

Standing Committee on Law and Justice

# **Racial vilification law in New South Wales**

Ordered to be printed 3 December 2013 according to Standing  
Order 231.

New South Wales Parliamentary Library cataloguing-in-publication data:

**New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.**

Racial vilification law in New South Wales / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2013. – [xiv, 118] p. ; 30 cm. (Report ; no. 50)

Chair: Hon David Clarke, MLC

“December 2013”

ISBN 9781921286919

1. New South Wales. Anti-Discrimination Act 1977.
2. Race discrimination—Law and legislation—New South Wales.
  - I. Title.
  - II. Clarke, David.
  - III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 50.

342.944 (DDC22)

## How to contact the committee

Members of the Standing Committee on Law and Justice can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

---

The Director

---

Standing Committee on Law and Justice

---

Legislative Council

---

Parliament House, Macquarie Street

---

Sydney New South Wales 2000

---

Internet [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice)

---

Email [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)

---

Telephone 02 9230 3528

---

Facsimile 02 9230 2981

---

## Terms of reference

That the Committee inquire into and report on racial vilification law in New South Wales, in particular:

1. the effectiveness of section 20D of the *Anti-Discrimination Act 1977* which creates the offence of serious racial vilification;
2. whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and
3. any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech.<sup>1</sup>

These terms of reference were referred to the Committee by the Premier of New South Wales, the Hon Barry O'Farrell MP and were adopted by the Committee on 17 December 2012.

---

<sup>1</sup> *Minutes*, Legislative Council, 19 February 2013, p 1458.

## Committee membership

<b>The Hon David Clarke MLC</b>	Liberal Party	<i>Chair</i>
<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Deputy Chair</i>
<b>Mr Scot MacDonald MLC</b>	Liberal Party	
<b>The Hon Sarah Mitchell MLC</b>	The Nationals	
<b>The Hon Shaoquett Moselmane MLC</b>	Australian Labor Party	
<b>Mr David Shoebridge MLC</b>	The Greens	



# Table of contents

	<b>Chair's foreword</b>	<b>xi</b>
	<b>Summary of recommendations</b>	<b>xii</b>
<b>Chapter 1</b>	<b>Introduction</b>	<b>1</b>
	<b>Conduct of the Inquiry</b>	<b>1</b>
	Submissions	1
	Hearings	1
	<b>Structure of the report</b>	<b>1</b>
<b>Chapter 2</b>	<b>Anti-discrimination regulation</b>	<b>3</b>
	<b>Background</b>	<b>3</b>
	<b>International human rights obligations</b>	<b>5</b>
	<b>Commonwealth regulatory framework</b>	<b>6</b>
	<i>Racial Discrimination Act 1975</i> and the Australian Human Rights Commission	6
	Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012	7
	<b>New South Wales regulatory framework</b>	<b>8</b>
	<i>Anti-Discrimination Act 1977</i>	8
	Anti-Discrimination Board of NSW and the Equal Opportunity Division of the NSW Administrative Decisions Tribunal	11
	Office of the Director of Public Prosecutions	12
	<i>Crimes Act 1900</i> and the <i>Crimes (Sentencing Procedure) Act 1999</i>	13
	<b>Anti-discrimination policies and strategies</b>	<b>13</b>
	National Anti-Racism Strategy	14
	<b>Previous reviews into s 20D of the <i>Anti-Discrimination Act</i></b>	<b>15</b>
	Samios Report	15
	NSW Law Reform Commission Report	16
	Nicholas Cowdery's paper	16
	<b>Other state and international jurisdictions</b>	<b>18</b>
	Other state jurisdictions	18
	International jurisdictions	20
<b>Chapter 3</b>	<b>Effectiveness of s 20D</b>	<b>23</b>
	<b>Measuring effectiveness</b>	<b>23</b>
	<b>Absence of prosecutions</b>	<b>23</b>
	<b>Educative and symbolic function of s 20D</b>	<b>26</b>

<b>Chapter 4</b>	<b>Elements of the offence in s 20D</b>	<b>31</b>
	<b>Evidentiary threshold</b>	<b>31</b>
	<b>‘Public act’</b>	<b>35</b>
	Distinction between ‘public’ and ‘private’ acts	36
	‘Public communications’ and the internet	38
	<b>‘Incite’</b>	<b>40</b>
	Definition of incite	41
	‘Promote or express’	41
	Establishing ‘incitement’	43
	Intention to incite	46
	Impact of offending conduct	50
	<b>‘Hatred towards, serious contempt for, or severe ridicule of’</b>	<b>51</b>
	<b>‘On the ground of the race of the person or members of the group’</b>	<b>52</b>
	Scope of the current provision	53
	Religious vilification	55
	<b>‘By means which include’</b>	<b>57</b>
	Amending the means element	57
	Repealing the means element	58
<b>Chapter 5</b>	<b>Other reform proposals</b>	<b>63</b>
	<b>Racial harassment provision</b>	<b>63</b>
	<b>Civil penalty provision</b>	<b>67</b>
	<b>Maximum penalty</b>	<b>69</b>
	<b>Attorney General’s consent requirement</b>	<b>73</b>
	<b>Location of the offence of serious racial vilification</b>	<b>76</b>
<b>Chapter 6</b>	<b>Complaints procedure</b>	<b>81</b>
	<b>Serious racial vilification complaints procedure</b>	<b>81</b>
	<b>Lodgement of complaints</b>	<b>81</b>
	Standing to lodge vilification complaints	81
	Timeframe for lodging complaints	84
	<b>Steps for prosecution of serious racial vilification offences</b>	<b>85</b>
	Timeframes for prosecutions	86
	Development of a brief of evidence	88
	Police involvement in s 20D prosecutions	89
	<b>Reflecting proposed amendments in s 20C</b>	<b>93</b>

<b>Appendix 1</b>	<b>Submissions</b>	<b>95</b>
<b>Appendix 2</b>	<b>Witnesses</b>	<b>97</b>
<b>Appendix 3</b>	<b>Tabled documents</b>	<b>98</b>
<b>Appendix 4</b>	<b>Answers to questions on notice</b>	<b>99</b>
<b>Appendix 5</b>	<b>Sections 18C and 18D of the <i>Racial Discrimination Act 1975</i> (Cth)</b>	<b>100</b>
<b>Appendix 6</b>	<b>Minutes</b>	<b>102</b>
<b>Appendix 7</b>	<b>Dissenting statement</b>	<b>118</b>

---

## Case studies

---

Case study #1

4

---

## Chair's foreword

This Inquiry was referred to the Committee by the Premier, the Hon Barry O'Farrell MP, in November 2012.

The Inquiry looked specifically at s 20D of the *Anti-Discrimination Act 1977* (NSW) which sets out the criminal offence for serious racial vilification. To date there have been no prosecutions under this provision.

A number of inquiry participants viewed the absence of prosecutions as a sign that s 20D has been ineffective. Other participants, however, argued that a lack of prosecutions should not necessarily deem the provision ineffective as racial vilification legislation serves a number of purposes, which include having educative and symbolic functions and acting as a general deterrent.

In our view the effectiveness of s 20D has been hindered by a number of procedural impediments. We have therefore made several recommendations designed to overcome these issues. In particular, we have recommended that issues with timeframes for lodging and referring complaints be addressed, that the President of the Anti-Discrimination Board be permitted to directly refer serious racial vilification complaints to the NSW Police Force, and that the NSW Police Force be authorised to prepare a brief of evidence for the Director of Public Prosecutions, following the referral of a serious racial vilification complaint.

There were also a number of issues raised during the Inquiry relating to the substance of s 20D, such as whether the requirement to prove incitement should be modified or whether the means element should be amended or repealed. The Committee has made few recommendations on these issues as we wish to see the effect of our procedural recommendations first. The Committee believes that if the procedural issues with s 20D are resolved then many of the other matters raised during the Inquiry may no longer be an issue, or as significant of an issue. In order to assess this we have proposed that there be another review of the effectiveness of s 20D, to be conducted as soon as possible after five years from the implementation of any amendments to s 20D that have been recommended in this report.

On behalf of the Committee, I extend my gratitude to all the participants in this Inquiry, including those who made submissions, shared their experiences with us and provided expert advice.

I also express my thanks to my colleagues for their thoughtful contributions and unanimous approach to this important Inquiry. Our role has benefited from both our individual perspectives and our cooperative approach. I would also like to thank Teresa McMichael, Kate Mihaljek, Rebecca Main and Anna Perkins of the Committee Secretariat for their outstanding support throughout the Inquiry.

I commend the report to the Government.



**The Hon David Clarke MLC**  
Committee Chair

## Summary of recommendations

- Recommendation 1** **40**  
That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.
- Recommendation 2** **40**  
That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to insert an exception for private conduct, as per section 12 of the *Racial and Religious Tolerance Act 2001* (Vic).
- Recommendation 3** **50**  
That, for avoidance of doubt, the NSW Government amend section 20D of the *Anti-Discrimination Act 1977* to state that recklessness is sufficient to establish intention to incite.
- Recommendation 4** **55**  
That the NSW Government amend Division 3A of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.
- Recommendation 5** **62**  
That the NSW Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice as soon as possible after the period of five years of any amendments to Division 3A of the *Anti-Discrimination Act 1977*.
- Recommendation 6** **73**  
That the NSW Government review the adequacy of the maximum penalty units in section 20D of the *Anti-Discrimination Act 1977*, taking into account the maximum penalty units for comparable offences within the *Crimes Act 1900* and other Australian jurisdictions.
- Recommendation 7** **76**  
That the NSW Government repeal the requirement for the Attorney General's consent to prosecutions of serious racial vilification in section 20D(2) of the *Anti-Discrimination Act 1977*.
- Recommendation 8** **84**  
That the NSW Government amend the standing for the lodgement of complaints provision in section 88 of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.
- Recommendation 9** **85**  
That, for the purposes of racial vilification proceedings only, the NSW Government extend the time limit for commencing prosecutions under section 179 of the *Criminal Procedure Act 1986* to 12 months to be consistent with the time limit for lodging complaints under section 89B of the *Anti-Discrimination Act 1977*.
- Recommendation 10** **88**  
That, if Recommendation 7 is not implemented, the NSW Government extend the timeframe for the President of the Anti-Discrimination Board to refer complaints to the Attorney General under section 91(3) of the *Anti-Discrimination Act 1977*.

**Recommendation 11**

92

That the NSW Government amend section 91 of the *Anti-Discrimination Act 1977* to allow the President of the Anti-Discrimination Board of NSW to directly refer serious racial vilification complaints to the NSW Police Force.

**Recommendation 12**

92

That the NSW Government amend the *Anti-Discrimination Act 1977* to allow the NSW Police Force to prepare a brief of evidence for the Director of Public Prosecutions, following the referral of a serious racial vilification complaint.

**Recommendation 13**

92

That, if Recommendation 7 is implemented, 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 *Anti-Discrimination Act 1977*.

**Recommendation 14**

93

That the NSW Police Force provide training to its members about the offence of serious racial vilification in section 20D of the *Anti-Discrimination Act 1977*.

**Recommendation 15**

93

That the NSW Government amend section 20C of the *Anti-Discrimination Act 1977*, where appropriate, to reflect any amendments made to section 20D.



# Chapter 1 Introduction

This chapter provides an overview of the Inquiry process and an outline of the structure of the report.

## Conduct of the Inquiry

- 1.1 The terms of reference for the Inquiry were referred to the Committee by the Premier, the Hon Barry O'Farrell MP on 20 November 2012. The terms of reference are reproduced on page iv.

### Submissions

- 1.2 The Committee invited submissions through advertisements in the *Sydney Morning Herald* and *The Daily Telegraph*. The Committee wrote directly to a number of stakeholders to invite them to make a submission to the Inquiry. The Committee also emailed ethnic groups through the EmailLink service provided by the Community Relations Commission for a Multicultural NSW to increase public awareness of the Inquiry.
- 1.3 The Committee received 45 submissions and one supplementary submission. Submissions were received from a range of interested stakeholders including the Anti-Discrimination Board of NSW, the Department of Justice and Attorney General, the Office of the Director of Public Prosecutions, legal professional bodies, community groups and individuals.
- 1.4 A full list of submission authors can be found in Appendix 1.

### Hearings

- 1.5 The Committee held two public hearings at Parliament House on 5 and 8 April 2013.
- 1.6 The Committee received evidence from a number of organisations, including representatives from the Anti-Discrimination Board of NSW, the International Commission of Jurists Australia, the Law Society of NSW, the NSW Council for Civil Liberties, the Institute of Public Affairs, the NSW Jewish Board of Deputies, the Aboriginal Legal Service and the NSW Bar Association, as well as Professors Simon Rice OAM and Neil Rees.
- 1.7 A full list of witnesses is provided in Appendix 2. Transcripts of the hearings are available on the Committee's website.

## Structure of the report

- 1.8 The next chapter, **Chapter 2**, provides an overview of the regulatory frameworks that govern racial vilification and anti-discrimination. It also details earlier reviews of the *Anti-Discrimination Act 1977* and concludes with a brief examination of racial vilification provisions in other jurisdictions.

- 1.9** **Chapter 3** examines the effectiveness of s 20D of the *Anti-Discrimination Act*. The chapter discusses the different views regarding the absence of serious racial vilification prosecutions and considers the educative and symbolic function of the provision.
- 1.10** **Chapter 4** commences with a discussion of the concerns raised by some inquiry participants about the high evidentiary threshold set by s 20D and whether it poses too significant of an impediment to potential prosecutions. The chapter then provides a detailed analysis of the individual elements of the offence.
- 1.11** **Chapter 5** discusses other reform proposals to s 20D of the *Anti-Discrimination Act* made by stakeholders, including suggestions to introduce a racial harassment offence or civil penalty provision, increase the penalty units associated with the offence, remove the Attorney General's consent requirement for prosecution and relocate the provision to the *Crimes Act*.
- 1.12** The final chapter, **Chapter 6**, considers the serious racial vilification complaints procedure and proposes a new model for s 20D prosecutions.

## Chapter 2 Anti-discrimination regulation

This chapter provides an overview of the regulatory frameworks in New South Wales and the Commonwealth which govern racial vilification and anti-discrimination. It also considers racial vilification offences in other jurisdictions and provides a summary of previous reviews into s 20D of the *Anti-Discrimination Act*.

### Background

2.1 Research conducted by the Australian Human Rights Commission in 2012 for the National Anti-Racism Strategy<sup>2</sup> found that almost two thirds of respondents had experienced racism and almost 90 per cent considered racism an extremely or very important issue in Australia.<sup>3</sup>

2.2 Some inquiry stakeholders shared their experiences of racism with the Committee. For example, Mr Kenrick Cheah, Vice-President of the Chinese Australian Forum of NSW, said that as an Australian person of Chinese descent, he had at times been made to feel like an inferior citizen:

It comes to a point where it is so ingrained in society that you take it for granted that is how life is and that is not what a fair and equal society should be like. You get treated on some occasions like an inferior Australian and there is no reason why you should be... I was born here. My parents were migrants and I grew up knowing that certain things that happen to you you have to accept because you look different or sound different and that is not fair.<sup>4</sup>

2.3 Mr Peter Chan, Secretary of the Chinese Australian Forum of NSW, also recounted incidences of racial discrimination since the 1990's including personal experiences of being told to "go back to where you came from."<sup>5</sup>

2.4 Another inquiry participant, Mr Anthony Pang, shared a personal account of being victimised because of his race:

I, too, was physically assaulted on a bus, during the height of Pauline Hanson, when an old man sitting next to me on a bus in George St, Chinatown deliberately and viciously elbowed me in my ribs as he was getting up and told me "go back where you come from Chinaman". This was without warning or provocation, as I had not been in any communication with this man. It was such a shock that I practically did not know how to respond.<sup>6</sup>

---

<sup>2</sup> The National Anti-Racism Strategy aims to educate the community about racism, and promote understanding on how it can be prevented and reduced. See paragraphs 2.61-2.62 for more information about the Strategy.

<sup>3</sup> Australian Human Rights Commission, *National Anti-Racism Strategy, Consultation Report*, 2012, p 4.

<sup>4</sup> Evidence, Mr Kenrick Cheah, Vice-President, Chinese Australian Forum of NSW, 8 April 2013, p 33.

<sup>5</sup> Evidence, Mr Peter Chan, Secretary, Chinese Australian Forum of NSW, 8 April 2013, p 33.

<sup>6</sup> Submission 37, Mr Anthony Pang, p 4.

- 2.5** The Executive Council of Australian Jewry compiled a report on incidents of anti-Semitism in Australia over the past 23 years and said that there is strong evidentiary basis for the contention that racism exists and has worsened over time.<sup>7</sup>
- 2.6** Around the beginning of this of the Inquiry a spate of racist attacks occurred on public transport in New South Wales and other states which received significant media coverage.<sup>8</sup> An incident that was referred to regularly during the Inquiry is described in the case study below.

### Case study #1<sup>9</sup>

On Saturday 30 March 2013 a Korean tourist was travelling on a Sydney bus with her nephew, Mr Kim, when she was subjected to racist obscenities, some of which incorrectly identified the woman as Japanese, by a middle-aged Caucasian man.

It is believed the incident started when Mr Kim's aunt accidentally bumped into the alleged offender on the bus, and although Mr Kim apologised on her behalf, the man verbally abused the pair.

While certain passengers on the bus attempted to intervene, others ignored the situation.

Mr Kim said that his aunt had been traumatised by the experience but that they would not be pursuing the matter. However it has since been reported that the Police have launched an investigation into the incident.

- 2.7** Mr Stepan Kerkyasharian, President of the Anti-Discrimination Board of NSW, told the Committee that race-hate speech can cause psychological and social harm:

... it is important to recognise that vilification has the potential to cause real harm. It is widely expected that speech promoting prejudice and hatred can cause significant psychological and social harm to individuals from targeted groups. Indeed, the person who lodges a complaint is not the only person affected by the vilification, because hate speech does not just have one victim.<sup>10</sup>

- 2.8** According to the Community Relations Commission for a Multicultural NSW, racism has led to minority groups feeling ostracised and has undermined their sense of belonging.<sup>11</sup> The Ethnic Communities Council of NSW suggested that “[w]hen individual incidences of incitement go undeterred, then community wide incitement and violence can follow.”<sup>12</sup> The Ethnic Communities Council also stated that racial vilification can have an economic impact on the community by reducing productivity in the business sector, placing a greater burden on the State Budget for social services and security, and having a detrimental effect on trade and tourism.<sup>13</sup>

<sup>7</sup> Evidence, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, 8 April 2013, p 40.

<sup>8</sup> R Olding, ‘Racist rant: tourists abused on Sydney bus’, *The Sydney Morning Herald*, 1 April 2013.

<sup>9</sup> R Olding, ‘Racist rant: ‘Not the first time I’ve been abused,’ says victim’, *The Sydney Morning Herald*, 3 April 2013.

<sup>10</sup> Evidence, Mr Stepan Kerkyasharian, President, Anti-Discrimination Board of NSW, 5 April 2013, p 3.

<sup>11</sup> Submission 8, Community Relations Commission For a Multicultural NSW, p 1.

<sup>12</sup> Submission 20, Ethnic Communities Council of NSW, p 1.

<sup>13</sup> Submission 20, Ethnic Communities Council of NSW, pp 1-2.

## International human rights obligations

**2.9** Australia has international human rights obligations to prohibit racial hatred. These obligations arise from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on the Elimination of all forms of Racial Discrimination (ICERD), both of which Australia is signatory to. This section discusses the obligations imposed by these conventions.

**2.10** The ICCPR both protects and limits freedom of expression. The pertinent articles for this Inquiry are as follows:

### Article 19

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary...

### Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

**2.11** However, when Australia ratified the ICCPR in 1980 it made a reservation to Article 20, stating that the Commonwealth and its constituent states had already criminalised public order offences and reserving the right not to introduce any further legislative provisions on these matters.<sup>14</sup> The United Nations Human Rights Committee<sup>15</sup> has recommended that Australia's reservation be withdrawn.<sup>16</sup>

**2.12** In regard to Australia's obligations under the ICERD, Article 4(a) requires State parties to:

- take positive steps to eradicate all incitement to, or acts of, racial discrimination and hatred, and
- declare an offence punishable by law the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination; and acts of racial violence or incitement to such acts.<sup>17</sup>

<sup>14</sup> United Nations Treaty Collection, *Declarations and Reservations, Australia*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

<sup>15</sup> The UN Human Rights Committee is composed of 18 independent experts from around the world who are 'persons of high moral character and recognised competence in the field of human rights'.

<sup>16</sup> Evidence, Mr Kerkyasharian, 5 April 2013, pp 2-3.

<sup>17</sup> Submission 10, Anti-Discrimination Board of NSW, p 1 and Article 4, United Nations, *International Convention on the Elimination of all Forms of Racial Discrimination*.

- 2.13** Since ratifying the ICERD in 1975, Australia has also had a reservation to Article 4(a), stating that the Commonwealth is not in a position to specifically criminalise all of the offences set out in the Article, and that its existing criminal law already deals with matters such as the maintenance of public order, public mischief, assault, riot, criminal libel and conspiracy.<sup>18</sup>
- 2.14** In line with this reservation neither the *Racial Discrimination Act 1975* (Cth) nor any other Commonwealth laws contain a criminal offence of racial hatred or vilification.<sup>19</sup> As such, the Commonwealth has relied upon racial vilification legislation in New South Wales and other states and Territories to help fulfil its international human rights obligations.<sup>20</sup>
- 2.15** The Committee on the Elimination of Racial Discrimination<sup>21</sup> has recommended that Australia withdraw its reservation to Article 4(a) of the ICERD.<sup>22</sup>

## Commonwealth regulatory framework

- 2.16** The Commonwealth and New South Wales operate separate regulatory frameworks to govern racial vilification. Inquiry stakeholders encouraged the Committee to consider the operation of s 20D of the *Anti-Discrimination Act* within the overall framework of racial vilification and anti-racial discrimination law across both jurisdictions.<sup>23</sup>
- 2.17** This section provides a brief overview of Commonwealth racial vilification legislation and the role of the Australian Human Rights Commission. It also discusses the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012.

### *Racial Discrimination Act 1975* and the Australian Human Rights Commission

- 2.18** The origin of national racial vilification legislation extends to the Racial Discrimination Bill 1974 which included a racial vilification provision. However the provision was deleted prior to the enactment of the *Racial Discrimination Act 1975* due to concerns about its implications for freedom of speech.<sup>24</sup>

---

<sup>18</sup> Submission 32, NSW Young Lawyers, pp 3-4.

<sup>19</sup> Submission 12, Law Society of NSW, p 2. The Commonwealth does provide criminal offences related to intentionally urging violence against groups or members of groups distinguished by, amongst other features, race, nationality, and national or ethnic origin, under ss 80.2(A) and 80.2(B) of the *Criminal Code Act 1995* (Cth), Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>20</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, pp 3-4.

<sup>21</sup> The Committee on the Elimination of Racial Discrimination is composed of 18 independent experts who are ‘persons of high moral standing and acknowledged impartiality’.

<sup>22</sup> Submission 10, Anti-Discrimination Board of NSW, p 2 and Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, 5 April 2013, pp 18-19.

<sup>23</sup> Evidence, Ms Catherine Mathews, General Executive, NSW Labor Lawyers, 5 April 2013, p 26.

<sup>24</sup> Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia*, (Sydney Institute of Criminology, 2002), pp 35-36.

