New South Wales Jewish Board of Deputies

The Representative Organisation of NSW Jewry
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The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000.

HAND DELIVERY

Dear Sir/Madam

SUBMISSION TO LEGISLATIVE COUNCIL OF NSW STANDING COMMITTEEE ON LAW AND JUSTICE - INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

We refer to the appearance of the Board's Past Presidents, Peter Wertheim AM and David Knoll AM, and our CEO, Vic Alhadeff, before the Inquiry on 8 April 2013.

Please find attached Answers to Questions on Notice.

We also attach 10 copies each of the Australian Antisemitism Report for 2011 and the Australian Antisemitism Report for 2012, published by the Executive Council for Australian Jewry.

Yours sincerely,

Yair Miller
President

ANSWERS TO QUESTIONS ON NOTICE:

SUPPLEMENTARY SUBMISSION TO LEGISLATIVE COUNCIL OF NSW STANDING COMMITTEE ON LAW AND JUSTICE - INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

The NSW Jewish Board of Deputies thanks the Committee for the opportunity to present on Monday and presents the following answers to the questions on notice.

Should NSW adopt a civil penalty regime for racial vilification law?

The NSW Jewish community is open to including, in addition to a workable criminal law, a civil penalty regime as a reform to the current vilification law.

However, it must be understood that the Police and Director of Public Prosecutions would not have a role to play in seeking a civil penalty. The relevant applicants are likely to be individual victims of serious vilification, or the Ant-Discrimination Board of NSW which, even without this additional responsibility, is under-resourced.

The application presumably would be made to the new NCAT.

Assuming, as suggested by the Honourable David Shoebridge MLC, that an effective contempt regime is introduced to the law governing the NCAT, the likely steps involved would be as follows[1]:

1. Complaint is brought by an individual victim of serious vilification to the Anti-Discrimination Board.
2. The individual or the Board commences proceedings for a civil penalty before the NCAT.
3. The NCAT conducts a hearing.
4. A civil penalty, together with a cease and desist order, may be determined by the NCAT, if the application is successful.

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[1] Note that steps 5 to 7 reflect what in fact occurred in the long-running litigation under Part IIA of the *Racial Discrimination Act* (Cth) brought by the Executive Council of Australian Jewry against Dr Fredrick Toben: *Jones v Toben* (includes explanatory memorandum) [2002] FCA 1150 (17 September 2002); *Jones v Toben* (Corrigendum dated 20 April 2009) [2009] FCA 354 (16 April 2009); and *Jones v Toben* (No 2) [2009] FCA 477 (13 May 2009)

5. If the Order is ignored, contempt proceedings may be commenced against the non-compliant defendant.

6. Contempt orders may be made following a further hearing.

7. If the contempt is not "*purged*" (that is by compliance with the original orders to pay a penalty and to cease and desist), then another hearing is required in a prosecution for contempt, leading possibly to a jail sentence.

Whilst a 3-tiered approach (civil prohibitions, civil penalties and criminal proscription) to serious racial vilification would be a welcome improvement to the existing legislation, in our view the civil penalties tier would not provide an optimal legislative answer to the type of fact situation in which it would apply. In our view it is not appropriate to deal with the "racial abuse on the bus" type of scenario by way of civil penalties only, rather than criminal sanctions, because in this sort of scenario:

A. The victim(s) deserve the protection of the State and should not be left only with the option of bringing and prosecuting a complaint relying on their own resources or those of the NSW Anti-Discrimination Board, which has no experience in prosecution work.

B. It is very unlikely that individuals, particularly victims of racial vilification, would be able to fund the legal process involved. Nor should they have to.

C. The prosecution of behaviour which disturbs the peace and undermines social cohesion is the responsibility of the State. Further, the Anti-Discrimination Board would require additional resources to be able to undertake civil prosecutions. The resources required would not be significantly different than for a criminal prosecution.

