**Submission No 57**

# INQUIRY INTO ANTI-VILIFICATION PROTECTIONS

**Organisation:** Union for Progressive Judaism

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UNION FOR PROGRESSIVE JUDAISM

PROGRESSIVE JUDAISM
VICTORIA INC.

12 March 2020

**Submission to legal and social issues committee of the Legislative Assembly Inquiry into Anti-vilification Protections**

The Union for Progressive Judaism ("UPJ') is the roof body that resources 27 congregations, schools, youth groups and communal organisations across Australia, New Zealand and Asia, serving about one fifth of the region's affiliated Jewish community. The Victorian roof body is Progressive Judaism Victoria ("PJV"). The UPJ and PJV are grateful of the request to make a late submission to this Inquiry.

We wholly support the submission made by the Jewish Community Council of Victoria ("JCCV"), the peak body for Victorian Jewry.

***Introduction***

This submission supplements that one by reference to our experience and learnings both in and out of Victoria.

Fundamental to combatting vilification is the need for a multi-faceted set of policies and programs. Both school and adult education institutions must have effective programs which combat prejudice and its expression. Community leaders, whether in government or the private sector, need to not only model respectful behaviours, but also promptly call out vilificatory conduct whenever and wherever it occurs. Additionally, there is a need for effective laws both civil and criminal. As noted by the JCCV, it is difficult to prosecute in Victoria. In terms of civil action, there have been three successful claims of vilification before VCAT, out of some 264 complaints of religious vilification and 295 complaints of racial vilification.

***What categories of behaviour should be prohibited?***

Three national inquiries conducted in the early 1990s all concluded that there is a connection between inflammatory words and violent action, and, in particular, between racist language and violence.[1]

Where there is a substantial threat to physical safety and security of a section of the public, criminal law must intervene against:

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[1] The ***National Inquiry into Racist Violence*** conducted by the Human Rights and Equal Opportunity Commission (the predecessor of the present Australian Human Rights commission) in1991, concluded that "*the evidence presented to the Inquiry also supports the observation that there is a connection between inflammatory words and violent action*": Human Rights and Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* (1991), p. 144:http://www.humanrights.gov.au/publications/racist-violence-1991. The ***Royal Commission into Aboriginal Deaths in Custody*** (1991) also concluded that there is a clear nexus between racist language and violence and that expressions of racism are both a '*form of violence*' and a promoter of subsequent violence against Aboriginal people Like the report of the National Inquiry into Racist Violence, it recommended that the government legislate to provide civil remedies to victims of racial vilification and also provide a conciliation mechanism for complaints, with exemptions for "*publication or performance of works of art and the serious and non-inflammatory discussion of issues of public policy*": Royal Commission into Aboriginal Deaths in Custody, National Report Vol 4 (1991), at 28.3.34 and 28.3.49 http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol4/26.html. The Australian Law Reform Commission, in its ***Multiculturalism and the Law*** report (1992) concluded (with one dissenter) that prohibition of "*racist abuse*" is consistent with existing limits on freedom of expression, and that public expressions of racism are damaging to the whole community, not only minority groups, undermining the tolerance required for Australia to survive as a multicultural society: Australian Law Reform Commission, *Multiculturalism and the Law, Report No 57* (1992), para 7.44: http://www.austlii.edu.au/au/other/lawreform/ALRC/1992/57.html **Two of the eight members of the Commission also favoured the introduction of a new criminal offence of incitement to racial hatred and hostility.**

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1. promoting or advocating force or violence against an identifiable group or member(s) of that group;
2. harassment or intimidation of a member or members of an identifiable group; and
3. intentional or reckless incitement of hatred against an identifiable group or member(s) of that group.

Western Australia has enacted effective provisions in Chapter XI of the *WA Criminal Code Act*. On 31 January 2011, in the Perth District Court, Brendon Lee O'Connell was convicted by a 12 person jury on 6 counts of racial incitement and harassment under sections 77 and 79 of that Code. He was sentenced to three years imprisonment. His appeal was dismissed by the Supreme Court of Western Australia on 4 May 2012. In Chapter XI, section 77 deals with intentional promotion of animosity towards, or harassment of, for example, a racial group. Section 79 addresses the publication of material for the purpose of creating or promoting or increasing such animosity or harassment.

In NSW, section 93Z was recently added to the *Crimes Act 1900*. It addresses intentional or reckless threats or incitement of violence towards another person or groups of persons on various grounds, including race and religious belief or affiliation. Because of the structure of the *NSW Crimes Act*, a specific proscription of harassment was not included. NSW elected not to criminalise intentional incitement of race hate where violence is not being threatened or incited. NSW also has civil provisions in the *Anti-Discrimination Act*. Those provisions have enabled the Anti-Discrimination Board (when properly resourced) to engage in education and conciliation activities to reduce repetition of vilificatory conduct. There is value in such provisions, but only in circumstances where the vilification plainly is not intentional.

