

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: NSW Aboriginal Land Council

Date received: 8/03/2013

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director,

Re: Inquiry into Racial Vilification Law in NSW

The NSW Aboriginal Land Council (**NSWALC**) is the peak Aboriginal representative body in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory corporation under the *Aboriginal Land Rights Act 1983 (NSW)*, and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW.

NSWALC notes that a fundamental right under the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) is the right of Indigenous peoples to live free from discrimination. In addition the ICERD imposes obligations on parties to the Convention to undertake to adopt measures designed to eradicate all incitement to, or acts of, racial discrimination. Similarly, the United Nations Declaration on the Rights of Indigenous People (the **Declaration**) outlines the rights of an estimated 370 million Indigenous people throughout the world and is an important yardstick by which a state's human rights and anti discrimination behaviour can be measured.

The following excerpts of the Declaration identify the inherent rights of Aboriginal peoples:

1. **Article 1**
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.
2. **Article 2**
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.
3. **Article 3**
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Additionally, Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 19(2) of the ICCPR protects freedom of expression. The Article reads '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'. Article 19(3) contemplates limits to freedom of expression in the following terms:

'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:

- i. For respect of the rights or reputations of others;
- ii. For the protection of national security or of public order (ordre public), or of public health or morals.'

Also relevant to the notion that Article 19 rights can be limited by the 'rights of others' are freedoms from racial discrimination, contained in Articles 2 and 26 of the ICCPR as well as in the ICERD.

Racial vilification and Aboriginal peoples

Racial vilification can result in physical harm to a person or property, as well as severe psychological distress which impacts on social determinants of health, particularly for Aboriginal peoples. The 1991 National Inquiry into Racist Violence found that there was an 'endemic problem' throughout the country relating to racist violence and racial vilification against Aboriginal peoples.

Australian Bureau of Statistics data from 2008 shows that more than a quarter (27%) of Aboriginal and Torres Strait Islander people aged 15 years and over reported having experienced discrimination in the last 12 months.¹ The most common situations or places where discrimination was experienced included the general public (11%), by police/security personnel/courts of law (11%), and at work or when applying for work (8%).²

Discrimination was higher among specific groups within the Aboriginal and Torres Strait Islander population, including those removed from their families (45%), the unemployed (41%) and people with disabilities or long-term health conditions (32%).³ The same study highlighted the toll racism takes on Aboriginal and Torres Strait Islander health, finding that:

Aboriginal and Torres Strait Islander people who had experienced discrimination were more likely than those who had not experienced discrimination, to report high/very high levels of psychological distress (44% compared with 26%) and to be in fair/poor health (28 compared with 20%). They were also more likely to engage in binge drinking (42% compared with 35%) and to have recently used illicit substances (28% compared with 17%).⁴

The *NSW 2021* plan includes targets on a range of indicators relating to Aboriginal peoples' health and wellbeing. The experience of racism, and particularly racial vilification, is a key determinant of health and has direct impact on retention rates at school, the obtainment of non-school qualifications, lower labour force participation and lower household incomes compared to non-

¹ Australian Bureau of Statistics, *4704.0 The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, October 2010.

² Ibid

³ Ibid

⁴ Ibid

Aboriginal peoples. The NSW Government must seek to address racism more broadly, but particularly racial vilification, as it has direct impacts on the health and wellbeing of Aboriginal peoples and meeting targets set out by the Government in *NSW 2021*.

Effectiveness of the *Anti Discrimination Act 1977 (NSW)*

Since 1989 vilification laws have been in place in NSW. Processes for addressing complaints include the referral of complaints to the NSW Anti Discrimination Board, followed by conciliation processes and then recommendations regarding prosecution. The NSW Anti Discrimination Board has handled numerous complaints, however because the vast majority of these matters have been dealt with by conciliation – which requires confidentiality – there is limited data currently available regarding how these laws are in practice addressing issues of racial vilification.

Since 1998 there have been just under 30 complaints referred by the NSW Anti-Discrimination Board to the Attorney General for criminal prosecution, however none have been prosecuted. There are a number of factors that have impacted on the limited referral to criminal prosecution and the subsequent lack altogether of prosecution. These include:

- Complainants not wishing to use criminal channels: In some situations complainants do not wish to use criminal channels to address racial vilification because they do not have control of the case when they are conducted by the police and there is a potential loss of confidentiality that is maintained through conciliatory processes.
- Consent to prosecute: Practically there has been some confusion regarding whether arrests can be made when an offence has been committed, without first seeking the consent to prosecute.
- Responsibility in the area of prosecutions relying on the executive: It is potentially problematic that responsibility regarding prosecution falls with the Attorney General rather than the Director of Public Prosecutions. Responsibility in the area of prosecutions should not involve politicians as it is at risk of being politicised.

