https://disability.royalcommission.gov.au/system/files/2023-06/Research%20Report%20-%20Options%20to%20improve%20service%20availability%20and%20accessibility%20for%20First%20Nations%20people%20with%20disability.pdf>>.

¹⁴ Ibid. See also Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 321-327.

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respectively – the incitement of hatred and serious contempt for a person or group of people on the ground of disability.¹⁵

9. Currently, a plethora of Australian jurisdictions, including NSW, impose criminal penalties for vilification of people on the basis of race and ethnicity.¹⁶ We note that serious vilification, if not deterred by criminal penalties, may incentivise violence towards marginalised communities – such as CALD people with disability.¹⁷
10. The international disability community often proffers the **Sagamihara Stabbings** – during which a knife-wielding man entered a care facility and murdered **19** people with Intellectual Disability ('ID') and injured **26** more, as a part of his vision of '*a world where a person with multiple disabilities can be euthanised*' and '*all handicapped should disappear*' – as a case study that illuminates the need to deter serious vilification disability'.¹⁸ These eugenic themes, accompanied by 'rhetorics of disgust', feature in the discourses that 'still affects perceptions of disability today', dehumanising and disqualifying disabled people as a demographic which should be euthanised.¹⁹
11. **Hate speech** and **hate crime** are entwined insofar as the exposure to vilifying language and hate speech against outgroups potentiates **prejudice** towards those communities.²⁰ The dehumanising nature of hate speech towards people with disability – especially Autistic people and people with Intellectual Disability – manifests as an overarching narrative towards eugenics and euthanasia, whereby **even a disabled person's right to live is impugned**.²¹

¹⁵ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 325. See also *Criminal Code 2002* (ACT) s 750.

¹⁶ *Crimes Act 1900* (NSW) s 93Z; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code 2002* (ACT) s 750.

¹⁷ See especially Gerard Goggin, Linda Steele, & Jessica Robyn Cadwallader (eds), *Normality and Disability: Intersections among Norms, Law, and Culture* (Routledge, 2019) 1, 45-140.

¹⁸ See, eg, Joel Michael Reynolds, 'Killing in the Name of Care' (2018) 12 *Levinas Studies* 141; Mark Sherry et al (eds), *Disability Hate Speech: Social, Cultural and Political Contexts* (Routledge, 2021) 1, 12-112.

¹⁹ Mark Sherry et al (eds), *Disability Hate Speech: Social, Cultural and Political Contexts* (Routledge, 2021) 1, 76-87.

²⁰ Ibid. See also Wiktor Soral, Michał Bilewicz, & Mikołaj Winiewski, 'Exposure to hate speech increases prejudice through desensitization' (2018) 44(2) *Aggressive Behavior* 136; Atte Oksanen et al, 'Exposure to online hate material and social trust among Finnish youth' (2015) 28(3) *Information Technology and People* 607.

²¹ Gerard Goggin, Linda Steele, & Jessica Robyn Cadwallader (eds), *Normality and Disability: Intersections among Norms, Law, and Culture* (Routledge, 2019) 1, 45-140. See also Frankie Sullivan, 'Not just language: an analysis of discursive constructions of disability in sentencing remarks' (2017) 31(3) *Journal of Media & Cultural Studies* 411.

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12. Even the language used by judges at sentencing, according to some scholars, appear to reflect attitudes that **condone violence crimes** towards people with disability.²² In *R v Dawes* (*Dawes*),²³ in which Daniella Dawes strangled her 10-year-old Autistic son, Jason, until he died from asphyxiation, the appellate Court approves of the trial judge's depiction of Jason as a principle cause of Ms Dawes' depression insofar as the family had to move from a country town in order to obtain support services for him.²⁴
13. This construction of disability and victim status as a matter *mitigating* the seriousness of the offence, as opposed to aggravating the seriousness of the offence, effectively devalues the lives of people with disability.²⁵ As seen in cases such as *Dawes*,²⁶ even courts are not immune to the **eugenic rhetoric of euthanasia** and the **pervasive, ableist narrative** – that the death of people with disability may **relieve** their carers of the burden of caring for them.²⁷
14. NSW cases concerning deaths of disabled people at the hands of carers,²⁸ especially cases which feature a 'desire to be free from the burden of caring' and other ableist *mens rea*,²⁹ exemplify the need to deter **eugenic rhetoric** that **vilifies** disabled people as burdens. Therefore, we concur with the Disability Royal Commission's recommendation that vilification 'be defined to include behaviour that incites hatred for or threatens violence towards a person or group of people with disability',³⁰ thereby improving criminal law.

