ECAJ EXECUTIVE COUNCIL OF AUSTRALIAN JEWRY

הועד הפועל של יהודי אוסטרליה

The Elected Peak Representative Body of the Australian Jewish Community

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29 October 2024

Committee Secretary
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100, Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the *Criminal Code Amendment (Hate Crimes) Bill 2024* ("the Bill")

Thank you for the opportunity to make a submission to your Committee's inquiry into the Bill. The Executive Council of Australian Jewry (the ECAJ) is the peak, elected, representative body of the Australian Jewish community. It was established for that purpose in 1944 by Australian Jewish organisations and their elected leaders. The ECAJ's constituent organisations are the roof bodies of the Jewish community in each State and the ACT.[1]

The ECAJ has long been advocating for stronger laws to hold perpetrators of hate speech accountable. In 2013, the ECAJ was instrumental in persuading Prime Minister Julia Gillard, on behalf of the Australian Government, to sign the London Declaration on Combating Antisemitism, which, among other things, committed Australia to legislating against hate crimes and incitement to racial hatred.[2] While there have been changes to the *Criminal Code 1995* over the years, experience has shown that iterations of laws seeking to proscribe hate speech have proven ineffective, insofar as there remains an environment of relative impunity with respect to the promotion, advocacy or glorification of racial and religious hatred and violence directed at Jewish people.

While the ECAJ welcomes attempts to reform this area of law, our overall assessment of the Bill is that it is a modest step in the right direction, but it does not go far enough to provide an effective response even to some of the more scandalous forms of hate speech that have

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1 Namely, the NSW Jewish Board of Deputies, the Jewish Community Council of Victoria Inc, the Jewish Community Council of Western Australia Inc, the Queensland Jewish Board of Deputies, the Jewish Community Council of South Australia, the Hobart Hebrew Congregation and the ACT Jewish Community Inc.

2 'Australian PM signs London Declaration', *The Executive Council of Australian Jewry*, 26 April 2013: https://www.ecaj.org.au/australian-pm-signs-london-declaration/

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reportedly been published with impunity. We believe that if the Bill were to be enacted in its present form, future instances of public hate speech of this kind will continue to go unprosecuted, and the Australian public's expectations of this area of the law will remain unfulfilled. We provide examples later in this submission for your consideration.

For this reason, the ECAJ is proposing that:

- sections 80.2A and 80.2B should contain only one mental element, namely promoting, advocating or glorifying, rather than inciting, the use of force or violence against another person, or a group, and that the relevant standard is one of recklessness (see Recommendations 1 - 3 below);
- the new criminal offences for threatening force or violence against protected groups, or members of protected groups, should not contain the element that "*a reasonable member of the targeted group would fear that the threat will be carried out*";
- a new Federal offence of serious vilification should be introduced as a matter of priority and that this offence should not include a so-called "good faith" defence.

We provide the following comments on reforms that would be effected by the Bill if it is enacted in its present form.

1. Reforms to sections 80.2A and 80.2B of the Criminal Code

The amendments in the Bill are aimed *inter alia* at strengthening the urging violence offences in these sections so as to capture conduct where a person who urges force or violence is reckless as to whether the violence will occur. We strongly urge the government to re-think sections 80.2A and 80.2B in their entirety. These provisions were enacted in 2010 and, to our knowledge, have never been used in a prosecution.

Flaws in the current provisions

At present, sections 80.2A and 80.2B make it an offence to urge violence against groups or members of groups on the basis of race or religion or nationality, national or ethnic origin or political opinion.

Both sections require a prosecutor to prove *inter alia* two mental elements, namely that the accused:

(i) intentionally urged another person, or a group, to use force or violence against the targeted group or supposed member of the targeted group; and

(ii) did so intending that force or violence will occur.

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Intention is thus an essential component of both mental elements. Both elements have to be proved by a prosecutor to the criminal standard.

