Vilification laws in NSW

The Australian Lawyers Alliance welcomes the opportunity to provide feedback in relation to racial vilification laws in NSW (letter addressed to Mr Greg Phelps Ref: 545578, undated).

About the ALA

The Australian Lawyers Alliance (‘ALA’) is a national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. We oppose oppression and discrimination and support democratic systems of government and an independent judiciary.

We value immensely the right of the individual to personal autonomy in their lives and to equal treatment under the law.

ALA Submission

As you are aware, we made detailed submissions to the Standing Committee on Law & Justice by way of letter dated 7 March 2013. That submission noted that Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination (CERD) requires Australia to declare as an offence punishable by law, all dissemination of ideas based on racial superiority and hatred. The submission in particular expressed the ALA’s view of the effectiveness of Section 20D of the Anti-Discrimination Act 1977 (‘the Act’).

Section 20D of the Anti-Discrimination Act 1977

Of particular concern and perhaps the most pertinent aspect of the ALA’s 2013 submission is that despite 27 complaints of racial vilification being referred to the Department of Prosecutions, no prosecutions have taken place to date under Section 20D. The ALA submits that this is largely arising out of the drafting of that section. When one looks to the second
reading speech relating to Section 20D of the Act, the primary element is that there must be an intention to incite racial vilification as opposed to simply engaging in racial vilification without full knowledge or awareness of its effect or intent.

It is understood that this drafting was predominantly adopted to avoid circumstances where someone would inadvertently be charged with a criminal offence through misconstrued conduct.

Furthermore, it would seem that the prosecution of racial vilification in NSW is simply not within the public interest when one considers that under Section 346 of the Crimes Act 1900 a prosecution of an offence will follow where one is considered to have incited an act that results in physical harm to person or property. Obviously, this creates a less onerous standard of proof to a prosecutor and, indeed, a Court to pursue charges against an individual who incites an offence to be committed. In practice, this essentially derogates from the sole intention to make it known to the people of NSW that racial vilification is not acceptable regardless of whether or not it is capable of inciting or indeed does incite physical harm upon another person. Perhaps the current position in relation to Section 20D is best summarised by Mr Stone and extracted in the “Racial Vilification Law in NSW” Report

“In terms of police – this I put no higher than a suspicion based on human nature – you tend to work most with that with which you are most familiar. When the police are looking at what charges to lay, they tend to work out of the central playbook rather than reach for the more exotic acts when they are looking at what charges to lay. The Crimes Act is their fundamental playbook, if I may use that analogy. I suspect … that they would tend … to stick with the assault and the aggravating factor rather than go looking for the more untested offences.” [Such as Section 20D]

Furthermore, extracted at 4.12 of the report, Mr Joshua Dale, Solicitor and Chair of the Human Rights Sub-committee for the Australian Lawyers Alliance, explained that amendment to extend the coverage of Section 20D of the Anti-Discrimination Act is required:

“In circumstances where someone is perceived to be of a particular background and they have suffered racial vilification, I think certain amendments need to be made to allow them to fall within the Act. Racial vilification is a broad notion that should be adopted whether or not someone identifies as being someone from a particular group and being more generalised as to whether or not people believe they are from a particular group and commit racial vilification. So I think it should be broadened to allow people in those sorts of circumstances to fall within the scope of the legislation.”

The ALA again reiterates their opinion that the punishment under Section 20D of the Act does not suitably recognise the seriousness of racial vilification in Australian society and its effect on its social fabric and, indeed, its effect on the rule of law in NSW. As referred to above in the extract of Mr Stone, it may be that Section 20D needs to find a new home under the Crimes Act as opposed to the Anti-Discrimination Act which would increase perception and wider acknowledgment if such a parallel were easily drawn with the fact that racial vilification is a crime in NSW.

The Recommendations

As the Standing Committee is aware, the report makes a number of recommendations in relation to evidence that was taken at the Public Hearing of submissions in April 2013. To assist the Committee, the ALA responds to each of the recommendations provided by the report as follows:

1. **Recommendation 1 – That the NSW Government consider amending section 20B of the Anti-Discrimination Act 1977 to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.**

   Agreed.

2. **Recommendation 2 – That the NSW Government consider amending section 20B of the Anti-Discrimination Act 1977 to insert an exception for private conduct, as per section 12 of the Racial and Religious Tolerance Act 2001 (Vic).**

   Agreed.

3. **Recommendation 3 – That, for avoidance of doubt, the NSW Government amend section 20D of the Anti-Discrimination Act 1977 to state that recklessness is sufficient to establish intention to incite.**

   Agreed. However, careful consideration needs to be given to the actual application of Section 20D of the Act insofar as it constitutes a threat of physical harm and/or inciting physical harm towards another person and/or group of persons. The concern of the ALA is that a person can commit the offence of serious racial vilification without necessarily threatening or inciting physical harm towards others. Therefore, if the NSW Government were to adopt the term “recklessness”, it should be defined on the basis that in order to satisfy the test of recklessness one does not need to carry the intent to incite or inflict physical harm to constitute serious racial vilification. Therefore, if one was to recklessly make a number of statements which create a serious outcome, not unlike the 2005 Cronulla Riots, then the individual who incites or encourages such events should be subject to the crime of serious racial vilification.

