

## **INQUIRY INTO RACIAL VILIFICATION LAW IN NSW**

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## Striking the right balance – freedom of speech and hate speech

Submission to the inquiry into racial vilification law in New South Wales

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## About the Human Rights Law Centre

The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

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## Contents

1.	INTRODUCTION	2
2.	SUMMARY OF RECOMMENDATIONS	4
3.	INTERNATIONAL HUMAN RIGHTS OBLIGATIONS	5
3.1	Freedom of expression	5
3.2	Limitations on freedom of expression	6
3.3	Racial vilification is not protected speech	7
3.4	Merely offensive speech does not constitute hate speech	8
3.5	Defining ‘Hate Speech’: The Rabat Plan of Action	9
4.	RACIAL VILIFICATION IN AUSTRALIA	12
4.1	The problem of racial vilification	12
4.2	United Nations criticism of racial vilification in Australia	13
5.	ANALYSIS OF CURRENT NSW LAW	14
5.1	NSW laws should prohibit racist hate speech	14
5.2	Are the current laws effective?	14
5.3	Considering possible amendments	15
5.4	Civil prohibition	17
5.5	Non-legislative measures	17
5.6	Ensuring consistency across affected groups	18

# 1. Introduction

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The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make a submission to the inquiry of the Law and Justice Committee of the Legislative Council (**the Committee**) into racial vilification law in New South Wales (**NSW**).

In 1989 the NSW Government introduced a civil prohibition on racial vilification and complementary criminal offence for serious racial vilification through hate speech under sections 20C and 20D respectively of the *Anti-Discrimination Act 1977* (NSW) (**ADA**).<sup>1</sup>

The Committee has been tasked to consider, in particular:

- (a) the effectiveness of section 20D of the *Anti-Discrimination Act 1977* which creates the offence of serious racial vilification;
- (b) whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and
- (c) any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech.

The terms of reference of this inquiry indicate that Committee will have regard to whether these proposed changes engage the right to freedom of expression and if so, whether they impose permissible limitations on freedom of expression. We note that the term freedom of speech is sometimes used synonymously with freedom of expression, but is a broader concept than 'speech' and extends to any act of seeking, receiving and imparting information or ideas regardless of the medium used.

As explained throughout this submission, vilification laws will necessarily restrict some people's right of free speech in order to protect the right of other people to be free from discrimination and to prevent threats to their physical safety. Finding the appropriate balance between these competing rights is often controversial. Indeed, there has been considerable debate over recent months about the content and application of the right to freedom of expression, and its relationship with other fundamental human rights such as the right to non-discrimination.<sup>2</sup> This debate has been characterised by fundamental misunderstandings about the nature of human rights and confusion about the interaction between these rights.

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<sup>1</sup> Section 20D provides that 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. A 'public act' and 'race' are defined in the ADA.

<sup>2</sup> For example, in response to s 19(2)(b) of the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) and the commentary surrounding the recent High Court cases of *Attorney-General (Sa) v Corporation of the City of Adelaide* [2013] HCA 3 (27 February 2013) and *Monis v The Queen* [2013] HCA 4 (27 February 2013) concerning the implied freedom of political communication under the Australian Constitution; See also ABC Radio National, the Law Report (available at <http://www.abc.net.au/radionational/programs/lawreport/rundle-street-preachers/4548266>).

Much commentary on vilification laws fails to recognise the profound impact that hate conduct has on the ability of certain individuals to exercise their freedoms and participate in public life. Importantly, the acceptance or tolerance of hate conduct by a community serves to condone or encourage this conduct, providing an ‘authorising environment’ for this conduct and increasing the likelihood of escalated behaviours.<sup>3</sup> Regulators of discrimination and vilification laws emphasise that social cohesion and perceptions of safety by the whole community are affected by the tolerance of mistreatment of vulnerable groups within the community.<sup>4</sup>

The primary purpose of this submission is to provide an explanation of the relationship between the right to free speech and the rights to equality, non-discrimination; and liberty and security of person, under international human rights law. The Committee is encouraged to adopt a human rights analysis to considering the effectiveness of current laws and any proposed changes. The HRLC makes a small number of recommendations to guide the committee in its assessment of whether the existing provisions are consistent with international human rights obligations and to guide the Committee’s thinking about how the provisions may be improved to comply with international human rights obligations.

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<sup>3</sup> Victorian Equal Opportunity & Human Rights Commission (VEOHRC), *Submission to the Review of Identity-Motivated Hate Crime*, May 2010, page 8.

<sup>4</sup> VEOHRC, *Submission to the Review of Identity-Motivated Hate Crime*, May 2010, page 9; Australian Human Rights & Equal Opportunity Commission, *Report of National Inquiry into Racist Violence in Australia* 1991.

## 2. Summary of recommendations

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### **Recommendation 1**

Prohibitions on hate speech should not extend to speech that offends but that is not intended to or likely to contribute to vilification of persons on the basis of race.

