Submission No 36

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

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Submission to the Legislative Council Law and Justice Committee *Inquiry into racial vilification law in NSW*

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Submission

On the basis of the following analysis, it is our submission that NSW should (1) legislate to prohibit racial vilification in terms that are different from the current provision, and (2) introduce a civil penalty provision..

Specifically, we submit that the criminal prohibition ought be against:

> an act, engaged in on the basis of race, that is intended, or is reasonably likely, to cause 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

and that it should be part of the NSW *Crimes Act.*

We submit that, as well, NSW should enact a new law providing a civil penalty for the wrong of racial vilification.

Background to section 20D

NSW is renowned as enacting 'the first law [anywhere] that criminalized the incitement of hatred, serious contempt, or severe ridicule of person(s) on the basis of race or membership in a group by threatening harm or inciting others to threaten harm'.[1]

Section 20D was inserted into the *Anti-Discrimination Act* (along with the other racial vilification provisions) by amending legislation in 1989.[2] An amendment in 1994 increased the maximum number of penalty units.[3]

Speaking to the 1989 amending Bill, the Attorney-General the Hon John Dowd said that the Government had 'drawn from the International Covenant on Civil and Political Rights in its approach to this issue'; he referred to articles 19 and 20, and said that '[i]t is in the spirit of this convention that the Government introduces this Bill'.[4] An earlier Bill had not created a criminal offence, and the new Bill was formulated by the government 'after general consultations with various community organizations by the Anti-Discrimination Board and a review by the Hon. J. M. Samios, M.L.C., of international legislation outlawing racial hatred'.[5]

Mr Dowd noted that 'The requirement for intention in the offence of serious racial vilification sets [s20D] apart from proposed section 20C and … ensures that prosecution and conviction will be limited to only very serious cases of racial vilification [which] may only be prosecuted … with the Attorney General's consent'.[6]

The Bill had 'the bipartisan support of the Australian Labor Party, the Australian Democrats and Call to Australia [excluding the Hon. Marie Bignold]'.[7]

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1 John C. Knechtle, 'When to Regulate Hate Speech', (2005-2006) 110 Penn St. L. Rev. 539 at 541, citing Sharyn Ch'ang, 'Legislating Against Racism: Racial Vilification Laws in New South Wales', in Sandra Coliver (education), *Striking A Balance: Hate Speech, Freedom Of Expression And Non-discrimination*, 1992 at 90.

2 *Anti-Discrimination (Racial Vilification) Amendment Act 1989*, Sch 1 (1).

3 *Anti-Discrimination (Amendment) Act 1994*, Sch 1 (2).

4 NSW Legislative Assembly Hansard, pages 7488-94, May, 1989.

5 NSW Legislative Assembly Hansard, pages 74894, May, 1989.

6 NSW Legislative Assembly Hansard, pages 74904, May, 1989.

7 The Hon J M Samios, NSW Legislative Council, pages 7840, 10 May, 1989.

Section 20D in the context of international human rights law

Section 20D implements one of Australia's international human rights obligations; one that, as it happens, Australia itself does not yet recognise and has not implemented.

Two international human rights treaties require the criminalising of race hate speech, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

The ICCPR (Article 20) requires a state to impose a legal prohibition against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The ICERD (Article 4(a)) requires a state to make it an offence punishable by law to disseminate ideas based on racial superiority or hatred, incitement to racial discrimination, as well to engage in acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

The UN Human Rights Committee has long been of the view that such restrictions on freedom of expression are compatible with the right of free expression (ICCPR Article 19), as that right 'carries with it special duties and responsibilities'.[8]

Although Australia is a party to both these treaties, its obligations are subject to reservations in relation to ICCPR Article 20 and ICERD Article 4(a).

When it ratified the ICERD in 1975 Australia said that it was 'not then in a position to criminalise racial vilification and incitement to racial hatred', and in its most recent report to the CERD Committee Australia repeated this claim.[9] The Committee has repeatedly expressed its concern about the reservation to Article 4(a) and noted that acts of racial hatred are not criminalized throughout Australia as required by the Convention. In its most recent observations on Australia, the Committee reminded Australia that article 4 is mandatory, and recommended that Australia remedy the absence of legislation, give full effect to article 4, and withdraw its reservation.[10]

When it ratified the ICCPR in 1980 Australia said that its understanding of Article 20 is that it covers the same conduct as is addressed in article 19 (free speech with special duties and responsibilities). Australia did not address the fact of it reservation in its most recent report under the ICCPR, and the UN Human Rights Committee has since identified the reservation as an issue for Australia to address, saying that it wants Australia to indicate whether it 'envisages withdrawing its reservations to the

8 UN Human Rights Committee, General Comment No. 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Article 20), para. 2, CCPR/C/21/Add.2 (July 29, 1983).

