

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Legal Aid NSW submission

to the

LEGISLATIVE COUNCIL – STANDING COMMITTEE ON LAW AND JUSTICE

MARCH 2013

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 economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 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 welcomes the opportunity to make a submission to the Legislative Council Standing Committee on Law and Justice in relation to the Inquiry into Racial Vilification Law in NSW. Should you require any further information, please contact Alexander Grosart, Senior Solicitor, Human Rights, Civil Law Division at alex.grosart@legalaid.nsw.gov.au or Annmarie Lumsden, Executive Director, Strategic Policy and Planning at annmarie.lumsden@legalaid.nsw.gov.au.

Introduction

In this submission Legal Aid NSW will address each term of reference of the Inquiry into Racial Vilification Law in NSW. In relation to term of reference 3, Legal Aid NSW will suggest a number of amendments for improvements that could be made to section 20D to improve the operation of the section.

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

In its current form, the elements of the offence in section 20D set a high threshold for the offence. This, coupled with a requirement that the Attorney-General consent to prosecution of the offence, has contributed to the offence sitting unused on the statute books for over 20 years.

Legal Aid NSW recommends that section 20D be amended to improve the efficacy of the provision, while maintaining the right to free speech.

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

It is essential that anti-discrimination laws preserve a safe community free from incitement to racially motivated threats of violence.

At present, section 20C of the Act makes racial vilification unlawful and section 20D recognises that incitement that threatens physical harm on the ground of race should attract criminal penalties to reflect the seriousness of the conduct.

Section 20D is important as racially-motivated threats of violence can impinge upon the ability of people to participate in public life, and as such, any amendments need to ensure that the protections that section 20D offer to the community are not diminished.

Subject to the amendments proposed below, Legal Aid NSW is of the view that section 20D establishes a realistic test for the offence of serious racial vilification.

3. Improvements that could be made to section 20D, having regard to the continued importance of freedom of speech

The continued importance of freedom of speech in section 20D

The Australian Government has ratified a number of international legal instruments that provide for the right to freedom of speech.¹

Legal Aid NSW acknowledges the importance of freedom of speech as a fundamental human right, while recognising that the right is not absolute, and may be subjected to limits where necessary to protect competing rights.²

¹ Article 19, *Universal Declaration of Human Rights*; Article 19, *International Covenant of Civil and Political Rights*; Article 5, *International Convention on the Elimination of all Forms of Racial Discrimination*.

² For example, see Article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*, which obliges State Parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".

Courts and Tribunals already understand the need to balance competing civil rights.³ For example, in *Wagga Wagga Aboriginal Action Group & Others v Eldridge*,⁴ the NSW Equal Opportunity Tribunal held that the right to freedom of expression has never been regarded as absolute, and that the right to freedom of speech cannot be used as a defence to a complaint of racial vilification.

Furthermore, political speech is protected by the limited implied freedom of political communication in the Australian Constitution and legislation is to be read subject to this constitutional limit.⁵

If the amendments suggested below are adopted, Legal Aid NSW considers that section 20D will strike an appropriate balance between freedom of speech and freedom from racial discrimination and vilification.

Improvements to section 20D

Legal Aid NSW believes that section 20D could be revised in order to improve the effectiveness of the provision.

Legal Aid NSW recommends that where amendments are made, the following principles should be adhered to:

- There is no reduction in the protections given to the community by section 20D.
- Where possible, section 20D should be brought into line with the definition of racial vilification in the proposed *Human Rights and Anti-Discrimination Bill 2012 (Cth)* to promote consistency.
- An appropriate balance should be struck between freedom from racial discrimination and vilification and freedom of speech.

Legal Aid NSW suggests that the amendments proposed below will:

- Result in more efficient law by clarifying the operation of section 20D, and
- Extend the coverage of section 20D in a modest way to address gaps in the Act.

The definition of 'public act'

The definition of 'public act' in section 20B currently includes, amongst other aspects, any conduct observable by the public.

Legal Aid NSW recommends that the definition of 'public act' under section 20B be amended to explicitly include any conduct that is within the hearing of people who are in a public place. Amending this provision in this way will clarify the meaning of 'public act' and, in a modest way, extend the coverage of the racial vilification sections.

A similar concept is included in the Commonwealth's *Human Rights and Anti-Discrimination Bill 2012*.⁶

³ For example, see the discussion regarding the international law basis for limits on freedom of speech in *Bropho v Human Rights and Equal Opportunity Commission* [2004] FCAFC 16 at [59] –[62].

⁴ *Wagga Wagga Aboriginal Action Group & Others v Eldridge* (1995) EOC 23-24.

⁵ *Lange v Australian Broadcasting Corporation* (1977) 189 CLR 520; *Sunol v Collier (No 2)* [2012] NSWCA 44.

⁶ Subclause 51(3)(b)(ii), *Human Rights and Anti-Discrimination Bill 2012 (Cth)*.

Legal Aid NSW notes that amending section 20B in this way will affect the operation of sections 20C and 20D as well.

Coverage of associates

Section 20D currently covers incitement that threatens physical harm towards a person, or group of persons, or their property on the grounds of race of the person or group of persons.

