



**Submission to the
NSW Law Reform Commission (NSWLRC)**

**Serious racial and
religious vilification in NSW –
Review of section 93Z of
the Crimes Act (NSW)**

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Prepared by the Muslim Legal Network (NSW)

The Muslim Legal Network NSW is an Australian-based legal practitioner and law student association. It is a gateway for Australian Muslim law students and legal practitioners to both network with one another and engage with the wider legal community. We provide community legal education and participate in law reform and legal advocacy, as well as offering a Muslim perspective on civil liberties issues.

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INTRODUCTION

1. The Muslim Legal Network (NSW) (“MLNNSW”) welcomes the opportunity to provide submissions to the NSW Law Reform Commission (“NSWLRC”) in their review of the effectiveness of section 93Z of the *Crimes Act 1900 (NSW)* (“the CA”) as well as other criminal and civil provisions in addressing serious racial and religious vilification in NSW.
2. Combating “hate crimes” and religious vilification effectively is important for all religious and racial minorities. The ongoing gaps in religious vilification laws are particularly felt by the Australian Muslim community due to rise of Islamophobia not only in the community but alarmingly in the media and the approach by government and the security agencies when dealing with issues related to terrorism.
3. Any changes to the legislative framework should not be made in response to lobbying by select community groups because it could have unintended consequences and disrupt the social harmony of Australia’s multicultural society. It is important that we correctly diagnose the problem and identify what is working so that shortcomings can be addressed more effectively. The amendment to section 93Z of the CA without consultation following community tensions caused by the recent flaring up of ongoing Palestinian-Israeli conflict is a case in point.

IMPACT OF VILIFICATION – THE LIVED EXPERIENCED OF THE MUSLIM COMMUNITY

4. The use of Islamophobic language and discourse whether it be in the political sphere or on social media and other online platforms has increased significantly.¹ This was brought to the attention of the broader Australian public by the tragic terrorist attack at the mosque in Christchurch, New Zealand which 51 people were killed and many others sustained serious injuries.
5. Though the daily lived experience of Australian Muslims changed following the September 11, 2001 attacks in the United States. A 2003 report from the New South Wales Anti-Discrimination Board highlighted that media discussions on topics like the war on terror, asylum seekers, and crime have fostered a harmful atmosphere of anti-Arab and anti-Muslim sentiment. This has resulted in increased racial vilification and discrimination.²
6. The findings of a recent report by the Australian Human Rights Commission (AHRC) in 2021 (‘the AHRC Report 2021) highlighted detailed accounts of Islamophobic

¹ Cat Woods, *Campaign against race hate crimes should go much further*, NSW Law Society Journal Online, 8 February 2023 <<https://lsj.com.au/articles/campaign-against-race-hate-crimes-should-go-further/>>

² Human Rights and Equal Opportunity Commission, *Isma – Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004) Chapter 2. <https://humanrights.gov.au/sites/default/files/content/racial_discrimination/isma/report/pdf/ISMA_complete.pdf>

hatred, vilification, and discrimination in the Australian community. The report also noted this reflected anti-immigration sentiment, and the rise of far-right extremism as the Race Commissioner remarked:

The stories shared by Australian Muslim community members for this project have brought home to me that the undercurrents of religious discrimination, vilification and hate that manifested so horribly in the Christchurch attack, are not an aberration. They are consistent with the experiences of Islamophobia and anti-Muslim hate that is routinely experienced in Australia.³

7. The focus and targeting of Australian Muslims are reflected in the attitudes of broader community, whereas as recent as 2020, negative perceptions of Muslims stood at 37%, whilst in comparison, negative views were at 5% for Buddhists, 9% for Jews, 11% for Christians, 12% for Hindus, and 13% for Sikhs.⁴
8. More recently, the ongoing conflict in Gaza has seen a significant rise in reports of Islamophobic attacks in the Australian community⁵ as well as globally.⁶ According to Islamophobia Register Australia, there was a thirteen-fold increase in the number of Islamophobic incidents been reported in the first seven weeks since the most recent escalation of the Palestinian-Israeli conflict on 7th October 2023.⁷ The Australian Human Rights Commission will soon commence community consultations to understand the extent and impact of vilification in Australia resulting from the war.⁸
9. These attitudes are sadly reflected with attacks at mosques and females wearing hijab.⁹ The types of violence suffered by mosque attendees and their buildings include arson, physical assault, graffiti, secretion of faeces, vandalism, verbal abuse,

