

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

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**Submission to the Law and Justice Committee Inquiry into Racial Vilification Law
in New South Wales**

I make this submission in my capacity as a private citizen.

Section 20D should not be considered in isolation from other provisions of the *Anti-Discrimination Act 1977*

The Committee has been tasked with inquiring into section 20D, which creates an offence of serious racial vilification. However, a number of other provisions of the *Anti-Discrimination Act 1977* create other serious vilification offences. These are:

- Section 38T (offence of serious transgender vilification)
- Section 49ZTA (offence of serious homosexual vilification)
- Section 49ZXC (offence of serious HIV/AIDS vilification)

These provisions are, except in respect of the ground of vilification, in the same terms as section 20D.

Accordingly, in considering its position the Committee should reflect on whether any changes it might propose to section 20D could also be sensibly proposed in respect of the other serious vilification offences.

It would be anomalous for section 20D to be amended and the other serious vilification offence provisions not to be similarly amended. If there are to be offences of serious vilification in New South Wales, all such offences should be in substantially the same terms unless there is a special for any variation.

The offence of serious vilification appears largely redundant

Section 20D provides:

1. A person must 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 is not to be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

The Committee should note that it is not an offence for a person, by public act, to incite hatred, serious contempt or severe ridicule under this provision. It is only an offence where those things are done by means of the matters listed in paragraphs (a) or (b) of sub-section 1 (whether or not also done in combination with other means).

It seems that the matters listed in paragraphs (a) and (b) are, in the main, offences under the criminal law quite apart from section 20D and quite apart from whether those things are done to incite hatred, serious contempt or severe ridicule.

Paragraph (a) deals with threatening harm to persons or to property. Section 61 of the *Crimes Act 1900* provides that: 'Whosoever assaults any person, although not occasioning actual bodily harm, shall be liable to imprisonment for two years.' Assault includes not only actual violence but also causing the apprehension of immediate and unlawful violence: see the summary at section [5-000] of the *Criminal Trials Bench Book* (Judicial Commission of NSW). Accordingly, most of the conduct made an offence by paragraph (a) is already covered by an ordinary criminal offence.

However, paragraph (a) appears to be broader than common assault in that it does not require the victim to fear harm, whether the fear is of immediate harm (as required for common assault) or otherwise.

Threatening to destroy property is an offence under section 199 of the *Crimes Act 1900*. Again, paragraph (a) is broader than that offence in that section 199 requires that the victim fear the threat will be carried out whereas paragraph (a) does not.

It should also be noted by the Committee that section 31 of the *Crimes Act 1900* makes it an offence for a person to send a document containing threats of physical harm.

Accordingly, to the extent that paragraph (a) is not redundant (in that it overlaps with other existing criminal offences) it has the effect of criminalising threats that are not taken seriously by the recipient of the threat and criminalises that conduct by reference to the fact the threats are made to incite hatred, serious contempt or severe ridicule. I express no view as to whether this is appropriate.

Paragraph (b) deals with the situation of ‘inciting others’. This situation is largely already covered by section 351B of the *Crimes Act 1900* which makes it an offence to aid, abet, counsel or procure the commission of an offence.

Paragraph (b) of the test is irrationally narrow

Paragraph (b), if read strictly, would seem to permit a person to incite a single individual to threaten harm. The paragraph says ‘incites *others*’; using the plural. In other words, the situation where a single person is incited to do the things mentioned is not captured by the paragraph. This is very strange and makes no sense.

If section 20D (and the other serious vilification offences) is to be retained paragraph (b) should be amended to read ‘inciting any other person or persons...’ or similar.

Vilification as an aggravating factor in sentencing

Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* sets out a number of ‘aggravating factors’ that must be taken into account by a Court when sentencing an offender for any criminal offence. One of these factors is that

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability) (Section 21A(2)(h))

It seems that if an offence is committed in order to incite hatred, serious contempt or severe ridicule of a person on the basis of race then that offence would have been motivated by hatred or prejudice. Accordingly, that will be taken into account as an aggravating factor in sentencing.

Since much of the conduct criminalised by section 20D is already covered by other criminal offences, the Committee should consider whether the hatred or prejudice aggravating factor is a sufficient means of reflecting community disdain for serious vilification. It should be noted that the hatred and prejudice ground covers more attributes (seemingly without limit) than are the subject of serious vilification offences in the *Anti-Discrimination Act 1977*. I express no view as to whether it is sufficient.

I trust this submission is of assistance to the Committee

Yours sincerely

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