The section does not cover serious racial vilification where the threats of physical harm are against a person or group of persons on the grounds of the race of an associate of a person or group of persons. In these cases, the person or group of persons that is targeted for incitement is not targeted on the grounds of their race but because of their association with another person whose race is the subject of serious racial vilification.

Legal Aid NSW advocates that sub-section 20D(1) be amended to explicitly provide for the coverage of incitement directed at persons or a group of persons on the grounds of the race of the person or the race of their associate. Legal Aid NSW suggests that section 20C should be amended to provide for coverage of associates to promote consistency across the subdivision.

Currently, all States and Territories, with the exception of South Australia and Western Australia provide for coverage of associates of a person with a protected attribute. Associate discrimination is also covered at the federal level in the *Disability Discrimination Act 1992* and the *Racial Discrimination Act 1975*.⁷ The Commonwealth's *Human Rights and Anti-Discrimination Bill 2012* extends coverage of associates to all protected attributes, and explicitly provides for coverage of associates in regards to racial vilification.⁸

While Commonwealth anti-discrimination law does not provide for a criminal offence for serious racial vilification, there is no valid policy reason why the *Anti-Discrimination Act 1977* (NSW) should not provide for coverage of associates in racial vilification.

Section 7 of the *Anti-Discrimination Act 1977* (NSW) already provides for the coverage of associates for race discrimination and amending section 20D to provide for specific coverage of associates in terms of racial vilification will result in clarity, and consistency with State, Territory and Commonwealth anti-discrimination law.

Coverage of imputed race

Arguably, under section 20D of the Act the offence of serious racial vilification may only be made out where a person commits the relevant public act on the grounds of the race of the person or members of the group. That is to say, the person committing the relevant public act would need to have accurately identified the race of the person or group of persons that the incitement is directed towards, in order to be covered by section 20D.

Legal Aid NSW proposes that section 20D be extended to cover the situation where a person commits serious racial vilification on the grounds of the *imputed* race of a person or a group of persons, or their associates. 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 or their associates.

⁷ Section 7, *Disability Discrimination Act 1992* (Cth); Sections 11-18, *Racial Discrimination Act 1975* (Cth).

⁸ Subclause 51(2)(b)(ii), *Human Rights and Anti-Discrimination Bill 2012* (Cth).

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

A similar concept is included in the Commonwealth's *Human Rights and Anti-Discrimination Bill 2012*.⁹

Conduct

Section 20D currently requires that the relevant public act committed by a person must, by its own means, threaten physical harm or incite others to threaten physical harm to the relevant person or group.

Legal Aid NSW regards this requirement as a very high threshold and believes that the test of conduct required should be reviewed to ensure that it allows for effective prosecutions in line with community expectations about conduct which incites others to threaten physical harm.

Legal Aid NSW advocates that the test of the relevant conduct required should be an objective one.

Introducing an objective test into section 20D will strengthen the operation of the provision by bringing conduct which is reasonably likely to threaten physical harm or incite others to threaten physical harm within the coverage of the provision.

The introduction of an objective test will also ensure consistency with the framing of the racial vilification provision at the Commonwealth level in section 18C of the *Racial Discrimination Act 1975* (Cth), which contains a "reasonably likely" test.

A similar test is used in Victoria's *Racial and Religious Tolerance Act 2001* in section 24.

Prosecution to be consented to by the Director of Public Prosecutions

Legal Aid NSW proposes that the requirement that the Attorney-General consent to the prosecution for an offence under section 20D be removed and replaced by a requirement that the Director of Public Prosecutions consent to the prosecution for an offence under the section.

Vesting the Attorney-General with a discretionary power in relation to whether or not to prosecute under section 20D unnecessarily politicises the process which already has an inherent tension between the competing rights of freedom of speech and freedom from racial discrimination and vilification.

Legal Aid NSW has concerns that the political sensitivities involved are a significant impediment to the effectiveness of section 20D as there is always the risk that any decision made by the Attorney-General could lead to claims that the government has favoured one particular viewpoint or ideology over another.

In any event, involving the Attorney-General in the decision of whether to prosecute under section 20D impinges upon prosecutorial discretion regarding the initiation of proceedings.

Vesting the power in the Director of Public Prosecutions, as has been done for the equivalent offence in Victoria,¹⁰ removes the decision of whether or not to prosecute from the political sphere.

⁹ Subclause 51(2)(b), *Human Rights and Anti-Discrimination Bill 2012* (Cth).

Conclusion

In summary, Legal Aid NSW recommends:

- That the definition of 'public act' under section 20B be amended to include conduct that is within the hearing of people in a public place.
- That section 20D be amended to include coverage of the associates of a person or group of persons.
- That section 20D be amended to include coverage of the imputed race of a person or group of persons or their associates.
- That section 20D be amended to include an objective test of conduct.
- That section 20D be amended to require that the Director of Public Prosecutions consent to prosecution of the offence.

Legal Aid NSW submits that the above recommendations are modest amendments to address gaps in the legislation, extend coverage in certain limited respects and provide for a more effective section 20D.

Legal Aid NSW welcomes the opportunity to provide these comments and would be prepared to provide further comment if this would be of assistance to the inquiry.

¹⁰ Section 24, *Racial and Religious Tolerance Act 2001* (Vic).