- 2.19** Racial hatred bills were reintroduced into the Commonwealth Parliament in 1992 and 1994.<sup>25</sup> Ultimately the *Racial Hatred Act* was inserted into the *Racial Discrimination Act* as Part IIA “Prohibition of offensive behaviour based on racial hatred.” The *Racial Discrimination Act* only provides civil remedies to racial vilification incidents.
- 2.20** In *Regulating Racism, Racial Vilification Laws in Australia* Professor Luke McNamara identified three major themes for the enactment and operation of national vilification legislation: the reluctance to employ criminal law to regulate racial vilification; the influence of free speech sensitivity; and the valuable contribution of the civil human rights dispute resolution process.<sup>26</sup>
- 2.21** The relevant provisions of the *Racial Discrimination Act* for this Inquiry are s 18C, which sets out unlawful race hate acts, and s 18D, which provides exemptions for certain behaviour.<sup>27</sup> Sections 18C and 18D are provided in Appendix 5.
- 2.22** Part IIB of the *Human Rights Commission Act 1986* sets out the regulatory framework for the enforcement of Part IIA of the *Racial Discrimination Act*. The Australian Human Rights Commission is primarily responsible for handling racial vilification complaints brought under the *Racial Discrimination Act*,<sup>28</sup> while the Federal Circuit Court of Australia<sup>29</sup> and the Federal Court of Australia Commission adjudicate complaints in certain circumstances.

### **Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012**

- 2.23** On 20 November 2012, the Commonwealth Government released an Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (the Draft Bill). The Draft Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for consideration the following day.<sup>30</sup>
- 2.24** The Draft Bill consolidated the five existing Commonwealth Acts<sup>31</sup> which deal with human rights and anti-discrimination laws, including the *Racial Discrimination Act*, into a single Act. The Draft Bill aimed to:
- lift differing levels of protections to the highest current standard, in order to resolve gaps and inconsistencies without diminishing protections;
  - ensure that clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcomes;
  - enhance protections where the benefits outweigh any regulatory impact;

<sup>25</sup> Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia*, (Sydney Institute of Criminology, 2002), p 41.

<sup>26</sup> Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia*, (Sydney Institute of Criminology, 2002), pp 108-109.

<sup>27</sup> Part IIA *Racial Discrimination Act 1975* (Cth).

<sup>28</sup> Note within s 18C of the *Racial Discrimination Act 1975* (Cth).

<sup>29</sup> Formerly known as the Federal Magistrates Court of Australia.

<sup>30</sup> Legal and Constitutional Affairs Legislation Committee, Senate, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), p 1.

<sup>31</sup> The *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004*, and the *Australian Human Rights Commission Act 1986*.

- encourage voluntary measures that business can take to assist their understanding of obligations and reduce occurrences of discrimination; and
- establish a streamlined complaints process, to make it more efficient to resolve disputes that do arise.<sup>32</sup>

**2.25** The Senate Legal and Constitutional Affairs Legislation Committee’s inquiry generated a great deal of public debate and involvement and recommended a raft of amendments to the Bill:

Over the course of the committee’s inquiry, significant issues have been brought to light regarding the drafting of some sections of the Draft Bill. It is clear that substantial amendments are necessary if the consolidated legislation is to fulfil its stated intent of providing a clearer, simpler law...<sup>33</sup>

**2.26** In March 2013 the Commonwealth Government put the overhaul of the anti-discrimination laws on hold.<sup>34</sup>

## **New South Wales regulatory framework**

**2.27** This section outlines the operation of the New South Wales civil and criminal regulatory framework for racial vilification complaints. It considers the *Anti-Discrimination Act 1977* and the roles of the Anti-Discrimination Board of NSW (the Board), the Equal Opportunity Division of the NSW Administrative Decisions Tribunal and the Office of the Director of Public Prosecutions. The section concludes with a brief discussion of the *Crimes Act 1900* and the *Crimes (Sentencing Procedure) Act 1999*.

### ***Anti-Discrimination Act 1977***

**2.28** Racial vilification amendment bills were introduced into the NSW Parliament in 1987 and 1989 (the initial bill lapsed because of the 1988 State election). The Anti-Discrimination (Racial Vilification) Amendment Bill 1989 introduced the following two-tier regulatory system for racial vilification:

- a civil system, which provides for complaints to be heard by the Anti-Discrimination Board (the Board) and the Equal Opportunity Division of the NSW Administrative Decisions Tribunal, and
- a criminal system, which allows for alleged offences to be heard in the conventional criminal justice system but is procedurally linked to the complaints-based civil system.<sup>35</sup>

**2.29** This dual regulatory system is often described as the “NSW model” and has been replicated with certain variations across most other states and the Australian Capital Territory.<sup>36</sup>

---

<sup>32</sup> Legal and Constitutional Affairs Legislation Committee, Senate, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), p 1.

<sup>33</sup> Legal and Constitutional Affairs Legislation Committee, Senate, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), p 83.

<sup>34</sup> Daniel Hurst, ‘Anti-discrimination laws overhaul delayed’, *Sydney Morning Herald*, 21 March, 2013.

<sup>35</sup> Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia*, (Sydney Institute of Criminology, 2002), pp 121-126.

Professor Simon Rice OAM, Director of Law Reform and Social Justice, College of Law at the Australian National University, and Professor Neil Rees, Professor of Law, School of Law at the University of the Sunshine Coast, noted that civil and criminal racial vilification provisions serve different purposes – a criminal provision protects individuals against harm, while the civil complaint provision has a broader aim to prevent incitement more generally.<sup>37</sup>

**2.30** The Anti-Discrimination (Racial Vilification) Amendment Bill 1989 introduced the first law in the world that criminalised the incitement of hatred, serious contempt, or severe ridicule of person(s) on the basis of race or membership in a group by threatening harm or inciting others to threaten harm.<sup>38</sup>

**2.31** In his Second Reading speech the Hon John Dowd, the then Attorney General, said that the Bill:

- drew on Australia’s international obligations and sought to balance the right to freedom of expression and the right to an existence free from racial vilification
- provided distinct civil and criminal provisions
- would deter serious racial vilification and reserve prosecution for only the most serious matters, and
- had a significant educative and symbolic function.<sup>39</sup>

**2.32** Professor McNamara noted that the Bill passed with little parliamentary debate due to bipartisan support and an understanding that it “... struck an acceptable balance between the objective of providing protection to victims of racial vilification and the objective of respecting freedom of speech.”<sup>40</sup>

**2.33** Other key legislation in this area includes the *Community Relations Commission and Principles of Multiculturalism Act 2000*, which recognises and values different linguistic, religious, racial and ethnic backgrounds and promotes equal rights and responsibilities for all residents of New South Wales.<sup>41</sup> The *Community Relations Commission and Principles of Multiculturalism Act* established the Community Relations Commission for a Multicultural NSW which “... promotes equal rights and responsibilities for all residents of New South Wales, and a positive policy program that gives effect, among other goals, to the prevention of racism and racial vilification.”<sup>42</sup>

<sup>36</sup> Gareth Griffiths, ‘Racial vilification laws: The Bolt case from a State perspective’, *E-brief*, NSW Parliamentary Library Research Service, October 2011, p 3.

<sup>37</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, pp 10-11.

<sup>38</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 2.

<sup>39</sup> *Hansard*, Legislative Assembly, 4 May 1989, pp 7488-7489.

<sup>40</sup> Luke McNamara, *Regulating Racism, Racial Vilification Laws in Australia*, (Sydney Institute of Criminology, 2002), p 127.

<sup>41</sup> Submission 26, Department of Attorney General and Justice, p 8.

<sup>42</sup> Submission 8, Community Relations Commission for a Multicultural NSW, p 1.

**Key sections of the *Anti-Discrimination Act***

**2.34** The key sections of the *Anti-Discrimination Act* for this Inquiry are:

- s 20B, which sets out the definition of a ‘public act’
- s 20C, which provides the civil provision and the defences for such an act
- s 20D, which provides the criminal offence of serious racial vilification, including the maximum penalty units and the requirement for the Attorney General’s consent for prosecution, and
- Part 9, which sets out the functions of the President of the Anti-Discrimination Board, the Tribunal and the Board and includes the racial vilification complaint procedure.<sup>43</sup>

**2.35** See Chapter 4 for further discussion about s 20B and s 20D, and Chapter 6 for examination of Part 9.

**2.36** Section 20C, which sets out the civil offence for racial vilification, reads:

**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.

**2.37** Section 20D sets out the criminal offence for serious racial vilification, and reads:

**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.

---

<sup>43</sup> Sections 20B, 20C and 20D, *Anti-Discrimination Act 1977*.

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.

- 2.38** Inquiry stakeholders noted that s 20D of the *Anti-Discrimination Act* includes the same conduct as the civil provision in s 20C, with an additional ‘means’ element:

The level of conduct subject to criminal sanctions in NSW is defined as the same kind of conduct, but with the aggravating feature that the incitement by public act includes threatening or inciting others to threaten physical harm towards people or property.<sup>44</sup>

- 2.39** The other significant difference is that the criminal offence under s 20D requires proof of intent to ensure that prosecution will be limited to only very serious cases of racial vilification.<sup>45</sup>

- 2.40** The ‘means’ element and the requirement for proof of intent are examined in more detail in Chapter 4.

### **Anti-Discrimination Board of NSW and the Equal Opportunity Division of the NSW Administrative Decisions Tribunal**

- 2.41** The Anti-Discrimination Board of NSW and the Equal Opportunity Division of the NSW Administrative Decisions Tribunal play key roles in addressing discrimination across the State. The Board seeks to provide services that promote equality and eliminate discrimination across New South Wales:

The functions of the Anti-Discrimination Board of NSW (the Board) include the acquisition and dissemination of knowledge on all matters relating to the elimination of discrimination and the achievement of equal rights, and consultation with governmental and other groups in order to ascertain means of improving services and conditions affecting minority groups and other groups which are the subject of discrimination and inequality.<sup>46</sup>

- 2.42** The Board has five members and vests most of its powers in the President.<sup>47</sup>
- 2.43** The Board is the first point of contact for all racial vilification complaints. The President of the Board is responsible for investigating complaints. Following an initial confidential investigation, the President may either:
- refer a racial vilification matter to the Board’s conciliation service

<sup>44</sup> Submission 26, Department of Attorney General and Justice, p 2. Also see Submission 31, NSW Bar Association, p 2.

<sup>45</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 2.

<sup>46</sup> Submission 10, Anti-Discrimination Board of NSW, p 1.

<sup>47</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 5.

- refer a serious racial vilification matter on to the Director of Public Prosecutions (DPP) for further investigation, or
- dispense the matter.

**2.44** The Board received 31 racial vilification enquiries and 15 racial vilification complaints in 2011-2012. The number of racial vilification complaints has decreased over the past two years.<sup>48</sup> The Board finalised 92.5 per cent of all complaints within 12 months of receipt and the average time to finalise complaints was 5.9 months in 2011-2012.<sup>49</sup>

**2.45** See Chapter 6 for further discussion about the serious racial vilification complaints procedure.

**2.46** The main function of the Equal Opportunity Division of the NSW Administrative Decisions Tribunal is to resolve complaints about alleged breaches of the *Anti-Discrimination Act* as referred by the President of the Board. Other functions include deciding whether to give permission for a complaint to proceed after it has been declined by the President and deciding whether to register a conciliation agreement made at the Board so that it can be enforced.<sup>50</sup>

### **Office of the Director of Public Prosecutions**

**2.47** Section 20D(2) of the *Anti-Discrimination Act* requires the Attorney General to consent to prosecutions of serious racial vilification offences. However the Attorney General delegated this power to the Director of Public Prosecutions in 1990.<sup>51</sup>

**2.48** The Office of the Director of Public Prosecutions (ODPP) advised that its prosecutorial and investigative responsibilities include:

- prosecuting indictable offences in the District and Supreme Courts of NSW, and certain matters in the Local Courts, and
- advising the police or other investigating agencies as to whether or not proceedings should be instituted in accordance with the ODPP Guidelines.<sup>52</sup>

**2.49** Since 1992 the ODPP has received 11 referrals from the Board concerning possible serious racial vilification offences. However no prosecutions have been instituted.<sup>53</sup> The ODPP referred two of the 11 cases to the police for further investigation but the results of those investigations did not produce enough evidence to warrant prosecution for an offence.<sup>54</sup>

**2.50** See Chapter 5 for further discussion about the Attorney General's consent power and Chapter 6 for an analysis of the serious racial vilification complaints procedure.

---

<sup>48</sup> Anti-Discrimination Board, *Annual Report 2011-2012*, pp 12-14.

<sup>49</sup> Anti-Discrimination Board, *Annual Report 2011-2012*, p 16.

<sup>50</sup> Administrative Decisions Tribunal, *Anti-Discrimination cases – Equal Opportunity Division*, [www.adt.lawlink.nsw.gov.au/adt/administrative\\_eo\\_division.html](http://www.adt.lawlink.nsw.gov.au/adt/administrative_eo_division.html).

<sup>51</sup> Submission 10, Anti-Discrimination Board of NSW, p 5.

<sup>52</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

<sup>53</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

<sup>54</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

### ***Crimes Act 1900 and the Crimes (Sentencing Procedure) Act 1999***

- 2.51** The *Crimes Act 1900* and the *Crimes (Sentencing Procedure) Act 1999* contain similar offences to the serious racial vilification offence set out in s 20D of the *Anti-Discrimination Act*.
- 2.52** The *Crimes Act* is the primary instrument for regulating criminal offences in New South Wales. Offences in the *Crimes Act* that are similar to the serious racial vilification offence in s 20D of the *Anti-Discrimination Act* include:
- common assault
  - affray
  - threatening to destroy or damage property
  - intimidation or annoyance by violence or otherwise.<sup>55</sup>
- 2.53** Additionally, if any such offence is motivated by hatred or prejudice against a group of people to which an offender believes any victim belongs, that is an aggravating factor for the purpose of sentencing (s 21A(2)(h) *Crimes (Sentencing Procedure) Act 1999*).<sup>56</sup>
- 2.54** The Department of Attorney General and Justice explained that the current serious racial vilification offence is distinguished from the offences within the *Crimes Act* as it is the only criminal offence in New South Wales that specially targets the incitement of racial hatred by means of threatened violence, where the threat or incitement need not be directed towards a specific individual.<sup>57</sup>
- 2.55** The interaction between s 20D of the *Anti-Discrimination Act* and the criminal code is analysed in Chapter 5.

### **Anti-discrimination policies and strategies**

- 2.56** Many stakeholders believed that the government should offer non-legislative measures to complement legislative efforts to combat discrimination and vilification, arguing that the law is most effective when it works “hand-in-hand” with education.<sup>58</sup> For example the Department of Attorney General and Justice noted the important role education and awareness-raising campaigns play in overcoming racial vilification:

Legislative responses alone are unlikely to be an effective way to combat racial vilification in NSW or to mitigate the risk of it occurring. Measures such as education, awareness raising, promoting respect and celebrating cultural diversity also have an important role to play. By supporting positive and respectful relationships, non-legislative responses such as these can act to address the causes of racial vilification at a grassroots level.<sup>59</sup>

<sup>55</sup> ss 61, 93B, 199(1), 545B, *Crimes Act 1900*.

<sup>56</sup> Submission 6, Office of the Office of the Director of Public Prosecutions, p 4 and Submission 26, Department of Attorney General and Justice, pp 6-7.

<sup>57</sup> Submission 26, Department of Attorney General and Justice, pp 6-7.

<sup>58</sup> Evidence, Mr Wertheim, 8 April 2013, p 40.

<sup>59</sup> Submission 26, Department of Attorney General and Justice, p 14.

- 2.57** Likewise, the Chinese Australian Forum of NSW and Australian Lawyers for Human Rights strongly supported community education programs such as the *Racism. It stops with me campaign*.<sup>60</sup> The campaign seeks to raise awareness about racism and empower individuals and organisations to take positive steps to overcome racism.<sup>61</sup>
- 2.58** The NSW Council for Reconciliation also recommended that "... governments must continue to support broad anti-racism education, anti-racism activities and organisation and the growing of rights respecting culture. In particular, education must be conducted to alert the wider community that serious racial vilification... is, and should be, a crime."<sup>62</sup>
- 2.59** The Human Rights Law Centre provided a list of complementary policies, procedures and other measures that could be used to address institutionalised racism and racial vilification:
- Complementary policies, procedures and other measures to address institutionalised racism and racial vilification should be retained and enhanced. Complementary measures should include, among other initiatives:
- strong policy statements to make it clear that acts of racial hatred and vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection are prohibited in legislation, are unacceptable and dangerous to the community;
  - broad education and social marketing campaigns with a view to combating existing prejudices and to promoting understanding and tolerance between racial and ethnic groups and the role of prohibitions on racial vilification; and
  - training for public authorities and law enforcement officers about the prohibitions on serious vilification on the grounds of race, homosexuality, transgender status or status of HIV/AIDS infection including how complaints of vilification should be recorded, reported and investigated.<sup>63</sup>
- 2.60** Similarly, the NSW Aboriginal Land Council called on the Government to have "... an active program to eradicate racist messages from policies, from institutions, from the labour market and from the media."<sup>64</sup>

### National Anti-Racism Strategy

- 2.61** In its 2011 multicultural policy, *The People of Australia*, the Commonwealth Government committed to develop and implement a National Anti-Racism Strategy. The Strategy aims "[t]o promote a clear understanding in the Australian community of what racism is, and how it can be prevented and reduced."<sup>65</sup> The objectives of the Strategy are to:
- create awareness of racism and how it affects individuals and the broader community

<sup>60</sup> Evidence, Mr Chan, 8 April 2013, p 35 and Submission 33, Australian Lawyers for Human Rights, p 4.

<sup>61</sup> Australian Human Rights Commission, *About the campaign*, <http://itstopswithme.humanrights.gov.au/it-stops-with-me/about-campaign>.

<sup>62</sup> Submission 25, NSW Council for Reconciliation, p 6.

<sup>63</sup> Submission 35, Human Rights Law Centre, p 18.

<sup>64</sup> Submission 23, NSW Aboriginal Land Council, p 5.

<sup>65</sup> Australian Human Rights Commission, *National Anti-Racism Strategy*, 2012 p 2.

- identify, promote and build on good practice initiatives to prevent and reduce racism, and
- empower communities and individuals to take action to prevent and reduce racism and to seek redress when it occurs.<sup>66</sup>

**2.62** The National Anti-Racism Strategy is grounded in extensive research undertaken by the Australian Human Rights Commission which found that:

... some people in Australia are more vulnerable to racism and discrimination, particularly Aboriginal and Torres Strait Islander peoples and people from culturally and linguistically diverse backgrounds. Members of certain religious groups also experience discrimination on the basis of their race or ethnicity.<sup>67</sup>

### Previous reviews into s 20D of the *Anti-Discrimination Act*

**2.63** Earlier reviews of the effectiveness of s 20D of the *Anti-Discrimination Act* include:

- *Report on the Review by the Hon James Samios, MBE, MLC, into the Operation of the Racial Vilification Law of New South Wales* (Samios Report), by the Hon James Samios, MBE, MLC
- *Review of the Anti-Discrimination Act 1977 (NSW)*, by the NSW Law Reform Commission
- *Review of Law of Vilification: Criminal Aspects*, by the then Director of Public Prosecutions, Mr Nicholas Cowdery AM QC.

**2.64** An outline of these reviews is provided in the following sections. The reviews made a number of recommendations, many of which were also canvassed during the Inquiry and which are considered in more detail throughout this report.

#### Samios Report

**2.65** The first review of s 20D of the *Anti-Discrimination Act* was undertaken by the Hon James Samios MLC in 1992. The ensuing report was presented to the NSW Government on 27 August 1992.

**2.66** Overall, the Samios Report concluded that "... New South Wales has struck a good balance between reliance on the civil and on the criminal law."<sup>68</sup> However the Samios Report did make a number of recommendations to improve the Act. Recommendations that have been implemented include extending the definition of race to include 'ethno-religious' and increasing the maximum penalty for serious racial vilification offences.<sup>69</sup> Recommendations that were not implemented include:

- extending coverage of the provision to persons of a presumed race

<sup>66</sup> Australian Human Rights Commission, *National Anti-Racism Strategy*, 2012 p 2.

<sup>67</sup> Australian Human Rights Commission, *National Anti-Racism Strategy*, 2012 p 5.

<sup>68</sup> James Samios, *Report on the Review by the Hon James Samios, MBE, MLC, into the Operation of the Racial Vilification Law of New South Wales*, (Parliament of New South Wales, 1992), p 13.

<sup>69</sup> Submission 26, Department of Attorney General and Justice, p 2.

- relocating the offence to the (now repealed) *Summary Offences Act 1988*, and
- vesting the power of consent with the Director of Public Prosecutions rather than the Attorney General.<sup>70</sup>

### **NSW Law Reform Commission Report**

- 2.67** The NSW Law Reform Commission concluded its extensive *Review of the Anti-Discrimination Act 1972* in 1999 and gave detailed consideration to the effectiveness of the serious racial vilification provision.
- 2.68** The Law Reform Commission found that s 20D of the *Anti-Discrimination Act* strikes an effective balance between adequately dealing with vilification and yet does not impose unwarranted restrictions on free speech. The report did not propose an extension of the conduct caught by the current vilification provisions.<sup>71</sup>
- 2.69** The report only made one specific recommendation in respect to s 20D of the Act – that it be relocated to the *Crimes Act*.<sup>72</sup> (This recommendation was also raised during this Inquiry and is discussed in Chapter 5). However, it did make certain recommendations concerning potential amendments to s 20C of the Act that would impact the serious racial vilification provision in s 20D, including:
- Recommendation 92 - The prohibition on vilification in the ADA should not be limited by reference to “the public” but by reference to a “public communication”
  - Recommendation 93 - Provide expressly that proof of specific intention to incite is not required for establishing vilification
  - Recommendation 94 - Provide that the capacity to incite should be assessed in the circumstances of the particular case and without assuming that the audience is either malevolently included or free from susceptibility to prejudice.<sup>73</sup>
- 2.70** None of the Law Reform Commission’s recommendations have been implemented.<sup>74</sup>

### **Nicholas Cowdery’s paper**

- 2.71** In 2009 Mr Nicholas Cowdery AM QC, the then Director of Public Prosecutions, presented a paper that discussed the criminal aspects of racial vilification law in New South Wales.

---

<sup>70</sup> James Samios, *Report on the Review by the Hon James Samios, MBE, MLC, into the Operation of the Racial Vilification Law of New South Wales*, (Parliament of New South Wales, 1992), pp vi-vii.

<sup>71</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1972*, Report 92 (1999), pp 525-526.

<sup>72</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1972*, Report 92 (1999), p 553.

<sup>73</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1972*, Report 92 (1999), pp xlvi-xlvii.

<sup>74</sup> Submission 6, Office of the Director of Public Prosecutions, p 5 and Submission 26, Department of Attorney General and Justice, p 3.

**2.72** The paper discussed the premise that no prosecutions have not been instituted under s 20D of the *Anti-Discrimination Act* because of an inability to adduce sufficient evidence to prove incitement:

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.<sup>75</sup>

**2.73** Mr Cowdery's paper explored the evolution of the serious racial vilification offence in New South Wales and possible avenues to overcome the absence of prosecutions, including aligning s 20D of the *Anti-Discrimination Act* with the analogous Canadian offence:

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).<sup>76</sup>

**2.74** The paper also discussed whether:

- the word 'serious' should be omitted from s 20D
- the scope of sections 20C and 20D should be extended to include people of 'actual or presumed' race
- the 'incitement' element of sections 20C and 20D should be omitted, and
- the need for enhanced education and awareness programs about vilification.<sup>77</sup>

**2.75** Mr Cowdery's paper also canvassed considerations that pertained exclusively to s 20D of the *Anti-Discrimination Act*, including whether:

- vilification should also be subject to criminal sanction where the communication is 'otherwise than in private'
- it is preferable to include a specific subjective mental requirement such as 'intended to'

<sup>75</sup> Submission 3, Professor Gail Mason, Attachment C: Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects*, Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, University of Sydney, August 2009, p 4. See also, Submission 33, Australian Lawyers for Human Rights, p 3.