### **Recommendation 2**

The continued problem of racism and racial hatred within the Australian community and the harm caused by this conduct should be noted and guide the development of amendments to s 20D.

### **Recommendation 3**

Prohibitions contained in the ADA against racial vilification, transgender, homosexual and HIV/AIDS vilification should be retained.

### **Recommendation 4**

The Committee should conclude that the current regime does not adequately protect against racist hate speech.

Section 20D of the ADA should be amended to bring the existing prohibition in line with international human rights obligations.

### **Recommendation 5:**

The offence of serious racial vilification should address the harm resulting from racist hate speech, covering acts that are intended to cause harm or are *likely to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of proper of their family or associates*.

Acts intended or likely to create racial hatred or contempt resulting in non-physical abuse should also be captured by the offence of serious racial vilification.

### **Recommendation 6:**

A complementary civil prohibition on racial vilification giving rise to a civil cause of action be retained.

**Recommendation 7:**

Complementary policies, procedures and other measures to address institutionalised racism and racial vilification should be retained and enhanced. Complementary measures should include, among other initiatives:

- strong policy statements to make it clear that acts of racial hatred and vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection are prohibited in legislation, are unacceptable and dangerous to the community;
- broad education and social marketing campaigns with a view to combating existing prejudices and to promoting understanding and tolerance between racial and ethnic groups and the role of prohibitions on racial vilification; and
- training for public authorities and law enforcement officers about the prohibitions on serious vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection including how complaints of vilification should be recorded, reported and investigated.

**Recommendation 8:**

The prohibition on serious racial vilification be expanded to address racial, ethnic and religious vilification.

**Recommendation 9:**

Any amendments to the current section 20D to improve the operation and application of this prohibition, be considered for adoption in relation to other serious racial vilification offences under the ADA.

## 3. International human rights obligations

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### 3.1 Freedom of expression

The ability to speak freely and express an opinion is a ‘foundation stone for every free and democratic society’.<sup>5</sup>

The International Convention on Civil and Political Rights (**ICCPR**), to which Australia is a State party, protects this fundamental freedom. Article 19(2) of the ICCPR provides that:

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<sup>5</sup> UN Human Rights Committee, *General Comment 34*, UN Doc CCPR/C/GC/34.

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontier, either orally, in writing or in print, in the form of art, or through any other media of his choice.

As well as its importance to individual dignity, freedom of expression is an enabling right that contributes to public participation in decision-making and democratic processes and therefore accountability and democracy. Citizens cannot exercise their right to vote effectively or take part in public debate that contributes to political processes if they do not have access to information and ideas and are not able to express their views.

Importantly, free speech is also essential to create an environment conducive to critical discussions of racial issues and to promote understanding and tolerance. In this way, the exercise of the right to free expression is essential to deterring hate speech.<sup>6</sup> However, the right to free expression is not absolute and may be subject to certain limitations that are reasonable, necessary and proportionate.

### 3.2 Limitations on freedom of expression

Under international human rights law, it is well established that the right to freedom of expression carries with it 'special duties and responsibilities'.<sup>7</sup> This is because of the potential for absolute freedom of expression to cause harm to others.

Freedom of expression is not superior to other rights and does not trump the right to equality. Where the freedom of expression impacts the rights of others, the freedom to express an opinion must be balanced against those rights.

According to international human rights law, freedom of expression may be subject to limitations that are reasonable and demonstrably justified in a free and democratic society.<sup>8</sup> Article 19(3) of the ICCPR permits some limited restrictions to freedom of expression to protect the following legitimate interests:

- (a) to ensure respect of the rights or reputations of others; or
- (b) for the protection of national security or of public order or of public health or morals.

Restrictions on freedom of expression are only permitted if they are provided by law, they are narrowly defined to serve a legitimate interest listed, and they are necessary in a democratic society to protect that interest.

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<sup>6</sup> See, for example, statement by Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 5 November 2012 (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12744&LangID=E> ).

<sup>7</sup> Article 19(3) of the ICCPR.

<sup>8</sup> UN Human Rights Committee, *General Comment No. 34 on Article 19*, stating that these inbuilt limitations 'may never be invoked as a 'justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights'; *General Comment No. 31 on the nature of the general legal obligation imposed on State parties*.

Indeed, political leaders in Australia have long acknowledged the need for limitations on freedom of expression to achieve this balance. In a recent speech, Federal Opposition Leader Tony Abbott noted that ‘free speech can be restrained at the margins but only in order to secure other important rights’.<sup>9</sup>

Despite this, vilification laws generate controversy because they restrict one person’s right to freedom of expression to protect the rights of others to ‘live in the community without being subject to vilification on the grounds of a protected personal attribute’.<sup>10</sup>

There are many laws in Australia that impose restrictions on freedom of expression to achieve the legitimate aims identified in article 19(3) of the ICCPR and protect the rights of others. The law has long recognized the potential danger caused by speech. These laws include: consumer protection laws prohibiting misleading and deceptive conduct; defamation laws protecting against damage to reputation caused by publicly stated untruths; and criminal laws regulating child pornography are all long recognized limitations on free speech in Australian law. Each of these laws seek to strike an appropriate balance between freedom of expression and protection of other rights and values that ensure the proper function of a democratic society.

