STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Supplementary question: NSW Society of Labor Lawyers

Answers are to be returned to the Committee secretariat by Wednesday 24 April 2013.

A. Question by Email

What is your view on the potential option for amendment to s20D outlined below:

20D Serious Racial Vilification

A person must not by a public act, promote or express hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race of the person or members of the group that is intended, or reasonably likely in the circumstance of the case to:

a. Threaten physical harm towards, or towards any property of, the person or group of persons, or
b. Incite others to threaten harm towards, or towards any property of, the person or group of persons, or
c. Cause a person to have a reasonable fear for their own safety or security of property or for the safety or security of property of their family.

The definition of race would be expanded in s4(1) to include presumed race.

The NSW Society of Labor Lawyers notes the following:

1. The potential option (set out above) (the "**Proposed Option**") is intended to amend the current section 20 D of the Anti-Discrimination Act 1977 (the "**Act**") as follows, showing section 20 D marked up with the text of the Proposed Option by text scored through = deleted text and underlined text = new text:

> **"...Anti-Discrimination Act 1977 No 48**
> Current version for 28 February 2013 to date (accessed 14 April 2013 at 15:33)
>
> **20D ~~Offence of s~~Serious racial vilification**
>
> (1) A person ~~shall~~ must not, by a public act, promote or express ~~incite~~ hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group that is intended, or reasonably likely in the circumstances of the case to ~~by means which include~~:
> (a) ~~threatening~~ threaten physical harm towards, or towards any property of, the person or group of persons, or
> (b) ~~inciting~~ incite others to threaten ~~physical~~ harm towards, or towards any property of, the person or group of persons , or
>
> (c) Cause a person to have a reasonable fear for their own safety or security of property or for the safety or security of property of their family.

[The definition of race would be expanded in s4(1) to include presumed race]

Maximum penalty:

In the case of an individual—50 penalty units or imprisonment for 6 months, or both.
In the case of a corporation—100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution…."

2. We submit that any proposed amendment to Section 20D include a review of the penalties as currently enacted, as noted in our written Submission dated 22 March 2013 (the "**Labor Lawyers' Written Submission**").

3. We also submit that any proposed amendment to Section 20D delete the word "Serious" from the heading of the section, again as noted in the Labor Lawyers' Written Submission. The word "Serious" should be removed from the heading in the Proposed Option.

4. We also submit that any proposed amendment to Section 20D include amendment to the procedural requirements elsewhere in the Act, for example that the current 28-day limit imposed in sub-s. 91(3) of the Act (for the referral of a possible Section 20D matter to the Attorney–General / Office of the Director of Public Prosecutions) should be abolished, or able to be extended from time to time as required, again as noted in the Labor Lawyers' Written Submission.

5. It is also confirmed that otherwise the Labor Lawyers' Written Submission recommended no change to Section 20 D of the Act or any change not yet be made, pending consideration of Section 20D in the overall framework of racial vilification and anti-discrimination law.

6. For the wording of the Proposed Option, we further note the following:

   (a) for purposes of drafting the word "shall" may be preferred to the word "must" (for example in draft sub-section 1);
   (b) the change from current Section 20D appears intended to "catch" factual circumstances for which "incite" may not be proved beyond reasonable doubt, but it is submitted that a high threshold of evidence beyond reasonable doubt to "promote" or "express" may still maintain an elevated and perhaps prohibited threshold for the offence of racial vilification;
   (c) such a high threshold may nonetheless remain appropriate (including by the wording of the Proposed Option) if Section 20D is continued to have an educative purpose (noting the Second Reading Speech, as referred to in the Labor Lawyers' Written Submission);
   (d) similar comments pertain to the addition text in the Proposed Option of a public act "…that is intended, or reasonably likely in the circumstances of the case to …" threaten physical harm or incite others to threaten harm;
   (e) for consistency however the word "physical" in sub-paragraph 1(a) of the Proposed Option should be deleted (then consistent with sub-paragraph 1(b) of the Proposed Option);
   (f) appropriate comparable amendments ought be made otherwise in the Act for example in section 20C again for reasons of consistency and where factual

circumstances relevant to Section 20D include consideration of ss. 20B and 20C of the Act;

