NEW SOUTH WALES JEWISH BOARD OF DEPUTIES
The Representative Voice of NSW Jewry
ועד הקהילה היהודית בנ.ס.וו.
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The NSW Law Reform Commission
Locked Bag 5000
Paramatta NSW 1124

Attn: The Hon Tom Bathurst AC KC

By email: nsw-lrc@dcj.nsw.gov.au

Dear Sirs and Madams,

Senior Racial & Religious Vilification – Options Paper

The NSW Jewish Board of Deputies is pleased to provide a brief submission in relation to the Options Paper.

Definition of "Public Act"

While the current definition of "public act" is broad and could be refined to ensure that statements made to limited numbers of persons are not excluded from the scope of operation of the criminal law, we posit an alternative approach for consideration.

NSW could adopt in place of the definition of "public act" a requirement that the scope of operation of section s.93Z be "*an act taken not to be done in private*." The *Racial Discrimination Act 1975 (C'th)* defines such an act as an act that:

> *(a) cause words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the site or hearing of people who are in a public place.*

The term "public place" is defined in subsection 18C (3) as follows:

> *Public place includes any place to which the public has access as of by right or invitation, whether express or implied and whether or not a charge is made for admission to the place.*

We think that consistency between State and Federal law is inherently desirable as it facilitates law enforcement and public understanding of the law.

Whether the current definition is retained or the formulation in s18C is adopted, we agree with the proposition at paragraph 2.6 of the Options Paper that adapting some of the elements of the definition of "public place" may help ensure that statements made to limited numbers of persons are not excluded from the scope of operation of the criminal law.

We have in mind meetings which are ostensibly open only to adherents of a particular section of a particular faith community. There is often no fee, and the exclusion of non-adherents tends to be subtle. In

our view, it is better to widen the scope of operation, given the seriousness of the social ill that section 93Z seeks to address.

Some concerns have been expressed that s.93Z (or indeed the proposed s.93ZA to which we refer below) could restrict religious teaching and preaching, but in our view that concern is misplaced. We know of no authentic religious teaching that calls in aid the glorification of violence or the promotion of hatred of the other.

Finally, we do not support adopting the somewhat convoluted definition of a "public place" in the *Summary Offences Act 1988* (NSW).

Mental element of recklessness

We firmly oppose removing the mental element of recklessness from section 93Z. Narrowing the reach of s.93Z is the opposite of that which is needed.

We can conceive of no circumstance where actions which incite, urge, promote, advocate, glorify or threaten violence could or should be protected by any freedom of political communication.

Incitement to Violence

We strongly recommend in addition to the verb "incite", that there be other verbs such as urges, promotes, advocates or glorifies. It is not intended that those verbs replace the verb "incites". However, the purpose of expanding the category of verbs is to remove any suggestion that it is necessary to prove an impact on an audience in every case, in addition to having to prove the act itself and the mental element and thereby to reduce prosecutorial reluctance.

Further, we have recommended, and continue to recommend, that the offence should also prescribe the harassment or intimidation of a protected group. It is crucial that the reference to violence include harassment or intimidation. We refer to the examples provided in our primary submission.

An offence of inciting hatred

We continue to recommend strongly that there be a new section 93ZA which would include a new lesser or minor offence that would proscribe the deliberate public promotion of hatred and animosity towards, contempt for, or ridicule of, a protected group.

History has taught repeatedly that social cohesion is damaged well before violence is threatened. And it is small minorities, such as the Jewish community, who are most at risk by reason of the current absence of an offence of inciting hatred. Authentic religious teaching and preaching done reasonably and in good faith would not be at risk from such a provision, as the mental element would be intention.

The concern expressed at paragraph 5.5 of the Options Paper that young people could be charged after saying something controversial and offensive without appreciating the gravity of their words or actions, in our view, does not raise an example that would fall within the proposed new section 93ZA. In the example given, deliberacy, and therefore the requisite mental element, are absent.

The same would apply to statements made by radio and podcast presenters which might be interpreted by others as advocating racial hatred, when that is not intended.

For that reason, the implied freedom of political communication would not be infringed by the proposed new section 93ZA. Following the observations by Kiefel CJ, Keane and Gleeson JJ in *LibertyWorks Inc v Commonwealth of Australia* (2021) 274 CLR 1 at [46], the proposed new section 93ZA is a rational response to a mischief which is actual and not merely perceived. Their Honours referred back to *Clubb v Edwards* (2019) 267 CLR 171 at [66] where Kiefel CJ, Bell and Keane JJ relevantly said:

> *The issue for the courts is not to determine the correct balance of the law; that is the matter for the legislature. The question is whether the law can be seen to be irrational in its lack of balance in the pursuit of the object. While it may be accepted that the court will reach that conclusion only where the disproportion is such as to manifest irrationality, it is desirable in interests of transparency, that the court face up to, and explicitly deal with, this question.*

A law that deals with intentional incitement (to use just the one verb for the purposes of illustration only) of racial hatred pursuing the proper goal of restoring and then maintaining social cohesion, is in our view, more than likely to satisfy the courts' current approach to questions of proportionality in this regard.

By way of comparison, new offences were introduced into the *Criminal Code* (Cth) in December 2023, which proscribe various forms of public discourse. The relevant provisions comprise Subdivision CA of Division 80 of the Code - Publicly displaying, and trading in, prohibited symbols and giving a Nazi salute. In addition, the scope of the existing offence of advocating terrorism in Subdivision C was expanded. The following is a list of some of these offences:

Section	Offence	Mental element
80.2C	Advocating terrorism	Recklessness
80.2D	Advocating genocide	Recklessness
80.2H	Public display of prohibited Nazi symbols or giving Nazi salute	Recklessness
80.2HA	Public display of prohibited terrorist organisation symbols	Recklessness

The constitutionality of these provisions has not been challenged thus far.

Increased Maximum Penalty

We agree with the suggestion at paragraph 6.3 of the Options Paper that the maximum penalty for section 93Z should be aligned with the maximum penalty for comparable offences.

Aggravated Offences

Once the maximum penalties are aligned, in our view, there is really no need to create special provisions for aggravated versions of the offences in section 93Z and 93ZA.

A Harm Based Test

It is our view that the harm-based test is entirely appropriate in civil provisions, such as section 18C of the *Racial Discrimination Act 1975 (C'th)*. However, it has no place in the criminal law, which is based upon demonstrated *mens rea*.

Yours faithfully,

David Ossip
President