CRIMES AND ANTI-DISCRIMINATION LEGISLATION AMENDMENT (VILIFICATION) BILL 2016

First Reading

Bill introduced on motion by Mr Paul Lynch, read a first time and printed.

Second Reading

Mr PAUL LYNCH (Liverpool) (11:07): I move:

That this bill be now read a second time.

It gives me great pleasure on behalf of the Labor Opposition to introduce this bill. It is being introduced because of the Government's torpor and sloth. Despite widespread agreement on the inadequacy of current anti-vilification law, the Government has introduced no legislation and has taken no action to deal with the issues raised in this bill. It has taken no action over hate speech. The object of this bill is to make amendments to the Crimes Act 1990 and the Anti-Discrimination Act 1977 in relation to racial, transgender, homosexual and HIV-AIDS vilification. Specifically, the bill moves the offence of serious racial, transgender, homosexual or HIV-AIDS vilification by means of threat or incitement of physical harm into the Crimes Act 1990 from the Anti-Discrimination Act 1977.

The bill also removes the requirement for the Attorney General to give consent to a prosecution for that offence. Additionally, the bill extends the time within which prosecutions for such offences may be commenced to not later than 12 months from the date when the offence was alleged to have been committed. The objects also include bringing together into a new part—proposed part 4H—all the provisions of the Anti-Discrimination Act 1977 dealing with racial, transgender, homosexual and HIV-AIDS vilification and makes those provision consistent. It provides that unlawful vilification under the Anti-Discrimination Act 1977 occurs when a person, by a public act, intentionally or recklessly promotes—rather than incites—hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on racial, transgender, homosexual and HIV-AIDS grounds.

The bill clarifies which public acts constitute such unlawful vilification. It provides that the proposed part applies whether or not the person or members of the group vilified have the characteristic that was the ground for the promotion of hatred, contempt or ridicule concerned. It also provides that the president of the Anti-Discrimination Board, after accepting a vilification complaint under the Anti-Discrimination Act 1977, is to refer the complaint to the Commissioner of Police if the president considers that the offence of serious racial, transgender, homosexual or HIV-AIDS vilification may have been committed, rather than investigating the complaint first and then referring such a complaint to the Attorney General.

The Government has refused to act. Accordingly, the Opposition presents the bill before the House today. The bill has two broad components. One is to implement unanimous legislative recommendations of the report of the Legislative Council Standing Committee on Law and Justice entitled "Racial vilification law in New South Wales", dated December 2013—three years ago. The second relates to a number of policy commitments made by the Leader of the Opposition in October last year. The target of this bill is hate speech. It is directed at people who promote or advocate violence based on race, gender or sexual orientation. There are, of course, legislative provisions presently in place. Racial vilification, for example, is targeted by section 20D of the Ant-Discrimination Act, which criminalises serious racial vilification. As is now a matter of notoriety, there has never been a prosecution or conviction under this section. That is despite the many years that it has been on the statute books, and despite more than 30 referrals to the Director of Public Prosecutions [DPP] under this section.

Contemporary Australia is a complex, diverse society. Its diversity on a racial and cultural basis is as broad as it is anywhere in the world. It functions, I think, remarkably well. Well over half of the electorate that I represent, for example, speak a language other than English at home. However, this comparative success does not exist purely by luck or happenstance. It requires appropriate institutions and appropriate legislative frameworks. As to vilification and discrimination on the basis of gender or sexual preference, I think contemporary Australia is a better place than it used be, but with much further still to go. Most obviously one of the reasons for progress to date is legislative change—changing the laws to support the type of diverse and inclusive society most of us wish to live in and many of us champion.

These are the reasons that legislation dealing with hate speech is central to contemporary Australia. These are the reasons that the Government's sloth and torpor are so inexcusable. The report of the Standing Committee on Law and Justice, "Racial vilification in New South Wales", was released in December 2013. The inquiry was referred to the committee by then Premier O'Farrell in November 2012. The committee received 45 submission and held public hearings. Its sensible and reasonable recommendations were adopted unanimously. The Government's response to this sweet

reason has been a resounding silence. A Government response to the committee report was due in six months at 3 June 2014. A response was received at 4.49 p.m. on that day—literally as the clock ran down. The response is worth citing in its entirety:

> The NSW Government continues to consider the Report by the Legislative Council Standing Committee on Law and Justice on its inquiry into*Racial Vilification law in NSW*.
>
> The Government is considering the important issues raised in the Report and is liaising with responsible agencies in determining its response.
>
> The Government thanks the Committee together with those who made a submission to the inquiry for their efforts.

And that is it—after that, nothing. After this meaningless collection of bureaucratese, nothing else was heard. One can speculate on this comprehensive lack of action by the Government. One possible explanation is the general torpor and lack of legislative action that characterises this Government over recent years. The Government has introduced fewer bills, implemented fewer Law Reform Commission recommendations and exhibited a lesser legislative agenda than any government in living memory. There are fewer sitting hours than in the pre-2011 Parliament and recent changes in standing orders allow members to disappear after question time on Thursday.

