

Consultation on serious vilification laws in NSW

Legal Aid NSW submission
to Mr Stepan Kerkyasharian AO

February 2017

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. Its Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Practice and private practitioners. The Criminal Law Practice services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Legal Aid NSW welcomes the opportunity to make a submission to the consultation on serious vilification laws. In our submission, we refer to the Standing Committee on Law and Justice inquiry and report on this issue, *Racial Vilification Law in NSW* (2013).

Should you require any further information, please contact Louise Pounder, Senior Legal Project Manager, Strategic Planning and Policy, on email: louise.pounder@legalaid.nsw.gov.au or phone (02) 9219 5063.

Q 1: Should the threshold for prosecuting the offence of serious racial vilification in the ADA (incite hatred towards, serious contempt for, or severe ridicule) be amended?

Legal Aid NSW does not have pressing concerns with the element of ‘incite hatred towards, serious contempt for, or severe ridicule’ in section 20D of the *Anti-Discrimination Act 1977* (NSW) (**ADA**). We note that the Court of Appeal has given a straightforward interpretation of ‘incite’ when interpreting this term in other provisions in the ADA. The Court of Appeal noted that its ordinary natural meaning is to ‘urge, spur on, stir up, animate, stimulate to do something’ (Oxford Dictionary), or ‘urge on, stimulate or prompt to action’ (Macquarie Dictionary).¹ We acknowledge that this may set a high bar for prosecution but consider this appropriate given the serious consequences that follow.

Q2: Should the element of the offence of serious racial vilification of “inciting others to threaten” in the ADA be amended?

Legal Aid NSW is not certain that “inciting others to threaten”, in section 20D(1)(b), is properly construed as an element of the offence. On our reading of the provision, subsections 20D(1)(a) and (b) may be interpreted as a non-exhaustive list of measures that may, but are not required to, make out the offence. However, as the Council of Civil Liberties submitted to the Standing Committee on Law and Justice inquiry, it is also possible to interpret the provision, as a whole, so as to restrict the offence to:

- 1) threats to a person, group or property, and
- 2) incitement to others to make such threats.²

Other contributors to that inquiry had other views about the construction of section 20D. Such confusion may have contributed to the reluctance of prosecutors to proceed with a prosecution for this offence. It may therefore be worthwhile to reconsider the drafting of this provision.

Q 3: What is the appropriate penalty for the offence of serious racial vilification?

Legal Aid NSW supports the Standing Committee’s recommendation that the NSW Government review the adequacy of the maximum penalty units in section 20D taking into account the maximum penalty units for comparable offences within the *Crimes Act 1900* and other Australian jurisdictions.³

¹ *Sunol v Collier (No 2)* [2012] NSWCA 44 [26].

² Standing Committee on Law and Justice *Racial vilification law in NSW* (2013) [4.151].

³ Standing Committee on Law and Justice *Racial vilification law in NSW* (2013) p73.

Q 4: Should the ADA be extended to cover serious vilification specifically on the grounds of “religious belief or affiliation”?

Legal Aid NSW supports the extension of section 20D of the ADA to cover serious vilification on the grounds of religious belief or affiliation, where that vilification involves threatening physical harm towards person or property, or inciting others to threaten such harm. If this extension is to be made, it would be appropriate to consider introducing an equivalent civil provision (such as section 20C).

Q 5: Should any changes to the elements or process for the investigation and prosecution of the offence of serious racial vilification be mirrored in the ADA offences of serious transgender vilification, serious homosexual vilification or serious HIV/AIDS vilification?

Yes. The elements and processes for the investigation and prosecution of all serious vilification offences should be consistent.

Q 6: Should all serious vilification offences be moved from the ADA to the Crimes Act 1900?

Legal Aid NSW does not have concerns about the placement of the offence in the ADA, and considers that it is unlikely that this location has contributed to the absence of prosecutions. Police frequently investigate and charge offences that are not within the *Crimes Act*, for example, the *Drug Misuse and Trafficking Act*, the *Firearms Act*, and the *Crimes (Domestic and Personal Violence) Act*. The Office of the Director of Public Prosecutions (**DPP**) confirmed in evidence before the Standing Committee inquiry that in two matters referred by the Anti-Discrimination Board to the DPP, the Office of the DPP referred the matter to the police for further investigation.⁴

Q 7: Any other proposals to protect individuals from harm arising from speech promoting prejudice, hatred and undermining social cohesion, having regard to the continued importance of freedom of speech.

Mens rea

Legal Aid NSW notes the Standing Committee recommendation that section 20D be amended to provide that recklessness is sufficient to establish intention to incite.⁵ Legal Aid NSW does not support this recommendation. Racial vilification under section 20D is a serious offence that carries a prison sentence. It should be treated as an offence of specific intent—that is, a crime where intention to cause a specific result is an element.⁶ In the Second Reading Speech made when introducing the offence, the then Attorney

⁴ Standing Committee on Law and Justice *Racial vilification law in NSW* (2013) pp 88-89.

⁵ Standing Committee on Law and Justice *Racial vilification law in NSW* (2013) Recommendation 3.

⁶ *Crimes Act 1900* s 428(1).

General, the Hon John Dowd, commented that there was a 'requirement for intention in the offence of serious racial vilification'.⁷

The usual mens rea for criminal offences of specific intent does not include recklessness.⁸ Legal Aid NSW is not satisfied that there is reason for this offence to be treated differently from other offences of specific intent. The protection of freedom of speech requires that speech be criminalised only when an intention to incite racial hatred can be proved.

Presumed or imputed race

Legal Aid NSW supports the Standing Committee's recommendation that 'the NSW Government amend Division 3A of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race'.⁹ This would provide protection even where a person committing the public act is misguided about the actual race of the person or group of persons. It would also resolve any difficulty that might be encountered if the complainant was not a member of the group vilified (but was perceived as such by the person who engaged in the act).

Legal Aid NSW also suggests that section 20C should be amended to encompass imputed race to promote consistency across the subdivision.

⁷ Cited in Standing Committee on Law and Justice *Racial vilification law in NSW* (2013) at [4.89].

⁸ *Halsbury's Laws of Australia* [130-85] "Recklessness".

⁹ Standing Committee on Law and Justice *Racial vilification law in NSW* (2013), Recommendation 8.