

NSW Law Reform Commission Inquiry into Serious Racial and Religious Vilification

19 April 2024

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers and the rights of people in detention
- Improving outcomes for people under the National Disability Insurance Scheme

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Recommendations

Recommendation 1 – Religious belief or affiliation

In the interests of both legal clarity and consistency, the undefined protected attributes of ‘religious belief or affiliation’ and ‘religious activity’ in sections 49ZD and 49ZE of the Anti-Discrimination Act 1977 (NSW), should be replaced with ‘religious belief or affiliation’ as defined in section 93Z of the Crimes Act 1900 (NSW).

Recommendation 2 – Sexual orientation

Bisexual people should be protected against civil vilification under the Anti-Discrimination Act, to achieve consistent operation with section 93Z of the Crimes Act.

Recommendation 3 – Gender identity

Non-binary people should be protected against civil vilification under the Anti-Discrimination Act, to achieve consistent operation with section 93Z of the Crimes Act.

Recommendation 4 – Sex characteristics

- a. The protected attribute of intersex status in section 93Z of the Crimes Act should be updated to sex characteristics, with a definition drawing on that set to commence shortly in the Anti-Discrimination Act 1991 (Qld).*
- b. People with innate variations of sex characteristics should be protected against civil vilification under the Anti-Discrimination Act 1977 (NSW).*

Recommendation 5 – Disability

Disability should be added as a protected attribute in s93Z of the Crimes Act 1900 (NSW), and civil vilification provisions covering disability should be included in the Anti-Discrimination Act 1977 (NSW).

1. Introduction

PIAC welcomes the opportunity to provide this submission to the NSW Law Reform Commission's (NSWLRC) inquiry into 'Serious Racial and Religious Vilification', in particular by reviewing and reporting on the effectiveness of section 93Z of the *Crimes Act 1900* (NSW).

We are a community legal centre with a long history of involvement in litigation, policy and law reform work in relation to anti-discrimination and vilification issues. This includes our leading role in advocating for a comprehensive review of the *Anti-Discrimination Act 1977* (NSW),¹ and participation in the current general NSWLRC inquiry into that legislation.²

PIAC supports protection against hate speech through an offence of intentionally or recklessly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status as currently reflected in section 93Z of the *Crimes Act*.

Given the potential impact on freedom of speech and the attached criminal penalty, it is appropriate that the provision sets a relatively high bar and will likely only capture a small number of possible instances of hate speech (threatening or inciting violence).

However, the effectiveness of this approach as a response to hate speech depends on two factors currently not reflected in NSW law:

1. That the protected attributes, and their respective definitions, included in section 93Z provide sufficient coverage to the groups most likely to experience hate speech, and
2. That civil vilification provisions in the *Anti-Discrimination Act*, which capture a wider range of possible instances of hate speech than 93Z,³ are consistent with the *Crimes Act* in their coverage of protected attributes.

In this submission, we highlight three key areas where we believe the coverage offered by the *Crimes Act* and *Anti-Discrimination Act* to counter hate speech should either be expanded, or made consistent, or both:

1. Religious belief or affiliation
2. LGBTIQ protections, and
3. Disability.

¹ Including through PIAC, 'Leader to Laggard: The case for modernising the NSW Anti-Discrimination Act', August 2021, available at: <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/>

² PIAC, 'Preliminary Submission to the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 (NSW)', 13 October 2023, available at: <https://piac.asn.au/2023/10/13/preliminary-submission-to-the-nsw-law-reform-commission-review-of-the-anti-discrimination-act-1977-nsw/>

³ For example, section 38S of the *Anti-Discrimination Act* prohibits transgender vilification, applying to public acts that 'incite hatred', 'serious contempt' or 'severe ridicule' for trans persons.