<sup>76</sup> Submission 3, Professor Gail Mason, Attachment C: Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects*, Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, University of Sydney, August 2009, p 4.

<sup>77</sup> Submission 3, Professor Gail Mason, Attachment C: Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects*, Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, University of Sydney, August 2009, p 6.

- the 28 day time frame for the President of the Board to refer a matter to the Attorney General should be extended, and
- if the police are the appropriate body to investigate vilification offences.<sup>78</sup>

## Other state and international jurisdictions

**2.76** This section outlines the racial vilification provisions in other state and international jurisdictions. These provisions are compared to s 20D of the *Anti-Discrimination Act* and considered in more detail throughout the report.

### Other state jurisdictions

**2.77** As previously mentioned, most other states and the Australian Capital Territory have adopted a similar dual vilification regulatory system as New South Wales.<sup>79</sup> The Northern Territory and Tasmania do not have vilification legislation.<sup>80</sup> The Tasmanian Law Reform Commission undertook an inquiry into vilification provisions in 2011 and recommended against introducing racial vilification offences given the lack of successful prosecutions in other Australian jurisdictions with similar offences.<sup>81</sup>

**2.78** Racial vilification offences in the Australian Capital Territory are set out in ss 66-67 of the *Discrimination Act 1991*. The offence incorporates the notion of a public act of incitement that is threatening and based on a person's race, and while the act itself must be intentional, the person need not intend that the act be public or incite. Instead it must be proven that the person was reckless as to whether the act was in public or incites. The offence is not punishable by imprisonment.<sup>82</sup>

**2.79** Section 131A of the *Anti-Discrimination Act 1991* (QLD) provides that a person must not by a public act 'knowingly or recklessly' incite hatred. The maximum term of imprisonment is six months and also includes substantial fines for individuals and corporations.<sup>83</sup>

**2.80** Section 4 of the *Racial Vilification Act 1996* (SA) is the same as the offence set out in s 20D(1) of the *Anti-Discrimination Act*.<sup>84</sup> The maximum penalties are \$25,000 for a body corporate and \$5,000 or three years imprisonment (or both) for an individual.<sup>85</sup>

---

<sup>78</sup> Submission 3, Professor Gail Mason, Attachment C: Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects*, Roundtable on Hate Crime and Vilification Law: Developments and Directions, Law School, University of Sydney, August 2009.

<sup>79</sup> Gareth Griffiths, 'Racial vilification laws: The Bolt case from a State perspective', *E-brief*, NSW Parliamentary Library Research Service, October 2011, p 3.

<sup>80</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>81</sup> Submission 26, Department of Attorney General and Justice, p 10.

<sup>82</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>83</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>84</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>85</sup> s 4, *Racial Vilification Act 1996* (SA).

**2.81** Victoria has two separate racial vilification offences:

- s 24(1) of the *Racial and Religious Tolerance Act* (Vic) provides that a person must not intentionally engage in conduct that the offender knows is likely to incite hatred towards a group of person and to threaten or incite others to threaten physical harm to or harm to property of that group of persons, and
- s 24(2) of the *Racial and Religious Tolerance Act* (Vic) provides that a person must not, on grounds of race, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, another person or class of persons of that race.<sup>86</sup>

**2.82** Western Australia has adopted a significantly different vilification regulatory model than New South Wales and does not have a civil prohibition on racial vilification. Chapter XI of the *Criminal Code Compilation Act 1913* (WA) set out a comprehensive range of criminal offences against racist conduct, including:

- s 77, conduct intended to incite racial animosity or racial harassment
- s 79, possession of material with intent to publish and intent to incite racial animosity or racial harassment
- s 80A, conduct intended to racially harass; and
- s 80C, possession of material for display with intent to racially harass.<sup>87</sup>

**2.83** Western Australia also has the following strict liability offences, which have certain defences such as artistic performance and genuine academic debate:

- s 78, conduct likely to incite racial animosity or racial harassment; and
- s 80, possession of material that is likely to incite racial animosity or racial harassment and with intent to publish.

**2.84** Additionally, s 80E of the Western Australian legislation sets out the definition of a public act as conduct ‘otherwise than in private’. Western Australia also has much higher penalties for vilification offences than in New South Wales such as 14 years imprisonment.<sup>88</sup>

**2.85** Western Australia is the only jurisdiction in Australia to have had successful prosecutions for racial vilification. The first involved possession of racist material arising from numerous acts of racist graffiti on a synagogue and a Chinese restaurant.<sup>89</sup> The second was a prosecution in 2009 concerning a series of racist statements.<sup>90</sup>

<sup>86</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>87</sup> , Submission 26, Department of Attorney General and Justice, Appendix 1.

<sup>88</sup> Submission 26, Department of Attorney General and Justice, Appendix 1 and *Criminal Code Act Compilation Act 1913* (WA), s77.

<sup>89</sup> Submission 31, NSW Bar Association, p 3.

<sup>90</sup> Submission 26, Department of Attorney General and Justice, Appendix 1.

### International jurisdictions

**2.86** A number of international jurisdictions have vilification legislation. Canada and the United Kingdom were the most regularly referenced international jurisdictions during the Inquiry. This section briefly outlines the vilification provisions in these jurisdictions. However the Committee was cautioned against drawing parallels between Canada, the United Kingdom and New South Wales because the other jurisdictions have an underlying human rights regime (i.e. a Bill of Rights) that is not available in this State.<sup>91</sup>

#### *Canada*

**2.87** Section 319 of the *Criminal Code of Canada* sets out a public incitement to hatred offence:

319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

#### **Wilful promotion of hatred**

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.<sup>92</sup>

**2.88** Section 319 also provides defences to the offence and includes a consent power for the Attorney General.<sup>93</sup>

#### *United Kingdom*

**2.89** Sections 18 and 19 of the *Public Order Act 1986* (UK) criminalise public conduct which is threatening, abusive or insulting if it is intended, or in the circumstances is likely, to stir up racial hatred.<sup>94</sup>

**2.90** As with the Canadian provision, s 27(1) of the *Public Order Act 1986* (UK) provides that proceedings for racial hatred offences may not be commenced in England or Wales without consent of the Attorney General.<sup>95</sup>

---

<sup>91</sup> See for example: Evidence, Ms Catherine Mathews, General Executive, NSW Labor Lawyers, 5 April 2013, pp 27; Evidence, Mr Joshua Dale, Chair, Sub-Committee on Human Rights, Australian Lawyers Alliance, 5 April 2013, p 37.

<sup>92</sup> s 319, *Criminal Code of Canada*.

<sup>93</sup> s 319, *Criminal Code of Canada*.

<sup>94</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 5.

<sup>95</sup> Submission 32, NSW Young Lawyers, p 5.

**2.91** The United Kingdom also has penalty enhancement provisions within its criminal code to combat race-based crime.<sup>96</sup>

---

<sup>96</sup> Submission 26, Department of Attorney General and Justice, pp 8-9.



## Chapter 3 Effectiveness of s 20D

This chapter examines the effectiveness of s 20D of the *Anti-Discrimination Act*. Consideration is given to the argument that the absence of prosecutions under the provision undermines its effectiveness. The educative and symbolic function of the provision is also discussed.

### Measuring effectiveness

- 3.1** The terms of reference for this Inquiry require the Committee to consider the effectiveness of s 20D of the *Anti-Discrimination Act*.
- 3.2** Stakeholders noted that there are a variety of ways in which effectiveness can be measured. For example, one measure is to look at the number of successful prosecutions brought under the provision. In fact, the Premier of New South Wales, the Hon Barry O’Farrell MP, referred the Inquiry to the Committee specifically due to concerns about the lack of prosecutions arising from s 20D of the *Anti-Discrimination Act*.<sup>97</sup>
- 3.3** As mentioned in Chapter 2, since 1992 the Anti-Discrimination Board of NSW (the Board) has referred 11 potential serious racial vilification matters<sup>98</sup> to the Director of Public Prosecutions (DPP) for possible breaches of s 20D of the *Anti-Discrimination Act*, yet none of these referrals have led to a single prosecution being instituted.<sup>99</sup>
- 3.4** However the Committee heard that a lack of prosecutions should not necessarily deem the provision ineffective as racial vilification legislation serves a number of purposes, including providing an educative and symbolic function and acting as a general deterrent. These arguments are considered in the following sections.

### Absence of prosecutions

- 3.5** Numerous inquiry participants expressed the view that the absence of serious racial vilification prosecutions signified that s 20D is ineffective. For example, the Board stated:

... the current legislative scheme is totally ineffective in relation to serious acts of racial hatred, incitement to such acts and incitement to racial hatred. The complete absence of prosecutions, let alone convictions, for this offence since the provisions were enacted over 20 years ago reflects the inability of racial vilification laws to address even the most serious expressions of racial hatred and racial harassment.<sup>100</sup>

<sup>97</sup> Correspondence from the Hon Barry O’Farrell MP, Premier of New South Wales, to Chair, 20 November 2012.

<sup>98</sup> During the Inquiry it was sometimes quoted that there had been 27 matters referred to the DPP. This number included race, homosexuality, transgender and HIV/AIDS vilification referrals. Submission 10, Anti-Discrimination Board of NSW, p 7.

<sup>99</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

<sup>100</sup> Submission 10, Anti-Discrimination Board, p 9.

**3.6** Additionally, the Board was concerned that the absence of prosecutions would result in a lack of public confidence in the provision and in turn send the message that racism is tolerated in New South Wales.<sup>101</sup>

**3.7** The NSW Council for Civil Liberties was equally frustrated by the absence of serious racial vilification prosecutions:

NSWCCL does not believe that the offence of serious racial vilification has been effective in NSW. In this regard we note that there have been numerous referrals made to the NSW Director of Public Prosecutions (DPP) in respect of the offence but none has been prosecuted... Instances of serious racial vilification that have gone unpunished in recent times in NSW include actions taken by certain individuals in the lead-up to the 2005 Cronulla Riots.<sup>102</sup>

**3.8** Similarly, the Australian Lawyers Alliance argued that “[f]or there to be no prosecutions under section 20D in some 24 years is tantamount to admitting there have been no occurrences of racial vilification worthy of prosecution. This illogical conclusion would surely be out of step with community expectations and experiences.”<sup>103</sup>

**3.9** The NSW Jewish Board of Deputies suggested that the lack of prosecutions demonstrated an “expectation gap” between the public’s and the Parliament’s expectations for the provision.<sup>104</sup> Furthermore, the NSW Jewish Board of Deputies contended that s 20D of the *Anti-Discrimination Act* had failed in its purpose to prosecute and punish those who engage in criminal incitement:

Those who engage in violent behaviour motivated by racial hatred are clearly liable to criminal prosecution under the existing criminal law, outside the provisions of the ADA [Anti-Discrimination Act]. But those who incite them to hatred in the first place by appealing to, and seeking to manipulate, their prejudices, fears and grievances, are effectively beyond the reach of the criminal law, if they themselves do not engage in specific acts or threats of violence, or clearly and unambiguously procure others to do so. Section 20D of the ADA was enacted in 1989 precisely in order to prosecute and punish those who engage in criminal incitement (i.e. serious vilification). But that section has failed to do the job it was intended to do.<sup>105</sup>

**3.10** Mr Peter Wertheim, Executive Director of the Executive Council of Australian Jewry, also said that the lack of prosecutions despite the number of referrals indicated that the provision does not meet community expectations.<sup>106</sup>

**3.11** Other stakeholders, such as the Redfern Legal Centre, were concerned that the lack of prosecutions undermined the educative and symbolic value of the provision.<sup>107</sup> This point is considered later in this chapter.

---

<sup>101</sup> Submission 10, Anti-Discrimination Board, p 9.

<sup>102</sup> Submission 39, NSW Council for Civil Liberties, p 2.

<sup>103</sup> Submission 21, Australian Lawyers Alliance, p 7.

<sup>104</sup> Submission 5, NSW Jewish Board of Deputies, p 12.

<sup>105</sup> Submission 5, NSW Jewish Board of Deputies, p 12.

<sup>106</sup> Evidence, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, 8 April 2013, p 42.

<sup>107</sup> Submission 34, Redfern Legal Centre, p 4.

**3.12** However some inquiry participants, such as the International Commission of Jurists Australia and Mr Simeon Beckett, Barrister, NSW Bar Association, regarded the absence of serious racial vilification prosecutions to be evidence of the provision's success as a deterrent.<sup>108</sup>

**3.13** This was supported by Mr Simon Breheny, Director of the Legal Rights Project for the Institute of Public Affairs, who stated:

The law is a success because it is being obeyed. No one is threatening physical harm towards others on the basis of their race. Surely we would prefer a legal system where no convictions are ever recorded. In this case the provisions should be seen as a successful law not one that requires amendment.<sup>109</sup>

**3.14** Mr Breheny explained that the provision should be considered effective as people were abiding by the law:

I think this is a successful law. It is extraordinary that we are holding an inquiry into a law that, by all accounts, has been successful. It is successful because people are obeying it. When the Director of Public Prosecutions says in 23 years or 24 years of this law's existence we have not had a successful prosecution – despite the fact that complaints have been made the determination has always been that the threshold under this legislation would not have been met – to me that clearly signifies that people have not been doing what this provision sets to outlaw. Therefore it is a successful provision; people are obeying the law. If we want to change the law, fine, but it is not because this provision has been unsuccessful.<sup>110</sup>

**3.15** However Mr Breheny advocated repealing s 20D of the *Anti-Discrimination Act* and reverting to common law actions based on intimidation, arguing that certain individual attributes, like race, should not attract specific offences or penalties.<sup>111</sup> See Chapter 5 for discussion about the interaction between serious racial vilification offences and the criminal code.

**3.16** It was also suggested to the Committee that the effectiveness of s 20D should be viewed within the context of the entire *Anti-Discrimination Act*, which contains other mechanisms (such as the civil prohibition against racial vilification in s 20C) which may be the reason why prosecutions are not brought under s 20D. For example, the International Commission of Jurists Australia submitted:

... conclusions as to the effectiveness of section 20D cannot be drawn from the absence of prosecutions. Rather, this may be an indication of the effectiveness of other mechanisms in the Act, designed to deal with the appropriate resolution of complaints regarding racial vilification.<sup>112</sup>

<sup>108</sup> Submission 30, International Commission of Jurists Australia, p 2 and Evidence, Mr Simeon Beckett, Barrister, NSW Bar Association, 8 April 2013, p 59.

<sup>109</sup> Evidence, Mr Simon Breheny, Director, Legal Rights Project, Institute of Public Affairs, 8 April 2013, p 11.

<sup>110</sup> Evidence, Mr Breheny, 8 April 2013, p 13.

<sup>111</sup> Evidence, Mr Breheny, 8 April 2013, p 13.

<sup>112</sup> Submission 30, International Commission of Jurists Australia, p 2.

**3.17** Mr John Dowd, President of the International Commission of Jurists Australia, elaborated on this argument during his evidence to the Committee and cautioned against only considering the lack of prosecutions to determine whether the provision has been successful:

... you cannot look at 20D without looking at the general structure of the Act, there are mechanisms set in there to solve problems and resolve disputes. Civil and criminal matters, most matters do not go to court and do not go to hearings. Most hearings are dealt with by a plea bargain effectively – it is not technically that, but effectively a plea bargain. There are discussions about whether matters go ahead, different offences. In civil matters almost all matters are resolved at one stage or other only because there is an ultimate sanction there, but that is the way our legal system works. Looking at who gets prosecuted and who gets convicted is no way to judge it.<sup>113</sup>

**3.18** As noted in Chapter 2, apart from in Western Australia, there have been no prosecutions in any other jurisdictions. The Human Rights Law Centre noted that in the case of Victoria, for example, this may be due to the successful application of the civil and administrative mechanisms for dealing with vilification:

... a similarly low rate of complaints and prosecutions has been experienced in Victoria under the *Racial and Religious Tolerance Act 2001* (Vic). This may in part be because there are related civil and administrative mechanisms for dealing with inappropriate but less serious forms of racial discrimination and vilification.<sup>114</sup>

### ***Committee comment***

**3.19** The Committee notes that since 1992 the Anti-Discrimination Board of NSW has referred 11 potential serious racial vilification matters to the DPP for possible breaches of s 20D of the *Anti-Discrimination Act*, yet none of these referrals have led to a prosecution being instituted. We note that the majority of stakeholders have interpreted this to mean that the provision is ineffective.

**3.20** On the other hand, we also acknowledge that other stakeholders have argued that the lack of prosecutions indicates that s 20D is working, in that it has effectively deterred unacceptable behaviour.

**3.21** While the Committee believes that both arguments carry weight, we put forward our own view – which is that the effectiveness of s 20D has been hindered by a number of procedural impediments. Consideration of those impediments and recommendations to overcome them are discussed later in this report.

## **Educative and symbolic function of s 20D**

**3.22** The Committee received evidence that it is not uncommon, particularly in the field of human rights and anti-discrimination laws, for provisions to be introduced with a view to educating the public.<sup>115</sup>

---

<sup>113</sup> Evidence, Mr John Dowd, President, International Commission of Jurists, 5 April 2013, p 12.

<sup>114</sup> Submission 35, Human Rights Law Centre, p 14.

<sup>115</sup> Submission 41, NSW Society of Labor Lawyers, pp 6-7.

**3.23** The idea of the law as an educative force was embraced by several inquiry participants. For example, the Board acknowledged the significant educative function of the provision and explained it sends a clear message about appropriate behaviour in the community:

Effective vilification legislation also acts to send a clear message that the community disapproves of, and will not tolerate, certain behaviours. The people of New South Wales come from many different racial, ethnic and linguistic backgrounds, and successive governments, from both sides of politics have supported the principles of a multicultural New South Wales.<sup>116</sup>

**3.24** Mr Dowd supported the educative function of the provision during his evidence to the Committee, stating that Parliament should clearly set out the standards of acceptable behaviour, as well as the penalties for breaching these standards:

A lot of our laws are educative on serious offence, and a whole range of offences are there. It is not just a matter of penalty; it is a matter of this is what the law is. I think our society is very much opposed to racial vilification. The Parliament should say that and it should say that with a penalty sanction. Laws should not be looked at as though they are going to lead to a conviction. With all the procedures involved, I think the Parliament should say. Most citizens are law abiding, therefore, we should tell them what the law is.<sup>117</sup>

**3.25** Similarly, Mr Wertheim said “[t]he law itself performs an educative role by setting the standard or by declaring the standard. I believe the standard already exists in the community but the law must encapsulate it and give expression to it...”<sup>118</sup>

**3.26** Mr David Knoll, Barrister, NSW Jewish Board of Deputies, said that serious racial vilification provisions demonstrated to the community, particularly newly arrived migrants, that this type of behaviour is not tolerated.<sup>119</sup>

**3.27** Professor Simon Rice OAM, Director of Law Reform and Social Justice, College of Law at the Australian National University, stressed the important symbolic function of s 20D of the *Anti-Discrimination Act*:

... as long as the existence of the law is not harmful or causing anything from cost to harm, it is there as, at the very least, a symbolic statement, and whether or not its lack of enforcement indicates it is effective or it is ineffective is a subsidiary question to a public policy statement that race-based conduct is beyond the pale. I think the symbolic nature of the legislation is very important around questions of race, quite apart from effectiveness.<sup>120</sup>

<sup>116</sup> Submission 10, Anti-Discrimination Board, p 2.

<sup>117</sup> Evidence, Mr Dowd, 5 April 2013, p 13.

<sup>118</sup> Evidence, Mr Wertheim 8 April 2013, p 40.

<sup>119</sup> Evidence, Mr David Knoll, NSW Jewish Board of Deputies, 8 April 2013, p 42.

<sup>120</sup> Evidence, Professor Simon Rice, Director, Law Reform and Social Justice, College of Law, Australian National University, 8 April 2013, p 22.

**3.28** Professor Neil Rees, Professor of Law at the University of the Sunshine Coast, agreed that community leaders and parliamentarians were behoved to be “standard setters.”<sup>121</sup>

**3.29** The NSW Society of Labor Lawyers wanted greater significance placed on the educative role of the serious racial vilification provision:

We very much press in our submission the educative value of the whole regime, but particularly of section 20D, and we would like to see some focus on the educative value of that provision remaining rather than it being seen as a prosecution aspect that has never been used. We feel that its value as an educative role is quite important and should be again focused upon.<sup>122</sup>

**3.30** It was put to the Committee that to be most effective the educative function of the provision must work in conjunction with the deterrent function. For example, Mr Andrew Stone, Barrister, Australian Lawyers Alliance, illustrated how the deterrent and educative functions can work together by using a driving analogy:

... there are different levels of deterrence. If I can answer that by analogy: Before the Easter weekend you put advertisements on television to tell people to drive safely. That is a level of deterrence. That is the equivalent of having the statute and its educative effect. You also put 34 police cars on the F3 and that is the equivalent of the DPP actually being prepared to enforce. Deterrence works at a multiplicity of levels and whilst it may have some educative effect, to be frank, that is a lot less effective than people being in fear of outcomes.<sup>123</sup>

**3.31** On the other hand, the Institute of Public Affairs considered the educative function of the provision to be redundant. Mr Breheny elaborated on this argument during his evidence to the Committee: “As I said, if there is [educative] value, it is one factor among many factors. Because the law often follows after, if you like, morals and the community has progressed, I do not think it has an educative function.”<sup>124</sup>

### ***Committee comment***

**3.32** The Committee agrees that s 20D of the *Anti-Discrimination Act* has an important educative and symbolic function. The provision enshrines in law that the Parliament does not tolerate racial hatred, and sends a message to the community about appropriate behaviour.

**3.33** Prosecutions are a means by which the community can be educated about legislation as they garner media attention and provide a platform for the State to declare that racial hatred is unacceptable in the community. Without a single prosecution being initiated there have been limited opportunities for most of the community to engage with, or become aware of, this important provision.

---

<sup>121</sup> Evidence, Professor Neil Rees, Professor of Law, University of the Sunshine Coast, 8 April 2013, p 21.

<sup>122</sup> Evidence, Ms Catherine Mathews, General Executive, NSW Society of Labor Lawyers, 5 April 2013, p 27.

<sup>123</sup> Evidence, Mr Andrew Stone, Barrister, Australian Lawyers Alliance, 5 April 2013, p 34

<sup>124</sup> Evidence, Mr Breheny, 8 April 2013, p 14.

- 3.34** The Committee believes that in addition to having educative and symbolic functions, s 20D must also have a real world application and be able to be applied by the courts. The remainder of this report contains a number of recommendations which aim to remove barriers to the practical application of the provision.



## Chapter 4 Elements of the offence in s 20D

This chapter examines the elements of the serious racial vilification offence in s 20D of the *Anti-Discrimination Act 1977*. Consideration is given to the debate around whether these elements form too high of an evidentiary threshold to enable a successful prosecution and the need for legislative clarity within s 20D.

### Evidentiary threshold

**4.1** Under s 20D, the prosecution must prove beyond reasonable doubt that an incident meets the following five elements to secure a conviction for a serious racial vilification offence:

- a public act
- which incites
- 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:
  - threatening physical harm towards, or towards any property of, the person or group of persons, or
  - inciting others to threaten physical harm towards, or towards any property of, the person or groups of persons.

