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INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Australian Lawyers for Human Rights

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AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
nsw@alhr.asn.au
www.alhr.asn.au

ALHR SUBMISSION TO THE INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Summary of recommendations

ALHR notes that Australia is obliged to provide for criminal sanctions for the dissemination of racial hatred or vilification. Given this, ALHR recommends that:

I. Section 20D of the *Anti-Discrimination Act 1977* (NSW) ("the Act") be retained, subject to the following amendments:

- Repeal section 20D(2); and
- Insert the words "knowingly or recklessly" after the words "incite racial hatred" in section 20D(1); and
- Replace the reference to "the public" with a reference to "public communication."

II. The Act should provide, expressly, that proof of specific intention to incite is not required for establishing vilification.

The reasons for these recommendations are set out more fully below.

Australia's international human rights obligations

1. Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR), Article 20(2) of which provides that:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

2. Australia is also a signatory to the *Convention on the Elimination of Racial Discrimination* (CERD), and is required by Article 4(a) of that treaty to ensure that conduct that amounts to the dissemination of racial hatred is criminally sanctioned. Under Article 4(a) of the CERD, State parties:

> Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or 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 the financing thereof.

3. ALHR notes that, at the Federal level, Australia is not compliant with its CERD obligations

as there is no criminal offence of racial vilification.[1] While ALHR notes that Australia made an express reservation at the time it became a party to the CERD, stating that "it was not at that time in a position to treat as offences all the matters covered by article 4(a), except to the extent that they were already covered by existing criminal law", ALHR notes also that Australia has been called on in a number of Concluding Observations of the UN Committee on the Elimination of Racial Discrimination to withdraw this reservation, noting the mandatory nature of Article 4(a) of the CERD.[2]

4. ALHR is aware of the debate in relation to the need to balance, on one hand, the requirement to criminalise conduct amounting to racial vilification and, on the other hand, the right to freedom of expression. ALHR is of the view that the right to freedom of expression is not completely unfettered and carries with it certain responsibilities, including the responsibility not to disseminate racial hatred or vilification. On this point, ALHR refers the Standing Committee on Law and Justice to General Recommendation 15 of the UN Committee on the Elimination of Racial Discrimination:

> In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 19 of the Universal Declaration of Human Rights and is recalled in article 5 (d) (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance.[3]

5. Given the obligations set out above, and given the failure at a Federal level to enact a criminal offence of racial hatred, ALHR submits that it is even more important that NSW preserve the criminal offence of racial vilification, subject to amendments that might improve its efficacy.

Current provisions in New South Wales

6. In NSW, the provisions giving effect to the obligation to prohibit racial hatred are found in Division 3A of the Act. Section 20C makes unlawful any "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 or members of the group".[4]

7. Section 20D, the subject of the current inquiry, provides for criminal penalties in the case of 'serious racial vilification'. However, the distinction between the two provisions is not in fact a matter of mere seriousness. Rather than criminalising certain forms of speech itself, s 20D is directed to conduct where racial hatred, contempt or ridicule is caused by threats towards persons or property (or incitement of such threats).

Efficacy of section 20D

8. As indicated by the Inquiry terms of reference, to date, there has been no prosecution brought under s 20D. Similar provisions have been enacted in Victoria, Queensland, South Australia and the Australian Capital Territory.[5] There do not appear to be any reported decisions considering these provisions. Western Australia has implemented

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[1] ALHR notes that section 18C the *Racial Discrimination Act 1975* (Cth) provides that offensive behaviour because of race, colour or national or ethnic origin is unlawful however this is a civil prohibition rather than something which creates a criminal offence.
[2] See for example CERD/C/AUS/15-17/CRP.1, Concluding Observations of the Committee on the Elimination of Racial Discrimination – Australia, 2-27 August 2010.
[3] UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 15: Organized violence based on ethnic origin (Art. 4)*: 03/23/1993 at paragraph 4.
[4] Anti-Discrimination Act 1977 (NSW), s 20C.
[5] *Racial Vilification Act 1996* (SA) s 4; *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 24, 25.

solely criminal provisions in a different form to other states.

9. In 2009, then Director of Public Prosecutions (DPP), Nicholas Cowdery, QC, indicated that, despite referrals having been received by his Office, the most common reasons for the decision not to prosecute such offences were the Crown's inability to prove beyond reasonable doubt either:[6]
   - The requirement of incitement (i.e. the urging of racial hatred, ridicule etc); or
   - That the incitement was caused by threats of harm, or inciting others to threaten harm (to person or property).

