

**Submission
No 25**

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: NSW Reconciliation Council

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NEW SOUTH WALES
RECONCILIATION
COUNCIL

Submission

on Racial Vilification Law in NSW (Inquiry)



NSW Reconciliation Council Submission

to the NSW Legislative Council Law and Justice Committee

Introduction

This submission is made in response to the inquiry established by the Law and Justice Committee into racial vilification law in NSW on 17 December 2012. The NSW Reconciliation Council (NSWRC) welcomes the opportunity to contribute to the process of investigation about the effectiveness of the legislation.

This submission is not intended to comprehensively address all aspects for consideration under the legislation. Rather, it aims to provide a response from the perspective of the NSWRC regarding racial vilification as it relates to Reconciliation in NSW.

The committee Terms of Reference request submissions regarding:

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

About the NSW Reconciliation Council

The New South Wales Reconciliation Council (NSWRC) is the peak representative body for Reconciliation in NSW. The Council is made up of Indigenous and non-Indigenous Australians, working through a range of groups and organisations to promote united communities and address the 'unfinished business' of Reconciliation. This means promoting recognition of rights, economic independence and social justice for Aboriginal and Torres Strait Islander peoples, as well as improving relationships and respect between Indigenous and non-Indigenous people.

NSWRC and its membership are aware that these relationships at the community level have a vital impact on Aboriginal and Torres Strait Islander peoples' socio-economic status, health, culture and well-being. As a peoples' movement, Reconciliation draws on the wisdom of grassroots and community based individuals, working towards a fairer society for all and greater respect, opportunities and engagement with Aboriginal and Torres Strait Islander peoples.



Racial Vilification Legislation and Reconciliation

NSWRC believes the Reconciliation process can be advanced by raising community awareness and understanding, and by promoting and supporting social justice, equity and human rights. Strong legislation which protects individuals and groups from racial discrimination promotes the dignity of all, increases access to services and economic independence and is a vital part of a Reconciled Australia. In addition, raising awareness of the rights and responsibilities of Australians in relation to anti-discrimination in everyday public life benefits all Australians and creates more cohesive and inclusive communities based on mutual respect.

Australia's International Obligations

The NSW Reconciliation Council considers the provision in question under the Act in the context of Australia's international obligations: particularly the International Covenant on Civil and Political Rights (ICCPR), the International Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Convention for the Elimination of all forms of Racial Discrimination (ICERD).

NSWRC points to **Article 6** of the International Convention on the Elimination of all forms of Racial Discrimination, to which Australia is a signatory. The provision outlines Australia's responsibility to assure effective protection and remedy against acts of racial discrimination:

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Specifically regarding Indigenous Australians, Australia's commitment under the UNDRIP indicates that:

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 recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

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.

Racial Discrimination towards Aboriginal and Torres Strait Islander Peoples

NSWRC recognises the effect that racial discrimination has on a broad spectrum of outcomes for Aboriginal and Torres Strait Islander peoples, and thus views the prevention of all forms of discrimination as of vital importance to the wellbeing of Australia's First Peoples. According to the Australian Institute of Criminology, racial vilification can silence and subordinate minority groups, minimizing participation in society and affecting life outcomes. In addition, vilification may also have broader community impact as it perpetuates environments in which further racist violence is more likely to be carried out.¹

Aboriginal people experience racial discrimination at a higher rate than mainstream Australia – with one in four Indigenous Australians having experienced discrimination in the course of a year.² The effects of discrimination experienced by Indigenous people stretches across health, housing, education and social wellbeing and is a result of both historical oppression and continuing racism. ABS statistics point to the effect that discrimination has on individuals: Aboriginal and Torres Strait Islanders who have experienced discrimination have higher rates of psychological distress, engage more in binge drinking and other health risk factors such as smoking, and have a lower level of trust in institutions such as police, schools, hospitals and other people in general.³

Racism also continues to play a significant role in our state, with 28.1% of people reporting anti-Indigenous sentiment⁴, and one in twenty people reporting being victims of racial violence.⁵ Initiatives such as the National Anti-Racism Strategy recognize the continuing effect that racism and discrimination has on our national wellbeing.

It is in this context that NSWRC approaches the effectiveness of Section 20D of the Act. It is clear that racial discrimination is an issue in Australia. It is the responsibility of governments to enact robust legislation to prevent and punish discrimination either through civil or criminal avenues as appropriate, as well as conduct appropriate education to influence behavior change in the community. With no prosecutions since its enactment, it is the view of NSWRC that the effectiveness of Section 20D can be improved to effectively prevent and punish criminal racial vilification.

¹ Sally Frances Reid and Russell G. Smith, "Regulating Racial Hatred," *Trends and Issues in Crime and Criminal Justice Series No.79* (Australian Institute of Criminology, Canberra: 1998.) p2.

² ABS Report 4704.0 "Social and Emotional Wellbeing:Discrimination" *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (Australian Bureau of Statistics, 2010) 4704.0. Accessed at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Main+Features1Oct+2010>>

³ Ibid

⁴ Kevin Dunn et al, "Challenging Racism: The Anti-Racism Research Project - State Level Comparison" (Paper presented at 4Rs Conference: Rights, Reconciliation, Respect and Responsibility 30 September – 3 October 2008) p2.

