

Bills Committee on Race Discrimination Bill

Administration's response to questions raised at the meeting held on 25 April 2008

Purpose

At the meeting of the Bills Committee on 25 April 2008, Members raised a number of questions concerning Clauses 45, 46, 48 and 94 of the Race Discrimination Bill (“the Bill”). They related to –

- (a) with regard to Clauses 45 and 46:
 - (i) the purposes of the two clauses;
 - (ii) the meaning of the terms “activity in public” and “incite hatred” in the definitions of “vilification” and “serious vilification”;
 - (iii) the meaning of “reasonably and in good faith” in Clause 45(2);
 - (iv) comparable legislation in Australia and case law;
 - (v) compatibility of the two clauses with the right to freedom of speech protected under the Basic Law;
- (b) with regard to Clause 48:
 - (i) whether the reference to “knowingly” in Clause 48(3)(a) is tantamount to making “ignorance of the law” a defence;
 - (ii) the justifications for Clause 48(4) which renders the making of a false statement an offence; and
- (c) with regard to Clause 94, the background and rationale for the proposed amendment to the Chinese Permanent Cemeteries Ordinance (Cap 1112).

2. This paper provides the information requested.

Vilification and serious vilification in Clauses 45 and 46

(a) Purposes of the two clauses

3. Clause 45, which covers vilification, provides that it is unlawful for a person, by an activity in public, to incite hatred towards, serious contempt for, or severe ridicule of, another person or members of a class of persons on the ground of the race of the person or members of the class or persons. Clause 46, which covers serious vilification, differs from Clause 45 in that any such activity in public includes threats of physical harm or inciting others to threaten physical harm on the victims or their premises or property. Under Clause 46, serious vilification is a criminal offence liable on conviction to a fine at level 6 and to imprisonment for two years.

4. These provisions are not new. Similar provisions in the disability context are contained in sections 46 and 47 of the Disability Discrimination Ordinance (Cap. 487).

5. From the policy point of view, we believe that racial vilification should not be tolerated, not to mention serious racial vilification which involves threatening physical harm to others or their premises or property. The proposals in Clauses 45 and 46 are in line with Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) which commits States 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” .

(b) Meaning of “an activity in public”

6. One of the key elements of vilification is that it must be “an activity in public”. This is not confined just to activities undertaken in a “public place”.

7. An activity carried out by a person in a public place would ordinarily be regarded as an activity in public. However, the Bill goes beyond that. Clause 45(3) makes it clear that it is not essential that the person carrying out the activity is in a public place while carrying out the activity. Rather, activity in public under Clauses 45 and 46 includes –

- (a) all forms of communication to the public;
- (b) all conduct observable by the public; and
- (c) all distribution or dissemination of any matter to the public.

8. As an example, it would be unlawful for a person to disseminate, through the internet, messages or materials which incite hatred against persons of a particular race, although the act of posting the messages was done in the privacy of his own home. However, the mere act of his composing the message in his own house would not by itself constitute an unlawful act, so long as the message is not sent and communicated to the public.

9. As another example, a person chanting racist slogan in a public park would be caught by the provisions. On the other hand, a person speaking the same words behind closed doors and whose conduct cannot be observable by the public or be heard, would not be covered. The key is whether the public could hear or see the communication or observe the conduct.

10. A question was raised at the meeting whether, in Clause 45(3)(a), the reference to "writing" covers writing an article in private containing racist views even though the article is not published. Clause 45 reflects our policy that vilification covers an activity in public. Writing in private without any act of communication to the public is not an activity in public. Clause 45(3)(a) reads "any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, screening and playing of tapes or other recorded material". The key is "communication to the public". A private act not communicated to the public will not be covered.

