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LAW & JUSTICE

QUESTIONS ON NOTICE

NSW Legislative Council Inquiry into Racial Vilification Law in NSW

Hearing of 8 April 2013

Response by the Chinese Australian Forum of NSW

1) Placing section 20D of the Anti-Discrimination Act 1977 within the Crimes Act

**CHAIR:** Would you take on notice my question as to what you see the value would be of placing section 20D within the Crimes Act ?

**RESPONSE:**

In the submission dated 8 March 2013, the Chinese Australian Forum highlighted the following recommendation of the Law Reform Commission of NSW (Review of ADA 1975):

Recommendation 96: to remove section 20D from the ADA and relocate the offence of serious vilification in the Crimes Act 1900 (NSW)

The Chinese Australian Forum lists below the benefits of relocating the offence of serious vilification in the Crimes Act 1900 (NSW):

1. To highlight the seriousness of the offence and thereby discourage or suppress serious racial vilification [1] [2]. The state has an obligation to take what steps it can to protect its citizens from harm, in this case both hurt to human dignity and, when vilification incites violence, physical injury [3].
2. To criminalize racial vilification is a clear statement of public policy, to the effect that incitement to racial hatred is not tolerated in contemporary society. [3]
3. The problems arising from the need to obtain the consent of the Attorney General and the need to refer the complaint to the Attorney General within 28 days of receiving the complaint is obviated. The need for senior responsibility in the area of prosecutions need not involve politicians but rather the power be delegated to the Director of Public Prosecutions ("DPP") as in all criminal cases. [2]
4. This would bring NSW in line with Western Australia, the only State where there has been a successful prosecution of serious racial vilification. [4]
5. A criminal provision is an appropriate response to the harm that can be caused by vilifying conduct: 'Racist behaviour hurts individuals, groups and society. Not only does it cause immediate pain to the victims, but it intimidates members of targeted groups from full participation in their own community. Racist abuse against an identifiable group can result in the members of that group being fearful of joining in the political process, and can thus result in disempowerment of the group as a whole' [3]

Section 7.61 of the 1999 NSW Law Reform Commission report 92 (1999) states “the primary rationale for vilification legislation is to protect human rights, in particular the right to live free from hostility and violence. The need for reform of section 20D’s shortcomings was highlighted by Nicholas Cowdery AM QC, a former Director of Public Prosecutions, who stated in 2009 that “section 20D as it stands has failed to produce a single prosecution from 27 cases consented to by the Attorney General over the years”.

The result is that those who incite others to racial hatred, serious contempt and severe ridicule have been able to do so without anyone of them having to face legal consequence intended by section 20D of the ADA.

Harassing or intimidatory behaviour against an individual or group on the ground of race, is not covered by section 20D if the behaviour falls short of a threat of physical harm or does not involve an element of incitement to the wider public.

**The Chinese Australian Forum recommends that “conduct intended to harass on grounds of race” be made unlawful in NSW, as is currently provided for in section 80A of the Western Australian Criminal Code. This was suggested in 2007 by Administrative Decisions Tribunal AP50: “the AD Act would need to be amended to make racial harassment unlawful, just as it makes sexual harassment unlawful” (para 39 Remedies, NSWADTAP 50 (2007) Hennessy N-Magistrate (Deputy President); Conley J - Judicial Member; Lowe A - Non Judicial Member).**

**The existing qualification in section 20D ‘By means which include... physical harm’ should be repealed and substituted by that ‘conduct intended to harass on grounds of race’, as is currently provided for in section 80A of the Western Australian Criminal Code.**

**- End of Response -**

#### **References:**

- (1) Community Relations Commission of NSW
- (2) Ethnic Communities’ Council of NSW
- (3) Professor Simon Rice and Professor Neil Rees
- (4) NSW Jewish Board of Deputies

## 2) Civil Penalty Regime

**Mr DAVID SHOEBRIDGE:** ... You have got the criminal regime that potentially leads to jail, then you have individuals running their own cases, and you have said that is resource intensive and difficult. Then there is a halfway house that would have the State run a set of proceedings against someone for a civil penalty, which might see a fine imposed and a finding of vilification but would not lead to jail. Could you review that submission and see whether or not that civil penalty regime might accommodate some of your concerns and might allow for some of the real issues that you have experienced being responded to by the Anti-Discrimination Act ?

