Submission No 28

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Armenian National Committee of Australia

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The Armenian National Committee of Australia (ANCA), the peak public affairs body of the Armenian-Australian community, presents the following submission to the New South Wales (NSW) Government's inquiry into the effectiveness of the existing racial vilification legislation.

1. Background

1.1 The terms of reference set by the NSW Standing Committee on Law and Justice focus on the effectiveness of section 20D of the *Anti Discrimination Act 1977* (NSW) ("the Act"). Specifically it seeks to establish whether section 20D:

- sets a 'realistic' test for serious racial vilification offences; and
- whether the test is 'in line with community expectations'.

1.2 We believe that section 20D fails to meet a 'realistic' test. There is a wide body of literature that has outlined the ineffectiveness of the mentioned section including numerous cases, which have been referred to the Director of Public Prosecutions (DPP) with no action having eventuated or charges laid. In line with this we strongly believe that the aforementioned section has failed to operate 'in line with community expectations'.

1.3 It is important to distinguish between public debate and freedom of speech, which is racially motivated and incites hatred in our multicultural society. Racial vilification laws should concretely focus on prosecuting such crimes and not creating an outcome of censorship. Reform to the law is needed in this regard to protect the basic rights of all citizens to ensure a robust society free of racial hatred. We fully support the strengthening of laws that are aimed in ensuring public conduct is not racially motivated.

1.4 Leaving such crimes unpunished due to a lack of adequate legislation only allows for crimes to be recommitted in a more frequent and harsher manner. This is all too evident by the experiences of not only the Armenian community but also the Jewish and other minority communities. The strengthening of legislation does not require a complete overhaul but rather some minor changes to fulfill the two key expectations: 'realistic' and 'in line with community expectations'.

2. Act

2.1 Section 20D Offence of serious racial vilification:

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(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.

Maximum penalty:

In the case of an individual-50 penalty units or imprisonment for 6 months, or both.

In the case of a corporation-100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

2.2 Key terms

2.2.1 A conviction under section 20D requires proof beyond reasonable doubt of every one of the following elements:

1. a public act
2. which incites
3. hatred towards, serious contempt for, or severe ridicule of, a person or group of persons
4. on the ground of the race
5. 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.

3. Interpretation of the law

3.1 Public Act

3.1.1 There is term "public" is not defined in legislation and therefore the common law definition needs to be adopted.

3.1.2 The Act defines the term "public act" in section 20B and extends to situations which include: "any form of communication to the public", "any conduct…observable by the public", and "the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons".

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3.1.3 Consideration must be given to the period of when section 20D was created. In 1989, the internet was at its infancy and not a widely used medium for communication. Large volumes of material are now generated on a daily basis and published on the interest, which is freely open to the public. Detailed consideration must be given to the regulation of "free speech" on the internet with proper mechanisms for redress on racial hatred.

3.1.4 The level of intent required must show that the dissemination of material is considered to be a "public act" and that the material will "promote or express hatred". Requiring this level of proof adds an unnecessary barrier for prosecution against racial vilification crimes.

3.2 Incites

3.2.1 The term "incites" is not defined in the Act. Again a common law definition is applied.

3.2.2 The resulting ambiguity has resulted instances where cases before the Courts have led the accused arguing the concept of incitement requires proof that other people have actually been incited.

3.2.3 The 2004 case of *Z v University of A & Ors (No. 7)* clarified this position by deeming an objective test must be applied.

> *Thus, in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race? The question is not, could the ordinary reasonable reader reach such a conclusion after his/her own beliefs have been brought into play by the public act?*

3.2.4 The terminology used in the Act should be replaced/strengthened to ensure a coherent definition for the term "incites".

3.2.5 For a criminal offence to be recorded under section 20D, the intention to incite, the element of *mean rea* must be present. In order to satisfy this requirement, intent and reckless indifference need to be proved.

3.2.6 Serious racial vilification offences more often than not are targeted against an individual or a small number of people. Its impact however is far reaching. The Act should therefore proscribe acts, which are reckless as well as deliberate.