**4.2** There was debate during the Inquiry as to whether these elements were appropriate or whether they created too high of an evidentiary threshold to enable successful prosecutions under s 20D. While some stakeholders supported the latter, others suggested that the current thresholds were adequate and should not be amended.

**4.3** This section outlines concerns with the overall evidentiary threshold in s 20D. Concerns about the individual elements forming the threshold are detailed throughout the remainder of this chapter.

**4.4** The Department of Attorney General and Justice informed the Committee that the most common reason for deciding not to prosecute s 20D matters was that the available admissible evidence was not sufficient to establish the elements of the offence:

In a review of the decisions not to prosecute in the 11 s 20D matters referred to the DPP, the ODPP noted that the most common reason for deciding not to prosecute was that the available admissible evidence was not sufficient to establish the elements of the offence (specifically the elements of incitement and threatened violence). The ODPP's summary of reasons for decisions in these 11 matters indicates that:

- a lack of evidence regarding threatened violence may have been an issue in 5 of the 11 matters,
- a lack of evidence of incitement may have been an issue in 9 of the 11 matters, and

- a lack of evidence establishing that the incitement was by a public act was a factor in possibly 6 of the 11 matters.<sup>125</sup>

4.5 The Department of Attorney General and Justice cautioned that while removing or relaxing particular elements of s 20D of the *Anti-Discrimination Act* may make the offence easier to prosecute, it could also potentially unfairly incur on freedom of expression. Additionally, any modifications should be measured against the underlying purpose of the offence.<sup>126</sup>

4.6 Mr Stepan Kerkyasharian, President of the Anti-Discrimination Board of NSW (the Board), expressed the opinion that "... the primary reason for the lack of prosecution is that the threshold for establishing all the elements of the offence is simply too high because of the way the section is drafted and also because of its complexity."<sup>127</sup> He added that it would be beneficial to remove unnecessary obstacles to prosecutions:

Our view is that the provision should be amended to remove the unnecessary barriers to prosecution, and I emphasise the word "unnecessary". I also want to make the point very strongly that we are not seeking to lower the bar. It remains our view that criminal sanctions should flow only from the most extreme expressions of racial hatred.<sup>128</sup>

4.7 The NSW Jewish Board of Deputies also recommended amending the current elements "... to ensure that the elements of the offence are set out simply yet with precision so as not to set the evidentiary bar for a successful prosecution at too low or, as is presently the case, at too high, a level."<sup>129</sup>

4.8 A number of stakeholders advised the Committee that any amendments to the evidentiary threshold in s 20D of the *Anti-Discrimination Act* should consider freedom of expression implications. For example, the International Commission of Jurists Australia stated: "... when inquiring into section 20D of the Act, it must be kept in mind that where legislation imposes restrictions on freedom of speech and creates a criminal offence, the bar must be set very high."<sup>130</sup>

4.9 Mr Simon Breheny, Director of the Legal Rights Project for the Institute of Public Affairs, was similarly concerned that changes to s 20D of the *Anti-Discrimination Act* would unnecessarily impinge on the right to freedom of expression:

This inquiry into racial vilification law in New South Wales risks opening the door to changes that could have serious consequences for freedom of speech. The current criminal law in this area is based on physical harm. The concept is a simple one. Threats of physical violence are unacceptable and should be outlawed. The law as it stands is appropriate. However, it must not be expanded to catch any form of conduct

<sup>125</sup> Submission 26, Department of Attorney General and Justice, p 9.

<sup>126</sup> Submission 26, Department of Attorney General and Justice, p 10.

<sup>127</sup> Evidence, Mr Stepan Kerkyasharian, President, Anti-Discrimination Board of NSW, 5 April 2013, p 2.

<sup>128</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 2.

<sup>129</sup> Submission 5, NSW Jewish Board of Deputies, p 1.

<sup>130</sup> Submission 30, International Commission of Jurists Australia, p 2.

less than specific threats of physical violence. To do so risks undermining one of our most important liberal democratic rights, freedom of speech.<sup>131</sup>

- 4.10** Likewise, Mr Kirk McKenzie, Chair of the Human Rights Committee for the Law Society of NSW, conceded that while it may be necessary to lower the evidentiary bar in s 20D to secure prosecutions, it is vital to maintain an appropriate balance between vilification legislation and freedom of speech:

I suspect we are lowering the bar somewhat because you will see from some of the other submissions made, including the submission of the Director of Public Prosecutions himself, that the view of the Director of Public Prosecutions and the Anti-Discrimination Board is that it is hard to prosecute any offence in New South Wales because of the very narrow drafting of the section. The Society's concern is that the need for a vilification offence be balanced with the need to maintain appropriate freedom of speech.<sup>132</sup>

- 4.11** Legal Aid NSW considered it critical for the Committee to consider whether any amendments to s 20D of the *Anti-Discrimination Act* reduced the protections afforded to the community under the current provision and whether an appropriate balance can be struck between freedom from racial discrimination and vilification and freedom of expression.<sup>133</sup>

- 4.12** The Committee's attention was also drawn to the impact a criminal conviction can have on a person. The NSW Society of Labor Lawyers argued that lowering the evidentiary bar may have serious repercussions for individuals convicted of serious racial vilification offences:

... if a person is convicted under section 20D they carry with them a conviction not for a criminal offence of assault, which is a serious matter, but they carry with them a sanction from society that they have racially vilified another. That is a very serious conviction in the area of a very serious aspect of society. If I was looking for employment and I had to disclose a conviction such as being in breach of section 20D my personal submission is that would probably affect my employment for the rest of my life.<sup>134</sup>

- 4.13** Some inquiry participants argued that the existing elements under s 20D imposed such a high evidentiary threshold that ultimately prosecutors pursued offences under the *Crimes Act 1900*, where the evidentiary bars are lower and the sentences are higher, thereby undermining the authority of s 20D of the *Anti-Discrimination Act*. As outlined in Chapter 2, the *Crimes Act* contains a range of offences similar to the offence of serious racial vilification in s 20D such as common assault, affray, threatening to destroy or damage property and intimidation or annoyance by violence or otherwise.<sup>135</sup>

- 4.14** The Australian Lawyers Alliance provided an explanation of this position:

<sup>131</sup> Evidence, Mr Simon Breheny, Director, Legal Rights Project, Institute of Public Affairs, 8 April 2013, p 11.

<sup>132</sup> Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, The Law Society of NSW, 5 April 2013, p 19.

<sup>133</sup> Submission 24, Legal Aid NSW, p 3.

<sup>134</sup> Evidence, Ms Catherine Mathews, General Executive, NSW Society of Labor Lawyers, 5 April 2013, pp 29-30.

<sup>135</sup> ss 61, 93B, 199(1), 545B, *Crimes Act*.

... the most significant problem with s20D, and perhaps the reason for the lack of prosecution and effectiveness, under the section [is that it] essentially creates a higher onus of proof on the prosecutor to satisfy the elements of this offence with little incentive when taking into account already existing provisions and sentencing of the *Crimes Act 1900*.

The offence of racial vilification under s20D carries with it a sentence that is no greater than other offences for physical harm to person and/or property that fall within the scope of the *Crimes Act 1900*. In addition, if someone is to incite an offence that results in physical harm to person or property it is our submission that section 346 of the *Crimes Act 1900* adequately deals with actions of this nature. Under that provision, it is an offence to be an accessory before the commission of a crime and carries with it the same sentence of whatever crime was committed. It is the belief of the ALA that the test in establishing an accused is guilty of an offence under section 346 is much less onerous on a prosecutor, and therefore public funding, than a prosecution advanced under s20D. The reality is that the punishment for the offence is not reflective or indicative of the seriousness of racial vilification.<sup>136</sup>

**4.15** The Australian Lawyers Alliance further argued that this situation hampers the effectiveness of s 20D and fails to punish the dissemination of ideas based on racial superiority and hatred in New South Wales.<sup>137</sup>

**4.16** Miss Sarah Pitney provided a similar argument, suggesting that the stringent constraints placed on serious racial vilification offences deter prosecutors and lead to a reliance on sentence aggravation provisions to address racially vilifying conduct, thereby undermining the educational impact of criminalising such action. As noted in Chapter 2, under the *Crimes (Sentencing Procedure) Act 1999* if an offence is motivated by hatred or prejudice against a group of people to which an offender believes any victim belongs, then the court can consider it an aggravating factor for the purpose of sentencing.<sup>138</sup>

**4.17** Alternatively, the NSW Society of Labor Lawyers did not view the perceived 'high' evidentiary threshold in s 20D of the *Anti-Discrimination Act* as a reason for it to be amended. The Labor Lawyers stated:

... we do not believe the current test should be changed to lower the harm threshold or otherwise should be amended. This is because ... criminalising racial vilification has inherent procedural limitations. We regard the proper functioning of a democratic system of government and a robust public sphere as a more productive way to eliminate racial discrimination.<sup>139</sup>

**4.18** Mr John McKenzie, Chief Legal Officer of the Aboriginal Legal Service, recommended incremental change to s 20D of the *Anti-Discrimination Act*, noting that while racial vilification features significantly in the experience of many communities, particularly Aboriginal and Torres Strait Islander people, wider society is likely to rebel against significant reforms.<sup>140</sup>

<sup>136</sup> Submission 21, Australian Lawyers Alliance, pp 3-4.

<sup>137</sup> Submission 21, Australian Lawyers Alliance, pp 3-4.

<sup>138</sup> s 21A(2)(h) *Crimes (Sentencing Procedure) Act 1999*.

<sup>139</sup> Submission 41, NSW Society of Labor Lawyers, p 13.

<sup>140</sup> Evidence, Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, 8 April 2013, p 48.

***Committee comment***

- 4.19** The Committee notes the evidence presented by the Department of Attorney General and Justice that the Director of Public Prosecutions has not instituted any prosecutions under s 20D due to the fact that in most of the 11 referrals from the Anti-Discrimination Board of NSW there was insufficient evidence to establish the elements of the offence.
- 4.20** We also cannot exclude the possibility that another reason for the absence of prosecutions may be due to the inability of the Board to prepare a brief of evidence for the Director of Public Prosecutions. (This issue is discussed in more detail in chapter 6).
- 4.21** The Committee acknowledges that while many inquiry participants were in favour of adjusting the threshold to make it easier to secure a conviction, stakeholders cautioned the Committee to balance any such moves against the right to freedom of expression. We are mindful that there are life-long consequences for individuals convicted of a criminal offence, and believe that any amendments to s 20D should maintain the scope of the offence to the most serious cases of racial vilification.
- 4.22** The Committee notes the evidence that in the current circumstances it is prudent for prosecutors to pursue proceedings for similar offences (such as common assault and affray) under the *Crimes Act* rather than under s 20D of the *Anti-Discrimination Act* due to the latter's high evidentiary threshold. We are concerned that this may undermine the effectiveness of s 20D, however believe that this issue will be addressed by the recommendations made throughout this report.

**'Public act'**

- 4.23** In order for there to be an offence of serious racial vilification under s 20D of the *Anti-Discrimination Act* the vilification must occur via a 'public act'. The definition of 'public act' is set out in s 20B:

**20B Definition of "public act"**

In this Division, "public act" includes:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) 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 or group of persons on the ground of the race of the person or members of the group.<sup>141</sup>

<sup>141</sup> s 20B, *Anti-Discrimination Act*.

- 4.24 Inquiry stakeholders raised a number of issues with s 20B, including the distinction between ‘public’ and ‘private’ acts, whether the words ‘public act’ should be replaced with ‘public communications’, and whether the internet is included in the current definition.

### **Distinction between ‘public’ and ‘private’ acts**

- 4.25 The Committee received evidence from various stakeholders concerned about the lack of legislative clarity about what constitutes ‘public’ and ‘private’ acts.<sup>142</sup> Professor Simon Rice OAM, Director of Law Reform and Social Justice for the College of Law at the Australian National University, explained that a number of factors contribute to the confusion about what constitutes a ‘public act’, including individual perception and legislative intention:

Reasonable people will differ around this. Any example could be given and we would say, “is that public or private?” It is a shifting perception and the difficulty with saying it happens in public is it then creates confusion and uncertainty as to when the law is in operation and when people can rely on it, and what the Parliament’s intention is.<sup>143</sup>

- 4.26 Professor Neil Rees, Professor of Law, School of Law at the University of the Sunshine Coast, said that providing clarity around this matter was an avoidance of doubt issue that would benefit parties to the matter.<sup>144</sup>
- 4.27 The Committee was told that the lack of legislative clarity in this area can lead to extensive delays in the complaints process. Professor Rice gave an example of a homosexual vilification case that took up to three years because the NSW Administrative Decisions Tribunal had to decide whether the incident occurred in public or in private.<sup>145</sup>
- 4.28 The Anti-Discrimination Board agreed on the importance of providing clarity around the matter, stating: “The expression ‘public act’ if not clarified, is likely to remain the subject of extensive legal debate, and consequent legal costs, about whether particular conduct was public or private.”<sup>146</sup>
- 4.29 The Committee was informed that the NSW Administrative Decisions Tribunal has interpreted ‘public act’ broadly, such as in *Z v University of A & Ors (No 7) [2004] NSWADT 81*:

Decisions of the New South Wales Administrative Decisions Tribunal have interpreted ‘public act’ broadly, meaning it is not necessary that a member of the public actually saw the impugned conduct or heard the communication. The conduct or communication “*must be capable of being seen or heard, without undue intrusion, by a non-participant to constitute a public act. Thus abuse which is loud enough for bystanders to readily*

<sup>142</sup> See for example, Submission 23, NSW Aboriginal Land Council, p 3; Answers to question on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 6.

<sup>143</sup> Evidence, Professor Simon Rice, OAM, Director, Law Reform and Social Justice, College of Law, Australian National University, 8 April 2013, pp 19-20.

<sup>144</sup> Evidence, Professor Neil Rees, Professor of Law, School of Law, University of Sunshine Coast 8 April 2013, p 20.

<sup>145</sup> Evidence, Professor Rice, 8 April 2013, p 21.

<sup>146</sup> Answers to question on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 6.

*overhear may constitute a public act whereas a conversation in a normal speaking voice would probably not.*<sup>147</sup>

**4.30** The Committee received suggestions from a number of inquiry participants to amend the definition of ‘public act’ by drawing on the findings from *Z v University of A & Ors*. For example, Legal Aid NSW proposed amending the definition of ‘public act’ “... to explicitly include any conduct that is within the hearing of people who are in a public place.” They added that this would clarify the meaning of ‘public act’ and, in a modest way, extend the coverage of the racial vilification sections.<sup>148</sup>

**4.31** The Aboriginal Legal Service forwarded a similar argument. Mr McKenzie said during evidence:

I think that it is important for that occasional instance of really bad racial vilification, if it is yelled loud enough and clearly enough that people on the public street can hear it then I think that is a public act. That is why I would support that broadening of it.<sup>149</sup>

**4.32** Similarly, the Community Relations Commission for a Multicultural NSW recommended amending the definition of ‘public act’ to:

(a) any form of communication to the public, including without limitation speaking, writing, printing, displaying notices, whether physical or over the internet, broadcasting, telecasting, screening and playing of tapes or other recorded material, or

(b) any conduct (not being a form of communication referred to in paragraph (a) observable by the public.<sup>150</sup>

**4.33** The Board and the NSW Jewish Board of Deputies felt that amending the definition of ‘public act’ to include ‘otherwise than in private’ would provide greater scope and clarity, and would align with the current jurisprudence in the area and the analogous provisions of Part IIA of the *Racial Discrimination Act 1975* (Cth).<sup>151</sup>

**4.34** A limited number of inquiry participants, such as the NSW Aboriginal Land Council, were in favour of extending the criminalisation of serious racial vilification to all circumstances regardless of whether or not the vilification occurred in public.<sup>152</sup>

**4.35** Further to this suggestion, the NSW Young Lawyers noted that restricting serious vilification offences to public acts conflicts with Article 4(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination (ICERD) which requires the criminalisation of *all* vilification.<sup>153</sup> As discussed in Chapter 2, Australia currently has a reservation to this Article of the ICERD.

<sup>147</sup> Submission 10, Anti-Discrimination Board of NSW, p 4. Also see Submission 5, NSW Jewish Board of Deputies, p 3.

<sup>148</sup> Submission 24, p Legal Aid NSW, p 3.

<sup>149</sup> Evidence, Mr John McKenzie, Chief Legal Officer Aboriginal Legal Service, 8 April 2013, p 51.

<sup>150</sup> Submission 8, Community Relations Commission for a Multicultural NSW, p 7.

<sup>151</sup> Submission 10, Anti-Discrimination Board of NSW, p 4 and Submission 5, NSW Jewish Board of Deputies, p 4.

<sup>152</sup> Submission 23, NSW Aboriginal Land Council, p 4.

<sup>153</sup> Submission 32, NSW Young Lawyers, pp 4-5.

- 4.36 Professors Rice and Rees suggested that “the private-public dividing line ... should be drawn a little bit further into the private domain than what it has been in the past” and include places such as the lobby of an apartment block.<sup>154</sup> However, if a person could establish that their conduct was intended to be private than it would not be caught by the Act.<sup>155</sup> To elaborate on the latter point, under the current provision the onus lies on the complainant to prove that the act was in public. However Professors Rice and Rees suggested that the respondent should be responsible for providing that their conduct was intended to be in private and therefore not eligible for consideration under s 20D.
- 4.37 Professor Rice explained this with the following example: “It may well have been heard publicly but if they can show that was not their intention, if it was a dispute between people inside an apartment with thin walls, then they may well be able to establish that.”<sup>156</sup>
- 4.38 Professors Rice and Rees informed the Committee that this is the approach that has been taken in Victoria. Under s 12 of the *Racial and Religious Tolerance Act 2001* (Vic), if the respondent can establish that their conduct was intended ‘to be heard or seen only by themselves’, they will not be caught by the Act.<sup>157</sup>
- 4.39 It is noted that there is no reference to ‘public act’ in the Victorian legislation, which criminalises all racially vilifying conduct with the exception of private conduct, as outlined above.

#### **‘Public communications’ and the internet**

- 4.40 Some inquiry participants suggested replacing the words ‘public act’ with ‘public communications’. Concerns were also raised that the current definition of ‘public act’ does not adequately regulate serious racial vilification offences that occur on the internet. These matters are discussed below.
- 4.41 The proposal to amend ‘public act’ and replace it with ‘public communications’ was canvassed in the NSW Law Reform Commission’s *Review of the Anti-Discrimination Act 1977* which recommended “[t]he prohibition on vilification in the ADA [Anti-Discrimination Act] should not be limited by reference to the “public” but by reference to a “public communication”.”<sup>158</sup>
- 4.42 The Australian Lawyers for Human Rights supported the NSW Law Reform Commission’s recommendation that the prohibition on racial vilification should not be limited by reference to ‘the public’ but by reference to ‘public communication’.<sup>159</sup>
- 4.43 The Law Society of NSW was also an advocate of this argument. During evidence to the Committee, Mr McKenzie reasoned that ‘public communication’ was a more effective means of capturing modern forms of communication, especially social media:

---

<sup>154</sup> Evidence, Professor Rees, 8 April 2013, p 19.

<sup>155</sup> Evidence, Professor Rice, 8 April 2013, p 19.

<sup>156</sup> Evidence, Professor Rice, 8 April 2013, p 21.

<sup>157</sup> s 12, *Racial and Religious Tolerance Act 2001* (Vic).

<sup>158</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, Report 92, (Sydney, 1999), p 541.

<sup>159</sup> Submission 33, Australian Lawyers for Human Rights, p 4.

There is anecdotally a greater potential for racial vilification in the twenty-first century than there was when this offence was created, simply because of the prominence of social media, Facebook, Twitter – even the internet itself – and because people tend to be fairly casual in what they say on some of those media, there may well be a greater need, because of the greater means to make public communications, to make sure that the offence is contemporary in that respect.<sup>160</sup>

**4.44** Mr McKenzie further argued that ‘public communication’ is more effective at capturing actions, such as vilifying speeches, than ‘public act’.<sup>161</sup>

**4.45** The serious racial vilification offence was inserted into the *Anti-Discrimination Act* in 1989 before the internet played a major role in the wider community, and while the current definition of a ‘public act’ includes “any form of communication to the public...”, such as broadcasting, telecasting, screening and playing recorded material, there was some concern amongst inquiry stakeholders regarding the inability to regulate acts of racial vilification that have occurred on the internet.<sup>162</sup>

**4.46** The NSW Jewish Board of Deputies encapsulated this apprehension when it explained the challenges posed by internet regulation:

A question arises as to whether the publication of material on the internet that is freely accessible to the general public also constitutes a “public act” as defined by section 20B of the ADA and, if so, whether it constitutes a public act by the publisher only or also by the internet service provider and/or platform provider.<sup>163</sup>

**4.47** Stakeholders acknowledged these difficulties and viewed the Inquiry as an opportunity to provide clarity about the inclusion of the internet and social media within s 20B.<sup>164</sup>

**4.48** One proposal by Mr Peter Wertheim, Executive Director of the Executive Council of Australian Jewry, was that the use of the internet as a form of media be reflected in the definition of ‘public act’ to reflect case law.<sup>165</sup>

### ***Committee comment***

**4.49** The Committee notes the concerns of inquiry participants regarding the lack of clarity around the term ‘public act’ in s 20B of the *Anti-Discrimination Act*. As well as causing frustration, this situation can potentially lead to lengthy delays in the complaints handling process.

**4.50** We note that the existing case law, such as in *Z v University of A & Ors*, has interpreted ‘public act’ broadly to include conduct or communication that is “capable of being seen or heard, without undue intrusion, by a non-participant”.

<sup>160</sup> Evidence, Mr McKenzie, 5 April 2013, p 23.

<sup>161</sup> Evidence, Mr McKenzie, 5 April 2013, p 23.

<sup>162</sup> See for example: Submission 37, Mr Anthony Pang, p 4 and Evidence, Mr Kerkyasharian, 5 April 2013, p 3.

<sup>163</sup> Submission 5, NSW Jewish Board of Deputies, p 4.

<sup>164</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 6; Evidence, Mr John Dowd, President, International Commission of Jurists Australia, 5 April 2013, p 11 and Submission 5, NSW Jewish Board of Deputies, p 16.

<sup>165</sup> Evidence, Mr Peter Wertheim, Executive Director, Council of Australian Jewry, 8 April 2013, p 39.

- 4.51 A number of suggestions were made by stakeholders to help clarify the scope of ‘public act’. A suggestion that the Committee was particularly drawn to was the proposal from Professors Rice and Rees to extend the public-private dividing line “a little bit further into the private domain” to include quasi-public places, such as the lobby of an apartment block. We agree with this proposal, and have therefore recommended that the Government consider amending s 20B to capture conduct in such places.
- 

### **Recommendation 1**

That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.

---

- 4.52 The Committee acknowledges the further proposal from Professors Rice and Rees to include an exception for conduct that the respondent could prove was intended to be in private. This would then cover the example of a dispute between people inside an apartment with thin walls, who – even if they were heard publicly – could establish that they have not breached the Act. We note that such an exception exists in s 12 of the *Racial and Religious Tolerance Act 2001* (Vic).
- 4.53 The Committee agrees that private conduct should be excluded from the racial vilification provisions in the *Anti-Discrimination Act*, and therefore recommends that the Government also consider amending s 20B to provide this exception.
- 

### **Recommendation 2**

That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to insert an exception for private conduct, as per section 12 of the *Racial and Religious Tolerance Act 2001* (Vic).

