

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Name: Miss Sarah Pitney

Date received: 29/01/2013

Contents

Introduction – 2

Current legislation – 2

Serious racial vilification - 3

Penalty anomaly - 3

Consent - 4

Specific intent - 4

Civil regulation - 6

Opposition to a separate offence - 7

Relocation - 9

Conclusion – 9

The NSW racial vilification legislative model attempts to strike an appropriate balance between the maintenance of freedom of speech and the prevention of public acts of racial hatred by integrating flexible civil regulation processes and a criminal offence of ‘serious racial vilification’. However, the former is not satisfactorily accessible, whilst the latter imposes stringent constraints that deter prosecutors leading to a reliance on sentence aggravation provisions to address racially vilifying conduct. By highlighting racial motivation in sentencing rather than in conviction, the educational effect of criminalisation as a statement of public reprobation is undermined and apparent legitimacy afforded to racial vilifiers’ views. Whilst there are concerns that removing the aforementioned constraints on prosecution may unduly curtail freedom of speech or render the legislation counter-productive, careful amendment of existing legislative provisions to create a specific criminal offence of racial vilification and their relocation to the *Crimes Act 1900* (NSW) is essential to protect the dignity and security of targets of racial hatred.

Current legislation

The *Anti-Discrimination Act 1977* (NSW) s 20C prohibits the public incitement, on racial grounds, of ‘hatred towards, serious contempt for, or severe ridicule of’ individuals or groups. Such unlawful conduct is a matter of civil regulation through conciliation processes undertaken by the Anti-Discrimination Board or adjudication by the Administrative Decisions Tribunal.¹ Only when racial vilification is aggravated by threats of ‘physical harm towards, or towards any property of’ the individual or group or ‘incitement of others to do so’ may charges of ‘serious racial vilification’ be laid under s 20D. Thus, racial vilification itself is not a criminal offence but merely a component of the actus reus of ‘serious racial vilification’.²

¹ *Anti-Discrimination Act 1977* (NSW) pt 9.

² Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, 2002) 199-201.

Serious racial vilification

The criminalisation of ‘serious racial vilification’ has been criticised for its failure to ‘extend the regulatory net’ of criminal law.³ The absence of any prosecutions under s 20D to date is largely reflective of the excessive constraints that inhibit the effectiveness of the provision.⁴

Penalty anomaly

The requisite threats or incitement of others to violence that must accompany racial vilification to establish ‘serious racial vilification’ also constitute alternative offences. For example, threats to property are addressed by the *Crimes Act 1900* (NSW) s 199, threats of physical harm may amount to common assault,⁵ and the incitement of others to violence may be prosecuted under the common law offence of incitement.⁶ These alternative offences are accompanied by higher maximum penalties,⁷ and as racial motivation is not an element of these offences, it may be regarded in sentencing as an aggravating factor.⁸ As noted by the Director of Public Prosecutions of Western Australia, this ‘penalty anomaly’ deters prosecutors from pursuing charges of racial vilification even when ‘factually appropriate’.⁹ For example, although the conduct of Brett King, the initiator of text messages that triggered the Cronulla riots, arguably fell clearly within the ambit of s 20D,¹⁰ alternative charges of inciting, urging and encouraging riot and affray were laid.¹¹ The reliance

³ McNamara, above n 2, 133; Sharyn Ch’ang, ‘Legislating Against Racism: Racial Vilification Laws in New South Wales’ in Sandra Coliver (ed), *Striking A Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (University of Essex, 1992) 87, 99.

⁴ Human Rights and Equal Opportunity Commission, *Racial Vilification Law in Australia* (2002) Australian Human Rights Commission <http://www.hreoc.gov.au/racial_discrimination/cyberracism/vilification.html>.

⁵ *Crimes Act 1900* (NSW) s 61.

⁶ Dan Meagher, ‘So far no good: The regulatory failure of criminal racial vilification laws in Australia’ (2006) 17 *Public Law Review* 209, 214.

⁷ *Ibid*, 215.

⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(h).

⁹ Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 5159 (Geoffrey Gallop, Premier).