To prove that an alleged offender has intentionally urged others to use force or violence, a prosecutor would most likely need to prove an intention by the accused to spur on, stir or stir up, animate, stimulate, or prompt others to commit violence.[3] It would appear not to be necessary to prove that any person actually responded or was of a mind to respond in that manner.[4] The court would need to assess the effect of the accused person's conduct on an ordinary member of the class of persons to whom the conduct was directed, taking into account the circumstances in which the conduct occurred.[5]

Yet in practice, a message to members of an audience urging them to engage in violence is most often conveyed by verbal signals and symbolism employing vague language and allusions to a particular cultural, religious or ideological context, where the message is subliminally suggested, but is not stated expressly. This makes it difficult to prove the first mental element to the criminal standard, and all but impossible to prove the second. Even in some of history's most extreme and paradigmatic examples of incitement of racially or religiously motivated violence, evidence to the criminal standard of the first, and especially the second, mental element has been missing, and this remains true in the contemporary context. As a Senate Standing Committee Report concluded in 2014:

> ***It is no longer the case that explicit statements (which would provide evidence to meet the threshold of intention) are required to inspire others to take potentially devastating action*** *in Australia or overseas.* ***The cumulative effect of more generalised statements when made by a person in a position of influence and authority can still have the impact of directly encouraging others*** *to go overseas and fight or commit terrorist acts domestically. This effect is compounded with the circulation of graphic violent imagery (such as beheading videos) in the same online forums as the statements are being made. The AFP therefore require tools (such as the new advocating terrorism offence) to intervene earlier in the*

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3 We have applied the reasoning in *Veloskey &Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 (27 June 2002) at [21] and, specifically, the Appeal Panel's analysis of the related concept of "incitement".

4 *Ibid*.

5 *Ibid*.

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radicalisation process to prevent and disrupt further engagement in terrorist activity.[6] (Emphases added)

Although the Senate Standing Committee was referring specifically to the means by which members of an audience are typically moved to engage in *terrorism*, the Report's detailed dissection of this process is equally applicable to the way susceptible people can be manipulated into engaging in other forms of violence.

For these reasons we believe that sections 80.2A and 80.2B do not reflect the reality of the ways in which people are motivated to commit acts of racial or religious violence, and set an unreasonably high bar for prosecutors. This has made the sections unusable in every known case which has been referred for prosecution under these sections.

Even if the second mental element were to be expanded so as to include recklessness, as is proposed in the Bill, most of the problems with these sections would remain. Proof of intention would still be required to establish the first mental element, and the sections would therefore continue to fail to capture conduct that employs subtle linguistic and symbolic signals that trigger emotions which move people to engage in violence.

For example, in 2014 there were reports that a public antisemitic tirade by an extremist religious preacher had been referred to either or both Federal and NSW State authorities[7] for consideration as to whether he should be prosecuted under Federal or NSW legislation. The preacher had described Jewish people as "*the hidden evil*" and called for "*a jihad against the Jews*". Despite the egregious nature of the hate speech that was used, no prosecution eventuated, presumably because it was felt that an intention to urge violence could not be proved beyond reasonable doubt. In our view, the result would be no different if the Bill were to be enacted in its present form, because the evidentiary bar would still be too high. The following barriers to prosecution would continue to apply even if sections 80.2A and 80.2B were to be amended in the manner contemplated by the Bill.

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6 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014*, (October 2014), p.796: https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/bills/2014/pdf/b14.pdf?la=en&hash=4458F76D5327E190011C96478FBBD35B2D167D91

7 Michael Safi, 'Advocating genocide' to be crime under proposed new national security laws', *The Guardian*, 4 September 2015: https://www.theguardian.com/australia-news/2015/sep/04/advocating-genocide-to-be-new-under-new-national-security-laws

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- A prosecutor would still be required to prove two mental elements, namely: an intention to urge others to use force or violence; and recklessness as to whether force or violence will occur.

- The use of the word "urges" remains unchanged in the Bill. For the reasons outlined earlier in this submission, the meaning of "urges" is notoriously difficult to define, and proving to the criminal standard that particular behaviour falls within its meaning, is therefore not feasible in most real-life situations involving promotion, advocacy or glorification of violence.

