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INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Redfern Legal Centre

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Redfern Legal Centre

Racial vilification law in NSW

Submission to the Legislative Council Inquiry, NSW Law and Justice Committee

Redfern Legal Centre

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1. Introduction: Redfern Legal Centre

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal and human rights organisation with a prominent profile in the Redfern area.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

2. RLC's Experience

In the year 2011 – 2012, 6.1% of of RLC's clients identified as being Aboriginal or Torres Strait Islander and 30.6% were of culturally and linguistically diverse backgrounds. Our clients bring to us their life experience of discrimination and vilification. Their disadvantage is frequently the outcome of historic and continuing prejudice and marginalisation. Racial profiling and stereotyping continues to influence how they are provided with services, education, employment, access to premises and policing as well as to how they are treated by neighbours and others in the community.

Contributing authors Natalie Ross, Joanna Shulman and Elizabeth Morley together have many years of practice in community legal services delivery and discrimination law.

3. RLC's view in summary

RLC welcomes the NSW Law and Justice Committee's inquiry into the criminal racial vilification provisions in the Anti-Discrimination Act (NSW) 1977 (the ADA). However, RLC submits that a complete review of the ADA should be undertaken. There have been significant developments in anti-discrimination laws in other Australian states and territories, and internationally, and the Federal government is now attempting to consolidate Federal anti-discrimination laws. For consistency, and to ensure that people in NSW have the equivalent human rights protections as other Australians, such a review is overdue.

RLC is of the view that significant improvements can be made to section 20D of the ADA, and also to section 20C (the civil racial vilification provisions).

4. RLC's recommendations

4.1 Recommendation 1: Referral procedures - Consent

The need to obtain prior consent of the Attorney General to commence criminal proceedings at section 20D(2) should be removed.

4.2 Recommendation 2: Referral procedures - Referral without formal complaints

The President of the NSW Anti-Discrimination Board (**ADB**) should be empowered to refer a matter to the Director of Public Prosecutions without the requirement that a formal complaint is received.

4.3 Recommendation 3: Referral procedures - Extension of time

The current 28 day time limit for referrals from the ADB to the Director of Public Prosecutions should be extended.

4.4 Recommendation 4: Section 20C- incitement

The element of 'incite' referred to in Section 20C (1) should be removed and replaced with the word express or promote

4.5 Recommendation 5: Section 20D Elements - Means

The provisions in s20D (1) (a) and (b) relating to the means of incitement should be removed.

5. Discussion

5.1 Racial vilification in NSW

RLC clients, particularly our Aboriginal clients, experience racial vilification. RLC is acutely aware of the critical impact that racial vilification has on the vilified individual or group, communities and society as a whole. The cumulative harm of racial vilification on minority groups affects their participation in society, causes substantial pain and breeds environments conducive to unrest and violence.

Case study 1

A few weeks ago an Aboriginal woman attended RLC in a distressed state. She instructed us that on the previous day she had been travelling on a bus with her daughter and a friend, when she was subjected to a tirade of racist abuse from another passenger. Words said included "And you, you black c---. I bet it smells. Your face looks like your c---. All you black c---'s let your children have sex with your husbands." In this instance the person also said they had a knife and would use it. Our client called the police, but by the time the police attended the perpetrator had left the bus. Our client was disappointed that neither the bus driver or fellow passengers had offered her support or challenged the perpetrator.

Case Study 2

Our client was an international student of African appearance, although a citizen of north America. She lived in city high rise apartment. From the day she moved in, the staff on the service desk in the foyer of her building made comments to the effect that a black person could not afford to live in the building, a black person was not wanted in the building, a black person must be in an overcrowded apartment, and that black girls look like men. They also referred to her as a nigger. She reported the comments were loud enough to be heard by other users of the foyer.

