T R A N S C R I P T

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Anti-Vilification Protections

Melbourne—Wednesday, 24 June 2020

(via videoconference)

MEMBERS

Ms Natalie Suleyman—Chair
Mr James Newbury—Deputy Chair
Ms Christine Couzens
Ms Emma Kealy
Ms Michaela Settle
Mr David Southwick
Mr Meng Heang Tak

WITNESSES

Mr David Knoll, AM, Co-President, and

Mr Brian Samuel, OAM, JP, Co-President, Union for Progressive Judaism.

The CHAIR: I declare open the Legislative Assembly Legal and Social Issues Committee public hearing into the Inquiry into Anti-Vilification Protections in Victoria.

I would also like to acknowledge the traditional owners of the land on which we are meeting. I pay my respects to their elders, both past and present, and the Aboriginal elders of their communities who may be here today. All evidence taken at this hearing is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Assembly standing orders. Therefore the information you provide during the hearing is protected by law. However, any comment repeated outside the hearing may not be protected. Any deliberately false or misleading evidence to the committee may be considered a contempt of Parliament. All evidence here is recorded, and you will be provided with a proof version of the transcript following this hearing. The transcript will be ultimately made public and posted on the committee's webpage.

I would like to now welcome from the Union of Progressive Judaism David Knoll, AM, the Co-President, and also Brian Samuel, OAM, JP, Co-President. Thank you. You will receive up to 10 minutes to provide your submission to committee members, followed by questions. Thank you so much for being here today.

Mr KNOLL: You are most welcome. I took the liberty of providing to you a document yesterday, which I trust was distributed, in an effort to facilitate your review of some of the specific provisions in the Victorian, Western Australian and New South Wales applicable statutes. We indicated in the original submission that that was not the right place to deal with questions of what should appear in the law, but having been asked to make a further submission and appear before you, we thought it would be useful to you to provide a means of comparison and to utilise probably the most extreme example of race hate in public so that you can see how, for example, it was not prosecuted in New South Wales and in our view could only be successfully prosecuted even today in Western Australia. It also identifies for you the different penalty regimes in each of the states. We also argue very much for civil provisions along the lines that some of your other submissions have indicated that do not require an intention element in order for a conciliation and civil process to be undertaken.

I happen to have a fair bit of experience in the conciliation context in the race hate area, and where something is not intentional, and often the effect is very harmful and hurtful, bringing parties together results in a form of, for example, public apology and often even a greater communal connection, which then helps build a more cohesive multicultural society. So you can sometimes take an act of race hate that was plainly not intentional and turn it into community building. But it is very important to then have an effective criminal law that deals with actions that are either intentional or reckless. I just want to deal with the question of 'reckless' because some of the submissions that you have received expressed concern about it. 'Reckless' means knowing that there will be adverse consequences and persisting with conduct disregarding those consequences. So there is still a knowledge element in recklessness, and you will see in each of the provisions that I have provided to you, except in the current Victorian provision, recklessness is covered, and we think it is an important element.

I would rather use our time to deal with any questions that you may have. I am going to be deliberately brief because, having put something before you in writing that you can then consider when you have your committee meetings and can then obviously take advice from parliamentary counsel and so on, we hope we can be as constructive as possible in dealing with any questions you might have.

It will not be of any surprise to you that the Jewish community has been active in every state of Australia trying to ensure that there are laws that protect every ethnic community. We are deliberately standing up not only for ourselves but also for others. Progressive Judaism was the first faith community in Australia to support marriage equality. Those of you who saw the online campaign would have seen Rabbi Jacqueline Ninio in their very first online advertising. We are very proud of that. Our synagogues perform marriages for people who happen to be gay and lesbian as long as they are both Jewish—sorry, there is that restriction—and we make sure that they are actively welcomed into our synagogues. We strongly support the anti-vilification law

protecting people who are vilified by reason of their gender, sexual preference or transgender status. I think I will stop there and invite questions.

The CHAIR: Thank you, David. I might just start with a question. You recommend that vilification as a criminal offence in Victoria should emulate the Western Australian model or the New South Wales model. Can you explain a little bit more the advantages of each model and identify which is your preferred model for adoption in Victoria?

Mr KNOLL: We are very explicit that the Western Australian model is the gold standard. The reason it is the gold standard is that it provides for two separate categories of offence. The more serious offence is the one for which intention is a necessary element, and the example I have given you in the table is section 77. So if you want to turn to the table that I have provided to you which I have headed 'Quick guide', I have not included every provision; I have only included those provisions that enable you to see the real differences in how they work. You will see, for example, the conduct definition in the first row of the table. Then you will see the intention element in the second row of the table. You will see that in each of the provisions, except the fourth column, section 78, there is a reference to intention.

