Submission No 22

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Public Interest Advocacy Centre

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Regulating Racial Vilification in NSW:

Submission to the Legislative Council Standing Committee on Law and Justice Inquiry Into Racial Vilification Law in NSW

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1. Introduction

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to provide this submission to the Legislative Council Standing Committee on Law and Justice Inquiry into racial vilification law in New South Wales (NSW).

PIAC believes that racial vilification laws are important to provide for substantive equality for those individuals and groups who are most affected by discrimination and racial vilification in NSW.

PIAC's submission does not address every aspect of the Inquiry. Rather, PIAC's submission focuses on areas relevant to PIAC's expertise and experience.

PIAC has specific expertise and casework experience relating to the provisions of s 20C. Our submission focuses on s 20C, rather than on s 20D of the *Anti-Discrimination Act 1977* (NSW) (the ADA).

The Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Department of Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's expertise in discrimination law and equality

A fundamental part of PIAC's role has long been to provide legal assistance to disadvantaged people who claim they have suffered discrimination or vilification. PIAC has represented litigants in a number of significant cases relevant to vilification and defamation law in Australia.[1] PIAC has also contributed its casework expertise in a broad range of public policy development and review processes in relation to anti-discrimination law,[2] vilification law and specifically racial vilification law, and the promotion of equality and human rights.[3]

PIAC has made a number of submissions on anti-discrimination law, most recently in relation to the consolidation of federal anti-discrimination law, and the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth).[4]

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1 In relation to homosexual vilification: *The Block* (*Burns v Radio 2UE Sydney Pty Ltd and Ors* [2004] NSWADT 267); In relation to defamation; *Ali v Nationwide News Pty Ltd* [2008] NSWCA

2 See, eg, Alexis Goodstone and Dr Patricia Ranald, *'Discrimination ... have you got all day?' Indigenous women, discrimination and complaints processes in NSW* (2001); Public Interest Advocacy Centre, *Submission on the Australian Human Rights Commission Legislation Bill 2003: Submission to the Senate Legal and Constitutional Committee on the Australian Human Rights Commission Legislation Bill* (2003); Robin Banks, *Implementing the Productivity* Commission *Review of the Disability Discrimination Act; submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill* (2009), Gemma Namey, *The other side of the story: extending the provisions of the Sex Discrimination Act 1984 (Cth): Submission to the Senate Standing Committee on Legal and Constitutional Affairs on the Sex and Age Discrimination Legislation Amendment Bill 2010* (2010), Lizzie Simpson and Robin Banks, *Taxis for All: Submission to the NSW Legislative Council's Select Committee on the NSW Taxi Industry* (2010). These and most PIAC publications, including submissions, are available on the Centre's website: <http:///www.piac.asn.au/publications/pubs/dateindex.html>.

3 See, for example, Chris Hartley et al, *National Human Rights Baseline Study: submission by the Public Interest Advocacy Centre* (2011), Chris Hartley and Edward Santow, *ACT Government consultation on the inclusion of economic, social and cultural rights in the Human Rights Act 2004* (2011), Edward Santow and Brenda Bailey, *Human Rights Charter Review-respecting Victorians* (2011).

4 Available at: <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/index.htm>

2. Section 20C

PIAC submits that s 20C of the *Anti-Discrimination Act 1977* should be retained.

PIAC submits that the existing s 20C strikes an appropriate balance and does not impose an inappropriate fetter on freedom of expression. PIAC is of the view that the right to free speech is fundamental to the operation of a liberal democratic society. However, it is well understood that freedom of expression is not absolute, and it cannot be a used to justify expression that deeply humiliates, offends or incites hatred or injustice against a person, or a group of people.[5]

Section 20C of the ADA is consistent with Australia's legal obligations under the International Convention on Civil and Political Rights (**ICCPR**) and the Convention on the Elimination of Racial Discrimination (**CERD**).

Article 19 of the ICCPR provides that:

> 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, or of public health or morals.