(c) Meaning of "incite" hatred, serious contempt and severe ridicule

11. The activities in the public prohibited under Clauses 45 and 46 are those which "incite" hatred, serious contempt or severe ridicule against the other person or members of a class of persons. The word "incite" is not a legal term and has been held to have its ordinary natural meaning which is to "urge, spur on ... stir up, animate; stimulate to do something" or "urge on; stimulate or prompt to action"¹. Whether an act would be

¹ Western Aboriginal Legal Service Ltd v Jones [2000] NSWADT 102

considered an activity in public inciting hatred on the ground of the race of a person is ultimately a question of fact.

(d) Meaning of “reasonably and in good faith” in Clause 45(2)

12. Exemptions from Clause 45(1) are provided in Clause 45(2) for legitimate activities which are not intended to be caught by the definition but which might otherwise be challenged as racial vilification. Specifically they are –

- (a) a fair report on an activity in public;
- (b) communications which attract absolute privilege (e.g. proceedings in the court or the legislature); and
- (c) an activity in public done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussions about and expositions of any matter (e.g. debates over issues of public interest).

13. The meaning of “reasonably and in good faith” is elaborated in paragraphs 21-24 below, having regard to the legal precedents in Australia.

(e) Legislation and case law in Australia

14. For reference, decisions of courts and tribunals in Australia, based on comparable legislative provisions, are set out in the following paragraphs.

15. In Australia, legal provisions similar to Clauses 45 and 46 of the Bill can be found in the Racial Discrimination Act 1975, the Anti-Discrimination Act 1977 (New South Wales), the Anti-Discrimination Act 1991 (Queensland), the Discrimination Act 1991 (Australian Capital Territory), the Racial and Religious Tolerance Act 2001 (Victoria) and in the Racial Vilification Act 1996 (South Australia). The relevant extracts are reproduced at Annex.

16. In previous judgment, the Australian courts have held that the reference to public act would include abusive comments from a neighbour that could be heard on the street².

² McMahan v Bowman [2000] FMCA 3; Chambers v Darley [2002] FMCA 3

17. As referred to in paragraph 11 above, the word “incite” has been held to have its ordinary natural meaning which is to “urge, spur on, ... stir up, animate; stimulate to do something” or “urge on; stimulate or prompt to action”.³ It is not sufficient if the words merely convey hatred or express serious contempt or severe ridicule⁴.

18. In *Creek v Cairns Post Pty Ltd*⁵, a newspaper article which pictured the holiday camp of an Aboriginal family and the permanent home of a non-Aboriginal family in a way that could have conveyed that the Aboriginal family lived in substandard conditions when compared with the other family was found not to be in breach of the Racial Discrimination Act 1975 as there was not anything to suggest that race was a factor in the decision of the newspaper to publish the article and the photographs. The Court also held that there must be a profound or serious effect and not just a mere slight in order to breach s. 18C(1)(a) of the Act, which provides that “it is unlawful for a person to do an act, otherwise than in private, if the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people and the act is done because of race”.

19. In another case⁶, the Federal Magistrates Court held that some abusive comments from a neighbour to children and their father when a ball was hit over the fence, including the term "black bastard" was a breach of the provisions. The words could be heard on the street and there were people on the street.

20. The yardstick for determining whether an act constitutes incitement is an objective one. It is not based on the subjective response, for instance, of a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of the relations among racial groups. The hypothetical listener should be described as an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views.⁷

21. Section 18D of the Australian Racial Discrimination Act 1975 provides for a defence, similar to Clause 45(2)(c) of the Bill, for an activity done “reasonably” and “in good faith”.