9 *Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination*, Commonwealth of Australia 2009, [26].

10 Committee on the Elimination of Racial Discrimination Seventy-seventh session – 27 August 2010 Consideration of reports submitted by States parties under article 9 of the convention Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia CERD/C/AUS/CO/15-17.

Covenant' and, if not, 'why it does not intend to do so and how the reservation to article 20 is compatible with the object and purpose of the Covenant'.[11]

In reporting on its human rights obligations, Australia relies on the fact New South Wales, along with some other states and territories, has enacted legislation that makes vilification an offence.[12]

Federal activity

We have noted above Australia's failure to accept the international obligation to criminalise race hate speech, and its reliance on measures taken in states and territories, such as s 20D.

The *Racial Hatred Act*, which amended the *Racial Discrimination Act* by inserting the racial vilification complaint provisions in Part IIA, had at one stage included provisions that would have criminalised race hate speech and fulfilled Australia's international obligations in this regard. The Bill would have inserted into the *Crimes Act 1914* (Cth) 'Part IVA-Offences Based On Racial Hatred'; modelled on laws in Canada, the UK and New Zealand, this would have made it a criminal offence to do an act which is reasonably likely to incite racial hatred.[13]

A majority of the Senate Legal and Constitutional Legislation Committee recommended that the Bill be enacted,[14] however, the criminal provisions were removed on 'free speech' grounds' when the Bill was amended in the Senate,[15] and have not been revisited.

Comparable legislation

Australian jurisdictions

The language of s 20D (the 'NSW model'[16]) is used in the equivalent provisions in Queensland (s 131 *Anti-Discrimination Act* (Qld)), South Australian (s 4 *Racial Vilification Act 1996* (SA)), and ACT (s 67 *Discrimination Act* (ACT)), and in one of two vilification prohibitions in Victoria (s 24(1) *Racial and Religious Tolerance Act 2001* (Vic)); he second vilification prohibition in Victoria (s 24(2)) does not require aggravating conduct, and the reasons for the distinction between s 24(1) and (2) are not readily apparent. Tasmania has only a civil complaint provision, with similar effect to that part of the NSW model (ss 19 and 55, *Anti-Discrimination Act* (Tas)).

The Western Australian *Criminal Code* proscribes specified forms of racially vilifying conduct, some of which require proof of intent[17] and some of which do not.[18] The

11 CCPR /C/ AUS /Q/ 6 Human Rights Committee List of issues prior to the submission of the sixth periodic report of Australia (CCPR/C/ AUS /6) , adopted by the Committee at its 106 th session (15 October – 2 November 2012), 5.

12 *Combined Fifteenth, Sixteenth and Seventeenth Periodic Reports of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination*, Commonwealth of Australia 2009, [26].

13 see generally Anne Twomey, 'Racial Hatred Bill 1994', *Bills Digest*, Parliamentary Research Service, Department of the Parliamentary Library, Vol. 174 (1994).

14 Report Racial Hatred Bill 1994, 7 March 1995.

15 see generally L McNamara, 'The merits of racial hatred laws: beyond free speech' (1995) 4(1) *Griffith Law Review* 29.

16 Gareth Griffith, 'Racial vilification laws: the *Bolt* case from a State perspective', e-brief 14/2011, NSW Parliamentary Library Research Service, page 3.

17 *Criminal Code* (WA) ss 77, 79, 80A, 80C.

18 *Criminal Code* (WA) ss 78, 80, 80B, 80D.

Code has eight separate offences that deal with racial vilification. Western Australia is the only jurisdiction to rely only on a criminal provision, and to not have a concurrent civil remedies provision.

Section 80 of the Commonwealth *Criminal Code* prohibits intentionally urging the use of force or violence against a group of people, or a member of a group, when 'the target group is distinguished by race, religion, nationality, national or ethnic origin or political opinion', if it is intended that violence or force will occur, and the use of violence or force will 'threaten the peace, order and good government of the Commonwealth'.