The discussion of each of these areas addresses Terms of Reference 2,⁴ 3⁵ and 5.⁶

2. Religious belief or affiliation

PIAC supports the protection of people of faith against vilification. This includes supporting the inclusion of ‘religious belief or affiliation’ as a protected attribute for the purposes of section 93Z of the *Crimes Act 1900*, including its associated definition: ‘religious belief or affiliation means holding or not holding a religious belief or view.’⁷ This is a straight-forward definition that sets out relatively clear boundaries of what is, and is not, protected.

We supported, in principle, the NSW Government’s 2023 commitment to introduce civil vilification prohibitions with respect to religious belief, not only to ensure consistency between the *Crimes Act* and *Anti-Discrimination Act*, but also to provide greater protection to people of minority faiths against ongoing abuse and harassment.

Unfortunately, however, we were unable to support the legislation that was ultimately introduced, the *Anti-Discrimination Amendment (Religious Vilification Act) 2023* (NSW), because it introduced a much wider attribute – religious belief or affiliation or religious activity – without any associated definition for any of these terms.

We wrote to MLAs and MLCs in July and August 2023 expressing our concerns about this approach – the substantive text of the correspondence which we sent can be found at **Attachment A** of this submission.

In short, those concerns included that:

- The lack of definitions, including for religious affiliation and religious activity, means the scope of these provisions is unclear
- The provisions are largely inconsistent with the approach in other states and territories, including Victoria and Queensland
- The potential for the provisions to apply to non-natural persons, and therefore to protect religious organisations rather than just individual people of faith, and
- The potential for the provisions to protect individuals and organisations who may be publicly criticised for engaging in unlawful religious activities.

Given the current inquiry into section 93Z, and the clear terms of reference for the NSWLRC to consider ‘the desirability of harmonisation and consistency between New South Wales, the

⁴ Criminal vilification offences in other Australian and international jurisdictions, and the desirability of harmonisation and consistency between New South Wales, the Commonwealth and other Australian States or Territories.

⁵ The availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW).

⁶ The need to promote community cohesion and inclusion.

⁷ Section 93Z(5), *Crimes Act 1900* (NSW).

Commonwealth and other Australian States and Territories’,⁸ and ‘the availability of civil vilification provisions in the *Anti-Discrimination Act 1977* (NSW),⁹ we submit that this is an opportunity for the Commission to consider the issues created by the broad attributes, and their lack of definition, in the civil religious vilification provisions passed by NSW Parliament last year.

We suggest that these protected attributes should be amended to be consistent with the much clearer and well-defined attribute of religious belief or affiliation as currently featured in section 93Z.

Recommendation 1 – Religious belief or affiliation

In the interests of both legal clarity and consistency, the undefined protected attributes of ‘religious belief or affiliation’ and ‘religious activity’ in sections 49ZD and 49ZE of the Anti-Discrimination Act 1977 (NSW), should be replaced with ‘religious belief or affiliation’ as defined in section 93Z of the Crimes Act 1900 (NSW).

3. LGBTIQ protections

While much public attention has been focused recently on racial and especially religious hate speech, lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) people, and especially trans and gender diverse people, have also experienced a disturbing increase in vilification.

In the past 12 months this has included:

- A widely-reported Neo-Nazi demonstration against transgender rights on the steps of Victorian Parliament in March 2023;¹⁰
- A less-well reported violent attack against LGBTIQ rights protesters and NSW Police in Sydney in March 2023;¹¹ and
- Repeated threats of violence and other forms of intimidation against LGBTIQ community events, such as Drag Story Times at local libraries, most recently involving the cancellation of a planned ABC event in the lead-up to the 2024 Sydney Gay and Lesbian Mardi Gras following death threats against staff involved in its organisation.¹²

⁸ Term of Reference 2.

⁹ Term of Reference 3.