¹⁰ Meagher, above n 6, 218

¹¹ AAP, ‘Hate text suspect faces court’, *Sydney Morning Herald* (online), 27 January 2006 <<http://www.smh.com.au/news/national/hate-text-suspect-faces-court/2006/01/27/1138319425239.html>>.

instead upon sentence aggravation provisions does not adequately ‘distinguish’ racially motivated conduct as this aspect is neglected in the conviction.¹² Thus, it may be appropriate to increase the maximum penalty prescribed for ‘serious racial vilification’ of six months imprisonment and/or a fine in line with other jurisdictions such as Western Australia and South Australia, where penalties of fourteen years and three years imprisonment are available respectively for similar conduct.¹³

Consent

The requirement that the Attorney-General’s consent be obtained before the prosecution of ‘serious racial vilification’ also generates reluctance to pursue charges.¹⁴ Whilst this prerequisite may serve an important ‘gate-keeping function’ by limiting prosecutions that unduly encroach upon the right to freedom of speech,¹⁵ there is concern that such politicisation generates the perception that the legislation is applied discriminatively and that the conduct is ‘outside the scope’ of normal criminal processes.¹⁶ As noted by the Law Reform Commission in 1999, an appropriate alternative may be to require Anti-Discrimination Board consent.¹⁷

Specific intent

The effectiveness of s 20D is undermined by the requirement that the prosecution prove beyond reasonable doubt a subjective intention on the part of the accused not only to carry out the relevant

¹² Tasmanian Law Report Institute, *Racial Vilification and Racially Motivated Offences*, Report No 14 (2011) 42; Benjamin White, ‘The case for criminal and civil sanctions in Queensland’s racial vilification legislation’ (1997) 13 *Queensland University of Technology Law Journal* 235, 243.

¹³ *Anti-Discrimination Act 1977* (NSW) s 20D; *Criminal Code* (WA) s 77; *Racial Vilification Act 1996* (SA) s 4.

¹⁴ *Anti-Discrimination Act 1977* (NSW) s 20D(2).

¹⁵ Meagher, above n 6, 215.

¹⁶ *Ibid*; New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1992) 551-2.

¹⁷ New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1992) 552.

‘public act’, but that the act will incite hatred, serious contempt or severe ridicule.¹⁸ Whilst not expressly stated in s 20D, Attorney-General Dowd clarified this constraint in his Second Reading Speech.¹⁹ This ‘additional mens rea requirement’ of intent as to the upshot of the act or ‘specific intent’²⁰ has previously been described as a hindrance to the implementation of similar anti-discrimination legislation²¹ and equated to ‘proof of the motive’²² underlying the conduct. Although the Attorney-General referred sixteen complaints to the Director of Public Prosecutions between 1993 and 2008, no prosecutions were pursued, largely because of the heavy onus this requirement places upon the prosecution.²³

This hurdle may be reduced by introducing complementary offences with different mens rea requirements. For example, Western Australian legislation encompasses two offences of engaging in conduct that is ‘likely’ or alternatively ‘intended’ to incite racial animosity corresponding with penalties of different severity.²⁴ Where strict liability is imposed, it is a ‘defence’ to demonstrate the conduct ‘was engaged in reasonably and in good faith’ for a specified purpose such as fairly reporting a matter of public interest and thus imposition upon freedom of speech is minimised.²⁵ Alternatively, Victorian legislation criminalises conduct ‘intended’ or ‘known’ by the accused to be ‘likely’ to incite hatred when accompanied by threats or the incitement of others to violence.²⁶ Similarly, Canada imposes liability for ‘wilful’ racial vilification that has been interpreted as necessitating proof of either ‘intent to promote hatred or knowledge of the substantial certainty of

¹⁸ Nicholas Cowdery, ‘Review of Law of Vilification: Criminal Aspects’ (Paper presented at Hate Crime and Vilification Law Roundtable, Sydney Institute of Criminology, University of Sydney, 29 August 2009) 2.

¹⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 1989, 7490 (John Dowd, Attorney-General).

²⁰ *He Kaw Teh* (1985) 157 CLR 523, 569 (Brennan J).

²¹ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (Mason CJ and Gaudron J).

²² Meagher, above n 6, 215.

²³ Peter Wertheim, ‘Hate Crime and Vilification Law: Developments and Directions’ (Paper presented at Hate Crime and Vilification Law Roundtable, Sydney Institute of Criminology, University of Sydney, 29 August 2009) 5.

²⁴ *Criminal Code* (WA) ss 77-78.

