Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 02 May 2023

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Paul Scarr asked the following question:

Senator SCARR: Okay. I won't probe any more than that on that issue. But there is a technical question I did want to ask, and either of you may have a response to this. This is just a factual question. The same submission talks about—and I didn't do international law at university, so I don't pretend to be an expert on that—whether a statement that was made at the time the declaration was entered into by Australia was a reservation in international law. So apparently when we entered into this treaty there was a declaration we made:

The Government of Australia … declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a).'

My question is: what is the current status of that wording, and how does that wording apply as a matter of fact, if you like, to the making of laws by the federal parliament? Do you have anything you can provide? I'm happy for you to take that on notice but I'm interested in any views you might have at this stage in relation to that.

Mr Muffett: That is certainly straying beyond my areas of expertise. I've got no reason to question the accuracy of the submission that there is that declaration that was lodged in 1975. But—

Senator SCARR: Could you take that on notice?

Mr Muffett: I can.

The response to the question is as follows:

Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) provides that States Parties undertake to adopt immediate and positive measures designed to eradicate all incitement of, or acts of racial hatred and discrimination. Article 4(a) provides that such measures shall include declaring as an offence punishable by law 'all dissemination of ideas based on racial superiority or hatred, incitement to racial violence, as well as all acts of violence or incitement to such acts' on racial grounds.

Article 20 of the CERD contemplates that States may make reservations at the time of ratification or accession. Australia lodged a reservation in relation to Article 4(a) at the time of ratification, stating that:

> Australia is not at present in a position specifically to treat as offences all the matters covered by article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such

> matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a).

Australia's reservation to Article 4(a) of the CERD remains in effect, and operates so as to modify the legal effect of Article 4(a) with respect to Australia. In this regard, the reservation is distinct from a 'declaration' or 'statement of interpretation', which outlines how a State interprets a particular provision of a treaty, but does not seek to modify its application.

Australia lodged its reservation to Article 4(a) of the CERD at the time of ratification because it was not in a position to treat all of the matters covered by that article as offences. However, we note that the *Racial Discrimination Act 1975* (Cth) and legislation in all states and territories, prohibit racial discrimination. In particular, 18C of the *Racial Discrimination Act 1975* makes it unlawful to do an act, otherwise than in private, that is reasonably likely to offend, insult, humiliate or intimidate another person because of their race, colour or national or ethnic origin.

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Paul Scarr asked the following question:

Senator SCARR: My last question is in relation to submissions we received from our Hindu community and our Buddhist community. While submissions weren't received from the Jainists, it's also noted that the swastika has particular significance in those religions and cultures, going back hundreds of years, and pre-dates the misappropriation of the symbol by the Nazis. There is a clear desire on the part of those communities that the bill on its face make it absolutely clear that the use of the symbol in those religious and cultural contexts should not be captured, but even more that it should perhaps be, on the face of the bill, recognised that the symbol had aetiology or origin predating its misapplication or misappropriation by the Nazis. In constructing a bill, is that the sort of thing you could maybe put in an overview of the offence or some sort of explanatory statement that could be embedded within the section to provide that guide? At the moment, as you'll know from reading the way the section's crafted, there's subsection (4), which is:

To avoid doubt, the display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol.

But I'm exploring in my own mind, in the context of drafting Commonwealth legislation of this nature, whether there's an even stronger indication that could be embedded in the face of the bill—sort of a traffic sign or something—that this section is not about the use of symbols which had bona fide genuine use in those religions, and in that way show a deep respect for people of those faiths. What can we do, Mr Muffett?

Mr Muffett: There are a few aspects. The first is around the actual elements of the offence and the defence itself. As you mentioned, subsection (4) very clearly says:

To avoid doubt, the display of a swastika in connection with Buddhism, Hinduism or Jainism does not constitute the display of a Nazi symbol.

In terms of broader messaging, I understand you're referring more to an objects or a preambular type clause.

Senator SCARR: Correct.

Mr Muffett: They are—I don't want to go as far as to say it's unprecedented in criminal law, but it would certainly be unusual in the Criminal Code to have such a provision. That content is generally included in things like the explanatory memorandum and in second reading speeches. Should the court find any uncertainty on the face of the legislation, it may rely on those materials. But an objects clause, or certainly a preamble to a criminal offence, would be unusual in the Commonwealth Criminal Code.

Senator SCARR: As a final point, could you take on notice to see whether you can find any examples— maybe if you ask your colleagues. I am alive to the fact of the profound sensitivities in relation to this. When you read the submission, it really does come through very strongly. And in my own mind, I'm trying to work out how we can accommodate that in some way if it's possible, over and above the second reading speech and the explanatory memorandum.

Mr Muffett: Let me double-check that there's nothing in the code of that nature. I'm fairly confident there's not. My hesitation is that there might be one lurking somewhere in an older provision there. So let me double check that and we can take down notes and get back to you

The response to the question is as follows:

There are no criminal offences in the *Criminal Code Act 1995* that contain a specific preamble or objects clause.