

27 November 2015

The Hon Gabrielle Upton, MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney,

Review of racial vilification offence

Kingsford Legal Centre welcomes your Government's review of the NSW offence of racial vilification (s 20, *Anti-Discrimination Act 1977*). In particular, we welcome your commitment to go further than the recommendations of the 2013 Law and Justice Committee to make this law work. We are concerned that without major changes the law will continue to be difficult to prosecute, as has been the experience in other jurisdictions. We make some suggestions below as to how to improve this offence to make it more effective.

About Kingsford Legal Centre

Kingsford Legal Centre is a community legal centre that has been providing advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. We provide general advice on a wide range of legal issues. We also have a specialist discrimination law service (NSW wide), a specialist employment law service and an Aboriginal Access program. In addition to this work, we also undertake law reform and policy work in areas where the operation and effectiveness of the law could be improved. We monitor Australia's compliance with human rights mechanisms and work with other organisations to provide non-government organization (NGO) reports to the United Nations treaty bodies on the attainment of human rights in Australia. We do this through identifying areas where our clients have experienced human rights breaches and monitoring the operation of laws and policies in Australia.

In 2014, we provided 237 advices on discrimination issues. Of these, 46 were on racial discrimination issues. While we have advised a large number of

clients on racial discrimination and vilification, we have had little exposure to the NSW offence in section 20D. This is not surprising given that there have been no prosecutions of this offence. Where we have given advice on racial vilification, prosecution under section 20D has not been possible because of the high threshold requirements of the offence, even in cases where other criminal offences have been committed.

Case study: Mae

Mae sought advice from us about her options for addressing racial abuse and threats of violence. She was followed by three people and sought refuge in a nearby medical centre. They followed her into the centre, shouted racial abuse and made threats of extreme violence. Mae feared for her safety and was very distressed by the incident. The President of the Anti-Discrimination Board did not refer the case for prosecution as he did not feel that the threshold requirements for serious vilification were met. At least one of the offenders was subsequently convicted of other criminal offences.

In our experience, there are various reasons why clients may not wish to lodge a complaint with the Anti-Discrimination Board, engage in conciliation, or commence and conduct civil proceedings. Complaints and proceedings can cause further stress for clients and may not provide the remedies that they seek. Prosecution by the state for racial vilification sends an important message that racial vilification is not acceptable in our society and that victims are equal members of the community whose rights will be protected by the state.

Suggested improvements to section 20D and Division 3A

Elements of the offence

We support the Committee's recommendation 1 to extend section 20D to apply to **quasi-public places**. However, we encourage you to consider extending the section further to apply to *all racial vilification*, without limiting the location. This would be consistent with the international human rights obligations contained in Article 4(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination.¹ It is also consistent with other offences involving threatened violence, which do not require violence to be threatened in public.²

¹ We note that Australia has made a reservation to this article, however in doing so, it also indicated its intention to ask Parliament to legislate provisions implementing this

Our support for recommendation 2 to insert a **private conduct exception** is conditional on section 20D applying to *all vilification*, not just that occurring in a public or quasi-public place. This is the case in the Victorian *Racial and Religious Tolerance Act 2001*, which currently contains this exception. The purpose of this exception is to shift the public/private line so that the onus is on the defendant to establish that his or her conduct was intended to be private. This type of exception is not needed if the complainant must establish that the conduct occurred in a public or quasi-public place.

We recommend that the term **'incite' be replaced with 'promote or express'**. As discussed in the Committee's report, this would bring section 20D in line with international human rights law, make it clearer as to who is inciting whom, and use Plain English.

We support the Committee's recommendation 3 to clarify that **recklessness** is sufficient to establish intention in section 20D. We note that this is consistent with general principles of criminal law.

We support the Committee's recommendation 4 that Division 3A of the Act should include persons of **presumed or imputed race**. Racial vilification is just as harmful to individuals, communities and society in cases where the offender is mistaken as to the ethnic background of the victim/s, and an offender should not escape prosecution on this basis.

We recommend that the racial vilification offence also be extended to include **religious vilification**. This would ensure that inciting religious hatred would be covered by the offence. In particular, Muslims in Australia have suffered significant vilification and harassment in recent times, with little legal remedy available. It would also bring the vilification offence in line with international human rights obligations in Article 20(2) of the International Covenant on Civil and Political Rights, which requires that 'Any advocacy of national, racial or

article. The Committee on the Elimination of Racial Discrimination has also indicated that this article is mandatory (General Recommendation VII) and repeatedly requested Australia to remove its reservation and implement article 4 in legislation.

² For example, offences of stalking or intimidation with intent to cause fear of physical or mental harm (s 13, *Crimes (Domestic and Personal) Violence Act 2007*); violent disorder (s 11A, *Summary Offences Act 1988*); documents containing threats (s31, *Crimes Act 1900*); affray (s 90, *Crimes Act 1900*); threatening to destroy or damage property (s 199, *Crimes Act 1900*).

religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.³

In the last five years, we have advised 12 clients about religious discrimination, vilification and harassment. We have had to tell these clients that it can be difficult to seek remedy under NSW anti-discrimination law because there is no protection against religious discrimination, vilification or harassment, and it can be difficult to establish ethno-religious discrimination, vilification or harassment.

Case study: Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

Case study: Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

We also recommend that the offence be extended to include **extreme speech that incites racial hatred** in the absence of explicit threats of physical harm. Harassment or intimidation based on race can be a form of serious and substantial abuse. It can make people fear for their safety and limit the extent to which they participate in society. It also creates a broader culture within which race based discrimination and physical harm becomes more acceptable.

³ We note that Australia has made a reservation to this article. However, the United Nations Human Rights Committee has recommended that Australia withdraw this reservation: *Concluding Observations on Australia*, CCPR/C/AUS/CO/5, 2 April 2009.

We support the Committee's recommendation 5 to refer any amendments to Division 3A back to the Committee for **further review** five years after implementation. Given the lack of experience prosecuting racial vilification both within Australia and internationally, it is essential that the effectiveness of racial vilification amendments be reviewed to ensure that they are having the desired impact.

Other amendments

We support the Committee's recommendation 7 to remove the **Attorney-General's consent requirement** for prosecuting the offence. The consent requirement unnecessarily politicises serious vilification matters and removing it will send the message that serious vilification is considered to be in the same category of offences as other criminal offences.

We support relocating the offence to the **Crimes Act 1900** to address the perception that investigating racial vilification is a matter for the Anti-Discrimination Board, and not the police. We also support the Committee's recommendations to improve the prosecution process, including recommendation 14 to provide **training to the NSW Police** about serious racial vilification. A sound understanding of the nature of racial vilification and the serious impact that it can have on individuals, communities and society is essential to ensuring appropriate investigation and subsequent prosecution of this crime.

We support the Committee's recommendation 8 to give **standing to persons of a presumed or imputed race**. We recommend that standing also be given to the **President of the Anti-Discrimination Board** so that serious vilification matters can be referred without receipt of a formal complaint.

We support the Committee's recommendation 9 to **extend the time limit** for commencing prosecutions to 12 months to be consistent with the time limit for lodging complaints under the *Anti-Discrimination Act*. Prosecution should be available for racial vilification where complaints are lodged with the Anti-Discrimination Board within time.

Other vilification laws

We recommend that the Government make similar amendments to the other vilification laws contained in the *Anti-Discrimination Act*: that is, homosexuality, transgender status and HIV/AIDS in sections 49ZTA, 38T, and 49ZXC. The problems that exist for section 20D also exist for other vilification offences, and

amending these offences would ensure increased protections against vilification as well as consistency in NSW discrimination law.

Data collection and monitoring of prejudice-motivated crime

It is difficult to understand patterns of prejudice-motivated crime and police and prosecutorial responses as there is inadequate tracking and monitoring of this crime. Reporting can be ad hoc and dependent on what police write down at the time a crime is reported. We recommend systematic and strategic data collection and monitoring of prejudice-motivated crime. This will assist Police and relevant stakeholders to gain a greater understanding of prejudice-motivated crime and the appropriateness and adequacy of police and prosecutorial responses.

We are happy to elaborate further on our suggestions in a meeting with you or your Department. We look forward to the release of the exposure draft bill next year.

Yours sincerely,
KINGSFORD LEGAL CENTRE



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