²² Ibid. See also Phillip French and Rosemary Kayess, 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008) 57-84.

²³ *R v Dawes* [2004] NSWCA 363.

²⁴ Ibid. See also Phillip French and Rosemary Kayess, 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008) 57-84.

²⁵ See, eg, Katrine Del Villar et al, 'Voluntary Requests, or Vulnerable Adults? A Critique of Criminal Sentencing in Assisted Suicide and 'Mercy Killing' Cases' (2022) 45(2) *University of New South Wales Law Journal* 449, 455; *R v Dawes* [2004] NSWCA 363, where the mother strangled her 10-year-old Autistic son when he refused to get ready for school.

²⁶ See, eg, *R v Dawes* [2004] NSWCA 363; *R v Sutton* [2007] NSWSC 295, where the offenders received five-year good behaviour bonds – for the manslaughter of their son, Matthew – by way of their son's severe disability.

²⁷ Phillip French and Rosemary Kayess, 'Deadly Currents Beneath Calm Waters: Persons with Disability and the Right to Life in Australia' in Luke Clements and Janet Read (eds), *Disabled People and the Right to Life: The Protection and Violation of Disabled People's Most Basic Human Rights* (Routledge, 2008) 57-84.

²⁸ See, eg, *R v Davis* [2016] NSWSC 1362; *Haines v The Queen* [2018] NSWCCA 269; *R v Dowdle* [2018] NSWSC 240.

²⁹ See especially *R v Ritchie* [2003] NSWSC 864.

³⁰ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 325. See also *Criminal Code 2002* (ACT) s 750.



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15. Indeed, the Disability Royal Commission expressly recommends that jurisdictions such as NSW, which imposes criminal penalties for vilification on people on the grounds of race, extend their legislation to ‘cover vilification... on the ground of their disability or perceived disability’,³¹ expressly noting the following under **Recommendation 4.30**:

‘States and territories that already have legislation imposing criminal penalties for vilification of people on grounds that do not include disability should extend the legislation to vilification of people on the ground of disability.’³²

16. As **Zheng***, an Autistic young person and CALD victim-survivor of domestic violence, acknowledged the importance of intersectional vilification laws in their account of discrimination and trauma:

*“Every stage of my life has had pain. In **childhood**, I had to go to school and listen to other **schoolkids** call me slurs such as **ch*nk** and **ch*ng-ch*ng**. In **adulthood**, I had to listen to my own **parents** tell me that they wish that **they had killed me in the womb**, because that could have at least spared them a lifetime burden of caring for me. Do you know what it is like to grow up in a **community**... full of people who **don’t value your life**? It’s... devastating.”*

17. Therefore, we reiterate that laws must be strengthened to prohibit, prevent, and criminalise ableism, especially as racism is co-constitutive with ableism. Moreover, we reiterate that the strengthening of these laws must espouse principles of disability justice,³³ whereby leadership of the most impacted — including Autistic people from First Nations communities and CALD refugees with disability — must **co-design** and **co-develop** policy and legal reform, in order to embed an intersectional voice.³⁴

³¹ Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 4, 327.

³² *Ibid.*

³³ See, eg, Senate Select Committee on Autism, Parliament of Australia, Services, support, and life outcomes for autistic Australians (2022) 366.

³⁴ See generally Commonwealth, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (2023) vol 9, 27.

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Thank you for the opportunity to contribute to this review. We trust that the recommendations presented in this submission will inform the development of policies and practices that address the vilification experienced by multicultural and diasporic communities in NSW, including those with people from immigrant and refugee backgrounds.

We welcome further opportunity to discuss our recommendations.