10. Section 20D also requires the consent of the Attorney General consent to the prosecution.

11. ALHR notes that the s 20D model differs from, for example, the broad liability model provided for in Canada. Section 319 of the Canadian *Criminal Code*[7], provides:

> **Willful promotion of hatred**
> (2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of:
> a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
> b) an offence punishable on summary conviction.

12. In ALHR's view, this model complies more closely with the requirements of Article 4(a) of the CERD, which requires that not only should threats to person or property be criminalised, but that the dissemination of racial hatred itself should be criminalised. ALHR notes that Nicholas Cowdery, while DPP, recommended that the Canadian formulation be adopted in Australia, to relieve the current difficulty that prosecutors face in obtaining convictions. He further suggested replacing the term "willful" with a subjective mental intention.[8]

13. However, ALHR notes also the reports produced in 1991-1992 of the Australian Law Reform Commission on *Multiculturalism and the Law* and of Commissioner Elliot Johnston QC in the *Royal Commission into Aboriginal Deaths in Custody* cited in the Bills Digest prepared by the Parliamentary Research Service in relation to the Racial Hatred Bill 1994. These reports rejected criminalising the offence of incitement to racial hatred or vilification.[9]

14. While s 20D is drafted more narrowly than what Article 4(a) of the CERD requires, ALHR acknowledges that it may be controversial to enact a broad liability provision in relation to racial vilification, particularly, in the wake of the debate surrounding s 19(2)(b) of the draft Human Rights and Anti-Discrimination Bill at the Federal level.

15. If that is the case, ALHR submits that s 20D should at least be retained, subject to the proposed amendments below.

Recommendations

16. ALHR refers to Nicholas Cowdery's above statement concerning the Crown's inability to prove incitement beyond reasonable doubt. ALHR refers also to the view expressed in

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[6] Nicholas Cowdery, 'Review of Law of Vilification: Criminal Aspects' (2009) Hate Crime and Vilification Law Roundtable, Sydney Institute of Criminology, Faculty of Law, University of Sydney, 29 August 2009).
[7] RSC 1985, c C-46
[8] Ibid.
[9] Parliamentary Research Service Bills Digest 174 – 1994 Racial Hatred Bill at p.3 found online: http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/M7Z10/upload_binary/M7Z10.pdf;fileType=application%2Fpdf#search=%22legislation/billsdgs/M7Z10%22 (accessed 12 March 2013).

Bills Digest 174 that "Although approximately three matters have been referred to the Attorney General, no prosecutions have been commenced because there was not sufficient evidence".

17. Given this, ALHR submits that s 20D should be amended to include the mental element of recklessness, similar to the equivalent provision in Queensland, by insertion of the words "knowingly or recklessly" before the words "incite hatred towards" in s 20D(1).

18. Further, ALHR submits that Recommendation 93 of the NSW Law Reform Commission *Report 92 Review of the Anti-Discrimination Act 1977 (NSW)* should be adopted; that is, that the Act should provide expressly that proof of specific intention to incite is not required to establish vilification.

19. ALHR supports also Recommendation 92 of Report 92, where the Law Reform Commission recommends that the prohibition on racial vilification in the Act should not be limited by reference to "the public" but by reference to "public communication." The ALHR agrees with the rationale provided for this recommendation, being that:

> the prohibition on offensive behaviour based on racial hatred... involves a public element, but only in circumstances where the conduct is offensive to the victim. The public nature of the conduct is difficult to define and of limited relevance. Accordingly, the Commission recommends that the reference in the vilification provisions to "the public" should be deleted, but that the communication should be one which is intended or likely to be received by someone other than a member of the group being vilified.

20. ALHR submits also that s 20D(2) should be repealed to remove the barrier of obtaining the Attorney General's consent, noting that it is more appropriate for the DPP to make independent prosecutorial decisions.

21. Finally, ALHR notes that s 20D is but one part of the toolkit to eliminate racial discrimination. While this may be outside the scope of the terms of reference, ALHR's view is that the aim of eliminating racial discrimination would be strongly supported by community education. For example, ALHR refers to the Australian Human Rights Commission's campaign: "Racism. It stops with me".[10] This campaign takes an inclusive stance by calling on the community to take ownership of the issue. Further it highlights the real social and economic cost of racism. ALHR would welcome similar efforts by the Government at a State level.

Best regards,

Stephen Keim SC
President
Australian Lawyers for Human Rights

Contributor: Vicky Kuek, NSW Co-Convenor

[10] Australian Human Rights Commission, "Racism. It stops with me" found online at http://itstopswithme.humanrights.gov.au/ (accessed 13 March 2013).