

A JEWISH PERSPECTIVE ON THE NEED FOR EFFECTIVE ANTI-VILIFICATION CRIMINAL LAWS

In this short note, it is impracticable to address the panoply of issues surrounding reform of criminal laws concerning vilification of minorities. Such laws have support in important international conventions.⁸ This short note seeks only to provide readers a sense of that which the Australia Jewish Community – part of Australian society since the arrival of the First Fleet – is experiencing and the need for a broader and more effective set of laws.

The terms of reference for review of s 93Z of the *Crimes Act 1900* (NSW) published on 14 February 2024 will enable a careful, considered and much needed review to occur. The reference is timely, particularly so, but not only for the New South Wales and indeed wider Australian Jewish community. That is because, sadly and regrettably, Jew-hatred, historically described as Antisemitism, is again becoming part of acceptable discourse in the secular mainstream, and unsurprisingly, but regrettably, it is leading to intimidation, threats, harassment, and violence. Such conduct, which has been left largely unchecked, operates as a social anaesthetic. Allowed to continue and fester, it will very quickly undo the decades of positive work done to strengthen social cohesion making our country the very special multicultural society that it is.

The term “Antisemitism” was first used in 1879 by a minor Jew-baiting journalist by the name of Wilhem Marr.⁹ It was intended as a euphemism for the word “Judenhass”, which is best translated as Jew-hatred, and was never intended to relate to people other than Jews. Nazi ideology followed. Words became harassment, and violence, and led to the murder of 6 million Jewish people. Antisemitism broadly consists of hostility, discrimination, prejudice or hatred towards individual Jews or Jews as a group, their religion, history and peoplehood.

Fast forward to 2024. Pressure has been placed on non-Jewish organisations to sever ties with Jews. By way of example, a world-renowned Jewish expert on trauma and mental health,¹⁰ and renowned

Australian Jewish musicians¹¹ were “cancelled” by host organisations after being intimidated into doing so by those would wish to deny Jewish people their rights of free speech and free expression.

The harm is not new, but it has become severe. The Annual Reports on Antisemitism in Australia published by the Executive Council of Australian Jewry have shown a marked rise in the number of reported antisemitic incidents year on year since 2016.¹² The rise has been especially dramatic following the atrocities committed by Hamas in Israel on 7 October 2023, but the rise began even before Israel’s military response in Gaza.¹³

⁸ See, eg, Art 4 of the International Convention on the Elimination of all Forms of Racial Discrimination. The Convention was done at New York on 7 March 1966. It was opened for signature 21 December 1965, 660 UNTS 195. Australia signed the Convention on 13 October 1966. It came into force generally on 4 January 1969 (except Art 14 which came into force on 4 December 1969). The Convention entered into force for Australia on 30 October 1975. Also see: Art 20 of the International Covenant on Civil and Political Rights opened for signature 16 December 1966, 999 UNTS 171. The Covenant entered into force for Australia on 13 November 1980, except Art 41, which came into force for Australia on 28 January 1993.

⁹ Wilhelm Marr <<https://www.jewishvirtuallibrary.org/wilhelm-marr>>.

¹⁰ See, eg, Bruce Hill, “Israeli Speaker Disinvited from Conference”, *Australian Jewish News*, 7 March 2024 <<https://www.australianjewishnews.com/israeli-speaker-disinvited-from-conference/>>. Subsequently on 18 March 2024, the Executive Director of the Australia & New Zealand Mental Health Association has apologised to Israeli trauma specialist Dr Moshe Farchi and the

Australian Jewish community for the decision to disinvite Dr Farchi from the Frontline Mental Health Conference on the Gold Coast earlier this month: J-Wire Newsdesk, *Dr Moshe Farchi Received Apologies for Being Uninvited to Gold Coast Conference* (2024) <<https://www.jwire.com.au/dr-moshe-farchi-received-apologies-for-being-uninvited-to-gold-coast-conference/>>. See also: A McBeth, J Noland and S Rice, *International Law of Human Rights* (2nd ed, 2017) 100–101.

¹¹ See, eg, *The Australian*, 24 April 2024 <<https://www.theaustralian.com.au/nation/deborah-conway-says-she-wont-be-silenced-by-antiisrael-activists/news-story/1daf1d819a5caf522eb3f6ddfecfcabc>>; Shmone Kellie Balaam, “Israeli Night at Kapara in Fremantle Cancelled due to Protests”, *The West Australian*, 12 March 2024 <<https://www.perthnow.com.au/entertainment/music/shmone-israeli-night-at-kapara-in-fremantle-cancelled-due-to-protests-c-13905033>>.