³ Australian Human Rights Commission, *Sharing the stories of Australian Muslims Report 2021*, page 7, <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_sharing_stories_australian_muslims_2021.pdf>

⁴ Scanlon Foundation, *Mapping Social Cohesion 2020* (Executive Summary, February 2021) 7 <<https://scanloninstitute.org.au/report2020>>

⁵ Daisy Dumas. *Islamophobic and antisemitic incidents record large spike in Australia, advocates say*, The Guardian, 10 November 2023, <<https://www.theguardian.com/australia-news/2023/nov/10/islamophobic-and-antisemitic-incidents-rise-in-australia-advocates-say>>

⁶ United Nations, *UN experts warn Islamophobia rising to “alarming levels”* United Nations, Media Center, 15 March 2024, <<https://www.ohchr.org/en/statements/2024/03/un-experts-warn-islamophobia-rising-alarming-levels>>

⁷ Islamophobia Register Australia, *Reports of Islamophobia coming in at unprecedented rate – now thirteen-fold post Israel-Palestine escalations*, 28 November 2023 <https://islamophobia.com.au/wp-content/uploads/2023/12/Website_Islamophobia-Register_28-NOV-Press-Release.docx.pdf>

⁸ Australian Human Rights Commission, *The escalating humanitarian crisis in Gaza and addressing the impacts in our communities*, 6 March, 2024 <<https://humanrights.gov.au/about/news/media-releases/escalating-humanitarian-crisis-gaza-and-addressing-impacts-our>>

⁹ Amy Greenbank, *Islamophobic abuse mostly directed at women wearing headscarves while shopping, study finds*, Australian Broadcasting Corporation (ABC), 18 November 2019 <<https://www.abc.net.au/news/2019-11-18/muslim-women-enduring-most-islamophobia-in-australia/11708376>>

online abuse and hate mail, including death threats. According to research in 2019, mosque attendees faced targeted Islamophobic violence, with nearly 40% of mosques reporting incidents of verbal abuse towards their congregants. Furthermore, 17% of these mosques received threats of violence, resulting in one physical assault, and 20% reported incidents of objects being thrown at them or their premises.¹⁰ These alarming statistics highlight the prevalence of Islamophobia and the need for increased awareness and action to combat such hate-motivated crimes. As recent as the Church stabbing a few weeks ago, mosques have been forced to increase security to 24 hours of the day and close their complex outside of the congregational prayer times due to safety concerns.¹¹

LACK OF REPORTING AND POLICE CAPACITY

10. Despite clear evidence of an increase in Islamophobic attacks, studies show that they remain underreported due to several internal factors such as the normalisation of hate and external barriers, including the feeling by victims that it would be pointless to report due to the high personal costs and the general lack of trust in police and other statutory agencies.¹²
11. The lack of reporting was acknowledged by NSW Police, in which its research suggests that only about 25% of hate crimes are reported. Whilst this has seen police focus on a new education campaign encouraging more victims and survivors to come forward to report to police, as Professor Asquith stressed, “[w]e have such a big, dark figure of hate crime: all of that crime which never comes to the attention of the criminal justice system, or even communities, even something like Call It Out or the Islamophobia Register or the Asian Australian Alliance’s COVID 19 Racism Incident register.”¹³ There are examples of clear hate crimes committed against members of the community in which police took little or no action.
12. From an operational perspective, the need to provide ongoing support and guidelines to police officers to help prosecute such cases remains vital. However, there is a acknowledgement by many academics and commentators of the need to review how

¹⁰ Scott Poynting (Charles Sturt University), Derya Iner (Charles Sturt University), Gail Mason (University of Sydney), Nicole L. Asquith (University of Tasmania) and Ron Mason (University of Tasmania), *Graffiti, arson, death threats: new research finds widespread violence against Australian mosques*, The Conversation, 15 March 2021 <<https://theconversation.com/graffiti-arson-death-threats-new-research-finds-widespread-violence-against-australian-mosques-156843>>