UK and Canada and NZ

In different terms, each of Canada, the United Kingdom and New Zealand criminalise racial vilification.

Canadian law criminalises the public incitement, or the promotion, of hatred against certain groups including groups distinguished by race (s 319 *Criminal Code* (Canada) RSC 1985, c. C-46; see Appendix A). The legislation is unchanged since Luke McNamara described it in 1994.[19] The provision is essentially the same as the NSW provision, except that an additional element is that the incitement 'is likely to lead to a breach of the peace'.

United Kingdom law criminalises public conduct which is threatening, abusive or insulting if it is intended, or in the circumstances is likely, to stir up racial hatred (ss 18 and 19 *Public Order Act 1986* (UK)). The provisions differ from the NSW provision in that they require proof of intent. Baroness O'Neill, Chair of the Equality and Human Rights Commission, has suggested that the word 'insulting' be removed there is 'evidence that police are using this power to arrest and fine people for exercising their fundamental human right to freedom of expression'.

New Zealand law criminalises public conduct which is threatening, abusive, or insulting if it is likely to excite hostility or ill-will against, or bring into contempt or ridicule of a group of persons in New Zealand on the ground of the race (s 131 *Human Rights Act 1993* (NZ)). The provision is essentially the same as the NSW provision. Before the *Human Rights Act* provision, incitement to racial disharmony was a criminal offence under the *Race Relations Act 1971* (NZ)[20].

Under-use of racial vilification offence provisions

In all four jurisdictions we have referred to (NSW, Canada, UK and NZ), the consent of the Attorney-General is necessary to commence a prosecution, although in NSW the decision is made by the DPP under delegation from the Attorney-General.[21] . The UK Crown Prosecution Service has published its checklist for prosecuting racist or religious crime.[22]

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19 Luek McNamara, 'Criminalising Racial Hatred: Learning From the Canadian Experience', (1994) 1(1) *Australian Journal of Human Rights* 198.

20 See Paul Spoonley, 'Inciting racial disharmony in New Zealand', (1978) 7(1) *Journal of Ethnic and Migration Studies*, 111

21 Pursuant to s11(2) of the *Director of Public Prosecutions Act*, 1986 (NSW), *Government Gazette* 10 July 1990: L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology, 2002, 140.

22 <ww.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a22>.

In all jurisdictions, prosecutions are rare. For example, in 2004-7, '84 cases of incitement to racial hatred [were] referred to the [UK] Crown Prosecution Service; of these 84 only four proceeded to prosecution and only two were successful'.[23] Notoriously there have been no prosecutions, successful or otherwise, in NSW.

There has been only one reported conviction in Australia, under the original provisions of the West Australian *Criminal Code* in 2005, for a 'high profile graffiti attack in which swastikas and slogans including 'Hitler was right' and 'Asians Out' were painted on a synagogue and Chinese restaurant', and possession of racist material'.[24] More recently, charges were dismissed in the prosecution of a young aboriginal woman[25] who 'allegedly called a Caucasian woman a 'white slut', among other things'; the court is reported to have said 'racial vilification laws were intended to deal with severe abuse, and not petty name-calling'.[26].

The difficulty of prosecution has been attributed variously to the requirement that the Attorney-General consents to a prosecution, the need to prove intent, the absence of a definition of 'hatred', a victim's unwillingness to proceed, inability to identify the offender, the pursuit of alternative charges, and a concern that a prosecution will give publicity to racist groups.[27]

In McNamara's view, the 'limited use of anti-hate laws in Canada does suggest that there may be a significant weakness in the capacity of existing legal procedures to respond effectively to the impact of hate propaganda and racial vilification'. He concludes that 'a legal response based exclusively, or even primarily, on the criminalisation model, is inadequate'.[28]

Whether to criminalise racial vilification

Whether to criminalise racial vilification is not clearly answered 'yes' or 'no'; the answer will depend on the terms in which any prohibition is proposed. Before looking at ways in which a prohibition might be expressed, we briefly review general arguments for and against criminalising racial vilification.[29] Arguments for racial

23 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at 349.

24 Katharine Gelber,' The False Analogy between Vilification and Sedition', (2009) 33 *Melbourne University Law Review* 270.

25 *The Australian*, 15 September 2006.

