Submission No 8

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Community Relations Commission for a Multicultural NSW

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22 February 2013

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Director

Inquiry into racial vilification law in NSW

I **attach** a submission to this inquiry by the Community Relations Commission for a Multicultural NSW.

Please contact me if you have any questions.

Yours faithfully

Stepan Kerkyasharian AO
Chairperson and Chief Executive Officer
Community Relations Commission for a Multicultural NSW

SUBMISSION TO THE INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

1. INTRODUCTION

1.1 I make this submission as Chairperson of the Community Relations Commission For a Multicultural NSW (**CRC**). The Commissioners-in-Session have approved the submission.

1.2 Multiculturalism is a deliberate public policy of governments on both sides of politics. As part of this commitment, the *Community Relations Commission and Principles of Multiculturalism Act 2000* (NSW), under which the CRC is established, promotes equal rights and responsibilities for all residents of New South Wales (**NSW**), a positive policy program that gives effect, among other goals, to the prevention of racism and racial vilification.

1.3 It is part of the CRC's role to ensure that the 'Principles of Multiculturalism' in our Act are upheld. These principles include:

> *'the people of New South Wales are of different linguistic, religious, racial and ethnic backgrounds who, either individually or in community with other members of their respective groups, are **free to profess, practise and maintain their own linguistic, religious, racial and ethnic heritage**'* [emphasis added][1].

1.4 Accordingly, the CRC supports laws, policies and programs that will contribute to the goal of achieving a cohesive and harmonious society. The CRC influences legislation and policy through several means including by referring matters regarding discrimination and/or racial vilification to the Anti-Discrimination Board of New South Wales (**ADB**) *for* investigation and/or research[2]. As the leading government agency supporting a harmonious relationship between communities in NSW, the CRC has extensive experience working with ethnic community groups. Consequently, the CRC is well positioned to provide advice to the government on legislation which impacts on our citizens' basic right to go about their daily lives with a sense of safety and security regardless of their ethnic, religious, linguistic or racial origin.

1.5 Regrettably we live in a society in which serious displays of racial hatred continue to occur. It is well-understood that members of minority groups feel ostracised from the wider community and have a diminished sense of belonging when incitement to racial hatred goes unpunished. History has taught us that when incitement is undeterred, violence too often follows. There are many examples.

1.6 In stating this, the CRC is also aware that incitement of racial hatred is not the purview of the majority. However, displays of racial hatred can be far reaching if demonstrated through mainstream media. [A cartoon which marked up a map of Italy with derogatory labels about the people who come from those areas that was published in 2009 in an Australian Financial Review article criticising then Prime

[1] Community Relations Commission and Principles of Multiculturalism Act 2000 (NSW) ss3(a).

[2] Anti-Discrimination Act 1977 (NSW) ss119(1)(a1).

Minister Berlusconi is one example. Another is demonstrated through remarks made on Radio 2SM in 2010 about 'Ching Chong Chinamen' (people of Asian origin), suggesting that their facial features negatively impact on Asian people's capacity to drive.]

1.7 The CRC is aware that members of minority groups can also be perpetrators of racial hatred. [The public racist comments made by some members of the 'Blatchy Blues' at the State of Origin match held in NSW in 2012, and racially motivated attacks on international students, in particular those of Indian origin, in 2009 and 2010 are notorious recent, local examples of such conduct].

1.8 There is a need for both civil provisions to enable remedies for discrimination of racist conduct that does not involve intentional or reckless incitement to racial hatred and criminal provisions that deter and punish incitement to intentional or reckless incitement to racial hatred.

1.9 An appropriate balancing of rights and responsibilities is necessary.[3] One of the world's leading experts on legal protection against racial hatred, Professor Kathleen Mahoney argued in the first issue of the Australian Journal of Human Rights that free speech is enhanced when vulnerable groups are protected from serious harm through racial hate speech.[4] The existing civil racial vilification provisions in the Anti-Discrimination Act 1977 (NSW) (ADA) achieve a sensible balance between facilitating free and robust public debate on issues of public importance and our citizens' basic right to go about their daily lives free from racial hatred and the violence which so often follows. The criminal provisions are in need of reform.

1.10 The terms of reference of the present inquiry focus on the effectiveness of section 20D of the ADA, and whether it establishes a '*realistic*' test for the offence of serious racial vilification '*in line with community expectations*'. In the CRC's view, it is abundantly clear that the section as currently drafted is ineffective.

