

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

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OUR REFERENCE

DIRECTOR'S CHAMBERS

YOUR REFERENCE

DATE

21 February 2013



The Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Macquarie St
Sydney NSW 2000

Inquiry into racial vilification law in NSW

I refer to the above inquiry and your invitation to make a submission.

I enclose a response prepared by senior officers within my Office, with which I agree.

Yours faithfully

Lloyd Babb SC
Director of Public Prosecutions

SUBMISSION OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS (NSW)

NSW Legislative Council Standing Committee on Law and Justice Inquiry into racial vilification law in NSW

This submission has been prepared on behalf of the Office of the Director of Public Prosecutions (NSW) (ODPP).

The ODPP role

The ODPP is responsible for prosecuting indictable offences in the District and Supreme Courts of NSW and some matters in the Local Courts.

The ODPP does not investigate offences, but may advise the Police or other investigating agencies as to whether or not proceeding should be instituted. In formulating such advice regard is had to the NSW ODPP Prosecution Guidelines, Guideline 4 concerns the decision to prosecute and in particular provides:

*“The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:
(1) whether or not the admissible evidence available is capable of establishing each element of the offence;
(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not
(3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.”¹*

Since 1992 the ODPP has received 11 referrals from the Anti Discrimination Board (the ADB) pursuant to section 89C of the *Anti Discrimination Act 1977* (the ADA) concerning possible offences of serious racial vilification pursuant to s20D of the ADA. No prosecution has been instituted in respect of any matter referred to the ODPP by the ADB.

Pursuant to section 18 of the *Director of Public Prosecution Act 1986* if the DPP is considering instituting or taking over conduct of a prosecution for an offence the DPP may request police to carry out further investigation. In two of the matters referred by the ADB the ODPP referred the matter the police for further investigation; however the results of those investigations did not produce evidence warranting prosecution for an offence.

In regard to the terms of reference of this inquiry into racial vilification we make the following submissions:

¹ Prosecution Guidelines of the Office of the Director of Public Prosecutions for New South Wales 1 June 2007

1. **The effectiveness of section 20D of the ADA, which creates the offence of serious racial vilification; and**
2. **whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations**

In order to gauge the effectiveness of s 20D of the ADA, and whether it establishes a 'realistic' test, it is necessary to consider what it is intended to achieve. That in turn must be considered in the context of the legislative scheme established by the ADA to address racial vilification, as well as the wider criminal law.

Section 20D is contained in Division 3A of Part 2 of the ADA, which was inserted by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* and commenced operation on 1 October 1989. The then Attorney General explained the purpose of Division 3A, as follows in the 2nd Reading Speech (Hansard, Assembly 4 May 1989 pp 7488 to 7491):

"The bill will amend the Anti-Discrimination Act 1977 by establishing a new ground of complaint of racial vilification and creating a criminal offence of serious racial vilification. The emphasis in the bill is on conciliation and education in order that complaints may be resolved quickly and as harmoniously as possible. Prosecution of offences will be limited to very serious conduct. The Anti Discrimination Act provides an existing structure for the investigation and conciliation of complaints of racial vilification..."

Proposed section 20C of the bill will make it unlawful for a person to engage in racial vilification...It is not the intention of the Government to cover matters of a trivial nature...Proposed section 20C will also provide for exceptions....These exceptions have been included in the bill to achieve a balance between the right to free speech and the right to an existence free from racial vilification and its attendant harms....

Proposed section 20D of the bill will provide that racial vilification which is in the nature of threatened violence or the incitement of others to threaten violence, constitutes a summary offence....This offence is aimed at very serious and blatant forms of racial vilification such as the threatening or inciting others to threaten physical harm to people or property. The requirement for intention in the offence of serious racial vilification 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."

Thus a two-tiered scheme exists: less serious vilification incurs civil liability under s 20C, and more serious vilification incurs both civil liability under s 20C and criminal liability under s 20D. Section 20D includes all the elements of the civil prohibition created by s 20C, (that is that a person has, by a public act, incited hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race of that person or members of the

group), but in addition requires that the incitement be intentional², and that the means by which that incitement occurs include threats of physical harm towards, or towards any property of, the person or group, or incitement of threats of such physical harm.