Reports of racial vilification are also reported in the media broadcasting on significant incidents. Of note is the recent verbal abuse directed to an ABC news presenter on public transport who was referred to as a "black c---."[1]

RLC is also aware of the findings in the report titled "The Challenging Racism: The Anti-Racism Research Project"[2] that was led by Professor Kevin Dunn which indicates that racism is still prevalent in society. The survey has recorded concerning levels of anti-Muslim, anti-Aboriginal, anti-Asian and anti-Semitic attitudes.

RLC is also acutely aware that any redress of racial vilification laws must be balanced and considered in light of our international obligations and common law requirements to protect freedom of speech and freedom of expression.

5.2 International Obligations

Article 19 of the International Convention on Civil and Political Rights (ICCPR) states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

However, this right is limited by Article 19(3) which states that:

The exercise of the [right to freedom of expression] ….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 for respect of the rights and reputations of others. Australia ratified the International Convention on the Elimination of all forms of Racial Discrimination (CERD) in 1975. Article 4 of CERD says that member states:

Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, 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 financing thereof.

Australian States are not signatories to these international instruments, but we submit that NSW should be guided by the principles in these international human rights conventions.

[1] Matt Young, *ABC journalist cops racist rant on Sydney bus,* (8 February 2013) NET Syndicated news.com
[2] Kevin Dunn, 'Challenging Racism: The Anti-Racism Research Project' (2008) University of Western Sydney <http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism>.

5.3 The effectiveness of Section 20D and suggested improvements

5.3.1 Section 20D

The criminal provisions of section 20D became part of the Anti-Discrimination Act 1977 (**Act**) in 1989 in order to create a criminal offence for serious racial vilification. Along with the civil provisions in section 20C, it attempts to address racial vilification on both a practical and symbolic level.

In practice, however, there have been no prosecutions under section 20D. It is also recognised that section 20C imposes a very high threshold on racial vilification complaints. RLC is concerned that the symbolic value of the civil and criminal provisions in:

- recognising the seriousness of the conduct;
- deterring potential wrongdoers; and
- educating the public

is undermined by the lack of prosecutions and the difficulty in achieving successful civil complaints.

Section 20D criminalises the act of inciting hatred, contempt or severe ridicule towards a person or group on grounds of race *if* such incitement is done by the means of threatening physical harm towards people or their property, or inciting others to threaten such harm.[3]

5.3.2 Lack of prosecutions

Since section 20D came into force at least 27 incidents of racial vilification have been referred for criminal prosecution. The Director of Public Prosecutions (**DPP**) has decided that the burden of proof required under section 20D could not be discharged in any of these referrals.[4]

The DPP[5] has broadly outlined the circumstances[6] of some of the complaints received for prosecution under section 20D which include:

[3] RLC notes that unlike the civil provisions in section 20C there are no defences or exceptions to the offence of serious racial vilification under section 20D. The other differences are that under the civil provision it appears that it is not necessary to prove intent nor a threat of harm to person or property or an incitement to another to cause harm to person or property.
[4] Sean Nicholls, *O'Farrell moves to strengthen hate laws,* (13 January 2013) The Sydney Morning Herald <http://www.smh.com.au/nsw/ofarrell-moves-to-strengthen-hate-laws-20130112-2cmh5.html#ixzz2KAqh8hP3>.
[5] Nicholas Cowdery AM QC (Director of Public Prosecutions), 'Review of Law of Vilification: Criminal Aspects' (2009), New South Wales (Delivered at the Hate Crime and Vilification Law Roundtable, Institute of Criminology, Faculty of Law, University of Sydney, 29 August 2009).
[6] The referrals are from the Anti-Discrimination Board, the Jewish Board of Deputies, the Attorney General and individual citizens.

- The public display of a sign in front of a house reading "Jews make fantastic lampshades. Why should Israel be above the law?"
- Publication in a newsletter of anti-Jewish statements including an article headed "Jews - The One True Evil."
- Incidents of personal abuse directed at indigenous Australians which included references to aspects of Aboriginality.
- A threat of violence directed towards an indigenous Australian in terms referring to aboriginality.
- Allegations that security guards and police failed to intervene in an attack on an Aboriginal Australian.[7]

The DPP has not explained in the above incidents which element/s of section 20D were unlikely to be satisfied. However, the DPP has stated that "the most common reason why prosecutions have not been commenced has been the inability of the prosecution to adduce evidence to prove to the necessary standard either incitement or incitement by the specific means described in the offence provisions."

