

Questions on Notice, taken by Verity Smith, Solicitor, PIAC

Question 1.

The Hon. TREVOR KHAN: If one is to look at section 4, I notice that recommendation 3 posits two alternatives, one of which Mr Shoebridge picked up, and that is simply repealing the sections. I think that is unlikely to happen. The second alternative is to limit it in some way to abusive or threatening language. Have any of you got a view as to how you would limit it to abusive and threatening language? I am attracted by it, you see.

Mr O'NEIL: We are happy to take that on notice. We are not criminal law experts so we are not sure how we would perceive of such a section, such a new limit on that provision. At the heart of it I suppose would be the need to up the threshold above from where it is right now and to avoid situations where someone using the F word is enough to have police—

The Hon. TREVOR KHAN: I absolutely accept that. That is a pointless charging exercise and likely to lead to the trifecta. I absolutely accept that. My concern is there are vulnerable groups in society, women, the LGBTI community, we can pick a whole range, who can be the subject of abusive and threatening language which if you simply remove it may in fact leave them more vulnerable to oppressive conduct and language. That includes women in the Aboriginal community as well. I am interested in seeing a recommendation go forward that actually has a chance of success and protects those vulnerable groups in the community who are deserving of continuing protection. Anything you can give would be greatly appreciated.

Mr DAVID SHOEBRIDGE: I think that is an opportunity to take it on notice.

Ms SMITH: Ms Crellin this morning spoke of the other existing offences which could potentially capture the circumstances that you are talking about. I would also be happy to take that on notice too.

Answer 1.

In our view, the *Crimes Act 1900* (NSW) and *Crimes (Domestic and Personal Violence) Act 2007* (NSW) already contain relevant offences to capture 'abusive and threatening language' of the kind described by Mr Khan.

Section 93Z *Crimes Act* creates an offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status. The maximum penalty in the case of an individual is 100 penalty units or imprisonment for 3 years (or both) (s93Z(1)).

Section 13 *Crimes (Domestic and Personal Violence) Act* creates an offence to stalk or intimidate another person with the intention of causing the other person to fear physical or mental harm. Intimidation includes 'conduct amounting to harassment or molestation of the person' (s7(a)), or 'an approach made to the

person by any means (including by telephone, text messaging, e-mailing and other technologically assisted means) that causes the person to fear for his or her safety' (s7(b)). For the purposes of this offence, the prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm (s13(4)). The maximum penalty is imprisonment for 5 years, or 50 penalty units, or both (s13(1)).

We are not aware of any groups who recommend that the offensive language offence be retained as a protection against oppressive conduct and language. If there is evidence of concern about the repeal of the offensive language offence by disadvantaged or marginalised groups, it may be more appropriate to discuss how these concerns can be met through the relevant existing legislation referred to above, rather than through the retention of s4A *Summary Offences Act 1988* (NSW).

Instead of acting as a protection for disadvantaged groups, the Australian Law Reform Commission has reported that most offensive language criminal infringement notices are issued for language directed at *police* (Australian Law Reform Commission, (2017), 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report (ALRC Report No. 133)' p424).

PIAC supports the repeal of s4A *Summary Offences Act 1988* (NSW).