Under this scheme complaints of racial vilification are made to the President of the ADB, who, if the complaint is accepted, carries out an investigation (s 90). If after that investigation the President is of the view that an offence under s 20D may have been committed the ADA requires that he refer the matter to the Attorney General for further action (s 91). In practice however the President refers such matters directly to my Office (as the Attorney has delegated to the Director of Public Prosecutions (DPP) the authority to consent to a prosecution under s 20D). Pursuant to s 11(6) of the *Director of Public Prosecutions Act 1986* the DPP must advise the Attorney of any decision to commence or not commence a prosecution in relation to a matter so referred.

If after investigation the President of the ADB is not of the view that an offence under s 20D may have been committed, (or if the DPP advises after a referral that no prosecution under s 20D is warranted), but that the allegations may meet the requirements of s 20C, then the President may attempt to resolve the matter by conciliation (s 91A). If conciliation is unsuccessful or inappropriate the matter may be referred to the Administrative Decisions Tribunal (ADT), which may make a variety of orders including awarding compensation of up to \$100,000, enjoining any further unlawful conduct, and ordering the publication of an apology and/or retraction in respect of the conduct the subject of the complaint (s 108(2)). Failure to comply with non monetary orders made under s 108(2) is a criminal offence under s 111.

Further, a complainant in relation to a matter which has been referred for consideration of a criminal prosecution may request that the complaint be referred to the ADT (s 93A).

As was noted in the 2nd Reading speech quoted above, the criminal offence created by s 20D was intended to deal with only the most serious cases of racial vilification, determined to be those carried out by threatened violence or incitement of others to threaten violence. That intention has also been expressed in the 2nd Reading speeches in relation to the offences of serious vilification on the basis of the other grounds subsequently included in the Act, namely homosexuality, transgender status, and HIV/AIDS infection.

The effectiveness of the overall scheme of anti vilification legislation has been considered on several previous occasions, in particular the Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of New South Wales (the Samios Report) released in late 1993, and Law Reform Commission of NSW Report 92 (1999) – A Review of the ADA - (at paragraphs [7.50] to [7.148]).

² The requirement that the element of 'incitement' in s 20D be intentional is not explicit, but is supported both by the then Attorney's comments in the 2nd Reading Speech, and by the comments in *John Fairfax Publications Pty Ltd v Kazak (EOD)* [2002] NSW ADTAP 35 at [6] – [10]

The Samios Report concluded in relation to racial vilification that the ADA had *'struck a good balance between reliance on the civil and on the criminal law'* (at p 13). The Report did however recommend several amendments, some of which have been enacted.

The Law Reform Commission (LRC) also considered these issues in some detail, in particular the need to strike a balance between adequately dealing with vilification and yet not imposing unwarranted restrictions on free speech, before concluding that it did not propose an extension of the conduct caught by the current provisions (at [7.73]). The LRC noted (at [7.72]) that:

"very little hard data and limited statistical information is available on the effectiveness or otherwise of vilification legislation. The available information, however tends to indicate that this balance has been appropriately struck in New South Wales by the vilification provisions within the Act."

The LRC recommended amendments to some of the elements of the civil vilification provisions which are also currently contained in the criminal vilification provisions, including s 20D, however did not recommend any amendment to the criminal provisions except that they be moved to the *Crimes Act 1900* (Recommendation 96).

Apart from the provisions of the ADA, any conduct which involves either threats of violence to a specific person or their property, or incitement of such threats, is likely to breach other provisions of the criminal law. Examples may include sending a document containing threats (s 31 *Crimes Act*), affray (s 93C *Crimes Act*), assault (s 61 *Crimes Act*), intimidation or annoyance by violence or otherwise (s 545B *Crimes Act*), stalking or intimidation with intent to cause fear of harm (s 13 *Crimes (Domestic and Personal Violence) Act*), contravening an apprehended violence order (s 14 *Crimes (Domestic and Personal Violence) Act*), or counselling or procuring any such offence (ss 351 and 546 *Crimes Act*). If any such offence is motivated by hatred or prejudice against a group of people to which an offender believes any victim belongs, then that is an aggravating factor for the purpose of sentence (s 21A(2)(h) *Crimes (Sentencing Procedure) Act 1999*).

Where available, prosecution for such an offence may be sufficient to address the entirety of the criminality concerned, including any element of racial vilification.

