

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

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The Director,
Standing Committee on Law and Justice
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Dear Sir/Madam

SUBMISSION TO LEGISLATIVE COUNCIL OF NSW STANDING COMMITTEE ON LAW AND JUSTICE - INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Please find attached the submission of the NSW Jewish Board of Deputies to the above Inquiry. Our response to the Terms of Reference of the Inquiry is summarised in section 1 of the Submission.

Kindly note that two of the Board's Past Presidents, Peter Wertheim AM and David Knoll AM, will be available to appear before the Committee at the public hearings on 3 and 4 April 2013.

Yours sincerely,

Yair Miller
President

SUBMISSION TO LEGISLATIVE COUNCIL OF NSW STANDING COMMITTEE ON LAW AND JUSTICE - INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

The NSW Jewish Board of Deputies, the elected representative organisation of the Jewish community in New South Wales, presents the following Submission to the NSW government's Inquiry into the effectiveness of the existing legislation proscribing serious racial vilification. A **list of recommendations** appears at the end of this Submission.

1. OVERVIEW

The terms of reference of the present inquiry focus on the effectiveness of section 20D of the *Anti Discrimination Act 1977* (NSW) ("the ADA"), and whether it establishes a '*realistic*' test for the offence of serious racial vilification '*in line with community expectations*'.

We submit that section 20D does not contain a '*realistic*' test as it has proven to be completely ineffective. Some 27 matters have been referred by successive Attorneys General from both sides of politics to the Director of Public Prosecutions ("DPP") for prosecution under that section, but no charges have been laid and no prosecutions have been commenced. On this basis, it is our contention that the section has failed to operate '*in line with community expectations*'.

Nicholas Cowdery AM 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 to the criminal standard certain elements of the offence as currently defined.¹ Any reform will therefore need to ensure that the elements of the offence are set out simply yet with precision so as not to set the evidentiary bar for a successful prosecution at too low or, as is presently the case, at too high, a level.

Reform is needed to protect the basic right of all citizens to go about their daily lives free from racial hatred and with the unimpaired capacity to participate to the best of their abilities in all aspects of the life of the community. The law should be targeted specifically at public conduct that intentionally or recklessly incites racial hatred or racially harasses others. We do not advocate the criminal proscription of robust public debate on any topic unless the manner of debate descends to the level of such conduct. The Jewish community knows too well that leaving such conduct unpunished invites even worse conduct. The reform we advocate would not involve a major or strategic change, but rather the minimum change necessary to make the law fulfil its original purpose in practice. The crime of serious

¹ '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) p4

vilification is thus about prosecuting real wrongdoing and redressing real harm, and *not* about censorship.

The treatment of racial vilification in Australia generally is far from uniform.² In NSW, the ADA contains both a civil prohibition³ and criminal proscription⁴ of racial vilification. In Western Australia, only criminal proscriptions exist.⁵ In the United Kingdom, by comparison, the *Public Order Act* criminalises conduct which is “*threatening, abusive or insulting*” with intent to “*stir up hatred on the ground of race*”.

2. THE POSITION IN NSW

The text

Section 20D of the ADA provides as follows:

(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 months, or both.

In the case of a corporation-100 penalty units.

2 See the table below:

JURISDICTION	LIABILITY
Commonwealth	Civil only
New South Wales	Civil and Criminal
Queensland	Civil and Criminal
South Australia	Civil and Criminal
Tasmania	Civil only
Victoria	Civil and Criminal
Western Australia	Criminal only
Australian Capital Territory	Civil and Criminal
Northern Territory	Nil

3 s.20C

4 s.20D

5 Chapter XI Criminal Code Act

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

The elements

A conviction for a serious racial vilification offence under section 20D requires proof beyond reasonable doubt of every one of the following five elements:

1. A public act
2. Which incites
3. Hatred towards, serious contempt for, or severe ridicule of a person or group of persons
4. On the ground of race
5. 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.

Meaning and interpretation

(a) public act

For the purposes of section 20D of the ADA, the expression "*public act*" is defined in section 20B. The expression extends to "*any form of communication to the public*", "*any conduct...observable by the public*" and "*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 one of the prohibited grounds.

The word "*public*" is not defined in the legislation. The jurisprudence in this and other areas of the law and other jurisdictions suggests that courts are inclined to give a broad interpretation to the word "*public*" and to exclude from its scope only those circumstances that might be characterised as purely domestic, for example, a conversation in a private home that cannot be clearly overheard from a public street or park.

Whilst it is not necessary that a member of the public actually saw the impugned conduct or heard the communication, the conduct or communication must be capable of being seen or heard, without undue intrusion, by a non-participant in order to constitute a public act.