---

## **‘Incite’**

- 4.54 Under s 20D(1) of the *Anti-Discrimination Act*:

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...<sup>166</sup>

- 4.55 The Committee received a great deal of evidence concerning the requirement to prove ‘incitement’ to qualify as an offence under s 20D. A number of stakeholders referred to the 2009 paper *Review of Law of Vilification: Criminal Aspects* by the then Director of Public Prosecutions, Mr Nicholas Cowdery AM QC, concerning the difficulties proving incitement, with many echoing his view that the incitement test places an excessive burden upon the claimant to present evidence to prove racial vilification.<sup>167</sup>

---

<sup>166</sup> s 20D(1), *Anti-Discrimination Act 1977*.

<sup>167</sup> See for example, Submission 4, Kingsford Legal Centre, p 1.

---

- 4.56 While there were some calls to repeal the incitement requirement for serious racial vilification offences,<sup>168</sup> the majority of stakeholders suggested amending the provision.
- 4.57 This section examines the primary concerns raised during the Inquiry about the term ‘incite’ and its application to s 20D of the *Anti-Discrimination Act*, including:
- the definition of ‘incite’
  - whether proof of incitement requires evidence that others have in fact been incited, and
  - if incitement must be intentional.
- 4.58 The section also discusses whether ‘promote or express’ should replace ‘incite’ and the appropriateness of replacing the current objective test with a circumstantial test that focuses on the impact of racial vilification on a victim, rather than the intent of the alleged offender.

### Definition of incite

- 4.59 The *Anti-Discrimination Act* does not provide a definition of ‘incite.’ However the NSW Administrative Decisions Tribunal has used the ordinary dictionary definition of ‘incite’ in making rulings. For example, in *Burns v Dye [2002]* NSWADT 32 the Tribunal said:

... the word ‘incite’ is to be given its ordinary natural meaning which is to “urge, spur on, ... stir up, animate; stimulate to do something” (New Shorter Oxford English Dictionary, 1993) (Oxford); “urge on; stimulate or prompt to action” (the Macquarie Dictionary, third edition, 1997) (Macquarie).<sup>169</sup>

- 4.60 Despite current jurisprudence concerning the term and its use in civil proceedings being described as “reasonably settled,”<sup>170</sup> it was suggested during the Inquiry that alternate words or phrases may be more appropriate. For example, Mr Dowd and Professor Rice preferred the term ‘cause’ while others were in favour of the expression ‘promote or express.’<sup>171</sup>

### ‘Promote or express’

- 4.61 During the Inquiry the Committee received evidence debating whether it was desirable to amend s 20D of the *Anti-Discrimination Act* to replace the word ‘incite’ with ‘promote or express’.
- 4.62 The original Anti-Discrimination (Racial Vilification) Amendment Bill included the expression ‘promote or express’ instead of ‘incite.’ The Law Society of NSW argued that this terminology was preferable as the words ‘promote or express’:
- would increase the scope of s 20D of the *Anti-Discrimination Act*

<sup>168</sup> See for example: Submission 35, Human Rights Law Centre, p 15.

<sup>169</sup> Submission 34, Redfern Legal Centre, pp 8-9.

<sup>170</sup> Evidence, Professor Rees, 8 April 2013, p 24.

<sup>171</sup> Evidence, Mr Dowd, 5 April 2013, p 12; Evidence, Professor Rice, 8 April 2013, p 24 and Submission 12, Law Society of NSW, p 4.

- are consistent with Australia’s obligations under the International Covenant on the Elimination of all forms of Racial Discrimination
- make clearer who is inciting whom, and
- use Plain English.<sup>172</sup>

**4.63** The Australian Lawyers Alliance and the NSW Council for Civil Liberties agreed with the Law Society’s recommendation.<sup>173</sup>

**4.64** The NSW Jewish Board of Deputies however cautioned against changing ‘incite’ to ‘promote or express’ due to the body of jurisprudence that has developed around the term:

Removing the terminology of incitement from the Anti-Discrimination Act and replacing it with new terminology would involve jettisoning the body of jurisprudence that has developed in Australia in particular around the concept of incitement in connection with the civil prohibition in section 20C, assuming that that jurisprudence applies to section 20D.<sup>174</sup>

**4.65** Nonetheless during his evidence to the Committee, Mr Wertheim conceded that he would not object to such an amendment as the NSW Administrative Decision Tribunal’s interpretation of ‘incite’ offers very little practical difference between it and ‘promote or express.’<sup>175</sup>

**4.66** The NSW Bar Association was apprehensive about amending s 20D of the *Anti-Discrimination Act* to include ‘promote or express’ instead of ‘incite’. In its answers to questions on notice the Bar Association argued that such an amendment would significantly lower the evidentiary threshold and may unduly impinge on freedom of expression:

The Association notes that the effect of the proposed amendment is that the offence is no longer solely directed to the incitement of others to hatred, serious contempt or severe ridicule, as provided in the current 20D. Rather, it criminalises the expression of hatred, serious contempt or severe ridicule (as well as the promotion of the same).

...

The Association considers that whilst the court would give the word “promotes” much the same meaning as “incites”, the word “expresses” is a much less demanding requirement. Freedom of speech considerations may weigh against criminalising mere expressions of hatred etc. The Association is concerned that criminalising speech in such a manner goes beyond the scope of article 20(2) of the ICCPR [International Covenant on Civil and Political Rights] and also article 4 of CERD [International Covenant on the Elimination of all forms of Racial Discrimination].<sup>176</sup>

<sup>172</sup> Submission 12, Law Society of NSW, p 4 and Evidence, Mr McKenzie, 5 April 2013, p 23.

<sup>173</sup> Evidence, Mr Joshua Dale, Chair Sub-Committee on Human Rights Australian Lawyers Alliance, 8 April 2013, p 2 and Evidence, Mr Stephen Blanks, Secretary, New South Wales Council for Civil Liberties 8 April 2013, p 9.

<sup>174</sup> Submission 5, Jewish Board of Deputies, p 5.

<sup>175</sup> Evidence, Mr Wertheim, 8 April 2013, p 46.

<sup>176</sup> Answer to question on notice, NSW Bar Association, 3 May 2013, pp 1-2.

- 4.67 A different view however was presented by the NSW Labor Lawyers. In response to a proposed option for an amended s 20D from the Committee which contained the words ‘promote or express’ instead of the word ‘incite’, the Labor Lawyers submitted that the words ‘promote’ or ‘express’ may still maintain a high and potentially prohibitive threshold for the offence. They added that such a high threshold may nonetheless be appropriate if the provision is to have an educative purpose (see Chapter 3 for more on the ‘educative and symbolic’ purpose of s 20D).<sup>177</sup>
- 4.68 The NSW Bar Association noted that any amendment to the use of the word ‘incite’ would also have consequences for the application of s 20C of the *Anti-Discrimination Act*.<sup>178</sup>

### *Committee comment*

- 4.69 The Committee acknowledges that there are difficulties with proving incitement. As discussed at the beginning of this chapter, the challenge of proving this element has repeatedly been cited as a reason why there have been no prosecutions instituted under s 20D of the *Anti-Discrimination Act*.
- 4.70 We note that numerous inquiry participants were in favour of adopting more accessible language such as ‘promote or express’ or ‘cause’, however we also note the comment from Mr Wertheim that there is very little practical difference between the different words. Given that there was no clear consensus on an alternative, the Committee believes that, at this time, the current provision should be maintained.

### **Establishing ‘incitement’**

- 4.71 Sections 20C and 20D of the *Anti-Discrimination Act* require proof of incitement. As there have been no serious racial vilification prosecutions it is unclear whether judicial officers would apply a subjective or objective test to determine proof of incitement. On initial reading of s 20D it may be argued that a subjective test would apply as there is no mention of reasonableness in the provision. However, most inquiry participants assumed that an objective test would be used as this has been the approach taken in s 20C proceedings.
- 4.72 The use of an objective test is examined below, followed by consideration of whether a ‘circumstantial’ test may be more appropriate for the offence of serious racial vilification.

### *Objective test*

- 4.73 In the absence of case law concerning s 20D, stakeholders looked to 20C for guidance regarding the term ‘incitement’. Case law concerning the civil prohibition in s 20C establishes that ‘incitement’ can be proved in the absence of evidence that other people have been roused to hatred. The NSW Jewish Board of Deputies advised that the test applied by the courts is “... whether a hypothetical audience of reasonable people who are neither immune from, nor particularly susceptible to, feelings of hatred on one of the prohibited grounds would be incited.”<sup>179</sup>

<sup>177</sup> Answers to question on notice, NSW Society of Labor Lawyers, 24 April 2013, p 2.

<sup>178</sup> Answer to question on notice, NSW Bar Association, 3 May 2013, p 2.

<sup>179</sup> Submission 5, NSW Jewish Board of Deputies, p 5.

**4.74** The Jewish Board of Deputies noted that this is an objective test based on how the ‘ordinary reasonable reader’ would react, as set out in *Z v University of A & Ors (No 7)* [2004] NSWADT 81:

... in the context of vilification provisions, the question is, could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the grounds of race?<sup>180</sup>

**4.75** Professor Rees used the example of recent media reports of people being racially abused on public transport to illustrate how this objective test would be applied:

To take the example that is, I suppose, fresh in people’s minds: the newspaper reports of people being abused on public transport in Sydney and Melbourne. Under the existing law you have got to look at the impact that that behaviour would have upon an ordinary person sitting on the bus and say how would they have felt about the person who was the victim.<sup>181</sup>

**4.76** Despite civil jurisprudence in this area being firmly established in regard to s 20C, the Anti-Discrimination Board of NSW noted it is unclear whether this objective test would apply to s 20D of the *Anti-Discrimination Act* as no cases have been brought forward for prosecution.<sup>182</sup> It was therefore suggested to the Committee that the serious racial vilification provision should be amended to explicitly refer to an objective test that considers whether conduct is ‘reasonably likely’ to threaten or cause harm. For example, Legal Aid NSW advocated the amendment saying it would strengthen the provision and bring it into line with Commonwealth legislation:

Introducing an objective test into section 20D will strengthen the operation of the provision by bringing conduct which is reasonably likely to threaten physical harm or incite others to threaten physical harm within the coverage of the provision.

The introduction of an objective test will also ensure consistency with the framing of the racial vilification provision at the Commonwealth level in section 18C of the *Racial Discrimination Act 1975* (Cth), which contains a “reasonably likely” test.<sup>183</sup>

**4.77** The Aboriginal Legal Service concurred with the Legal Aid NSW recommendation on the basis that it introduced a degree of reasonableness into the provision:

... it is introducing a reasonableness so that if it is to go to a single judge or a magistrate or to a jury there is that test of is this reasonable in all the circumstances, not simply on the basis of a subjective test of what the victim says they felt, because that of course is very skewed.<sup>184</sup>

---

<sup>180</sup> Submission 5, NSW Jewish Board of Deputies, p 5.

<sup>181</sup> Evidence, Professor Rees, 8 April 2013, p 24.

<sup>182</sup> Submission 10, Anti-Discrimination Board of NSW, P 5.

<sup>183</sup> Submission 24, NSW Legal Aid, p 5.

<sup>184</sup> Evidence, Mr McKenzie, 8 April 2013, p 49.

- 4.78 During his evidence to the Committee, Mr McKenzie added that the Legal Aid NSW recommendation limited the ability of a respondent or their legal counsel to present arguments that their actions did not intend to cause harm.<sup>185</sup>

*Circumstantial test*

- 4.79 Questions were raised during the Inquiry about the appropriateness of applying an objective test to s 20D.
- 4.80 The NSW Bar Association was critical of the objective test as it ignores any special characteristics or proclivities to which the audience or potential audience of the alleged offender might be subject. The Bar Association noted that the Victorian Court of Appeal has rejected the use of this objective test when construing the meaning of ‘incite hatred’.<sup>186</sup> The NSW Council for Civil Liberties was similarly inclined and asserted that it was appropriate to place a greater emphasis upon the circumstances created by the acts.<sup>187</sup>
- 4.81 Drawing on the ‘Catch the Fire Ministries’ case in Victoria,<sup>188</sup> the NSW Bar Association proposed a new test that would consider whether the natural or ordinary effect of the conduct incites hatred or other relevant emotion in the circumstances of the case:

The test for incitement of hatred should be whether the natural or ordinary effect of the conduct is to incite hatred or other relevant emotion in the circumstances of the case. Those circumstances should include both the characteristics of the audience to which the words or conduct is directed and the historical and social context in which the words are spoken or the conduct occurs.<sup>189</sup>

- 4.82 Mr Simeon Beckett, Barrister, NSW Bar Association, elaborated on the potential operation of this test during his evidence to the Committee:

The Catch the Fire Ministries case in Victoria... clarified the issue of incitement so that the court could take into account the relevant circumstances. In other words, the test is not so much the reasonable reader, not the ordinary man or woman in the street, whether they would be incited to hatred, but you needed to take into account the circumstances such as, for example, a rally of Nazi supporters where they are inciting people to hatred against Jews at a public gathering. In other words, would the people who are at that particular gathering be incited to hate Jewish people as a result of what was said at that particular meeting?<sup>190</sup>

<sup>185</sup> Evidence, Mr McKenzie, 8 April 2013, pp 51-52.

<sup>186</sup> Submission 31, NSW Bar Association, p 6.

<sup>187</sup> Evidence, Mr Jackson Rogers, Executive Member, NSW Council for Civil Liberties, 8 April 2013, p 3.

<sup>188</sup> *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284* (14 December 2006) examined whether a seminar presentation by Catch the Fire Ministries, or publication of articles by the same organisation, incited hatred against, serious contempt for or revulsion or severe ridicule of Muslims on the ground of religious belief. It also considered whether the conduct was engaged in reasonably and in good faith for a genuine religious purpose as set out in ss 8, 9 and 11 of the *Racial and Religious Tolerance Act 2001* (Vic).

<sup>189</sup> Submission 31, NSW Bar Association, p 7.

<sup>190</sup> Evidence, Mr Simeon Beckett, Barrister, NSW Bar Association, 8 April 2013, p 54.

**4.83** Mr Beckett explained that as with the objective test based on the ‘ordinary reasonable reader’, a circumstantial test would not require a prosecutor to identify that someone was incited by a person’s comments. Additionally, a prosecutor would still have to prove incitement to the criminal standard – i.e. beyond reasonable doubt.<sup>191</sup>

### ***Committee comment***

**4.84** The Committee notes that the courts use an objective test to establish incitement in proceedings under s 20C of the *Anti-Discrimination Act*. In such cases the question posed is “... could the ordinary reasonable reader understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the grounds of race?”

**4.85** We note that it is unclear whether this objective test would apply to s 20D of the *Anti-Discrimination Act* as there have been no cases forwarded for prosecution. This situation led to certain inquiry participants supporting an amendment to s 20D to expressly refer to conduct that is ‘reasonably likely’ to threaten or cause harm.

**4.86** The Committee does not support this suggestion. In our view, the use of the objective test to determine incitement under s 20C appears to be working effectively and there is no indication that the test could not be applied to future proceedings concerning s 20D. Therefore we do not see the need for the legislation to be amended.

**4.87** We acknowledge that the Victorian Court of Appeal has rejected the use of an objective test for construing the meaning of ‘incite hatred’ and instead applies a circumstantial test to establish incitement. The circumstantial test considers “... whether the natural or ordinary effect of the conduct incites hatred or other relevant emotion in the circumstances of the case”, thereby having a wider scope to consider any special characteristics or proclivities to which the audience of the alleged offender may be subject to. It appears to the Committee that the circumstantial test could be equally effective in determining incitement in serious racial vilification matters. However the Committee considers it appropriate to leave the application of either test to the determination of the courts.

### **Intention to incite**

**4.88** Section 20D of the *Anti-Discrimination Act* requires an offender to ‘incite’ hatred, serious contempt or severe ridicule of a person or group of persons based on their race. Concerns were raised during the Inquiry regarding the necessary mental state, or ‘mens rea’, required when proving incitement. Mr Kerkysharian noted that it is not clear from the current provision what mental element is required, and argued that “[i]t is ... necessary to clarify whether a criminal intent is there – being an intention or recklessness.”<sup>192</sup>

**4.89** In his Second Reading Speech on the Anti-Discrimination (Racial Vilification) Amendment Bill, the then Attorney General, the Hon John Dowd, commented that incitement should be intentional, saying “[t]he requirement for intention in the offence of serious racial

---

<sup>191</sup> Evidence, Mr Beckett, 8 April 2013, pp 60-61.

<sup>192</sup> Evidence, Mr Kerjaysharian, 5 April 2013, p 4.

vilification...sets it apart from proposed section 20C and further ensures that prosecution and conviction will be limited to only very serious cases of racial vilification.”<sup>193</sup>

- 4.90** Inquiry participants noted that as no cases under s 20D have come before the courts, it remains uncertain as to whether the word ‘incite’ would be interpreted in the way anticipated by Mr Dowd.<sup>194</sup>
- 4.91** Nonetheless, several stakeholders assumed that courts would interpret the provision as requiring intent,<sup>195</sup> and some stakeholders viewed this to be an issue.
- 4.92** For example, NSW Young Lawyers expressed the view that if intent is necessary it is a unique hurdle to serious racial vilification offences that may be a contributing factor to the lack of prosecutions.<sup>196</sup> A similar point was raised by Mr Stephen Blanks, Solicitor and Secretary, NSW Council for Civil Liberties: “I think one of the elements that causes a problem and a hurdle which is inappropriate is the requirement for intentional incitement of harm.”<sup>197</sup>
- 4.93** Likewise, Miss Sarah Pitney suggested that the effectiveness of s 20D was being undermined by the requirement of proof of intent:

The effectiveness of s 20D is undermined by the requirement that the prosecution prove beyond reasonable doubt a subjective intention on the part of the accused not only to carry out the relevant ‘public act’, but that the act will incite hatred, serious contempt or severe ridicule... This ‘additional mens rea requirement’ of intent as to the upshot of the act or ‘specific intent’ has previously been described as a hindrance to the implementation of similar antidiscrimination legislation...<sup>198</sup>

- 4.94** Mr Peter Chan, Secretary of the Chinese Australian Forum of NSW, argued that having a standard of proof that relies on intent, conduct and harm being inflicted is too onerous.<sup>199</sup> Professor Rice agreed that intent can be difficult to prove, adding: “If it turns entirely on the intention of the person then it will fail if the person can profess another intention of wilful blindness or ignorance.”<sup>200</sup>
- 4.95** To overcome difficulties with proving intent, a number of participants expressed the view that s 20D of the *Anti-Discrimination Act* should include a mens rea of recklessness. The NSW Jewish Board of Deputies advised that recklessness is still a form of criminal intent:

<sup>193</sup> Submission 10, Anti-Discrimination Board of NSW, p 5.

<sup>194</sup> Submission 5, NSW Jewish Board of Deputies, p 6; Submission 8, Community Relations Commission for a Multicultural NSW, p 4.

<sup>195</sup> See for example: Submission 39, NSW Council for Civil Liberties, p 3; Evidence, Mr Peter Chan, Secretary, Chinese Australian Forum of NSW, 8 April 2013 p 32; Evidence, Mr McKenzie, 5 April 2013, p 22.

<sup>196</sup> Submission 32, NSW Young Lawyers, p 6.

<sup>197</sup> Evidence, Mr Stephen Blanks, Solicitor and Secretary, NSW Council for Civil Liberties, 8 April 2013, p 2.

<sup>198</sup> Submission 1, Miss Sarah Pitney, p 5.

<sup>199</sup> Evidence, Mr Chan, 8 April 2013, p 32.

<sup>200</sup> Evidence, Professor Rice, 8 April 2013, p 25.

The argument that proof of intention to incite ought to be a requirement for securing a conviction under section 20D derives from the common law concept that the element of mens rea (“a guilty mind”) must be present to justify the imposition of criminal sanctions. Satisfying this requirement in any criminal prosecution usually entails proof of criminal intent or at least reckless indifference by the accused to the consequences of the proscribed behaviour.

Criminal intent can either involve deliberation or recklessness...<sup>201</sup>

- 4.96** Mr McKenzie from the Law Society of NSW similarly noted that recklessness is usually sufficient to prove intent:

The present section does not make it clear that reckless conduct is covered. It would be interpreted to only be confined to intentional conduct. The orthodox approach of lawyers is that if you are reckless as to the consequences of your acts then that is sufficient to ground criminal liability, to ground the mental elements of criminal liability. Usually in relation to an offence intentional recklessness is enough.<sup>202</sup>

- 4.97** The NSW Jewish Board of Deputies and the Community Relations Commission for a Multicultural NSW insisted that reckless acts should fall under s 20D due to the significant impact of serious racial vilification on the community:

Because the impact of serious racial vilification is seldom limited to one person or a small number of people, but usually creates fear and diminished social participation for the targeted racial group, it is appropriate to proscribe acts which are reckless as well as acts which are deliberate.<sup>203</sup>

- 4.98** NSW Young Lawyers noted that requiring the prosecution to establish ‘inadvertent recklessness’ would be consistent with other jurisdictions such as Victoria and the United Kingdom.<sup>204</sup>

- 4.99** The Law Society of NSW and Australian Lawyers for Human Rights recommended amending s 20D to incorporate the phrase ‘knowingly or recklessly,’ which they noted is consistent with the Queensland vilification provision.<sup>205</sup>

- 4.100** A slightly different option was proposed by the NSW Council for Civil Liberties, which proposed dividing s 20D into two elements, each with a separate mens rea. The first element would require ‘intent’ to abuse or ridicule on the grounds of race, while the second would require a ‘reckless disregard’ to the consequences of one’s actions.<sup>206</sup>

- 4.101** While the proposal from the NSW Council for Civil Liberties involves a shift in the balance of the focus from the intent of the offender to the impact on the victim, it still requires the offender to have a mens rea. This was elaborated on by Mr Jackson Rogers, Solicitor and

---

<sup>201</sup> Submission 5, NSW Jewish Board of Deputies, p 6.

<sup>202</sup> Evidence, Mr McKenzie, 5 April 2013, p 22.

<sup>203</sup> Submission 5, NSW Jewish Board of Deputies, p 6; See also Submission 8, Community Relations Commission for a Multicultural NSW, p 6.

<sup>204</sup> Submission 32, NSW Young Lawyers, p 6.

<sup>205</sup> Submission 12, Law Society of NSW, p 3.

<sup>206</sup> Evidence, Mr Blanks, 8 April 2013, p 9.

Executive Member of the NSW Council for Civil Liberties, who noted that the Canadian racial vilification legislation has the same balance:

There is a lot of inquiry into the mindset of the individual or individuals involved and we think that the emphasis should not be so much focused on that. We think that the results or the milieu that is created by the acts should be also looked into in an objective sense, and we think that in that regard the Canadian legislation has the right balance, that there is still a requirement to look into the mens rea of the individuals concerned, but it places more emphasis upon the circumstances created by the acts, and that is the appropriate way of looking at an offence like serious racial vilification.<sup>207</sup>

**4.102** The Council for Civil Liberties' proposal received some support from Mr Breheny who told the Committee:

I do not think I would disagree with having two separate mens rea. Recklessness is a fairly acceptable standard of mens rea in many other areas of criminal law, and I do not think it would be inappropriate to include that in this particular provision as well.<sup>208</sup>

**4.103** Another option could be to create two separate offences and penalties for serious racial vilification involving intent or recklessness. NSW Young Lawyers noted that this is the option used in Western Australia: "... Western Australian legislation contains two separate offences carrying penalties of different severity – one of engaging in conduct 'intended to incite racial animosity and the other where racial animosity was merely a 'likely' consequence.'<sup>209</sup>

**4.104** NSW Young Lawyers asserted that incorporating recklessness into s 20D by inserting the words 'inadvertent recklessness' (as per the Victorian legislation) or by creating two separate offences with different levels of mens rea (as per the Western Australian legislation) would make the provision more effective:

... following either of these legislative models will enable racial vilification to be prosecuted more effectively, enabling the rights of racially vilified individuals to be acknowledged and providing a deterrent to potential offenders.<sup>210</sup>

### *Committee comment*

**4.105** The Committee notes that it is not clear from the current wording in s 20D of the *Anti-Discrimination Act* as to which mens rea is required to prove incitement.

