Submission No 39

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: NSW Council for Civil Liberties

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21 March 2013

The Hon David Clarke MLC
Chairperson
Legislative Council Standing Committee on Law and Justice
By email: lawandjustice@parliament.nsw.gov.au

Dear Chairperson,

Re: Inquiry into racial vilification laws in NSW

The NSW Council for Civil Liberties (NSWCCL) is grateful for this opportunity to make a submission to this NSW parliamentary inquiry into the offence of serious racial vilification, contained within s.20D (***"the Section"***) of the *Anti-Discrimination Act 1977 (NSW)* (***"the Act"***). NSWCCL is one of Australia's leading human rights and civil liberties organisations. Founded in 1963, NSWCCL is a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. To this end the NSWCCL attempts to influence public debate and government policy on a range of human rights issues by preparing submissions to parliament and other relevant bodies. NSWCCL is a Non-Government Organisation (NGO) in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

NSWCCL is committed to the preservation of freedom of expression and the rights of people to make offensive and insulting remarks. But the freedom of expression is not absolute and there are proscribed limitations recognized in both international law and the laws of jurisdictions comparable to NSW. These proscribed areas include true threats, defamation, dangerous speech aimed to incite panic, speech that violates legitimately-protected commercial or administrative interests, and hate speech. Hate speech is required to be prohibited by law under the International Convention on Civil and Political Rights (ICCPR) (Article 20(2)), ratified by Australia in 1980. It is required to be made an offence, that is, punishable by the criminal law, under the International Convention on the Elimination of all Forms of Racial Discrimination (Article 4(a)), ratified by Australia in 1975. NSWCCL notes that while the Federal government has prohibited serious racial vilification, it has not made it an offence.

NSWCCL believes that serious racial vilification should be an offence punishable by law. It bases this view on the fact that NSW is a political community which should strive to play its part in the community of nations and on the essential dignity possessed of every human being regardless of

race or colour. Protecting that dignity, if necessary with the force of the law, is a legitimate end of a responsible government.

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

NSWCCL does not believe that the offence of serious racial vilification has been effective in NSW. In this regard we note that there have been numerous referrals made to the NSW Director of Public Prosecutions (DPP) in respect of the offence but none has been prosecuted. It is our view that the reason the DPP has decided not to prosecute has been on account of the high bar created by the wording of the offence (as to which see 2, below). Instances of serious racial vilification that have gone unpunished in recent times in NSW include actions taken by certain individuals in the lead-up to the 2005 Cronulla Riots.

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

NSWCCL does not believe that the test for the offence of racial vilification meets the expectations of the community. NSWCCL believes that the community expects that the fundamental right to be free from serious racial vilification will be protected in NSW. In this regard, we note the following concerns with the Section:

a. Restriction to threats On one view, the verb "include" (as taken in its ordinary meaning) suggest an open-ended list of possible ways for the incitement to take place. But in our submission the collective meaning of the Section restricts the offending conduct only to either (i) threats to a person or group or the property of a person or group; or (ii) incitement to others to make such threats. The reason for this is complicated and semantic but we believe taken as a whole the "means" element is restrictive in both intention and practice. We note that the former NSW Director of Public Prosecutions seems to agree with this view.[1] If the Section is restricted in this way, we consider that it is unduly restrictive – a person might incite race hate by, for example, spreading lies about a group of people, or *actually* harming their property.

b. The emphasis on intention For the same reason as a. above, and on the basis that the Section is restricted to either (i) threats or (ii) inciting others to threats, we consider that the Section places great emphasis on the intention of the offender rather than the result of the offending conduct. Both threatening behaviour or inciting others to threatening behaviour seems to require a proof of intention that is both difficult and unnecessary in the context of hate speech.[2] In our view, there ought to be an objective element to the offence which references the likely result of the offending conduct. This is the view of the law supported in Canada, for example, where a key element of the

[1] Nicholas Cowdery AM QC, *"Review of Law of Vilification: Criminal Aspects,"* Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney Law School, 28 August 2009.

[2] We note that the jurisprudence in respect of s.20C has developed an *objective* standard in respect of inciting race hate: *Fairfax v Kazak* [2002] NSWADT 35; *Velosky v Karagiannis* [2002] NSWADT 18; *Burns v Radio 2UW Sydney Pty Ltd* [2004] NSWADT 267, but consider that the "means" requirement means that incitement under s.20D for serious racial vilification requires subjective intention to be proven.

corresponding offence is that the offending incitement is "likely to lead to a breach of the peace."[3] More emphasis on the results, or potential results, than currently contemplated by the Section is appropriate in criminalizing serious racial vilification.

c. The membership requirement The Act may, in its current form, prohibit a victim of serious racial vilification from making submissions regarding the vilification by virtue of s.88, which requires that a person "has the characteristic that forms the basis" of the vilification. In addition to this, we consider that the current wording of the Section emphasizes this "membership requirement" by requiring that the incitement, contempt or ridicule be directed towards "a person or a group of persons on the ground of the race of the person or members of the group." This would seem to curtail, for example, prosecution of vilification mistakenly directed towards a dark-skinned individual on the grounds that the vilifier thought that he or she was an Indigenous Australian. Yet the vilification can be just as real for the victim no matter what his or her race, and the assault on the dignity of the community is not any the less real because the offender has made an incorrect assumption about a community member.

d. The penalty In our view, the punishment of a maximum of 6 months in prison is relatively lenient when compared to comparable offences and has lead prosecutors to prefer other sentences when seeking to punish a person for what is essentially hate speech. We note in particular that a threat which has the possibility of being immediately carried out has long been recognized in NSW law as a "common assault," which is an offence punishable by two years imprisonment (*Crimes Act 1900*, s 61). Even a threat to property of a person in NSW is punishable by five years imprisonment (*Crimes Act 1900* s 199(1)). We consider that the relative leniency of the sentence is cause for investigators and prosecutors to pursue other means to prosecute hate speech.

e. Attorney-General's consent We understand that the requirement for the Attorney-General's consent to a prosecution under the Section is not the reason that it has not been utilized by the state prosecutor. Nevertheless, we consider that it is certainly a bar to investigation by the police and in this sense may have the effect of relegating the offence to a lesser role in the state's laws.

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

Based on the above we make the following recommendations:

a. that the means element of serious racial vilification be removed;

b. that the Section place the emphasis on the results of the act, rather than the intention of the offender, by providing that the act be likely to result in a breach of the peace;

[3] *Canadian Criminal Code*, s 319.

c. that the membership requirement be removed from the Section;

d. on the basis that the changes contemplated in a. b., and c. above were incorporated into the Section, we consider that it would proscribe only the most serious of activities involving hate speech based on racial grounds where a breach of the peace was likely to ensue. Given the seriousness of the offence, we consider that a prison sentence ought to be available and that the maximum sentence ought to be 3 years.

e. That the offence be removed from the ADA and placed into the criminal code;

Please do not hesitate to contact me should you require anything further. The NSWCCL is available to give evidence in person should the Committee so require it.

Yours faithfully,

Stephen Blanks
Secretary