Thus, abuse which is loud enough for bystanders to readily overhear may constitute a public act whereas a conversation in a normal speaking voice would probably not.⁶

A question arises as to whether the publication of material on the internet that is freely accessible to the general public also constitutes a "*public act*" as defined by section 20B of the ADA and, if so, whether it constitutes a public act by the publisher only or also by the internet service provider and/or platform provider. Section 20B was enacted in 1989. In 1989, the internet had not developed into the widely used, publicly accessible medium that it has since become. A very large volume of material is now published on the internet and may be accessed generally by any member of the public, usually without the necessity for any payment. Regulating racial hatred that is expressed over the internet should not in principle be different from regulating racial hatred using other media.⁷

Further, subsection 20B(c), in contrast to subsections 20B(a) and 20B(b), imposes an additional and entirely unnecessary barrier to prosecuting serious vilification by requiring 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*". Requiring proof of such knowledge, in addition to intention, creates an unnecessary and insuperable hurdle for a prosecutor.

Further, subsection 20B(c) refers to the distribution and dissemination of "*any matter*". This term is not defined and its meaning is ambiguous. In addition, it is not certain that the expression '*distribution and dissemination of any matter*' would always be encompassed by the expression '*any form of communication to the public*' in subsection 20B(a).

Amending the definitions of "*public act*" in the ADA so as to deal with these issues in line with the jurisprudence that is now available in connection with the expression "otherwise than in private" would bring the anti-vilification provisions of the ADA into the internet age and in line with the judicial interpretation of the equivalent provisions of Part IIA of the Racial Discrimination Act 1975 (RDA).

(b) Incites

The word "*incite*" is not defined in the ADA. Cases that have arisen out of the civil prohibition in section 20C (and analogous provisions in other jurisdictions outside NSW) have defined the expression to mean "*to urge on, stimulate or prompt to action*". This is based on the Macquarie Dictionary definition of the word "*incite*".

The legislation does not make it clear whether proof of incitement requires evidence that others have in fact been incited. In certain civil cases that have come before the Courts, those accused of incitement have sought to argue that the concept of incitement encompasses both the act of the alleged inciter and the reaction of those who have been

6 Z v University of A & Ors (No 7) [2004] NSWADT 81 at [100].

7 See the excellent paper by Mr Justice Fryberg of the Queensland Supreme Court published in 2003 entitled: "The impact of electronic commerce on litigation" (2003) 24 Aust Bar Rev 199.

incited. They have contended that proof is required that other people have actually been incited.

However, the Courts have not accepted that contention. The case law establishes that “*incitement*” can be proved even in the absence of evidence that other people have in fact been roused to hatred (or to acting upon that hatred). Rather, the test is whether a hypothetical audience of reasonable people who are neither immune from, nor particularly susceptible to, feelings of hatred on one of the prohibited grounds would be incited. The following passages from *Z v University of A & Ors (No 7)* [2004] NSWADT 81 make it clear that an **objective test** must be applied:

[101] Guidance as to the meaning of the words ‘which incites’ can be found in the Tribunal decisions which have considered the meaning of these words in the context of the racial vilification provisions of the ADA. See Western Aboriginal Legal Service Ltd v Jones & Anor [2000] NSWADT 102; Veloskey & Anor v Karagiannakis & Ors [2002] NSWADTAP 18; John Fairfax Publications Pty Ltd v Kazak (EOD) [2002] NSWADTAP 35. The Appeal Panel in Veloskey held that the word ‘incite’ should be given its ordinary English meaning, namely, to urge, spur on, stir or stir up, animate, stimulate, or prompt to action. Thus it is not sufficient if the words merely convey hatred or express serious contempt or severe ridicule. [at 21]

[102] The preponderance of authority is that [the section] does not require proof of an intention to incite and that it is not necessary to prove that anyone was actually incited to respond in the requisite manner. In Veloskey the Tribunal held:

‘In determining whether the public act is capable, in an objective sense, of inciting others to feel hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race, the approach taken to the characterisation of the audience for these purposes is crucial. [at 26]

...

Thus, in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race? The question is not, could the ordinary reasonable reader reach such a conclusion after his/her own beliefs have been brought into play by the public act? [at 28]

[104] The public act must be capable, in an objective sense, of inciting hatred towards, serious contempt for, or severe ridicule of, a person or persons. These words are to be given their ordinary dictionary meaning.