⁵ National Anti Racism Strategy. Accessible at: << <http://itstopswithme.humanrights.gov.au/strategy.html>>>

Racial Vilification and Freedom of Speech

NSWRC is aware of the controversial nature of racial vilification and anti-discrimination legislation in some parts of the community regarding a perceived tension between legislation and free speech. As discussed by the Australian Institute of Criminology⁶, conceptions of freedom of expression and protection from racial vilification as conflicting rights are false dichotomies, because racial vilification may in itself limit the capacity of victims to engage with freedom of expression. Further expressed by the 2002 Race Discrimination Commissioner Dr William Jonas: “Racial abuse, vilification and the dissemination of racist propaganda are forms of expression that violate the rights and freedoms of others.”

NSWRC draws the Committee’s attention to the fact, reflected in international law, that legislation can and must adequately provide both for freedom of expression and open public debate as well as protect the livelihoods of those affected by vilification. The International Covenant on Civil and Political Rights aids us in relation to this issue in Article 19:

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, on the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities, It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) for respect of the rights or reputations of others:
 - (b) for the protection of national security or of public order (ordre public), or of public health or morals.

In consideration of section 20D, NSWRC urges the Senate Committee to reflect Australia’s obligations under the ICCPR to create legislation which appropriately limits freedom of speech to preserve the rights of all its citizens; particularly minority and vulnerable groups.

In addition, it is imperative to note that the section under consideration; Section 20D, gives regard to *serious racial vilification*, including *threatening physical harm or damage of property*, or *inciting others* to do the same. These offences are very clearly criminal in other areas of domestic law and must be treated as so.

⁶ Sally Frances Reid and Russell G. Smith, “Regulating Racial Hatred,” *Trends and Issues in Crime and Criminal Justice Series No. 79* (Australian Institute of Criminology, Canberra: 1998) p1.

The Effectiveness of Section 20D

NSWRC is concerned by the existence of a fundamental structural problem regarding the implementation of Section 20D and the delegation of responsibility to act regarding its provisions. Section 20D is located in the *Anti Discrimination Act 1977*, unlike other criminal offences; many of which are provided for under the *Crimes Act*. In itself the location of the offence under a statute is not an issue, and there are many pieces of legislation that reflect this. However in the context of Section 20D, NSWRC is concerned that there is a lack of responsibility by the NSW police and other agencies in taking responsibility for enforcing the provisions.

Whether or not the provision could be relocated under the *Crimes Act*, NSWRC urges clearer direction is provided to the police and government agencies about their responsibility to enact Section 20D.

Recommendation:

NSW Police and relevant government agencies are directed about their responsibility to act regarding Section 20D.

In addition, the NSW Director of Public Prosecutions (DPP) has indicated that a primary reason that prosecutions have not been commenced under section 20D is that prosecution has been unable to adduce evidence to prove the necessary standard of incitement described in the offence provisions.⁷ NSWRC recognises that a standard of proof under 20D is high, however we also acknowledge that the test for assessment is common to other areas of criminal law and therefore not untenable.

Currently, however, Section 91 of the Act requires that the Anti Discrimination Board (ADB) president has the responsibility to refer a matter to the Attorney General if they consider that an offence may have been committed under Section 20D. NSWRC is concerned that the process set out under s 91 is structurally problematic. The ADB is not currently resourced adequately to provide a comprehensive evidence brief in its referral of the matter to the Attorney General. In addition, the restricted time period of 28 days may provide a barrier to preparation of a comprehensive case.

⁷ Nicholas Cowdery, DPP, “Review of Law of Vilification: Criminal Aspects” (Paper presented at Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney: 28 August 2009) Page 4.

Recommendation: That the Act formally gives responsibility and resourcing to the ADB to either prepare a comprehensive evidence brief for the DPP or contract the appropriate agencies to do so.

Whether Section 20D Establishes a Realistic Test

Unlike the civil context, Section 20D requires the establishment of ‘intention’ to incite racial vilification. In addition, NSWRC draws the Committee’s attention to the difficult to prove concept of ‘incite’, where “a mere expression of hatred, no matter how offensive, is not sufficient to meet that definition in terms of the criminal law if it does not “incite” others to hatred towards, serious contempt for or severe ridicule of a person or group of persons on particular grounds.”⁸

Recommendation: That requirements to prove both ‘intent’ and ‘incite’ are recognised as a very high threshold and potentially reviewed.

Potential Improvements

NSWRC points to the ICERD under Article 7 which outlines the responsibility of States parties to adopt measures in the fields of teaching, education, culture and information which lead to combating racial prejudice. It is the view of NSWRC that legislation alone is not enough to counter racism and vilification. NSWRC recognises the continuing and deep hold that racism has in our community, and a continuing reluctance in our community to invoke criminal law regarding racism.

In order to counter this phenomenon, and if Section 20D is not to be moved to the *Crimes Act*, Government must provide greater education and direction for the police force and other agencies to treat serious racial vilification as criminal offence as important as the treatment of other offences under our system.

In addition, governments must continue to support broad anti-racism education, anti racism activities and organisations and the growing of a rights respecting culture. In particular, education must be conducted to alert the wider community that serious racial vilification – which involves incitement of violence or damage of property is, and should be, a crime. The law is comparable to other criminal offences, which are uncontroversial in the community. Work is

⁸ Nicholas Cowdery, DPP, “Review of Law of Vilification: Criminal Aspects” (Paper presented at Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney: 28 August 2009) Page 4.



needed to counter current misinformation in the public sphere about the importance of a criminal remedy for serious racial vilification.