Lawyers for the People

AUSTRALIAN LAWYERS ALLIANCE

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The Director
Standing Committee on Law and Justice
Legislative Council, Parliament House
Macquarie Street Sydney NSW 2000

24 April 2013

By email: lawandjustice@parliament.nsw.gov.au
Law@parliament.nsw.gov.au

Dear Sir/ Madam,

ALA Submissions in response to Racial Vilification Law in New South Wales

We thank the Standing Committee on Law and Justice for the opportunity to give evidence regarding this inquiry.

As requested we attach to this email a copy of the corrected transcript. Please note that corrections are marked with an underline and highlighted in yellow for your convenience.

1. Question on notice 1 – The Hon Peter Primrose - If I go to submission 36, which I do not expect you have read, Professor Rice and Professor Rees recommended in their submission to the committee that the criminal offence of racial vilification should be this:

   "...an act engaged in on the basis of race, that is intended, or is reasonably likely, to cause a person to have 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."

> Basically, there are two parts to the question: Do you think that is viable in terms of New South Wales, and what would be the ramifications, if any, for freedom of speech, of adopting that type of definition?

Broadly, we agree with the form and submission made by Professor Rice and Rees noting the ALA's submissions concerning increasing the maximum sentence, which we maintain is paramount to enforcing Serious Racial Vilification in New South Wales.

Freedom of Speech principles derive from two sources in Australia, which are:

a. The International Covenant on Civil and Political Rights (ICCPR)
b. The Commonwealth Constitution.

Each of these instruments deal with the notion of Freedom of thought, conscience, religion, opinion and expression at an international level and the freedom of political communication at a national Constitutional level.

At the outset, the ALA is of the view that speech or communication likely to incite racial hatred and amount to serious racial vilification involving violence or widespread social disruption would far outweigh, both from a human rights perspective and a public order or interest perspective, general rights of freedom of speech or political communication.

From a constitutional point of view, the right to freedom of political communication is a common law notion read into the Constitution i.e. an implied right and should remain in that form and, therefore, a matter for the judiciary to balance notions of this freedom with those of serious racial vilification. In saying this, the ALA believes that amendments to serious racial vilification would not present any conflict with the Constitution, and implied rights of political communication, in that it would not infringe any rights involved with the election of government in which the right to freedom of political communication derives[1].

[1] See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 generally.

The ALA makes this submission on the basis that the rights to freedom of political communication, at a Constitutional level, are limited to communication that is undertaken in political matters. Serious racial vilification is not a matter of politics and is a crime that involves the incitement of violence or perceived violence against an individual or group because of their race and therefore elicits a distinct difference that we submit is not capable of infringing on any implied constitutional rights to political communication.

Therefore, any limitation of notions of freedom of speech, if any, would be those rights imparted on the residents of NSW courtesy of the ICCPR.

The Standing Committee is drawn to articles 18 and 19 of the ICCPR where there are notable exceptions to upholding rights concerning the freedom of speech generally. These include:

- Under Article 18(3) – *"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of other."*
- Under article 19 (3)(a)&(b) – *"The exercise of the rights provided for in paragraph 2 [freedom of expression] of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals."*

Furthermore, there is a specific prohibition under article 20 of the ICCPR, that creates an obligation on Australia as a signatory, which includes the NSW jurisdiction, to prohibit by law any advocacy of national, racial or religious hatred capable of inciting discrimination, hostility or violence.

The ALA therefore submits that from an international law perspective it is imperative that notions of freedoms concerning speech are limited where that speech may incite serious racial vilification. Therefore, by widening the scope of section 20D and encouraging prosecution of those who engage in serious racial vilification is paramount to ensuring the moral fabric of NSW and to ensuring public safety and order.

The ALA believes that the submission of Professor Rice and Rees concerning a re-draft of section 20D is appropriate in balancing these notions and does not conflict with any associated constitutional and/or international obligations concerning the freedom of speech.

2. Question on notice 2 – Mr David Shoebridge – perhaps one of the reasons why we are not getting prosecutions under section 20D is because if you have a threatened physical violence you effectively have an assault, and if race was part of the motivations of the assault that is an aggravated factor under the Sentencing Act, in section 22A I think. One of the sub-clauses has race as an aggravating factor. Do you know of any study of the extent to which that aggravating factor has been used?

To the knowledge of the ALA there has been no study that has taken place as to the extent the aggravating factor in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (CSPA) has been used in NSW.

By way of background, the sentence aggravating provisions came into operation in February 2003. Since that time there have been some notable cases in the Supreme Court and Court of Appeal concerning its use and application, which are summarized below.

a. *R v MAH* [2005] NSWSC 871

This was matter where a male under the age of 18 was convicted of murder and sentenced to 22 years imprisonment with a non-parole period of 16 years and 6 months. The murder was committed in the company of another. During sentencing submissions it was raised that the murder was motivated by the hatred of the victim and should therefore apply the

meaning in section 21A(2)(h) of the CSPA. The court found that the purpose of the section was to punish those who committed an offence that was motivated by hatred for a group of people as opposed to hatred towards an individual and that any submission to the contrary appears misconceived.

In applying the principles in this case it would appear to the ALA that the Supreme Court has interpreted these provisions in light of the parliamentary intention that these provisions would apply to serious racial vilification in considering maximum penalties.

b. *Aslett v The Queen* [2006] NSWCCA 49

This was a criminal appeal based on a home invasion in the company of others where 3 of the 4 accused had sexually assaulted a 16-year-old girl. Among other points of appeal the Appellant submitted that elements of the sexual offences were erroneously treated as aggravating factors within the meaning of section 21A. On sentencing at first instance findings were made that the provisions of section 21A applied because the victims were selected because of their race, namely that "Asians tended to keep money and jewelry in their homes."[2] On appeal it was found that there was no evidence to suggest any hatred or prejudice towards the victims because of their race but because the convicted appellant identified individuals of Asian decent as having valuables in their homes that might be worth stealing.

It is therefore clear that the Court of Appeal would need to see evidence of hatred or prejudice towards individuals solely based on their race and not elements associated with perceptions of their race, which is in line with the parliamentary intention of section 21A.

The ALA therefore submits that the Supreme Court and Court of Appeal recognize the aggravating provisions in section 21A as applying to those situations where crimes are committed motivated by hatred and prejudice. The ALA therefore supports the current

[2] *Aslett v The Queen* [2006] NSWCCA 49, 124.

legislative regime concerning sentencing procedure that would apply in cases of serious racial vilification. In saying this, the ALA re-asserts its position that the punishment for serious racial vilification should be increased.

We thank the Standing Committee on Law and Justice for this opportunity to provide our submissions on this very important issue.

If we may be of any further assistance in your inquiry please do not hesitate to contact us.

Yours faithfully,

Joshua Dale
Chair, Human Rights Sub-Committee
Australian Lawyers Alliance