D. The clear message from the State must be that this sort of abuse is considered to be criminal conduct and not merely a civil wrong and, as such, has no place in our community.

E. Civil penalties usually only involve the payment of money and, in this type of case, a cease-and-desist order, but the payment of money is not the appropriate method for correcting serious racial vilification.

Should an effects test be included?

At page 11 of the submission by Professors Rice and Rees, a possible prohibition is presented as follows:

> *The prohibition be against an act engaged in on the basis of race, that is intended, or is reasonably likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of property of their family or associates.*

It is difficult to see how such a provision would not already be covered by existing Crimes Act provisions in which the element "on the basis of race" does not have to be proved.[2]

Secondly, under that proposal, intent would not have to be proved if the fear was reasonably likely to be a result of the conduct. We do not advocate the introduction of a criminal law that does not include any element of *mens rea*.

Moreover, if an effects test – the "reasonably likely to" approach – is adopted, exceptions to liability will also have to be legislated, as Professors Rice and Rees correctly indicate at page 12 of their submission. The availability of such exceptions as defences would open the door to the very problem about which the Honourable David Shoebridge MLC expressed concern, namely that it would make it possible for defendants to put themselves forward in court "as martyrs to some horrible racist cause", claiming falsely that they have been victimised.

The approach we have recommended minimises this possibility. If racial vilification is treated as a crime requiring proof of intention or recklessness, there would no provision for the kinds of exceptions that would need to be available if racial vilification is treated as a civil wrong in which intention or recklessness need not be proved. Such exceptions are wholly inapplicable where intention or recklessness is required to be proved to the criminal standard.

Thirdly, requiring that the fear relate to a person's own safety or that of their family or associates would replace the present "means" element with a differently drafted "means" element. It would replace one barrier to proving intentional incitement of racial hatred that has, as a matter of practice, proven to be insurmountable, with another which we consider would be no less difficult to surmount.

Finally, and quite fundamentally, the proposed provision would wrongly preserve the focus on acts against a particular person or group of persons and their property, rather than focusing the crime upon the impact on a racial group in society and society as a whole. In our view, the crime of serious racial vilification should proscribe acts which damage the fabric of racial harmony which generally prevails in Australian society, and normal civic relations, by vilifying on the basis of race, and doing so intentionally or recklessly. Where any person is intimidated or harassed, or where there is incitement to racial hatred, there ought to be no need to prove any link at all to a threat of physical harm. Inciting people publicly to hate others because of their race, and doing so intentionally or with a conscious disregard for what the consequences might be (i.e., recklessly), is sufficient in our view to warrant the imposition of criminal sanctions. We also believe that there is strong and demonstrable public support for that view. We refer you in particular to the case of *DPP v Brendan Lee O'Connell*, which was tried before a 12-person jury in the Perth District Court in

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[2] For example: It can be an assault where A puts B in fear of C: Macpherson v Beath (1975) 12 SASR 174; An assault can be committed recklessly where the accused foresees the likelihood of inflicting injury or fear, and ignores the risk: Vallance v R (1961) 108 CLR 56; The threat must be immediate (R v Knight (1988) 35 A Crim R 314), an element that ought not be included in defining the crime of serious vilification.

2010. On 31 January 2011, the jury convicted the Defendant on 6 counts under sections 77 and 79 of the Western Australia *Criminal Code*. These sections do not require a prosecutor to prove a link to a threat of physical harm, or an incitement of others to threaten physical harm, or even "a reasonable fear in the circumstances [by victims] for their own safety or security of property, or for the safety or security of property of their family or associates," as advocated by Professors Rice and Rees.

It should be noted that O'Connell was sentenced to 3 years imprisonment. His appeal was dismissed by the Supreme Court of Western Australia on 4 May 2012.