²⁵ *Criminal Code* (WA) s 80G; Wertheim, above n 24, 7; Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 5159 (Geoffrey Gallop, Premier).

²⁶ *Racial and Religious Tolerance Act 2001* (Vic) s 24.

such a consequence'.²⁷ Thus, creating a complementary strict liability offence or amending s 20D to incorporate advertent recklessness as an alternative mental state may increase the legislation's efficacy without unreasonably compromising principles of criminal liability.

Civil regulation

Racial vilification, in the absence of aggravating threats of or incitement of others to violence, is currently a matter of civil regulation. Opponents to a separate criminal offence of racial vilification hail the success of civil regulation as a victim-oriented mechanism that provides a more proportionate curtailment of freedom of speech than criminalisation would achieve. For example, the conciliation process can provide more flexible outcomes than criminal processes such as the publication of apologies,²⁸ and where conciliation is unsuccessful or inappropriate the matter may be referred to the Administrative Decisions Tribunal.²⁹ In such cases, the vilifying act need only be established on the balance of probabilities,³⁰ and only objective intent to incite hatred, serious contempt or severe ridicule must be demonstrated.³¹

However, empirical data suggests that the merits of s 20C are overstated. A high rate of complaint discontinuance is attributed to the burden placed upon complainants to pursue the matter and dissatisfaction with lenient penalties available.³² Furthermore, between 1993 and 1995, most complaints lodged were made by the majority 'Anglo-Celtic' racial group and other 'established' ethno-racial communities such as Italians.³³ These complaints also produced more successful outcomes than those lodged by Indigenous Australians, suggesting majority racial groups are better

²⁷ *Criminal Code*, RSC 1985, c C-46, s 319(2).; *R v Keegstra* [1900] 3 SCR 697, 700.

²⁸ *Anti-Discrimination Act 1977* (NSW) s 108; White, above n 12, 240.

²⁹ *Anti-Discrimination Act 1977* (NSW) ss 93A-93C.

³⁰ Wertheim, above n 23, 1.

³¹ *Kimble & Souris v Orr* [2003] NSWADT 49 (11 March 2003) [62].

³² Nancy Hennessy and Paula Smith, 'Have We Got It Right? NSW Racial Vilification Laws Five Years On' (1994) 1 *Australian Journal of Human Rights* 249, 259.

³³ McNamara, above n 2, 148-150.

positioned to initiate and pursue complaints than minorities who may experience racial vilification at disproportionately higher levels.³⁴ This is highly problematic, as unlike criminal proceedings, all complaints must be self-initiated.³⁵ Whilst four of the first six cases upheld by the Tribunal involved Indigenous Australian victims³⁶ and attracted publicity providing an educative effect,³⁷ it remains clear that conciliation, often touted as a key advantage of civil regulation, is largely inadequate.

Opposition to a specific offence of racial vilification

Opponents to the criminalisation of racial vilification express concern that the introduction of a criminal offence mirroring s 20C would be incompatible with constitutionally implied freedom of communication. In 1992, the Australian Law Reform Commission, whilst noting disturbing levels of racial vilification, recommended against incorporating a specific criminal prohibition of racial vilification into Commonwealth legislation, fearing criminalisation would ‘restrict freedom of speech unduly’.³⁸ However, as held in *Lange v Australian Broadcasting Corporation*³⁹ and noted by the Administrative Decisions Tribunal in *Kazak v John Fairfax Publications*,⁴⁰ such freedom is ‘not absolute’ and ‘will not invalidate a law enacted to satisfy some other legitimate end’. The Tribunal identified the relevant ‘end’ in relation to s 20C as the ‘right to dignified and peaceful existence free from ... vilification’.⁴¹ Whilst this decision related only to the imposition of civil penalties for racial vilification, it has been noted in Canada when addressing the constitutional validity of legislation imposing criminal penalties⁴² that where provisions are drafted with appropriate ‘definitional limits’ and safeguards such as requiring consent to prosecute, freedom of expression is maintained by

³⁴ Ibid; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 71.

³⁵ Hennessy and Smith, above n 32, 259.

³⁶ McNamara, above n 2, 166.

³⁷ Hennessy and Smith, above n 32, 262.

³⁸ Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) 133 [7.47].