¹⁰ ‘Nazi salutes performed on steps of Victorian parliament as protesters clash over trans rights’, *SBS News*, 18 March 2023: <https://www.sbs.com.au/news/article/nazi-salutes-performed-on-steps-of-victorian-parliament-as-protesters-clash-over-transgender-rights/yr7qzkevn>

¹¹ ‘Two arrested as mob sets upon protesters outside Mark Latham event in Sydney’, *Guardian Australia*, 22 March 2023: <https://www.theguardian.com/australia-news/2023/mar/21/two-arrested-after-mob-charges-rights-activists-outside-mark-latham-event-in-sydney>

¹² ‘ABC boss details abuse staff received over Drag Queen Storytime event’, *OutinPerth*, 14 February 2024: <https://www.outinperth.com/abc-boss-details-abuse-staff-received-over-drag-queen-storytime-event/>

The current inquiry should therefore consider how NSW law deals with serious anti-LGBTIQ vilification, including seeking increased consistency between section 93Z and civil vilification provisions under the *Anti-Discrimination Act*, on the attributes of:

- Sexual orientation
- Gender identity, and
- Sex characteristics.

3.1 Sexual orientation

Currently, section 93Z protects lesbians, gay men and bisexual people against serious vilification. This is because it covers the protected attribute of ‘sexual orientation’, defined as: ‘a person’s sexual orientation towards (a) persons of the same sex, or (b) persons of a different sex, or (c) persons of the same sex and persons of a different sex.’¹³

On the other hand, the civil vilification prohibitions in the *Anti-Discrimination Act* only cover lesbians and gay men, while excluding bisexual people – because it utilises the outdated protected attribute of ‘homosexuality’.¹⁴

This discrepancy should be rectified. This could be achieved by passage of the Equality Legislation Amendment (LGBTIQA+) Bill 2023 as introduced by the Independent Member for Sydney Alex Greenwich. Alternatively, it should be addressed by this and the concurrent NSW Law Reform Commission inquiry into the *Anti-Discrimination Act*, so that bisexual people have access to both civil vilification complaint mechanisms, in addition to existing protection under the criminal offence of inciting or threatening violence.

Recommendation 2 – Sexual orientation

Bisexual people should be protected against civil vilification under the Anti-Discrimination Act, to achieve consistent operation with section 93Z of the Crimes Act.

3.2 Gender identity

Currently, section 93Z protects all trans and gender diverse people, including those who are non-binary, against serious vilification, because the protected attribute it includes – ‘gender identity’ – is defined broadly, as: ‘the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), without or without regard to the person’s designated sex at birth.’¹⁵

¹³ Section 93Z(5), *Crimes Act 1900* (NSW).

¹⁴ Section 49ZT ‘Homosexual vilification unlawful’, *Anti-Discrimination Act 1977* (NSW).

¹⁵ Section 93Z(5), *Crimes Act 1900* (NSW).

On the other hand – and similar to the limitations with respect to sexual orientation, described above – the protections against civil vilification in the *Anti-Discrimination Act* are much narrower. This is because the relevant protected attribute there is ‘transgender’, defined as a person:

- a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
- b) who has identified as a member of the opposite sex by living as a member of the opposite sex...¹⁶

This definition consequently excludes people who are non-binary, because they do not live, or seek to live, as a member of the ‘opposite sex’.

Once again, this discrepancy should be rectified, either through passage of the Equality Legislation Amendment (LGBTIQA+) Bill 2023, or this and the concurrent inquiry into the *Anti-Discrimination Act*, so that non-binary people have access to both civil vilification complaint mechanisms, in addition to existing protection of the criminal offence of inciting or threatening violence.

Recommendation 3 – Gender identity

Non-binary people should be protected against civil vilification under the Anti-Discrimination Act, to achieve consistent operation with section 93Z of the Crimes Act.

3.3 Sex characteristics

Section 93Z includes a protected attribute of ‘intersex status’, defined as:

the status of having physical, hormonal or genetic features that are-

- a) neither wholly female nor wholly male, or
- b) a combination of female and male, or
- c) neither female nor male.

While this wording does ensure intersex people, or people who have innate variations of sex characteristics, are covered by the criminal offence of inciting or threatening violence, this term – intersex status – and its associated definition are no longer considered best practice.