(g) the definition of "race" would be expanded in s4(1) of the Act to include presumed race should not be undertaken and instead (as submitted in oral evidence to the Committee on 5 April 2013) there ought be no requirement for the race or presume race of a potential complainant to be a requirement to lodge a complaint or raise factual circumstances as part of matters for consideration under the Act;

(h) it is submitted that the need for a definition of "presumed race" for consideration of section 20D with respect is incorrect;

(i) the definition of "presumed race" in sub-section 4 (1) of the Act is relevant to the making of a "vilification complaint" referred to in s. 88 of the Act;

(j) the term "vilification complaint" is not defined in the Act;

(k) arguably any "vilification complaint" referred to in s. 88 of the Act is distinguishable from "…a complaint to be investigated [which] alleges an offence under section 20D…", as distinguished in section 90A of the Act;

(l) by sub-section 91(1) of the Act, arguably the President of the Anti-Discrimination Board is required to consider whether an offence has been committed under Section 20 D (amongst other provisions) in "…respect of the matter the subject of the complaint.." and therefore is not limited to any "complaint" or "vilification complaint";

(m) arguably therefore the President is required to consider whether an offence has been committed under Section 20 D of the Act in respect of the matter the subject of the complaint, that matter being any complaint and the factual circumstances relevant to the complaint;

(n) further, and as submitted in oral evidence to the Committee on 5 April 2013 a matter of alleged racial vilification or possible racial vilification or the factual circumstances which have arisen should be raised by a complainant whether or not they are part of any race the intended subject of the event – irrespective of race or personal response the potential racial vilification ought be accepted as offensive to all in society other than only persons from a race or persons from a presumed race; and

(o) a removal of any such requirement would also ensure that persons who are of a race or presumed race but who are concerned as to repercussions by lodging a complaint will have no requirement of race or presumed race as a threshold to the issue being raised (for example members of the Tamil community in Australia may feel their families in Sri Lanka or elsewhere might be investigated or targeted or otherwise troubled by a complaint raised in New South Wales by persons identified as being part of the Tamil race, or the "presumed" Tamil race).

7. We also note the definition within current Section 20B of the Act which includes the following and perhaps might be seen as a comparable provision:

> **"…20B Definition of "public act"**
>
> In this Division, ***public act*** includes:
>
> (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
>
> (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
>
> (c) the distribution or dissemination of any matter to the public with knowledge that the matter **promotes or expresses** hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group…" (emphasis added)

B. <u>Question at Hearing from the Hon. Peter Primrose</u>

The Hon. PETER PRIMROSE: The question I would like you to take on notice is that the Jewish Board of Deputies is in favour of significantly amending section 20D to include a provision concerning conduct intended to harass on the grounds of race. It is suggested that the definition of "harass" include behaviours that threaten, intimidate or seriously and substantially abuse. Can you please detail what issues, if any, may transpire should such a provision be included in section 20D? I ask you to take that question on notice and have a look at their submission. Your comments would be valuable.
Ms MATHEWS: We would be assisted with that. We can have a look at, for example, in Western Australia the recommendations of the Law Reform Commission and what was subsequently enacted in the Parliament and also the review five years after the New South Wales legislation was passed, which gives some comments on that. We will refer back to you with a written submission.

The NSW Society of Labor Lawyers notes the following:

8. Significantly amending section 20 D of the Act to include a provision concerning conduct intended to harass on the grounds of race (including behaviour which threaten, intimidate or seriously and substantially abuse) will substantially alter the intention of Parliament when section 20D was enacted.

9. It is accepted that such a course is open to the Parliament in its review of Section 20D of the Act.

10. It is submitted that such a course is not warranted in the present circumstances of consideration to date of Section 20 D.

11. For example, a review of the Annual Reports of the Anti-Discrimination Board of New South Wales published over a number of years indicates a reduction in both enquiries and complaints concerning racial vilification.

12. In jurisdictions with other "definitions" of racial vilification, similarly there is not a high number of complaints and/or prosecutions (including Canada, the United Kingdom and Western Australia).

13. There is a risk that Section 20D (whether in its present form or as contemplated in this question) will afford a platform for publications which are racially vilifying and discriminatory (and perhaps be seen to endorse same by those who make those publications or defend a complaint or prosecution).

14. An alternative might be for Parliament to consider enacting an additional provision for "racial harassment" comparable to the provisions for "sexual harassment" but not otherwise amend Section 20D of the Act.