WA has a section 78, which is based on an effects test. It has a lower penalty regime. If you turn to the next page, you will see that in WA the effect required is 'to create, promote or increase animosity', which is defined as hatred or serious contempt. So you still have to find in a court that there was hatred or serious contempt as an effect of the action that you are prosecuting, and you have to find that it deals with the persons, which you will see in the second row, on page 8—so it is serious contempt, for example, towards or harassment of a racial group or a person as a member of a racial group. Of course we commend to you expanding the categories to include those I mentioned earlier and others that have been put before you. But its enormous benefit is that you have a lower class of criminal offence where you are in effect deterring conduct that is likely to undermine our social fabric by promoting contempt or serious contempt for a racial group. Our advise is to just stick to that language.

New South Wales decided not to go down that path, and you will see, in the last column, that the New South Wales law requires there to be violence. We know from our own painful history that if the law only intercepts at the point where there is actual violence it is too late. But the New South Wales version is still more effective and easier to prosecute than the Victorian version.

I will just identify for you the main problem—there are a few, but the main problem—you currently have in Victoria, which the current Bill partially deals with, the current version of your Bill. You will see on the first page, which is seven, under the heading 'Quick guide' in the second row that you have to prove two intentions in Victoria to prosecute: you have to prove 'intentionally engage in conduct'; and there has to be actual knowledge that the offender knows the effect of inciting hatred or that threatening physical harm is going to happen. It is extremely easy for a defendant to say, 'I really didn't know there was going to be violence that would follow'. It makes prosecution very difficult.

In New South Wales, a similar problem existed in the old section 20D of the *Anti-Discrimination Act*. The New South Wales Government agreed to remove that, because once you have got a double-intention element—and in fact I think Victoria realistically has three levels of intention you have to prove—your prospects of a prosecution go to zero or below.

Mr SOUTHWICK: Thank you very much, David, for that presentation, and Brian, for joining us, and the work that both of you do. I also just wanted to point out the importance of what you said earlier: the fact that the UPJ and the community more broadly have been very strong in terms of supporting all groups and all backgrounds and not just the Jewish community. I think that has come across really strongly in your presentation and your submission. And also, if I could, that table has been very, very useful, certainly for me and I am sure other committee members, in articulating some of the differences particularly between Western Australia and New South Wales, because New South Wales has been pushed very strongly as a gold model. But I can see from your comments there how Western Australia does have that pointy end to it.

If I could just go back into the original submission, one of the points you refer to strongly is about the importance of education, and within that you differentiate between education against racism and antisemitism

and the fact that there needs to be specific education around antisemitism. Would you mind just elaborating a bit further about that?

Mr KNOLL: Very briefly, and I commend the Rutland documents that are in the footnotes to you, but the short summary is this: in the early 2000s some studies were undertaken to measure the effectiveness of anti-racism education in public schools. That which we discovered was that the education is reasonably effective when you retest after three and six months, but we ran into a fairly persistent problem of students understanding for example to use a sixth grader's one—and I will leave out his name, obviously, because that was not published—'You cannot go beating up people because they are Asian'. Another lass said: 'Just because somebody is black doesn't mean they are not human'. Then another kid put his hand up and said: 'But we can still go after the bloody Jews'. So this was after having had the anti-racism education. Now, that is not an isolated example.

Both in Sydney and Melbourne and now in Adelaide where we have, for example, Holocaust museums—there is a new one being set up in Adelaide—we utilise that opportunity to bring kids through. Certainly in Sydney, although the Holocaust is a primary example, we have people who have been victims of other genocides in Africa and Asia speak to the students, so the Holocaust becomes an example of what can go wrong for any community. But we know that unless antisemitism is specifically identified as a form of anti-racism in the course of anti-racism education, students do not automatically see having a go at Jews as being racist. It has to be made explicit, and the studies confirm that.

Mr SOUTHWICK: Great, could I just add another question too, if I may? In the submission you refer to discussion around the swastika, specifically saying not focusing necessarily on the symptoms but the cause. I wanted to kind of draw attention more broadly to how the swastika is being used, particularly in its current form, and not just obviously attacking the Jewish community but other communities as well as a broader form of hate.

