

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: FamilyVoice Australia

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Submission

on

Racial Vilification Law in New South Wales

to the

Law and Justice Committee

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1. Introduction

On 17 December 2012 the Premier of New South Wales, noting that there had been no successful prosecutions to date under section 20D of the *Anti-Discrimination Act 1977* which provides for an offence of “serious racial vilification”, referred to the Law and Justice Committee of the Legislative Council an inquiry into racial vilification law in NSW, in particular:

- *the effectiveness of section 20D of the Anti-Discrimination Act 1977 which creates the offence of serious racial vilification;*
- *whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and*
- *any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech.*

The Committee has invited submissions which are due by 8 March 2013. The Committee is due to report by 31 May 2013.

2. Equal treatment under the law

The right to equal treatment by the law is a fundamental principle of common law.

The provision of specific criminal offences that only differ from more general offences by including a requirement that the offence was motivated by hatred or prejudice towards a particular group breaches this principle, by treating crimes of the same nature differently when committed against certain people than when committed against other people.

An exception to this may be justifiable in the case of groups based on age (e.g. children or the aged) or condition of dependence (e.g. the intellectually disabled) where it is obvious that the law can justly provide a more serious penalty in order to protect those who by their very nature cannot so easily protect themselves.

But this is not necessarily true of persons distinguished by race, religion or sexual orientation. In creating separate offences based on race or similar grounds there is a danger that offences without that particular motivation may be treated less seriously.

Such offences may involve an equal amount of hate and viciousness – but the hate may be directed against a particular individual or against any available victim without selection on the basis of association with a particular group of persons.

Do we really want to treat offences that lack a particular motivation as in any way less serious? But this necessarily follows from treating all offences that do involve this factor as a separate class of offences.

The *Victorian Sentencing Manual* has some useful observations relevant to this matter.

Absence of a clear motive does not diminish moral culpability. Nor does it reduce the need for specific and general deterrence, especially where those considerations are otherwise indicated: Avent 22/12/1995 CA Vic; DPP v Cook (2004) 141 A Crim R 579; [2004] VSCA 11.¹

And on offences with more serious consequences for the victim:

in cases where the consequences of the offending are particularly dire, the offender's motive may be of little or reduced weight.²

It is useful to consider section 20D of the *Anti-Discrimination Act 1977* in the light of this general principle of equal treatment under the law.

Recommendation 1:

In reviewing section 20D of the Anti-Discrimination Act 1977, due regard should be given to the fundamental right of all people to equal treatment by the law.

3. Freedom of speech

Freedom of speech or expression is considered one of the most cherished freedoms of democratic society. In the political arena, politicians understand that a “right not to be offended” would stifle legitimate debate and limit political freedom.

Speech in Australia has long been legitimately restricted by laws on such matters as defamation, sedition, obscenity, commercial confidentiality and national security. Speech may involve the expression of personally held beliefs, which may or may not be supported by evidence, and which may be controversial and lead to vigorous debate.

The essence of freedom of expression is not merely the freedom to express ideas that are comfortable. It is the freedom to disagree, to dispute or to cause controversy. The *International Covenant on Civil and Political Rights* (ICCPR) recognises freedom of expression as a right in Article 19:

- 1. Everyone shall have the right to hold opinions without interference.*
- 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
- 3. The exercise of the rights provided for in paragraph 2 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.*

The restrictions on freedom of expression set out in sections 3(a) and (b) are sufficiently limited in scope to preserve freedom to engage in vigorous or even hostile debate.

Respect for the reputations of others is adequately protected in Australia by defamation laws, which since 2005 have been uniform. An important element of these uniform defamation laws is the provision for a defence against a complaint of defamation that the matter was “substantially true”.³ This rightly affirms truth as more important than reputation or offence.

Protection of national security and public order are essential for the preservation of civilised society and in Australia that protection is provided by the crime of sedition.⁴ Importantly, the law defines sedition in terms of the *action*, such as urging the overthrow of the government or urging violence

within the community, *irrespective of whether the action is associated with race, religion, nationality or political opinion.*⁵ This rightly affirms the *action* as primary, not the characteristics of those involved.

Recommendation 2:

In reviewing section 20D of the Anti-Discrimination Act 1977, due regard should be given to the fundamental right of freedom of speech and the need for the law to prohibit the action of inciting violence in the community, irrespective of whether the action is associated with race, religion, nationality or political opinion.

4. Section 20D: Serious racial vilification

Section 20D of the *Anti-Discrimination Act 1977* provides for the offence of serious racial vilification as follows:

(1) A person shall not, by a public act, 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 by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

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.

This section is dealing with a criminal offence punishable by imprisonment. It is intended to address behaviour which involves threatening or inciting physical harm to persons or property.

It is quite distinct from the provision in section 20C of the Act which makes it unlawful:

to 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.

The acts of threatening or inciting physical harm to persons or property are reprehensible and ought to be punished by law regardless of the existence or otherwise of a racial component.

Any person who is made to fear physical harm for any reason, whether because of race, religion, sexuality or simply because another person has taken a particular dislike to them, deserves to be protected by the law.

New South Wales law does provide such protection to all persons.

Section 20D of the *Anti-Discrimination Act 1977* is a redundant provision as the matters it covers are dealt with in a more comprehensive manner – protecting all persons in new South Wales - in the *Crimes Act 1900* and the *Crimes Prevention Act 1916*.

4.1 Threatening physical harm to persons

Section 61 of the *Crimes Act 1900* provides for common assault:

Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.