3.2.7 The intention is not to limit free speech, which is why we believe that public acts of racial vilification should be deemed criminal only if the intention or recklessness is proved to the criminal standard.

3.3 Hatred, serious contempt or severe ridicule

3.3.1 Throughout Australia there is general consensus as to the application of "hatred".

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3.3.2 The most compelling definition for the term was defined in the NSW Administrative Decisions Tribunal case of *Kazak v John Fairfax Publications Ltd (2000) NSWADT 77*.

> *"hatred" means "intense dislike; detestation" (Macquarie), "a feeling of hostility or strong aversion towards a person or thing; active and violent dislike" (Oxford);*
> *"serious" means "important, grave" (Oxford); "weighty, important" (Macquarie);*
> *"contempt" means "the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account" (Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);*
> *"severe" means "rigorous, strict or harsh" (Oxford); "harsh, extreme" (Macquarie);*
> *"ridicule" means "subject to ridicule or mockery; make fun of, deride, laugh at"(Oxford); "words or actions intended to excite contemptuous laughter at a person or thing; derision" (Macquarie).*

3.3.3 We concur that the above definitions encompass the meaning of hatred, however, we raise concern about its application if a racially motivated attack fails to reach the element of "incitement".

3.3.4 We believe that this shortfall should be addressed to ensure the protection of individuals and/or groups from racial vilification.

3.4 On the grounds of race

3.4.1 Section 4 of the Act defines "race" as including "colour, nationality, descent and ethnic, ethno-religious or national origin".

3.4.2 We raise concerns over section 88 of the Act which requires:

> *A vilification complaint cannot be made unless each person on whose behalf the complaint is made:*
>
> *(a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or*
> *(b) claims to have that characteristic and there is no sufficient reason to doubt that claim.*

3.4.3 Protection under section 20D extends only to persons who are actually members of the race that is vilified but not to those who are vilified because they are *presumed* to be members of that race.

3.4.4 We believe there should be no requirement to distinguish between the two (see 3.4.3). The Act should follow the provisions of the section 80F of the Western Australian *Criminal Code*.

3.4.5 This will ensure equal protection under the law regardless of whether an individual is presumed to be a member of a race or is actually a member of a race.

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3.5 Means

3.5.1 Harm caused by racial vilification to minority groups can result in a loss of security and safety and becomes a serious impediment in daily living.

3.5.2 Criminal sanctions under the current law will only apply when an act can be proved beyond a reasonable doubt.

3.5.3 A serious limitation arises in that public incitement of hatred is not sufficiently serious enough to warrant criminal sanctions, even if the incitement and intent is proved to be beyond a reasonable doubt.

3.5.4 For a criminal conviction to be registered on the grounds of racial vilification there must either be a contemporaneous threat of harm to a person or property or a contemporaneous incitement of others to threaten such harm[1].

4. Why action is needed

4.1 Over the past two decades racially motivated attacks have been on the increase in Australia and are no longer isolated incidents[2].

4.2 The 1991 report of the National Inquiry into Racist Violence in Australia as well as the Royal Commission into Aboriginal Deaths in Custody concur with the trend mentioned in 4.1.

4.3 Over the past two decades the Australian public has witnessed the proposed policies of the One Nation Party, mass riots in Cronulla resulting from racial violence against people of ‘middle eastern appearance’, an increase in attacks against Indian students in Sydney and Melbourne who claimed they were victims of racially motivated attacks, desecration of memorials dedicated to victims of the Armenian Genocide in Sydney with racial slurs covering the monuments (these are only a handful of examples of recent developments).

4.4 Racism is a critical issue, which needs to be addressed at all levels of government. It is not only a source of discrimination and public vilification but also a potential source for violence, which would destabilize the multicultural Australian society.

4.5 Under the law those who engage/are engaged in violent behavior motivated by racial hatred are labile for prosecution under existing criminal laws, which fall outside the scope of the Act. This however does not apply to individuals who incite them to hatred in the first place.