¹² The reports can be accessed via: <https://www.ecaj.org.au/antisemitism-report/>.

¹³ Julie Nathan, “Preliminary Statistics Concerning Surge in Antisemitic Incidents Following Hamas Atrocities in Israel on 7 October 2023” (Executive Council of Australian Jewry, 15 December 2023) <<https://www.ecaj.org.au/wordpress/wpcontent/uploads/ECAJ-preliminary-report-antisemitic-incidents-since-Oct-7-attack-1.pdf>>. The incidents include but are not limited to assaults and threatened assaults, bomb threats and other threatened harm to Jewish schools and community centres; intimidation of Jewish university students; assaults and bullying against Jewish school students; <<https://www.theaustralian.com.au/nation/gas-you-kill-you-surge-in-antisemitism-incidents/news-story/478aefb7b8baddacaa56775a8b519cbez>>.

Back in 2007, Associate Professor Suzanne Rutland and the late Emeritus Professor Sol Encel conducted a study of Antisemitism in government schools in South Western Sydney. Racism was seen as wrong conduct, but anti-Jewish prejudice was not.¹⁴ The problem carries forward to universities. More than 15 years later, a study undertaken by the Monash University Social Research Centre reported back in July 2023 that:

Antisemitism is affecting how Jewish students approach their appearance while at university. It is not uncommon for these students to hide their Jewish identity when on campus. The extent of hiding their Jewish identity is higher among those who have previously experienced antisemitism in a university setting. These antisemitic experiences are affecting Jewish students both within a classroom environment and externally of the class setting. Students were largely dissatisfied and faced many barriers when trying to raise a complaint with their university in response to antisemitic behaviour. The majority of those who did raise a complaint were dissatisfied with their university's response. Many students won't raise a complaint as they don't believe complaining will make a difference.¹⁵

At Sydney University, just one example, Jew-hatred has crossed the threshold into physical incidents.¹⁶

Permit me to go back to a personal experience on 31 March 2009, when I participated in a public debate of the proposition that the freedom of expression should include the licence to offend when at the City Rectal Hall in Sydney. A middle-aged, charming woman spoke to me after the debate, warmly intending her remark to be supportive of my position that a licence to offend which includes the right to spread racial hatred would inevitably operate to undermine civil society, democracy and indeed freedom of expression. She said to me: "Whilst the Holocaust is a living memory, people will understand what happened to the Jews." Implied of course was the proposition that once the Holocaust is no longer a living memory, people will not understand what happened to the Jews, and will do it again.

For many decades, while memories of the Shoah (Holocaust) were fresh, and survivors bore witness in a way that could not be challenged, worldwide guilt served to shift to the subconscious that which had been a conscious and explicit Antisemitism. Until quite recently, one could harbour traditional anti-Jewish prejudice, but one could not express it freely. That has changed.

A different variant, Islamist theological Antisemitism, similarly, is no longer seen as extraordinary and newsworthy. Its elements too have passed into secular mainstream speech. These streams have converged into a river, and reinforce each other today. We are now seeing that which the late Rabbi Lord Jonathan Sacks back in 2016 described as "an unholy alliance of radical Islamism and the political left".¹⁷

Further, criticism of Israel in respect of her invasion of Gaza seeking to end Hamas' oft repeated threat to repeat of the horrors of 7 October 2023 has morphed seamlessly into Antisemitic commentary, and in some cases vilification and harassment of Jewish Australians. The frequency and breadth of acceptance of both the commentary and the vilification across the world has simply exploded; not that it was ever far beneath the surface.

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Teachers and families spoke to them in confidence. The teachers reported a veneration of Hitler and antipathy to Jews with statements such as "Hitler did the right thing", "Hitler did not go far enough". One student asked: "Why Do All the Teachers Hate Hitler. After All, He only Killed Jews?", S Rutland (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. Also see: B Kunde, "The Children of Abraham Living Apart: The Psychology and Sources of Muslim Youth Antisemitism in Sydney" (Paper submitted for the AAJS Conference, Mandelbaum House, Sydney, 2007).

¹⁵ Jewish University Experience Survey (2023) <<https://www.zfa.com.au/survey/>>.

