7 November 2024

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

Response to Questions on Notice

Dear Senators,

Thank you for the opportunity to testify before the Committee on this important piece of legislation. Please find following our response to three questions on notice. There are three matters on which we have been invited to respond to question on notice.

The first two issues occur on page 37 of the draft Hansard, in which Senator Scarr asked for our view on the testimony of Commissioner Finlay, who "proposed some words of clarification to be added that would require consideration of the context in which conduct occurs," and also asked for our view of the reframing of the "urging" criteria proposed in Mr Wertheim's submission from the Executive Council of Australian Jewry.

Issue 1: AHRC Proposal

1. You have asked whether we consider the submission of the Australian Human Rights Commission that the Bill should give effect to recommendations made in an Australian Law Reform Commission report of 2006, to be satisfactory in light of our concerns. The Commission's proposal is as follows:

> The Commission would support amendments consistent with those proposed by the ALRC in its 2006 report to then s 80.2 that would require consideration of:
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> the context in which the conduct occurred, including (where applicable) whether the conduct was done:
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> (a) in the development, performance, exhibition or distribution of an artistic work; or
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> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
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> (c) in connection with an industrial dispute or an industrial matter; or
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> (d) in the dissemination of news or current affairs.

2. In our submission we argued that to address our concerns sections 80.2A, 80.2B, 80.2BA and 80.2BB should clarify that harm inflicted by violence or force includes only physical harm. If these concerns cannot be addressed through that clarification, we said that a 'religious purpose' defence in the proposed amended 80.2A, 80.2B and new 80.2BA and 80.2BB should be provided. We said that, in the absence of such a defence, a judge or Tribunal may form the view that certain religious speech or practices ran afoul of the provisions because the target group apprehended harm or felt intimidated. For consistency with existing law, we said that the 'religious purpose' defence should be modelled on section 37 of the *Sex Discrimination Act 1984* (Cth). We also said that, in the interest of affording protections commensurate to Australia's historical regard for freedom of religion and speech and association, the exception should extend to not only

religious bodies, but also religious individuals and that it should capture the examples provided in our submission.

3. We note that the proposal from the AHRC fails to include a religious purpose alongside other purposes. It thus fails to align with other Australian laws that provide exceptions for vilification.[1] In addition the proposal is novel in that, unlike other exceptions, it only amounts to a requirement to take into consideration the matters stated. It does not amount to a true exception, in the sense of a provision that 'carves out' various forms of conduct from the prohibition. Finally, further to the position outlined in our submission, the structure of the proposal differs from the protection afforded to religious speech at section 37 of the *Sex Discrimination Act 1984*. Any exception should be aligned with that provision to afford consistency and certainty to religious institutions. Moreover, that proposal avoids subjecting religious teaching to a broad 'reasonably and in good faith' (for example as contained at section 18C of the *Racial Discrimination Act 1976* (Cth)), which would subject religious teaching to inordinate judicial scrutiny and imprecise and unjustified judicial discretion.

Issue 2: ECAJ Proposal

4. You have also asked for our comments on the proposal of the Executive Council for Australian Jewry to replace the word 'urge' with the words 'promotes, advocates or glorifies the use of force or violence against another person, or a group'. First, we note that, as the absence of citation in the ECAJ submission suggests, this particular formulation is novel to vilification law. We are concerned that the proposal would only exacerbate the concerns we raise in our submission in respect of the potential for traditional teachings and practices concerning sexuality and marriage to give rise to psychological injury. It may be that replacing an 'urging' test with a test focussed on 'promoting, advocating or glorifying' force or violence would expand the scope of traditional teachings caught by the prohibition. We consider that while the ECAJ could well raise a legitimate concern in respect of the conduct they seek to address (a matter we have not separately verified), further detailed consideration of the means to address that concern is required, beyond that which is available in the extremely limited timeframe afforded this Inquiry.

Issue 3: The Meaning of Force or Violence

5. The third matter on notice arose in the context of a discussion on our claim that psychological harm could be held to constitute actual bodily harm. Senator Scarr said " I've just tried to refer to the Court of Criminal Appeal case in relation to this issue of harm—and I'm happy for you to take this on notice—but it seems to me, from what I'm reading, that it was a discussion the court had with respect to the meaning of actual bodily harm in the context where an assault had occurred. So there was an assault within the meaning of the criminal law. As you probably know, there is a common assault, which is the lower standard. The question was, in the context of their having being an assault, whether or not it was an assault that had in fact caused actual bodily harm. Then there was the discussion with respect to harm encompassing psychological harm, but it was in the context of there first having been an assault. I'll dig a bit deeper in terms of reading the case, but that raises the observation that—and I understand the concern, and I'm seeking to address that concern some way—in the context of that case, there was an

[1] See, eg, *Anti-Discrimination Act 1977* (NSW), s 49ZE, *Racial and Religious Tolerance Act 2001* (Vic), s 11.

assault, so there was some physicality in terms of what had occurred, and then the question was whether or not that assault had occasioned actual bodily harm as a consequence. It was there that the court look at, 'What is harm?' and drew a distinction between a transient feeling of fear, as opposed to PTSD or something, but this was in the context of an assault having occurred. Can I ask you to take that on notice"

6. In our submission to the Committee we noted three grounds for our concern that the notion of 'force or violence' will be interpreted to include psychological injury and, as a result, will undermine existing exemptions provided to religious institutions in Commonwealth law, including sections 37 and 38 of the *Sex Discrimination Act 1984* (Cth).