³ *Western Aboriginal Legal Service Ltd. v Jones* [2000] NSWADT 102

⁴ *Veloskey v Karagiannakis (EOD)* [2002] NSWADTAP 18, para. 21 of the judgment

⁵ (2001) 112 FCR 352 at 359

⁶ *McMahon v Bowman* [2000] FMCA 3

⁷ *Inquiry into Broadcasts by Ron Casey* (1989) 3BR 351, 357

22. The operation of the defence may be illustrated by the case of *Jones v Toben*⁸. There, the Federal Court found that a website that denied the Holocaust and vilified Jewish people was unlawful under Racial Discrimination Act 1975. The material posted on the Internet by Dr Fredrick Toben cast doubt on the Holocaust and suggested that homicidal gas chambers at Auschwitz were unlikely and that some Jewish people, for improper purposes including financial gain, had exaggerated the number of Jews killed during World War II. The Court found that a reason for the publication was to offend and insult Australian Jewish people who maintained that the Holocaust had occurred. The publication was not done reasonably and in good faith. Rather, the material was designed to be deliberately provocative and inflammatory.

23. The meaning of “reasonably” and “in good faith” was further considered in *Bropho v Human Rights & Equal Opportunity Commission*⁹. There, French J considered that the word “reasonably” contains elements of rationality and proportionality. A thing is done ‘reasonably’ if it bears a rational relationship to that activity and is not disproportionate to what is necessary to carry it out. It imports an objective judgment. The judgment will be informed by a recognition of the values of the need to prohibit the evil of racial vilification and hatred and the need to protect freedom of speech and association within their reasonable limits.¹⁰

24. French J further considered that the “good faith” exercise of the freedom of speech protected under section 18D of the Racial Discrimination Act 1975 will, so far as practicable, seek to be faithful to the norms implicit in its protection and to the negative obligations implied by section 18C. It will honestly and conscientiously endeavour to have regard to and minimise the harm it will, by definition, inflict. It will not use those freedoms as a ‘cover’ to offend, insult, humiliate or intimidate people by reason of their race or colour or ethnic or national origin.¹¹

(f) Compatibility of Clauses 45 and 46 with the freedom of speech

25. Article 27 of the Basic Law safeguards the freedom of speech for Hong Kong residents. It is well recognised that this freedom is not absolute - a person's exercise of this right carries with it special duties and

⁸ [2003] 199 ALR 1

⁹ Section 18C of the Racial Discrimination Act (Australia) is broader than Clause 45(1) of the Race Discrimination Bill in that it covers acts that have effects less serious than incitement to hatred, serious contempt or severe ridicule.

¹⁰ [2004] FCAFC 16 (6 February 2004), para. 79 of French J’s judgment.

¹¹ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 (6 February 2004), para. 95 of French J’s judgment.

responsibilities, including especially the obligation to respect the legitimate rights of others. Article 16(3)(a) of the Hong Kong Bill of Rights, which incorporates Article 19(3)(a) of the International Covenant of Civil and Political Rights into our law, provides that the right to freedom of expression carries with it special duties and responsibilities and may be subject to restriction by law where it is necessary for respect of the rights or reputations of others.

26. Clauses 45 and 46 do not attempt to regulate private exchanges. They only prohibit "activity in public" and, as explained in paragraph 12 above, Clause 45(2) makes it clear that the section does not catch legitimate activities including fair report on an activity in public and an activity in public done reasonably and in good faith for various purposes.

27. Clauses 45 and 46, therefore, do not contradict the freedom of speech.

28. Our position is also in line with international standard and the view of UN Committee for the Elimination of Racial Discrimination. In its General Recommendation XV, the Committee clearly stated the following –

"In the opinion of the Committee, the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. This right is embodied in article 9 of the Universal Declaration of Human Rights and is recalled in article 5(d)(vii) of the International Convention on the Elimination of All Forms of Racial Discrimination. Its relevance to article 4 is noted in the article itself. The citizen's exercise of this right carries special duties and responsibilities, specified in article 29, paragraph 2, of the Universal Declaration, among which the obligation not to disseminate racist ideas is of particular importance. The Committee wishes, furthermore, to draw to the attention of States parties article 20 of the International Covenant on Civil and Political Rights, according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

(g) Technical amendments to be considered

29. In view of Members' questions raised on Clauses 45 and 46, we shall consider whether technical amendments as follows should be made –

- (a) amending Clause 45(2)(b) to cover an activity in public that
 - (i) is a communication or the distribution or dissemination of any matter; and
 - (ii) consists of a publication which is subject to a defence of absolute privilege in proceedings for defamation; and
- (b) amending Clause 46(1) which refers to “activity in public which includes threatening...or inciting others to threaten..” in order to make it clear that the threat or the incitement of threat is a necessary element of the activity in public which would constitute serious vilification.