26 http://www.abc.net.au/am/content/2006/s1741596.htm

27 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at 357-8, 359; Anne Twomey, 'Racial Hatred Bill 1994', *Bills Digest*, Parliamentary Research Service, Department of the Parliamentary Library, Vol. 174 (1994); S Reid and R Smith, 'Regulating Racial Hatred', *Trends & Issues In Crime And Criminal Justice*, No.79 February 1998, Australian Institute of Criminology, 5; L McNamara, 'Criminalising Racial Hatred: Learning From the Canadian Experience', (1994) 1(1) *Australian Journal of Human Rights* 198, citing E. Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 *Windsor Yearbook of Access to Justice* 46 at 52; L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology, 2002, 199 citing Ch'ang.

28 L McNamara, 'Criminalising Racial Hatred: Learning From the Canadian Experience', (1994) 1(1) *Australian Journal of Human Rights* 198.

29 See also Jacqui Seemann 'Racial Vilification Legislation and Anti-Semitism in NSW: The Likely Impact of the Amendment' (1990) 12 *Sydney Law Review* 596, 612-614.

vilification laws generally have been canvassed by the NSW Law Reform Commission and other authors.[30]

Arguments against criminalising racial vilification

First among reasons not to criminalise racial vilification is that it would constrain freedom of expression. Any prohibition on vilifying conduct is a constraint on freedom of expression, and ought to be assessed carefully for that reason.[31] At the same time, constraints on freedom of expression are unremarkable; for example, general law confidentiality obligations constrain freedom of speech, and there are numerous statutory constraints, such as *Defamation Act 2005* (NSW); s 4 *Summary Offences Act* 1988 (NSW); s 17 *Workplace Surveillance Act 2005* (NSW); s 27(5) *Plant Breeder's Rights Act 1994* (Cth); and Part 3-1, Div 1, *The Australian Consumer Law*. As we noted above, international human rights law recognises the legitimacy of restrictions on freedom of expression. So, although freedom of expression is a consideration when deciding whether to criminalise racial vilification, this 'free speech sensitivity'[32] is not a bar, and the real issue is finding the right balance between competing interests when determining the extent of the proposed constraint.

Secondly, it is suggested that the difficulty of mounting a successful prosecution is a consideration. There is a risk that the legislation will become discredited if it is not used, and will lose its status as a strong statement of public policy. But McNamara points out that exclusive reliance on criminalisation is inadequate; an offence provision must be seen as one part of a larger strategy on the part of the state to protect people for the harm of racial vilification, which includes a civil complaints mechanism, public education programs, political leadership, affirmative employment policies and community development programs.

Thirdly, it is possible that court proceedings to enforce a prohibition on vilifying conduct will give exposure to the very views that the legislation would suppress, particularly if the proceedings 'make martyrs out of the leaders of these groups who might be imprisoned for expressing their racist views and subsequently come to be seen as victims of an intolerant society'.[33] This is a risk whenever a person's conduct is the subject of a public hearing. The state's rejection of the legitimacy of racist views is on display at the same time, and to the extent that court proceedings promote views and perceptions views, they do so as much for prosecutors and victims of the conduct as they do for perpetrators.

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30 Review of the NSW Anti-Discrimination Act 1977 (NSW), 1999, Vol 1, pages 515-519; and see Ben White, The Case for Criminal and Civil Sanctions in Queensland's Racial Vilification Legislation (1997) 13 *QUTLJ* 235 at 242-244; Dan Meagher, 'So Far So Good?: A Critical Evaluation Of Racial Vilification Laws In Australia', (2004) 32 *Federal Law Review* 226.

31 See, eg Katharine Gelber, 'Hate Speech in Australia: Emerging Questions', (2005) 28(3) *University of New South Wales Law Journal* 861.

32 L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Institute of Criminology, University of Sydney, 2002, pp 304.

33 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at 359; and see L McNamara, 'Criminalising Racial Hatred: Learning From the Canadian Experience', (1994) 1(1) *Australian Journal of Human Rights* 198 citing E. Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" (1991) 11 *Windsor Yearbook of Access to Justice* 46 at 52.