¹¹ Sam Nichols, Millie Roberts, and Sean Tarek Goodwin, Lebanese Muslim Association says mosques under threat following Sydney church stabbing, ABC News, 17 April 2024 <<https://www.abc.net.au/news/2024-04-17/nsw-sydney-church-stabbing-lebanese-muslim-association/103733100>>

¹² Matteo Vergani, *Barriers to Reporting Hate Crime and Hate Incidents in Victoria: A mixed-methods study*, Centre for Resilient and Inclusive Societies, Deakin University, 2020 <<https://nla.gov.au/nla.obj-2849051680/view>>

¹³ Cat Woods, *Campaign against race hate crimes should go much further*, NSW Law Society Journal Online, 8 February 2023 <<https://lsj.com.au/articles/campaign-against-race-hate-crimes-should-go-further/>>

criminalisation is used in Australian jurisdictions to address racial and religious bigotry.¹⁴

CRIMINILISING “HATE CRIMES”

13. NSW has several criminal and civil measures designed to tackle serious vilification and "hate crimes," with section 93Z being one of them. Introduced in 2018, this provision sought to address issues related to serious vilification or "hate speech" that incites violence. It encompasses religious vilification as a protective attribute and replaces the four existing serious vilification offences previously outlined in the *Anti-Discrimination Act 1997 (NSW)* ("the AD Act"). Given there has not been any successful convictions,¹⁵ it remains important to review it and other criminal provisions that address vilification and hate crimes.
14. The provision focuses on a particular and severe type of hate crime which has a high legal threshold since many forms of racial or religious vilification do not involve a 'threat or incitement to violence'. The 'typical' hate crime involves unprovoked attacks by multiple unknown offenders targeting a victim based on group affiliation, often a minority group. These attacks are fueled by contempt, disrespect, or resentment towards the victim's group, serving to express intolerance and animosity. They seek to undermine values of acceptance and respect for cultural and religious diversity.¹⁶
15. In NSW, these types of hate crimes, are dealt with as an aggravating factor on sentencing where the offence was motivated by hatred for, or prejudice against, a group of people to which the offender believed the victim belonged under section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. This common law approach requires focus on the offender's state of mind or the motivation of the offender as to whether they were fully or partially motivated by religious or racial hatred.
16. One of the objectives of sentencing provisions is to allow courts to condemn, discourage, penalise, and acknowledge the harm caused by an offender's conduct by imposing a more severe penalty on the offender. This penalty is intended to reflect the seriousness of the harm caused to a victim of violence. However, as Mason and Dyer explain, the sentencing courts have not always been able to achieve that purpose, particularly when the offence was only partially motivated by the

¹⁴ Gail Mason, *Penalty Enhancement Laws: A model for regulating hate crime in Australia*, University of Western Australia Law Review 48.2 (2021): 486
<https://www.able.uwa.edu.au/_data/assets/pdf_file/0008/3660182/5-Mason.pdf>

¹⁵ Christopher Knaus and Michael McGowan, 'NSW police botch the only two race hate prosecutions under new laws', *The Guardian* (online, 2 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/02/nsw-police-botch-the-only-two-race-hate-prosecutions-under-new-laws>>

¹⁶ Gail Mason and Andrew Dyer, *A Negation of Australia's Fundamental Values': Sentencing Prejudice-Motivated Crime* (2013) Melbourne University Law Review, Volume 36, No. 3, pages 871-914 <https://law.unimelb.edu.au/_data/assets/pdf_file/0017/1700126/36_3_3.pdf>

aggravating factor.¹⁷ Also, as Professor Asquith points out, in many instances, the aggravating factor is not even considered because the prosecution have not provided sufficient evidence to demonstrate that the crime was racially or religiously motivated.¹⁸ In fact in such cases, unless the offender had a history with police or was being monitored, there would be a lack of evidence to prove racial motivation or hatred towards a group of persons. The Court would necessarily be confined to the facts of the case and in particular, the words used and the circumstances of the offending.

