NSW Council for Civil Liberties Inc.

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15 May 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 – Responses to questions on notice

The New South Wales Council for Civil Liberties (NSWCCL) here responds to the questions on notice posed to it during the Committee hearing on 8 April 2013. We have sought to paraphrase some of the questions for the sake of brevity. We believe that we have appropriately captured the substance of the Committee's questions. Please let us know if this is not the case.

1. **Would you support a further amendment to Section 20D that extends its operation beyond serious racial vilification on the grounds of other important protected attributes such as religious belief?**

It may be that NSW ought to look at criminalizing serious vilification on prohibited grounds other than race, such as sexuality, gender or religious belief. However, NSWCCL is not of the view that this ought to be contained in the one "catch-all" provision within the ADA (or elsewhere). It is our position that racial vilification is a particularly dangerous and virulent form of discrimination that ought to be targeted carefully by the criminal law. Keeping this particular offence separate should also enable easier monitoring of its effectiveness and further legislative amendment should that be considered necessary.

During this question, the problem was raised by the Committee that the protection afforded by the Section extends to some people of distinct ethno-religious backgrounds, eg Jews, but not other groups, particularly Muslims. In NSWCCL's view, there is an anomaly because, in practice, there is significant vilification of Muslims of Middle-Eastern background, but that as the law presently stands, Muslims generally are not recognized as a distinct ethno-religious group. NSWCCL believes that Section 20D should apply to vilification of Muslims in cases where that vilification is related to ethnic origin, such as "Middle-Eastern background".

2. **How would having an alternative regime to deal with affray and riot in the Anti-Discrimination Act assist matters if you already have got the ability to increase the penalty on the basis of race in those circumstances?**

It is the view of the NSWCCL that if the offence of serious racial vilification is defined as we propose it to be (or similarly), then the offence would be definitionally distinct from both affray and riot, in that it would target the communications/actions that either *lead to* such affray or riot, or might have reasonably been expected to lead to these sorts of offences, even if they did not do so. Under the current drafting of the Section, the "means" element limits the offence to those akin to, if not identical to, affray or riot, ie group threats or violence. These latter offences would almost always be preferred by a prosecutor because they carry such heaver penalties. We are of the view that removing the "means" element and thereby broadening the types of actions that might lead to breaches of the peace based on racial hatred will create a distinct, though necessarily confined, offence which will be capable of being prosecuted and will have a deterrent effect on people who either intend to or recklessly cause harm to the fabric of the NSW polity.

3. **Do you think that [there are political demonstrations between ethnic communities in NSW which sometimes result in activities which might be seen to be 'serious racial vilification' in the NSWCCL's submission but really ought not be a police matter and that this] might be a good argument for retaining [the Section] within the Anti-Discrimination Act and retaining the role of the Anti-Discrimination Board in being [a] mediator [in those situations], even if then it goes through a referral to the police?**

The example given by the Committee at the hearing, that being of political demonstrations between ethnic Armenians and Turks in NSW that have resulted violence or breaches of the peace that might be caught by the Section, should it be amended along the lines we have proposed, does raise concerns about expanding the scope of the Section and give pause to NSWCCL. We have long fought for the right to hold protests and have acted in defence of protestors who have caused breaches of the peace "in the heat of the moment." We are also concerned about the possibility of heavy-handed policing of the Section in such situations. We note that the superior courts in Canada do not seem to have been called upon to make a judgment about s.319 of their *Criminal Code* in respect of political assemblies. They have indicated, on numerous occasions, however, that *peaceful* assembly is a constitutionally-protected right and therefore it may go without saying that in Canada, nationalistic assembly which breaches the peace would be prosecutable under s.319. On balance, and repeating that this is a concerning area of the law, NSWCCL supports the Canadian model. The right to peaceful assembly is not an unlimited right and nationalistic assembly which results in damage to property or violence is not an acceptable use of that right. We are therefore not of the view that the Section would best be kept within the ADA. Having said that, the NSWCCL did not press its submission at the Committee hearing that the Section ought to be moved to the *Crimes Act* and that this is a secondary concern to the NSWCCL compared to its other submissions.

4. What about where there are no specific words of threat and no specific harm but a reasonable person is placed in fear of their safety [by some actions which have a racial element]? Would you think we should be criminalising that expressly, placing a reasonable person in fear of their safety?

The NSWCCL is of the view that the example given by the Committee, that of a person on a bus stating to a woman, *"I can't bear people like you"* and causing the woman to be concerned about being in the public space would constitute an assault in NSW. We note that an assault can be constituted by "mere words" depending on the circumstances[1] and that the key consideration is the "apprehension of injury or the instillation of fear."[2] Nevertheless, we accept that you raise a troubling possibility; that a person from a minority group might be subjected to abuse or harassment and have no recourse to the authorities for protection in such circumstances. We note in this regard that there has been some discussion in front of this Committee of creating an offence of "racial harassment," which would seem to be aimed at criminalizing this very type of behaviour.

The NSWCCL does not support creating a separate offence of racial harassment. Of course, we do not condone people abusing or harassing others on racial lines. We hope it goes without saying that we find such behaviour abhorrent in the extreme. However, we are mainly concerned with how such an offence would be policed. One example from Western Australia illustrates the point: there the police added the offence of racial harassment to the charges against a 16-year-old indigenous girl who was accused of assaulting a white woman. During the fight, the child called the woman a "white slut". We do not think that this sort of "spur of the moment" racial abuse is properly characterized as racial harassment (nor ultimately did the WA courts, but the alleged offender still had to go through the trauma of resisting the charge).[3] Our fear is that racial harassment will become the same sort of offence as "obscene language" used to be in NSW, a charge tacked on by police during a fight or arrest to ensure a heavier conviction on the person charged.

If the Committee is minded to consider an offence of racial harassment, we suggest that this be based on the UK model, which requires at least two separate instances by the same person(s) against the same person(s).[4] We are of the view that this will ensure the offence is not abused by police, while still having a deterrent effect on racial abuse and giving the State the means by which to prosecute this behaviour.

5. Further comment

Finally, upon reading the transcript of our Committee hearing, it became apparent to NSWCCL that we were advocating heavier prison sentences in respect of the Section on the basis that similar criminal offences have much heavier penalties. We were thus unwittingly entering the law-and-order "auction" that has been on display in NSW for some time. We want to add that it is of course

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1 *R v Tout* (1987) 11 NSWLR 251 at 254–255

2 *The Queen v Phillips* (1971) 45 ALJR 467 at 472

3 *Police v A Child* (unreported, Magistrate Auty, 14 September 2006).

4 See *Crime and Disorder Act 1998* (UK) s 32 and *Protection from Harrassment Act 1997* (UK), ss 2 and 7.

entirely possible that the State makes these other offences less attractive to prosecutors by dramatically reducing the prison sentences associated with them. We urge the Committee to consider this approach, or otherwise recommend the NSW government to consider reduction in prison sentences across the board.

Please do not hesitate to contact me if you require anything further.

Yours faithfully,

Stephen Blanks
Secretary