7. The first was that provisions in the *Commonwealth Criminal Code 1995* make a distinction between physical and non-physical forms of harm, protecting only the former (see for example subsections 100.1(2)(a), (3) and section 146.1). Sections 80.2A and 80.2B do not make the same distinction. Applying the principle *expressio unius est exclusio alterius* (the express mention of one thing excludes the other), our concern is that the failure to define violence or force in sections 80.2A and 80.2B and new sections 80.2BA and 80.2BB as excluding psychological injury in the context of that deliberate exclusion elsewhere in the criminal code means the statutory drafters intended to include psychological injury.

8. The third of the three reasons we offered is that the Explanatory Memorandum expressly clarifies that 'fear' arising from a threat of force of violence can involve psychological harm. This is clarified in the commentary concerning the newly proposed section 80.2BA:

> Subsection 80.2BA(8) would clarify that 'fear' includes apprehension. This is intended to recognise that fear can manifest in various forms, including the anticipation of harm. This subsection is intended to ensure that the new offences not only capture immediate and tangible 'fear', but also anticipatory or psychological apprehension.[2]

An identical clarification is also made in respect of 80.2BB(9).[3]

9. It is in that context that we refer to the fact that the courts have upheld the proposition that criminally unlawful violence or force against a person includes actions that give rise to psychological injury. We assert that, when read together, these three matters could well form the basis for conclusion that 'force or violence' within the Act incorporates psychological injury. In our submission we referred to the representative judgement of the New South Wales Court of Criminal Appeal in *Shu Qiang Li v R*:

> A further matter is that, if the victim had been injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind, that would be likely to have amounted to "actual bodily harm" (see *R v Lardner*, unreported, NSWCCA, 10 September 1998.)[4]

10. This statement reflects the series of judgements of the NSW Court of Appeal that psychological harm can amount to actual bodily harm under the *Crimes Act 1900*.[5] Note that the express phrase is not, if actual physical harm occurs, a psychological injury can

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[2] Explanatory Memorandum, Criminal Code Amendment (Hate Crimes) Bill 2024, [73].
[3] Ibid, [96].
[4] [2005] NSWCCA 442 [45].
[5] *McIntyre v The Queen* (2009) 198 A Crim R 549, [44]; [2009] NSWCCA 305; *Shu Li v The Queen* [2005] NSWCCA 442, [45]; *R v Lardner* (Unreported, Court of Criminal Appeal for New South Wales, Dunford J, 10 September 1998).

result. Rather the expressed dictum is that psychological injury itself can amount to 'actual bodily harm'. This is notwithstanding the fact that the *Crimes Act 1900* (NSW) does not contain any express reference to psychological harm.[6] A series of judgements of the NSW Civil and Administrative Tribunal have also recently determined that victims of crime would be awarded compensation for actual bodily harm where expert evidence supports a diagnosis of a 'very serious psychological or psychiatric 'condition'.[7]

11. With respect, to focus on the technical question of whether the psychological injury was occasioned by an act of actual physical violence misses our primary concern. As we say in our submissions, it is the prospect that a court would accept the submission that the urging of force or violence includes circumstances in which a religious institution urges a course of conduct that a complainant later asserts gave rise to a psychological injury that grounds our concern. Our concern is that the judgements we refer to could well be cited in support of that conclusion, in so far as those judgements accept that the conceptual framework of force or violence enfolds within it psychological harm. The judgements, as representatively cited above, accept that such harm *is* force or violence, or in that context, 'actual bodily harm'.
12. It is in light of these factors that we request that the provision expressly clarifies that force or violence does not include psychological injury.

Thank you again for the opportunity to testify and to provide clarity to our position.

Yours,

Rt Rev Dr Michael Stead

Bishop of South Sydney

Chair, Freedom for Faith

[6] See *Crimes Act 1900* (NSW), s 59.

[7] See, for eg, *Shu Qiang Li v R* [2005] NSWCCA 442 'injured psychologically in a very serious way, going beyond merely transient emotions, feelings and states of mind' (at [45]), relied upon in *BXB v Commissioner of Victims Rights* [2015] NSWCATAD 173; *EMT v Commissioner of Victims Rights* [2021] NSWCATAD 39; *CZU v Commissioner of Victims Rights* [2017] NSWCATAD 240 and *FNA v Commissioner of Victims Rights* [2022] NSWCATAD 388.