Removing the terminology of incitement from the ADA and replacing it with new terminology would involve jettisoning the body of jurisprudence that has developed in Australia in particular around the concept of incitement in connection with the civil prohibition in section 20C, assuming that that jurisprudence applies to section 20D. Any benefit that might be obtained from removing the difficulties inherent in the concept of incitement from the criminal provisions may well be outweighed by introducing entirely new concepts whose interpretation by the Courts could not be predicted.

Section 20D of the ADA does not state expressly that the incitement must be intentional. When anti-vilification laws were first introduced in New South Wales in 1989, the then

Attorney-General said in his Second Reading Speech that intention to incite would need to be proved in order to establish a breach of section 20D, but not of section 20C. As no case under section 20D has ever come before the courts, it remains uncertain whether the word "incites" would be interpreted in the way anticipated in the Attorney-General's Second Reading Speech. It is also uncertain which part or parts of the jurisprudence that has developed in connection with the equivalent expression in section 20C would apply, if any.

The argument that proof of intention to incite ought to be a requirement for securing a conviction under section 20D derives from the common law concept that the element of mens rea ("a guilty mind") must be present to justify the imposition of criminal sanctions. Satisfying this requirement in any criminal prosecution usually entails proof of criminal intent or at least reckless indifference by the accused to the consequences of the proscribed behaviour.

Criminal intent can either involve deliberation or recklessness. Because the impact of serious racial vilification is seldom limited to one person or a small number of people, but usually creates fear and diminished social participation for the targeted racial group, it is appropriate to proscribe acts which are reckless as well as acts which are deliberate.⁸

The counter-argument is that public acts of vilification on the ground of race ought to be criminalised whether or not there is intent or recklessness, because of the potentially destructive effects of such a message in a society in which some 140 linguistic, cultural or ethno-religious groups are represented in the total population and where, for more than 40% of Australians, one or both parents were born overseas.

Our view is that public acts of vilification on the ground of race should only be considered criminal if intention or recklessness is proved to the criminal standard. The underlying principles should be the same as those which ordinarily apply for other criminal behaviour.

(c) Hatred, serious contempt or severe ridicule

Anti-vilification legislation in other States in Australia has replicated the formulation "*hatred towards, serious contempt for, or severe ridicule of*" that appears in the ADA. Federally, Part IIA of the RDA employs the expression "*hatred*" only. Examples of both formulations can be found in analogous legislative provisions in other countries.⁹ Little seems to turn on

⁸ Recklessness means a conscious disregard of the consequences: *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. 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.*" See: http://dictionary.oed.com/cgi/entry/50199237?query_type=word&queryword=reckless&first=1&max_to_show=10&ort_type=alpha&result_place=1&search_id=9KbQ-TkNyjv-7568&hlite=50199237.

⁹ In Canada, the term hate propaganda is widely used to describe the conduct referred to in Australia as vilification. Hate propaganda" has been described by Dickson C.J.C. as "... expression intended or likely to create or circulate extreme feelings of opprobrium and enmity against a racial or religious group..." *R. v. Keegstra* [1991] 2 W.W.R. 1 at 23, per Dickson C.J.C. See also, Law Reform Commission of Canada, *Hate Propaganda*. Working Paper 50 (Ottawa: Law Reform Commission of Canada, 1986).

the distinction, even though “*serious contempt*” and “*severe ridicule*” are arguably less stringent criteria than “*hatred*”. These expressions are to be given their ordinary dictionary meanings. The Tribunal at first instance in *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 at [40] set out the following definitions:

'hatred' means 'intense dislike; detestation' (Macquarie); 'a feeling of hostility or strong aversion towards a person or thing; active and violent dislike' (Oxford);

'serious' means important, grave' (Oxford); 'weighty, important' (Macquarie);

'contempt' means 'the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account' (Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);

'severe' means 'rigorous, strict or harsh' (Oxford); 'harsh, extreme' (Macquarie);

'ridicule' means 'subject to ridicule or mockery; make fun of, deride, laugh at' (Oxford); 'words or actions intended to excite contemptuous laughter at a person or thing; derision' (Macquarie).

These definitions would exclude, rightly in our view, much material that would widely be regarded as innocuous. For example, humour based on ethnic stereotypes, considered in context, can often be accepted as light-hearted and would clearly fall outside the operation of section 20D of the ADA (and, for that matter section 20C).

However, harassing or intimidatory behaviour against an individual or group on the ground of race, including the use of words that, viewed objectively, constitute serious and substantial abuse, appears to be outside the reach of section 20D and the general law if the behaviour falls short of a threat of harm or does not involve an element of incitement to the wider public. In our view, this is a serious gap in the current law.