I know that even with the ECAJ and the New South Wales Jewish Board of Deputies with the changes that they have made, they are now moving towards a full ban of the swastika in New South Wales. Obviously this would not be something that should be done in isolation and we need to do all the things we are talking about, but I just wanted your views on that. Seeing that New South Wales went through all of their changes and we have heard feedback from others to say, 'Well, you know, if you adopted the New South Wales changes, that would incorporate being able to ban things like the swastika', but that does not seem like that has been enough. Certainly I have had them contact me wanting to look at the campaign that we have been running here to do the same model in New South Wales. I am just interested in your comments about that.

Mr KNOLL: Brian and I had a chat about this a little earlier because he very kindly—being the Victorian on the team—forwarded to me a Bill specifying the swastika. Can I make a practical suggestion for you? The Bill picks out the swastika in particular and identifies a means by which it can be dealt with. It actually is an example of conduct that in the way in which it is used is likely to cause serious contempt, in particular for Jewish people. But it is not the only example, and it is not the only symbol of antisemitism. And, for example, the same symbol is used by the Nepalese community for entirely innocent purposes. Although they could very easily designate their purpose when they use it, because it simply identifies a community building, there is more to it than that, but that is the simple version.

If, for example, you were drafting your legislation and you were to incorporate a provision very much like section 78 in the Western Australian criminal code and you put in the statutory notes and identified 'for example, displaying a swastika is intended to be prohibited by this provision', you would achieve not only the effect on the swastika but you would identify it as an example of something which can cause harm. And other communities who have symbols that would cause them offence would also then be covered by the law. And as I say, we do not want only offence to the Jewish community to be dealt with by this law. We agree with you: it should be dealt with, and we think the simple way to do it is to adopt section 78 and identify in the legislation this example as an example of what section 78 is driving at.

Ms COUZENS: Thank you, David and Brian, for your time today and, David, for your presentation. You talked a bit about the current Act. Other submitters have argued that the Victorian Equal Opportunity and Human Rights Commission needs more resources and expanded powers to be more effective. What are your views on that?

Mr KNOLL: If you do not fund the power to investigate and to then conciliate, then you send a message out to perpetrators that, 'Although we've got some law, don't worry too much'. We have that problem in New South Wales. The Anti-Discrimination Board is fundamentally underfunded and cannot do its job. So yes, you absolutely have to fund your body. You have to give it specific and effective investigative powers and you have to give it conciliation powers. Those powers have to work with a law that is based on an effects test, because in the civil context, which is the only place that they operate—they are not a gatekeeper for the criminal law—it is absolutely crucial that what they are conciliating is not an Act based on intention, because once it is based on intention, that is where every conciliation would break down, and that is why we commend to you following the commonwealth model, supported by properly funded investigative and conciliation powers.

Ms COUZENS: You mentioned the education of young people and some of the comments that young people made after spending that six months of education. Do you think that it needs to be an ongoing cultural change to get that overall change going forward?

Mr KNOLL: Without a doubt; this is not something you are going to do in a day. Brian is nodding. He might wish to add something.

Mr SAMUEL: Yes, I just wanted to draw a parallel with the White Ribbon organisation, which David knows is being relaunched today, and one of the key things that we have discovered in the previous White Ribbon, which is 'no violence against women', is that the actual education process has to actually start basically at the primary school level in order for the cultural change to occur. It is not going to be something that is going to occur overnight; the cultural change we anticipate is probably going to take somewhere between 15 and 20 years, a generational change, in order to do it, so that has got to be an ongoing thing.

Mr KNOLL: And you have an example in Victoria that is quite recent, and it really is the tip of the iceberg. You had two children from the same family and then another child from a different family who were vilified and in one case violently accosted because they were Jewish. They were in public schools. The fact that such conduct could even occur—the children had to move to a private school, and our community got behind them—and the perpetrators have not been disciplined at all tells you that there is a cultural problem that needs to be addressed.

Ms COUZENS: And in terms of social media, obviously that is rife with vilification. Do you have a view on what needs to happen to change that?

Mr KNOLL: There is a famous old case now called *Dow Jones v. Gutnick*, which dealt with communications over the internet also being subject to these laws. That is a really, really good example of where requiring proof of intent undermines the law. If you do not have an effects test in your civil provision and a lower criminal standard effects test like section 78 in your criminal provision, then there is no way to deal with the effects, and it is crucial—and the High Court has now been quite clear about this in the Google case—that simply being an ISP does not excuse you from transmitting a message that is in violation of the law. So that is crucial. I am not sure that a state government can necessarily govern what is transmitted, but you can certainly regulate the effects of what is transmitted.