**4.106** We acknowledge that the Attorney General in his Second Reading Speech considered that incitement should be intentional. However we also note the evidence from stakeholders that proving intent to incite is extremely difficult and poses a significant hurdle to prosecutions under s 20D.

<sup>207</sup> Evidence, Mr Rogers, 8 April 2013, p 3.

<sup>208</sup> Evidence, Mr Breheny, 8 April 2013, 17.

<sup>209</sup> Submission 32, NSW Young Lawyers, p 6.

<sup>210</sup> Submission 32, NSW Young Lawyers, p 6.

- 4.107** A number of stakeholders argued that proof of recklessness should be sufficient to establish intention to incite. The Committee accepts the view of the Law Society and the Jewish Board of Deputies that recklessness is a sufficient form of criminal intent. We cannot see why this general principle of criminal law would not apply to s 20D, and recommend that this be clarified to avoid doubt on the matter.’

---

### **Recommendation 3**

That, for avoidance of doubt, the NSW Government amend section 20D of the *Anti-Discrimination Act 1977* to state that recklessness is sufficient to establish intention to incite.

---

### **Impact of offending conduct**

- 4.108** The effect of the current wording in s 20D is that in order to bring a prosecution, a third party must have been incited to racial hatred as a result of the offending act. This was criticised by inquiry participants who argued that the focus should instead be on the impact of the offending conduct on the victim. For example, Mr Kerkyasharian stated:

One of the complexities and difficulties at the moment is the implication that one has to prove that a third party was motivated to carry out a violent act, and my view is that that element should be taken out.

... the main issue should be whether a person or a group of people feel threatened or frightened... I think it should really be not the motivation but the impact it has on the victim.<sup>211</sup>

- 4.109** Professor Rice labelled the requirement for a third party to be incited as ‘old fashioned’:

The existing legislation is based on somebody proselytising and criticising a particular racial group, and having an impact upon ordinary members of the community who are therefore incited to have hostility towards a particular group. I think that is a rather old-fashioned view of the wrong that is being done here.<sup>212</sup>

- 4.110** Professor Rice agreed that the provision should instead focus on the impact of the wrong doing on the people who are racially vilified:

We say that the wrong is the sense of social exclusion that people feel about this and that we should cut out the middle person, if I can put it that way, of having somebody in the middle who has been incited by the behaviour of the person who is engaged in the alleged wrongdoing. We think you go directly from the behaviour of the wrongdoer to the impact that that has had upon the person who is the subject of that behaviour, and let us just cut out the middle person who is supposedly incited because that sends you down rather difficult paths... Can a reasonable member of this community in the twenty-first century be incited to feel ill will and hostility towards members of a particular racial group? That is not a very comfortable decision-making process to have to engage in and what we are proposing simply goes from the act of

---

<sup>211</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 10.

<sup>212</sup> Evidence, Professor Rees, 8 April 2013, p 24.

the alleged wrongdoer to the impact that that has upon the victim of that wrongdoing.<sup>213</sup>

- 4.111 However, the Law Society of NSW cautioned against this approach, emphasising that the mens rea of a criminal offence should consider the intent of the alleged perpetrator.<sup>214</sup>
- 4.112 The same point was made by Mr Breheny, who commented: “This is criminal law, so you must have a mens rea and actus reus. If you weaken the mens rea side of things, then why do we not make this into a civil provision rather than a criminal one?”<sup>215</sup>

### *Committee comment*

- 4.113 The Committee notes that the current wording of s 20D requires a third party to be incited to racial hatred as a result of the offending act. On the face of it this appears to be an obscure requirement. We note the suggestion from stakeholders to ‘cut out the middle person’ and instead focus on the impact of the wrongdoing on the victim. We consider this to be a valid point.
- 4.114 However, we also note the warnings from other stakeholders that criminal offences should consider the intent of the alleged offender. The Committee agrees that this is a key element of criminal law, and is therefore of the view that if any future amendments are made to s 20D that shift the focus of a racially vilifying act from the impact on a third party to the impact on the victim, that there still be a requirement for the alleged offender to have the necessary mens rea.

## **‘Hatred towards, serious contempt for, or severe ridicule of’**

- 4.115 This section briefly considers the third element of the offence in s 20D of the *Anti-Discrimination Act* – that the respondent’s actions incite ‘hatred towards, serious contempt for, or severe ridicule of,’ the targeted individual or group. The Committee did not receive a great deal of evidence about this element of the offence.
- 4.116 As previously discussed in this report, there have no prosecutions under s 20D of the *Anti-Discrimination Act*. However certain civil cases have provided examples of how key terms associated with serious racial vilification could possibly be interpreted by the courts.
- 4.117 A number of inquiry participants, including the NSW Jewish Board of Deputies, drew the Committee’s attention to *Kazak v John Fairfax Publications Ltd [2000]* NSWADT 77 at [40] which set out the dictionary definitions of ‘hatred’, ‘serious’, ‘contempt’, and ‘severe’:

*The Tribunal at first instance in Kazak v John Fairfax Publications Ltd [2000] NSWADT 77 at [40] set out the following definitions:*

*‘hatred’ means ‘intense dislike; detestation’ (Macquarie); ‘a feeling of hostility or strong aversion towards a person or thing; active and violent dislike’ (Oxford);*

<sup>213</sup> Evidence, Professor Neil Rees, 8 April 2013, p 24.

<sup>214</sup> Evidence, Mr McKenzie, 5 April 2013, pp 24-25.

<sup>215</sup> Evidence, Mr Breheny, 8 April 2013, p 13.

*'serious' means important, grave' (Oxford); 'weighty, important' (Macquarie);*

*'contempt' means 'the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account' (Oxford); the feeling with which one regards anything considered mean, vile, or worthless (Macquarie);*

*'severe' means 'rigorous, strict or harsh' (Oxford); 'harsh, extreme' Macquarie); 'ridicule' means 'subject to ridicule or mockery; make fun of, deride, laugh at' (Oxford); 'words or actions intended to excite contemptuous laughter at a person or thing; derision' (Macquarie).<sup>216</sup>*

- 4.118** The NSW Jewish Board of Deputies recommended broadening the scope of the definition of hatred to include "... truly gross behaviours such as detestation, enmity, ill-will, revulsion, serious contempt or malevolence."<sup>217</sup>
- 4.119** The Public Interest Advocacy Centre explained that *Burns v Radio 2UE Sydney Pty Ltd & Ors [2004]* NSWADT 267, which concerned an allegation of homosexual vilification, specifically considered the meaning of 'severe ridicule,' to be "... harsh or extreme mockery or derision"<sup>218</sup>.
- 4.120** The NSW Bar Association called the language used in s 20D of the *Anti-Discrimination Act* "straightforward" and felt it was appropriate to leave interpretation of 'serious' and 'severe' and 'threatening physical harm' to a judicial officer.<sup>219</sup>

### ***Committee comment***

- 4.121** The Committee understands that the jurisprudence surrounding the interpretation of 'hatred', 'serious', 'contempt', 'severe' and 'severe ridicule' is well established as there have been a number of civil prohibition proceedings heard in the NSW Administrative Decisions Tribunal that have considered these terms. The Committee expects that the courts would interpret these terms in the same manner should a prosecution for serious racial vilification be instituted.

### **'On the ground of the race of the person or members of the group'**

- 4.122** Section 20D requires that racial vilification be proved '... on the ground of the race of the person or members of the group'. Section 4 of the *Anti-Discrimination Act* defines race to include "colour, nationality, descent and ethnic, ethno-religious or national origin."<sup>220</sup> This definition extends to the offence of serious racial vilification.
- 4.123** Suggestions were made during this Inquiry that the definition of race be extended to include persons of a presumed race, associates of a targeted individual or group, or family members. Some suggestions were also made to amend the Act to include religious vilification. These suggestions are considered below.

<sup>216</sup> Submission 5, NSW Jewish Board of Deputies, pp 6-7.

<sup>217</sup> Submission 5, NSW Jewish Board of Deputies, p 15.

<sup>218</sup> Submission 22, Public Interest Advocacy Centre, pp 5-6.

<sup>219</sup> Submission 31, NSW Bar Association, p 5.

<sup>220</sup> s 4, *Anti-Discrimination Act*.

### Scope of the current provision

- 4.124** During the Inquiry it was brought to the Committee’s attention that persons of a presumed race are not covered by s 20D. This position is at odds with other provisions within the *Anti-Discrimination Act*. For example, people presumed to be homosexual or HIV/AIDS-infected are protected under sections 49ZF, 49ZXB and 49ZXC of the Act.<sup>221</sup>
- 4.125** The effect of this is illustrated by the example in the case study in Chapter 2 (at 2.6) of the Korean woman who was verbally abused on a Sydney bus, who would not be able to lodge a complaint with the Anti-Discrimination Board of NSW as she was incorrectly identified as being Japanese by the alleged offender.<sup>222</sup>
- 4.126** It was argued that s 20D fails to recognise that people of a presumed race are equally impacted by racial vilification. Mr John McKenzie, Chief Legal Officer for the Aboriginal Legal Service, told the Committee that people feel incredible hurt when they are racially vilified – either because of their actual or presumed race.<sup>223</sup>
- 4.127** Various stakeholders supported extending coverage of s 20D of the *Anti-Discrimination Act* to persons of a presumed race.<sup>224</sup>
- 4.128** Mr Joshua Dale, Solicitor and Chair of the Human Rights Sub-Committee for the Australian Lawyers Alliance, explained that the amendment would widen the scope of the provision to capture all potential victims:

In circumstances where someone is perceived to be of a particular background and they have suffered racial vilification I think certain amendments need to be made to allow them to fall within the Act. Racial vilification is a broad notion that should be adopted whether or not someone identifies as being someone from a particular group and being more generalised as to whether or not people believe they are from a particular group and commit racial vilification. So I think it should be broadened to allow people in those sorts of circumstances to fall within the scope of the legislation.<sup>225</sup>

- 4.129** Other stakeholders that supported extending protection to people of a presumed race included the Community Relations Commission for a Multicultural NSW, the NSW Council for Civil Liberties, the Institute of Public Affairs and the NSW Jewish Board of Deputies.<sup>226</sup>

<sup>221</sup> Sections 49ZF, 49ZXB and 49ZXC, *Anti-Discrimination Act 1977*.

<sup>222</sup> R Olding, “Racist rant: ‘Not the first time I’ve been abused,’ says victim”, *The Sydney Morning Herald*, 3 April 2013, and Evidence, Mr Kerkyasharian, 5 April 2013, p 4.

<sup>223</sup> Evidence, Mr McKenzie, 8 April 2013, p 47.

<sup>224</sup> See for example, Submission 10, Anti-Discrimination Board of NSW, p 8; Submission 24, Legal Aid NSW, p 4 and Submission 28, Armenian National Committee of Australia, p 4.

<sup>225</sup> Evidence, Mr Dale, 5 April 2013, p 33.

<sup>226</sup> Submission 8, Community Relations Commission for a Multicultural NSW, p 8, Evidence, Mr Rogers, 8 April 2013, p 7 and Evidence, Mr Breheny, 8 April 2013, p 12 and Evidence, Mr Wertheim, 8 April 2013, p 39.

**4.130** A broader view was expressed by the NSW Labor Lawyers, which contended that anyone should be able to lodge a complaint about racial vilification, regardless of race or presumed race:

... a matter of alleged racial vilification or possible racial vilification or the factual circumstances which have arisen should be raised by a complainant whether or not they are part of any race the intended subject of the event – irrespective of race or personal response the potential racial vilification ought be accepted as offensive to all in society other than only persons from a race or persons from a presumed race.<sup>227</sup>

**4.131** A suggestion to include associates was made by Legal Aid NSW which advocated that “... sub-section 20D(1) be amended to explicitly provide for the coverage of incitement directed at persons or a group of persons on the grounds of the race of the person or the race of their associate.”<sup>228</sup>

**4.132** Another suggested amendment for s 20D was to include ‘family’. The suggestion was that a new clause be added to s 20D to make it an offence to “cause a person to have a reasonable fear for their own safety or security of property *or for the safety or security of property of their family*” (emphasis added).<sup>229</sup>

**4.133** The Anti-Discrimination Board of NSW supported the underlying intention of this proposed option, however stated that it would prefer the terms ‘relative’ and ‘associate’ as the *Anti-Discrimination Act* already contains definitions of both terms. The Board added that the term ‘family’ could “potentially exclude claims from individuals who share strong ties which are akin to family, but which may not be legally recognised as such.”<sup>230</sup>

**4.134** The Board advised the Committee that if an amendment were made to expand the definition of race, it would be preferable to amend the definition at the beginning of Division 3A of the Act where the racial vilification provisions appear, rather than within section 4(1), so as not to inappropriately expand the definition of race to other sections:

Amending section 4 (1) would have the effect of expanding the definition of race throughout the ADA, including sections dealing with certification of special needs programs by the Attorney General (s126A) and Public Sector Equal Opportunity Management Plans (s122A-S). Such an expansion would render parts of the ADA nonsensical and is clearly inappropriate.<sup>231</sup>

### ***Committee comment***

**4.135** The Committee notes that s 20D of the *Anti-Discrimination Act* does not cover persons of a presumed race and that this is at odds with other sections of the Act which protect persons who are presumed to be homosexual or HIV/AIDS infected. The majority of inquiry participants considered this situation to be unjustifiable as persons of a presumed race are

<sup>227</sup> Answers to question on notice, NSW Society of Labor Lawyers, 24 April 2013, p 3.

<sup>228</sup> Submission 24, Legal Aid NSW, p 4.

<sup>229</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 11. The proposal was also put to some witnesses in a question on notice from the Committee.

<sup>230</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 6.

<sup>231</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 7.

equally hurt by serious racial vilification. Widening the scope of the provision to capture victims who are incorrectly identified was strongly supported by stakeholders.

- 4.136** The Committee recognises the value of extending the scope of s 20D to include persons of a presumed race, particularly in light of the recent incident on a Sydney bus that saw a Korean women racially vilified for presumably being Japanese and therefore ineligible to lodge a complaint. The Committee acknowledges that the most appropriate place to amend the race element of the offence is the beginning of Division 3A of the *Anti-Discrimination Act* so as to ensure the definition only applies to sections 20C and 20D rather than the entirety of the Act.

---

#### **Recommendation 4**

That the NSW Government amend Division 3A of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.

---

- 4.137** The Committee notes the proposals suggesting that s 20D offences should protect a victim's 'family', 'relatives' and 'associates'. While we acknowledge that a person's friends and family may suffer from similar feelings of hurt as the victim, the Committee did not receive enough evidence on this matter to recommend any changes. Likewise, the Committee did not receive enough evidence to support significantly widening s 20D to allow opening standing for racial vilification complaints (further discussion on standing to lodge complaints is provided in Chapter 6).

#### **Religious vilification**

- 4.138** There was some discussion during the Inquiry about the possibility of widening the scope of s 20D of the *Anti-Discrimination Act* to capture religious vilification. As previously mentioned, 'ethno-religion' was incorporated into the Act in 1994 with the intention of including racial groups such as "Jews, Muslims and Sikhs."<sup>232</sup> However there is no specific reference to religious vilification in the Act.
- 4.139** The Human Rights Law Centre highlighted that Australia's international obligations as set out in Article 20(2) of the International Covenant on Civil and Political Rights requires States to prohibit vilification motivated by race, ethnicity or religion, and encouraged the Committee to ensure "... that the criminal and civil prohibition on vilification is consistent with this international human rights obligation."<sup>233</sup>
- 4.140** The Forum of Australia's Islamic Relations supported extending coverage to religious vilification due to concerns about the number of incidents involving discrimination towards Muslim people, such as verbal and physical assaults against Muslim women on public transport, in shopping centres and in hospitals.<sup>234</sup>
- 4.141** However many stakeholders opposed including religious discrimination within the *Anti-Discrimination Act*. For example, following questioning from the Committee, the Board

---

<sup>232</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, pp 3-4.

<sup>233</sup> Submission 35, Human Rights Law Centre, p 18.

<sup>234</sup> Submission 2, Forum of Australia's Islamic Relations, p 2.

declared that at this point in time, it is not advocating the inclusion of pure religious discrimination.<sup>235</sup>

- 4.142** Similarly, the NSW Council for Civil Liberties cautioned that there should be a clear distinction between religious and racial vilification:

One has to be very careful in drawing a distinction between the religious aspect of vilification and the racial aspect of vilification, which can apply in both cases. But one should be free to criticise religion. Although one might not agree with different views, religions are subject to criticism...<sup>236</sup>

- 4.143** Freedom 4 Faith's submission noted that the right of people to hold and manifest religious beliefs should not encroach on freedom of expression by criminalising conduct which merely incites contempt for, or revulsion or ridicule of, religious beliefs and their manifestation.<sup>237</sup>

- 4.144** The International Commission of Jurists Australia considered such an amendment would create intra-religious and quasi-religious disputes:

The ICJA [International Commission of Jurists Australia] recognises that while the Act defines 'race' to include 'ethno-religious or national origin' the Act does not specifically prohibit 'religious vilification'. The ICJA is aware that other jurisdictions do create an offence of 'religious vilification', however the ICJA does not consider that it is appropriate to include this offence in the Act.

The ICJA submits that expanding section 20D to cover 'religious vilification' would create the potential for intra-religious and quasi-religious disputes to come under the Act, as well as other types of disputes that are not appropriately dealt with under the Act.<sup>238</sup>

- 4.145** Mr John Dowd, President of the International Commission of Jurists Australia, further expanded on the International Commission of Jurists Australia's argument during his evidence to the Committee, saying the problem of religious vilification was not serious enough to warrant creating a criminal offence and referring to his intent when he introduced the legislation in his former role as Attorney General:

I do not think there is a big enough problem to warrant creating a criminal offence. It is very easy to throw it in and create another offence – oh, I will put religion in. I thought about this very carefully before introducing the legislation. A lot of vilification that goes on is within religions... I do not see that in our society there is a sufficient attack within this legislation to warrant the inclusion of religion.<sup>239</sup>

- 4.146** Mr Wertheim also opposed extending vilification laws to include religion because it presented a number of challenges including critiquing religious belief:

... other considerations apply with regard to religious vilification laws that do not apply with regard to racial vilification laws. In particular, when you start to deal with

---

<sup>235</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 7.

<sup>236</sup> Evidence, Mr Blanks, 8 April 2013, p 5.

<sup>237</sup> Submission 17, Freedom 4 Faith, pp 3-4.

<sup>238</sup> Submission 30, International Commission of Jurists Australia, pp 2-3.

<sup>239</sup> Evidence, Mr Dowd, President, 5 April 2013, p 14.

religious vilification and you get to a situation of critiques of religious belief, for example, you are cutting very dangerously close to trying to regulate debate about religious belief and we believe that any belief—whether it is religious, ideological, philosophical, scientific, artistic—ought to be capable of robust debate. It is just too hard to define where simply, for example, critiquing a religion is going to be regarded as denigrating it and vilifying people. I think that is too hard a line to draw and certainly it raises a very important issue as to where you do draw the line in a situation like that. Those sorts of questions do not arise when you are talking about vilification based on race.<sup>240</sup>

### **Committee comment**

**4.147** The Committee notes that the issue of religious vilification falls outside the terms of reference of the Inquiry.

### **‘By means which include’**

**4.148** Section 20D of the *Anti-Discrimination Act* requires that the prosecution prove that an act was conducted ‘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.<sup>241</sup>

**4.149** A significant proportion of the evidence received by the Committee considered the appropriateness of this ‘means’ element. The element is the gravamen of the serious racial vilification criminal offence; its application distinguishes s 20D of the *Anti-Discrimination Act* from s 20C (the civil prohibition). However a number of stakeholders considered that the means element is too difficult to establish and that it encourages the perception amongst the community that incitement to hatred alone is not considered sufficiently serious to invoke a criminal offence.<sup>242</sup> It was also noted that acts commonly occurring in incidents where s 20D could apply can also be charged under the *Crimes Act* which attract heavier penalties with a less onerous evidentiary threshold.<sup>243</sup> This latter issue is discussed further in Chapter 5.

**4.150** This section explores the suggestions raised during the Inquiry to amend or repeal the means element.

### **Amending the means element**

**4.151** A number of stakeholders argued in favour of amending the means element in s 20D to make the provision more effective. Debate centred on the use of the word ‘include’ which some saw

<sup>240</sup> Evidence, Mr Wertheim, 8 April 2013, p 43.

<sup>241</sup> s 20D, *Anti-Discrimination Act*.

<sup>242</sup> See for example, Submission 21, Australian Lawyers Alliance, p 3.

<sup>243</sup> Submission 34, Redfern Legal Centre, p 9.

as overly restrictive and incapable of recognising the harm caused by non-physical threats. For example, the NSW Council of Civil Liberties stated:

... On one view, the verb “include” (as taken in its ordinary meaning) suggests an open-ended list of possible ways for the incitement to take place. But in our submission the collective meaning of the Section restricts the offending conduct only to either (i) threats to a person or group or the property of a person or group; or (ii) incitement to others to make such threats. The reason for this is complicated and semantic but we believe taken as a whole the “means” element is restrictive in both intention and practice.<sup>244</sup>

**4.152** Mr Dowd described the drafting of the current provision as “clumsy”<sup>245</sup> and commented “... I think it would be more elegantly put if we took out the words “means which include”. It is to say “shall include”. That is more effective than “means which include.””<sup>246</sup>

**4.153** Another suggestion from the Law Society of NSW is to add the words ‘but not limited to’ after the word ‘include’ in sub section (1).<sup>247</sup>

**4.154** The Australian Lawyers Alliance, however, did not view 20D as being restricted by the term ‘include’:

The interpretation rule of *expressio unius est exclusio alterius* (the express mention of one thing excludes all others) is ordinarily applied to legislative provisions where items not included on a list are taken to be removed from consideration.

As section 20D(1) includes the phrase “including”, we can consider subsections (a) and (b) to be illustrative and not exhaustive. In other words, a person can commit the offence of serious racial vilification without necessarily threatening or inciting physical harm towards others.

The ALA believes this interpretation would be in line with community expectations for the offence of racial vilification as non-physical acts can provoke racial disharmony without physical harm.<sup>248</sup>

### **Repealing the means element**

**4.155** Other inquiry participants were in favour of repealing the means element altogether.<sup>249</sup> For example, in its submission to the Inquiry the Anti-Discrimination Board of NSW considered the means element to be superfluous as people can feel threatened without threats to physical harm:

---

<sup>244</sup> Submission 39, NSW Council for Civil Liberties, p 2.

<sup>245</sup> Evidence, Mr Dowd, 5 April 2013, p 11

<sup>246</sup> Evidence, Mr Dowd, 5 April 2013, p 16.

<sup>247</sup> Evidence, Mr McKenzie, 5 April 2013, p 20.

<sup>248</sup> Submission 21, Australian Lawyers Alliance, p 6.

<sup>249</sup> See for example, Evidence, Mr Chan, 8 April 2013, p 34.

The Board considers that that the ‘means’ test imposed by section 20D is unnecessary. A public act may be extremely threatening without explicitly threatening physical harm, or inciting others to threaten physical harm, to a person or property.<sup>250</sup>

**4.156** The Board elaborated on this view in their answers to questions on notice:

In the Board’s experience those who incite and stir up racial hatred often stop short of actual threats of harm and violence, particularly in written attacks. However, words such as “the Final Solution”, “cutting out the rot” or “seeing this through to the end” (actual words from a complaint), when in the context of aggressive, vilificatory statements, are all capable of implying serious threats and should be capable of prosecution. The fact that an individual intentionally (or recklessly) incites or promotes racial hatred ought to be sufficient for penalties to apply.<sup>251</sup>

**4.157** The Board contended that the inclusion of the means element in s 20D “...presents an additional barrier to the chances of a successful prosecution of this offence.”<sup>252</sup> This was reiterated by Ms Jacqueline Lyne, Legal Officer at the Anti-Discrimination Board of NSW, during her evidence to the Committee:

... we are talking about removing that element of the offence so that when a threat to a person’s safety or property is made it should not have to be directly by threats of violence or inciting others to violence, so therefore a serious implied threat would be sufficient to meet that bar.<sup>253</sup>

**4.158** The NSW Jewish Board of Deputies, which also favoured repealing the means element, expressed the view that the psychological harm caused by racial vilification should be serious enough to constitute an offence:

The policy underpinning the inclusion of the “means” element in section 20D is that public incitement to hatred on a prohibited ground is said not to be sufficiently serious to warrant the imposition of criminal sanctions, even if the incitement is proved beyond reasonable doubt to have been intentional. Only a contemporaneous threat of harm to a person or property (or incitement of others to cause such harm) is said to justify criminalising vilificatory behaviour.

And yet it seems clear that a vilificatory act need not be accompanied by, or itself constitute, a threat, or incitement to others to threaten physical harm to a person or property, and the act may nonetheless be perceived by the target person or group (and by others) – and reasonably perceived – as extremely threatening. The threat may be unmistakable to a reasonable observer even if it is merely implicit and not provable beyond reasonable doubt.

The harm to specific minority groups who are the targets of vilificatory conduct, goes well beyond merely “offending” them. **The harm is in the impairment of their ability to go about their daily lives with a sense of safety and security.**<sup>254</sup>

<sup>250</sup> Submission 10, Anti-Discrimination Board of NSW, p 8.

<sup>251</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 6.

<sup>252</sup> Submission 10, Anti-Discrimination Board of NSW, p 8.

<sup>253</sup> Evidence, Ms Jacqueline Lyne, Legal Officer, Anti-Discrimination Board of NSW, 5 April 2013, p 9.

<sup>254</sup> Submission 5, NSW Jewish Board of Deputies, p 9. Emphasis as per original.

- 4.159** The NSW Jewish Board of Deputies recommended repealing the means element of s 20D of the *Anti-Discrimination Act* and inserting instead a prohibition on public incitement to hatred with intent or recklessness; or harassment with intent or recklessness; on a proscribed ground.<sup>255</sup> (The proposal to include a racial harassment provision is considered in Chapter 6).
- 4.160** However Mr McKenzie from the Aboriginal Legal Service opposed any suggestions to broaden the scope of the offence to non-physical harm. He was resolute that ‘serious racial vilification’ only include actions that involve physical harm, threat or serious incitement, arguing that while actions that cause psychological harm are serious, “...if you are going to use a criminal sanction, keep it to that form of behaviour that the greatest groundswell of mainstream Australia will support you in saying that is so bad that it deserves to possibly end up in jail.”<sup>256</sup> He emphasised that civil remedies are available and argued that they are more appropriate for acts such as racial harassment.<sup>257</sup>
- 4.161** Another suggestion, contained in a proposed option for an amended s 20D from one Committee member, was to repeal the words ‘by means which include’ and insert the words ‘that is intended, or reasonably likely in the circumstances of the case to’.
- 4.162** Inquiry participants noted that the proposed option attempts to remove the means test from the current definition of s 20D by replacing it with two new elements – the first being one of intent and the second one of effect.<sup>258</sup>
- 4.163** While acknowledging that the proposed option introduces the concept of intention, the Anti-Discrimination Board expressed the view that the required test for the mental element of serious racial vilification should be “intention or recklessness”<sup>259</sup> (arguments for requiring a mens rea of ‘intent’ or ‘recklessness’ were considered earlier in this chapter).
- 4.164** The view held by the NSW Society of Labor Lawyers was that replacing the means test with the words “intended, or reasonably likely in the circumstances of the case to” still maintains a very high threshold for the offence, which may be appropriate if s 20D is to have an educative purpose.<sup>260</sup>
- 4.165** The NSW Jewish Board of Deputies similarly believed that the proposed option maintained a high threshold for the offence, however they viewed that to be a negative barrier. The Board of Deputies asserted that the requirement of intent to cause harm would be very difficult to prove beyond reasonable doubt and that as such, “it may be no less difficult an obstacle to surmount for a prosecutor than under the current section 20D.”<sup>261</sup> They also criticised the effects-based alternative, contending that there is little difference between the requirement in the proposed option for a ‘likely’ connection to harm and an actual connection:

---

<sup>255</sup> Submission 5, NSW Jewish Board of Deputies, p 16.

<sup>256</sup> Evidence, Mr McKenzie, 8 April 2013, p 50.

<sup>257</sup> Evidence, Mr McKenzie, 8 April 2013, p 50.

<sup>258</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 5; Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, p 5.

<sup>259</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 6.

<sup>260</sup> Answers to question on notice, NSW Society of Labor Lawyers, 24 April 2013, p 2.

<sup>261</sup> Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, p 5.

The difference is not great. It contemplates a very modest reduction in the level of difficulty facing a prosecutor in deciding whether or not to prosecute serious racial vilification. It is our submission that such a modest change would do very little to improve the law, and would not meet the community's reasonable expectations of a workable criminal law.<sup>262</sup>

- 4.166** Another proposed option (canvassed earlier at 4.132 – 4.133) contained a suggestion to insert an additional clause to make it an offence to “cause a person to have reasonable fear for their safety or security of property or for the safety or security of property of their family”.<sup>263</sup> However stakeholders noted that most of the elements in the proposed new clause would already be covered by apprehended violence laws, which do not require a racial element.<sup>264</sup>

### *Committee comment*

- 4.167** The Committee notes that significant concerns were raised during the Inquiry regarding the ‘means’ element in s 20D. There was particular confusion as to whether the term ‘include’ resulted in the means listed in s 20D(1)(a) and (b) as being illustrative or exhaustive.
- 4.168** The Committee notes the suggestions to clarify this issue, such as replacing the words ‘means which include’ with ‘shall include’, or adding the words ‘but not limited to’ after the word ‘include’.
- 4.169** There was also a suggestion made by some inquiry participants to repeal the means element entirely. Proponents of this suggestion argued that s 20D should not be limited to threats of physical harm and that the means element is an unnecessary burden to prosecutions. However the Committee notes that the civil prohibition available in s 20C of the Act may already deal with non-physical threats.
- 4.170** At this point in time the Committee does not recommend making any changes to the means element in s 20D. We acknowledge that there have been a number of occasions in this chapter where we have not recommended change and instead proposed that the current provision be maintained. The reason for this is that the Committee strongly feels that there are a number of procedural issues with s 20D that currently impede its effectiveness. As such we have made a number of recommendations in the following chapters to address those matters.
- 4.171** The Committee believes that if these procedural issues are resolved then many of the other matters raised within this chapter may no longer be an issue, or may no longer be as significant an issue. However only time will tell, therefore we recommend that there be another review of the effectiveness of the racial vilification provisions in the *Anti-Discrimination Act*, to be conducted in five years from the date of any amendments to Division 3A (which contains ss 20B, 20C and 20D) that have been recommended in this report.

<sup>262</sup> Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, p 5.

<sup>263</sup> See Submission 36, Professor Simon Rice and Professor Neil Rees, p 3 and Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, p 5.

<sup>264</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, pp 5-6; Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, pp 2-4.

---

**Recommendation 5**

That the NSW Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice as soon as possible after the period of five years of any amendments to Division 3A of the *Anti-Discrimination Act 1977*.

---

## Chapter 5 Other reform proposals

This chapter considers a range of other proposals made during the Inquiry to reform s 20D of the *Anti-Discrimination Act*. These include proposals to introduce a racial harassment offence, introduce a civil penalty provision, increase the penalty units associated with the offence, remove the requirement for the Attorney General's consent for prosecution, and relocate the provision to the *Crimes Act*.

### Racial harassment provision

**5.1** As mentioned in Chapter 4, the NSW Jewish Board of Deputies advocated the introduction of an offence of racial harassment into s 20D of the *Anti-Discrimination Act* that would capture the use of words that, viewed objectively, constitute serious and substantial abuse. They suggested:

The qualification 'By means which include... physical harm' currently contained in section 20D (and sections 49ZTA, 49ZXC and 38T) of the ADA should be repealed, so that the crime to be proved is either:

- (a) public incitement to hatred with intent or recklessness; or
- (b) harassment with intent or recklessness; on a proscribed ground.<sup>265</sup>

**5.2** The Jewish Board of Deputies outlined its case in favour of including race-based harassment within the purview of s 20D of the *Anti-Discrimination Act*, contending that there is a serious gap in the law for racial abuse that does not lead to 'incitement':

... harassing or intimidatory behaviour against an individual or group on the ground of race, including the use of words that, viewed objectively, constitute serious and substantial abuse, appears to be outside the reach of section 20D and the general law if the behaviour falls short of a threat of harm or does not involve an element of incitement to the wider public. In our view, this is a serious gap in the current law.<sup>266</sup>

**5.3** The NSW Jewish Board of Deputies noted that s 80A of the Western Australian *Criminal Code Compilation Act 1913* sets out a racial harassment offence (which was subject to a successful prosecution) and suggested that enacting such an offence in New South Wales would cover the current gap in the law.<sup>267</sup>

**5.4** The Jewish Board of Deputies added that the definition of "harass" should be to "...threaten, intimidate or seriously and substantially abuse."<sup>268</sup>

**5.5** Mr Peter Wertheim, Executive Director of the Executive Council of Australian Jewry, elaborated on the NSW Jewish Board of Deputies' proposal during his evidence to the Committee, explaining that it would entail two types of racial vilification offences –

<sup>265</sup> Submission 5, NSW Jewish Board of Deputies, p 16.

<sup>266</sup> Submission 5, NSW Jewish Board of Deputies, p 7.

<sup>267</sup> Submission 5, NSW Jewish Board of Deputies, p 8.

<sup>268</sup> Submission 5, NSW Jewish Board of Deputies, p 7.

a racial harassment offence and a public incitement to hatred offence – both of which would require proof of intention or recklessness:

In our view... we are looking at two general types of offences within the rubric of serious racial vilification. One is a harassment-type offence where there is a defined individual or individuals who personally are the victims and can be identified as the victims, people who have been a target of verbal abuse or other forms of abuse because of their race. The bus cases provide a very apt illustration. We say that those sorts of things should be capable of prosecution so that the victims can be protected even if there is no urging of violence, a threat of violence, or an act of violence. The mere act of harassment because of race in a situation like that should be sufficient to invoke the protection of the State for the victims...

The other type of case that we think should be protected under the law is where there is a more general vilification out there in the whole community where an entire minority group... [is] being targeted for incitement to hatred by the general community. There again we think the State needs to step in because the reality is that we are a multicultural society...<sup>269</sup>

**5.6** Mr Wertheim added "...the principle that that kind of tearing up of the social fabric should not be allowed and should be dealt with as a criminal offence is something that has been recognised in other jurisdictions and should be recognised in New South Wales as well."<sup>270</sup>

**5.7** In response to a suggestion that there may be community concerns that the evidentiary bar would be lowered if a racial harassment provision were introduced, Mr Wertheim responded:

The community reaction could be alleviated firstly by the need to prove intent. A mere sounding off and giving vent to racial hatred of itself would not suffice to secure a conviction. One would have to prove intent. Secondly, the nature of abuse or verbal barrage, or whatever the facts required in a particular situation, would need to satisfy the serious and substantial abuse criterion, and I think that puts it out of the range of what you are suggesting that the community might be concerned about.<sup>271</sup>

**5.8** Mr Wertheim said that the experience of members of the Chinese Australian Forum being told to "go back home" would fall within his definition of racial harassment.<sup>272</sup>

**5.9** The NSW Jewish Board of Deputies noted that the proposed provision would exclude innocuous material such as certain humour based on ethnic stereotypes.<sup>273</sup>

**5.10** The Ethnic Communities Council of NSW, the Armenian National Committee of Australia and the Chinese Australian Forum also supported the introduction of a racial harassment offence.<sup>274</sup>

<sup>269</sup> Evidence, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, 8 April 2013, p 41.

<sup>270</sup> Evidence, Mr Wertheim, 8 April 2013, p 41.

<sup>271</sup> Evidence, Mr Wertheim, 8 April 2013, p 46.

<sup>272</sup> Evidence, Mr Wertheim, 8 April 2013, p 44.

<sup>273</sup> Submission 5, NSW Jewish Board of Deputies, p 7.

<sup>274</sup> Submission 20, Ethnic Communities Council of NSW, p 3 and Submission 28, Armenian National Committee of Australia, p 7; Answers to questions on notice, Chinese Australian Forum, 24 April 2013, p 2.

- 5.11** The Redfern Legal Centre supported extending coverage of sections 20C and 20D of the *Anti-Discrimination Act* to include racially vilifying speech by amending the current provisions rather than introducing a new offence. The Centre also proposed changing the focus from the means of the offending act to the impact on the victim/s:

RLC submits that extreme speech that incites racial hatred should be subject to prosecution in the absence of explicit threats of physical harm...

RLC therefore proposes amendments to both sections 20C and 20D to make them more useful in addressing the social evil of race hate speech, while maintaining our valued freedom of speech. Our suggested amendment to section 20C would make it a more viable means for individuals and groups affected by hate speech to get redress, by changing the focus to the nature of the hate speech and the effect on the complainant(s). Our suggested amendments to section 20D change the focus to the effect of the hate speech on the community as a whole, rather than on the means.<sup>275</sup>

- 5.12** As discussed in Chapter 4, stakeholders cautioned that any shift in the focus of s 20D should nonetheless retain the requirement of a mens rea as it is a criminal offence.
- 5.13** Several stakeholders however expressed concerns about introducing a racial harassment provision. It was suggested that such action would unduly infringe on freedom of expression and make it too easy to bring criminal prosecutions for expressions of racial hatred. It was also noted that s 20C of the *Anti-Discrimination Act* may be sufficient for dealing with abusive language that targeted a person or group because of their race.<sup>276</sup>
- 5.14** As discussed in Chapter 2, there are legitimate constraints on freedom of speech that are recognised by the international legal community.<sup>277</sup> However these limitations do not extend to offensive or insulting conduct which it was thought introducing a racial harassment provision would capture.
- 5.15** The Law Society of NSW believed this position was best exemplified in a speech by former Chief Justice James Spigelman, who argued that prohibitions on racial vilification are justified but should not attempt to outlaw speech which merely offends or insults:

Chief Justice Spigelman makes a good argument, in our view, that offending and insulting is something that is not precluded by international law, there is no provision of the Racial Discrimination Convention or the International Covenant on Civil and Political Rights which says you have to prevent people from offending or insulting each other.

... what Mr Spigelman is saying in that article is that there is a need for an effective racial vilification offence but it has to be fairly carefully drafted to ensure that it does not intrude too far on freedom of speech.<sup>278</sup>

<sup>275</sup> Submission 34, Redfern Legal Centre, p 10.

<sup>276</sup> Evidence, Mr Stephen Blanks, Secretary, NSW Council for Civil Liberties, 8 April 2013, p 5.

<sup>277</sup> See for example, the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of all forms of Racial Discrimination.

<sup>278</sup> Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of New South Wales, 5 April 2013, p 19.

- 5.16** Mr Kirk McKenzie, Chair of the Human Rights Committee at the Law Society of NSW, added “[i]nsult or offend is something that you have just got to put up with, but if there is an element of racial superiority or racial hatred or incitement to violence or damage to property, or incitement of civil unrest, that is entirely different.”<sup>279</sup>
- 5.17** Freedom 4 Faith expressed similar concerns about the implications of criminalising racially-abusive language, adding that “[m]aking it unlawful to offend someone, or to insult them or make fun of them may have some attractions to groups that think they will benefit from such protection in the short term, but other groups will also clamour for protection.”<sup>280</sup>
- 5.18** Mr Simon Breheny, Director of the Legal Rights Project at the Institute of Public Affairs, was adamant that amending s 20D of the *Anti-Discrimination Act* to include conduct that offends, insults or humiliates would be unacceptable:
- Other submissions to the inquiry have recommended such regressive changes which could make it possible for a person to be fined or imprisoned merely for expressing a certain opinion. Lowering the bar to include, for instance, conduct that offends, insults or humiliates would be a dangerous step in the wrong direction. Such restrictions on free speech are completely unacceptable.<sup>281</sup>
- 5.19** The NSW Council for Civil Liberties agreed that a separate racial harassment offence would “... [set] the bar a bit too low in terms of serious racial vilification.”<sup>282</sup>
- 5.20** The NSW Bar Association noted that charges under the proposed harassment provision may be brought under the existing provisions in the NSW criminal code:
- Those matters are caught by s 545B of the *Crimes Act 1900* and s 13 of the *Crimes (Domestic and Personal Violence) Act 2007*. Where such a crime is motivated by racial hatred, that is an aggravating factor for sentencing of the offender: s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*.<sup>283</sup>
- 5.21** The similarities between s 20D and the criminal code are discussed in Chapter 2.
- 5.22** In response to concerns that a racial harassment provision would ‘lower the bar’ and potentially lead to a significant increase in the number of racial vilification cases heard in court, Mr David Knoll, Barrister, NSW Jewish Board of Deputies, stated that judicial discretion would be the prime influence to alleviate potential community concerns about a “floodgates situation” occurring.<sup>284</sup> Mr Wertheim also insisted that the inclusion of the clause ‘seriously and substantially abuse’ would also limit any floodgate effect as it implies that “... conduct is repetitive, which targets a particular racial group and which is designed to intimidate them to the point where they are fearful of engaging in social interaction.”<sup>285</sup>

---

<sup>279</sup> Evidence, Mr McKenzie, 5 April 2013, p 22.

<sup>280</sup> Submission 17, Freedom 4 Faith, p 5.

<sup>281</sup> Evidence, Mr Simon Breheny, Director, Legal Rights Project, Institute of Public Affairs, 8 April 2013, p 11.

<sup>282</sup> Evidence, Mr Blanks, 8 April 2013, p 5.

<sup>283</sup> Answers to questions on notice, NSW Bar Association, 3 May 2013, p 3.

<sup>284</sup> Evidence, Mr David Knoll, Barrister, NSW Jewish Board of Deputies, 8 April 2013, p 45.

<sup>285</sup> Evidence, Mr Wertheim, 8 April 2013, p 45.

**Committee comment**

- 5.23** The Committee acknowledges the proposal by the NSW Jewish Board of Deputies to introduce a racial harassment provision into s 20D of the *Anti-Discrimination Act*. The proposed provision intends to capture the use of words that constitute serious and substantial abuse, potentially filling the perceived ‘gap’ in the current legislation that does not criminalise racial abuse which does not lead to incitement.
- 5.24** However the Committee notes that there were significant concerns about introducing a racial harassment provision with many stakeholders arguing that such an amendment would unduly infringe on freedom of expression.
- 5.25** The Committee agrees with these concerns and therefore does not support the introduction of a racial harassment provision to s 20D of the *Anti-Discrimination Act*.

**Civil penalty provision**

- 5.26** Another proposal raised to the Committee was to include a civil penalty for racial vilification within the *Anti-Discrimination Act*. This proposal was made by Professor Simon Rice OAM, Director, Law Reform and Social Justice, College of Law at the Australian National University and Professor Rees, in response to concerns about the effectiveness of s 20D and its high evidentiary threshold. Professors Rice and Rees suggested that a civil penalty would act as a ‘halfway house’ between the civil offence in s 20C and the criminal offence in s 20D.
- 5.27** Professors Rice and Rees argued that a civil penalty provision was desirable in certain instances of racial vilification as:

Legal action by an agency of the state, which can result in a fine, is likely to be a far more effective way of responding to the harm caused by vilifying behaviour than costly and long drawn out civil proceedings that might result in a very modest award of damages.<sup>286</sup>

- 5.28** Professors Rice and Rees stated that the key advantages of a civil penalty provision are:
- a government agency undertakes the legal action rather than the wronged individual
  - there is no requirement to prove a mens rea
  - proceedings only need to be proved on the balance of probabilities, rather than ‘beyond reasonable doubt’ (as required in criminal offences)
  - the respondent is required to provide pertinent information
  - the respondent cannot be imprisoned for their actions but sanctions may include a fine.<sup>287</sup>
- 5.29** Professors Rice and Rees recommended that the civil penalty apply “...when a person engages in conduct on the basis of race that causes a person to have a reasonable fear in the

<sup>286</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 14.

<sup>287</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 14 and Evidence, Professor Neil Rees, Professor of Law, School of Law, University of Sunshine Coast, 8 April 2013, p 27.

circumstances for their own safety or security of property, or for the safety or security of property of their family or associates.<sup>288</sup>

- 5.30** Professor Rice explained that under this proposal the Anti-Discrimination Board of NSW would be the ‘moving party’ in civil penalty matters. However, he recognised that the Board does not currently have the resources to undertake this role and thus the issue of an appropriate ‘moving party’ requires further investigation.<sup>289</sup>
- 5.31** Furthermore, it was proposed that civil penalty proceedings be conducted in the NSW Administrative Decisions Tribunal as it has extensive experience in dealing with racial vilification cases.<sup>290</sup>
- 5.32** Professor Rees recommended that the Committee seek advice from Parliamentary Counsel in relation to setting penalties if it pursued a civil penalty provision.<sup>291</sup>
- 5.33** While there was some support for the introduction of a civil penalty provision,<sup>292</sup> certain stakeholders were concerned about such a move. For example, the Anti-Discrimination Board of NSW said that while it broadly supported the idea of a civil penalty, the prosecutorial role it was attributed in the Rice and Rees proposal did not fit with its current role or functions and may result in decreased trust in the Board’s impartiality.<sup>293</sup>
- 5.34** Likewise, although the NSW Jewish Board of Deputies called a civil penalty provision a “welcome improvement to the existing legislation,”<sup>294</sup> it did not consider such a provision would provide an optimal legislative answer to racial vilification for a number of reasons including:
- the Anti-Discrimination Board’s lack of experience in prosecuting matters, and the need for additional resources if it was to take on the ‘moving party’ role
  - the State must send a clear message that racial vilification amounts to criminal conduct and not merely a civil wrong
  - fines are not an appropriate method for correcting serious racial vilification.<sup>295</sup>

### *Committee comment*

- 5.35** The Committee notes the proposal by Professors Rice and Rees that New South Wales may benefit from a three-tiered approach to the regulation of racial vilification which would include the introduction of a civil penalty provision as a ‘halfway house’ between the civil offence in s 20C and the criminal offence in s 20D.

<sup>288</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 13.

<sup>289</sup> Evidence, Professor Simon Rice, OAM, Director, Law Reform and Social Justice, College of Law, Australian National University, 8 April 2013, p 28.

<sup>290</sup> Submission 36, Professor Simon Rice and Professor Neil Rees, p 14.