RLC will highlight briefly some of the procedural issues before turning to a review of the 'incitement' and 'specific means' elements.

5.3.4 Concerns over procedure

Complaints about racial vilification can be made to the ADB. If the President of the ADB is of the view that the complaint is one of serious racial vilification, conciliation of the complaint will not be attempted. The ADB president may within 28 days refer such complaints to the Attorney General. (The ADB President is required to notify the complainant of the referral to the Attorney General and of the complainant's right to require the President to refer the complaint to the Administrative Decisions Tribunal (**ADT**) for judicial determination within 21 days.) RLC has some specific concerns over the complaints procedure which include the requirement of consent and time constraints.

5.3.5 Attorney General's Consent

The consent of the Attorney General is required before a person can be prosecuted under section 20D.[8] In 1990 the Attorney-General delegated the power to the DPP pursuant to section 11(2) of the Director of Public Prosecutions Act, 1986 (NSW). The express requirements for the consent of the Attorney General is assumed to have been put in place

[7] Cowdery, above n 5, 3.

[8] It is a requirement under the section that a person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution. In practice, in 1990 the Attorney-General delegated the power to the Director of Public Prosecutions (Director of Public Prosecutions Act 1986 (NSW) s11(2).

to address concerns over malicious or frivolous prosecution and in order to protect free speech.[9]

The Samios Report[10] raised concerns that the requirement for consent of the Attorney General had two consequences. Firstly, that doubt was created as to police powers in light of the requirement of consent and secondly the possibility of police getting the impression that the crime was not within their 'jurisdiction'.

The Samios Report also considered that:

> "the need for senior responsibility in the area of prosecutions for serious racial vilification should not involve politicians. Naturally, it was never the intention of the previous Attorney-General, The Honourable John Dowd, QC, to exercise the statutory power personally. That is why he delegated that power to the Director of Public Prosecutions…Any power of control by a senior prosecutor should be vested directly in the Director of Public Prosecutions by the Act."[11]

Experience indicates that concerns over malicious or frivolous prosecution under section 20D are unfounded. In addition, the fact that DPP is the body which decides whether or not to pursue prosecution suggests that the "gatekeeping" function of the Attorney General is not required. RLC submit that section 20D should be amended to remove the requirement of consent by the Attorney- General.

RLC also submits that the 28 day deadline for referrals from the ADB for prosecution should be extended. Given that there is generally a 6 month limitation for the prosecution of a summary offence the additional time limitation of 28 days seems unnecessarily restrictive.

RLC also agrees with the recommendation made by the NSW Law Reform Commission (**NSW LRC**) that the President of the ADB be empowered to refer a matter to the DPP whether or not the ADB has received a formal complaint in a matter where the President is of the view that the circumstances may constitute an offence of serious racial vilification.

In addition to the above procedural amendments RLC considers that the 'incitement' and 'specific means' elements under section 20D need review.

5.3.6 The elements of Section 20D

The use of the term "incite" in both sections 20C and 20D has been the subject of considerable debate and has been strongly criticised for being vague, onerous and unnecessary. The term incite is not defined in the ADA.

In the case of *Burns v Dye* [2002] NSWADT 32 the ADT discussed the definition of incitement in the context of the homosexual vilification provisions. The ADT said:

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[9] Luke McNamara, 'Regulating Racism: Racial Vilification Laws in Australia' (2002) *Sydney Institute of Criminology*, 140.
[10] Hon James Samios, 'Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of New South Wales' (1992) *Legislative Council*, Sydney.
[11] Ibid 29.