### 3.3 Racial vilification is not protected speech

The international community has accepted, at least since the Holocaust, that it is important to combat racist hate speech as part of the ‘special duties and responsibilities’ that attach to the right of freedom of expression.<sup>11</sup> Hate speech diminishes the dignity of a person and a person’s sense of self-worth. It excludes and isolates people and affects democratic participation in society.<sup>12</sup>

To this end, the ICCPR sets out the ‘specific response required from the State’ to combat racist hate speech. Article 20(2) provides:

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

In response to arguments that the right to freedom of expression and the obligation to protect against hate speech are inconsistent, the UN Human Rights Committee has explained that Article 20(2) is fully compatible with the right of freedom of expression and they are ‘mutually dependent and reinforcing’.<sup>13</sup>

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<sup>9</sup> Tony Abbott, ‘Freedom Wars’, Address to the Institute of Public Affairs, Sydney, posted 6 August 2012, transcript available at: <http://www.tonyabbott.com.au/News/tabid/94/articleType/ArticleView/articleId/8833/Address-to-the-Institute-of-Public-Affairs-Sydney.aspx>.

<sup>10</sup> Rees, Lindsay and Rice, *Australian anti-discrimination law: Text, Cases and Materials*, The Federation Press (2008), page 527

<sup>11</sup> CERD General Recommendation I (1972) on States parties obligations (Art. 4); General Recommendation VII (1985) on Legislation to eradicate racial discrimination (Art. 4); CERD General Recommendation XV (1993) on organized violence based on ethnic origin (Art. 4).

<sup>12</sup> Professor Chesterman cited in Neil Rees, Katherine Lindsay and Simon Rice, *Australian anti-discrimination law: Text, Cases and Materials*, (The Federation Press, 2008), page 532.

<sup>13</sup> Human Rights Committee, *General Comment 11 on Article 20*, para.2; UN Office of the High Commissioner of Human Rights, *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* (5 October 2012) (**Rabat Plan of Action**), para. 10.

Article 20(2) is the more specific obligation of the right of freedom of expression which carries ‘special duties and responsibilities’.<sup>14</sup>

Prohibitions on hate speech enacted under Article 20(2) must however also come within the limits of article 19(3) and satisfy the test for justifying limits on free speech under that article.<sup>15</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**) also addresses the ongoing issue of systemic discrimination on the grounds of race. Article 4 imposes a positive obligation on State parties to eliminate harmful hate speech.<sup>16</sup> It provides:

States Parties [...] undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) 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; [Our emphasis]

[...]

Article 4 thereby imposes four distinct obligations on state parties. Those obligations are to prohibit:<sup>17</sup>

- dissemination of ideas based on racial superiority;
- dissemination of ideas based on racial hatred;
- incitement to racial discrimination; and
- incitement to acts of racially motivated violence.

The Committee on the Elimination of Racial Discrimination (**CERD**) has stated that Article 4(a) requires legislation that criminalises serious acts of racial hatred, incitement to such acts and incitement to racial hatred.

Thus, under international human rights law, it is necessary to incorporate prohibitions on racial vilification into national laws. This obligation to legislate to protect remains even in the absence of evidence of racial vilification within that state because of the destructive potential of hate speech.

### 3.4 Merely offensive speech does not constitute hate speech

Importantly, the obligation to prohibit hate speech does not extend to regulating views that merely offend others.<sup>18</sup>

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<sup>14</sup> Human Rights Committee, *General Comment 34 on Article 19*, para. 51.

<sup>15</sup> *Malcolm Ross v Canada*, CCPR/C/70/D/736/1997, UN Human Rights Committee, 26 October 2000.

<sup>16</sup> We note that while Australia is a State party to ICERD, it has placed a reservation on the application of Article 4(a) on the basis that Australia has in force existing criminal sanctions in areas of assault, public mischief etc that can also address racially motivated violence. The Australian Government’s reservation states that ‘it is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of Article 4(a).’

<sup>17</sup> Toby Menkel, ‘Hate Speech Rules under International Law’, *Centre for Law and Democracy*, February (2010), accessed at <http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf>, 12 March 2013 citing the CERD, *General Comment No. 15*.

Freedom of expression extends not only to information and ideas that are favourably received or seen as ‘inoffensive’ but also to ideas that may ‘offend, shock or disturb’. As the European Court of Human Rights stated in its seminal decision *Handyside v UK*<sup>19</sup>, freedom to hold and express unpopular views is essential to the “demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’”.<sup>20</sup>

As the UN High Commissioner of Human Rights has identified<sup>21</sup> there will be situations where causing offence is necessary to advance society, such as by highlighting the plight of vulnerable minorities.