Further reforms needed

In our view, if sections 80.2A and 80.2B are to be effective, they need to be re-formulated in a way that will allow a prosecutor the practical prospect of securing a conviction of a person who engages in hate speech of the kind described in the foregoing examples. In particular:

- **Recommendation 1 - Remove the second mental element (intending that force or violence will occur) as an element of both offences (under s. 80.2A and 80.2B) and convert it into a defence.**
  If a prosecutor proves beyond reasonable doubt that an accused person intentionally urged another person, or a group, to use force or violence against a targeted group or supposed member of the targeted group on the basis of race or religion, or another protected attribute, then this should be sufficient in our view to establish *prima facie* criminal liability. Such an intention denotes both ill-will towards the target and an anti-social propensity to damage the social fabric and breach the peace. The evidentiary onus should thus shift to the accused to establish that the accused did not intend that force or violence would occur, and was not reckless as to whether force or violence would occur.

- **Recommendation 2 - Change the words of the first mental element of both offences from "*urges another person, or a group, to use force or violence*" to "*promotes, advocates or glorifies the use of force or violence against another person, or a group*".**
  This would address the subtleties of communication that the Senate Standing Committee identified in 2014, and which make it unduly difficult, even in egregious cases, for a prosecutor to prove incitement, which the use of the word "urges" currently requires.

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- **Recommendation 3 - For the same reasons, change the standard of the first mental element of both offences from intention to recklessness.**

2. **Reforms to expand the list of protected attributes**

If enacted, the Bill would expand the list of protected attributes for the offences in section 80.2A and 80.2B and proposed sections 80.2BA, 80.2BB, so as to protect persons distinguished by sex, sexual orientation, gender identity, intersex status or disability.

We fully support this change, as a reform which our organisation has long advocated.

3. **Reforms to create new criminal offences for threatening force or violence against groups, or members of groups**

If enacted, the Bill would create new criminal offences for threatening force or violence against groups, or members of groups distinguished by race, religion, sex, sexual orientation, gender identity, intersex status, disability, nationality, national or ethnic origin or political opinion (proposed sections 80.2BA and 80.2BB).

We support the introduction of new offences of threatening (as distinct from urging) force or violence against others on the basis of race, religion and other protected attributes. However, we query whether it should be an element of these offences that "*a reasonable member of the targeted group would fear that the threat will be carried out*", or whether in the alternative this should be a defence. If all of the other elements of the offence proposed in either of sections 80.2BA and 80.2BB have been proved to the criminal standard, especially the mental elements, then it should be presumed that the target or targets of the threat are justified in taking the threat seriously. Accordingly, the evidentiary onus should shift to the defendant to establish that in all the circumstances the threat was *not* such that a reasonable member of the targeted group would fear that the threat will be carried out.

4. **Reforms to remove the defences in section 80.3 for certain offences**

We welcome the removal of the defences in section 80.3 in respect of the offences in sections 80.2A and 80.2B, and the proposed new offences in sections 80.2BA and 80.2BB. The defences in section 80.3 for acts done in good faith were in large part carried over from the repealed section 24F of the *Crimes Act 1914* (Cth) and drafted

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specifically to apply to the offence of sedition. Such defences are fundamentally misconceived in relation to offences based on the intentional urging of violence against groups distinguished by race, religion, nationality, national or ethnic origin or other attributes or by political opinion, or supposed members of such groups. Such an intention is intrinsically incompatible with the presence of "good faith". In the circumstances in which a good faith defence could be established, the mental elements of the offences could not be made out in the first place. The removal of the defence in respect of the offences in section 80.2A and 80.2B is something we have long advocated, and the same applies in respect of the proposed new offences in sections 80.2BA and 80.2BB.

5. Absence of any reforms to create a new Federal offence of serious vilification

We are deeply disappointed to note that the Bill contains no provision to create a new Federal offence that would proscribe serious vilification of individuals or groups on the basis of race, religion or other protected attributes. We were hoping for and expecting such a reform following the Prime Minister's reported comments on 12 February 2024, viz:

> "*And the idea that in Australia, someone should be targeted because of their religion, because of their faith – whether they be Jewish, or Muslim or Hindu or Catholic or Buddhist – is just completely unacceptable.*
> *"And that's why I've asked, as well, the Attorney-General to develop proposals to strengthen laws against hate speech, which we will be doing. This is not the Australia that we want to see.*"[8]

The following are examples of what we would regard as serious vilification that have occurred recently in Australia and which have not been prosecuted, and would in our view still not be prosecutable if the Bill were enacted in its present form.