> "The racial vilification provisions of the Act are similar to the provisions dealing with homosexual vilification and were considered in the recent decisions of *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 and *Western Aboriginal Legal Service Limited v Jones & Anor* [2000] NSWADT 102 (both on appeal). Both examined in some detail the element of incitement and from them the following principles may be distilled. First, the word `incite' is to be given its ordinary natural meaning which is to "urge, spur on, . . . stir up, animate; stimulate to do something" (New Shorter Oxford English Dictionary, 1993) (Oxford); "urge on; stimulate or prompt to action" (the Macquarie Dictionary, third edition, 1997) (Macquarie).
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> Second, the vilification provisions of the Act do not make unlawful the use of words that merely *convey* hatred towards a person, or the expression of serious contempt or severe ridicule: *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701 at 78-266.".

The 'means element' in section 20D has also been the subject of continued debate for two main reasons:

- The 'means element' (personal violence or damage to property or incitement of the same) has been seen to be very difficult to establish and an impediment to prosecution; and

- The same conduct (personal violence, damage to property, threats of injury to person or property) can be subject to charges under the *Crimes Act* that attract heavier penalties and have a less onerous evidentiary burden.

RLC considers that threats of violence are already adequately dealt with under the *Crimes Act*, and that there are provisions for enhanced penalties when an offence was motivated by hatred for or prejudice against a group of people to which the victim belonged.

5.4 Proposal to amend sections 20C and 20D

RLC agrees with the following comments made in 2009 by Mr Peter Wertheim, a member of the NSW Anti-Discrimination Board:

> "And yet it seems clear that a vilificatory act need not be accompanied by, or itself constitute, a threat, or incitement to others to threaten, physical harm to person or property, and the act may nonetheless be perceived by the target person or group (and by others) – and reasonably perceived – as extremely threatening. The threat may be unmistakable to a reasonable observer even if it is merely implicit and not provable beyond reasonable doubt.
>
> There is a strong argument to be made that public incitement of hatred on any of the prohibited grounds, of itself, entails a breach of the peace, and that criminal sanctions are therefore appropriate where the incitement is intentional. Even if the incitement is not immediately accompanied by a threat of physical harm, or by an incitement of others to threaten physical harm, the incitement of the public to hatred on one of the prohibited grounds contributes to the creation of a social climate that is more conducive to the occurrence of acts or threats of physical harm to the groups that

are targeted, and more conducive to social violence in general."

RLC submits that extreme speech that incites racial hatred should be subject to prosecution in the absence of explicit threats of physical harm for the reasons given above by Mr Wertheim. Race hate speech can make people fearful, and restrict their participation in community life. It can make incidents of physical harm against the vilified group more likely in the future.

RLC therefore proposes amendments to both sections 20C and 20D to make them more useful in addressing the social evil of race hate speech, while maintaining our valued freedom of speech. Our suggested amendment to section 20C would make it a more viable means for individuals and groups affected by hate speech to get redress, by changing the focus to the nature of the hate speech and the effect on the complainant(s). Our suggested amendments to section 20D change the focus to the effect of the hate speech on the community as a whole, rather than on the means.

We suggest removing the incitement requirement from section 20C and replace it with a term such as "expressing" or "promoting". Unlawful racial vilification would then be the expression or promotion of hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, on the ground of their race, subject to the existing defences in section 20C(2). The existing defences in section 20C offer considerable free speech protection for public debate.

We also suggest that the "means" element be removed from section 20D, and an incitement to violence provision be added. The offence of serious racial vilification would then become the incitement of hatred towards, serious contempt for, severe ridicule of, or violence towards a person, or group of persons, on the ground of their race. There would be no requirement as to the means of such incitement.

The proposed change should not impinge on public expressions of opinion and expression done reasonably and in good faith. To the extent that there is some remaining concern then defences consistent with those provided in section 20C could be added to section 20D.

We believe that our recommendations should achieve a balance of rights to freedom of opinion and expression with providing protection necessary for the respect of the rights and reputations of others and with making dissemination of ideas based on racial superiority or hatred an offence punishable by law.