

**NSW Law Reform Commission review of  
section 93Z of the *Crimes Act*  
1900 (NSW)**

**Submission by the  
Australian National Imams Council**

23 April 2024

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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 by the NSW Law Reform Commission of section 93Z of the *Crimes Act 1900* (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 *Anti-Discrimination Act 1977* (NSW) (**AD Act**) to make it unlawful to vilify a person or group of persons on the ground of religious belief or affiliation or religious activity.
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. Members of the Australian Muslim community have over the years expressed concern about the operation of s.93Z. For instance, such concerns were noted in the report of the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*.<sup>1</sup> ANIC also cited the lack of any charges brought under s.93Z in pointing to its ineffectiveness.
6. However, concern was expressed about the rushed approach to amending 93Z during late 2023. Such a step was also against the majority recommendation of the Faith Affairs Council which recommended that the Government defer the

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<sup>1</sup> [https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20\(Religious%20Freedoms%20and%20Equality\)%20Bill%202020.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20(Religious%20Freedoms%20and%20Equality)%20Bill%202020.pdf) at 3.11 and 3.13.

amendment to allow for consultation.<sup>2</sup> The Faith Affairs Council has been described as being “established as a consultative mechanism to provide advice on priorities and emerging trends, the impacts of government policy on faith communities, and enhancing community harmony, security and well-being”.<sup>3</sup>

7. In the above context, the announcement of the broader review into the operation of s.93Z is a welcome development. However, such a review should not be rushed and look more broadly at the operation of s.93Z. Section 93Z should not be considered in a vacuum or without regard to other protective civil laws. Doing so risks an attempt to give s.93Z a wider operation than is warranted and unduly expanding the scope of criminal laws. It is also important that such a review take into account the experiences of the different communities. Laws designed to address hate speech and incitement to violence in our multicultural and diverse society must provide an effective safeguard for minority communities.
8. We appreciate the opportunity to make this submission and look forward to further engaging on the review of the Act.

#### **SUBMISIONS IN RELATION TO TERMS OF REFERENCE (TOR)**

9. In terms of **TOR 1**, there can be little dispute that racial and religious vilification has a significant and deleterious impact on all parts of the NSW community. It is an issue of particular concern for the Australian Muslim community which, unlike other some other communities, also does not have protection relating to religious discrimination under existing laws.
10. For instance, notwithstanding the breadth and range of the protected attributes in the AD Act, there is no protection against discrimination on the grounds of a person’s religious identity and belief. The AD Act includes, as a protected attribute, ethno-religious or national origin. However, the term ‘ethno-religious origin’ has been found to include Jewish or Sikh people but not Australian Muslims.<sup>4</sup>

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<sup>2</sup> The outcome of the first Faith Affairs Council is referred to in ANIC’s release dated 1 December 2023: <https://www.anic.org.au/news/anic-concerned-about-rushed-approach-to-amending-section-93z-of-the-crimes-act-nsw/>

<sup>3</sup> <https://multicultural.nsw.gov.au/media-releases/nsw-faith-affairs-council-starts-work/>

<sup>4</sup> *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

11. Hence, as it stands, in NSW, Australian Muslims do not have any legislative protections against religious discrimination, including in the workplace.
12. The Australian Muslim community has experienced in an increase in anti-Muslim sentiment and Islamophobia since the tragic events of Christchurch on 15 March 2019, when 51 men, women and children were murdered while they were praying in two mosques.<sup>5</sup> The apprehension and concern of many Australian Muslims and Arabs has intensified following the conflict in the Middle East. The review should also take into account the incidence of increasing anti-Muslim sentiment or Islamophobia.<sup>6</sup>
13. The Australian Human Rights Commission recently reiterated that ‘In Australia, many communities continue to be affected by the war.....the anti-semitism, anti-Palestinian and other racism we have seen in Australia during this conflict is unjustifiable and must be condemned’.<sup>7</sup> This is supported by data from Islamophobia Register Australia showing 13-fold increase in Islamophobic attacks since October 2023. This follows a worldwide trend as UK figures show that anti-Muslim hate has tripled since October 2023<sup>8</sup> and a 172% increase in the US.<sup>9</sup> In the Australian context this follows several years of negative sentiment towards Muslims, with the Scanlon report showing successive years of respondents having a negative attitude towards Muslims (in 2020 it was 41% and in 2023 it was 23%)<sup>10</sup> with the social cohesion index in 2023 being the lowest on record.<sup>11</sup>
14. A recent report based on a community survey conducted in February 2024 asked respondents about their experiences since October 2023.<sup>12</sup> It highlighted that many of the participants felt unsafe and reported being impacted physically, mentally and financially. Half of the participants felt unsafe expressing their views

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<sup>5</sup> *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.