Article 20(2) provides that:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

NSW was the first Australian State to introduce racial vilification laws, by the insertion of Part 2, Division 3A (ss 20B – 20D) into the ADA.[6] All Australian jurisdictions now have racial vilification laws, with the exception of the Northern Territory.[7]

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5 See Article 19(3) ICCPR; Human Rights Committee, 102nd session, Geneva, 11-29 July 2011, *UN ICCPR General Comment No. 34* Article 19 Freedom of Expression; *Ross v. Canada, 1 May 1996, Communication No. 736/1997; Thorgeirson v. Iceland, 25 June 1992, Application No. 13778/88, para. 63.*

6 The Liberal Party of NSW introduced the racial vilification provisions on 4 May 1989 through the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989.

7 *Discrimination Act 1991* (ACT) ss 66 – 67; *Racial Vilification Act 1996* (SA) ss 3 – 6; *Civil Liability Act 1936* (SA) s 73; *Anti Discrimination Act 1998* (Tas) Section 19; *Anti-Discrimination Act 1991* (QLD) ss 124A, 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 7 – 12, 24 – 25; *Criminal Code 1913* (WA) ss 77 – 80H; *Racial Discrimination Act 1975* (Cth) ss 18C – 18D.

Most other States and the ACT have similar provisions to those of NSW. The racial vilification provisions of s 18C of the *Race Discrimination Act 1975* (Cth), however, differ from s 20C of the ADA on some points.

Under the NSW provisions, the impact, or 'harm caused' by the 'public act' must be greater than under the Commonwealth legislation. The threshold is therefore higher in NSW for an act to be found to be racial vilification.[8]

Section 18C of the *Race Discrimination Act 1975* (Cth) provides that the public act must be 'reasonable likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people', whereas under s 20C of the ADA the public act must 'incite hatred towards, serious contempt or severe ridicule' of another person or group of persons.

Arguably, it is harder to prove racial vilification in NSW than under the Commonwealth provisions.[9] The most recent case of *Eatock v Bolt* [2011] FCA 1103, in which journalist Andrew Bolt was found to have contravened s 18C of the *Racial Discrimination Act* goes some way to illustrate the lower threshold required to prove racial vilification under the federal legislation, although it should be noted that the judgment in that case turned primarily on whether the freedom of expression exemption, or defence, applied to the words of the respondent, Mr Bolt. Importantly, in determining that the exemption did not apply, Bromberg J took into account the possible degree of harm the conduct involved may have caused.

PIAC acted on behalf of the complainant in *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267*,* which concerned an allegation of homosexual vilification. The provisions relevant to homosexual vilification in the ADA contain a similar threshold for proving vilification as is provided for in s 20C in respect of racial vilification.

In that case, PIAC represented Gary Burns in a homosexual vilification complaint against John Laws, Steve Price and Radio Station 2UE. The matter concerned comments that they made about the appearance of a gay couple on the Channel 9 television show, "The Block". In 2004, the Administrative Decisions Tribunal upheld Mr Burns' complaint and found that both Mr Price's and Mr Laws' comments amounted to homosexual vilification. Radio 2UE, Mr Laws and Mr Price originally appealed this decision but the case was settled in 2008 with Mr Price and 2UE publicly apologising for any hurt that their comments may have caused homosexual males.

The Tribunal specifically considered the meaning of 'severe ridicule'. The Tribunal noted that:[10]

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8 Gareth Griffith, *Racial Vilification Laws: The Bolt Case from a State perspective* October 2011, E-brief 14/2011 NSW Parliamentary research Service, 3.

9 Gareth Griffith, *Racial Vilification Laws: The Bolt Case from a State perspective* October 2011, E-brief 14/2011 NSW Parliamentary research Service, 8.

10 *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267*,* para 36 – 42.