Intersex advocacy organisations, including Intersex Human Rights Australian, instead call for the adoption of ‘sex characteristics’ as the relevant protected attribute, with definitions similar to that which has recently been added to the *Anti-Discrimination Act 1991 (Qld)*:¹⁷

Sex characteristics, of a person, means the person’s physical features and development related to the person’s sex, and includes-

¹⁶ Section 38A, *Anti-Discrimination Act 1977 (NSW)*.

¹⁷ Dictionary, *Anti-Discrimination Act 1991 (Qld)*, introduced by the *Births, Deaths and Marriages Registration Amendment Act 2023*, and set to commence on 29 April 2024.

- a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy; and
- b) the person's chromosomes, genes and hormones that are related to the person's sex; and
- c) the person's secondary physical features emerging as a result of puberty.

Section 93Z should therefore be updated to reflecting this more contemporary approach.

The *Crimes Act* provisions are nevertheless better than the civil prohibitions on vilification in the *Anti-Discrimination Act*, which effectively do not protect intersex people at all. As with sexual orientation and gender identity, this discrepancy should be redressed, either through passage of the Equality Legislation Amendment (LGBTIQA+) Bill 2023, or via this and the concurrent NSW Law Reform Commission inquiry into the *Anti-Discrimination Act* such that people with innate variations of sex characteristics have equivalent access to protections against hate speech as other members of the LGBTIQ, and wider NSW, community.

Recommendation 4 – Sex characteristics

- c. *The protected attribute of intersex status in section 93Z of the Crimes Act should be updated to sex characteristics, with a definition drawing on that set to commence shortly in the Anti-Discrimination Act 1991 (Qld).*
- d. *People with innate variations of sex characteristics should be protected against civil vilification under the Anti-Discrimination Act 1977 (NSW).*

4. Disability

Disability is not currently covered by either section 93Z, or through civil vilification prohibitions under the *Anti-Discrimination Act*.

The issue of public abuse and harassment of people with disability was highlighted by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. In Volume 4, they observed:¹⁸

The evidence shows that many people with disability experience harassment in a range of places and circumstances not covered by the [*Disability Discrimination Act 1992* (Cth)]. This includes harassment in public places and by strangers. At Public Hearing 28, people with disability shared their experiences of harassment in public places and said they have come to expect some form of abuse and harassment whenever they leave their homes.

¹⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Volume 4: Realising the human rights of people with disability*, 2023, page 319, available at: <https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Volume%204%2C%20Realising%20the%20human%20rights%20of%20people%20with%20disability.pdf>

The Royal Commission considered various legal responses to this harassment and abuse, and made two recommendations that are analogous in their approach to the dual prohibition of civil vilification, and criminal offence of inciting or threatening violence, in NSW:

Recommendation 4.29 Offensive behaviour

The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision:

Section 39A Offensive behaviour because of disability

- 1) It is unlawful for a person (the first person) to do an act, otherwise than in private, if:
 - a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - b) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability...

Recommendation 4.30 Vilification because of disability

- a. The *Disability Discrimination Act 1992* (Cth) should be amended by inserting a new provision as follows:

Section 39C Vilification because of disability

It is unlawful for a person (the first person) to do an act otherwise than in private, if:

- a) the act involves threats by the first person to perpetrate or encourage violence or serious abuse directed at another person or group of people;
 - b) the act is reasonably likely, in all the circumstances, to incite hatred towards another person or a group of people; and
 - c) the act is done because of the disability of the other person or because some or all of the people in the group have or are perceived by the first person to have a disability.
- b. **States and territories that already have legislation imposing criminal penalties for vilification on grounds that do not include disability should extend the legislation to vilification of people on the ground of disability.** [emphasis added].

Prohibiting vilification on the basis of disability is also the emerging consensus position within Australian states and territories.