The gap should be filled by the enactment of an additional offence of **'conduct intended to harass on grounds of race'**, as is currently provided for in section 80A of the Western Australian *Criminal Code*. However, to avoid duplication of the elements of the 'incitement' offence, the definition of “harass” should exclude any reference to “*severely ridicule*” but include “*intimidate*”. The definition should read:

"Harass" includes threaten, intimidate or seriously and substantially abuse".

(d) on the ground of race

“*Race*” is defined in s.4 of the ADA as including “*colour, nationality, descent and ethnic, ethno-religious or national origin*”. This broad definition is declaratory of the case law on the meaning of “*race*” as it has developed both in Australia and overseas.¹⁰ However,

10 *King-Ansell v Police* [1979] 2 NZLR 531; *Mandla v Dowell Lee* [1982] UKHL 7; [1983] 2 AC 548; *Miller v Wertheim* [2002] FCAFC 156; *Jones v Scully* [2002] FCA 1080 (2 September 2002)

vilification solely on the ground of religion would fall outside the prohibitions contained in the ADA.

Some protection is already provided in the existing legislation to religious minorities by the inclusion of "*ethno-religious origin*" as a prohibited ground. However, the way the case law has developed, there is no prohibition in New South Wales against criticizing the beliefs or practices of a particular religion on exclusively philosophical or theological grounds. The only restriction is that if the adherents of that religion are also an ethno-religious group, the manner of such criticism must not collectively vilify the group.

Race must be '*a substantially contributing factor*'¹¹ or '*an operative ground*'¹² of the incitement. Section 4A of the ADA does not apply to the vilification provisions. Hence the 'race' element is not proved if there are other, equally consistent, grounds for the incitement.¹³

Section 88 of the ADA precludes a vilification complaint from being made by anyone who does not have, or reasonably claim to have, the characteristic that was the ground of the alleged vilification. This means that the protection afforded by section 20D (and section 20C) extends only to persons who are actually members of the race that is vilified but not to persons who are vilified because they are presumed to be members of the race.

In contrast, under the analogous provisions contained in Chapter XI of *The Criminal Code* in Western Australia, and also in the United Kingdom, there is no requirement to prove that alleged victims are actual members of the relevant race. A conviction may be secured even if that is not the case, and the alleged offender merely believed it to be so, correctly or incorrectly. Western Australia has secured the only conviction in Australia for racial incitement and harassment.¹⁴

This is expressly provided for in section 80F.

80F. Belief as to existence or membership of racial group:

For the purposes of proceedings for an offence under section 77, 79, 80A, 80C, 313, 317, 317A, 338B or 444 it does not matter whether a group of persons was a racial group or whether a person was a member of a racial group as long as the accused person believed at the time of the alleged offence that the group was a racial group or that the person was a member of a racial group, as the case may be.

This provision is almost the mirror opposite of section 88 of the ADA. In our view, the WA provision is to be preferred. It is clearly possible for persons to be vilified because they are presumed to be members of a race, and, as citizens, they are entitled to equal protection under the law to persons who are actual members of that race.

11 *O'Callaghan v Loder* [1984] EOC 92-023 at 75, 499

12 *Waterhouse v Bell* (1991) 25 NSWLR 99 at 106

13 *Veloskey & Anor v Karagiannakis & Ors* [2002] NSWADTAP 18 at [30].

14 Perth District Court, DPP v Brendan Lee O'Connell. On 31 January 2011, the Defendant was convicted by a 12-person jury on 6 counts of racial incitement and harassment under sections 77 and 79 of the WA Criminal Code. He was sentenced to 3 years imprisonment. His appeal was dismissed by the Supreme Court of Western Australia on 4 May 2012

(e) The 'means' element

The means used to incite must 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.

Even the most egregious examples of public acts of incitement to hatred on the ground of race will not attract criminal sanctions under the current law unless it can be proved, beyond reasonable doubt, that the means of incitement were those stipulated in section 20D. Only (a) **a contemporaneous threat of harm to a person or property** or (b) **a contemporaneous incitement of others to threaten such harm** is said to justify the criminalization of an act of racial vilification. Further, the contemporaneous threat or incitement must be **one of the means used to incite** hatred, contempt or severe ridicule on the ground of race.

The policy underpinning the inclusion of the "means" element in section 20D is that public incitement to hatred on a prohibited ground is said not to be sufficiently serious to warrant the imposition of criminal sanctions, even if the incitement is proved beyond reasonable doubt to have been intentional. Only a contemporaneous threat of harm to a person or property (or incitement of others to cause such harm) is said to justify criminalising vilificatory behaviour.