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[1] Wertheim, P. (2009), *Hate Crime and Vilification Law: Developments and Directors* (http://sydney.edu.au/law/criminology/ahcn/docs_pdfs/HATE_CRIME_AND_VILIFICATION_LAW.pdf)

[2] Human Rights and Equal Opportunity Commission Racist Violence: *Report of the National Inquiry into Racist Violence in Australia*, Irene Moss, Race Discrimination Commissioner, Chairperson of the Inquiry, Canberra, Australian Government Publishing Service, 1991, p xviii, pp 387-398. http://www.multiculturalaustralia.edu.au/doc/racediscrimcomm_2.pdf

4.6 The enactment of section 20D of the Act was in order to prosecute those who engage in criminal incitement but that section has failed in this regard.

4.7 For a prosecution to proceed under section 20D of the Act, the Attorney General of NSW must provide consent for the prosecution. It is important to note that no one has been prosecuted under section 20D in NSW.

4.8 This raises a potential serious gap between *the letter and the spirit* of the law. We believe that the reason for this gap is due to the difficulty in proving the "incitement" element and the "means" element.

5. Attorney General's Consent

5.1 Section 91 of the Act requires the President of the Anti-Discrimination Board of NSW, after receiving and investigating a complaint, and before taking action to resolve the complaint by conciliation, to consider whether an offence may have been committed under any of the criminal provisions.

5.2 If the President deems that an offence may have been committed, the complaint must be referred to the Attorney General within 28 days after receipt of the complaint.

5.3 Once the Attorney General receives the referral, he/she then decides whether to grant consent for the matter to be prosecuted under section 20D. If consent is given the matter is referred to the DPP to determine if prosecution should commence. If the Attorney General does not refer the case then there is no possibility of prosecution.

5.4 It is unclear why this mechanism is utilized. We believe that it would be far more effective for the DPP to prosecute serious vilification offences, without the involvement of the Attorney General. This is not to say that the Attorney General should stop referring cases to the DPP in this regard but it would streamline the process and result in more effective prosecution of such cases.

6. Trial by jury

6.1 We believe that a jury should try serious racial vilification cases.

6.2 A trial by jury will provide an effective mechanism for ensuring that the law, including the objective test discussed at 3.2.3 is applied inline with prevailing community and societal standards.

6.3 A trial by jury will provide effective safeguards and will enhance the public's confidence in the Act.

7. Interim Orders

7.1 The current Act makes no provision for interim orders.

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7.2 It is generally understood that an interim order preserves the *status quo* until the courts reach an outcome.

7.3 In vilification cases being prosecuted under the Act, a conventional interim order would be counter productive.

7.4 An interim order imposed under the Act would require the person charged do, or cease to do, or refrain from doing, any act pending the final outcome of the court, or in civil proceedings by the tribunal.

7.5 In order to establish the interim order the provision in the Act would be based upon an application by the prosecutor or at the courts discretion. The court would need to determine if an interim order is warranted based pursuant to the facts of the case in question.

8. Recommendations

8.1 That section 20D of the Act be removed and replaced by a set of statutory provisions for the criminal proscription of serious vilification, to form part of the *Crime Act 1900 (NSW)*.

8.1.1 The term "public act" be amended to include acts in both physical places and on the internet.

8.1.2 The term "hatred" be clearly defined to include gross behaviors.

8.1.3 The following items as well as any of the four currently proscribed by the legislation be reclassified as criminal offences:
- the public incitement of hatred against; and
- the harassment of any person.

8.1.4 The terms "threaten", "intimidate", and "substantially abuse" should be incorporated into the definition of harassment.

8.1.5 Criminal prosecution should also extend to not only crimes of vilification against those presumed to have characteristic giving rise to the proscribed conduct.

8.1.6 The prosecutor should have the ability to apply for interim orders. The court should also, on its own accord, have the ability to make such orders.

8.1.7 The consent of the Attorney General should no longer be required, however the Attorney General should still be able to refer cases to the DPP.

8.1.8 Serious racial vilification cases should be tired before a jury.