- It is already unlawful in Tasmania, which includes disability as a protected attribute in both in its general provision applying to 'conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute',¹⁹ and its specific prohibition on public acts that 'incite hatred for, serious contempt for, or severe ridicule of, a person or a group of persons'.²⁰

¹⁹ Section 17(1), *Anti-Discrimination Act 1998* (Tas).

²⁰ Section 19(b), *Anti-Discrimination Act 1998* (Tas).

- The Australian Capital Territory includes disability within its civil vilification provision, which makes it ‘unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people.’²¹
- In the Northern Territory, 2022 amendments prohibited ‘offensive behaviour because of an attribute’, applying to ‘an act that (a) is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and (b) is done because of an attribute of the other person or of some or all of the people in the group.’²²

Other jurisdictions that do not currently protect people with disability against hate speech are also moving in this direction.

- In March 2024, the Queensland Government consulted on a draft Anti-Discrimination Bill 2024²³ that would prohibit ‘hateful, reviling, seriously contemptuous, or seriously ridiculing conduct’, including on the basis of disability.²⁴
- The Victorian Government has also in-principle agreed to recommendations of a Parliamentary Inquiry which recommended that that state’s vilification provisions be expanded to cover disability, along with a number of other attributes.²⁵
- The Western Australian Law Reform Commission has also recommended both that anti-vilification provisions be introduced to prohibit vilification on the grounds of disability (among other attributes), and that existing criminal anti-vilification provisions be expanded to cover disability.²⁶

To promote consistency with other jurisdictions, implement the recommendations of the Disability Royal Commission, and above all to protect people with disability against harassment, abuse and hate speech, we urge the inclusion of disability as a protected attribute for the purposes of both the s93Z criminal offence, and in civil vilification provisions under the *Anti-Discrimination Act 1977* (NSW).

²¹ Section 67A(1)(a), *Discrimination Act 1991* (ACT).

²² Section 20A(1), *Anti-Discrimination Act 1992* (NT).

²³ Draft Anti-Discrimination Bill 2024 (Qld): <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/f6e7fb8e-ec58-4b7f-aab2-5788ad9f3fb2/anti-discrimination-bill-2024-consultation-draft-new-bill.pdf?ETag=7f7e35eda3bcff87bdeb71fb08f8bcde>

²⁴ Clause 84(1), draft Anti-Discrimination Bill 2024 (Qld): ‘A person must not, because of the age, disability, gender identity, race, religion, sex, sex characteristics or sexual orientation of another person or a group of persons, engage in a public act that a reasonable person would consider hateful, reviling, seriously contemptuous, or seriously ridiculing the other person or members of the group.’

²⁵ Victorian Government, Response to Legislative Assembly and Social Issues Committee report: Inquiry into Anti-Vilification Protections, September 2021.

²⁶ Recommendations 114 and 115, Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)*, Project 111, Final Report, May 2022.

Recommendation 5 – Disability

Disability should be added as a protected attribute in s93Z of the Crimes Act 1900 (NSW), and civil vilification provisions covering disability should be included in the Anti-Discrimination Act 1977 (NSW).

Attachment A: Letter to NSW MPs re 2023 Religious Vilification Amendments

The following is the text of a letter PIAC sent to a number of NSW MLAs and MLCs as they considered the Anti-Discrimination Amendment (Religious Vilification) Act 2023 in late July and early August 2023:

Dear [MLA]MLC]

Concerns about Anti-Discrimination Amendment (Religious Vilification) Bill 2023

We write to express our serious concerns about the Anti-Discrimination Amendment (Religious Vilification) Bill 2023, as introduced in June and currently before NSW Parliament.