### RESPONSE:

**The Chinese Australian Forum would welcome the addition of a civil penalty to provide disincentive against the committing of public acts of racial vilification, and to provide an additional recourse for victims.**

In particular the submission from Professor Simon Rice and Professor Neil Rees:

We propose that the NSW *Anti-Discrimination Act* be amended to provide for a civil penalty when a person engages in conduct on the basis of race that *causes a person to have a reasonable fear in the circumstances for their own safety or security of property; or for the safety or security of property of their family or associates.*

This proposed wrong differs from the criminal provision in that does not require proof of intent to cause another to fear for their safety or an awareness of the likelihood of this occurring. The essence of the wrong is performing the racially based act that has these consequences.

The Chinese Australian Forum is of the view that victims of racial vilification would in most cases lack the legal knowledge or financial means to commence proceedings against perpetrators of racial vilification. The Chinese Australian Forum agrees with Professor Simon Rice and Professor Neil Rees that the Anti-Discrimination Board should be given the power and the resources to undertake proceedings to investigate and establish the veracity of racial vilification complaints.

The Chinese Australian Forum further notes that the Racial Vilification Act 1996 of South Australia already provide for people who believe they have been vilified to sue for damages under the *Civil Liability Act 1936 (SA)*.

Provision for damages are given in Section 7 of Racial Vilification Act 1996 of South Australia:

### 6—Damages

- (1) A court by which a person is convicted of an offence against this Act may award damages (including punitive damages) against the defendant.
- (2) Damages may be awarded under subsection (1)—
  - (a) if the offence was directed at a specific person—in favour of that person; or

- (b) if the offence was directed at the members of a particular racial group—in favour of an organisation formed to further the interests of the relevant group.
- (3) The total amount of the damages that may be awarded for the same act, or series of acts, cannot exceed \$40 000.

Section 73 of the The Civil Liability Act 1936 of South Australia gives the matching provisions for Racial Victimisation:

- (1) In this section—

"act of racial victimisation" means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include—

- (a) publication of a fair report of the act of another person; or
- (b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions);

"detriment" means—

- (a) injury, damage or loss; or
- (b) distress in the nature of intimidation, harassment or humiliation;

"public act" means—

- (a) any form of communication with the public; or
- (b) conduct in a public place;

"race" of a person means the nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates.

(2) An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment.

(3) In an action for damages for racial victimisation, damages may be awarded to compensate any form of detriment.

(4) The total amount of the damages that may be awarded for the same act or series of acts cannot exceed \$40 000.

(5) In applying the limit fixed by subsection (4), the court must take into account damages awarded by a court in criminal proceedings on convicting the defendant, in respect of the same act or series of acts, of the offence or a series of offences of racial vilification<sup>1</sup>.

(6) Before a court awards damages for an act of racial victimisation, the court must—

- (a) take reasonable steps to ensure that all persons who may have been harmed by the act are given a reasonable opportunity to claim damages in the proceedings; or
- (b) take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court.

The Chinese Australian Forum notes that the test for racial victimization in South Australia is simply that of a “detriment”, a concept recommended as the test for direct discrimination to replace the “comparability test” by the NSW Law Reform Commission in its Report 92 (1999):

### **Recommendation 3**

The concept of direct discrimination should be redefined:

- to cover conduct causing detriment or disadvantage on the ground of an irrelevant characteristic [**Draft Anti-Discrimination Bill 1999: cl 9, 12**];
- to include in conduct, a refusal or omission to act [**Draft Anti-Discrimination Bill 1999: cl 11**]; and
- to clarify what attributes may constitute a “characteristic” [**Draft Anti-Discrimination Bill 1999: cl 16, 17, 18**].

**Note:** See section 6 of the *Racial Vilification Act 1996*

- **End of Response** -

The Chinese Australian Forum of NSW was represented by:

1. President – Patrick Voon
2. Vice President – Kenrick Cheah
3. Secretary – Peter Chan
4. Committee Member - Chesney O'Donnell (in attendance)