Fourthly, McNamara suggests that criminalising vilification can lead to individualising and marginalising the advocates of race hate. Because 'only the most 'serious' cases are prosecuted under criminal statutes, the defendants' actions can be marginalised and considered to be distinct from the attitudes and conduct of others in a given society'.[34] This is the case for the prosecution of almost any serious charge: in prosecutions for, say, murder, arson and massive fraud cases, defendants' actions can be similarly marginalised and considered to be distinct from the attitudes and conduct of others in a given society. The very point of the prosecution is to reinforce the prohibited behaviour as both aberrant and unacceptable in society. The marginalising of the defendant is not a reason to not prosecute, but it is a reason to see the prosecution in the larger context of changing social attitudes.

Finally, it is suggested that prohibiting the incitement of racial hatred can have a tempering effect on those promoting racist views.[35] While on the one hand it is 'desirable that these groups realise that abusive and offensive speech against a particular race is unacceptable in modern society', on the other the criminal sanctions encourage 'racist groups to continue to disseminate poisonous ideas under the guise of moderate and reasonable debate'. This argument seems speculative, and is answered by pointing out that the prohibition of vilification is concerned with the likely effect of the conduct, not with the manner in which the conduct is carried out; 'poisonous ideas' are poisonous ideas no matter how moderately expressed, and will be caught by a prohibition.

Arguments for criminalising racial vilification

First among reasons to consider criminalising racial vilification is to suppress serious vilification. The fact that there have been no prosecutions under the law does not establish that the law is not effective. To the contrary, an available inference is that the existence of a law that bans serious vilification has successfully warned people not to engage in serious vilification. This would overstate the case, as there has been conduct that, in the judgement of the Anti-Discrimination Board at least, could be characterised as serious vilification. But without long term evaluation,[36] against clearly stated legislative goals,[37] it is notoriously difficult to evaluate the success of legislation in achieving change in behaviours and conduct.[38]

Even in the absence of any empirical assessment of the effect in the community of criminalising racial vilification, the state has an obligation to take what steps it can to

34 L McNamara, 'Criminalising Racial Hatred: Learning From the Canadian Experience', (1994) 1(1) *Australian Journal of Human Rights* 198; L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology, 2002, 244-249.

35 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at 358; Anne Twomey, 'Racial Hatred Bill 1994', *Bills Digest*, Parliamentary Research Service, Department of the Parliamentary Library, Vol. 174 (1994).

36 S Reid and R Smith, 'Regulating Racial Hatred', *Trends & Issues In Crime And Criminal Justice*, No.79 February 1998, Australian Institute of Criminology, 5.

37 Twomey, 'Racial Hatred Bill 1994', *Bills Digest*, Parliamentary Research Service, Department of the Parliamentary Library, Vol. 174 (1994).

38 See eg A Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition', (1985) 9 *Legal Stud. F*. 23; John D Donohue, 'The Legal response to Discrimination: How does Law Matter?', in Bryant Garth and Austin Sarat (eds) *How Does Law Matter?*, Northwestern University Press, 1998.

protect its citizens from harm,[39] in this case both hurt to human dignity and, when vilification incites violence, physical injury.

This leads to a second reason to consider criminalising racial vilification. To criminalise racial vilification is a clear statement of public policy, to the effect that incitement to racial hatred is not tolerated in contemporary society. Criminalising racial vilification is a formal statement that certain conduct is 'criminal because it offends the common consciousness'. [40]

Much the same rationale for addressing racism exists in NSW as it does in the UK: 'the legislation was introduced in the hope of bringing 'to an end the acrimony, controversy and uncertainty which have hampered our capacity as a society to deal with the problems of race relations'. It was enacted because the hope that immigrants to this country in the early 1960s would eventually assimilate into society and would enjoy equal status to the indigenous population, had not materialised. As the White Paper made clear, the issue of race and tackling racism was clearly a priority for the government and society of the day'. [41]

When introducing the racial vilification amendments in 1989, the Attorney-General, Mr Dowd, said:[42]

> This bill is a clear statement by the Government that racial vilification has no place in our community. That is no reflection on our society. Our society has been perhaps the most successful in bringing together people from different parts of the world to form a community in which my children's generation and, more important, my grandson's generation, will not draw a distinction between themselves and the ancestry of others. They will be known for who they themselves are. That is an important statement. We are better than the rest of the world but our standards must be higher. There is a growth of racial vilification within the community. The Government does not intend to interfere with freedom of speech but it must redress the balance, to allow people who come to our shores to have the same rights as those whose ancestors were born here.