4. **Recommendation 4 – That the NSW Government amend Division 3A of the Anti-Discrimination Act 1977 to include persons of a presumed or imputed race.**

   Agreed.

5. **Recommendation 5 – That the NSW Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice as soon as possible after the period of five years of any amendments to Division 3A of the Anti-Discrimination Act 1977.**

   Agreed. However, there should be an undertaking by the Standing Committee to re-examine the terms of reference in light of the effectiveness of Section 20D. If history is any guide, it is the ALA’s submission that there simply cannot be another circumstance where a law against racial vilification is enacted and subsequently not utilised for approximately 27 years.
6. **Recommendation 6** – That the NSW Government review the adequacy of the maximum penalty units in section 20D of the Anti-Discrimination Act 1977, taking into account the maximum penalty units for comparable offences within the Crimes Act 1900 and other Australian jurisdictions.

   Agreed. Note the ALA’s recommendation is to increase the maximum sentence up to five years’ imprisonment.

7. **Recommendation 7** - That the NSW Government repeal the requirement for the Attorney General’s consent to prosecutions of serious racial vilification in section 20D(2) of the Anti-Discrimination Act 1977.

   Agreed.

8. **Recommendation 8** – That the NSW Government amend the standing for the lodging of complaints provision in section 88 of the Anti-Discrimination Act 1977 to include persons of a presumed or imputed race.

   Agreed.

9. **Recommendation 9** – That, for the purposes of racial vilification proceedings only, the NSW Government extend the time limit for commencing prosecutions under section 179 of the Criminal Procedure Act 1986 to 12 months to be consistent with the time limit for lodging complaints under section 89B of the Anti-Discrimination Act 1977.

   Agreed.

10. **Recommendation 10** – That, if Recommendation 7 is not implemented, the NSW Government extend the timeframe for the President of the Anti-Discrimination Board to refer complaints to the Attorney General under section 91(3) of the Anti-Discrimination Act 1977.

   It is the ALA’s strong position that Recommendation 7, “that the NSW Government repeal the requirement for the Attorney General’s consent to prosecutions of serious racial vilification in Section 20D(2) of the Act”, be implemented. The ALA reiterates that persons who commit serious racial vilification ought to be subjected to harsher criminal prosecution and that the test for criminal prosecution ought to be capable of satisfaction without being overseen by the Attorney General. The ALA again draws to the attention of the Standing Committee that no prosecutions have taken place under Section 20D in some 27 years since its inception which is not reflective of a situation where no occurrences of racial vilification worthy of prosecution have taken place. This history is simply out of step with community expectations and experiences and one only needs to look to media coverage of very public displays of serious racial vilification to show that these prosecutions need to be given the same freedoms as those that would take place in the usual criminal arena.

11. **Recommendation 11** – That the NSW Government amend section 91 of the Anti-Discrimination Act 1977 to allow the President of the Anti-Discrimination Board of NSW to directly refer serious racial vilification complaints to the NSW Police Force.

   Agreed.
12. **Recommendation 12** – *That the NSW Government amend the Anti-Discrimination Act 1977 to allow the NSW Police Force to prepare a brief of evidence for the Director of Public Prosecutions, following the referral of a serious racial vilification complaint.*

Agreed, however, this would be subject to meaningful implementation of Recommendation 14, i.e., that the NSW Police Force provide training to its members about the offence of serious racial vilification in Section 20D of the Act.

13. **Recommendation 13** – *That, if Recommendation 7 is implemented, the NSW Government remove the requirement for the President of the Anti-Discrimination Board of NSW to refer serious racial vilification complaints to the Attorney General under section 91(2) of the Anti-Discrimination Act 1977.*

Agreed. This requirement should be changed to require the President of the Anti-Discrimination Board of NSW to refer serious racial vilification complaints to the Department of Public Prosecutions, i.e. Section 91(2) of the Act would need to be amended to reflect this change.

14. **Recommendation 14** – *That the NSW Police Force provide training to its members about the offence of serious racial vilification in section 20D of the Anti-Discrimination Act 1977.*

Agreed.

15. **Recommendation 15** – *That the NSW Government amend section 20C of the Anti-Discrimination Act 1977, where appropriate, to reflect any amendments made to section 20D.*

The ALA agrees that any substantive amendment to Section 20D should be reflected in Section 20C in order to apply consistency and avoid ambiguity of the Act. The ALA undertakes to offer further review and submissions in relation to any draft bill that amends Section 20D and/or Section 20C.

We thank the Standing Committee on Law & Justice for this further opportunity to provide our responses in relation to the recommendations released in the report.

The ALA remains committed to assisting the Standing Committee in relation to this Inquiry. Should such further assistance be required, please do not hesitate to contact General Manager, Mr Richard Trim, on (02)9258 7700 or by email at richard@laywersalliance.com.au.

Yours faithfully

Roshana May  
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Australian Lawyers Alliance