And yet it seems clear that a vilificatory act need not be accompanied by, or itself constitute, a threat, or incitement to others to threaten physical harm to a person or property, and the act may nonetheless be perceived by the target person or group (and by others) – and reasonably perceived – as extremely threatening. The threat may be unmistakable to a reasonable observer even if it is merely implicit and not provable beyond reasonable doubt.

The harm to specific minority groups who are the targets of vilificatory conduct, goes well beyond merely "offending" them. **The harm is in the impairment of their ability to go about their daily lives with a sense of safety and security.** Such a sense of security is fundamental to the enjoyment of democratic rights and is necessary for all members of the community to make a meaningful contribution to, and develop a sense of belonging in, the society in which they live. Failure by the state to provide this security for minority groups can have devastating consequences. The UK Crown Prosecution Service Guidelines for prosecuting racist crime describes the effect of these crimes on victims as follows:

"The impact on victims is different for each individual, but many experience similar problems. They can feel extremely isolated or fearful of going out or even staying at home. They may become withdrawn, and suspicious of organisations and strangers. Their mental and physical health may suffer in a variety of ways. For young people in particular the impact can be damaging to self-esteem and identity and, without potential support, a form of self-hatred of their racial or religious identity can result which may take the form of self-harm or even suicide.

The confusion, fear and lack of safety felt by individuals has a ripple effect in the wider community of their racial or religious group. Communities can feel victimised and vulnerable to further attack."

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.¹⁵

Threats of physical harm towards a person or property, even in the absence of incitement to hatred, may well fall within the reach of the general provisions of the criminal law. For example, a person who "*counsels or procures another*" to commit a serious indictable offence can be prosecuted as an accessory before the fact under section 346 of the Crimes Act (NSW) 1900. To "*counsel*" others would include urging or inciting them. Apprehended violence orders are available under Part 15A of the Crimes Act and a common assault, if sufficiently serious, can be prosecuted as an indictable offence under Section 61 of that Act. The common law concept of assault encompasses acts that intentionally or recklessly put a victim in fear of physical or other unlawful danger.

It follows that if there were to be a threat of physical harm towards a person or property, it would make sense to deal with it, where applicable, under the general criminal law so that there would be no need to prove the occurrence of (i) a public act (ii) that has incited hatred (iii) on one of the prohibited grounds. It would make no sense at all to prosecute the matter under the criminal provisions of the ADA, which impose penalties that are no higher than under other available provisions of the criminal law, but carry a far heavier evidentiary burden.

In addition to the harm caused to targeted individuals and groups, public incitement of hatred on the ground of race, of itself, entails a breach of the peace, which is a further reason that criminal sanctions are appropriate where the incitement is intentional. Even if the incitement is not immediately accompanied by a threat of physical harm, or by an incitement of others to threaten physical harm, the incitement of the public to hatred on one of the prohibited grounds contributes to the creation of a social climate that is more conducive to the occurrence of acts or threats of physical harm to the racial groups that are targeted, and more conducive to social violence in general.

3. ABSENCE OF CASE LAW ON s.20D

Serious violent crime that is fuelled by racial hatred is no longer a rare and isolated phenomenon in Australia.

As early as 1991, the Report of the National Inquiry into Racist Violence in Australia¹⁶ noted high levels of violence in Australia induced by racial hatred, as did the report of the Royal

15 "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.html> at page 4 of 13.

16 Human Rights and Equal Opportunity Commission Racist Violence: *Report of the National Inquiry into Racist Violence in Australia*, Irene Moss, Race Discrimination Commissioner, Chairperson of the Inquiry, Canberra, Australian Government Publishing Service, 1991, p xviii, pp 387-398.
http://www.multiculturalaustralia.edu.au/doc/racediscrimcomm_2.pdf

Commission into Aboriginal Deaths in Custody the same year.¹⁷ Both reports recommended legislative intervention to proscribe racial vilification. They recommended the introduction of a range of remedies including, in the case of the first Report, criminal sanctions.

Subsequent developments have included:

- The rise to prominence, and subsequent fall, of the One Nation Party (ONP) between 1996 and 1999. The ONP's official platform included abolishing policies related to Aboriginal and multicultural affairs and restricting immigration.¹⁸ The rhetoric of many of its leaders led to frequent allegations of anti-Aboriginal and anti-Asian racism.
- On the evening of Saturday, 14 February 2004 riots broke out in Redfern in Sydney sparked by the death of Thomas 'T.J.' Hickey, a 17-year-old indigenous Australian.
- On 19 November 2004, civic disturbances began on Palm Island in Queensland following the death of an indigenous resident, Mulrunji in a police cell. The events led to the first trial of an Australian police officer for a death in custody. The officer was acquitted by a jury in June 2007.
- In March 2005 the NSW Bureau of Crime Statistics and Research released a report that concluded that racist taunts are a principal cause of violence in schools.¹⁹ That is an experience unfortunately shared from time to time by Jewish as well as other students and teachers.²⁰
- Racial violence against people 'of middle eastern appearance' developed into a full-blown riot at Cronulla beach in Sydney on 11 December 2005 and led to retaliatory riots by young men from the Lebanese Muslim community over subsequent nights. Several countries issued warnings against travelling to Australia.
- On 14 October 2006, a Jewish Hasidic man named Menachem Vorscheimer, while walking on the street in Melbourne, had his religious garments removed from him and was punched in the face in front of his two children by a team of drunken footballers on a passing bus.
- In 2009, a political controversy erupted in Australia and in India as to whether a spate of physical attacks against Indian students in Sydney and Melbourne over the previous three years, including several knifings and murders, had been racially motivated.

17 The complete national report and various State reports can be accessed via www.austlii.edu.au/au/other/IndigLRes/rciadic/.

18 <http://www.onenation.com.au/Policy%20document.htm>

19 *School violence and its antecedents: interviews with high school students*, http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/pages/bocsar_mr_r56

20 See e.g., Rutland, Suzanne D. 'Negotiating religious dialogue: A response to the recent increase of anti-Semitism in Australia', in Elizabeth Burns Coleman and Kevin White (eds), *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society*, Canberra: ANU E-Press, 2006, pp. 17-30. UWS Challenging Racism Project - http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism

- In February 2013 ABC TV presenter Jeremy Fernandez was racially abused on a public bus in Melbourne in front of his two year old daughter: <http://www.abc.net.au/local/stories/2013/02/08/3686232.htm>. Unlike many similar incidents which are the subject of complaints to Federal and State human rights and anti-discrimination agencies in Australia but go unreported in the media, the high media profile of Mr Fernandez ensured that this particular incident received prominent media coverage.

Racism in Australia should therefore be seen not only as a source of discrimination, public vilification and injustice but also as a potential source of violence that threatens the cohesiveness and peace of Australian society. It needs to be addressed at both levels simultaneously.

Those who engage in violent behaviour motivated by racial hatred are clearly liable to criminal prosecution under the existing criminal law, outside the provisions of the ADA. But those who incite them to hatred in the first place by appealing to, and seeking to manipulate, their prejudices, fears and grievances, are effectively beyond the reach of the criminal law, if they themselves do not engage in specific acts or threats of violence, or clearly and unambiguously procure others to do so. Section 20D of the ADA was enacted in 1989 precisely in order to prosecute and punish those who engage in criminal incitement (i.e. serious vilification). But that section has failed to do the job it was intended to do.

Under the current law, a person cannot be prosecuted for an offence under section 20D of the ADA unless the Attorney General of NSW has consented to the prosecution. In point of fact, not a single person in New South Wales has ever been prosecuted for, let alone convicted of, a criminal offence under section 20D. Altogether, we understand that there have been 27 occasions when the Attorney General referred to the Director of Public Prosecutions (DPP) complaints received by the President of the Anti Discrimination Board to consider whether an offence of serious vilification (most of them on the ground of race) might have occurred.

The fact that there have been no prosecutions raises the question of whether there is a gap between the way legislators and the public have expected the criminal provisions to operate and the way they in fact operate – an “expectation gap”. If there is such a gap, the main reason appears to be the need to prove two of the elements of the offence that are particularly difficult to prove – the “incitement” element and the “means” element. The “means” element represents the more serious obstacle. We are aware of three particularly heinous examples of apparent serious racial vilification that were not prosecutable under section 20D.

The first case concerned the publication of a white supremacist newsletter on the internet, which contained material from which it could be inferred that the authors were inciting hatred of Jews, blacks and women. We understand that no prosecution ensued because the DPP was of the view that a mere inference would not be sufficient to establish the “incitement” element beyond reasonable doubt. Further, there was no evidence to establish the “means” element.

The second case was the display of a billboard on a main public road seen by thousands of motorists every week. It included a statement that ‘Jews make great lampshades.’ When put into the context of the Holocaust, during which the commandant of the Nazi concentration camp at Bergen Belsen arranged for the skin of a Jewish inmate killed in the camp to be used to make a lampshade for the commandant’s wife, this slogan can also be interpreted as inciting people to exterminate Jews. The “incitement” and “public act”

elements could thus arguably be proved. But we understand that the advice of the DPP was that the billboard's *implied* advocacy of genocide would be insufficient to prove the "means" element beyond reasonable doubt.