As you may be aware, PIAC is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

We have a strong focus on anti-discrimination law, including through case work on behalf of people with disability, advocacy in relation to the previous Commonwealth Government's Religious Discrimination Bill(s), as well as an ongoing campaign to improve the *Anti-Discrimination Act 1977* (NSW) so that it better meets the needs of the NSW community.²⁷

1. Principles for introducing religious vilification protections in NSW

PIAC supports the introduction of prohibitions on religious vilification in the *Anti-Discrimination Act*. However, in our view, these provisions should:

- Be clear and easy to understand and apply.
- As far as possible, be consistent with existing prohibitions on vilification in the Act (on the basis of race, homosexuality, transgender status and HIV/AIDS).
- Protect *individuals* against vilification and not *organisations*.

²⁷ Including through our report 'Leader to Laggard: The case modernising the NSW Anti-Discrimination Act', August 2021, available at: <https://piac.asn.au/2021/08/06/leader-to-laggard-the-case-for-modernising-the-nsw-anti%E2%80%90discrimination-act/>

- Be as narrowly-targeted as possible to protect against vilification without unduly restricting freedom of speech.

Unfortunately, the Anti-Discrimination Amendment (Religious Vilification) Bill 2023 does not meet these objectives. We will analyse the Bill's provisions in the following section (including comparing it to other jurisdictions), before highlighting our specific concerns and finally providing recommendations for how the Bill could be amended to better achieve these aims.

2. Analysis of the proposed amendments

a. Uncontroversial aspects of the Bill

Much of the content of the amendments in the Bill is uncontroversial. We note that the

- definition of public act in proposed section 49ZD;
- test for what is considered vilification ('by a public act, to incite hatred towards, serious contempt for or severe ridicule of', in proposed section 49ZE(1)); and
- defences in proposed section 49ZE(2)

are all broadly consistent with the equivalent aspects of vilification provisions relating to race, homosexuality, transgender status and HIV/AIDS elsewhere in the Act. They are therefore welcomed.

b. Protected attributes

However, problems arise in relation to the proposed protected attribute(s) (section 49ZE), namely, whether a person, or group of persons:

- 'has, or does not have, a religious belief or affiliation', or
- 'engages, or does not engage, in religious activity.'

Importantly, the Bill does not propose a definition for any of 'religious belief', 'religious affiliation' or 'religious activity'. Combined with the lack of any pre-existing definitions in the Act itself, these terms are extremely broad and potentially vague.

This terminology, and lack of definitions in the current Bill, is also inconsistent with the approach adopted in the offence of 'publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS vilification' which was added to section 93Z of the *Crimes Act 1900* (NSW) in 2018.²⁸

Section 93Z of the *Crimes Act* covers 'religious belief or affiliation', (section 93Z(1)(b)), which is then defined as 'means holding or not holding a religious belief or view' (section 93Z(5)).

²⁸ Via amendments that replaced the offences of serious vilification on the basis of race, homosexuality, transgender status and HIV/AIDS which had previously been contained in the *Anti-Discrimination Act 1977* (NSW).

The protected attribute and related definition in the *Crimes Act* is much clearer, much narrower and in our opinion is much better targeted. We note that this terminology and definition was included in the Anti-Discrimination Amendment (Religious Vilification) Bill 2021 introduced by the then-Opposition.²⁹ It is unclear to PIAC why a different approach has now been taken in the present Bill.

We also highlight that the protected attributes (religious belief, affiliation and activity) included in the current Bill are much broader than most other Australian states and territories, meaning a broader range of speech will be prohibited as a result.

For example, in Victoria, the equivalent protected attributes are 'religious belief or activity', with these clearly defined as follows:³⁰

religious belief or activity means –

- (a) holding or not holding a lawful religious belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity.

Queensland also has protected attributes of 'religious activity' and 'religious belief', but once again these are clearly, and narrowly, defined:³¹

- 'religious activity means engaging in, not engaging in or refusing to engage in a lawful religious activity',
- 'religious belief means holding or not holding a religious belief.'

Both jurisdictions include definitions of their respective protected attributes, while neither jurisdiction covers 'religious affiliation'.

