INTRODUCTION

This paper is extracted from a submission by the Human Rights Committee of the NSW Bar Association to the NSW Bar Council, this section of which was co-authored by me. Its reproduction for the purposes of this Roundtable has been approved by the President of the NSW Bar Association.

VILIFICATION – EXISTING PROSCRIPTIONS

Under the *Anti-Discrimination Act 1977* (“ADA”), vilification on grounds of race, transgender status, homosexuality and/or HIV/AIDS status is proscribed.

Section 20C deals with racial vilification. It should be noted that the definition of “race” contained in section 4 of the ADA is fairly broad:

“race includes colour, nationality, descent and ethnic, ethno-religious or national origin.”

Section 38S deals with transgender vilification and section 49ZT with vilification on the grounds of homosexuality.

In each case, that which is proscribed is the doing of a public act, which is defined in each case to include:
- any form of communication to the public;
- any conduct observable by the public; and
- the distribution or dissemination of matter to the public knowing that the matter promotes or expresses hatred towards, or serious contempt for, or severe ridicule of a person or group of persons on one of the proscribed grounds.

In each case civil remedies are available where it is established that by a public act a person incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the relevant proscribed ground.

\[1\] Section 4.
However, civil remedies are not available in respect of:
- a fair report of a public act;
- a publication which would be subject to absolute privilege in proceedings for defamation; or
- a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about expositions of any act or matter.

In the case of transgender and HIV/AIDS vilification, there is also an exemption where a public act is done for “religious discussion or instruction purposes” pursuant to Section 38S(2)(c) and Section 49ZXB(2)( c ). In the case of homosexual vilification, there is an exemption for “religious instruction” under Section 49ZT(2)(c).

In relation to HIV/AIDS vilification, an action can be brought where a person is “infected or thought to be infected”; but in no other type of vilification is there reference to imputed status (so, for example, there is no reference to an action being available where a person was thought to be a transgender person or thought to be homosexual or thought to be of a particular race). This has not, in practice, been an issue in proceedings brought to date, although it could conceivably have resulted in proceedings not being brought.

The harm threshold contained in the provisions of Section 20C of the ADA, namely “hatred, serious contempt or severe ridicule” and the requirement of “incitement” result in arguably a higher standard to meet than that contained in Section 18C of the Racial Discrimination Act 1976 (Cth) (“RDA”), where the harm threshold is met where conduct is reasonably likely in all the circumstances to “offend, insult, humiliate or intimidate.” It is not necessary to prove incitement in an action under the RDA.3

Whether the threshold in NSW law is higher, it is different from that in the RDA. The NSW law operates by reference to the effect of the public conduct on third parties and on their attitudes or likely conduct to the persons vilified. On the other hand the RDA operates by reference to the effect of the conduct on the vilified person or group.

Consequently, under the RDA evidence of the effect of the impugned conduct on people who are vilified is admissible4. Such evidence is irrelevant in proceedings under the Victorian and NSW provisions5.

---

2 As an example of a recent case in which a complaint of vilification was upheld see Jones v The Bible Believers’ Church, [2007] FCA 55 in which the Federal Court found that Jews had a common ethnic origin and had been vilified by material.
3 Federal Discrimination Law, HREOC, 2008 at 746-78.
5 Catch the Fire Ministries Inc v The Islamic Council of Victoria Inc (2006) 206 FLR 56 at [67] and [140 - 141].
In NSW vilification is treated as a criminal offence where, by a public act, a person incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on one of the proscribed grounds by means which include:
- threatening physical harm towards, or towards any property of, a person or group of persons; or
- inciting others to threaten physical harm towards, or towards any property of, a person or group of persons.

Section 20D provides for an offence of serious racial vilification; section 38T for serious transgender vilification; section 49ZTA for serious homosexual vilification; and section 49ZXC for serious HIV/AIDS vilification. Such threats are already dealt with under the *Crimes Act* 1900 in Sections 31, 33B 545B, so the legislation has not really widened the scope of matters to prosecute.

**OPERATION OF THE ‘SERIOUS VILIFICATION’ CRIMINAL PROVISIONS OF THE LEGISLATION**

The Office of the Director of Public Prosecutions, NSW (“ODPP”), which commenced operations on 13 July 1987, has received several requests to consider prosecuting for serious vilification offences. No prosecution has been commenced (indeed, none has been brought since the Act in 1977).

Examples of situations in which requests have been made (by the ADB, the Jewish Board of Deputies, individual citizens and the Attorney General) are as follows.

- The public display of a sign in front of a house reading “Jews make fantastic lampshades. Why should Israel be above the law?”
- Publication in a newsletter of anti-Jewish statements including an article headed “Jews – The One True Evil”.
- Incidents of personal abuse directed at indigenous Australians which included references to aspects of Aboriginality.
- Vilification directed towards a homosexual in a restaurant.
- Shouting public abuse towards a homosexual.
- Harassment of a gay couple by a neighbour.
- A threat of violence directed towards an indigenous Australian in terms referring to Aboriginality.
- Allegations that security guards and police failed to intervene in an attack on an Aboriginal Australian.
- Comments in a radio broadcast directed towards disposing of homosexuals.

Although the consent of the Attorney General is required under the legislation in order to prosecute, in 1990 the Attorney General delegated this power to the Director of Public Prosecutions.6

---

6 Pursuant to s11(2) of the *Director of Public Prosecutions Act*, 1986 (NSW), *Government Gazette* 10 July 1990, as discussed in McNamara *supra* at 210, note 97.
Deficiencies in the current formulations of the law in relation to serious vilification

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.

“Incitement” means “to urge on, stimulate or prompt to action”. A mere expression of hatred, no matter how offensive, is not sufficient to meet that definition in terms of the criminal law if it does not “incite” others to hatred towards, serious contempt for or severe ridicule of a person or group of persons on particular grounds.

The incitement, to amount to “serious vilification” and a criminal offence under the existing “serious vilification” provisions, must be either by threatening physical harm towards a person or group or towards property of the person or group, or by inciting others to threaten harm towards the person, group or property. Again, a mere expression of hatred is insufficient.

Previous proposals

In May 2004 the (then) NSW Attorney General (Mr Bob Debus) became concerned that the current law was ineffective and that the government had not satisfied its obligations pursuant to the International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”). He cited the UK and Canada as examples of jurisdictions where successful prosecutions had been brought and noted a successful prosecution in Germany for Holocaust denial. He invited the DPP to provide suggestions as to a legislative model that would be effective.

In June 2004 the DPP made proposals in effect adopting the Canadian formulation in section 319 of the *Criminal Code*. That provision requires the prosecutor to establish:
- that a person by communicating (as defined) other than in private conversation
- thereby wilfully
- promotes hatred
- against an identifiable group (defined as any section of the public distinguished by colour, race, religion or ethnic origin).

(That proposal is hereafter referred to as “the Canadian formulation”.)

In contrast to Canada, the existing NSW provisions do not proscribe discrimination or vilification on the ground of religion, although “ethno-religious” discrimination has been held to contravene the ADR. However, the breadth of the definition of “race” has been noted above.

In September 2004 the Attorney General formed a working group to develop options for law reform in this area.

On 16 March 2005 the Chair of the Working Group on Serious Vilification published a Discussion Paper. The Working Group received and considered submissions and proposed model legislation that had some serious difficulties associated with it. After
further comment and discussion the Working Group ended its work without any formal recommendation being made.

The 1999 Review of the ADA

Report 92 of the NSW Law Reform Commission Review of the Anti-Discrimination Act 1977 considered the existing provisions of the Act in relation to serious vilification and recommended that the provisions be relocated in the Crimes Act 1900 (NSW)\(^7\) and that the President of the ADB have power to refer a matter to the Director of Public Prosecutions where she or he is of the view that it may constitute serious vilification, as defined.\(^8\) The first of those recommendations has not been implemented. It is similar to an earlier recommendation of the Samios Report of 1992, which suggested relocating the offence in the Summary Offences Act 1988 (NSW).\(^9\)

The second recommendation, that the President of the ADB have power to refer matters to the DPP, has been implemented in practice. The ADB currently does refer such matters to the DPP.

An exposure draft Bill for insertion into the Crimes Act 1900 was developed by the ADB and circulated by the former Attorney General, Mr Debus, to a number of community groups for comment (hereafter “exposure draft”).

One potential difficulty with that draft is that “intention” is required to be proved in order to establish the offence. Although this may be inferred from the nature of the act and/or other circumstances, it does create a hurdle for the prosecution and introduces a new potential defence. Experience with anti-discrimination law indicates that the need to prove discriminatory intention can substantially impede effective operation of discrimination law.\(^10\) The educative function of proscribing conduct is compromised if a defence of not having had an intention to offend could be raised. Thus, on one view, to introduce a subjective element into the definition is a retrograde step. Arguably, application of an existing objective standard is more likely to result in consistency than a subjective standard. The proposal emanating from the Canadian experience referred to above does not appear to suffer this drawback.

---

\(^7\) Recommendation No 96.

\(^8\) Recommendation No 97. McNamara points out op cit at 202 that these recommendations are similar to those contained in the Report of the Review by the Hon. James Samios, MBE, MLC into the Operation of the Racial Vilification Laws of New South Wales, Sydney, A report to the Minister for Ethnic Affairs and the Attorney General, August 1992, “The Samios Report”, Note 38

\(^9\) See McNamara supra at 202.

\(^10\) See Waters v Public Transport Commission (1991) 171 CLR 349 and the difference in view on this question between Mason C. J., Deane and Gaudron JJ. (at 171 CLR 359 and 382) on the one hand and McHugh J. (at 171 CLR 401) on the other.
RECOMMENDATIONS FOR REVIEW
A. ISSUES APPLICABLE TO BOTH CIVIL AND CRIMINAL MATTERS

Retention of both civil and criminal responses to vilification
In a review of anti-vilification laws, consideration should be given to retention of the current bifurcation of actions for vilification, so that vilification remains a civil action, enabling individuals to bring matters to hearing before the ADT, and in appropriate cases cause for a criminal prosecution.

Description
The current terminology used in the ADA, “vilification” and “serious vilification”, is unfortunate as it may suggest that some vilification is not “serious”. This terminology could be improved, for example to recognise “vilification” and “vilification involving threats of violence to persons and/or property” rather than “serious vilification”.

Definitions
Currently, in relation to vilification due to HIV/AIDS status, an action can be brought where a person is HIV/AIDS infected or thought to be HIV/AIDS infected. Consideration should be given in a review as to whether, consistently with the provision in relation to HIV/AIDS, an action could be brought in relation to race, homosexuality and transgender status where a person is vilified on the ground that he/she was “thought to be” transsexual, homosexual or of a particular race. Alternatively, the terms “actual or presumed” could be used in relation to each category.

Incitement
It is recommended that the “incitement” requirement of both the civil and criminal provisions be reviewed and that consideration be given as to whether it should be dispensed with. This would bring the provisions into harmony with the provisions of the RDA (Cth).

Educational Campaign
How widely known and understood are the proscriptions of vilification and serious vilification amongst the general public? There is a need for a much greater public education and awareness campaign to ensure that the damage that vilification does to individuals and to community cohesion and anti-vilification laws is well understood in the community.

In the period 2006 – 2007 the ADB reported that it received 25 complaints of racial vilification and none of any other type of vilification.11 Those 25 complaints constituted 2.7% of complaints received. This is probably not reflective of the extent of real problems of vilification in the community and indicates that probably only a fraction of vilifying behaviour is ever the subject of a complaint.

There is a need for research on the effectiveness of anti-vilification laws in NSW to date. It may be argued that it appears that the civil provisions have been utilised to some effect, with significant publicity amplifying the educative effect of decisions

---

11 ADB Annual Report 2006-7 p16.
within the community. In contrast, the criminal provisions have been largely symbolic rather than resulting in action likely to have a deterrent effect.

ISSUES APPLICABLE TO CRIMINAL ACTION

Consideration could be given in a review as to whether vilification should also be subject to criminal sanction where there is communication other than in private conversation which is intended to promote hatred against an identifiable group, as defined.

For similar reasons applied in relation to the use of the term “intentionally” in the exposure draft, the term “wilfully” used in the Canadian formulation should be omitted. It means no more than a deliberate act. It is preferable to include a specific subjective mental requirement (“intended to”).

Additionally, as required by Article 4(a) of CERD, in the absence of national legislation NSW could legislate to criminalise dissemination of ideas based on racial superiority as well as racial hatred.

Referral
At present it is required that if the President of the ADB is to make a referral of a vilification complaint to the Attorney General pursuant to section 20D, 38T, 49ZTA or 49ZXC, the “serious vilification” provisions, that the President may only make such a referral, pursuant to Section 91(3), within 28 days of receiving the complaint. This timeframe may be unrealistic in some circumstances and could prevent complaints being investigated, at least to some extent, and then being referred as “serious vilification.”

One option would be to locate what are currently sections 20D, 38T, 49ZTA or 49ZXC within the Crimes Act 1900 and still provide for the President to refer appropriate matters. In that way, matters that may constitute discrimination as well as serious vilification would be registered and some action taken.

Investigative Function
If serious vilification is dealt with under the Crimes Act, consideration would need to be given to who would investigate claims of vilification. It is possible that the NSW Police Force would be given this function if all vilification matters were dealt with under the Crimes Act. Unless the investigating body had adequate training, resources and experience, many such matters would never be prosecuted at all. There have been many criticisms of the police in the past as having been insensitive to issues of discrimination and these could no doubt be extended to vilification. Concern expressed in the past about locating law enforcement authority and prosecutorial discretion for prosecution for serious vilification” in the hands of the police “may be well-founded”. Consideration should be given in a review of the effectiveness of implementation of anti-vilification laws, as to whether additional training should be provided to police at intake and on a “refresher” basis for existing police officers in the area of vilification.

12 See for example N Hennessy and P. Smith “Have We Got It Right? NSW Racial Vilification Laws Five Years On” (1994) 1 Australian Journal of Human Rights 249 note 43 at 262.
13 McNamara supra at 144.