<sup>6</sup> Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, March 2021, at iii.

<sup>7</sup> <https://humanrights.gov.au/about/news/media-releases/escalating-humanitarian-crisis-gaza-and-addressing-impacts-our>).

<sup>8</sup> <https://www.bbc.com/news/uk-england-68374372>

<sup>9</sup> <https://www.aljazeera.com/news/2023/12/21/seen-as-less-human-why-has-islamophobia-surged-amid-israels-gaza-war>

<sup>10</sup> <https://aci.scanloninstitute.org.au/>

<sup>11</sup> <https://www.theguardian.com/australia-news/2023/nov/15/social-cohesion-lowest-on-record-as-australia-reels-from-cost-of-living-inequality-concerns-and-voice-debate>

<sup>12</sup> <https://mwa.org.au/wp-content/uploads/2024/03/MWA-SOR-Preliminary-Report-Final.pdf>

in the workplace and a third felt afraid of losing their job. This has been exacerbated by the news of groups of people targeting individuals who publicly criticise the state of Israel. Leaked messages from WhatsApp groups revealed campaigns to target individuals who expressed support for Palestinians – for instance, actors who wore the keffiyeh – a scarf worn in solidarity with Palestinians<sup>13</sup>; an ABC broadcaster, who reposted content on Gaza<sup>14</sup>; and doctors who engaged in political action in support of healthcare workers in Gaza.<sup>15</sup>

15. The above trends are concerning and highlight the importance of considering the experience of communities in proposing legislative responses.
16. In terms of **TOR 3**, as noted above, the discrimination legislative regime in NSW is fundamentally deficient in that it does not provide any 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. For instance, it arguably has the effect of making inoperative the protection against religious discrimination provided by the *Fair Work Act 2009* (Cth) in an employment context.
17. 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.
18. 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.
19. The Committee stated<sup>16</sup>:

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<sup>13</sup> <https://www.smh.com.au/culture/theatre/we-are-deeply-sorry-stc-apologises-for-its-handling-of-actors-protest-20231129-p5enqi.html>

<sup>14</sup> <https://www.smh.com.au/business/workplace/secret-whatsapp-messages-show-co-ordinated-campaign-to-oust-antoINETTE-lattouf-from-abc-20240115-p5exdx.html>

<sup>15</sup> <https://www.smh.com.au/national/dozens-of-doctors-reported-to-watchdog-over-israel-gaza-social-media-posts-20240119-p5eyof.html>

<sup>16</sup> Report of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 , March 2021, at iii.

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.

20. 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 attribute in the Act by the end of 2021 and that there should not be any “further delay”.<sup>17</sup>

21. More generally, as noted by the Human Rights and Equal Opportunity Commission:<sup>18</sup>

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.

22. Importantly, any review of s.93Z of the Act should not be in a vacuum or without regard to the other protective civil laws. Doing so risks an attempt to give s.93Z a wider operation than is warranted and unduly expanding the scope of criminal laws.

23. It is to be noted that the AD 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. 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

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<sup>17</sup> 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.

<sup>18</sup>[https://humanrights.gov.au/sites/default/files/content/pdf/human\\_rights/religion/article\\_18\\_religious\\_freedom.pdf](https://humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf)