- On 9 October 2023, protesters in the forecourt of the Sydney Opera House burned an Israeli flag and chanted "F**k the Jews", with a police investigation determining that "Where's the Jews" was also chanted. This gave rise to extensive media coverage locally and internationally. For video of the event see:

[8] David Crowe, 'Doxxing' laws to be brought forward after Jewish WhatsApp leak', *The Age/Sydney Morning Herald*, 12 February 2024: https://www.smh.com.au/politics/federal/doxxing-laws-to-be-brought-forward-after-jewish-whatsapp-leak-20240212-p5f4cc.html

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https://nypost.com/2023/10/10/reprehensible-protestors-chant-gas-the-jews-outside-sydney-opera-house/. No-one was prosecuted. The prosecuting authorities did not consider that it could be proved beyond reasonable doubt that the chants rose to the level of urging violence or threatening violence. For the same reason, it is our assessment that if the Bill is enacted in its present form, persons who engage in identical behaviour in the future could not be prosecuted under its provisions.

- On 15 December 2023, a self-described Muslim preacher, Brother Muhammad, of Al Madina Dawah Centre in Bankstown during a sermon that was posted online said: [The current Israel-Hamas conflict] *has to be a spark for the umma* [Muslim community] *and a spark to the final solution…"* The "final solution" is a well-known expression referring to the Nazi genocide of the Jewish people: https://www.dailymail.co.uk/news/article-12873669/Islamic-preacher-Muslim-army-anti-Israel-Sydney.html. No-one was prosecuted. The prosecuting authorities did not consider that it could be proved beyond reasonable doubt that the use of expression "final solution" in reference to Jews amounts to the urging of violence or the threat of violence against Jews in Australia. For the same reason, if the Bill is enacted, preaching of this kind in the future would still not be prosecuted.

- In a 22 December 2023 Friday sermon at Masjid As-Sunnah Lakemba in Sydney, Australia which was streamed live on the mosque's Facebook page, Imam Ahmad Zoud spoke about the "characteristics of the Jews." He described Jews as criminals, terrorists, and Zionists, but qualified that not all Jews were like this, "just most of them." He continued to say that they are characterized as being bloodthirsty and treacherous: https://www.memri.org/tv/australia-imam-ahmad-zoud-sydney-friday-sermon-jews-bloodthirsty-treacherous-criminals-monsters. The preacher could not be prosecuted under the existing law because the prosecuting authorities did not think it was possible to prove beyond reasonable doubt what specific conduct against "the Jews", if any, was being advocated. The result would have been no different if the Bill had been enacted and in force.

We could provide more examples in similar vein. We ask the Committee to recommend that these and similar examples of extreme racial vilification should be criminally proscribed. If the Committee is not of that view, then we would ask the Committee to state this explicitly, and give its reasons, so that the issue can be debated with precision in the parliament and in the wider community.

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We also ask the Committee to recommend that if a serious vilification offence is introduced, it should not be subject to the "good faith" defence in section 80.3. In our view this would be utterly misconceived and would convey a highly destructive message that the kind of conduct we have described in the above examples can be done in good faith. We submit, on the contrary, that in the circumstances in which there is genuine good faith, the mental elements of intention or recklessness could not be made out in the first place.

6. Conclusion

Whilst all legislation addresses social and economic issues, this Bill has an unusually high level of significance for Australia and for our current times. It is not only Jewish Australians who have observed with bewilderment and concern the impunity with which small numbers of extremists have been able to act and speak in ways which have undermined the peace, harmony and social cohesion that have traditionally been the hallmarks of public life in Australia.

Whilst criminal proscription can provide only one component of the answer to the destructive impacts of extremist hate speech, it is a critical component. The Bill has the potential to set a community standard against criminal hate speech that will command the respect of the vast majority of Australians, and send a resolute message that the coercive power of the State will be deployed as a last resort against anyone who acts by word or deed to destroy Australia's democracy, freedoms and rights and impose a totalitarian order enforced by brutal repression.

We consent to this submission being made public and wish the Committee well in its deliberations.

Yours sincerely

Daniel Aghion KC
President

Peter Wertheim AM
Co-CEO

Simone Abel
Head of Legal