Article 20(2) of the ICCPR requires a high threshold ‘because, as a matter of fundamental principle, limitation of speech must remain an exception. Limitations may not be ‘overly broad’<sup>22</sup> or restrict speech in a ‘wide or untargeted way’.<sup>23</sup> The imposition of criminal sanctions on speech that ‘offends’ but does not go beyond that and stir up hatred or violence would not be justified.

This is reflected in community perceptions about the role of anti-vilification laws in Australia. For instance, the Australian Human Rights Commission conducted broad public consultations about the role of anti religious vilification laws as part of its ‘Freedom of religion and belief in 21<sup>st</sup> century Australia’ project. The Commission found that that even among strict opponents of legal regulation of freedom of expression, many people participating in the NSW public hearing felt that ‘... criticising teachings [was] okay, just not vilifying individuals’.<sup>24</sup> Anti-vilification laws should aim to strike this balance.

### **Recommendation 1**

Prohibitions on hate speech should not extend to speech that offends but that is not intended to or likely to contribute to vilification of persons on the basis of race.

## **3.5 Defining ‘Hate Speech’: The Rabat Plan of Action**

There is currently no firmly agreed definition of what constitute ‘hate speech’ under international human rights law. The UN High Commissioner for Human Rights has suggested that it may not be appropriate to have a unified definition because of the range of national and regional responses to this

<sup>18</sup> Human Rights Committee, *General Comment No. 34*, para. 22.

<sup>19</sup> *Handyside v United Kingdom* [1976] 1 EHRR 737.

<sup>20</sup> *Handyside v United Kingdom* [1976] 1 EHRR 737, commenting on the right to freedom of opinion and expression under article 10 of the *European Convention on Human Rights*. See also *Arbeiter v Austria* [2007] ECHR Application No 3138/04 (25 January 2007); *Livingstone v The Adjudication Panel for England* [2006] EWHC 2533 (Admin), [36].

<sup>21</sup> UN High Commissioner for Human Rights, Nilav Pilay, ‘Freedom of Expression and Hate Speech: What International Law Says’ London School of Economic audio recording, available at <http://www2.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1754>, accessed 14 March 2013.

<sup>22</sup> Rabat Plan of Action, para. 18

<sup>23</sup> Rabat Plan of Action, para. 18

<sup>24</sup> Australian Human Rights Commission, *Freedom of Religion and Believe in Australia in the 21<sup>st</sup> Century*, Research Report, (2011) available at: [http://humanrights.gov.au/frb/Report\\_2011.pdf](http://humanrights.gov.au/frb/Report_2011.pdf)

issue, however there are international norms that have been developed to guide State parties in responding to this issue.<sup>25</sup>

In 2011, international experts participated in a series of workshops hosted by the Office of the High Commissioner on Human Rights regarding the relationship of incitement to national, racial or religious hatred and freedom of expression in international human rights law. They undertook a 'comprehensive assessment of the implementation of legislation, jurisprudence and policies' in this area. The 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (**Rabat Plan of Action**) to address the key issues identified through this process.

The Rabat Plan of Action highlighted the importance of clearly identifying what forms of speech justify criminal sanction, what forms of speech may be appropriately addressed through less restrictive means including civil action and what forms of speech raise concerns about 'tolerance, civility and respect for the rights of others' but are not sanctioned by law.<sup>26</sup> The Rabat Plan of Action emphasises that criminal sanctions should be used as a last resort and civil sanctions and remedies should also be considered.<sup>27</sup>

Whether or not speech should be prosecuted as a criminal offence, civil prohibition or not at all comes down to the question of severity. As acknowledged in the Rabat Plan of Action 'the incitement to hatred must refer to the most severe and deeply felt form of opprobrium'.

Based on international and national jurisprudence and experience, the Rabat Plan of Action includes a six part guide to developing a criminal offence of incitement of discrimination, violence or hatred.

In summary, the law should take into account and allow the court or tribunal to take into account:

- the context of speech (for example, in the social and political context, is the speech likely to 'incite' discrimination, hostility or violence or have a bearing directly on understanding the intention of the accused or causation of violence?);
- the position or status of the speaker in society, such as the speaker's standing in the context of the audience to whom they are directing their comments (such as a highly popular media outlet that reaches many listeners);
- the speaker's intent. The Rabat Plan of Action considers that article 20(2) requires intent, and '[n]egligence and recklessness are not sufficient for an article 20 situation which required "advocacy" and "incitement" rather than mere distribution or circulation.'<sup>28</sup> However, it should be noted that article 4 of ICERD requires states to prohibit dissemination of ideas, which may not require a person to intend to incite hatred or violence. As Rice and Rees discuss in their submission to this inquiry, the nature and extent of the harm caused by racist hate speech should be the focus for the development of these laws. On that basis Rice and Rees