17. In other jurisdictions, penalty enhancement laws have been used when it has been motivated by hatred towards protected groups, raising the maximum penalty for existing criminal offences. In Western Australia, such measures are used for racially aggravated crimes, drawing inspiration from the United Kingdom's *Crime and Disorder Act 1998 (UK)*. In contrast to sentencing aggravation, where the test is focused on the offender's motives, having the aggravating element added to the offence at the start means the prosecution only needs to establish outward expressions of hostility, bias, or hatred. Also, when the additional penalty coincides with the base offence, it acknowledges the social and emotional harm caused by the racial or religious hostility.¹⁹
18. The UK experience suggests that racial or religious hostility with such offences is almost always verbal in nature. Whilst there are concerns about criminalising 'moderate' verbal racial or religious insult, such action would unlikely result in criminal prosecution without being occupied by a base offence such as assault.²⁰ Victims of such insults or hostility could seek remedies under the AD Act even though as mentioned previously, reforms under those provisions should also be undertaken so that barriers for victims in those instances are reduced.
19. Given the limited scope of section 93Z and its effectiveness, penalty enhancement laws are one way of broadening the use of criminalisation to send a message that social cohesion and tolerance are values that are vigorously protected. In the UK, of the 8,890 criminal matters that were aggravated by racial or religious motivation in 2018-19, there was a conviction rate of 84.7%.²¹ In contrast, no convictions have

¹⁷ Gail Mason and Andrew Dyer, *A Negation of Australia's Fundamental Values': Sentencing Prejudice-Motivated Crime* (2013) Melbourne University Law Review, Volume 36, No. 3, pages 913-914 <https://law.unimelb.edu.au/data/assets/pdf_file/0017/1700126/36_3_3.pdf>

¹⁸ Cat Woods, *Campaign against race hate crimes should go much further*, NSW Law Society Journal Online, 8 February 2023 <<https://lsj.com.au/articles/campaign-against-race-hate-crimes-should-go-further/>>

¹⁹ Gail Mason, *Penalty Enhancement Laws: A model for regulating hate crime in Australia*, University of Western Australia Law Review 48.2 (2021): 470 <https://www.able.uwa.edu.au/data/assets/pdf_file/0008/3660182/5-Mason.pdf>

²⁰ Gail Mason, *Penalty Enhancement Laws: A model for regulating hate crime in Australia*, University of Western Australia Law Review 48.2 (2021): 470 <https://www.able.uwa.edu.au/data/assets/pdf_file/0008/3660182/5-Mason.pdf>

²¹ Gail Mason, *Penalty Enhancement Laws: A model for regulating hate crime in Australia*, University of Western Australia Law Review 48.2 (2021): 470, p. 486 <https://www.able.uwa.edu.au/data/assets/pdf_file/0008/3660182/5-Mason.pdf>

been secured under section 93Z since its introduction in 2018. Two attempts by the NSW Police, made without the Office of the Director of Public Prosecutions (the ODPP) consent, resulted in overturned convictions due to procedural issues.²²

20. Whilst the MLNNSW supports the NSW government's recent amendment to section 93Z to remove the requirement for the ODPP to approve any prosecution under the provision, it was done soon after the escalation of tensions in the Palestinian-Israeli conflict on 7 October 2023 and the reaction to protestors at the Opera House in support of the Palestinian cause.²³
21. The Australian National Imams Council (ANIC), who had been calling for such changes to section 93Z, along with Faiths NSW, sought to delay any change to ensure it was part of a broader review of vilification laws and hate crimes. It was argued that there is a genuine risk that the removal of the requirement for the ODPP's approval without any safeguards can result in the inconsistent application of vilification laws, leading to charges being deemed invalid.²⁴ As Mason points out, legislators should not respond to high profile events only, but rather make changes only after the examination of the empirical evidence to find the appropriate level of criminalisation for such crimes, and taking into account the role of civil, anti-discrimination provisions and consideration for the freedom of speech.²⁵ All too often laws affecting the community are introduced as a reactionary measure, rather than through broad consultation and a measured approach.
22. Notably, in Queensland's comprehensive parliamentary inquiry into serious vilification and hate crimes in 2021, the Australian Muslim Advocacy Network (AMAN) and Islamic Council of Queensland (ICQ) made a submission in which they made several important recommendations. This included the removal of the Crown Law officer approval requirement for Queensland's equivalent of NSW's section 93Z of the CA. However, this was complemented with other recommendations to ensure police can effectively prosecute serious vilification crimes including the establishment a hate crime review panel comprising of police and community advocates to guide best practice and facilitate better communication, especially in high-impact cases. This is similar to the model adopted in the UK. It also recommended that religious and cultural diversity training be incorporated for new police recruits, including