The third involved a neighbour of an Australian woman of Asian origin who deposited dog faeces on her door, damaged her lock, left saliva on her screen door, and spread stories about her being an "Asian prostitute", as well as calling her a slut, telling her to go back to Thailand where she belonged, and threatening to have her removed from the public housing where she lives. The neighbour was not prosecuted.

4. ATTORNEY GENERAL'S CONSENT

In NSW, section 91 of the ADA requires the President of the Anti Discrimination Board of NSW ("ADB"), after investigating a vilification complaint, and before endeavouring to resolve the complaint by conciliation, to consider whether an offence may have been committed under any of the criminal provisions. If the President considers that an offence may have been committed, the complaint must be referred to the Attorney General. Such a referral may only be made within 28 days after receipt of the complaint.

On receiving a referral from the President of the ADB, the Attorney General decides whether to consent to the matter being prosecuted as required by subsection (2) of section 20D. If the Attorney General consents, the matter is referred to the Director of Public Prosecutions (DPP) to determine whether a prosecution should be commenced. The determination is made according to the DPP Prosecution Guidelines and by applying the tests specified in the Guidelines for deciding in any case whether a criminal prosecution will be commenced. If the Attorney General does not consent, there is no referral to the DPP and no possibility of a prosecution.

In Western Australia, under section 80H of *The Criminal Code*, only the consent of the DPP is required. The Attorney General has no power to withhold the referral of a potential prosecution from the DPP. In fact the Attorney General is not involved in any way.

The rationale for the NSW provision involving the Attorney General is unclear. The prosecution of serious vilification offences in the usual way by the DPP, without the involvement of the Attorney General, would convey the important message that such offences are considered by the community to be in the same general category as any other criminal offences prosecuted by the DPP. On the other hand, we see no reason why the Attorney General should not be able to continue to refer cases to the DPP.

5. TRIAL BY JURY

If our recommendations were adopted, the issues to be tried in the prosecution of a case of alleged serious vilification would include:

- (i) in an incitement case, whether in all the circumstances the audience was incited or, alternatively, whether a hypothetical audience of reasonable people who are neither immune from, nor particularly susceptible to, feelings of hatred on one of the prohibited grounds would be incited; and

- (ii) in a harassment case, whether in all the circumstances the actions of the accused rise to the level of conduct that threatens, intimidates or substantially and seriously abuses the victim.

In our view, these are issues that can and should properly be put to a jury. Judging by the experience in Western Australia, serious vilification cases will only rarely be prosecuted, and the use of a jury in these cases will not be unduly costly in financial terms.

More importantly, trial by jury will provide a mechanism for ensuring that the law, including any objective test, is applied in a way that gives effect to prevailing community standards. In our view, this will provide an important safeguard and provide reassurance that the law will operate to protect, and not oppress, the general community.

6. PENALTY ENHANCEMENT

Conduct proscribed by s.20D of the ADA might in fact be more heavily punished if prosecuted under other available provisions of the criminal law. A conviction under the *Crimes Act 1900* (NSW) for example can result in the imposition of enhanced penalties under Section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act, 1999* (NSW), which provides that one aggravating factor that can be taken into account in sentencing is whether: "*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)*". However, the effect of the aggravation on the penalty to be imposed is left entirely to the discretion of the sentencing judge and would ordinarily not be specified.

Penalty enhancement provisions are also to be found in *The Criminal Code* in Western Australia where certain offences have been committed in "*circumstances of racial aggravation*" defined at s 80I as follows:

80I. Meaning of "circumstances of racial aggravation"

In sections 313, 317, 317A, 338B and 444 —

"circumstances of racial aggravation" means circumstances in which —

- (a) *immediately before or during or immediately after the commission of the offence, the offender demonstrates hostility towards the victim based, in whole or part, on the victim being a member of a racial group; or*

...

- (c) the offence is motivated, in whole or part, by hostility towards persons as members of a racial group.

Thus, offences committed under sections 313 (assault), 317 (assault causing bodily harm), 317A (assault with intent), 338B (making threats) and 444 (criminal damage) of *The Criminal Code* in circumstances of racial aggravation will attract higher penalties than if the same offences had occurred absent such circumstances. The higher penalties are specified.

In most States of the USA, also, the extent of penalty enhancement is prescribed by statute. Some 43 States (out of 50) and the District of Columbia have enacted such laws. An increase of 1/3rd in the maximum term of imprisonment that would otherwise be applicable is typical of the way penalty enhancement provisions currently work in the US. In *Wisconsin v Mitchell* 508 U.S. 476 (1993), the US Supreme Court upheld the constitutionality of a penalty enhancement Statute directed against crimes motivated by hate based on the victim's race, religion, national origin, sexual origin or gender.