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<sup>25</sup> UN High Commissioner for Human Rights, Nilav Pilay, 'Freedom of Expression and Hate Speech: What International Law Says' London School of Economic audio recording, available at <http://www2.lse.ac.uk/newsAndMedia/videoAndAudio/channels/publicLecturesAndEvents/player.aspx?id=1754>

<sup>26</sup> Rabat Plan of Action, Part III, A, Recommendations

<sup>27</sup> Ibid, Section C. Jurisprudence, Recommendations

<sup>28</sup> Ibid, Part III, A, Recommendations

recommend that the prohibition cover conduct that is expressly intended or 'is likely' to offend the prohibition on hate speech;<sup>29</sup>

- the content or form of the speech and how it contributes to incitement. This guiding principle may arise out of previous concerns in international jurisprudence that some more sophisticated language or language techniques may not be caught by the narrow confines of article 20 that prohibit 'incitement' even though 'their effect may be as pernicious as explicit incitement, if not more so'<sup>30</sup> The 'form, style, nature of the arguments' may reveal much about its severity;
- the extent of the speech (for example, the reach, public nature, magnitude and size of the audience). The Rabat Plan of Action does not however suggest that only speech that was widely distributed should be punished. It should however be a factor considered in determining severity; and
- the likelihood or imminence of the risk of harm. The Rabat Plan of Action indicated that while it is difficult to define appropriate limits to laws on hate speech, 'some degree of risk of resulting harm must be identified'. Consistent with this guidance, Rice and Rees propose an offence of causing a person to have a 'reasonable fear in the circumstances [context] for their own safety or security of property, or for the safety or security of property of their family or associates.'

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<sup>29</sup> Rice and Rees, *Submission to the Legislative Council on Law & Justice Inquiry into Racial Vilification Laws in NSW*, 15 March 2013.

<sup>30</sup> *Faurisson v. France*, Human Rights Committee, Communication No. 550/1993, 8 November 1986, para. 4 per Evatt, Kretzmer and Klein.

## 4. Racial Vilification in Australia

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### 4.1 The problem of racial vilification

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression recently declared that ‘regrettably, incitement to hatred continues to be found in all regions of the world.’<sup>31</sup> Unfortunately, Australia does not depart from this trend.

The prevalence of racism, including vilification on the basis of race, in Australia is well documented. There is evidence of a ‘disturbing reality of everyday racist abuse’.<sup>32</sup> Around one in five Australians say they have experienced race-hate talk, such as verbal abuse, racial slurs or name-calling and more than one in 20 Australians say they have been physically attacked because of their race.<sup>33</sup>

Ares of particular concern identified in reports and inquiries into racism in Australia include:

- the rise of ‘Islamophobia’<sup>34</sup>
- negative stereotyping of African communities, particularly the Sudanese community<sup>35</sup>; and
- systemic discrimination against Aboriginal and Torres Strait Islander communities.<sup>36</sup>

There are also emerging issues relating to racism in Australia with cyber-racism and the significant potential for material published on the internet to contribute to racial hatred.<sup>37</sup>

Racism in its most extreme form manifests in racial vilification. Racism and racial vilification cause harm to individuals, to groups and society as a whole.<sup>38</sup> VicHealth has conducted extensive research into the negative physical and mental health effects of race based discrimination. For example, a 2007 survey found that high levels of racism towards Aboriginal communities in Victoria was associated with

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<sup>31</sup> Statement by Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 5 November 2012 (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12744&LangID=E> ).

<sup>32</sup> ‘Racial and Religious Vilification in the ACT: Investigating the effectiveness of Part 6 of the ACT Discrimination Act 1991’, ACT Human Rights Office Issues Paper (2006), page 3.

<sup>33</sup> Australian Human Rights Commission campaign ‘Racism. It stops with me.’ Available at: <http://itstopswithme.humanrights.gov.au/about-racism.html>, accessed 12 March 2013.

<sup>34</sup> See, for example, the National Action Plan to Build on Social Cohesion, Harmony and Security: <http://www.immi.gov.au/living-in-australia/a-multicultural-australia/national-action-plan/nap.htm>, accessed 12 March 2013; Dr Helen Szoke noted that ‘after September 11, 2001, the racist focus on Muslim communities has been exacerbated and has been quite acute’ quoted in F. Farouque, ‘Detention Not Human, Says Commissioner’, *The Age*, 5 September 2011.

<sup>35</sup> Australian Human Rights Commission, *In Our Own Words, African Australians: A review of Human Rights and Social Inclusion Issues* (June 2010), page 12.

<sup>36</sup> Australian Human Rights Commission campaign ‘Racism. It stops with me.’ Available at: <http://itstopswithme.humanrights.gov.au/about-racism.html>.

<sup>37</sup> An example of highly offensive material that has the potential to incite hatred of Aboriginal people is an American website called ‘Encyclopedia Dramatica’, which contains an article that provides numerous ‘facts’ about Aboriginal people. It describes Aboriginal people as ‘the niggers of Australia’ and as the ‘most primitive animals on the planet’ and contains other extremely offensive content relating to Aboriginal people. See Encyclopaedia Dramatica, *Aboriginal*, <https://encyclopedia.dramatica.se/Aboriginal>, 6 May 2010 (accessed 15 March 2013).