It is nevertheless potentially problematic there has been a complete lack of prosecution regarding racial vilification and that, of the almost 30 complaints referred for prosecution, none have been prosecuted. There is disconnect between the number of complaints of racial vilification referred by the NSW Anti Discrimination Board for prosecution and the willingness of the Attorney General to consent to prosecution.

Recommendation 1: NSWALC recommends that responsibility regarding the consent to prosecute lies with the Director of Public Prosecutions rather than the Attorney General.

In addition to issues regarding the prosecution (or lack of), there are issues regarding some of the wording section 20(D) of the *Anti Discrimination Act 1977 (NSW)*. The lack of definition within the Act of the word ‘public’ has been problematic, in that there is no proper distinction between ‘public’ and ‘private’ acts. For example questions arise as to whether vilifying statements made to a crowd at a private event is a public or private act. In addition, the current wording of section 20(D) does not address situations where an individual is vilified with only the vilifier present, or where an individual is vilified with only the vilifier present in a public place, where it could potentially be observable to the public if the public had been present.

The definition provided in the Act of ‘public act’ in section 20(B) does little to address the above issues.

Recommendation 2: NSWALC recommends that where there is incitement to threaten physical harm that it is considered a criminal offence whether or not the vilification occurred in public.

Under section 20 (D) racial vilification is committed when the offender ‘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’. Issues have arisen regarding whether there should be the subjective intention to ‘incite’ rather than it being sufficient enough in itself that the conduct is likely to incite hatred. Both the civil and criminal provisions of the *Anti Discrimination Act 1977 (NSW)* use the term ‘incite’, although only in the criminal provisions is there a requirement that intent be proven, while the civil provisions do not have this requirement.⁵ The definition and meaning of ‘incite’ should be consistent within both criminal and civil provisions.

Recommendation 3: NSWALC recommends that proof of specific intention to ‘incite’ should not be required for establishing vilification.

The Anti Discrimination Act 1977 (NSW) and freedom of speech

Freedom of speech is fundamental to liberal parliamentary democracy. Additionally, the Universal Declaration of Human Rights states that the rights and freedoms of the individual are limited by ‘the rights and freedoms of others’; while the ICCPR, like the Universal Declaration of Human Rights, states that freedom of expression can be limited by law, where this is necessary to respect the rights or reputations of others, or for the protection of public order.

As a result it is evident that international human rights instruments do not assert freedom of expression as an absolute right. Importantly, freedom of expression can be limited by the rights of other individuals including the right to freedom from racial discrimination. NSWALC is concerned that debate regarding the *Anti Discrimination Act 1977* is not framed so that racial vilification provisions are in opposition to freedom of speech. Laws that protect in particular Aboriginal peoples from racial vilification and discrimination as well as provide avenues for conciliation and then criminal prosecution and freedom of speech should not be seen as being mutually exclusive.

Freedom of speech is not absolute. This is evident in existing laws including laws relating to defamation, contempt of court and copyright law. In its current form, the *Anti-Discrimination Act 1977 (NSW)* also makes allowances for freedom of speech that include that the media can fairly report someone else’s act of vilification, that acts that are done ‘reasonably and in good faith’ for purposes in the ‘public interest’ are not against the law and that material that is privileged (such as statements made in Parliament) do not breach the *Anti Discrimination Act 1977 (NSW)*.

NSWALC is of the firm belief that freedom of expression must be limited by the right to freedom from racial vilification and abuse. Relying on an apparent clash between racial vilification laws and an implied right to engage in hate speech to condemn one of the few avenues of legal redress available to victims of racial vilification relies on the rhetoric of simplistic and abstract ‘free speech’ arguments.

Recommendation 4: Freedom of expression must be limited by the right to freedom from racial vilification. NSWALC recommends that the racial vilification provisions within the *Anti Discrimination Act 1977 (NSW)* should only be amended to provide greater protection and legal redress against racial vilification.

⁵The Hon John Dowd, Second Reading Speech, *Parliamentary Debates (Hansard)* NSW Legislative Assembly, 4 May 1989 at 7490

The amendment of legislation is not the only answer to address the racial vilification that is experienced particularly by Aboriginal peoples at a frequent and constant rate. Education about the standard that is set by legislation, and importantly the *Anti Discrimination Act 1977 (NSW)*, must be actively supported by Government and government departments. It is paramount that compliance with legal standards regarding anti discrimination is valued by Government and that there is an active program to eradicate racist messages from policies, from institutions, from the labour market and from the media.

In addition it should be noted that the Aboriginal Legal Service (NSW/ACT) is the recognised Aboriginal peak body on justice issues in NSW and the ACT and as such may have greater insight into racial vilification laws and Aboriginal peoples in NSW. Contact details for the Aboriginal Legal Service (NSW/ACT) is available at <http://www.alsnswact.org.au/>.

Yours faithfully,

Malcolm Davis
A/Deputy Chief Executive Officer

Date: