Redfern Legal Centre

14 January 2016

Director, Civil Law and Cabinet

NSW Department of Justice

By email: policy@justice.nsw.gov.au

Response to the Report of the Legislative Council, NSW Law and Justice Committee, *Racial vilification law in New South Wales*

Redfern Legal Centre (RLC) welcomes the opportunity to respond to the publication of *Racial vilification law in New South Wales* ("the Report") in December 2013.

In our submission to the inquiry, provided in March 2013, we emphasised the need for a complete review of the *Anti-Discrimination Act 1977* ("ADA") and this continues to be a pressing issue, particularly in light of developments in other jurisdictions.

We also note the comments of the NSW Attorney General in October 2015, regarding the need to make the racial vilification provisions more accessible and effective. We welcome moves to increase protection of vulnerable minority communities and it is clear that, in the two years since the release of the Report, NSW has faced increasing challenges in relation to the impact of race hate speech on individuals and communities.

RLC continues to assist many clients who identify as being from a diverse range of backgrounds and experience significant prejudice and marginalisation. In the year 2014-2015, 42% of clients assisted by our general legal team were from a culturally and linguistically diverse background (based on main home language) and 8% of clients identified as being Aboriginal or Torres Strait Islander.

We commend the recommendations of the Report that go to what it terms "procedural impediments" to the effectiveness of section 20D of the ADA. These include:

- Timeframes for lodging and referring complaints;
- That the President of the Anti-Discrimination Board be permitted to directly refer serious racial vilification complaints to the NSW Police Force.

We maintain, however, that there are significant procedural and substantive issues that could have been dealt with in the Report rather than the deferral of these matters on the basis that its current recommendations may be sufficient to address these concerns.

Procedural recommendations

RLC commends those Recommendations of the Report that promote greater access to the racial vilification provisions and also simplify and expedite the referral and investigation process. These include the recommendations to repeal the requirement for the Attorney General's consent to prosecutions of serious racial vilification in section 20D(2) (Rec 7) and the requirement for the President of the Anti-Discrimination Board of NSW to refer serious racial vilification complaints to the Attorney General (Rec 13); as well as the extension of the time limit for commencing prosecutions to 12 months.

RLC continues to press its recommendations in relation to the following issues:

RLC notes that the Committee received a range of proposals on amending the current limitations regarding who can make a complaint of racial vilification, given section 88 of the ADA only allows an alleged victim of an offence to lodge a complaint.[1]

The proposals ranged from allowing open standing for the lodgement of racial vilification complaints, to giving relevant community groups or representative organisations or the President of the Anti-Discrimination Board standing to lodge vilification complaints.

RLC has proposed:

> The President of the NSW Anti-Discrimination Board (**ADB**) should be empowered to refer a matter to the Director of Public Prosecutions without the requirement that a formal complaint is received.

In spite of receiving considerable evidence as to the "significant potential for serious racial vilification incidents to go unpunished" and a range of suggestions as to how this may be addressed,[2] the Committee appeared to take an overly cautious approach to the proposals.

The Report notes the "proposals for community groups or the President of the Anti-Discrimination Board to have standing to lodge vilification complaints" and then comments, at [6.16]:

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[1] The Report refers to the advice of the Department of Attorney General and Justice on this point at [6.6].

[2] See Report at [6.7]-[6.11].

> However in our view an open standing or lodgement by third parties may widen the scope of s 88 too far and possibly encourage the lodgement of frivolous claims.

The Report thus appears to have conflated all of the proposals with regard to standing such that it has included our proposal to give the President of the ADB standing to refer a matter to the DPP in its concerns about the involvement of third parties encouraging "frivolous claims".

We strongly press this recommendation and believe it has been prematurely dismissed in the reference to "open standing and third parties" without due consideration of the particular discretion that could be exercised by the ADB President.

Substantive recommendations

We note the comments of the Attorney General in October 2015, and consider that our recommendations in relation to the wording of both section 20C and section 20D respond to the concerns raised as to the effectiveness of the legislation. We consider the current review of the racial vilification provisions should encompass these issues rather than defer substantive change until the impact of the recommended procedural amendments can be assessed, as proposed by the Report. Given the current state of racial tension in Australia, the Report's proposal to undertake a further review in five years would delay urgently needed reforms.

RLC and others made submissions on the requirement to prove 'incitement'. In our submission we proposed replacing "incite" in section 20C(1) with the word express or promote. Unlawful racial vilification would then be the expression or promotion of hatred towards, serious contempt for, or severe ridicule of, a person or group of persons, on the ground of their race, subject to the existing defences in section 20C(2). The existing defences in section 20C offer considerable free speech protection for public debate.

It appears the Committee only dealt with the term "incite" in response to proposals to amend section 20D so this issue has not been addressed with regard to the civil prohibition.[3] We reiterate our submission as to the benefits of replacing "incite" with terms that are clear and more accessible so as to promote the beneficial intention of the provision.

We did not propose the removal of the term "incite" from section 20D(1), however, as we consider the most appropriate amendment would be to remove the provisions in section 20D (1) (a) and (b) relating to the *means* of incitement as grounds for a prosecution.

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[3] We note the Report cites the RLC submission on these points at [5.11] but only responds in relation to section 20D.

Section 20D criminalises the act of inciting hatred, contempt or severe ridicule towards a person or group on grounds of race *if* such incitement is done by the means of threatening physical harm towards people or their property, or inciting others to threaten such harm.

We suggested that the "means" element be removed from section 20D, and an incitement to violence provision be added. The offence of serious racial vilification would then become the incitement of hatred towards, serious contempt for, severe ridicule of, or violence towards a person, or group of persons, on the ground of their race. There would be no requirement as to the means of such incitement.

The proposed change should not impinge on public expressions of opinion and expression done reasonably and in good faith. To the extent that there is remaining concern, then defences consistent with those provided in section 20C could be added to section 20D.

A number of submissions proposed removal of the "means" element from section 20D and we press our recommendation and reiterate our submission that it appears this has formed one of the barriers to prosecution.

As noted in our submission to the Inquiry, the DPP has stated that "the most common reason why prosecutions have not been commenced has been the inability of the prosecution to adduce evidence to prove to the necessary standard either incitement or incitement by the specific means described in the offence provisions." [4]

Our suggested amendment to section 20C would make it a more viable means for individuals and groups affected by hate speech to get redress, by changing the focus to the nature of the hate speech and the effect on the complainant(s). Our suggested amendments to section 20D change the focus to the effect of the hate speech on the community as a whole, rather than on the means.

We believe that our recommendations should achieve a balance of rights to freedom of opinion and expression with providing protection necessary for the respect of the rights and reputations of others and with making dissemination of ideas based on racial superiority or hatred an offence punishable by law.

Conclusion

As the case studies in our submission and our ongoing experience with our clients demonstrate, the lack of prosecutions in no way reflects the reality for many people in our community. The cumulative harm of racial vilification on minority groups affects their

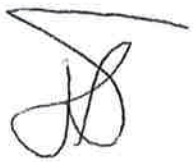
[4] Nicholas Cowdery AM QC, 'Review of Law of Vilification: Criminal Aspects' (2009), New South Wales (Delivered at the Hate Crime and Vilification Law Roundtable, Institute of Criminology, Faculty of Law, University of Sydney, 29 August 2009).

participation in society, causes substantial pain and breeds environments conducive to unrest and violence.

We welcome the NSW Attorney General's announcement in October 2015 that indicates support for the Report's recommendations and we reiterate our call for a comprehensive review of the legislation. We would welcome the opportunity to meet with you to further discuss these issues.

Yours faithfully

REDFERN LEGAL CENTRE



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