> It is clear from the debates in relation to both the racial vilification and homosexual vilification provisions that the Parliament was concerned to 'achieve a balance between the right to free speech and the right to an existence free from … vilification and its attendant harms'… We must have that consideration in mind when deciding where the line is to be drawn for the purposes of characterising conduct as vilification.
>
> We consider the ordinary meaning of the term 'severe ridicule' having regard to the guidance given by the parliamentary debates, by common dictionary definitions … and by our own understanding of the ordinary meaning of the words. A distinction can be drawn between 'mild ridicule, mere mockery or derision', and 'harsh or extreme mockery derision'…
>
> We understand 'severe ridicule' to be 'harsh or extreme mockery or derision'. As a tribunal of fact, we make an evaluative judgment within a broad discretion as to whether the conduct amounts to 'severe ridicule'…

The Tribunal determined, in relation to Mr Price, that:[11]

> Mr Price's conduct, particularly as it was done in explicit disregard of known constraints and possible consequences, did not express or imply any limits to the ridicule. Even after he said to Mr Laws 'I think that'll do, we might move on eh?', Mr Price continued to engage in the conduct. Mr Price's conduct was, effectively, licence to listeners to engage in ridicule without regard to limits or boundaries, and was capable of inciting ridicule certainly to a sever degree.

The *Burns* case is an example of the way in which 'severe ridicule' is interpreted under the ADA.

All Australian jurisdictions have a diversity of racial vilification laws, including criminal sanctions in some States and a statutory tort in South Australia. The civil human rights regulatory model of s 20C, however, is an effective and relatively accessible model. Effective civil anti-discrimination laws provide a mechanism for responding to expressions and actions that can make a meaningful contribution to behavioural changes and attitudinal shifts in NSW, which are likely to offer the most long term protection to those individuals and groups in NSW currently subjected to racial vilification.

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[11] *Burns v Radio 2UE Sydney Pty Ltd & Ors [2004] NSWADT 267 (22 November 2004),* para 59.

3. Section 20(C)(2)

PIAC submits that if reform of the ADA as a whole is contemplated, consideration should be given to replacing the defences, or exemptions, to racial vilification in Section 20(C)(2) with a general limitations provision, such as:

> (2) Nothing in this section renders unlawful a public act that is justifiable.
>
> (3) A public act is justifiable if it is done in good faith, for the purpose of achieving a particular aim; and
>
> (a) That aim is a legitimate aim; and
> (b) The person who did the public act considered, and a reasonable person in the circumstances of the person would have considered, that engaging in the conduct would achieve that aim; and
> (c) The public act is a proportionate means of achieving that aim.

The clause could also include a non-exhaustive explanation of the matters to be taken into account in determining whether any act is a proportionate means of achieving a legitimate aim.

A general limitations clause would enhance the flexibility of racial vilification law in NSW and create a standard that can adapt over time in line with changing community expectations.

A general limitations clause would also allow for an examination of any public act complained of, no matter the 'purpose' of the act. This would ensure that no specific area is privileged or exempted from racial vilification laws more than any other.

The *Human Rights and Anti-Discrimination Exposure Draft Bill 2012* (Cth) (HRAD) introduces a general limitations clause at Section 23 as follows:

> …
>
> Exception for justifiable conduct
>
> (2) It is not unlawful for a person to discriminate against another person if the conduct constituting the discrimination is justifiable.
>
> *When conduct is **justifiable***
>
> (3) Subject to subsection (6), conduct of a person (the ***first person***) is ***justifiable*** if:
>
> (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
> (b) that aim is a legitimate aim; and

(c) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
(d) the conduct is a proportionate means of achieving that aim.

(4) In determining whether subsection (3) is satisfied in relation to conduct, the following matters must be taken into account:

(a) the objects of this Act;
(b) the nature and extent of the discriminatory effect of the conduct;
(c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;
(d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c).

(5) Any other matter that it is reasonable to take into account may also be taken into account.

The Explanatory Notes to the HRAD note that:

> Clause 23 sets out a new concept for Commonwealth anti-discrimination law. This general limitations clause will allow for a more flexible, case-specific approach giving people and organisations more assistance in determining whether a practice or action was the most appropriate method of achieving an objective. The clause will also be able to adapt to changing standards and community expectations over time.
>
> Clause 23 is intended to align with the international human rights law concept of 'legitimate differential treatment' . . .
>
> Although the idea of a general limitations clause is new, this builds on the defence of reasonableness in existing indirect discrimination provisions and reflects the policy rationale underpinning existing exceptions and international law.

The general limitations clause of the HRAD has been widely supported.[12]

A general limitations clause would also be consistent with Australia's international human rights obligations under the ICCPR and the CERD.