³⁹ (1997) 189 CLR 520, 567-8.

⁴⁰ [2000] NSW ADT 77 (22 June 2000) [94]-[96].

⁴¹ *Kazak v John Fairfax Publications Ltd* [2000] NSW ADT 77 (22 June 2000) [15].

⁴² *Criminal Code*, RSC 1985, c C-46, s 319(2).

limiting the offence to ‘only the harm at which the prohibition is targeted’.⁴³ Thus, whilst the maintenance of freedom of speech must be regarded in legislative drafting, checks and balances such as requiring consent from the Anti-Discrimination Board to prosecute may alleviate such concerns.

There is also concern that criminalisation of racial vilification may enable racial vilifiers to garner sympathy for their views or lead to convictions against racial minorities that the legislation is drafted to protect.⁴⁴ Indeed, in 1991, the Royal Commission into Aboriginal Deaths in Custody recommended against the criminalisation of racial vilification when ‘it is words, not acts, which are in issue’,⁴⁵ fearing the creation of ‘martyrs’.⁴⁶ These predictions materialised in Western Australia after the introduction of legislation criminalising racial vilification in the absence of any aggravating conduct.⁴⁷ The first person to be prosecuted under the legislation was of Aboriginal descent (although charges were later dropped as the conduct concerned was deemed ‘trivial’).⁴⁸ Furthermore, in an appeal by the first person to be convicted under the legislation, Justice Mazza observed that the defendant clearly intended to utilise his opportunity to address the court to ‘voice his aberrant views’.⁴⁹ However, as noted in this appeal, the trial judge, in line with his obligation to prevent abuse of the court’s processes, restricted the accused’s ability to do so.⁵⁰ Likewise, as noted in Canada, whilst the prosecution of racial vilification attracts ‘extensive’ media attention, such attention illustrates to the public ‘the severe reprobation’ society holds towards such conduct and provides no ‘dignity’ to vilifiers regardless of their self-perceived martyrdom.⁵¹

⁴³ *Keegstra* [1990] 3 SCR 697, 700.

⁴⁴ McNamara, above n 2, 23.

⁴⁵ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 74-5.

⁴⁶ *Ibid.*

⁴⁷ *Criminal Code* (WA) ss 77-78.

⁴⁸ *Police v A Child* (Unreported, Kalgoorlie Children’s Court, Auty J, 14 September 2006); David Weber, ‘WA court dismisses charges over racial insult’, *ABC Local Radio*, 15 September 2006 (Amanda Forrester) <<http://www.abc.net.au/am/content/2006/s1741596.htm>>.

⁴⁹ *O’Connell v Western Australia* [2012] WASCA 96 (4 May 2012) [176]-[177].

⁵⁰ *O’Connell v Western Australia* [2012] WASCA 96 (4 May 2012) [177].

⁵¹ *Keegstra* [1990] 3 SCR 697, 769.

Relocation

Early legislative reviews recommended the relocation of s 20D, suggesting the current location in anti-discrimination legislation gives police ‘the impression it has nothing to do with them’, reducing the efficacy of criminalisation.⁵² This recommendation was not implemented in favour of maintaining a separation between police and the prosecution of racial vilification out of concern that the police force held a poor reputation with respect to race relations.⁵³ However, as noted by the Law Reform Commission, relocation to the *Crimes Act 1990* (NSW) to ‘highlight the seriousness’ of the conduct does not necessitate the removal of safeguards such as the requirement of consent to prosecute, regardless of whether police are enabled to investigate complaints.⁵⁴

Conclusion

Current mechanisms of targeting and addressing racial vilification are not adequately accessible. Whilst substantial improvements to the efficacy of s 20D are possible through amendments in line with other Australian jurisdictions, a specific offence of racial vilification with an appropriate legislative location is required to adequately provide more than a symbolic stance against racially vilifying behaviour. With appropriate safeguards, such legislation may be utilised without unduly compromising freedom of speech or producing counter-productive outcomes.

⁵² James Samios, Submission to Legislative Council, Parliament of New South Wales, *Report of the Review by the Hon James Samios into the Operation of the Racial Vilification Laws of New South Wales*, August 1992, 29.

⁵³ Hennessy and Smith, above n 32, 262; Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Report No 100 (1991) 69.

⁵⁴ New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report No 92 (1992) 552.