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21 March 2017

Dear Mr Kerkyasharian AO

Consultation on serious vilification laws in NSW

The Human Rights Law Centre (**HRLC**) welcomes the opportunity to make a submission to the inquiry into serious anti-vilification laws under the *Anti-Discrimination Act 1977* (NSW) (**ADA**).

This consultation is limited in scope and not intended to provide a comprehensive review of the ADA or anti-vilification laws. However, we would be willing to provide input into any broader consultation or queries raised outside the scope of the terms of reference of this consultation.

Importance of protecting against serious vilification

Vilification of people because of their race, religion, sexual orientation, gender identity, HIV/AIDS status or other protected attribute diminishes the dignity, self-worth and integration of people from a diverse range of backgrounds to our community. Hate speech and vilification has a profound impact on members of the NSW community. It negatively impacts on their ability to exercise their freedoms and participate in public life. It undermines the right of every person in our society to be treated equally and to be free from abuse, hatred, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of vilification serves to embolden or encourage discrimination by providing an 'authorising environment' for the escalation to violence.

Vilification protections under international human rights law

We also refer to the HRLC's previous *Striking the right balance – freedom of speech and hate speech* submission to the 2013 NSW inquiry into racial vilification laws.¹ This submission explains in detail the relationship between the right to free speech, equality and non-discrimination, and liberty and security of person, under international human rights law.

In summary, the right to freedom of expression² is a 'foundation stone for every free and democratic society',³ but it is not absolute. It can be limited where reasonable and necessary to protect the rights of others, or for national security, public order, public health or morals.⁴ International human rights law also requires states to implement criminal offences to prohibit the dissemination of ideas based on

¹ Human Rights Law Centre, *Striking the right balance – freedom of speech and hate speech: Submission to the inquiry into racial vilification law in New South Wales* (19 March 2013).

² International Convention on Civil and Political Rights (**ICCPR**), art 19(2).

³ UN Human Rights Committee, *General Comment 34*, UN Doc CCPR/C/GC/34.

⁴ ICCPR, art 19(3).

racial superiority or racial hatred, or incitement to racial discrimination or acts of racially motivated violence.⁵

Anti-vilification laws set standards of conduct that discourage people from vilifying others, constraining the spread of prejudice motivated violence in society, and encouraging people to speak out publicly against racism, homophobia, transphobia and discrimination on the basis of HIV/AIDS status. Serious vilification offences under the ADA recognise the unique and pervasive role of hate speech and conduct to threaten both a person's safety and their ability to fully participate in a democratic society.

In doing so, these laws necessarily restrict some people's right to free speech to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety. Criminal sanctions for vilification have a high threshold to appropriately deter discriminatory speech and conduct that damages community cohesion and safety. The purpose of a high threshold is to allow the expression of information or ideas that are offensive, unpopular, shocking or disturbing – but nonetheless lawful – to adequately protect free speech in a democratic society. However, where this threshold is so high that the criminal sanction does not provide a useful shield against vilification, reform is required.

Finding the appropriate balance between these competing rights is crucial, and often controversial.

Responses to current consultation terms of reference

We briefly discuss the specific queries raised in the current consultation process and make 12 key recommendations.

1. Should the threshold for prosecuting the offence of serious racial vilification in the Anti-Discrimination Act 1977 (incite hatred towards, serious contempt for, or severe ridicule) be amended?

We commend New South Wales on its status as the first Australian jurisdiction to pass legislation to defend against serious racial vilification under the ADA.⁶

Importance of racial vilification laws in NSW

Anti-vilification laws continue to serve an important function in NSW to deter and punish serious vilification on the basis of a person's race. The latest Scanlon Foundation Social Cohesion Survey revealed an increase in reported experiences of discrimination based on skin colour, ethnicity or religion (20% of respondents).⁷ Of those surveyed, 27% of people from a non-English speaking background reported experiences of discrimination, 55% of those who reported experiences of discrimination were verbally abused and 18% either were victims of property damage or physical assault.⁸

Gelber and McNamara's research in NSW in 2016 also highlighted that abuse motivated by race and religion occurs in multiple public settings and is not limited to gross slurs or epithets.⁹ People from culturally and linguistically diverse backgrounds interviewed shared the cumulative harmful

⁵ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), art 4(a).

⁶ Section 20D provides that a person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include: (a) threatening physical harm towards, or towards any property of, the person or group of persons, or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons. A 'public act' and 'race' are defined in the ADA.