<sup>38</sup> Professor Chesterman cited in Rees, Lindsay and Rice, *Australian anti-discrimination law: Text, Cases and Materials*, The Federation Press (2008), page 532.

poorer mental health and reduced life chances for Aboriginal Victorians.<sup>39</sup> The report concluded that '[r]educing the experience of racism is an important approach to improving health in this population. As one of the 'attitudinal engines of the exclusion, denigration, and subordination that make up and propel social inequality' racial vilification affects whole groups and communities.<sup>40</sup>

## 4.2 United Nations criticism of racial vilification in Australia

Over the last decade, a number of a number of United Nations human rights mechanisms have expressed concerns about racial vilification and recommended that Australia take steps to enhance protections against hate speech, specifically recognising the difficulties facing Arab and Muslim population in Australia.<sup>41</sup> The Committee recommended that Australia 'intensify efforts to combat racially motivated violence'.<sup>42</sup>

Through the Universal Period Review, the international community also recommended that Australia:

...take regular measures to prevent hate speech, including prompt legal action against those who incite discrimination or violence motivated by racial, ethnic or religious reasons.<sup>43</sup>

International treaty bodies have repeatedly called on Australia to introduce federal anti-hate speech legislation, emphasising the importance of giving effect to the positive obligations under article 20(2) of the ICCPR and article 4 of ICERD in Australia's domestic law.<sup>44</sup> Operating within a federal structure, the state of NSW is also required to comply with the obligations contained in UN human rights treaties to which Australia is a party.<sup>45</sup>

### Recommendation 2

The continued problem of racism and racial hatred within the Australian community and the harm caused by this conduct should be noted and guide the development of amendments to s 20D.

<sup>39</sup> VicHealth et al, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal communities*, 2007, available at: [http://visions-download.unimelb.edu.au/Mental%20health%20impacts\\_racial%20discrim\\_Indigenous-4.pdf](http://visions-download.unimelb.edu.au/Mental%20health%20impacts_racial%20discrim_Indigenous-4.pdf), accessed 12 March 2013. See also VicHealth et al, *Building on Our Strengths: A Framework to Race Based Discrimination and Support Diversity in Victoria*, 2011 (available at: <http://www.vichealth.vic.gov.au/Publications/Freedom-from-discrimination/Building-on-our-strengths.aspx> )

<sup>40</sup> Ibid.

<sup>41</sup> UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review (UPR): Australia*, UN Doc A/HRC/17/10 (24 March 2011), recommendations 86.59, 86.65, 8.6.98; CERD Committee, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010), para. 23.

<sup>42</sup> Ibid (CERD Committee, *Concluding Observations: Australia*, para. 23).

<sup>43</sup> Human Rights Council, *UPR: Australia*, recommendation 86.98 (Brazil).

<sup>44</sup> See for example, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2 April 2009).

<sup>45</sup> See, eg, article 50 of the ICCPR.

## 5. Analysis of current NSW law

### 5.1 NSW laws should prohibit racist hate speech

Under international human rights law, protection from racial vilification must be provided in law, even if racial vilification is not commonplace or prosecution is not often required.

The NSW Government should be commended for introducing laws that aim to address incitement of racial hatred as required by articles 20(2) of the ICCPR and article 4 of ICERD.<sup>46</sup> The NSW Government should also be commended for introducing criminal sanctions for vilification inciting hatred against transgender<sup>47</sup> and homosexual persons<sup>48</sup> and persons who are or may be thought to be HIV/AIDS infected.<sup>49</sup>

In accordance with the obligations imposed on State parties under international human rights law, the NSW Government should retain criminal offences to address serious vilification on these grounds in law.

#### **Recommendation 3**

Prohibitions contained in the ADA against racial vilification, transgender, homosexual and HIV/AIDS vilification should be retained.

### 5.2 Are the current laws effective?

While retaining prohibitions against racist hate speech in NSW laws is essential, whether the laws effectively address racial hatred in NSW is the subject of debate.

In its submission to this Inquiry, the Department of Attorney General and Justice notes that since section 20D was introduced in 1989, no complaints have been prosecuted under this provision, despite a number of referrals to the NSW Director of Public Prosecutions.<sup>50</sup> We note, however, that a similarly low rate of complaints and prosecutions has been experienced in Victoria under the *Racial and Religious Tolerance Act 2001* (Vic).<sup>51</sup> This may in part be because there are related civil and administrative mechanisms for dealing with inappropriate but less serious forms of racial discrimination and vilification.

<sup>46</sup> Treating hate crimes as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases and should be considered as a separate class of offences: Ben Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28(3) *University of New South Wales Law Journal* 868, page 878.