However s 20D in its current form appears to fill a role by addressing the inciting of racial hatred by means of threatened violence which is either not directed towards a specific individual, or in relation to which there are other reasons that a more specific criminal offence is not appropriate or adequate. Some examples in relation to the equivalent provision concerning serious vilification on the basis of homosexuality were cited by Clover Moore MP in the 2nd reading speech introducing that legislation:

"The legislation is aimed at bumper stickers with slogans which read 'Stop AIDS: Shoot Poofers'...The legislation aims to stop people such as Mr Hetherington from Bega who advertised...for 40 'decent men' to help him run gay men and lesbians out of town, for which he offered to pay them \$100 each..." (Hansard, Assembly 11 March 1993, p 658).

Conduct involving an element of racial vilification but which falls short of the requirements of s 20D in some fashion may well be able to be adequately dealt with either civilly under s 20C of the ADA, or, particularly where a specific victim is concerned, under other provisions of the criminal law and/or by the provisions in the *Crimes (Domestic and Personal Violence) Act* for Apprehended Violence Orders.

In order to deem s 20D to be “ineffective” it would appear necessary to identify relevant conduct which is inadequately addressed by the range of currently available measures.

3. any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech

As noted, the elements of the offence under s 20D are that there be:

- a public act (as defined in S 20B)
- which intentionally incites
- hatred towards, serious contempt for or severe ridicule of
- a person or group of persons on the ground of their race
- by means which include threatened violence or inciting of others to threaten violence

The first four of these elements, except for the requirement that the incitement be intended and subject to the defences in s 20C (2), define a breach of s 20C.

The LRC in its Report 92 considered the elements of s 20C of the Act in detail, and made several recommendations for amendment. Those recommendations have not been implemented, but appear to remain worthy of consideration, both in relation to s 20C and, where applicable, s 20D.

Similarly some of the recommendations made by the Samios Report are of continuing relevance and would also appear worthy of consideration.

“Public act”

In relation to the requirement of a ‘public act’ the LRC discussed in particular the fact that there is no definition of the term ‘public’ in section 20B of the ADA, which defines the term ‘public act’ for the purposes of both s 20C and s 20D (at [7.100]).

The LRC noted that there is no clear distinction between public acts and private acts, citing as an example that “where vilifying statements are made at a private function in the presence of a large number of people, it is unclear whether it is a public or private act”.

The LRC recommended 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 (at [7.111] and Recommendation 92).

“Incitement”

In relation to the issue of the characteristics of the notional audience liable to be ‘incited’ by the conduct the LRC noted that case law then applying was to the effect that the test should assume that the hypothetical listener is an ordinary reasonable person not immune from susceptibility to incitement nor holding racially prejudiced views (*Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604). The LRC recommended instead that the ADA should provide that the issue of the capacity of the conduct to incite should be assessed in the circumstances of the particular case and without assuming that the audience is either malevolently inclined or free from susceptibility to prejudice (Recommendation 94).

It is noteworthy that more recent case law has moved towards this position: In *Sunol v Collier* (No 2) [2012] NSWCA 44 the Court of Appeal held in relation to the civil prohibition on homosexual vilification that the act complained of must be capable of inciting the required emotions in ‘*an ordinary member of the class to whom it is directed*’ (at [41]).

Procedural requirements

Section 91 of the ADA requires that after investigating a complaint the President of the ADB must consider whether an offence under s 20D may have been committed, but has only 28 days from the date of receipt of the complaint in which to refer it to the Attorney General for consideration of a prosecution. The reason for that strict limit no doubt concerns the fact that any prosecution must be commenced within 6 months of the date of the alleged offence (s 179 of the *Criminal Procedure Act* 1986).

Consideration may be given to relaxing some of these constraints by measures such as extending the time in which a prosecution for this offence may be commenced, permitting the ADB a longer period of time in which to carry out the required investigation, and formalising in the ADA the ability of the President to refer a complaint which may involve an offence under s 20D directly to the DPP.

As noted earlier, the LRC recommended that all the serious vilification offences be moved from the ADA to the *Crimes Act* 1900. The earlier Samios Report had similarly recommended that s 20D be moved to the *Summary Offences Act* 1998. One advantage of such a move would be that, while the procedure of referral of serious vilification complaints by the ADB to the Attorney General or DPP could remain in place, such an offence could also be prosecuted by police with the consent of the Attorney or DPP without there having first been a complaint to the ADB.

**Office of the Director of Public Prosecutions
February 2013**