Clearly, both the Western Australian legislature and the jury in the *O'Connell* case considered the intentional incitement of racial hatred in public to be sufficient to warrant the imposition of criminal sanctions (and not merely civil penalties), even in the absence of any element of violence or fear of violence. This is the standard which should also apply in New South Wales. There is no good reason for NSW to adopt a lower standard to protect its harmonious, multicultural society than the standard adopted in Western Australia.

Adopting our recommendations would include the following safeguards to ensure that criminal sanctions could not be imposed lightly:

(1) The need to prove, to the criminal standard, incitement to hatred on the basis of race, or alternatively harassment on the basis of race, and in either case with intent or recklessness;
(2) A jury would decide whether these elements have been proved to the criminal standard.

What is your view on the potential option for amendment to s20D outlined below:

20D Serious Racial Vilification

A person must not by a public act, promote or express hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race of the person or members of the group that is intended, or reasonably likely in the circumstance of the case to:

a. *Threaten physical harm towards, or towards any property of, the person or group of persons, or*
b. *Incite others to threaten harm towards, or towards any property of, the person or group of persons, or*
c. *Cause a person to have a reasonable fear for their own safety or security of property or for the safety or security of property of their family.*

The definition of race would be expanded in s4(1) to include presumed race.

We first track this proposal against the current legislation to show the drafting differences:

> **20D ~~Offence of~~ Sserious racial vilification**
>
> **(1) A person shall not~~,~~ by a** public act~~,~~ promote or express ~~incite~~ **hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the** race **of the person or members of the group** that is intended, or reasonably likely in the circumstance of the case to ~~by means which include~~:
> **(a) threaten~~ing~~ physical harm towards, or towards any property of, the person or group of persons, or**
>
> **(b) incit~~e~~~~ing~~ others to threaten ~~physical~~ harm towards, or towards any property of, the person or group of persons,** or
>
> (c) cause a person to have a reasonable fear for their own safety or security of property or for the safety or security of property of their family.
>
> ~~Maximum penalty:~~
> ~~In the case of an individual 50 penalty units or imprisonment for 6 months, or both.~~
> ~~In the case of a corporation 100 penalty units.~~
>
> ~~(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.~~

The proposal attempts to remove the means element that is one of the principal problems with the present version of section 20D, and replace it with two alternative elements. The first element is intention but there is no provision for the traditional alternative of recklessness (a matter which can be quite simply addressed). The second alternative provides an effects test.

We set out below our quite substantial concerns with this proposal.

As to intention, the proposal would barely constitute an alternative to the current unworkable section. It is very difficult to prove beyond reasonable doubt intention to cause a particular harm. As a practical matter, it may be no less difficult an obstacle to surmount for a prosecutor than under the current section 20D.