<sup>47</sup> Section 38T ADA

<sup>48</sup> Section 49ZTA

<sup>49</sup> Section 49ZXC

<sup>50</sup> The Department quotes figures provided by the Director of Public Prosecutions, page 1.

<sup>51</sup> Victorian Equal Opportunity & Human Rights Commission, *Submission to Review of Identity-Motivated Hate Crime*, May 2010. The HRLC understands that no prosecutions have been commenced to date.

Nevertheless, the failure to prosecute severe forms of hate speech is contrary to international human rights obligations:

“To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.”<sup>52</sup>

Given the absence of any prosecution and the fact these laws are over 20 years old, it would be advisable to amend the current laws to bring them in line with current community expectations and international requirements. Emerging issues and threats such as the potential for cyber vilification create additional reasons for considering the effectiveness of the current provisions.

#### **Recommendation 4**

The Committee should conclude that the current regime does not adequately protect against racist hate speech.

Section 20D of the ADA should be amended to bring the existing prohibition in line with international human rights obligations.

### **5.3 Considering possible amendments**

Drawing on the recommendations of the Rabat Plan of Action, the HRLC considers that the threshold requirement that a person must have “incited” hatred or contempt in others is too high and incompatible with international human rights standards, which condemn acts that have significant potential to promote racism (whether or not they can be said to have caused an increase in racism or violence).<sup>53</sup>

HRLC recommends that the Committee consider lowering the threshold test for racial vilification by removing the element requiring “incitement” of violence. Removing this requirement should assist to ensure the legislation achieves its aims by targeting conduct that causes or could potentially cause racially motivated violence or damage.

In this respect, we draw the Committee’s attention to the submission to this inquiry made by Professors Neil Rees and Simon Rice which proposes an offence for acts engaged on the basis of race that are:

‘intended, or [are] likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of proper of their family or associates.’

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<sup>52</sup> CERD *General Recommendation No. 15*, para. 2; see also Rabat Plan of Action, para. 11.

<sup>53</sup> See for example, *Vejdeland and ors v Sweden*, ECHR Application no. 1813/07 (9 May 2012) finding that pamphlets distributed in a school alleged to homosexuality as a ‘deviant sexually proclivity which has a morally destructive effect on the substance of society’, constituted hate speech that could be the subject of criminal sanctions. The Court noted that while these statements do not ‘directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations’ that constituted an assault on the rights of others (at 57).

In particular we note there is no requirement to establish the conduct ‘incites’ violence, but at the same time, the test establishes a high threshold because it must be established that the person has a reasonable fear for their safety and security (or the safety and security of others).

We also note that this proposal takes account of many of the complex issues for consideration identified in the Rabat recommendations, such as how the element of ‘intent’ should be incorporated into the offence (the fact the offence should deal with the harm that results, not the perpetrator’s subjective intention), how the offence can balance freedom of expression with risks to health and safety by imposing a test of ‘reasonable fear’ for safety.

This proposed offence also avoids the need to establish the act occurred in public because of the potential severely harmful effects of racial vilification in traditionally private areas.

In addition, to comply with Article 4 of the ICERD, HRLC considers the law should prohibit dissemination of material that promotes racial hatred or contempt of persons on the grounds of race but which does not create an immediate fear of violence or physical harm.

In this respect we draw the Committee’s attention to sections 18 and 19 of the United Kingdom *Public Order Act 1986*, which criminalises conduct which is ‘threatening’ or ‘abusive’ if it is intended, or in the circumstances is likely to stir up ‘racial hatred’, which is defined in the Act.<sup>54</sup> This provision recognises that conduct that may not lead to physical harm may nevertheless cause psychological harm and contribute to elevated levels of racism in the community.<sup>55</sup>

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<sup>54</sup> The provision also prohibits conduct that is ‘insulting’. HRLC notes the submission of Professors Rice and Rees that this may be considered too low a threshold. Section 19(1) of the *Public Order Act 1986* provides: A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if— (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby. Section 19(2) provides a defence in the following terms: is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. A similar offence relating to ‘use of words or behaviour or display of written material’ intended or likely to stir up racial hatred is contained in s 18.

<sup>55</sup> We draw the Committee’s attention to the UK Crown Prosecution Service’s Policy on racist and religious crime, which sets out a number of considerations the Crown Prosecution Services takes into account in determining whether to prosecute an offence under these sections, based on existing case law and the need to preserve an appropriate balance between freedom of expression and the need to combat racist hate speech. For example, the Policy states ‘One of the first things we have to prove for this offence is whether the behaviour is threatening, abusive or insulting. These words are given their normal meaning but the courts have ruled that behaviour can be annoying, rude or even offensive without necessarily being insulting. We also have to consider whether the offender intended to stir up racial hatred or whether racial hatred was likely to result. Hatred is a very strong emotion. Stirring up racial tension, opposition, even hostility may not necessarily be enough to amount to an offence.’ The policy is available at: <http://www.cps.gov.uk/publications/prosecution/rpbcrcbook.html#a07> (accessed 18 March 2013).