²² Portfolio Committee, Legislative Council, No.5 Legal Affairs, Friday, 12 March 2021, page 64 <<https://www.parliament.nsw.gov.au/lcdocs/transcripts/2542/PC5%20Transcript%20%20-%20Friday%2012%20March%202021%20-%20CORRECTED.pdf>>

²³ Michael Koziol, *Minns to tighten 'toothless' laws against hate speech, violent threats*, Sydney Morning Herald, 13 November 2023 <<https://www.smh.com.au/national/nsw/minns-to-tighten-toothless-laws-against-hate-speech-violent-threats-20231113-p5ejl0.html>>

²⁴ Australian National Imams Council, *ANIC Concerned About Rushed Approach to Amending Section 93z of the Crimes Act (NSW)*, 1 December 2023 <<https://www.anic.org.au/news/anic-concerned-about-rushed-approach-to-amending-section-93z-of-the-crimes-act-nsw/>>

²⁵ Gail Mason, *Penalty Enhancement Laws: A model for regulating hate crime in Australia*, University of Western Australia Law Review 48.2 (2021): 470, p. 493 <https://www.able.uwa.edu.au/data/assets/pdf_file/0008/3660182/5-Mason.pdf>

engagement with Muslim and other minority communities to address and eliminate biases in policing.²⁶

23. Following their review, Queensland now includes “statutory aggravation” for various offences.²⁷ When there is a circumstance of aggravation, such as race or religion, the indictment or bench charge sheet (Court Attendance Notice) must include the aggravating circumstance. Subsequently, it falls on the Crown or police prosecution to prove beyond a reasonable doubt that this aggravating factor indeed existed.
24. If we are to take reform of hate crime laws seriously, it is important any changes are made following consultation with all key stakeholders, including with key community organisations and faith communities, including the Muslim community.

ANTI-DISCRIMINATION ACT AND CIVIL PROVISIONS

25. Whilst the MLNNSW welcomes the NSW Government’s recent inclusion of vilification provisions based on a person’s religious belief, affiliation, or participation in religious activities under the AD Act, this has not been extended to broader prohibitions against discrimination based on religion.
26. In contrast, the AD Act’s prohibition against race discrimination has been found to be afforded to ethno-religious groups like Jews and Sikhs, but not Muslims, some of whom are readily identifiable due to their clothing or appearance (hijab, beard etc) or daily practices, such as praying, remain without protection.²⁸ This discrepancy creates another external barrier for the Australian Muslim community to seek recourse for discriminatory conduct and undermines their trust in legal institutions.
27. The MLNNSW recommends that religious discrimination be included as a protected attribute in the AD Act similarly to the race discrimination provisions. The MLNNSW also recommends that the exceptions to the vilification provisions for certain person be removed to ensure that the law applies equally and allows faith communities build trust with the authorities and state institutions.

WEAPONISING ANTISEMITISM AND LIMITING FREE SPEECH

28. The MLNNSW is also concerned with attempts to label any criticism of the State of Israel as antisemitic, particularly in light of the ongoing conflict in Gaza and the

²⁶ Rita Jabri Markwell and Maryam Hashimi, *Inquiry into Serious Vilification and Hate Crimes - Submission to the Legal Affairs and Safety Committee Queensland Legislative Assembly*, Australian Muslim Advocacy Network (AMAN) and Islamic Council of Queensland (ICQ), 12 June 2021 <<https://documents.parliament.qld.gov.au/committees/LASC/2021/VilificationandHateCrimes/submissions/052.pdf>>

²⁷ *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023*, Statement of Compatibility, Queensland, <https://documents.parliament.qld.gov.au/tp/2023/5723T392-7F28.pdf>.