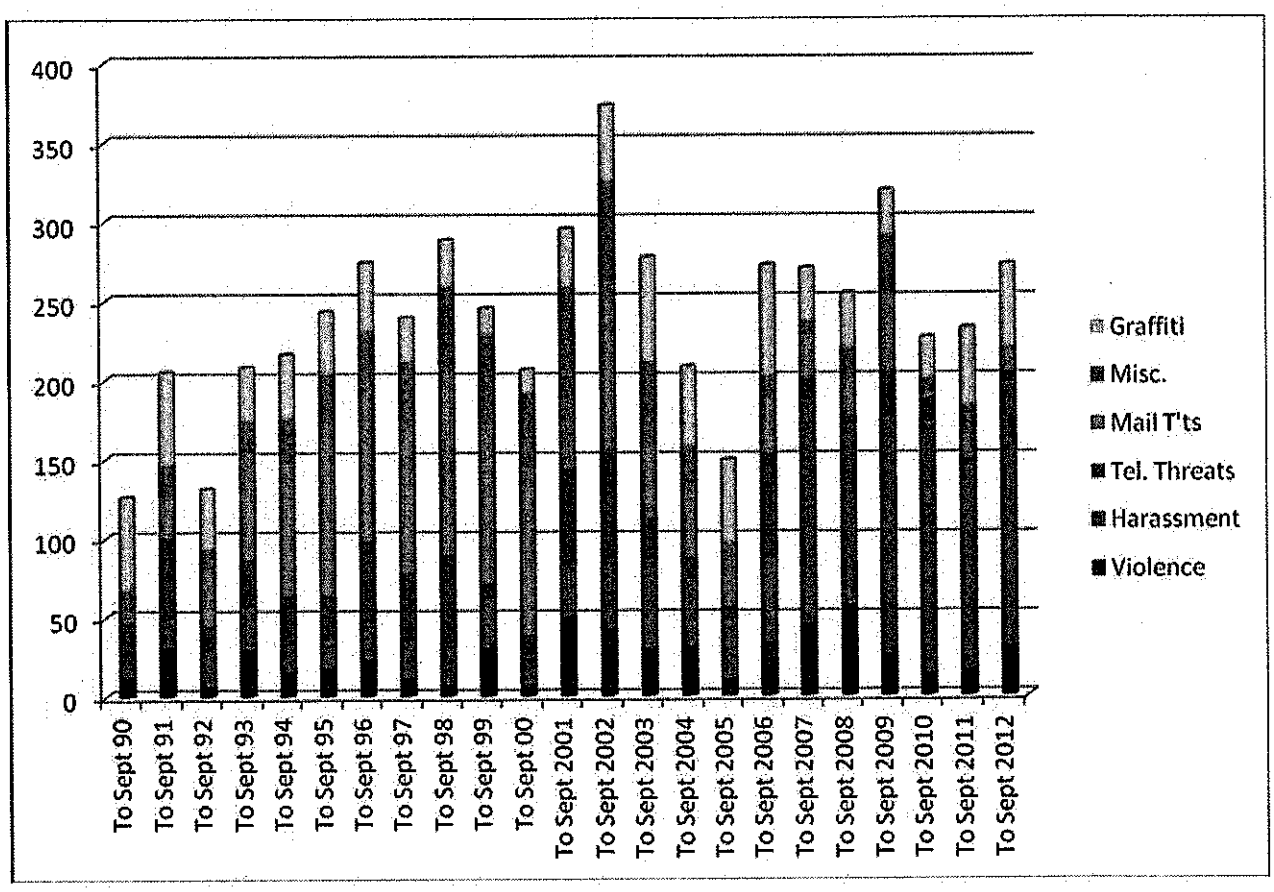
As to the effects-based alternative, further to our concerns expressed above:

- the proposal removes the requirement of proving intent (or recklessness) altogether. A criminal act would occur if one of the three identified effects was 'reasonably likely in the circumstances' to follow from the public act;
- instead of an actual connection from the public act to any harm, the new test would require a likely connection of harm. The difference is not great. It contemplates a very modest reduction in the level of difficulty facing a prosecutor in deciding whether or not to prosecute serious racial vilification. It is our submission that such a modest change would do very little to improve the law, and would not meet the community's reasonable expectations of a workable criminal law;
- removing the requirement of physical harm in the context of incitement (paragraph (1)(b)) similarly is only a modest change, and given the retention of the requirement of "physical" harm in subparagraph (1)(a), we consider that the courts are likely to interpret the two subparagraphs in the same way despite the different language in each of them; and

- the insertion of the new subparagraph (1)(c) introduces a new alternative causation test, which is the means element by another route. Further, as indicated above, it overlaps with existing criminal law sanctions which are easier to prove.

What level of anti-Jewish vilification is being experienced?

We extract below a graph from the most recent annual Antisemitism Report produced by the Executive Council of Australian Jewry, and enclose a copy of the full report. The report describes in detail the impact of vilification on the Australian Jewish community over the last year. It is our experience that when threats are allowed to build up, more serious anti-Jewish activity suffers an increase. The increases are not always in proportion but do appear to have persisted.



NSW Jewish Board of Deputies
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