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27 October 2020

The Hon. Gabrielle Upton MP
Committee Chair
Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
Parliament House
Macquarie Street
Sydney NSW 2000
By email: ReligiousFreedomsBill@parliament.nsw.gov.au

Dear Chairperson

Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

We refer to our submission dated 20 August 2020 and the appearance before the Committee of Mr Peter Wertheim on our behalf on 23 October 2020.

The Deputy Chair asked Mr Wertheim for his views about the desirability of introducing a new prohibition against religious vilification in NSW. No such prohibition is proposed in the Bill, and hence the matter was not addressed in our written submission. The Deputy Chair asked us to consider whether religious vilification directed at a particular individual, as distinct from a group, should be prohibited. It was agreed that the question be taken on notice. This letter constitutes our response based on advice from Mr Wertheim.

Firstly, we recognise without qualification that members of several faith communities, and not only the Jewish community, currently face serious forms of harassment and vilification based on religion. With the exception of Jews and Sikhs there are no legal protections in NSW or Federally for those who are targeted by such behaviour unless there is an associated act of violence, or a threat or incitement of violence. The concerns of members of faith communities who currently lack such protection are in our view entirely justified.

The difficulty lies in formulating legislation which will provide such protection without limiting the freedom to engage in debate about religious beliefs and practices. Any law that might operate to ban or chill discussion of any religion (or ideology, philosophy or other belief system) would not only violate one of the fundamental Enlightenment principles upon which modern free societies are based but would also most probably provoke a reaction that would be antithetical to the religious tolerance which the proponents of such a law hope to encourage. We left behind laws against blasphemy and sacrilege a long time ago, and few Australians would tolerate a return to them, or to anything of similar effect.

We believe that some of the provisions of Chapter XI of the Western Australian *Criminal Code Act 1913*, dealing with racial harassment and incitement to racial hatred, may be adapted to proscribe harassment and incitement to hatred on the basis of religion, rather than race, and provide protections for members of vulnerable faith communities without impinging unreasonably on freedom of expression.

Chapter XI was first inserted by s 3 of the *Criminal Code Amendment (Racial Harassment and Incitement to Racial Hatred) Act 1990* (WA). Further amendments, were introduced by the *Western Australian Criminal Code Amendment (Racial Vilification) Act 2004* in response to an upsurge in vilificatory conduct by the Australian Nationalist Movement in that state and difficulties with the existing vilification laws. In particular, the difficulties of proving intent and the low penalties were identified as in need of reform.

Chapter XI currently creates categories of offence which depend on an accused's state of mind. Sections 77, 79, 80A and 80C require proof of an **intention** to harass or vilify; ss 78, 80, 80B and 80D refer only to a **likely effect**.

We suggest that the intentional offences in sections 77, 79, 80A and 80C provide a possible model for new offences of harassment and incitement to hatred, not only on the ground of race but also on the ground of religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

An element of each of these offences is either:

- an intention to create, promote or increase animosity towards, or harassment of a protected-attribute group or a person as a member of such a group; or
- an intention to harass a protected-attribute group or a person as a member of such a group.

The expression "animosity towards" is defined in section 76 to mean "hatred of or serious contempt for" and "harass" includes to "threaten, seriously and substantially abuse or severely ridicule." Each of the elements of these offences, including the element of intent, is required to be proved to the criminal standard.

We would also recommend that these offences be prosecutable without requiring the prior consent of the Attorney General.

We are familiar with one case which was prosecuted in the Perth District Court under sections 77 and 79 of the WA *Criminal Code Act* in 2011: *DPP v Brendan Lee O'Connell* (File No. IND 1767 of 2009). O'Connell had been at a Friends of Palestine protest at the IGA supermarket in South Perth in May 2009, demonstrating against the sale of oranges imported from Israel, when he followed around a Jewish student who was also present, haranguing and taunting him, shouting that Judaism is a "religion and race of hate" and calling the student a "racist homicidal maniac". He was pointing a video camera at the student and recorded the incident. O'Connell then video-recorded himself calling Judaism a "death cult," and urging Jewish people to leave their religion. He subsequently placed the entire video recording on YouTube. O'Connell's own video recording was the principal source of evidence against him at the trial. O'Connell represented himself after dismissing his lawyer. O'Connell was convicted by a 12-person jury on 6 counts of racial incitement and harassment. It can be seen that animosity towards the Jewish religion also appears to have been a factor in O'Connell's behaviour. He was sentenced to 3 years imprisonment, and appears to have served his full sentence. As he was convicted by a jury, there is no published judgment.

Nevertheless, the fact that there was a conviction by way of a unanimous verdict of a 12-person jury illustrates that this law works as it was intended to, and that it has a high level of public acceptance. The small number of cases that have been prosecuted under Chapter 11 of The Criminal Code (WA) may also be interpreted as an indication that its provisions have only been resorted to infrequently and when the evidence is straightforward. It is therefore likely that those provisions would survive any challenge based on an alleged violation of the implied constitutional freedom of communication between people concerning political or government matters.

O'Connell appealed against his conviction to the Supreme Court of Western Australia*: O'Connell -v- The State of Western Australia* [2012] WASCA 96. The appeal was dismissed on 4 May 2012.

We believe that these provisions of the WA *Criminal Code Act* provide a superior response to serious racial and religious vilification compared to that currently provided by s.93Z of the NSW *Crimes Act*, which requires proof of a threat or incitement of **violence**. In our view that is too high a bar, and leaves vulnerable groups

without reasonable protection against serious harassment and vilification which falls short of a threat or incitement of violence. Whilst we welcomed the insertion of s.93Z into the NSW *Crimes Act*, and appreciate the support of the government and the legislature for introducing that provision, we believe there is little doubt that provisions modelled on the previously-mentioned sections of the WA *Criminal Code Act* will provide stronger protection.

We trust that this will be of assistance to the Committee, and wish it well in its deliberations.

Yours sincerely,

[redacted]

Lesli Berger
President

[redacted]

Vic Alhadeff
Chief Executive Officer