15. Arguably publications and events which are intended to threaten or harass are within Commonwealth crimes legislation (see for example the *Criminal Code Act* 1995).

16. Recommendations of the Western Australian Law Reform Commission in October 1898 (prior to the enactment of the comparable WA Criminal Code racial vilification provisions) included:

> "...
>
> 1. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being published, distributed or displayed whether by himself or another, guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby.
>
> 2. An amendment to the *Criminal Code* making a person who publishes, distributes or displays written material which is threatening, abusive or insulting guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby
>
> 3. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being displayed whether by himself or another, guilty of an offence if such display is **intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group**.
>
> 4. An amendment to the *Criminal Code* making a person who displays written material which is threatening, abusive or insulting guilty of an offence if such display is **intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group**...." (emphasis added - see the 30th Anniversary Reform Implementation Report (2002) of the Law Reform Commission of Western Australia – the "**LRCWA Report**"), a copy of which is **enclosed**).

17. As noted in the LRCWA Report (page 228), those recommendations did not form part of the subsequent legislation, including that:

> "...However, the element of 'threatening, abusive or insulting' was reduced to simply 'threatening or abusive' in respect of all four enacted offences.
>
> Further, the Commission's recommendation for the third and fourth offences to include 'intended or likely to cause serious harassment, alarm, fear or distress' was limited by Parliament to 'intends any racial group to be harassed'.
>
> In view of these small but nevertheless significant changes to the nature and scope of the Commission's proposed offences, the question whether the legislation sufficiently deters acts that incite racial hatred remains..."

18. It is noted that notwithstanding those concerns, prosecution has been "successful" in Western Australia: see the decision of the District Court of Western Australia in the matter of R. v. Brendon Lee O'Connell (per Wiseby DCJ Court File number IND 1767 of 2009) and the subsequent appeal reported at *O'Connell v. The State of Western Australia* [2012] WASCA 96 (4 May 2012) – copy **enclosed** and *Mulhall v. Barker* [2010] WASC 359 (7 December 2010) – copy **enclosed**.

19. However those few cases in Western Australia arguably demonstrate very limited "success" and few incidents which may warrant such a criminal provision for New South Wales (including in circumstances where an educative provision might be preferred and other criminal legislation, both state and Commonwealth, may apply).

20. Although not specifically directed to this question, the Committee may also wish to consider the comments in the article by Hennessy and Smith entitled "Have We Got it Right? NSW Racial Vilification Laws Five Years on" found at [1994] *AUJIHRights* 16; (1994) 1(1) *Australian Journal of Human Rights* 249, a copy of which is **enclosed**.

C. Question at Hearing from the Hon. David Shoebridge

Mr DAVID SHOEBRIDGE: Could I ask you to take on notice the question about incitement? A number of submissions and witnesses say inciting a third party to do something is one of the major flaws in this legislation. Could you have a look at that and consider what the society's position is on that element?
Ms MATHEWS: Certainly, and again I think that has been raised by the Western Australian Law Reform Commission and was not enacted in Western Australia but we will happily provide something in writing to the Committee on that. Again I am sorry for the time this has taken up but these are, as you have raised, very important issues, and we will try and address them as we can.

The NSW Society of Labor Lawyers notes the following:

21. It is submitted that long-standing decisions of the Anti-Discrimination Tribunal (if this is an indicator of application to any proposed change to Section 20 D of the act) do not require that a person is actually incited by the publication (whether oral or written or electronic) : see for example *Harou-Sourdon v. TCN Channel Nine Pty. Limited* (1994) EOC 92-604 and the commentary in Hennessy and Smith entitled "Have We Got it Right? NSW Racial Vilification Laws Five Years on" referred to above and a copy of which is **enclosed.**

22. As noted above, the terms "express or promote" may nonetheless be considered but arguably have already been considered by the Parliament before section 20D was first enacted, and were rejected.

23. The term "incite" might be seen as a "higher" standard than that reflected by the words "promote or express".

24. However the term "incite" appears within relevant international law and to have been derived specifically from those international treaties / standards when first enacted: again see Hennessy and Smith entitled "Have We Got it Right? NSW Racial Vilification Laws Five Years on" referred to above and a copy of which is **enclosed.**

New South Wales Society of Labor Layers
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