The other explanation is that the Government is frightened of or controlled by the extremist forces that dress up their attachment to unfair privilege, discrimination and vilification behind declarations about the importance of free speech. No society has had no restrictions on speech. The question is always what the limits are and where boundaries should be drawn. By its inaction, the Government has demonstrated that it does not require effective barriers to hate speech in this State. We in the Labor Opposition have a different view. We think effective laws against hate speech are essential. The fact that section 20D, for example, is on the books but there have been no prosecutions speaks volumes. It is, of course, preposterous to argue that there have been no examples of hate speech while the provision has been in force. Clearly there have been, but section 20D has not been able to be utilised. The obvious response is to make alterations to section 20D so that it can be used. That is what this bill does. [*Extension of time*]

This bill removes the current need in section 20D (2) for the Attorney General's consent to serious racial vilification prosecutions. This reflects recommendation 7 of the parliamentary inquiry report. This is achieved by schedules 2 [1], [2], [3] and [4]. This provision has, in effect, become a nonsense. In 1990 the Attorney delegated the consent power to the DPP, where it has remained ever since. The Attorney's involvement has potential to unnecessarily politicise the prosecution decision and was opposed by most stakeholders at the committee inquiry. This type of consent provision dates from an earlier time when the Attorney was seen as being more than just a politician and being somewhat above the fray. Occasionally attempts are made by Attorneys to behave in that way but it has become increasingly rare—to my regret and that, I suspect, of others.

This bill also adopts recommendation 9 of the committee report, which extends the time limit for prosecutions from six months to 12 months. This makes sense. granted the current time limit of 12 months to lodge a complaint with the Anti-Discrimination Board [ADB] under section 89B. The practical difficulties of this were seen in *Simon Margan v Director of Public Prosecutions &Anor* [2013] NSWSC 44. This provision will now be contained in a new section 91N (3) of the Crimes Act. Recommendation 11 provided for the President of the ADB to directly refer serious racial vilification complaints to the NSW Police. This is contained in a new section 94D of the Anti-Discrimination Act. Committee recommendation 12 allows the police to prepare a brief of evidence for the DPP following referral of a complaint, as normally happens in a traditional prosecution. That can now occur as a result of this bill.

These sensible procedural steps are blindingly obvious. The Government's failure to act on them for three years is extraordinary. This bill adopts them. There is currently no mechanism in place for the development of a brief to the DPP. The board has limited powers to investigate, in contrast to the police, to say nothing of expertise and experience in investigation. There is also the issue of lack of ADB resources, especially granted the Government's approach to funding them. Recommendation 1 of the committee report recommends that, for the sake of clarity, the legislation provide that the offence covers communications in quasi-public places. The most obvious example of this is the lobby of a strata title apartment block or a company title apartment block. This recommendation is reflected in a new section 50AA of the Anti-Discrimination Act [ADA] in the bill. The problem otherwise is how to draw the difficult line between public and private, with the risk that the balance falls on a point that is too restrictive.

Flowing from this discussion and bearing in mind this is about criminal liability is the proposal that the offence not include conduct that a defendant could prove was intended to be in private. The obvious example is of what is clearly a private conversation on private premises accidently overheard by someone else. There is a precedent for this in Victorian legislation. This was recommended by the

committee and is adopted in the bill. The bill's provisions on these issues create a new section 50AA (3) and (4) of the ADA. There has been doubt and discussion as to the level of necessary intent—the mens rea necessary to establish the elements of the offence under section 20D. The committee recommended, and I have included in this bill, a provision that proof of recklessness is sufficient to establish intention. This is in line with general common law legal principles and has the support of several stakeholders. This is specifically seen in the new section 50AB (1).

Another recommendation of the committee included in the bill is that persons of presumed race are included in the bill. There are already similar provisions, for example, regarding people who are presumed homosexual. Obviously, people of a presumed race are equally affected by vilification. The committee notes an example of a Korean woman verbally abused in public but not able to pursue a complaint because the abuser incorrectly identified her as Japanese. This proposal is reflected in the bill in a new section 50AB (2). Apart from the agreed recommendations of the parliamentary committee, Labor has also included some other proposals in this bill. Most significantly, in relation to the substantive offence, Labor proposes replacing the word "incite" with the word "promote". That is contained in section 50AB of the ADA and section 91N of the Crimes Act. The intention of this change is very clear—Labor wishes to lower the current bar for prosecution. There have been no prosecutions at all under section 20D, so the case for lowering the bar is powerful. Moreover, the behaviour that is criminalised by this change is certainly worthy of sanction.

There has been an acknowledgment for some time of the real difficulties of ever being able to prove "incitement". In that regard, I note the 2009 paper on the topic by Nicholas Cowdery, AM, QC. There has been some debate around these terms for some time. However, I think it must be clear that "promote" is a lower bar than "incite". Additionally, the bill proposes placing the operative section of the criminal offence into the Crimes Act and removing it from the Anti-Discrimination Act. That is seen in schedule 1 to the bill, which establishes division 15C of part 3 of the Crimes Act, creating section 91N, which is the offence of serious racial transgender, homosexual or HIV-AIDS vilification. Certainly the legal effect of a provision should be the same whether it is located in the Crimes Act or in the Anti-Discrimination Act. However, there is significant symbolism in the provision being located in the Crimes Act in the new section 91N. And symbolism, as everyone in this Chamber knows, is important.

The proposal to locate the provision in the Crimes Act has been frequently discussed. It is time it was done. Having it in the Crimes Act is consistent with the other changes made in this bill emphasising the role of the police. It is also consistent with the situation in other jurisdictions: Western Australia, the Commonwealth, the United Kingdom and Canada. Earlier reviews have recommended this. This is achieved by schedule 1 to this bill. It has taken way too long for the position to get to this stage. It is time there was some action. Before commending the bill to the House, I thank the House for allowing me the courtesy to continue this speech. I commend the bill to the House.

Debate adjourned.