Submission No 21

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Australian Lawyers Alliance

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

7 March 2013

Also via email: lawandjustice@parliament.nsw.gov.au

Dear Sir/ Madam,

Racial Vilification Law in New South Wales

The Australian Lawyers Alliance is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary. We value immensely the right of the individual to personal autonomy in their lives and to equal treatment under the law.

The Australian Lawyers Alliance ("ALA") welcomes the NSW Government's inquiry into racial vilification law. The ALA has considered the *Terms of Reference* as set out by the Legislative Council and is pleased to be given the opportunity to make submissions to the Standing Committee on this issue.

At the outset, we draw to the attention of the Legislative Council that in early 2012 the Australian Human Rights Commission ("AHRC") began its community consultation process in the development of a nationwide Anti-Racism Strategy (hereafter "ARS"). The AHRC discovered that 66% of respondents had experienced racism and 90% considered the issue

of racism to be either extremely or very important to Australia.[1] The ALA echoes the views of the respondents and submits that more needs to be done in the reduction and eradication of racial vilification in Australia and that any ARS ought to be supported by effective and robust legislation.

1. The effectiveness of section 20D of the *Anti-Discrimination Act 1977* ("the Act") which creates the offence of serious racial vilification

The ALA notes that New South Wales was the first State to introduce legislation dealing with the issue of racial vilification.[2] The Act contains both civil and criminal sanctions in this regard.

The introduction of section 20D to the Act in 1989[3] created a criminal offence of serious racial vilification. Section 20D reads as follows:

> ***20D Offence of serious racial vilification***
>
> *1. A person shall 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*

[1] Report of the National Anti-Racism Strategy consultation process, Australian Human Rights Commission, June 2012.
[2] *See Anti Discrimination (Racial Vilification) Act 1989 NSW*
[3] As amended by the *Anti Discrimination (Racial Vilification) Act 1989* NSW

months, or both.
In the case of a corporation-100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

At the time of writing, the ALA understands that at least 27 complaints of racial vilification have been referred to the Department of Public Prosecutions. However, to date, there have been no prosecutions under section 20D.

The ALA submits that the very fact there have been no prosecutions under s20D since its inception in 1989, is prima facie evidence that the section is ineffective. The ALA believes the ineffectiveness of the section stems from the fact it is far too difficult to establish the crucial elements of the offence – 'incitement' and 'means' and that there is little incentive to do so when compared with offences punishable under the *Crimes Act 1900*.

The ALA is of the opinion this is in contrast with Article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (CERD), which requires that all states who are members to the convention (of which Australia is one) to declare as an offence punishable by law all dissemination of ideas based on racial superiority and hatred.

If section 20D is read alongside the second reading speech relating to the Act, it is clear that one of the elements that needs to be established to prove the criminal offence is that there was an intention to incite. The ALA is of the view that this "means" element of the offence is too difficult to establish in that even intentional public incitement needs to be accompanied by a threat of harm to a person or property.

It is the ALA's position that this test is too onerous, and eliminates cases where a person has perceived the act of another to be seriously threatening, despite it not carrying with it an immediate threat of physical harm. This has the effect of creating a perception amongst the community that incitement to hatred alone is not considered sufficiently serious. Once again

this stands at odds with the article 4 of the CERD. It also fails to maintain any level of consistency in elements of the charge of assault in NSW, that is, a fear of imminent harm.

The ALA believes that the current form of s20D is not in line with obligations under the CERD and is therefore not effective. The convention specifically says that all states declare as an offence punishable by law all dissemination of ideas based on racial superiority and hatred.

It is simply disingenuous to suggest that serious racial vilification attract similar sentencing procedure as offences that are already addressed in the *Crimes Act 1900*.

It is the ALA's submission that the most significant problem with s20D, and perhaps the reason for the lack of prosecution and effectiveness, under the section essentially creates a higher onus of proof on the prosecutor to satisfy the elements of this offence with little incentive when taking into account already existing provisions and sentencing of the *Crimes Act 1900*.

The offence of racial vilification under s20D carries with it a sentence that is no greater than other offences for physical harm to person and/or property that fall within the scope of the *Crimes Act 1900*. In addition, if someone is to incite an offence that results in physical harm to person or property it is our submission that section 346 of the *Crimes Act 1900* adequately deals with actions of this nature. Under that provision, it is an offence to be an accessory before the commission of a crime and carries with it the same sentence of whatever crime was committed. It is the belief of the ALA that the test in establishing an accused is guilty of an offence under section 346 is much less onerous on a prosecutor, and therefore public funding, than a prosecution advanced under s20D. The reality is that the punishment for the offence is not reflective or indicative of the seriousness of racial vilification.

When faced with the proposition of allocating public funds by the prosecution to an offence with the same potential penalty, such as common assault, but one that is more onerous in proving, it is an obvious conclusion to draw that those offences would be pursued rather then

s20D. Therefore, the current section is simply not a realistic or effective approach to ensuring that dissemination of ideas based on racial superiority and hatred does not occur in NSW.