The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide the following in relation to a general limitations clause:

(10) Whenever a limitation is required in the terms of the Covenant to be "necessary", this term implies that the limitation:

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[12] <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx > Accessed 1 March 2013.

(a) is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,
(b) responds to a pressing public or social need,
(c) pursues a legitimate aim, and
(d) is proportionate to that aim[13].

Any assessment as to the necessity of a limitation shall be made on objective considerations.

Other international jurisdictions also contain a general limitations clause in their human rights and anti-discrimination legislation. For example the UK *Equality Act 2010* includes the limitation that relevant discriminatory conduct will not be discriminatory under the Act if it can be demonstrated to be a 'proportionate means of achieving a legitimate aim'.[14]

4. Section 20D

PIAC cannot offer comment on s 20D, as it is not within our expertise based on our casework experience. However, we note that there are criminal racial vilification laws in other Australian States, and also internationally.

Western Australia, the Australian Capital Territory, Queensland, South Australia and Victoria all have criminal sanctions for racial vilification.[15] South Australia, the ACT, Queensland and Victoria have both civil and criminal racial vilification laws. Western Australia has only criminal sanctions. Tasmania does not have criminal sanctions for racial vilification. The Tasmanian Law Reform Institute in 2011 specifically recommended 'that a serious racial vilification criminal provision not be introduced in the *Anti-Discrimination Act 1998* (Tas).'[16]

In NSW, criminal liability is attracted only when there is a threat to do violence to persons or property or when others are incited to do so, on the ground of race[17]. It is not necessarily the motivation of the offender that creates a criminal offence, but whether what the offender said incited or caused others to commit or threaten acts of

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13 United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights,* U.N. Doc. E/CN.4/1985/4, Annex (1985) < http://www.wfrt.org/humanrts/instree/siracusaprinciples.html > Accessed 6 March 2013.

14 *Equality Act 2010 (UK) section 19(2)(d) provides that a criterion or practice will be discriminatory if it cannot show it to be a proportionate means of achieving a legitimate aim'.*

15 *Discrimination Act 1991* (ACT) ss 66 – 67; *Racial Vilification Act 1996* (SA) ss 3 – 6; *Civil Liability Act 1936* (SA) Section 73; *Anti Discrimination Act 1998* (Tas) Section 19; *Anti-Discrimination Act 1991* (QLD) ss 124A, 131A; ss 7 – 12, 24 – 25; *Criminal Code 1913* (WA) ss 77 – 80H.

16 Tasmania Law Reform Institute *Racial Vilification and Racially Motivated Offences* <http://www.utas.edu.au/__data/assets/pdf_file/0009/283788/RV_Final_Report.pdf > accessed 1 March 2013.

17 *Anti-Discrimination Act 1977* (NSW) s 20D.

violence against person(s) on the ground of race and whether the offender intended this to be the outcome. The South Australian provisions mirror those in NSW[18].

The Victorian criminal racial vilification provision is also similar to the New South Wales provision, although it extends to situations where the offender intentionally engages in conduct that they know is likely to incite serious contempt, revulsion or severe ridicule without the requirement of the threat of violence[19].

The *Criminal Code* (WA) criminalises the possession, publication and display of written or pictorial material that is threatening or abusive with the intention of inciting racial hatred or of harassing a racial group[20].

The ACT criminal provision expressly requires an element of intentionality and recklessness to be established in the incitement of hatred.[21]

The Queensland criminal offence provision expressly requires knowledge of recklessness.[22]

Canada and the UK are examples of comparable international jurisdictions that have introduced criminal sanctions for racial vilification.[23]

Australia has ratified the CERD, but has expressed a reservation to Article 4 as follows:

> The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) sets out that:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the

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18 *Racial Vilification Act 1996* (SA) ss 3 – 6.

19 *Racial and Religious Tolerance Act 2001* – ss 24-25.

20 *Criminal Code 1913* (WA) ss 77 – 80H.

21 *Discrimination Act 1991* (ACT) s 67.

22 *Anti-Discrimination Act 1991* (QLD) s 131A.

23 *Criminal Code RS 1983 m c. C-46 Section 318 (Canada); Public Order Act 1986 (UK), c 64 ss 17 -22.*

principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.