The NSW provisions identify groups to be protected and include in addition to race and religious belief or affiliation, sexual orientation, gender identity, intersex status and HIV or AIDS. Progressive Judaism has been at the forefront of support for marriage equality and in protecting LGBTIQ+ persons from vilificatory conduct. [1]

We strongly commend that the Victorian Government give careful consideration to the WA and NSW precedents in considering reform of the Victorian legislation.

***Broad Policy Concerns***

Whilst this short submission is not the place to deal with drafting specifics, once it is accepted that vilificatory conduct can never be in the public interest, exceptions on the grounds that vilificatory speech can be protected free speech plainly must be kept to a minimum. Traditional exemptions for conduct undertaken reasonably and in good faith, for example, in the performance of an artistic work or in an academic paper, are usually inserted into anti-vilification laws. However, it is difficult to conceive of circumstance where vilifying a section of the public is reasonable or could be undertaken in good faith.

On the other hand, anti-vilification laws protect the public sphere and conduct undertaken entirely in private is usually and justifiably exempt.

We have deliberately not addressed the position under the *Racial Discrimination Act 1984 (Cth)* ("RDA") which provides a civil right of action, nor the *Commonwealth Criminal Code* which includes sections 80.2A and 80.2B. While the RDA provisions have been effective, for example, in relation to Holocaust denial, they have not always been carefully administered by the Human Rights Commission. The Commonwealth Criminal Code provisions are well known to be unworkable and there have been no prosecutions under them. They require a prosecutor to prove to the criminal standard a double *mens rea*, including "*an intention that violence will occur*". This has proven impossible, even in egregious cases.

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[1] See e.g., Kerry Robinson, Peter Bansel, Nida Denson, Georgia Ovenden and Cristyn Davies, "*Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse*", Young and Well Cooperative Research Centre, Melbourne (available at: www.twenty10.org.au/wp-content/uploads/2016/04/Robinson-et-al.-2014-Growing-up-Queer.pdf )

The double *mens rea* problem also existed under the now repealed section 20D of the *NSW Anti-Discrimination Act*.

***Must Antisemitism be specifically addressed?***

Experience and research has taught us that anti-racism policies that do not specifically incorporate and specify Antisemitism as a form of unacceptable racism do not assist in reducing both racism and Antisemitism.

A key 2004 study by Professor Kevin Dunn showed that ethnic groups which experience racism, such as Muslims, Aborigines and Asians show a decline of prejudice with lower age groups, but that is not the case in relation to Jewish people. Whilst the Dunn study was undertaken in NSW and Queensland, rather than in Victoria, survey questions were translated into six different community languages. There was a strong correlation between age and the level of intolerance toward Muslim Australians, Indigenous Australians, Asian and Jewish Australians and with the exception of intolerance towards Jewish Australians, it decreased towards lower age groups. The depth and consistency of negative attitudes towards Jews reinforced the concern that Antisemitism must be specifically addressed in education programs across all age groups. Both earlier and later studies in which Professor Suzanne Rutland of the University of Sydney, was as a lead researcher and author, demonstrated that even where anti-racism programs were implemented, racism was seen as wrong conduct but anti-Jewish prejudice was not. [2]

It is, in our view, not sufficient to focus on specific types of Antisemitic behaviour, such as the display of a swastika. Doing so would address symptom rather than cause.

***Recommendations***

We strongly urge the Victorian Government to significantly strengthen the anti-racism programs which are required to be implemented not only in government schools but across independent and faith-based schools, and to specifically identify and address Antisemitism as a form of prejudice which is socially unacceptable.

We further strongly urge the Victorian Government to strengthen criminal laws, preferably adopting the WA model or, in the alternative, the NSW model.

Finally, in implementing Victoria's already outstanding and positive multicultural policies, priority should be given to the funding and support of programs which address not only racial prejudice but also specifically Antisemitism.

Yours faithfully,

[redacted]

David D Knoll AM and Brian Samuel OAM, UPJ Co-Presidents  Dr Philip Bliss OAM, PJV President

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[2] Rutland and Encel, *'Racism in Australia: Different streams, Different responses'* (2007) The Department of Education and Training's annual report on "*Language Background other than English*" for Term 1 2006 shows 25,946 students with Arabic-speaking background, some 12.6% of the total. 17,095 of them are enrolled in schools in South Western Sydney. (Rutland, S. (2007) "*Jews and Muslims 'Downunder': Emerging dialogue and challenges*" University of Sydney - with a Sydney high school teacher, June 2006. Name withheld on request. In one all boys' school, the teacher said the boys' favourite video-clip that they watch on their phones is of American journalist Daniel Pearl saying "*I am a Jew, my mother is a Jew ...*" and then watching him being decapitated. In an all girls' school, a student came to the teacher saying, "*My friend pulled her mobile phone apart yesterday and when I asked her why, she said that the Jews control all the communications and that they could listen in to her conversations – is that true Miss?*" These students also expressed the belief prevalent throughout the Muslim world that the Jews were responsible for September 11. Kunde, B. (2007) "*The Children of Abraham living apart: The psychology and sources of Muslim Youth antisemitism in Sydney*".