“Knowingly aids another person” and making of a false or misleading statement in Clause 48

30. Clause 48(1) provides that “a person who knowingly aids another person to do an act made unlawful by this Ordinance is to be treated for the purposes of this Ordinance as himself or herself doing an unlawful act of the like description.”

31. Clause 48(3) sets out the circumstances in which a person does not knowingly aid another person to do an unlawful act. The reference to “knowingly” in this Clause does not refer to knowledge of what the law is but refers to the person aiding another person in reasonable reliance of a statement made to him by another person believes that he acts lawfully in aiding that other person. For example, an employee may be told by his employer to place an advertisement to recruit a person of a particular race because the employer says the “genuine occupational qualification” applies (ie, for example, the job involves providing persons of that racial group with personal services referred to in Clause 11(2)(e) of the Bill), when in fact the job is not of that nature. In that case, the employee would not be held liable for aiding the discriminatory act. Clause 48(3) recognises that, when one person does an act to aid another, he plays a subordinate role and may not know of all the circumstances relevant to the legality or otherwise of that act and may have been misled about those circumstances.

32. Clause 48(4) makes it an offence for a person to knowingly or recklessly make a false or misleading statement to get another person to do a discriminatory act. This is to deter a person from obtaining the assistance of another person in a discriminatory act through giving false or misleading information to the other person. Similar provisions are found, locally, in the Sex Discrimination Ordinance and, overseas, in the UK Race Relations Act.

Amendment to the Chinese Permanent Cemeteries Ordinance (Cap 1112) in Clause 94

33. Section 7(2) of the Chinese Permanent Cemeteries Ordinance (Cap. 1112) provides that the Board of Management of the Chinese Permanent Cemeteries (BMCPC) “may donate to any charity operating for the benefit of persons of the Chinese race in Hong Kong any moneys vested in it which are or may become surplus to the requirements of the proper management, and administration and maintenance of any Chinese Permanent Cemetery for the time being under the control of the Board”. This provision limits the scope of the Board’s donations to charities which operate for the benefits of Chinese people in Hong Kong.

34. Although Clause 50 of the Bill specifically permits a provision in a charitable instrument for conferring benefits on persons of a particular race, the BMCPC considers the existing limitation on the scope of the Board’s donations unnecessary. It has therefore proposed to amend the relevant section by replacing the words “persons of the Chinese race in Hong Kong” by “Hong Kong residents”. Clause 94, when enacted, would allow the Board to extend its charity donations to Hong Kong residents regardless of their race or ethnic origin.

35. Similarly, Clause 89 amends section 9(1)(b) of the Chinese Temples Ordinance (Cap 153)¹² by repealing the word “Chinese”. This is made at the request of the Chinese Temples Committee to remove the existing restriction on the disbursement of the General Chinese Charities Fund.

¹² Section 9(1)(b) of the Chinese Temples Ordinance provides that the General Chinese Charities Fund shall be held in such manner as the Chinese Temples Committee may direct, and may in the discretion of the Chinese Temples Committee be applied for the purposes of any Chinese charity in Hong Kong.

36. These proposals have no implications on other charities which may be established for the benefits of particular racial groups. Clause 50 protects the freedom of people to choose the beneficiaries of their donations.

**Constitutional and Mainland Affairs Bureau
May 2008**

**SECTIONS 18C & 18D of RACIAL DISCRIMINATION ACT 1975
(Commonwealth of Australia)**

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:
 - (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
 - (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.
- (3) In this section:

"public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

SECTIONS 20C & 20D, ANTI-DISCRIMINATION ACT 1977 (New South Wales, Australia)

20C Racial vilification unlawful

- (1) It is unlawful for a person, by a public act, to 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.