1.11 This submission focuses on the subject matter of the inquiry: the racial vilification provisions (sections 20B - 20D) of the ADA. However, in the CRC's view, the serious vilification provisions in sections 49ZTA, 49ZXC and 38T also warrant reform.

1.12 In the CRC's view, the time has come to:

(a) Simplify the threshold for prosecution, including modify the requirement of intent in section 20D and thus to make a clearer distinction between the threshold tests for vilification under sections 20C and 20D;

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[3] In the United States, "*[t]he first amendment freedom of speech is an active freedom in that it focuses on a right to do something, that is, to speak one's mind. In protecting citizens against racial and religious discrimination, the fifth and fourteenth amendments focus on the victim of discriminatory action. They are passive freedoms. They do not give anyone the right to do something, but rather shield citizens from unacceptable actions. To the extent that speech - as defined in American jurisprudence - can effect racial discrimination, the exercise of one freedom can violate another.*" David Knoll AM: "Anti-Vilification Laws: Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia" (1994) 1 AJHR 211.

[4] "Hate Vilification Legislation and Freedom of Expression - Where is the Balance?"(1994) 1 AJHR 353-369, http://www.austlii.edu.au/au/journals/AJHR/1994/1.htmlat page 4 of 13.

(b) amend the definition of 'public act' in section 20B to expressly include acts both in physical spaces and in cyberspace;

(c) ensure that both incitement of hatred and harassment can be prosecuted;

(d) extend protection of the law to persons presumed to be of a particular racial group;

(e) introduce penalties for offences against section 20D that reflect the seriousness of the offence; and

(f) remove unnecessary procedural barriers to commencing a prosecution.

2. A PLAIN LANGUAGE SIMPLIFICATION OF SECTION 20D

2.1 A reformed section 20D must recognise both policy and practical criteria as set out by David Knoll also in the first issue of the Australian Journal of Human Rights as follows:

> *"...Government should not feign to be neutral while allowing some private groups to wield power over - and to intimidate - others. Tolerance of intimidatory conduct is a form of moral majoritarianism. It is indeed an intolerance that is inappropriate to our multicultural society.*
>
> *Consideration also needs to be given to how easy or how hard the law will make the obtaining of a conviction. The elements of the offence must be laid out with adequate precision to enable* prosecutors *to manage their work efficiently. Confusing standards and imprecise drafting are barriers to prosecutorial willingness."*[5]

2.2 For the reasons set out below, the CRC recommends a simplification of section 20D to read as follows:

> ***"A person must not by words or other conduct, in public, intentionally or recklessly, express hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of the race or perceived race of the person or group of persons...."***

3. EFFECTIVENESS OF SECTION 20D

3.1 Section 20D of the ADA provides for a criminal vilification offence known as 'serious racial vilification'. Although the consent of the Attorney-General of New South Wales is required under the ADA in order to prosecute under section 20D, in 1990 the Attorney-General has delegated this power to the Director of Public Prosecutions (**DPP**).

3.2 Since the introduction of the ADA's anti-vilification provisions in 1989, the DPP has received over 27 requests to consider prosecution under section 20D. Despite this, an offence under section 20D is yet to be prosecuted.

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[5] Knoll, see note 3 above.

3.3 This is evidence to the CRC that section 20D and other related sections of the ADA are impractical tools therefore in need of review.

3.4 I include here an example of a complaint which the DPP did not prosecute because he considered that prosecution would be unsuccessful:

(a) the display of a billboard on a main public road that stated 'Jews make great lampshades'. The statement is widely understood to call for extermination of Jews. The context of this statement is that during the Holocaust, a commandant of the Nazi concentration camp at Bergen Belsen arranged for a lampshade to be made for his wife from the skin of a Jewish prisoner who was killed at the camp.

3.5 It is clearly a negative policy outcome to have criminal laws that simply do not work. What has followed is a loss of public confidence, and this in turn affects the authority of the law.

4. A REALISTIC TEST? PROPOSED CHANGES TO THE TEST

(i) Intention and incitement

4.1 When anti-vilification legislation was introduced in NSW in 1989, the then Attorney-General stated in his second reading speech that:

> *'the requirement for intention in the offence of serious racial vilification* [section 20D] *also sets it apart from proposed section 20C and further ensures that prosecution and conviction will be limited to only very serious cases of racial vilification*[6].

4.2 However, there is no explicit requirement for intention in section 20D.

4.3 Rather, to breach the vilification provisions in the ADA, a perpetrator must cross four thresholds. Firstly, he or she must 'incite' hatred towards, serious contempt for, or severe ridicule of, a person or group of persons. Secondly, he or she must do so on certain grounds such as race. Thirdly, he or she must do so by certain means involving threat or incitement. Fourthly, there must be a direct connection between the threat or incitement and physical harm towards the person or property of the person or persons against whom the threat of incitement is directed. The first two thresholds apply to both section 20C and section 20D. The third can have no rational justification. History is replete with examples of communicated to one group of persons which leads to violence against another group without the person who engaged in the incitement being directly connected to the violent outcome.

4.4 Since there have been no court proceedings regarding section 20D, it is uncertain whether 'incite' would be interpreted as suggested by the Attorney-General's Second Reading Speech

4.5 'Incite' is not defined anywhere in the ADA. However, as the solicitor in a series of successful test cases concerning the Commonwealth racial vilification laws, Peter Wertheim AM explains:

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[6] New South Wales, Parliamentary Debates, Legislative Assembly, 4 May 1989, 7490 (John Dowd, Attorney General).

'the Oxford Dictionary definition includes 'stir up, animate'. It therefore seems reasonably clear that the concept of incitement involves stimulating others to do something or feel something. This allows for the possibility that incitement may occur when the feelings of others are aroused, even if they do not act on those feelings'[7].

4.6 Nicholas Cowdery QC, the former Director of Public Prosecutions for NSW, considers that:

'the most common reason why prosecutions have not been commenced has been the inability of the prosecution to adduce evidence to prove the necessary standard either incitement or incitement by the specific means described in the offence provisions'[8].

4.7 In particular, the DPP's advice in relation to the prosecution of the example above regarding the billboard was that the billboard's implied advocacy of genocide would be insufficient to prove the mental element (i.e. incitement requirement) beyond reasonable doubt.[9]

4.8 When section 20D is reformed, the CRC considers that a consequential amendment should be made to section 20C to clarify that intent is not one of the elements of the civil provision (whereas it needs to be an element of the criminal provision).

4.9 The section 20C test should be aligned with the Commonwealth threshold which appears in section 18C of the *Racial Discrimination Act 1976* (Cth) (**RDA**), where the harm threshold is met where conduct is reasonably likely in all the circumstances to 'offend, insult, humiliate or intimidate'.[10] As Cowdery puts it:

'the NSW law operates by reference to the effect of the public conduct on third parties and on their attitudes or likely conduct to the persons vilified. On the other hand the RDA operates by reference to the effect of the conduct on the vilified person or group'[11].

4.10 Such a change would also follow the approach of NSW legislation towards sexual harassment legislation which focuses on the effect of conduct on the alleged victim. The sexual harassment provisions of the ADA are based on the premise of whether *'a reasonable person, having regard to all the circumstances, would have anticipated that* ***the other person would be offended, humiliated or intimidated***'[12] [emphasis added]. Further, the provisions regarding discrimination under the ADA do not require the alleged perpetrator to have intended to discriminate against the alleged victim.

4.11 The civil provision, unlawful vilification (i.e. section 20C), should only require proof of the likelihood (or reasonable likelihood) of a proscribed outcome. Section 20C should not require proof of the intention of the perpetrator to achieve that outcome. The lower

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[7] Peter Wertheim AM, 'Hate Crime and Vilification Law: Developments and Directions' (Paper presented at the Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, The University of Sydney, 28 August 2009) 3.

[8] Nicholas Cowdery AM QC, 'Review of Law of Vilification: Criminal Aspects' (Paper presented at the Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, The University of Sydney, 28 August 2009) 4.

[9] Peter Wertheim AM, 'Criminal Liability for Racial Vilification in NSW and WA: A Comparison' (2011) 7.

[10] Nicholas Cowdery AM QC, 'Review of Law of Vilification: Criminal Aspects' (Paper presented at the Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, The University of Sydney, 28 August 2009) 2.

[11] Ibid.

[12] Anti-Discrimination Act 1977 (NSW) s 22A.

threshold should correspond with appropriate civil remedies which are outlined briefly below.

4.12 The vilification offence should be a criminal offence (i.e. section 20D). Like most criminal offences, an element of the offence should be *mens rea*. This is the intention element. Criminal intent can either involve deliberation or recklessness. Because the impact of serious racial vilification is seldom limited tot one person or a small group, but usually creates fear and diminished social participation for the wider racial group, it is appropriate to proscribe acts which are reckless as well as acts which are deliberate.

4.13 Recklessness means be a conscious disregard of the consequences.[13] The Oxford English Dictionary definition of the word: "*Reckless*" relevantly is: "*Heedless of or indifferent to the consequences of one's actions; lacking in prudence or caution; willing or liable to take risks; rash, foolhardy; irresponsible.*"[14]

(ii) A 'public act'

4.14 The definition of 'public act' includes '*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 on the ground of the race of the person or members of the group*'[15].

4.15 It is an unreasonable requirement that, for the dissemination of material to be considered as a '*public act*', the actor must know that the material will '*promote or express hatred*'. This imposes an additional and entirely unnecessary barrier to prosecuting serious vilification. It is also illogical that this requirement applies to subsection 20B(c), but not subsections 20B(a) and 20B(b). The ADA should clearly articulate that a person's intention or knowledge regarding the potential impact of his/her conduct is irrelevant to determining whether he/she has breached the vilification provisions.

4.16 Further, subsection 20B(c) refers to the distribution and dissemination of *'any matter'*, however as this term is not defined its meaning is ambiguous. In addition, it is likely (particularly in the current environment, where both communication and the distribution of information – unlike in 1989 – are dominated by the internet) that the '*distribution and dissemination of any matter*' would always fall within subsection 20B(a) under '*any form of communication to the public*'.

4.17 Regulating racial hatred that is expressed over the internet is not of itself more problematic than regulating racial hatred using other media. Mr Justice Fryberg of the Queensland Supreme Court in 2003 published a paper entitled: "The impact of electronic commerce on litigation" in which he commented on the High Court's approach to jurisdiction in Dow Jones & Co Inc v Gutnick. (2002) 210 CLR 575 and

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[13] Herrington v British Railways Board [1972] AC 877 at 928 (Lord Pearson), endorsed by the High Court of Australia in Southern Portland Cement Ltd v Cooper (1973) 129 CLR 295.

14http://dictionary.oed.com/cgi/entry/50199237?query_type=word&queryword=reckless&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=9KbQ-TkNyjv-7568&hilite=50199237.

15 Anti-Discrimination Act 1977 (NSW) s 20B(c).

on the adaptation of law to e-commerce. Where a statement causes damage in an Australian State, that state and its court s and tribunals can regulate it.[16]

4.18 The CRC submits that section 20B should be replaced with a simpler provision along the following lines:

> ***20B Definition of "public act"***
>
> ***In this Division, "public act" includes:***
>
> ***(a) any form of communication to the public, including without limitation speaking, writing, printing, displaying notices, whether physical or over the internet, broadcasting, telecasting, screening and playing of tapes or other recorded material, or***
>
> ***(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public.***

(iii) Presumed identity

4.19 The protection provided by sections 49ZXB and 49ZXC of the ADA regarding HIV/AIDS vilification extends to persons who are *'thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected)'*. However, there currently is no reference to imputed status in relation to racial vilification in the ADA. The omission is almost certainly unintended, and should be corrected.

4.20 Further, section 88 of the ADA states that:

> *'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'.*

4.21 Consequently, the protection provided by the racial vilification provisions in the ADA does not extend to persons who are vilified because they are *presumed* to be members of a racial group as defined in the ADA.

4.22 Subsection 88(b) of the ADA is intended to protect persons such as Aboriginals who are challenged about their Aboriginal descent based on their appearance. However, section 88 does not protect all potential victims of vilification, such as

(a) a person vilified because the perpetrator thought he/she was Aboriginal, if that person was not Aboriginal;

(b) victims by association with a particular group - for example a non-Jewish spouse of a Jewish person who is presumed to be Jewish;[17] and

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[16] (2003) 24 Aust Bar Rev 199

(c) victims who are assumed to be of a particular group based on their appearance - for example a person of 'Middle Eastern appearance' who is assumed to be an Arab.

4.23 The CRC submits that the protection afforded by the racial vilification provisions, in particular the criminal provision (section 20D), should be extended to any person or group of people because of their actual or ***perceived*** race. This would be in line with the Western Australia criminal vilification provisions, where there is no requirement that the victims be actual members of the relevant protected group.[18]

5. OTHER PROPOSED IMPROVEMENTS TO THE LEGISLATIVE SCHEME

(i) Penalties for civil and criminal offences

5.1 The CRC is of the view that serious racial vilification should bear a maximum penalty for individuals of 250 penalty units or 3 years imprisonment, and for a corporation, 1250 penalty units. This would bring NSW into line with Western Australia, the only State where there has been as successful prosecution of serious racial vilification.

5.2 If at any point the President of the ADB considers that a criminal vilification offence has occurred, the President of the ADB should be empowered to refer the matter to the Attorney-General of NSW or directly to his or her delegate, the Director of Public Prosecutions, to determine whether the matter should be prosecuted. There should also be a reasonable time limit on the decision to proecsute or not being made.

5.3 If a criminal vilification offence is successfully prosecuted, the court should impose penalties on the perpetrator and be empowered to direct that some or all of that penalty be paid as compensation to the victim.

5.4 Following on from the CRC's recommendations regarding intention and the different types of punishable vilifying conduct outlined in section 4 of this submission, the remedies under the civil provision, section 20C, should be expanded to empower the President of the ADB to:

(a) direct the person to attend an education program chosen by the ADB; and/or

(b) hold a conciliation conference; and/or

(c) if either of these measures is not successful, refer the matter to the Equal Opportunity Division of the Administrative Decisions Tribunal of NSW (**ADT**) for conciliation, which could award damages as compensation to the victim, including for suffering and distress caused by the perpetrator's actions.

5.5 The education program would be akin to the remedial programs that repeat traffic offenders are required to attend. These programs focus on promoting participants'

[17] The heinous Nazi Nuremberg laws as applied punished people for associating with or being perceived to associate with Jewish people. Our laws should protect people who associate with or are perceived to associate with vilified minorities in our society.

[18] See Criminal Code Act 1913 (WA) s 80F.

understanding of the effects of drink driving on the self and the community at large.[19] Remedial programs which are designed to change drivers' attitudes and improve their knowledge have been found to be one of the most effective measures in reducing further driving offences.[20] An educational program which creates awareness about different racial and ethnic backgrounds and the effects of vilification would reduce the likelihood of unlawful vilification recidivism. Whilst an educational program would not be appropriate in all circumstances, it would be a valuable tool in changing the perceptions and behaviours of certain persons who engage in vilification. The ADB has extensive experience in providing education programs to the public regarding vilification, and would be well-positioned to run a course for persons who had committed unlawful vilification.[21]

(ii) Preparation of prosecution brief

5.6 According to the current vilification offence provisions in the ADA, the Attorney-General must consent to the prosecution of a criminal vilification offence. If the Attorney-General provides his/her approval, he/she will refer the matter to the DPP to be prosecuted.

5.7 The Attorney-General does not currently arrange for a prosecution brief to be provided to the DPP. Ideally the NSW Crown Solicitor's Office should prepare this brief, but in practice this does not occur. Consequently, there is no mechanism in place to ensure that the DPP is provided with a prosecution brief.

5.8 There is no reason why the preparation of a prosecution brief for the crime of serious racial vilification should be different to any other serious criminal offence, except only that the specialist resources of the ADB should support the process as needed. In this regard, the ADB should be given investigative powers under the ADA to enable it to appoint an independent third party to prepare a prosecution brief for the DPP. The investigative functions of the ADB would be a separate arm to its conciliatory functions.

I trust that the CRC's submissions are of assistance to the Committee. Please contact me if you have any questions.

22 February 2013

Stepan Kerkyasharian AO
Chairperson and Chief Executive Officer
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[19] Katherine Mills et al, 'An Outcome Evaluation of the New South Wales Sober Driver Programme: a Remedial Programme for Recidivist Drink Drivers' (2008) 27 Drug and Alcohol Review 65, 66.

[20] Lily Trimboli & Nadine Smith, 'Drink-Driving and Recidivism in NSW' (Crime and Justice Bulletin - Contemporary Issues in Crime and Justice Issue 135, NSW Bureau of Crime and Statistics and Research, September 2009) 2.

[21] Further, in the context of educating against racism and genocide, the Sydney Jewish Museum has run programs aimed at school children who have engaged in racially-motivated bullying, and with considerable success.