Submission No 17

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Freedom 4 Faith

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Submission on Serious Racial Vilification

Introduction

Freedom 4 Faith (F4F) is an organisation that was formed to educate the Christian church and wider public on issues relating to freedom of religion in Australia. F4F's leadership team includes senior Christian leaders from the Anglican, Baptist, Pentecostal, Presbyterian and Seventh-day Adventist traditions, as well as legal experts.

It scarcely need be said that no Church or Christian organisation could ever condone or defend racial vilification. The reason for this brief submission is to draw attention to the lack of clarity in the current text of section 20D and some of the problems that may arise in seeking to clarify the existing law, drawing upon the experience of other jurisdictions.

The present law

In the view of F4F, it is appropriate that any law which carries criminal penalties should deal only with behaviour that is unquestionably appalling, and that the terms of the law should be clear.

We observe that the current text of section 20D is less than clear:

(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.

The lack of clarity arises due to the offence in section 20D seeking to combine two distinct sets of behaviour that do not easily sit with each other. The first is the incitement of hatred, contempt, or ridicule because of a person's race. The second is the threatening of physical harm or the incitement of others to this end. Inciting ridicule is different from threatening harm or inciting others to threaten harm. Even inciting contempt or hatred are only that – neither, of themselves, necessarily amount to threatening or inciting physical harm.

Clarifying the present law

If the Committee wishes to clarify the present law, then in our view, the two conceptually distinct types of behaviour described in the current text of section 20D need to be untangled and each separately considered for the purposes of formulating appropriate criminal offences.

Threatening or inciting the threat of physical harm because of a person's race

The gravamen of the offence intended by section 20D ought to be that someone, by public act, threatens physical harm or incites others to do so because of a person's race. That is simple, clear and morally incontrovertible.

Inciting hatred, serious contempt or severe ridicule because of a person's race

Should it also be an offence for a person, by public act, 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? That is, should the requirement to threaten or incite physical harm be eliminated from such an offence? Perhaps, but creating a criminal offence based purely on what one says, without the need to show the adverse effects of that speech on others, requires significant justification. Furthermore, the question ought to be asked whether a civil remedy is sufficient to deal with this kind of behaviour, and such provisions already exist in the law.

There is, in our view, little case for outlawing ridicule. Jokes about particular groups are part of many cultures and can actually indicate some level of affection as much as being a source of humour. The criminal law is a blunt instrument. There are other less draconian ways of showing criticism of an off-colour joke.

What about inciting revulsion or contempt? The *Racial and Religious Tolerance Act 2001* (Vic) shows the difficulties with this if the law goes beyond race. It is a crime in sections 24 and 25 of the *Racial and Religious Tolerance Act 2001* to intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons based upon race or religion.

Race and religion are not necessarily entirely separate categories. The overlap is seen most clearly in terms of Judaism, since describing someone as a Jew is both a racial and religious description. There is therefore some logic in a law dealing with both race and religion.

However, that raises some difficult issues about freedom of speech in relation to religion. Consider, for example, a newspaper article or book that purports to be an exposé of a religious sect or cult that, according to the author, engages in religious practices that are injurious to its members. The author is particularly critical of the founder and leader of this group. The author may:

a) be entirely accurate in describing the religious practices of the group
b) be right in identifying the harmful effects of those religious practices for many members.

Yet in our view the author will have committed a criminal offence under Victorian law. Sections 11 and 12 (which create certain exceptions in relation to alleged civil wrongs) would appear to have no application to the criminal offences in the statute. In this example, the author has intentionally engaged in conduct (the writing and publication of a work) that relates to the religious activity of another person (the religious leader) and that is likely to incite serious contempt for, or revulsion for that religious leader and for the practices sanctioned by the group in the name of religious belief. The author would no doubt be both surprised and disappointed if readers were so blasé and disinterested in the issue that they were *not* moved to revulsion for the practices of that religious leader if the harm being caused was sufficiently serious.

Our organisation exists to protect the right of people to hold and manifest religious beliefs. However the protection of this right should not, in our view, encroach on

freedom of speech by criminalising conduct which merely incites contempt for, or revulsion or ridicule of, religious beliefs and their manifestation.

In other words, there are situations where it is right that we are led to revulsion, contempt or ridicule. Revulsion is a natural response to something which is revolting; contempt is a natural response to something that is contemptible; ridicule may be an appropriate response to something which is ridiculous. One cannot imagine anything to do with a person's race that could possibly be revolting or contemptible, and so a law making it an offence to incite hatred, revulsion or contempt, without needing to prove an intention to incite physical harm, may be appropriate. Our concern is if the law extends beyond race, as for example is the case in the exposure draft of the federal *Human Rights and Anti-Discrimination Bill*.

The difficulty we see is that there seems to be a persistent lobby group which seeks to enact laws based upon causing offence to others. In Victoria and the ACT, conduct which offends an intimate partner, or former partner, is already grounds for an apprehended violence order. There are examples of other such laws elsewhere. Tasmania's anti-discrimination law provides that:

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of [certain attributes] in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

A government Bill currently before the Tasmanian Parliament to amend this legislation provides that this offence of causing offence should now be extended to twenty different attributes to be protected by the Act.[1] While motivated by good intentions, such prohibitions often have unintended, adverse outcomes. For example, in 2011 a pub singer in the United Kingdom was arrested for singing the song "Kung Fu Fighting" because a Chinese man who walked past the pub complained he was offended.[2] No

[1] *Anti-Discrimination Amendment Bill* 45 of 2012, clause 9.

[2] 'UK Pub singer arrested for performing Kung Fu Fighting Song' *The European Union Times* 3 May 2011: http://www.eutimes.net/2011/05/uk-pub-singer-arrested-for-performing-kung-fu-fighting-song/

doubt the type of offence this man suffered was not the type of offence the UK law sought to regulate. This is just one example of how laws prohibiting offensive speech suffer from a lack of agreed meaning.

It is important, in particular, that there should be freedom to debate issues of belief and truth without fear of being hauled before a commission or tribunal. This is particularly important at a time when religion is being used not only by the occasional charlatan, but as a tool of violence in some areas around the world.

Making it unlawful to offend someone, or to insult them or make fun of them may have some attractions to groups that think they will benefit from such protection in the short term, but other groups will also clamour for protection. In particular, we do not think it is right to criminalise any discussion of ideas about religious faith. There are nations in the Muslim world that would like to criminalise 'defamation of religion'. In recent years we have seen the furore that erupted over the Danish cartoons and over the lecture given by the current Pope that made certain references to Islam. There are other groups who would like to be protected from other kinds of offence. We see this as a dangerous pathway to go down.

For that reason, we are nervous about laws which criminalise speech that causes contempt or revulsion, even if the prosecution needs the consent of the Attorney-General. We prefer other mechanisms to promote civility. In a free society, encouraging civility offers a better way than coercion.

Conclusion

We recommend the law be clarified so as that there remains a criminal offence of inciting physical harm on the basis of a person's race. We would support in principle a separate criminal offence of inciting hatred towards or serious contempt for, a person or group of persons on the ground of the race of the person or members of the group, provided that this provision is limited to race and that any Second Reading Speech or Explanatory Memorandum to a Bill that introduces the amendment makes it clear that this is a special measure restricted to race. The consent of the Attorney-General ought to be needed for a prosecution under such a section.