²⁸ *Ekeremawi v Nine Network Australia Pty Limited* [2019] NSWCATAD 29

widespread condemnation of Israel's actions against civilians. As mentioned above, it is disappointing that the recent amendments to section 93Z were in response to complaints by supporters of Israel in Australia following pro-Palestinian protests and not considered when various groups, including one of Australia's peak Islamic representative bodies, ANIC, have called for a broader review.

29. It is crucial to distinguish between legitimate expressions of support for Palestinians facing violence and displacement and actual antisemitic incidents. Mischaracterising expressions of support as antisemitic can and have created fear and unfairly demonised Palestinians and their supporters, many of whom, but definitely not all, are Muslims. The irresponsible and reactionary comments made by politicians and Australian journalists labelling any pro-Palestinian sentiment is highly inflammatory and inappropriate for all Australians and specifically creates a divide and ill feeling towards the Jewish community.

30. A growing number of Jewish people have voiced their concerns about Israel's actions.²⁹ While acknowledging that antisemitism poses a genuine threat, they believe that the manipulative use of this term is fostering unwarranted fear and stifling essential conversations about Israel's policies.³⁰

31. Part of the concern stems from attempts to formally redefine antisemitism which can have far reaching implications for freedom of speech, as it is increasingly been used for public policy and debate. The International Holocaust Remembrance Alliance's ("IHRA") working definition of antisemitism can blur the lines between criticism of Israel and antisemitism. Its complex language and multiple references to Israel could hinder genuine critiques of the country. Geoffrey Robertson AO QC has no qualms as whether the definition stifles free speech:

“...the definition, by so often referring to certain criticisms of Israel, is likely to encourage pro-Israeli organisations to urge that they be applied to ban criticisms of Israel. And correspondingly likely to discourage human rights groups and others from organising such protests.³¹”

33. It is crucial that the NSW government refrain from adopting the IHRA definition to avoid hampering public debate and policy.

²⁹ Jewish Council of Australia, *Jewish Council of Australia launches to provide expert voice on antisemitism and racism in Australia*, Media Release, 6 February 2024 <<https://www.jewishcouncil.com.au/media/jewish-council-launches-expert-voice-antisemitism-racism-in-australia>>

³⁰ Sarah Schwartz and Max Elliott Kaiser, *As Jews, we don't accept that criticism of Israel's government is antisemitic*, The Age, 6 February 2024 <<https://www.theage.com.au/national/as-jews-we-don-t-accept-that-criticism-of-israel-s-government-is-antisemitic-20240201-p5f1o6.html>>

³¹ Geoffrey Robertson AO QC, *Anti-Semitism: The IHRA Definition and Its Consequences for Freedom of Expression*, The Palestinian Return Centre, 3 September 2018 <https://prc.org.uk/upload/library/files/Anti-Semitism_Opinion_03.09.18eds.pdf?fbclid=IwAR1JGAkofecdSgKEyTo8OhantJKJZeGVconpx5V4slsjJIThZK1s0ZJDF8>

HUMAN RIGHTS ACT

34. Over the past decade, there have been several calls at both a State and Federal level for the strengthening of anti-discrimination legislation to include protections from discrimination for those who are a part of a religious group.
35. The MLNNSW is of the view that one of the most fulsome ways of providing sufficient protections for religious or other minorities is by way of implementation of a Human Rights Charter in NSW. The implementation of a Human Rights Charter has been called upon for many years and if properly implemented, would provide adequate protections for many persons who would otherwise be victims of discrimination.

CONCLUSION

36. MLNNSW stresses the urgency to address rising Islamophobia and hate crimes in NSW. This submission underscores the need for reforms to existing legislation, including section 93Z of the CA and the AD Act. Addressing underreporting, enhancing police capacity, and introducing religious discrimination protections are crucial steps. MLNNSW advocates for collaborative efforts and inclusive consultations to create a harmonious and inclusive society in NSW.
37. The MLNNSW is more than happy to respond to any questions by the NSWLRC or any other stakeholders regarding these submissions.