Of the other jurisdictions which currently have religious vilification provisions (Tasmania,³² the ACT³³ and Northern Territory³⁴), only the ACT takes as broad an approach as proposed in this Bill to 'religious affiliation'.³⁵

²⁹ Proposed section 4(1) 'religious belief or affiliation means holding or not holding a religious belief or view.' Bill available at: <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3869>

³⁰ Section 3 *Racial and Religious Tolerance Act 2001* (Vic).

³¹ Dictionary *Anti-Discrimination Act 1991* (Qld).

³² Section 19(d) *Anti-Discrimination Act 1998* (Tas).

³³ Section 67A(1)(e) *Discrimination Act 1991* (ACT).

³⁴ Section 20A *Anti-Discrimination Act 1992* (NT).

³⁵ As part of the definition of the protected attribute of 'religious conviction': 'having a religious conviction, belief, opinion or affiliation' (Dictionary *Discrimination Act 1991* (ACT)). We note that Tasmania's provisions *do* apply to 'religious affiliation', but this is defined as meaning 'holding or not holding a religious belief or view': see s 3. This is therefore, in substance, much narrower than the approach proposed in the NSW Bill and indeed is the same as the NSW *Crimes Act* and 2021 version of the Bill.

We urge that NSW follows the national best-practice on this issue, opting for the narrower and clearer approach of covering ‘religious belief or activity’ and providing clear definitions of those terms.

3. Specific concerns

In addition to general concerns about the breadth, and lack of clarity, of the Bill’s provisions, we have three more-specific concerns about its impact.

a. Coverage of organisations

The protections in section 49ZE cover persons and groups of persons, with the definition of person in the *Interpretation Act 1987* (NSW) including ‘an individual, a corporation and a body corporate or public.’³⁶ On its face, the provisions therefore apply to religious organisations in addition to individuals.

This is not necessarily a problem in relation to the other protected attributes already included in the Act, because organisations do not have a race, sexuality, gender identity or HIV/AIDS status. As explained by the Australian Discrimination Law Experts Group (ADLEG) in 2020:³⁷

Owing to the inability of bodies corporate to be characterised in a manner pertaining to sex, race, age or disability, all existing federal discrimination laws allow only natural persons to bring a claim of discrimination. This is the case without requiring specific definitions of ‘person’ in those laws, owing solely to the limited character that organisations can take. However, bodies corporate can indeed be characteristics in a ‘religious’ manner.

Therefore, the provisions as drafted may allow religious organisations to bring vilification complaints on their own behalf – that is, to seek redress for being vilified *as an organisation*.

This is a problem in principle – we further agree with ADLEG’s assessment (in relation to discrimination, but equally applicable to vilification) that:³⁸

Human rights are expressly designed to protect innately *human* characteristics. While bodies corporate and other organisations should consistent with other ... discrimination laws, be prohibited from *engaging in* discriminatory conduct, such bodies should not be permitted to themselves *bring a claim of* discrimination. [emphasis in original]

This is also a problem in practice, as it would allow larger, well-funded and resourced religious organisations to bring vilification complaints against individuals, with a potentially significant chilling effect on public criticism of these bodies.

³⁶ Dictionary *Interpretation Act 1987* (NSW).

³⁷ Australian Discrimination Law Experts Group, *Submission re the Religious Discrimination Bill 2019 (Cth) Second Exposure Draft*, 30 January 2020, p28, available at: <https://www.adleg.org.au/submissions/federal-religious-discrimination-bill-second-exposure-draft-jan-2020>

³⁸ Ibid.

While we recognise that defences in proposed section 49ZE³⁹ may apply, this is not an adequate answer to the substantive problem: before a person is to be required to raise and establish a defence, parliament should be satisfied that it is appropriate for that conduct to be made unlawful in the first instance.

Amongst other things, it must be established that religious organisations should be protected from speech (even unreasonable speech), in a way that other organisations (including charitable organisations, community and voluntary bodies) are not. This has not been established.