7. INTERIM ORDERS

Section 20D of the ADA makes no specific provision for interim orders. The more usual purpose of interim orders is to preserve the *status quo* until the legal issues are determined by the court. Such interim orders would be entirely counter-productive in a case of on-going racial vilification, for example, by way of a publication on the internet. Interim or interlocutory orders may also issue to prevent harmful conduct continuing during proceedings concerning that conduct, but only where the Court is satisfied of the existence of circumstances that are far more onerous to prove than the circumstances for satisfying the test for "status quo preserving orders".

There is accordingly a need for express authorisation in the legislation for the making of an order that a person charged do, or cease to do, or refrain from doing, any act or thing, pending the final determination of the charge by the court, or pending the final disposal of any appeal from that determination. The legislation needs to provide that such an order may be made where the Court (or Tribunal in any civil proceeding) is satisfied that there is an arguable case for the final orders and the balance of convenience favours such interim orders issuing.

If there is to be provision for interim orders, this would usually be either upon the application of the prosecutor or by the court of its own motion. The court would first need to be satisfied that there is sufficient evidence to establish that arguably the accused committed the offence and that the making of the interim order is reasonably necessary to prevent the person from continuing to commit the offence or committing further offences, or is appropriate to balance the rights of the accused against the rights of any potential victim not to be vilified. Further, an interim order could be available if the court is satisfied that the making of such an order is reasonably necessary to preserve or secure any matter or thing that may be or become evidence in any proceedings relating to the charge.

8. RECOMMENDATIONS

1. That section 20D, (and sections 49ZTA, 49ZXC and 38T) be removed from the ADA and replaced by a reformulated set of statutory provisions for the criminal proscription of serious vilification, to be inserted into the Crimes Act 1900.

2. That the replacement provisions incorporate the following recommendations.

Recommendation 1

The definition of public act be clarified to include acts in both physical places and cyberspace.

Recommendation 2

The serious vilification offences be defined in classical criminal law terms requiring proof, to the criminal standard, of both an *actus reus* (the act constituting the serious vilification) and a *mens rea* (criminal intent or criminal recklessness). It is NOT recommended that there be strict liability offences.

Recommendation 3

- a. "Hatred" should be defined so that it is clear that it involves truly gross behaviours such as detestation, enmity, ill-will, revulsion, serious contempt or malevolence.
- b. Both (i) the public incitement of hatred against and (ii) harassment of, any person, on any of the four grounds that are currently proscribed, should be criminal offences.
- c. The concepts of "threaten", "intimidate" or "seriously or substantially abuse" should be incorporated into a definition of harassment, adapting the definition contained in Division XI of *The Criminal Code* of Western Australia.

Recommendation 4

The criminal proscription of serious vilification and harassment should extend to serious vilification of those *presumed* to have the characteristic giving rise to the proscribed conduct, as is provided for under section 80F of *The Criminal Code* of Western Australia. Section 88 of the ADA should be repealed.

Recommendation 5

The qualification 'By means which include... physical harm' currently contained in section 20D (and sections 49ZTA, 49ZXC and 38T) of the ADA should be repealed, so that the crime to be proved is either:

- (a) public incitement to hatred with intent or recklessness; or
- (b) harassment with intent or recklessness;

on a proscribed ground.

Recommendation 6

The penalties for all the serious vilification offences should be the same, with the maximum being:

- In the case of an individual – 250 penalty units or imprisonment for 2 years or both.
- In the case of a corporation – 1250 penalty units.

Recommendation 7

The prosecutor should be able to apply for interim orders requiring the conduct that is the subject of the charge to cease pending trial, and for any alleged evidence of the conduct to be preserved. The court should also, on its own motion, be able to make such orders.

Recommendation 8

- a. Prosecutions for serious vilification should not require the prior consent of the Attorney General, but the Attorney-General should continue to be at liberty to refer cases to the DPP.
- b. Prosecutions should be conducted by the police or, on referral from the police or at the request of the Attorney General, by the DPP. All matters reported to the police that might give rise to a prosecution for serious vilification should be notified to the President of the Anti Discrimination Board.

Recommendation 9

Serious vilification cases should be tried before a jury.

Recommendation 10

A penalty enhancement regime (similar to that contained in s.80I of *The Criminal Code* of Western Australia) should also be introduced into the *Crimes Act 1900* (NSW) to increase by one-third the maximum penalties for other criminal offences (e.g. murder, assault, rape) that are proved to have been aggravated by hatred or harassment on any of the proscribed grounds.