

Criminal Code Amendment (Racial Vilification) Bill 2004

Introduction Print

EXPLANATORY MEMORANDUM

General

This Bill amends Chapter XI of the Criminal Code dealing with racist harassment and incitement to racial hatred. The Bill broadens the application of, and increases the penalties for, the existing provisions, as well as introduces strict liability offences, including defences to those offences.

Clause Notes

- Clause 1 sets out the short title of the Bill.
- Clause 2 provides that the Act comes into operation on the day on which it receives the Royal Assent.
- Clause 3 provides that the amendments are to *The Criminal Code*.
- Clause 4 amends section 76.

Three new terms are defined for the purposes of the Chapter. “Animosity towards” is a broader term than, and includes, the existing reference to hatred. “Harass” provides a definition for an existing term. “Member” of a racial group includes a person associated with a racial group. The definition of “written or pictorial material” is extended to include book and magazine given the insertion of the defences in proposed section 80G.

- Clause 5 substitutes proposed sections 77 to 80H for sections 77 to 80.

A two tiered approach is proposed for each type of offence, meaning the sections are paired in relation to each offence e.g. 77&78, 79&80, with the distinguishing factor in each pair being the element of intent. The first tier in each case is an offence requiring intent to be established with a higher maximum penalty. The second tier is a strict liability offence where it can be established that the conduct in question is likely to have the effect described. This approach means that an offence can still be established even if the intent of the accused person cannot be established, and remedies a limitation of the current provisions. Alternative verdicts will be available for the intent offences.

The principle of freedom of speech and expression is protected by applying only to conduct that does not occur in private, and by the insertion of defences to the strict liability offences. In addition, the consent of the Director of Public Prosecutions is required for a prosecution under sections 77, 78, 79 and 80, being those offences where the maximum penalty where intent can be established is 14 years, and their strict liability counterparts. This consent is used where a provision technically has the potential to catch circumstances which are beyond the intention of the legislation.

Proposed section 77 states that **conduct intended to incite racial animosity** towards a group or a member of a group is an offence and liable to imprisonment for 14 years. It effectively replaces the existing section 78 using the new terms that are proposed, and increases the penalty from two years.

Proposed section 78 is a new strict liability offence. It is in similar terms to proposed section 77, other than intent to incite is replaced with likely to incite. The penalty proposed is 5 years with a summary conviction penalty of two years or \$24 000.

Proposed section 79 states that **possession of material for dissemination with intent to incite racial animosity** towards a group or a member of a group is an offence and liable to imprisonment for 14 years. It effectively replaces the existing section 77, and increases the penalty from two years.

Proposed section 80 is a new strict liability offence. It is in similar terms to proposed section 79, other than intent to incite is replaced with likely to incite. The penalty proposed is 5 years with a summary conviction penalty of two years or \$24 000.

Proposed section 80A states that **conduct intended to racially harass** a group or member of a group is an offence and liable to imprisonment of 5 years with a summary conviction penalty of two years or \$24 000. It effectively replaces the existing section 80 using the new terms that are proposed, and increases the penalty from one year.

Proposed section 80B is a new strict liability offence. It is in similar terms to proposed section 80A, other than intent to harass is replaced with likely to harass. The penalty proposed is 3 years with a summary conviction penalty of one year or \$12 000.

Proposed section 80C states that **possession of material for display with intent to racially harass** a group or member of a group is an offence and liable to imprisonment of 5 years with a summary conviction penalty of two years or \$24 000. It effectively replaces the existing section 79, and increases the penalty from one year.

Proposed section 80D is a new strict liability offence. It is in similar terms to proposed section 80C, other than intent to harass is replaced with likely to harass. The penalty proposed is 3 years with a summary conviction penalty of one year or \$12 000.

Proposed section 80E(1) states that a reference to conduct in sections 77, 78, 80A and 80B includes conduct occurring on a number of occasions over a period of time.

The conduct referred to in proposed provisions 77, 78, 80A and 80B is conduct otherwise than in private. Proposed section 80E(2) states that conduct is not taken to occur in private if it consists of any form of communication with the public, or

occurs in a public place or in the sight or hearing of people who are in a public place.

Proposed section 80F states that, in relation to those offences where intent is an element, it is the accused person's belief as to the existence or membership of a racial group that matters.

Proposed section 80G(1) states that it is a defence to the strict liability offences relating to conduct likely to incite racial animosity or to racially harass that the conduct was engaged in reasonably and in good faith in relation to:

- an artistic work;
- any conduct engaged in for any genuine academic, artistic, religious, scientific or public interest purpose; or
- in making or publishing a fair and accurate report or analysis of any event or matter of public interest.

Proposed section 80G(2) provides the same defence to the strict liability offences relating to possession of material for dissemination if material likely to incite racial animosity or for display if likely to racially harass.

Proposed section 80H states that any prosecution under sections 77, 78, 79 and 80 requires the consent of the Director of Public Prosecutions.

Clause 6 replaces section 597A.

Proposed section 597A(1) and (2) provide for:

- in relation to section 77, alternative verdicts under sections 78, 80A or 80B; and in relation to sections 78 or 80A, alternative verdicts under the other or section 80B;
- in relation to section 79, alternative verdicts under sections 80, 80C or 80D; and in relation to sections 80 or 80C, alternative verdicts under the other or section 80D.

Conduct was also defined to include the singular to address the fact that the dictionary definition of “harass” means involving a series of repeated or similar actions.