To this end, racial vilification legislation has significant symbolic force, quite apart from its instrumental intent. In the UK, the House of Lords Select Committee, speaking of proposed amendments to criminalise religious vilification, 'accepted that it was unlikely the law would attract a great number of prosecutions',[43] but saw that the legislation sent 'signals or messages which Parliament may, and may rightly, wish to convey'.[44] The Committee 'emphasised the need for Parliament to send out a

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39 J Knechtle, 'When to Regulate Hate Speech', (2005-2006) 110 *Penn St. L. Rev*. 539 at 569.

40 Émile Durkheim 'The Division of Labour in Society', in Kenneth Thompson (ed), *Readings From Emile Durkheim*, Routledge, 2004, p30.

41 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at 368, Citing Home Office White Paper *Racial Discrimination* 1976 (Cmnd. 6234, 1975), p. 1.

42 NSW Legislative Assembly Hansard, page 7491.

43 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 *Liverpool Law Review* 349 at

44 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 Liverpool Law Review 349 at 364, citing House of Lords Select Committee on Religious Offences in England and Wales, First Report 2002, para. 54.

clearer 'message' to racists … '.[45] Research by Tomasic and Pentony revealed a similar argument for insider trading laws where, despite the unlikelihood of a prosecution, the existence of a criminal sanction was seen in the market as having symbolic significance.[46] The mechanism for civil complaints may not be able to achieve 'the same symbolic and educative effects as criminal sanctions in providing a clear statement of the unacceptability of racist behaviour'.[47]

A further reason to consider criminalising racial vilification is that to do so provides an accountability mechanism for hate crimes. A state that does not criminalise racial vilification risks being seen to tolerate such conduct, and an integral part of the state's goal of establishing a culture of respect is 'an insistence on accountability for hate crimes' which

> must … include deterring future violations, protecting potential victims, and safeguarding international peace and security … The need for a state to apply hate speech laws with firmness, consistency, and wisdom is essential if the norms of behavior we wish to promote in society are to be encouraged. We cannot erase hatred from the world, but we can condemn it and criminalize it.[48]

Conclusion

As we have noted above, there is an acceptable response to each of the valid concerns about criminalising racial vilification; the challenge lies in the way in which the offence is drafted. In our submission the reasons for criminalising racial vilification are persuasive, not least because the state has an obligation to take what steps it can to protect its citizens from harm, and to make a clear statement that racial vilification has no place in our community.

How best to legislate in response to racial vilification

We propose a three-tiered legal response to the serious issue of racial vilification in our community.

Civil complaint

NSW law should continue to provide the civil law response to racial vilification set out in s 20C, setting a 'different and more stringent harm test'[49] than is the case under federal legislation.

Criminal charge

NSW law should continue to provide a criminal law response to racial vilification, in terms different from those currently set out in s 20D. A criminal provision is

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45 D Nash and C Bakalis, 'Incitement To Religious Hatred And The 'Symbolic': How Will The Racial And Religious Hatred Act 2006 Work?'. (2007) 28 Liverpool Law Review 349 at 364, citing House of Lords Select Committee on Religious Offences in England and Wales, First Report 2002, para. 127.

46 Roman Tomasic and Brendan Pentony, 'Insider Trading and Business Ethics', (1989) 13 *Legal Stud. F.* 151 at 165-166; see also Roman Tomasic , 'Towards a Theory of Legislation: Some Conceptual Obstacles', 1985 *Statute L. Rev.* 84.

47 S Reid and R Smith, 'Regulating Racial Hatred', *Trends & Issues In Crime And Criminal Justice*, No.79 February 1998, Australian Institute of Criminology, 6.

48 Kathleen Mahoney, 'Hate Speech, Equality, and the State of Canadian Law', (2009) 44 *Wake Forest L. Rev.* 321, 351.

49 Gareth Griffith, 'Racial vilification laws: the *Bolt* case from a State perspective', e-brief 14/2011, NSW Parliamentary Library Research Service, page 9.

distinguished from a civil complaint provision by protecting individuals against harm, while the civil complaint provision has a broader aim, to prevent incitement more generally.

A vilification offence has more than the symbolic importance we discussed above: it must be workable. Prosecutions may be few, as international experience demonstrates, but amendments to the NSW provision will improve its operation.