**Recommendation 5:**

The offence of serious racial vilification should address the harm resulting from racist hate speech, covering acts that are intended to cause harm or are *likely to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of proper of their family or associates*.

Acts intended or likely to create racial hatred or contempt resulting in non-physical abuse should also be captured by the offence of serious racial vilification.

## 5.4 Civil prohibition

Section 20C imposes a civil prohibition on incitement of racial hatred. Alan Jones was famously found to have contravened this section in the wake of the Cronulla riots.<sup>56</sup>

While it is beyond the scope of the Committee's terms of reference, given the importance of combating mild and more extreme forms of racial vilification, the HRLC submits that it is appropriate NSW racial vilification laws to maintain a graduated regime, whereby a civil cause of action is able to be pursued by individuals affected by racial vilification.

Considering the inquiry's terms of reference, the HRLC does not propose to make detailed recommendations regarding the drafting of such a civil provision. We do direct the Committee's attention to the comprehensive submission made by the Victorian Equal Opportunity & Human Rights Commission in response to a review of laws relating prejudice motivated crime in Victoria.<sup>57</sup> The submission contains detailed analysis and recommendations regarding the drafting of civil and criminal responses to hate conduct.

**Recommendation 6:**

A complementary civil prohibition on racial vilification giving rise to a civil cause of action be retained.

## 5.5 Non-legislative measures

Legislative protections should be complemented by the introduction of other initiatives to eliminate racist hate speech, facilitate receipt of complaints, investigation and prosecution of hate speech and assist victims of hate speech or incitement to violence 'to bring about genuine changes in mindsets, perception and discourse'.<sup>58</sup>

<sup>56</sup> *Trad v Jones* (No. 3) (EOD) [2012] NSWADTAP 33, summarised in ABC and Australian Associated Press article, 'Tribunal rules Alan Jones incited hatred', ABC News, 3 October 2012, available at <http://www.abc.net.au/news/2012-10-02/tribunal-rules-alan-jones-incited-hatred/4292052>, accessed 18 March 2013.

<sup>57</sup> VEOHRC, *Submission to the Review of Identity-Motivated Hate Crime*, May 2010.

<sup>58</sup> Statement by Frank La Rue, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 5 November 2012 (available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12744&LangID=E> ).

As identified in the Rabat Plan of Action, this should include policies, practices and measures nurturing social consciousness, tolerance and understanding change and public discussion.<sup>59</sup> The National Anti-Racism Strategy and social marketing campaign “Racism. It stops with me” are examples of broader responses to racism and racial vilification.

The Rabat Plan of Action also encourages states to train police on obligations to prohibit incitement to hatred. Given the historic reluctance to prosecute the existing s 20D offence, this should be seen as a particularly important measure. In addition to training and guidance, improved data collection would enable recording of hate crimes, or potential hate crimes. We note that Victoria Police has developed a comprehensive strategy to tackle prejudice motivated crime.<sup>60</sup>

#### **Recommendation 7:**

Complementary policies, procedures and other measures to address institutionalised racism and racial vilification should be retained and enhanced. Complementary measures should include, among other initiatives:

- strong policy statements to make it clear that acts of racial hatred and vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection are prohibited in legislation, are unacceptable and dangerous to the community;
- broad education and social marketing campaigns with a view to combating existing prejudices and to promoting understanding and tolerance between racial and ethnic groups and the role of prohibitions on racial vilification; and
- training for public authorities and law enforcement officers about the prohibitions on serious vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection including how complaints of vilification should be recorded, reported and investigated.

## 5.6 Ensuring consistency across affected groups

Article 20(2) of the ICCPR requires States to prohibit vilification motivated by race, ethnicity or religion. We note that section 20D currently addresses racial vilification but does not expressly address religious vilification.

The Committee should ensure that the criminal and civil prohibition on vilification is consistent with this international human rights obligation.

<sup>59</sup> Rabat Plan of Action, Section C. Policies, para. 23

<sup>60</sup> See Victoria Police website for more information ([http://www.police.vic.gov.au/content.asp?Document\\_ID=32278](http://www.police.vic.gov.au/content.asp?Document_ID=32278))

We also note that serious vilification of people or members of a group who are transgender, homosexual or have or may be infected with HIV/AIDS under other parts of the ADA.

We understand that the NSW Director of Public Prosecutions has received a number of complaints of hate speech in relation to these attributes but no prosecutions have eventuated.<sup>61</sup> Any recommendations made to amend s 20D to enhance its effectiveness should also be extended to the remaining vilification offences.

***Recommendation 8:***

The prohibition on serious racial vilification be expanded to address racial, ethnic and religious vilification.

***Recommendation 9:***

Any amendments to the current section 20D to improve the operation and application of this prohibition, be considered for adoption in relation to other serious racial vilification offences under the ADA.

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<sup>61</sup> NSW Department of Attorney General and Justice, Submission to the current Inquiry, page 1.