By way of example, it seems likely that deciding where to locate ministers of religion would be considered a 'religious activity'. If the Bill covers the religious activities of organisations it would allow a complaint to be brought in response to public criticism of religious organisations who move ministers of religion who have engaged in child sex abuse from location to location, risking the safety of children. This should not be the consequence of a law that aims to protect human rights.

b. Coverage of unlawful religious activities

As noted above, the Bill applies to all 'religious activity'. Unlike equivalent provisions in Victoria and Queensland, however, this is not limited to 'lawful' religious activities, but is instead left unqualified.

This means the Bill would allow complaints to be brought by individuals and organisations who allege they have been vilified for engaging in religious activity despite that activity itself being unlawful. This is, in PIAC's view, excessively broad.

It is unclear why those engaged in unlawful religious activity should receive greater protection from speech than exists under the general law, and greater protection than those engaged in lawful charitable or community activity, for example.

By way of example, we note the Government has also promised to outlaw sexual orientation and/or gender identity conversion practices, given these practices cause serious harm to lesbian, gay, bisexual, transgender and queer (LGBTQ) people.

However, in the majority of instances where these practices occur, it is possible the perpetrators (individuals and/or organisations) may assert these are 'religious activities'. Given the Bill is not limited to *lawful* religious activities, even after the Government prohibits conversion practices, perpetrators of these harmful practices may nevertheless be able to bring vilification complaints in response to public criticism of their activities.

³⁹ Which protects public acts 'done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of an act or matter' Proposed section 49ZE(2)(c).

c. Problems arising from use of the undefined term 'affiliation'

As explained above, only one other jurisdiction (the ACT) includes religious 'affiliation' in its vilification provisions without otherwise narrowly defining it (Tasmania) or excluding it altogether (Victoria, Queensland and the Northern Territory).

In addition to our general concerns about the breadth and vagueness of this term, we have specific concerns that it would stifle criticism of religious organisations rather than just individuals and their beliefs and activities. This is because an individual could bring a complaint not because they have been vilified because of their individual religious beliefs or activities, but instead because a religious organisation they are 'affiliated with' has been publicly criticised.

As above, PIAC does not believe it has been established that religious organisations should be protected from speech in a way that other organisations are protected under the general law. Accordingly, there is insufficient basis for extending protection from speech to people affiliated with such bodies.

4. Solutions

First, we recommend that a clarifying provision be added to the Bill noting that the *protections* in section 49ZE only apply to 'natural persons' – in other words, only 'natural persons' (individuals) should be protected against religious vilification, rather than 'a corporation [or] a body corporate or public' (as per the *Interpretation Act 1987*). This should be carefully drafted to ensure that individuals may still bring complaints against corporations and bodies corporate or public that have themselves engaged in religious vilification.

Second, we recommend that the proposed protected attributes of 'religious belief', 'religious affiliation' and 'religious activity', be replaced with the protected attribute of 'religious belief or affiliation' as defined in s93Z of the *Crimes Act*, namely:

'religious belief or affiliation' means holding or not holding a religious belief or view.

This definition is clearer, narrower and appropriately targeted, as well as ensuring consistency between civil vilification protections under the *Anti-Discrimination Act 1977* and the related offence of 'publicly threatening or inciting violence' under the *Crimes Act*.

However, if the *Crimes Act* protected attribute and definition is not adopted, in the alternative we recommend:

- Deleting the term affiliation (because it is too broad and vague, as well as potentially allowing organisations to be protected indirectly) and
- Qualifying that protections for religious activity only cover 'lawful' religious activity (in line with Victoria and Queensland and to avoid what we assume are unintended consequences).

As indicated at the outset, PIAC supports the introduction of prohibitions on religious vilification. However, we believe this need to be done carefully, to ensure it covers individuals rather than organisations, and also does not unduly restrict freedom of speech. We believe that these recommendations would help to achieve these objectives.

We would welcome the opportunity to meet with you to discuss our concerns in more detail.