Common assault includes acts which threaten a person with violence.

In *Barton v Armstrong* [1969] 2 NSWLR 451, Taylor J observed:

Threats which put a reasonable person in fear of physical violence have always been abhorrent to the law as an interference with personal freedom and integrity, and the right of a person to be free from the fear of insult. If the threat produces the fear of apprehension of physical violence then I am of opinion that the law is breached, although the victim does not know when that physical violence may be effected.

The law on common assault would seem to cover, and provide a heavier penalty for acts which are addressed by section 20D (1) of the *Anti-Discrimination Act 1977* involving threatening physical harm to persons.

Prosecutions under section 61 of the *Crimes Act 1900* would have the advantage of not needing to prove the element of incitement of hatred, serious contempt for or severe ridicule of a person or group on the grounds of race. It should therefore be easier to establish the offence.

Additionally section 31 of the *Crimes Act 1900* provides a penalty of 10 years for sending a document containing a threat to kill or inflict bodily harm on any person.

4.2 Threatening physical harm to property

Section 199 of the *Crimes Act 1900* provides for the offence of threatening physical harm to property as follows:

(1) *A person who, without lawful excuse, makes a threat to another, with the intention of causing that other to fear that the threat would be carried out:*

(a) *to destroy or damage property belonging to that other or to a third person, or*

(b) *to destroy or damage the first-mentioned person's own property in a way which that person knows will or is likely to endanger the life of, or to cause bodily injury to, that other or a third person,*

is liable to imprisonment for 5 years.

(2) *A person who, during a public disorder and without lawful excuse, makes a threat to another, with the intention of causing that other to fear that the threat would be carried out:*

(a) *to destroy or damage property belonging to that other or to a third person, or*

(b) *to destroy or damage the first-mentioned person's own property in a way which that person knows will or is likely to endanger the life of, or to cause bodily injury to, that other or a third person,*

is liable to imprisonment for 7 years.

This offence seems to cover any actions that would be caught by section 20D (1) (a) in relation to threats to property.

It carries more severe penalties and does not require proving the incitement of hatred, serious contempt for or severe ridicule of a person or group on the grounds of race. It should therefore be easier to establish the offence.

4.3 Incitement offences

The *Crimes Prevention Act 1916* section 2 provides that:

If any person incites to, urges, aids, or encourages the commission of crimes or the carrying on of any operations for or by the commission of crimes that person shall be guilty of an offence against this Act.

Section 4 provides for a penalty of six months imprisonment for this offence.

This would cover any offence that could be committed under section 20D(1)(b) of the *Anti-Discrimination Act 1977* and carries an equivalent penalty. Prosecutions under this provision would not need to prove the incitement of hatred, serious contempt for or severe ridicule of a person or group on the grounds of race. It should therefore be easier to establish the offence.

Recommendation 3:

Section 20D of the Anti-Discrimination Act 1977 is redundant as the offences it provides are covered by provisions in sections 31, 61 and 199 of the Crimes Act 1900 and section 2 of the Crime Prevention Act 1916. Prosecutions under these provisions should be easier to prove as they do not require establishing the element of an act which incites “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”.

Section 20D should therefore be repealed.

5. Law enforcement

The *Sydney Morning Herald* reported on 13 January that: ⁶

The inquiry was ordered by the Premier, Barry O'Farrell, who is concerned there have been no successful criminal prosecutions in the history of the NSW laws and that they have fallen out of step with community expectations.

It further reported that:

According to figures supplied by the NSW Anti-Discrimination Board, 27 complaints have been referred by the board for criminal prosecution since 1998 the period for which records are available. But none were prosecuted as the Director of Public Prosecutions did not feel the burden of proof required by the legislation would have been achieved.

The terms of reference for this inquiry are restricted to consideration of section 20D of the *Anti-Discrimination Act 1977*. However Premier O'Farrell's concern, about whether criminal prosecutions are meeting community expectations, raises broader questions, such as:

- How many successful prosecutions have been made for related offences under the *Crimes Act 1900* and the *Crimes Prevention Act 1916*?
- Could the 27 complaints referred by the NSW Anti-Discrimination Board to the Director of Public Prosecutions have been prosecuted under the *Crimes Act 1900* and the *Crimes Prevention Act 1916*?
- Has the NSW Anti-Discrimination Board been too liberal in referring for prosecution complaints that lack substance?
- Has the Director of Public Prosecutions been too reticent to prosecute complaints?

A further inquiry could illuminate the effectiveness of current laws on threats of violence against persons or property, irrespective of the person or group targeted in the threat.

Recommendation 4:

A further inquiry into the effectiveness of current laws on threats of violence, irrespective of the person or group targeted in the threat, should be considered. Any such inquiry should focus on the action of incitement to violence against persons or property and not on the characteristics of the target person or group.

6. Endnotes

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1. Judicial College of Victoria, *Victorian Sentencing Manual*, Section 9.10.2: <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#5314.htm>
 2. *Ibid.*, Section 9.10: <http://www.judicialcollege.vic.edu.au/eManuals/VSM/index.htm#5316.htm>
 3. For example, the *NSW Defamation Act 2005*, s 26: “It is a defence to the publication of defamatory matter if the defendant proves that: (a) the matter carried ... imputations ... that are substantially true...”
 4. *Cth Criminal Code Act 1995*, s 80.2.
 5. *Ibid.*, s 80.2(5).
 6. Sean Nicholls, "O'Farrell moves to strengthen hate laws", *Sydney Morning Herald*, 13 Jan 2013.