Attention in the drafting of vilification offence provisions has been on the offending conduct, which raises many of the issues we noted above, such as giving a forum to the perpetrators and their views. Rather, the focus of the prohibition should be on harm that has been caused by threats of violence. Chesterman summarises these harms as financial, emotional and physical harm to individual members of the target race; harm to a group of people of the targeted race who are in a social minority with little power or influence; the harm of 'silencing': effectively removing the target group's own freedom of expression; and the harm to society through endangering peace and stability and undermining equality.[50]

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'.[51] We agree with McNamara that 'assessing the nature and extent of harm caused to the target group by the offending conduct may be more important than technical legal requirements concerning the need to prove intent on the part of the accused, or the need to establish that his/her conduct did or was likely to encourage others in the community to 'hate' a particular racial or ethno-religious group'.[52] Similarly, Gelber's view is that the primary concern is 'a measure of the impact of one's expressive activities on oneself and others'.[53]

Accordingly, we propose that the prohibition be against an act engaged in on the basis of race, *that is intended, or is reasonably likely, to cause 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*.

The proposed offence requires proof of three elements:

- an act that has the effect of causing 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
- a race-based reason for the act
- an intention to cause fear *or* that a reasonable person would be aware of the likelihood that fear would be caused.

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50 M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate, Aldershot, 2002, pp 193-195.

51 Tamsin Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1994) 1(1) *Australian Journal of Human Rights* 265.

52 Luke McNamara, 'Criminalising Racial Hatred: Learning from the Canadian Experience', Australian Journal of Human Rights Vol 1 No 1.

53 Katharine Gelber, 'Hate Speech in Australia: Emerging Questions', (2005) 28(3) *University of New South Wales Law Journal* 861.

We make four comments about the proposed offence.

First, it no longer contains the requirement found in section 20D that the offending conduct be a 'public act'. Racially based private action, such as conversations within an apartment block, which causes another person to fear for their safety because of their race, is just as unacceptable and damaging as similar conduct in a street or a park. We propose adoption of the approach in Victoria which has shifted the public/private dividing line in offences of this nature: s 12 of the *Racial and Religious Tolerance Act 2001* (Vic) contains an exception to liability when the person concerned can establish, objectively, that his or her conduct was intended to be private.

Secondly, the proposed offence requires proof *either* of intent to generate fear in another person *or* that a reasonable person would be aware of the likelihood that fear would be caused. The alternative to intent – a reasonable person's awareness of the likelihood – ensures that a perpetrator of racial vilification is not able to rely on their own lack of awareness, insight or wilful blindness as to the effect of their conduct, or on a belief that what they said was true.[54] Again, this ensures that the provision operates to protect against the harm caused by the conduct.

Our second comment is that while the conduct must be based on race, it does not need to be based on the particular race of the person who is the intended or likely target of the conduct. The precise identity of the race is irrelevant. The offence is concerned with conduct motivated by race that causes fear, not with whether the conduct identifies a particular race.

Our third comment is that the proposed offence does not admit any defence, for example of 'truth' or honest belief'. There is currently no defence in s20D, and that is appropriate. A criminal provision is intended to prevent the causing of harm, and the offending conduct is not excusable.[55]

Our fourth comment is that the proposed offence should be set out in the *Crimes Act 1900*, as it is in Western Australia, as was recommended by the NSW Law Reform Commission,[56] and has been explained and supported by McNamara.[57] The offence would appropriately be a new Division in *Crimes Act* Part 3: Offences Against The Person.

A related point is that the President of the Anti-Discrimination Board should retain a referral power for matters that come to attention. Primary responsibility for investigation, arrest and prosecution ought lie with the usual authorities in the criminal justice system: under the current referral regime the President of the Anti-Discrimination Board does not and is not able to prepare a brief of evidence of the sort that would routinely be prepare for in relation to a 'regular' crime under the *Crimes Act*.

54 See eg Tamsin Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1994) 1(1) *Australian Journal of Human Rights* 265.

55 See the discussion in Tamsin Solomon, 'Problems in Drafting Legislation Against Racist Activities' (1994) 1(1) *Australian Journal of Human Rights* 265.

