

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Supplementary question: Professor Simon Rice and Professor Neil Rees

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

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.

Response by Simon Rice and Neil Rees

1. The proposed amendment combines much of the existing section 20D with the substance of our proposal for change—engaging in conduct on the basis of race which is reasonably likely to cause a person to have a reasonable fear for their own safety or for the security of their property. In effect, it seeks to merge two very different approaches to the problem of clearly identifying race-based conduct which is so serious that it merits criminal prohibition.
2. The existing section 20D is changed in three ways. First, the words ‘promote or express’ replace the word ‘incite’ in the opening sentence, presumably because of the challenges associated with the fact that the word ‘incite’ might involve some examination of the effect of the conduct in question upon the mind of a real or notional by-stander. Secondly, the element of intent has been broadened to include a state of mind similar to recklessness—‘reasonably likely in the circumstances of the case’. Thirdly, the provision now contains three rather than two aggravating aspects of the conduct in question, with most of our suggested wording—‘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 [or associates]’—added to the existing circumstances of aggravation.
3. In our view the proposed amendment is unnecessarily complex and continues to incorporate an approach to serious racial vilification which is out of touch with modern life. Further, it does not appropriately identify and respond to the harm caused by the conduct in question.
4. As we said in a recent newspaper article (‘The freedom to hold and express unpopular opinions is one of our most important rights’, *The Australian*, 19 April 2013), it is not helpful to cast the offence in such a way that the notional ‘usual’ offender is a demagogue on a soap box who proclaims the ills of a particular racial group and urges passers-by to assault

members of the group or damage their property. This tactic of the Nazis and other similar organisations appears, thankfully, to have no adherents in modern Australia.

5. It appears that the harm targeted by the existing section—and by most of the proposed amendment—is the roused passions of the ordinary members of the community who are incited to harm members of a particular racial group by the preaching of the orator. This is not the primary harm caused by threats of race-based violence.
6. In our opinion, the primary harm generated by racial vilification is the social exclusion experienced by members of the racial group who are the targets of the conduct in question. The harm becomes serious enough to merit a response from the criminal law when the vilification causes a person to have a reasonable fear for their own safety or for the security of their property, or for that of their family or associates.
7. We suggest that it is better to focus upon that harm and to remove any notion of a bystander or third party from the offence. In addition, sections 80.2A and 80.2B of the Commonwealth Criminal Code now appear to deal effectively with instances in which a person urges others to commit acts of violence against people because of their race.
8. A simpler way of dealing with the wrong in question is to focus upon the harm in question—social exclusion because of race accompanied with threats of violence. We suggest the following:

‘A person must not [by a public act] engage in conduct on the ground of the race of another person that is intended, or reasonably likely in the circumstance of the case, to cause that other 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 or associates’.
9. In some instances conduct of this nature would fall, theoretically, within existing criminal offences. For example, threatening to assault someone (regardless of their race) will often amount to common law assault. However, prosecutions for threatened rather than actual assaults are rare.
10. Because the offence of serious racial vilification has an important role to play in setting standards, we believe it is important to accept the limited overlap with an existing offence and to describe the offending conduct as clearly as possible. Our proposal would criminalise recent ugly incidents on public transport where there was clearly no attempt to incite anyone but where the perpetrator engaged in behaviour towards strangers on the basis of their race which was reasonably likely in the circumstances to cause a reasonable person to fear for their own safety. Also, bystanders might be encouraged to voice their disapproval of conduct of this nature if the criminal prohibition is clear.
11. We would prefer that the words bracketed in paragraph 8 above—‘by a public act’—be replaced by the words ‘other than in private’ for reasons we canvassed during our appearance before the Committee. We note that this proposal provides more ‘free speech’ protection than the criminal prohibitions in section 24 of the Victorian *Racial and Religious Tolerance Act 2001* and in sections 80.2A and 80.2B of the *Commonwealth Criminal Code* which apply to conduct anywhere.