The CHAIR: David, you just spoke about online activity, but on the role of moderators and administrators of these sites, is there in your view a gap between making the moderators and editors more accountable for these sites?

Mr KNOLL: I am not the absolute expert on the way in which internet sites get moderated, but most of the problems tend to come from unmoderated sites. But to show that it is possible, consider the recent efforts by the owners of Twitter, who have twice now put a top and tail on tweets from President Trump. They had to do that because of the degree to which they had become offensive. There is no reason why the law cannot identify that any person who uses the internet to convey vilificatory language that meets the effects test either falls within section 78 as an offence or can be pursued civilly by an appropriate change in the civil law. The danger is nominating particular categories—that is to say, if you nominate, for example, a moderator, you might miss somebody else. The problem is: did you convey a message that violates the law? And if you conveyed it, you have committed an offence, or you have broken the law on a civil standard, because you did not intend to do it or it was not serious enough.

Keep in mind the effects test in the Commonwealth does not deal with mere slights. There is a case called *Creek v. Cairns Post*, which dealt with an Indigenous woman who was insulted. The court found that it was an insult, but it was not sufficiently seriously contemptuous to warrant remedy under the Commonwealth Act. Since then we have known that even the effects test version does not deal with mere insults but does deal with serious contempt. And so you should not be too perturbed about adopting the effects test because there is now well-established law that it does not deal with just using an insult—for example, in a comedy store—that does not rise to the level of serious contempt.

Mr SOUTHWICK: Look, I just wanted to come back again, David and Brian, to the education in the schools. I mean, you referred to the young kids that were attacked and had to move schools, from a Jewish background. We have seen a lot of racial attacks, particularly in Victoria, where you have got people from different ethnic backgrounds attacking other children from other ethnic backgrounds, and we are getting kind of a lot of really horrific things happening in Victoria at the moment, including more recently a death that kind of carried on from bullying and gangs outside of school. Obviously there is a strong criminal element in terms of what is happening, particularly amongst our youth; there is a big education piece that needs to be addressed. Do you have any thoughts on what we could be doing better, and are there any hopes of doing a better job of it than we are at the moment in kind of more of that education piece, understanding people's different cultural and religious backgrounds? We had religion in schools that gave people the opportunity to at least understand different faiths and backgrounds that we do not have in a specific program as such. Is there something like that that needs to be developed across the board?

Mr KNOLL: Inevitably your education experts will assist you with that. The one thing you do know is that what you currently have is not working. We know that what we currently have in New South Wales is not working well, but we are, at least on the measures that the academics have undertaken, experiencing somewhat fewer incidents per head of population. That is not a gold star. When I do a schools program, and I have done plenty over about 20 years, if I walk into a room full of kids of different ethnic backgrounds, obviously different races et cetera, I usually start by saying, 'Could you please put your hand up if you or your parents were refugees', and I put my hand up. I say, 'Could you please leave your hand up if I am speaking to you in a language that is not your first language', and I leave my hand up. And they all look at me and say, 'You're a white bloke. You're Australian. You've got an Australian accent', and I say, 'That doesn't mean people won't pick on me, because once I was a refo kid, and when I was a refo kid I was still learning how to speak English. It doesn't matter that I'm white, that you should discriminate against me, just as it shouldn't matter that you're black or you have an Asian face or you have a disability or in the middle of high school you are frightened to come out as a gay or lesbian or transgender person'.

We have got to teach respect by building empathy. We have got to have educators who are able to be empathetic. We have to have performance measures built around that education program. It is no good having an education policy without performance measures that actually measure the longitude of the effectiveness of the program. There are a lot of steps that have to be taken, and I am just outlining a few of the things we learnt from our studies back what is now almost 20 years ago in New South Wales.

Mr SOUTHWICK: That is great. Well said, David.

Mr TAK: I thought my questions were largely answered through David's question about education, so I have no more questions, Chair. Thank you, David and Brian, for your presentation.

The CHAIR: On behalf of the committee I thank David and Brian, and also for the work that UPJ does. Your submission has been very informative. Thank you so much for taking the time out to present to us. The next steps will be that we will be deliberating all the submissions and evidence that have been provided. We will be making some strong recommendations to government, and you will be updated with the progress of that. Again, on behalf of the committee, thank you so much for presenting here today.

Mr KNOLL: Delighted.

Mr SAMUEL: Thank you very much for giving us the opportunity to be present. Much appreciated.

Witnesses withdrew.