⁷ Professor Andrew Markus, Mapping Social Cohesion, Scanlon Foundation Surveys 2016 (2016).

⁸ Ibid 26.

⁹ Gelber, Katharine & McNamara, Luke, "Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided" (2016) 39(2) *University of New South Wales Law Journal* 44, 500.

effects of moderate abuse and conveyed that while NSW 'anti-vilification laws are 'invisible' and inaccessible, they are nonetheless symbolically important to targeted communities.¹⁰

Comparison of 'incitement to hatred' and 'offensive conduct' offences

In Australia, we have identified a number of approaches to regulating racial hatred and racial vilification:

- (a) **incitement to hatred criminal offences and civil provisions** - public acts which 'incite hatred towards, serious contempt for, or severe ridicule' or 'revulsion'¹¹ or conduct which intends or is likely to 'create, promote or increase' animosity or harassment on the basis of race;¹²
- (b) **offensive conduct civil provisions** – conduct that is likely to 'offend, insult, humiliate or intimidate' or 'ridicules';¹³ and
- (c) **dissemination of discriminatory materials criminal offences and civil provisions** – publishing or displaying materials that 'promote, express or depict' discrimination¹⁴ or possession of materials intended to or likely to incite racial animosity or racist harassment.¹⁵

There are material differences as well as overlap between these types of anti-vilification provisions. For example, we note that the distribution or dissemination of materials provisions could be covered by the incitement to hatred and offensive conduct provisions. The NSW serious vilification threshold is very similar to the SA Act and QLD Act.¹⁶

NSW's serious vilification offence applies to public acts, whereas offensive conduct civil provisions under the RDA and ACT Act applies to acts 'otherwise than in private'. The VIC Act requires the respondent to establish, on objective grounds, that it was intended to be private to be exempt from liability for vilification.¹⁷

In NSW, 'race' is defined broadly to include 'colour, nationality, descent and ethnic, ethno-religious or national origin'. The ACT Act extends the definition of race further to the status of being or having been an immigrant. The VIC Act does not include ethno-religious origin but extends the NSW definition of race to also include assumed or perceived race, ancestry and ethnic origin. The VIC Act also provides that 'if 2 or more distinct races are collectively referred to as a race each of those distinct races, that collective race' and the WA Act clarifies that the 'fact that a race may comprise two or more distinct races does not prevent it from being a race'. In comparison, the RDA adopts a narrower definition of 'race' as 'race, colour or national or ethnic origin'. In general, these definitions of race include Jewish people but not Muslim people.¹⁸ Thus, the NSW definition of 'race' could be broadened to also provide protections for people who are assumed or perceived to be from a particular racial group (even if they are from a different racial group), immigrants and people from multiple ethnic or racial groups.

¹⁰ Ibid.

¹¹ ADA s 20D, Criminal Code 2002 (ACT) (ACT Act) s 750, Racial and Religious Tolerance Act 2001 (VIC) (Vic Act) s 24, 25, Anti-Discrimination Act 1998 (Tas) (Tasmanian ACT) s 19 civil provision, Racial Vilification Act 1996 (SA) s 4 (SA Act), Anti-Discrimination Act 1991 (QLD) s 124A (QLD Act).

¹² *Criminal Code Act Compilation Act 1913* (WA) (**WA Act**) s 77-78.

¹³ *Racial Discrimination Act 1975* (Cth) (**RDA**) s 18C civil provision, Tasmanian Act s 17(1) civil provision. See also, Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991 (ACT): Final Report*, 91.

¹⁴ Tasmanian Act s 20 civil provision.

¹⁵ WA Act s 79-80. See also the Appendix: Cross-jurisdictional comparison table of vilification provisions.

¹⁶ Except that the QLD Act applies to race, religion, sexuality or gender identity. We refer to the Appendix.

¹⁷ Neil Rees, Simon Rice and Dominique Allen, *Australian AntiDiscrimination Law* (Federation Press, 2nd ed, 2014) 615.

¹⁸ *Ekmawi v Network Ten Pty Ltd* 2008] NSWADT 334 (18 November 2008); *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 (31 July 2002); *Ahmed v Macquarie Radio Network* (Radio Station 2GB) [2006] NSWADT 89 (27 March 2006); *Alchin v Rail Corp* (NSW) (2012) 225 IR 171. See also Ibid, Chapter 10; Australian Human Rights Commission, *Federal Discrimination Law 2011: Chapter 3 – The Racial Discrimination Act* (at 21 October 2011) 17; Gelber & McNamara, above n 9, 492.

The harm threshold of hatred, serious contempt or severe ridicule is based on the common law definition of defamation with a higher threshold by using the words 'serious' and 'severe' to qualify contempt and ridicule respectively.¹⁹ The harm threshold of conduct likely to offend, insult, humiliate or intimidate is lower and based on sexual harassment provisions in the *Sex Discrimination Act 1984* (Cth). In contrast, the dissemination of discriminatory materials provisions are most closely related to distribution of pornographic, blasphemous or offensive content offences. The very high threshold is more justified for defamation where the conduct is slander or libel which damages a person's reputation or business. However, using the same high threshold for incitement to hatred offences means that, in practice, these anti-vilifications are not effective at protecting people from conduct which incites, promotes, encourages or causes threats or violence towards a particular person or group of people because of their race.

The incitement to hatred offences generally require proof of the likelihood of incitement and fault elements of knowledge or intention. As a result, incitement to hatred offences are significantly more difficult to prove than offensive conduct civil provisions which require proof of the likelihood of the effect of the conduct in the circumstances. It is notoriously difficult for prosecutors to prove beyond reasonable doubt whether an offender knew or intended for their conduct to incite racial hatred. As a result, while the offensive conduct provisions have been used in practice, we are not aware of any instances of incitement to hatred offences being successfully prosecuted in NSW, Victoria or the ACT.

Importantly, the incitement to hatred offences do not consider the subjective effect or impact of the vilification on the individual or community at which it is directed (i.e. assessed in relation to a generic reasonable member of the community as a whole - 'an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views').²⁰ In comparison, the offensive conduct civil provision's focus is on the negative effects on members of the targeted group, not the wider audience of the conduct (i.e. assessed in relation to a 'reasonable victim' – 'a reasonable person from the racial, ethnic, and/or national origin group to whom the conduct relates').²¹ The dissemination of discriminatory materials offence in the WA Act does consider the intention of the offender to 'create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group'. However, this is not required in the equivalent civil provision under the Tasmanian Act, which applies to publishing or displaying but not possession.

Threshold for racial vilification under the ADA too high

While there are a range of possible reasons why these offences have not been prosecuted (e.g. low reporting rates, lack of awareness of offence, civil avenues for redress, prosecution of lesser charges²²), the HRLC considers that the threshold for section 20D is too high. This high threshold prevents prosecutions and the effective use of section 20D to protect against racial vilification. To the extent that it is not an effective remedy, it is thus incompatible with international human rights standards.

The 2013 NSW Legislative Council Standing Committee on Law and Justice's *Racial vilification law in New South Wales* report (**2013 Report**) recommended that section 20D be amended to

¹⁹ Above n 9, 492.

²⁰ Ibid 491-493. We note that this article discusses the civil wrong of unlawful racial vilification, and refer to the analysis relevant for the serious vilification offence.

²¹ Ibid 497-498.

²² See e.g. *Summary Offences Act 1988* (NSW) s 4A.

state that recklessness is sufficient to establish intention to incite.²³ It also recommended amending Division 3A of the ADA to include people of a presumed or imputed race.²⁴

Recommendation 1

We recommend that the NSW Government consider lowering the threshold for serious racial vilification.

There are a number of options on how to lower this high threshold requirement.

One option in line with the ACT Law Reform Advisory Council recommendation 17.1 is to amend the offence to prohibit conduct that ‘*expresses, or is reasonably likely in the circumstances to incite, hatred towards, serious contempt for, severe ridicule towards or revulsion of, a person or people with a protected attribute*’ [emphasis added].²⁵

To make it easier to prosecute serious vilification offences, the ACT recently amended its equivalent offence. The offence now applies to situations where a person *intentionally* carries out an act, that act is a threatening act, and the person is *reckless* about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people.²⁶

Another option would be to adopt the wording in the WA Act to prohibit conduct that intends or is likely to ‘*create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group*’ [emphasis added].

Alternatively, the word ‘incite’ could be substituted with ‘*likely to promote, encourage or cause hatred towards, serious contempt for, severe ridicule towards or revulsion of, a person or people with a protected attribute*’.

Professors Neil Rees and Simon Rice have also recommended prohibiting acts which are ‘intended, or likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of property of their family or associates’.²⁷ This proposal protects against potential misuse of the offence by requiring a person to have a *reasonable* fear for their safety and security (or the safety and security of others).

These amendments all operate to remove the word ‘incite’ and shift judicial consideration from the subjective intention of the offender to the objective harm that results from their conduct.

2. Should the element of the offence of serious racial vilification of “inciting others to threaten” in the Anti-Discrimination Act be amended?

The HRLC strongly supports the intention of section 20D(1)(b) to prevent the further dissemination of hate speech and conduct by targeting public acts which incite others to threaten physical harm towards a person or group of people because of their race. As discussed above, we are concerned that the high threshold of incite and the requisite fault element to prove this offence mean that it is not an effective remedy against vilification in practice.

²³ New South Wales Parliament Legislative Council Standing Committee on Law and Justice’s *Racial vilification law in New South Wales* (3 December 2013) Recommendation 3.

²⁴ Ibid, Recommendation 4.

²⁵ Above n 21, 97.

²⁶ ACT Act s 750.

²⁷ Professor Neil Rees and Simon Rice, above n 1, 15.

Recommendation 2

We recommend that any amendments to the threshold in section 20D(1) are also be made to section 20D(1)(b) in relation to inciting others to threaten violence, where appropriate.

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

The HRLC supports a criminal offence for serious vilification but have not had the time to research and fully consider the issue of the appropriate penalty. We note that the 2013 Report recommended that the NSW Government review the maximum penalty units for comparable offences within the Crimes Act and other Australian jurisdictions.

To assist this inquiry, we have summarised maximum penalties for serious vilification offences in Australia by jurisdiction in the table in the Appendix. We welcome further contact to discuss this issue if necessary.

4. Should the Anti-Discrimination Act be extended to cover serious vilification specifically on the grounds of “religious belief or affiliation”?

The right to freedom of religion is protected under international law and allows people of faith to practice their religion free from persecution and discrimination.²⁸ Article 20(2) of the ICCPR requires states to prohibit vilification motivated by race, ethnicity or religion. The right to freedom of religion is also protected in Australia under the Constitution²⁹ and national laws.³⁰ Section 20D currently prohibits racial vilification but does not expressly address religious vilification.

The HRLC strongly believes that every person should be free to hold their religious belief without fear of threats, violence and harm. Similarly, protections from vilification on the grounds of religion would need to protect a person not believing in any religion.

As with other protected attributes under the ADA, freedom of religious belief can also be limited to ensure freedom of expression is adequately protected.³¹ The inherently controversial character of freedom of religion means that most religious faiths believe their faith to represent the “absolute truth” and thus reject the faiths of others. Religious protections under the ADA must ensure that the expression of one person’s genuinely held religious belief is not used to justify vilifying speech or conduct.

The ACT Law Reform Advisory Council’s inquiry similarly stated that:

Unlike other attributes, it can be argued that the attribute of religious belief carries with it the risk of causing offence on the basis of religion; for monotheistic religions, an adherent’s exercise of free religious expression may necessarily cause offence to the adherent to another religion. More generally, it is likely that criticism of a religion will offend adherents to that religion. A prohibition against causing offence on the basis of religious belief does not, therefore, seem practical. Differently from causing offence, however, vilification on the basis of religious belief is beyond the usual bounds of both free religious expression and more general criticism of a religion, and a prohibition against vilification on the basis of religious belief seems appropriate.³²

Serious vilification offences apply on the basis of ‘religion’ in Queensland, ‘religious belief or activity’ in Victoria, ‘religious conviction’ in the ACT, and civil sanctions exist for ‘religious belief or

²⁸ ICCPR, article 18(1).

²⁹ *Commonwealth of Australia Constitution Act 1901* (Cth) s 116.

³⁰ See e.g. *Fair Work Act 2009* (Cth), *Human Rights Act 2004* (ACT) s 14; *Charter of Human Rights and Responsibilities 2006* (Vic) s 14 and various state statutes that protect individuals from discrimination or vilification on the basis of religious belief.

³¹ *Ibid* 408.

³² Law Reform Advisory Council, *Inquiry into the Discrimination Act 1991* (ACT): *Final Report*, 96.

affiliation or religious activity' in Tasmania. There are no protections from serious vilification on the basis of religion in South Australia or the Northern Territory.

Anti-Muslim vilification is not currently a criminal offence in NSW despite increasing reports of 'Islamophobia' and discrimination against people of Muslim backgrounds. Gelber and McNamara recommend that anti-vilification protections on the basis of religion be introduced to address these experiences of Islamophobia in NSW.³³

Recommendation 3

We recommend that the ADA be amended to introduce a serious vilification offence on the grounds of 'religious belief or activity'.

5. Should any changes required to the elements or process for the investigation and prosecution of the offence of serious racial vilification be mirrored in the Anti-Discrimination Act offences of serious transgender vilification, serious homosexual vilification or serious HIV/AIDS vilification?

The ADA also outlaws serious homosexual vilification,³⁴ serious HIV/AIDS vilification³⁵ and serious transgender vilification,³⁶ which have been modelled on the original serious racial vilification offence. Despite a number of complaints of these forms of vilification, these offences have never been prosecuted.

The Australian Human Rights Commission has commented on the high threshold test in NSW in relation to section 20C:

It is very difficult to prove vilification. It is not sufficient that the respondent's conduct conveyed hatred or expressed serious contempt. Rather, it must be shown that the respondent's conduct was capable, in an objective sense, of urging or arousing other people to feel hatred towards the complainant, on the ground of their sexual orientation or sex and/or gender identity.³⁷

Any strengthening of vilification protections for racial minorities should also be extended to these other categories as well.

Recommendation 4

We recommend that any amendments to section 20D should also be extended to the above serious vilification offences to enhance their effectiveness.

Protection from vilification based on actual or perceived attribute

The offence of serious HIV/AIDS vilification makes clear that it is an offence 'whether or not [a person is] actually HIV/AIDS infected'. As discussed above, vilification should be an offence where this is based on an assumed or perceived attribute – for example, where a person vilifies a person or group of people based on their assumed sexual orientation or gender identity (even where they have a different sexual orientation or gender identity).

³³ Above n 8.

³⁴ *Anti-Discrimination (Homosexual Vilification) Amendment Act 1993* (NSW) Sch 1.

³⁵ *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 2.

³⁶ *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW) Sch 1.

³⁷ Australian Human Rights Commission, *Protection from vilification and harassment on the basis of sexual orientation and sex and/or gender identity - Addressing sexual orientation and sex and/or gender identity discrimination: Consultation Report* (2011) <https://www.humanrights.gov.au/publications/section-9-protection-vilification-and-harassment-basis-sexual-orientation-and-sex-and/or> [9.1].

Recommendation 5

We recommend that amendments to sections 38T and 49ZTA should make clear that it is an offence whether based on a person's actual or perceived sexual orientation or gender identity.

Consistent penalties for serious vilification

The maximum penalty for serious racial vilification is 50 penalty units or 6 months imprisonment. In contrast, the maximum penalty for serious homophobic vilification, serious transgender vilification and serious HIV/AIDS vilification is 10 penalty units.

The HRLC has serious concerns that imposing different penalties depending on whether an offence is based on race, sexual orientation, gender identity or HIV/AIDS status creates a 'hierarchy' of vilification – where violating some people's right to non-discrimination and liberty and security of person is seen as more or less serious than other people's. This is inconsistent with the fundamental principle that all people have equal rights to fully participate in society regardless of their race, sex, sexual orientation, disability, religion, gender identity, ethnicity, intersex status or sex characteristics, political opinion, nationality or other protected attribute.

Recommendation 6

We recommend that penalties for serious vilification offences should be consistent across protected attributes.

We recommend that the NSW Government consult more broadly with LGBTI community organisations – particularly OII Australia and the intersex community – about the need for a serious vilification offence relating to intersex status or sex characteristics.

6. Should all serious vilification offences be moved from the Anti-Discrimination Act to the Crimes Act 1900?

The HRLC strongly supports that serious vilification offences be retained as a matter of public policy. However, there may be concerns that this offence is not used because of a lack of awareness within the NSW Police of this offence. Moving serious vilification offences from the ADA to legislation used more frequently and readily by NSW Police – such as the *Crimes Act 1900* (NSW) – may lead to it being used in the future.

For example, in Western Australia, offences prohibiting racist harassment and incitement to racial hatred are contained in the *Criminal Code Act Compilation Act 1913* (WA).³⁸ The ACT recently amended and transferred the equivalent serious vilification offence from the *Discrimination Act 1991* (ACT) to the *Criminal Code 2002* (ACT) for these reasons.

Recommendation 7

We recommend that serious vilification offences be moved from the ADA to the *Crimes Act 1900* (NSW) (**Crimes Act**).

³⁸ See e.g. Conduct intended to or likely to incite racial animosity or racist harassment; possession of material for dissemination with intent to or that is likely to incite racial animosity or racist harassment; conduct intended to or likely to racially harass; possession of material for display with intent to or that is likely to racially harass.

7. Do you have 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?

Consolidate serious vilification offences into single offence for all relevant protected attributes

To avoid inconsistency, we recommend consolidating multiple serious vilification offences under the ADA into a single serious vilification offence which applies to a broader range of protected attributes. For example, the ADA does not currently include a serious vilification offence on the grounds of disability.

States and territories are increasingly recognising the need to expand the protected grounds for vilification offences. Section 750 of the ACT Act prohibits serious vilification on the basis of disability, gender identity, HIV/AIDS status, race, religious conviction and sexuality. Section 19 of the Tasmanian Act also contains civil anti-vilification protections on the grounds of race, disability, sexual orientation or lawful sexual activity and religious belief or affiliation or religious activity.

Recommendation 8

We recommend that serious vilification offences be consolidated into a single offence for a broader range of relevant protected attributes to promote consistency and avoid confusion.

In the alternative, we recommend that serious vilification on the basis of disability be introduced.

Requirement of Attorney General's consent should be removed

Subsection 2 of each of the serious vilification offences in the ADA provides that '[a] person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution'.

This is a highly unusual provision. Currently, the *Crimes Act 1900* (NSW) only requires the Attorney General's consent to prosecute for a very small number of offences.³⁹ The vast majority of serious crimes do not require the Attorney General's consent for a prosecution to proceed.

The 2013 Report also recommended that the NSW Government repeal this requirement.⁴⁰

Recommendation 9

We recommend that the requirement to obtain the consent of the Attorney General to prosecute a serious vilification offence should be removed.

Complementary civil provision

In addition to a serious anti-vilification offence, civil protections against vilification aim to prevent discriminatory and vilifying conduct that can be proven on the balance of probabilities but not beyond reasonable doubt. Civil provisions also provide a legal remedy for a complainant, addresses the harm caused by vilification and prevent the escalation of discriminatory conduct.

³⁹ *Crimes Act 1900* (NSW) – s 78: incest or attempted incest; s 66F: sexual offences with a person with a cognitive impairment; s 249E: corrupt benefits for trustee offences; s 316: concealing a serious indictable offence.

⁴⁰ Above n 10, Recommendation 7. This recommendation is accompanied by Recommendation 13, which recommends that the NSW Government remove the requirement for the President of the Anti-Discrimination Board of NSW to refer serious racial vilification complaints to the Attorney General under section 91(2) of the ADA.

The ADA should retain the complementary civil protection against vilification in section 20C. The NSW Government may also wish to consider expanding this protection to other protected attributes in line with any amendments made to section 20D. Further, the NSW Government may also consider lowering the threshold consistent with amendments to section 20D and/or through the introduction of offensive conduct civil provisions.

Recommendation 10

We recommend that the NSW Government retain and consider appropriate civil protections against serious vilification.

Prohibition of dissemination of material likely to promote prejudice motivated hatred or contempt

Section 38R of the ADA confirms that a public act includes:

the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of a person on the ground that the person is a transgender person, or a group of persons on the ground that the members of the group are transgender persons.

To avoid doubt, the NSW Government may also wish to consider an offence which outlaws the dissemination of material likely to promote hatred or contempt of others on the basis of a broader range of protected attributes protected. This would provide an alternative offence to prevent the distribution of discriminatory and harmful material promoting hatred, even where this does not create an immediate fear of violence or physical harm.

Recommendation 11

We recommend that the NSW Government introduce an offence prohibiting the dissemination of material that is likely to promote hatred or contempt of others on the basis of a protected attribute.

Amendments to sentencing consideration of prejudice motivation

Section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires certain aggravating factors to be taken into account when sentencing. Currently this requires consideration of whether:

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).

In practice, offences (such as offensive language offences) in the Crimes Act may be used more readily by NSW Police than serious vilification offences in the ADA. However, the law should recognise that targeting a victim because of a protected attribute is a significant aggravating feature of offending as this targeting of someone because of an inalienable attribute diminishes a community's sense of safety. This recognises the broader harm caused to the community by prejudice motivated conduct.

Recommendation 12

We recommend that 'sex, gender identity or HIV/AIDS status' be added to section 21A(h) of the *Sentencing Act 1999* (NSW) to ensure that a person's hatred for or prejudice towards someone can be taken into account in sentencing for another offence (that is not a serious vilification offence).

We commend the NSW Government for considering potential amendments to improve the operation and effectiveness of serious vilification offences under the ADA in practice. These represent strong protections for fundamental human rights which NSW pioneered in Australia.

We welcome the opportunity to provide further feedback as part of this consultation. Please feel free to contact us if you have any queries in relation to this submission.

Yours sincerely



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Appendix: Comparison table of vilification provisions in Australia

Where	Provision	Public / private	Definition of race	Summary of threshold	Protected attributes	Civil or criminal	Penalty
CTH	<i>Racial Discrimination Act 1975</i> (Cth) s 18C	Otherwise than in private	Race, colour or national or ethnic origin	Act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate	Race	Civil	<i>No criminal offence</i>
ACT	<i>Criminal Code 2002</i> (ACT) s 750	Other than in private	Race includes colour, descent, ethnic and national origin and nationality and any 2 or more distinct races that are collectively referred to or known as a race	Intentionally carries out a threatening act where reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule	Disability, gender identity, HIV/AIDS status, race, religious conviction, sexuality	Criminal	50 penalty units
	<i>Discrimination Act 1991</i> (ACT) s 67A	Other than in private		Incite hatred toward, revulsion of, serious contempt for, or severe ridicule		Civil	
NSW	<i>Anti-Discrimination Act 1977</i> (NSW) s 20D, 38T, 49ZTA, 49ZXC	A public act (see s 38R)	Race includes colour, nationality, descent and ethnic, ethno-religious or national origin	Incite hatred towards, serious contempt for, or severe ridicule	Race, homosexual status, transgender status, HIV/AIDS status	Criminal	50 penalty units or 6 months imprisonment, or both (100 penalty units for a corporation)
	ADA ss 20C, 38S, 49ZT, 49ZXB					Civil	
NT	No anti-vilification provisions						
QLD	<i>Anti-Discrimination Act 1991</i> (QLD) s 131A	A public act	Race includes colour, descent or ancestry, ethnicity or ethnic origin and nationality or national origin	Knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule	Race, religion, sexuality or gender identity	Criminal	70 penalty units or 6 months imprisonment (350 penalty units)
	<i>Anti-Discrimination Act 1991</i> (QLD) s 124A			Incite hatred towards, serious contempt for, or severe ridicule		Civil	
SA	<i>Racial Vilification Act 1996</i> (SA) s 4	A public act	Race means the nationality, country of origin, colour or ethnic origin	Incite hatred towards, serious contempt for, or severe ridicule	Race	Criminal	\$5,000 or 3 years imprisonment, or both (\$25,000)
	<i>Civil Liability Act 1936</i> (SA) s 73					Civil	
TAS	<i>Anti-Discrimination Act 1998</i> (Tas) s 19	A public act	Race includes colour, nationality, descent, ethnic, ethno-religious or national origin, and status of being, or having been, an immigrant	Incite hatred towards, serious contempt for, or severe ridicule	Race, disability, sexual orientation or lawful sexual activity, religious belief or affiliation or religious activity	Civil	
VIC	<i>Racial and Religious Tolerance Act 2001</i> (Vic) ss 7, 8, 24		Race includes colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin, and if 2 or more distinct races are collectively referred to as a race, each of those distinct races, that collective race	Intentionally engage in conduct that the offender knows is likely to incite hatred against, serious contempt for, or revulsion or severe ridicule	Race or religious belief or activity	Civil and criminal	60 penalty units or 6 months imprisonment, or both (300 penalty units for a corporation)
WA	<i>Criminal Code Act 1913</i> (WA) ss 76-80G (not all offences included in this table)	Otherwise than in private	Racial group means any group of persons defined by reference to race, colour or ethnic or national origins	Intends or is likely to create, promote or increase animosity towards, or harassment	Race	Criminal	14 years imprisonment for intentional and \$24,000 and 2 years imprisonment where likely
				Possesses threatening or abusive written or pictorial material intending it be published, distributed or displayed where intending or likely to create, promote or increase animosity or harassment			14 years imprisonment for intentional and \$24,000 and 2 years imprisonment where likely
				Intends to harass or is likely to harass			\$24,000 or 2 years imprisonment for intentional and \$12,000 or 12 months imprisonment where likely