¹⁶ *The Australian*, 24 April 2024 <<https://www.theaustralian.com.au/higher-education/jewish-students-uneasy-for-new-year-as-israeli-flag-torn-down-at-sydney-university/news-story/d780fb6e652c967ddb8e8b28a4cd620e>>.

¹⁷ *Rabbi Lord Jonathan Sacks: The Blood Libel of Our Time* (4 April 2016) <<https://rabbisacks.org/archive/anti-zionism-is-the-new-anti-semitism-newsweek/>>.

That such criticism crosses the line from criticism of a particular Israeli policy into baldly Antisemitic invective is no longer newsworthy to many but not all news outlets.

The Jewish community knows too well that the more such Jew-hatred goes unpunished, the greater the impunity and severity with which it is repeated.

According to Rabbinic sources harsh or derogatory speech touches on self-image and self-respect in a way that other wrongs do not. Hate speech is all about power and not at all about truth. Hate should not be visited upon the stranger, nor should the stranger visit hate upon his or her host.

Rabbi Sacks made a prophetic call:

The hate that begins with Jews never ends with Jews. In a world awash with hate across religious divides, people of all faiths and none must stand together, not just to defeat Antisemitism but to ensure the rights of religious minorities are defended everywhere.¹⁸

Can we heed that call?

Education plays a part, but in addition a workable law is needed.

Justice Kunc's comment that "an unworkable law risks bringing the law into disrepute" was prescient when published in 2017.¹⁹ Sadly, s 93Z is either unworkable or suffers from prosecutorial reluctance or both.

It is essential that in any reform of s 93Z the elements of each offence are set out simply yet with precision to enable prosecutors to manage their work efficiently and to not create unnecessary barriers to prosecutorial willingness. In Australia, Western Australia is the only jurisdiction in which there has been a successful prosecution for criminal racist conduct, as it happened, targeting Jews.²⁰

In 2018, s 93Z of the *Crimes Act* replaced the former ss 20D, 38T, 49ZTA and 49ZXC of the *Anti-Discrimination Act 1977* (NSW). However, the new provision does not adequately protect the right of law-abiding minorities in our society.

All Australians should be able to live free from acts which intentionally or recklessly incite, promote, advocate or glorify harassment or intimidation on the prescribed grounds, even if that harassment or intimidation does not amount to violence.

There also is a need for a lesser offence to proscribe intentional or reckless public conduct to incite, promote, advocate, or glorify hatred, serious contempt, or severe ridicule on the prescribed grounds, because where only incitement to violence is proscribed, we do not protect against obvious harm. That harm is in the impairment of citizens' ability to go about their daily lives with a sense of safety and security. Such a sense of security is fundamental to the enjoyment of democratic rights and society. Those who live in fear of harassment or intimidation cannot sensibly exercise their right to express themselves freely in a civil society. Laws which protect that right aid, and do not diminish, rights of free expression.

It is necessary for Australia's social cohesion that all members of the community be able to make a meaningful contribution to, and to develop a sense of belonging in, the society in which they live. Failure by the state to provide this security for minority groups can have devastating consequences. We know as much from history. We are seeing it again in Australia now.

One of the world's leading experts on legal protection against racial hatred, Professor Kathleen Mahoney argued in the first issue of the *Australian Journal of Human Rights* 30 years ago that free speech is enhanced when vulnerable groups are protected from serious harm through racial hate speech.²¹

Whatever law is in place, there also exists significant disquiet around the now persistent reluctance to prosecute. That serves only to reemphasise the need for legislative precision and clarity to enable prosecutors to manage their work efficiently and to be willing to protect the minorities in our society whose right to live without fear is very much at stake. Australian social cohesion will be the beneficiary.

*David D Knoll AM**

¹⁸ Rabbi Lord Jonathan Sacks: *The Blood Libel of Our Time*, n 17.

¹⁹ Justice François Kunc, "Current Issues" (2017) 91 ALJ 599, 605.

²⁰ *O'Connell v Western Australia* [2012] WASCA 96; *Criminal Code Act Compilation Act 1913* (WA) Ch XI.

²¹ Kathleen Mahoney, "Hate Vilification Legislation and Freedom of Expression – Where Is the Balance?" (1994) 1 AJHR 353.

* Barrister, Adjunct Associate Professor Faculty of Law, UNSW. He is past President of the NSW Jewish Board of Deputies, and a past Honorary Secretary of the Executive Council of Australian Jewry. The opinions expressed above are written in a personal capacity.