The ALA draws to the attention of the Legislative Council that in the event an offence is committed that is motivated by hatred or prejudice arising out of a victim's race, religion, ethnic origin, language, sexual orientation, age or disability a court may take this into consideration this in imposing a harsher penalty at sentencing[4]. However, when section 20D only imposes a relatively minor potential penalty this significantly limits a courts discretion in properly redressing cases of serious racial vilification.

2. Whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations

In order for a prosecution under section 20D to be successful, it is necessary for the prosecution to prove each of the four elements contained in the section beyond a reasonable doubt. That is, that the act must:

(1) Be a public act

(2) Incite

(3) Hatred, contempt or severe ridicule

(4) On the grounds of race

Further, under sub-section 2 of section 20D, a prosecution cannot proceed unless the Attorney General has consented to the prosecution.

As to whether or not the test in section 20D is "realistic" turns on whether it is a pragmatic means of achieving the ultimate goal of decreasing the occurrence of racial vilification in

[4] *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A(h).

NSW (specifically) and Australia (generally). In determining whether section 20D of the Act establishes a 'realistic test', the ALA has considered the wording of the section itself, its interpretations and application.

To 'vilify' is to speak or write about someone (or a group of persons) in an abusively disparaging manner. The offence of 'racial vilification' is met when a person publicly vilifies a person (or group of persons) including:

(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.

The interpretation rule of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) is ordinarily applied to legislative provisions where items not included on a list are taken to be removed from consideration.

As section 20D(1) includes the phrase "including", we can consider subsections (a) and (b) to be illustrative and not exhaustive. In other words, a person can commit the offence of serious racial vilification without necessarily threatening or inciting physical harm towards others.

The ALA believes this interpretation would be in line with community expectations for the offence of racial vilification as non-physical acts can provoke racial disharmony without physical harm. However, the ALA is concerned that the emphasis on the manifestation of actual harm trivializes the non-physical harm that can be done when a person commits an act of racial vilification.

The ALA believes the Australian community at large would be surprised to learn that section 20D of the Act has resulted in no successful prosecutions or indeed no prosecutions at all. The Act is the NSW equivalent of the Commonwealth *Race Discrimination Act 1975* ("RDA"),

which is overseen by the AHRC. In the 2011/2012 reporting year, the AHRC received 26 complaints for racial hatred, or less than 1% of all complaints.

The prosecution statistics made under the section since its introduction in 1989 show that of the 29 complaints that have been referred to the Director of Public Prosecutions for criminal prosecution, none have been advanced.

It is difficult to assert that section 20D realistically reduces the prevalence of racial vilification when it has such low incidences of application and no incidences of success.
Even in circumstances where a person is found to have committed racial vilification, it is the case in NSW that criminal prosecutions under section 20D are not advanced. For example, the multiple decisions in the Keysar Trad and radio identity Alan Jones' legal saga. During 7 years of litigation and appeals, proceedings under the Act and related defamation proceedings went all the way to the High Court of Australia and back to the Administrative Disputes Tribunal. Mr Jones was found to have contravened section 20C of the Act and ordered to apologise, however, no prosecution under section 20D was commenced. It is the position of the ALA that the nature of the comments made by Mr Jones[5], should have been considered by the DPP, particularly in light of the fact Mr Jones had voiced his position on state wide radio.

The ALA would submit that the actions of persons who commit racial vilification ought to be subjected to harsher criminal prosecution and that the test for criminal prosecution ought to be capable of satisfaction without being overseen by the Attorney General. For there to be no prosecutions under section 20D in some 24 years is tantamount to admitting there have been no occurrences of racial vilification worthy of prosecution. This illogical conclusion would surely be out of step with community expectations and experiences. The people of NSW and indeed Australia would expect that any instances of racial vilification would be

[5] On 28 April 2005 Mr Jones, on his 2GB radio show, said in response to a channel 9 program about the conduct of young Lebanese men that *"If ever there was a clear example that Lebanese males, in their vast numbers, not only hate our country and our heritage, this was it. They have no connection to us: they simply rape, pillage and plunder a nation that's taken them in. I can't believe what I'm seeing. What did we do as a nation to have this vermin infest our shores?"*

adequately addressed and combatted to ensure the protection of our diverse and multicultural society.

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

The ALA's position is that the Legislative Council should take into account two improvements to section 20D.

Firstly, inciting serious racial vilification that might result in violence against a particular person or group is a very serious offence that should be reflected in a harsher sentencing regime to increase the effectiveness of the provision and its application. It is the ALA's submission that the sentence for this offence be increased to the region of 2 to 5 years.

Secondly, if NSW is to truly adopt the intention and comply with CERD that there should be no impediment to a prosecutor in pursuing potential cases for serious instances of racial vilification and it is the submission of the ALA that subsection 2 requiring the approval of the Attorney General should be repealed.

We thank the Standing Committee on Law and Justice for this opportunity to provide our submissions on this very important issue. If we may be of any ongoing assistance in your inquiry please do not hesitate to contact us.

Yours faithfully,

JNANA GUMBERT
NSW State President
AUSTRALIAN LAWYERS ALLIANCE