- (2) Nothing in this section renders unlawful:
- (a) a fair report of a public act referred to in subsection (1), or
 - (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

20D Offence of serious racial vilification

(1) 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.

Maximum penalty:

In the case of an individual 50 penalty units or imprisonment for 6 months, or both.

In the case of a corporation 100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

SECTIONS 124A & 131A, ANTI-DISCRIMINATION ACT 1991 (Queensland, Australia)

124A Vilification on grounds of race, religion, sexuality or gender identity unlawful

(1) A person must 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, religion, sexuality or gender identity of the person or members of the group.

- (2) Subsection (1) does not make unlawful--
- (a) the publication of a fair report of a public act mentioned in subsection (1); or
 - (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

131A Offence of serious racial, religious, sexuality or gender identity vilification

(1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes--

- (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.

Maximum penalty--

- (a) for an individual--70 penalty units or 6 months imprisonment;
- (b) for a corporation--350 penalty units.

(2) A Crown Law Officer's written consent must be obtained before a proceeding is started by complaint under the Justices Act 1886 in relation to an offence under subsection (1).

(3) An offence under subsection (1) is not an offence for section 155(2) or 226.

(4) In this section--

Crown Law Officer means the Attorney-General or Director of Public Prosecutions.

SECTIONS 66 & 67, DISCRIMINATION ACT 1991 (Australian Capital Territory)

66. Unlawful vilification--race, sexuality etc

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group:

- (a) race;
- (b) sexuality;
- (c) transsexuality;
- (d) HIV/AIDS status.

(2) This section does not make unlawful--

- (a) a fair report of an act mentioned in subsection (1); or
- (b) a communication or the distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or
- (c) a public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

67. Serious vilification offence--race, sexuality etc

(1) A person commits an offence if--

- (a) the person intentionally carries out an act; and

- (b) the person is reckless about whether the act is a public act; and
- (c) the act is a threatening act; and
- (d) the person is reckless about whether the act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group:
 - (i) race;
 - (ii) sexuality;
 - (iii) transsexuality;
 - (iv) HIV/AIDS status.

Maximum penalty: 50 penalty units.

(2) For subsection (1) (c), an act is a threatening act only if the person carrying it out--

- (a) by the act, intentionally threatens physical harm towards, or towards any property of, the person, or members of the group, mentioned in subsection (1) (d); or
- (b) is reckless about whether the act incites others to threaten such physical harm.

SECTIONS 7 & 24, RACIAL and RELIGIOUS TOLERANCE ACT 2001 **(Victoria, Australia)**

7. Racial vilification unlawful

(1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

(2) For the purposes of sub-section (1), conduct-

- (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
- (b) may occur in or outside Victoria.

Note: "engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.

24. Offence of serious racial vilification

(1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely-

- (a) to incite hatred against that other person or class of persons; and
- (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.

Note: "engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.

Penalty: In the case of a body corporate, 300 penalty units;

In any other case, imprisonment for 6 months or 60 penalty units or both.

(2) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Note: "engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.

Penalty: In the case of a body corporate, 300 penalty units;

In any other case, imprisonment for 6 months or 60 penalty units or both.

(3) For the purposes of sub-sections (1) and (2), conduct-

(a) may be constituted by a single occasion or by a number of occasions over a period of time; and

(b) may occur in or outside Victoria.

(4) A prosecution for an offence against sub-section (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions.

SECTION 4, RACIAL VILIFICATION ACT 1996 (South Australia)

4. Racial vilification

A person must 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 their race by—

(a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or

(b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group.

Maximum penalty:

- If the offender is a body corporate—\$25 000.
- If the offender is a natural person—\$5 000, or imprisonment for 3 years, or both.