- (c) is directed at a person or group of persons based on religious belief, affiliation, or activity.
24. The above amendment lessens the need to expand the scope of s.93Z and amend the type of conduct which s.93Z is directed at. It is appropriate that s.93Z continue to deal with conduct which may incite to violence. Such conduct is properly in the realm of the criminal laws.
25. However, speech which has the effect of vilifying or espousing hate (without inciting to violence) ought to properly be dealt with by civil laws, namely the AD Act. Such conduct is reprehensible and often precedes violence. The Christchurch murders in 2019 is an example of this. As observed in the report of the of the Royal Commission of Inquiry into the terrorist attack on Christchurch on 15 March 2019, the Australian perpetrator had expressed extreme right-wing views about people he considered a threat. Eventually, he mobilised to violence.<sup>19</sup> Affected communities ought to be able to bring their own action directed at hateful speech.
26. There are many benefits to providing a civil remedy which offers some protection to religious communities at risk of discrimination (and vilification).
27. First, it does not rely solely on criminal legislation, which 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.
28. 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.
29. 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. Anything said in that conciliation meeting is privileged, private and confidential.
30. The conciliatory approach allows for a broader scope of outcomes. Outcomes could include:
- (a) having material taken down and not put back up;

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<sup>19</sup> <https://multicultural.nsw.gov.au/media-releases/nsw-faith-affairs-council-starts-work/>

- (b) an undertaking not to repeat that particular conduct;
  - (c) a statement of apology/regret; and/or
  - (d) compensation or donation to community project.
31. 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.
32. 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.
33. Amending the criminal laws will, in ANIC's view, unlikely address the above concerns and experiences, nor make the protective laws more accessible. The review of s.93Z ought not be at the expense of appropriate civil laws which can more appropriately capture vilification and/or hate speech.
34. In terms of **TOR 4** and **TOR 5**, it is important to maintain a balance between, on the one hand, protecting against hateful speech and conduct which incites violence and, on the other hand, not impairing existing important freedoms, including freedom of speech, association and religion. Such a balance is better achieved through addressing some of the matters of concern through the civil laws rather than the Act. These considerations are equally relevant to the need to promote community cohesion and inclusion.
35. On the question of balance, and in the light of the emerging issues and discussions of foreign policy following the conflict in the Middle East, care must be taken to avoid, as described by the Executive Officer of the Jewish Council of Australia, Sarah Schwartz (**Schwartz**), and an expert on anti-semitism, Dr Max Elliott Kaiser, conflating Jews and Israel – that any criticism of the state of Israel is



seen as an attack on all Jews – “to stifle legitimate criticism of Israel’s actions in the Gaza Strip and West Bank”.<sup>20</sup>

36. Given the present concern with anti-semiticism, it is important to avoid conflating such a term with criticism of Israel. The risks of such a conflation are twofold. First, it allows for the “weaponisation of accusations of antisemitism ... to undermine the movement for a just future for Palestinians”. Second, it “undermines the fight against antisemitism ... It will lead to real instances of antisemitism being dismissed”.<sup>21</sup> Schwartz expressed support for a definition of antisemitism as “hatred, hostility, prejudice or discrimination against Jews because of their Jewishness.”<sup>22</sup>
37. In similar vein, the use of the terms such as “Islamist theological Antisemitism” conflate Islam and Muslims with anti-semiticism. It ostensibly demonises a whole group of people and their faith. In the process, it sets up the debate in terms of communities and faiths. Such an approach is unhelpful and antithetical to social cohesion in our society. A more constructive and collaborative approach and dialogue is required by different communities working together towards addressing instances of anti-semiticism, islamophobia and other such conduct. Again, this is best achieved through appropriate civil laws, rather than criminal laws.

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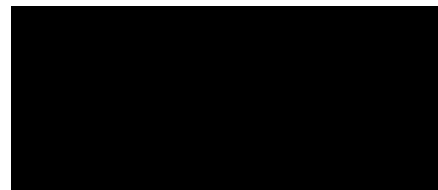
<sup>20</sup> <https://www.smh.com.au/national/as-jews-we-don-t-accept-that-criticism-of-israel-s-government-is-antisemitic-20240201-p5f1o6.html>

<sup>21</sup> <https://www.jewishcouncil.com.au/media/we-dont-accept-criticism-of-israel-is-antisemitic>

<sup>22</sup> <https://thejewishindependent.com.au/new-jewish-council-seeks-to-draw-a-line-between-jews-and-israel>

## **CONCLUSION**

38. ANIC welcomes the broader review into the operation of s.93Z. As has been stated above, 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 AD Act. Section 93Z will work most effectively alongside such appropriately drafted civil laws.
39. We are grateful for the opportunity to make this submission.
40. 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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