56 Review of the NSW Anti-Discrimination Act 1977 (NSW), 1999, Vol 1, pages 550-553.

57 L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology, 2002, 200-203.

Civil penalty proceedings

NSW should also provide for a wrong that is enforceable by way of civil penalty, for use in cases where criminal proceedings are unlikely to succeed but where the behaviour in question is so serious that it merits public disapproval. Recent incidents on public transport in Sydney[58] and Melbourne[59] are clear examples of the conduct that would fall within this proposed new wrong.

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.

Civil penalties have become an increasingly important regulatory tool.[60] They are 'sanctions that are imposed by courts in non-criminal proceedings, following action taken by a government agency'.[61] Civil penalties are now used in many different areas of regulatory activity, such as the marketplace, the environment, and the workplace. They convey public disapproval of conduct that is not easily prosecuted under the criminal law.

The Australian Law Reform Commission examined civil penalties at length in a report published in 2002.[62] The Commission reported that civil penalties:

> …are closely founded on the notion of preventing or punishing public harm. The contravention itself may be similar to a criminal offence (for example, breaches of director's duties or publish misleading material) and may involve the same or similar conduct, and the purpose of imposing a penalty may be to punish the offender, but the procedure by which the offender is sanctioned is based on civil court process.[63]

There is growing support for the use of civil penalties as an effective means of regulating behaviour that is seen as both a public and a private wrong. Former Victorian Chief Parliamentary Counsel, Eamonn Moran QC, has observed that 'a modern complex society with limited judicial resources and economic need for efficiency must necessarily seek mechanisms for the enforcement of its rules additional to traditional criminal processes.'[64]

A number of Commonwealth regulatory agencies now have power to initiate civil penalty proceedings against alleged wrongdoers. They include the Australian

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58 http://www.theaustralian.com.au/news/breaking-news/abc-news-presenter-racially-abused-on-bus/story-fn3dxiwe-1226573535603

59 <www.theage.com.au/national/speak-english-or-die-pair-released-as-police-hunt-for-instigator-20121123-29x6x.html>.

60 See Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 229-251.

61 Ibid 229.

62 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report No 95 (2002).

63 Ibid 73.

64 Eamonn Moran, 'Enforcement mechanisms (including alternatives to criminal penalties)' (2009) 2 *The Loophole* 12.

Securities and Investments Commission, the Australian Competition and Consumer Commission and the Environment Protection Authority.

A proposed civil penalty provision would send a message to the community that it is unacceptable to engage in behaviour based on race – in a public or a private place – that causes another person to have a reasonable fear for their own safety or for that of their family members or associates. A public wrong of this nature would be available for use in those circumstances where there is insufficient evidence of intent to cause physical harm to warrant criminal proceedings but the behaviour in question would cause a reasonable person to fear for their own safety or for that of others. It would be unnecessary to prove a 'guilty' state of mind on the part of the alleged wrongdoer in order to prove a breach of the civil penalty provision. It would only be necessary to prove that the alleged wrongdoer performed the act in question, that it was based on race and that it would have caused a reasonable person to fear for their own safety or for that of their family members or associates.

In our experience as principal solicitors of the anti-discrimination law practice at Kingsford Legal Centre, and as judicial members of the Administrative Decisions Tribunal (ADT), it is often unreasonable to expect a person who has experienced racial vilification to lodge a complaint with the Anti-Discrimination Board, to engage in the process of conciliation and, if the matter is not resolved privately, to commence and conduct proceedings in the ADT.

Often, the remedies which are available through civil proceedings under the Act are not an appropriate response to the harm suffered by the person who has been vilified; the victim understandably seeks a remedy which provides reassurance that they are an equal member of the community, and that appropriate steps will be taken by a public authority when some people challenge their right to live as ordinary citizens because of their race. Legal action by an agency of the state, which can result in a fine, is likely to be a far more effective way of responding to the harm caused by vilifying behaviour than costly and long drawn out civil proceedings that might result in a very modest award of damages.

One of the challenges associated with civil penalty proceedings is locating an agency that is well placed to investigate the alleged wrongful conduct and to initiate proceedings against the alleged wrongdoer. This is not the case here because these are entirely suitable functions for the Anti-Discrimination Board. However, the investigation and pursuit of civil penalty proceedings is significantly beyond the current capacity of the Anti-Discrimination Board, and it should not be given this role without the required resources.

We propose that civil penalty proceedings be conducted in the NSW Administrative Decisions Tribunal, because of its long experience in dealing with racial vilification cases.

Professor Simon Rice

Professor Neil Rees

15 March 2013