<sup>291</sup> Evidence, Professor Neil Rees, 8 April 2013, p 28.

<sup>292</sup> See for example: Answers to questions on notice, Aboriginal Legal Service, 24 April 2013, p 1; Answers to questions on notice, Chinese Australian Forum, 24 April 2013, p 3.

<sup>293</sup> Answers to questions on notice, Anti-Discrimination Board of NSW, 29 April 2013, pp 7-8.

<sup>294</sup> Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, pp 1-2.

<sup>295</sup> Answers to questions on notice, NSW Jewish Board of Deputies, 19 April 2013, Question 1, pp 1-2.

**5.36** The proposal however appears to further complicate the dispute resolution process. Further, we note that it does not have broad support from key stakeholders, particularly the Anti-Discrimination Board of NSW which was uncomfortable with the prosecutorial role the proposal had assigned to it. Therefore, at this time, the Committee does not consider it appropriate to introduce a civil penalty provision to the offence of racial vilification.

## Maximum penalty

**5.37** Another issue raised during the Inquiry concerns the maximum penalty for an offence of serious racial vilification. Section 20D of the *Anti-Discrimination Act* sets out the maximum penalty as follows:

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.<sup>296</sup>

**5.38** The maximum penalty units for serious racial vilifications offences were increased in 1994.<sup>297</sup>

**5.39** The Committee received evidence during the Inquiry supporting a further increase in the penalty for serious racial vilification offences. This section outlines these arguments, which particularly note that similar provisions in the *Crimes Act 1900* offer more severe penalties.

**5.40** Much of the discussions around the appropriate maximum penalty units for an offence under s 20D centred on comparisons with similar provisions in the *Crimes Act 1900*, such as:

- s 61, common assault, punishable by up to two years imprisonment
- s 93C, affray, punishable by up to ten years imprisonment
- s 199(1), threatening to destroy or damage property, punishable by up to five years imprisonment
- s 545B, intimidation or annoyance by violence or otherwise, punishable by up to two years imprisonment.<sup>298</sup>

**5.41** In its submission to the Inquiry the NSW Council for Civil Liberties contended that the ‘relatively lenient’ sentence for serious racial vilification compared to that of common assault meant that prosecutors were less likely to use s 20D when seeking redress for hate speech offences:

In our view, the punishment of a maximum of 6 months in prison is relatively lenient when compared to comparable offences and has lead prosecutors to prefer other sentences when seeking to punish a person for what is essentially hate speech. We note in particular that a threat which has the possibility of being immediately carried

<sup>296</sup> s 20D, *Anti-Discrimination Act 1977*. As pursuant to s 17 of the *Crimes (Sentencing Procedure) Act 1999* a penalty unit, in most incidents, refers to “...an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units.”

<sup>297</sup> Schedule 1(2), *Anti-Discrimination (Amendment) Act 1994*.

<sup>298</sup> ss 61, 93C, 199(1), 545B, *Crimes Act 1900*.

out has long been recognized in NSW law as a “common assault,” which is an offence punishable by two years imprisonment (*Crimes Act 1900*, s 61).

Even a threat to property of a person in NSW is punishable by five years imprisonment (*Crimes Act 1900* s 199(1)). We consider that the relative leniency of the sentence is cause for investigators and prosecutors to pursue other means to prosecute hate speech.<sup>299</sup>

- 5.42** Mr Knoll from the NSW Jewish Board of Deputies was of the opinion that the offence of serious racial vilification should be treated equally to assault and thus the sentence for each should be comparable:

There also appears to be a building consensus that it is necessary to increase the penalty points to the level of three years imprisonment in order to make clear that the crime of racial vilification should be treated as – and we emphasise this – no less serious than an ordinary assault.<sup>300</sup>

- 5.43** The Board of Deputies proposed the following penalty for serious racial vilification offences in its submission to the Inquiry:

The penalties for all the serious vilification offences should be the same, with the maximum being:

- in the case of an individual – 250 penalty units or imprisonment for 2 years or both, and
- in the case of a corporation – 1250 penalty units.<sup>301</sup>

- 5.44** Miss Sarah Pitney referred to the ‘penalty anomaly’ that occurs when offences within the *Crimes Act 1900* that are similar to serious racial vilification attract higher maximum penalties because of the sentencing aggravation provisions provided under the *Crimes (Sentencing Procedure) Act 1999*:

The requisite threats or incitement of others to violence that must accompany racial vilification to establish ‘serious racial vilification’ also constitute alternative offences. For example, threats to property are addressed by the *Crimes Act 1900* (NSW) s 199, threats of physical harm may amount to common assault, and the incitement of others to violence may be prosecuted under the common law offence of incitement. These alternative offences are accompanied by higher maximum penalties, and as racial motivation is not an element of these offences, it may be regarded in sentencing as an aggravating factor.<sup>302</sup>

- 5.45** Miss Pitney drew the Committee’s attention to the case of Mr Brett King, the initiator of the Cronulla riots in 2005, whose actions fell within the remit of s 20D of the *Anti-Discrimination Act* but was instead charged with inciting, urging and encouraging riot and affray.<sup>303</sup>

---

<sup>299</sup> Submission 39, NSW Council for Civil Liberties, p 3.

<sup>300</sup> Evidence, Mr David Knoll, Barrister, NSW Jewish Board of Deputies, 8 April 2013, p 38.

<sup>301</sup> Submission 5, NSW Jewish Board of Deputies, p 16.

<sup>302</sup> Submission 1, Miss Sarah Pitney, p 3.

<sup>303</sup> Submission 1, Miss Sarah Pitney, p 3.

- 5.46** Mr Joshua Dale, Chair of the Sub-Committee on Human Rights at the NSW Lawyers Alliance, suggested that the absence of serious racial vilification prosecutions may be attributed to the unwillingness of the State to pursue cases under s 20D of the *Anti-Discrimination Act* due to the higher evidentiary threshold and lesser sentences the offence attracts (an analysis of the evidentiary threshold in s 20D of the *Anti-Discrimination Act* was provided in Chapter 4):

This comes in again to our recommendation that the punishment should be increased. I certainly do not speak on behalf of the Director of Public Prosecutions [DPP] when I say this, but if I was presented with a case where the elements of assault were put to me, there is a lower burden of proof in proving that type of case and similar punishments where there is serious racial vilification and a much greater burden of proof. If I was allocating public funds to investigate one or the other for the same result I would expect that the crime with the lower burden and lower allocation of public funds would be pursued.<sup>304</sup>

- 5.47** The Australian Lawyers Alliance therefore supported increasing the penalty for serious racial offences from two to three years of imprisonment.<sup>305</sup>

- 5.48** On the other hand, Mr John Dowd, President of the International Commission of Jurists Australia, said that penalties should be proportionate to an offence and that he did not consider imprisonment to be an appropriate penalty for serious racial vilification. Additionally, Mr Dowd stressed that a criminal conviction has significant ongoing consequences that affect people for the rest of their lives.<sup>306</sup>

- 5.49** An alternative suggestion, put forward by the NSW Council for Civil Liberties, was that instead of making the penalties higher for serious racial vilification offences it was plausible that the NSW Government could instead lower the penalties for other similar criminal offences:

...it is of course entirely possible that the State makes these other offences less attractive to prosecutors by dramatically reducing the prison sentences associated with them. We urge the Committee to consider this approach, or otherwise recommend the NSW government to consider reduction in prison sentences across the board.<sup>307</sup>

- 5.50** The NSW Bar Association was hesitant to be drawn into a discussion about comparable sentencing. However in its answers to questions on notice it provided a detailed explanation of important penalty and sentencing considerations:

The Association submits that very careful consideration would be needed before an offence of racial vilification is made punishable by imprisonment for 5 years or more.

Indictable offences made punishable by 5 years imprisonment or more are regarded as "serious indictable offences" (*Interpretation Act 1987*, s 21). Serious indictable offences are amenable to a wide array of intrusive investigative techniques by law enforcement

<sup>304</sup> Evidence, Mr Joshua Dale, Chair, Sub-Committee on Human Rights, Australian Lawyers Alliance, 5 April 2013, p 34.

<sup>305</sup> Submission 21, Australian Lawyers Alliance, p 8.

<sup>306</sup> Evidence, Mr John Dowd, President, International Commission of Jurists, 5 April 2013, p 11 and p 13.

<sup>307</sup> Answers to questions on notice, NSW Council for Civil Liberties, 15 May 2013, pp 3-4.

authorities including: the use of forensic procedures (*Crimes (Forensic Procedures) Act 2000*, ss 61-63); police searches in conjunction with the execution of a search warrant (*Law Enforcement (Powers and Responsibilities) Act 2002*, s 87M); a covert police search authorised under the *Terrorism (Police Powers) Act 2002*; and the issue of a crime scene warrant (*Law Enforcement (Powers and Responsibilities) Act 2002*, s 94).

Even where an offence is not necessarily indictable but is nevertheless punishable by imprisonment for 5 years or more, it is still a serious criminal offence. A person charged with but not convicted of a serious criminal offence is at risk of having his or her assets confiscated under the *Criminal Assets Recovery Act 1990*.<sup>308</sup>

- 5.51** Some inquiry participants supported aligning the maximum penalty for serious racial vilification with those available in other jurisdictions. For example, the Community Relations Commission for a Multicultural NSW proposed increasing the penalty to bring it into line with Western Australia:

The CRC is of the view that serious racial vilification should bear a maximum penalty for individuals of 250 penalty units or 3 years imprisonment, and for a corporation, 1250 penalty units. This would bring NSW into line with Western Australia, the only State where there has been successful prosecution of serious racial vilification.<sup>309</sup>

- 5.52** Similarly, NSW Young Lawyers explained that while the current penalty units available for the offence of serious racial vilification are consistent with analogous offences in other jurisdictions such as Victoria and the United Kingdom, the NSW provision is distinct from these provisions because of its ‘means’ element and should therefore align more closely with the penalty available in Western Australia or South Australia:

The maximum penalty available for the offence of serious racial vilification under s 20D is, in the case of an individual, 50 penalty units (\$5,500) or imprisonment for 6 months or both.

This penalty is consistent for analogous offences in other jurisdictions; for example, both Victoria and the UK impose a maximum term of 6 months imprisonment, and Victoria imposes a maximum fine of \$8,450.40 (s 24(1) of the Racial and Religious Tolerance Act 2001 (Vic); s 27(3) of the Public Order Act 1986 (UK)).

Unlike in Victoria and the UK, in NSW the vilifying conduct must be accompanied by threats of violence or the incitement of others to violence (threatening element).

If the threatening element of the required conduct in s 20D is to be retained, it may be appropriate to increase the maximum penalty prescribed in line with other jurisdictions such as Western Australia or South Australia, where longer terms of 14 or 3 years imprisonment respectively are available for similar conduct.<sup>310</sup>

- 5.53** Another alternative suggestion to increase penalties was made by the Australian Hellenic Council (NSW), which proposed that:

---

<sup>308</sup> Answers to questions on notice, NSW Bar Association, 3 May 2013, p 3.

<sup>309</sup> Submission 8, Community Relations Commission for a Multicultural NSW, p 8.

<sup>310</sup> Submission 32, NSW Young Lawyers, pp 5-6.

- i. In the case of an individual 500 penalty units or imprisonment for 5 years or both
- ii. In the case of a corporation 2000 penalty units for the corporation and 500 penalty units of imprisonment for 2 years for any director or directors knowingly involved in the breach (similar to corporations laws prosecutions for directors personal liability or both).<sup>311</sup>

### ***Committee comment***

- 5.54** The Committee notes inquiry participants' concerns that the maximum penalties available under s 20D of the *Anti-Discrimination Act* are relatively lenient compared to the penalties available for comparable offences under the *Crimes Act*. For example, under the current provision a person convicted for serious racial vilification may face a fine of \$5,500 or six months imprisonment, while a person convicted of common assault may be imprisoned for up to two years.
- 5.55** There was a sense amongst a number of stakeholders that this discrepancy, in conjunction with the high evidentiary threshold required under s 20D discussed in Chapter 4, leads to a preference for prosecutors to use the *Crimes Act* and the *Crimes (Sentencing Procedure) Act 1999* to address race hate crimes. We note that while numerous of inquiry participants argued in favour of increasing the maximum penalties to overcome this issue, an alternate suggestion was that the penalties in the criminal code could be lowered.
- 5.56** The Committee appreciates that a criminal conviction has serious and ongoing consequences for individuals and does not approach the setting of criminal penalties lightly.
- 5.57** We recommend that the NSW Government review the adequacy of the maximum penalty units in s 20D, while taking into account the maximum penalty units for comparable offences in the *Crimes Act* and in other jurisdictions in Australia.

---

### **Recommendation 6**

That the NSW Government review the adequacy of the maximum penalty units in section 20D of the *Anti-Discrimination Act 1977*, taking into account the maximum penalty units for comparable offences within the *Crimes Act 1900* and other Australian jurisdictions.

---

### **Attorney General's consent requirement**

- 5.58** Under s 20D(2) the Attorney General is required to consent to serious racial vilification prosecutions:

A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.<sup>312</sup>

---

<sup>311</sup> Submission 40, Australian Hellenic Council (NSW), p 6.

<sup>312</sup> s 20D, *Anti-Discrimination Act*.

- 5.59** This consent power is also reflected in s 91(2) of the *Anti-Discrimination Act* which sets out the serious racial vilification complaints procedure. See Chapter 6 for further analysis of the serious racial vilification complaints procedure.
- 5.60** As mentioned in Chapter 2, the Attorney General delegated the consent power to the Director of Public Prosecutions in 1990.<sup>313</sup>
- 5.61** The consent clause was included in s 20D to provide a safeguard against mischievous serious racial vilification claims and to protect freedom of expression.<sup>314</sup> However, as noted by the Redfern Legal Centre, “[e]xperience indicates that concerns over malicious or frivolous prosecution under section 20D are unfounded.”<sup>315</sup>
- 5.62** Most inquiry stakeholders agreed that the Attorney General should not be involved in the process and supported the current practice. There were concerns that the Attorney General’s consent would unnecessarily politicise serious racial vilification matters. Mr Stepan Kerkyasharian, President of the Anti-Discrimination Board of NSW, explained this argument to the Committee:

The Anti-Discrimination Board should have the power to refer directly to the DPP and remove the Attorney General from the process. This is the case in practice anyway. I understand that the Attorney General has delegated that to the DPP anyway... it removes the political element from the process and it is important for a criminal prosecution to have such a distancing.<sup>316</sup>

- 5.63** Similarly, Mr Andrew Stone, Barrister and NSW Director of the Australian Lawyers Alliance, asserted “... to be frank, an independent and fearless DPP is a better political safeguard than an Attorney General who requires re-election and is more likely to appear on certain morning radio programs.”<sup>317</sup> In its submission to the Inquiry, the Australian Lawyers Alliance supported removing the consent requirement.<sup>318</sup>
- 5.64** Mr Stephen Blanks, Solicitor and Secretary of the NSW Council for Civil Liberties, said that any public perception of political interference in serious racial vilification matters was undesirable and therefore consent powers should be vested with the DPP:

I think from the public perception point of view, the requirement for Attorney General consent to a prosecution can be perceived to add a political element to any prosecution, and that is undesirable. The DPP has inherent within his functions the obligation to consider whether a prosecution would be in the public interest and it is better from a public perception point of view for that consideration to be seen as non-political rather than political.<sup>319</sup>

---

<sup>313</sup> Submission 26, Department of Attorney General and Justice, p 11.

<sup>314</sup> Evidence, Mr Dowd, 5 April 2013, p 13 and Submission 34, Redfern Legal Centre, pp 7-8.

<sup>315</sup> Submission 34, Redfern Legal Centre, p 8.

<sup>316</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 3.

<sup>317</sup> Evidence, Mr Andrew Stone, Barrister, New South Wales Director, Australian Lawyers Alliance, 5 April 2013 p 34.

<sup>318</sup> Submission 21, Australian Lawyers Alliance, p 8.

<sup>319</sup> Evidence, Mr Blanks, 8 April 2013, p 4.

- 5.65** Likewise, in its submission to the Inquiry the NSW Bar Association stated that the clause injects a political influence on serious racial vilification prosecutions and should be repealed:

The inclusion, at s. 20D(2) of the Anti-Discrimination Act 1977, of a requirement to seek the approval of the Attorney-General is, however, anomalous in criminal law in NSW. It inserts the involvement of the executive into the decision whether to prosecute and, as such, injects a political influence upon such prosecutions... It would therefore be appropriate to remove the Attorney-General's consent and repeal s. 20D(2).<sup>320</sup>

- 5.66** Mr Simeon Beckett, Barrister, NSW Association, expanded on this argument during his evidence to the Committee, calling the Attorney General's consent power outdated and anachronistic:

... the consent of the Attorney General to prosecute... seems to be an outdated and anachronistic provision with respect to racial vilification... The utility of retaining that part of section 20D, namely subsection 2, seems to have passed a long time ago. We are recommending the repeal of that particular subsection. Of course, the fundamental issue with respect to that provision is that it removes or at least influences the independence of the prosecuting authority, namely the Director of Public Prosecutions.<sup>321</sup>

- 5.67** Legal Aid NSW also proposed removing the requirement that the Attorney General consent for prosecution as it "... unnecessarily politicises the process which already has an inherent tension between the competing rights of freedom of speech and freedom from racial discrimination and vilification."<sup>322</sup>

- 5.68** Concerns were raised about the consent requirement being a bar to investigation of serious racial vilification matters and having the effect of relegating the offence to a lesser role in the State's laws.<sup>323</sup> For example, the NSW Jewish Board of Deputies said removing the involvement of the Attorney General would convey that serious racial offences are to be treated as all other criminal matters:

The prosecution of serious vilification offences in the usual way by the DPP, without the involvement of the Attorney General, would convey the important message that such offences are considered by the community to be in the same general category as any other criminal offences prosecuted by the DPP.<sup>324</sup>

- 5.69** Mr John McKenzie, Chief Legal Officer for the Aboriginal Legal Service, said that removing the Attorney General was of symbolic importance, and would demonstrate confidence in our system of laws and respect for the Director of Public Prosecutions.<sup>325</sup>

<sup>320</sup> Submission 31, NSW Bar Association, p 5.

<sup>321</sup> Evidence, Mr Simeon Beckett, Barrister, NSW Bar Association, 8 April 2013, p 54.

<sup>322</sup> Submission 24, Legal Aid NSW, p 5.

<sup>323</sup> Submission 39, NSW Council for Civil Liberties, p 3.

<sup>324</sup> Submission 5, NSW Jewish Board of Deputies, p 13.

<sup>325</sup> Evidence, Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, 8 April 2013, p 49.

**5.70** Mr Dowd concurred with the need to remove the Attorney General's consent power in relation to potential serious racial vilification offences but noted that the Attorney General has a general power to bring a prosecution in any matter:

... there is no question that the Attorney General should be out of the question, and it should be dealt with like all other prosecutions. The Attorney General has a parallel power under all prosecutions. The Attorney General can still bring a prosecution, but the provision here for seeking the permission of the Attorney General should go. I think the Director of Public Prosecutions has the experience, the staff and qualifications to deal with that.<sup>326</sup>

### ***Committee comment***

**5.71** The Committee acknowledges the overwhelming support of stakeholders to remove the requirement for the Attorney General's consent to prosecutions of serious racial vilification as set out in section 20D(2) of the *Anti-Discrimination Act*. The Committee understands that the Attorney General vested its consent power to the Director of Public Prosecutions in 1990 and that this amendment would align the legislation with current practice.

**5.72** The predominate concern with the consent requirement is that it unnecessarily politicises serious racial vilification matters. Additionally, it was suggested that removing the consent power would convey the message that serious racial vilification offences are treated the same as all other criminal offences. The Committee supports both of these arguments, particularly as it has been the practice of the previous 23 years. We therefore recommend that the NSW Government repeal the requirement for the Attorney General to consent to prosecutions of serious racial vilification.

**5.73** An analysis of the serious racial vilification complaints procedure, including the procedural requirement for the President of the Anti-Discrimination Board of NSW to refer complaints to the Attorney General in s 91(2) of the Act, is provided in Chapter 6.

---

### **Recommendation 7**

That the NSW Government repeal the requirement for the Attorney General's consent to prosecutions of serious racial vilification in section 20D(2) of the *Anti-Discrimination Act 1977*.

---

### **Location of the offence of serious racial vilification**

**5.74** The offence of serious racial vilification currently sits within the *Anti-Discrimination Act 1977* as opposed to the *Crimes Act 1900*. This situation was the focus of some debate during the Inquiry.

**5.75** The *Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of New South Wales* first raised the issue of relocating the offence of serious racial vilification in 1992. The report recommended that the provision be moved into the

---

<sup>326</sup> Evidence, Mr Dowd, 5 April 2013, p 13.

(now repealed) *Summary Offences Act 1988* to eliminate any possible confusion about the need for the police to obtain the Attorney General's consent before arresting a person for serious racial vilification offences.<sup>327</sup> In 1999, the NSW Law Reform Commission was similarly concerned about the operation of police powers and recommended that s 20D be relocated to the *Crimes Act*.<sup>328</sup>

- 5.76** The Department of Attorney General and Justice advised the Committee that both reports recommended that the President of the Anti-Discrimination Board retain a significant role in the prosecution of serious racial vilification offences if the offence was moved into the criminal code:

The LRC [Law Reform Commission] recommended that the President be empowered to refer a matter to the DPP [Director of Public Prosecutions] where he/she is of the view that it may constitute serious vilification. The Samios Report recommended that the President be empowered to either initiate a prosecution or refer a matter to others for prosecution where of the view, on reasonable grounds, that an offence of serious racial vilification may have been committed.<sup>329</sup>

- 5.77** It was expected that relocating the offence to the criminal code while maintaining the role of the President in racial vilification prosecutions "... would increase the flexibility by which potential cases of serious racial vilification could be investigated and prosecuted and by whom, and would increase the likelihood of the offence being prosecuted."<sup>330</sup>

- 5.78** Many inquiry participants expressed support for moving s 20D to the *Crimes Act*, citing a range of reasons. For example, the Department of Attorney General and Justice told the Committee that having s 20D in the *Anti-Discrimination Act* may entrench the perception that investigation of potential serious racial vilification offences is a matter for the Anti-Discrimination Board, rather than the police. The Department added that while there are currently no statutory barriers for agencies other than the Anti-Discrimination Board to investigate serious racial vilification matters, in practice all complaints are funnelled through the Board's complaints process.<sup>331</sup>

- 5.79** The Department of Attorney General and Justice also noted that other jurisdictions, such as Western Australia, the Commonwealth, the United Kingdom and Canada, have racial vilification offences within general criminal law legislation.<sup>332</sup>

- 5.80** During his evidence to the Committee, Mr Kerkyasharian said that Board members had differing opinions as to whether relocating s 20D was appropriate and acknowledged that the Board does not have the powers or resources to adequately pursue criminal matters:

<sup>327</sup> James Samios, *Report on the Review by the Hon James Samios, MBE, MLC, into the Operation of the Racial Vilification Law of New South Wales*, (Parliament of New South Wales, 1992), p 29.

<sup>328</sup> NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92, Vol. 1, Sydney, 1999, p 553.

<sup>329</sup> Submission 26, Department of Attorney General and Justice, p 12.

<sup>330</sup> Submission 26, Department of Attorney General and Justice, p 12.

<sup>331</sup> Submission 26, Department of Attorney General and Justice, p 12.

<sup>332</sup> Submission 26, Department of Attorney General and Justice, pp 12-13.

The Board currently does not have the powers or the resources to carry out the type of investigation required to establish evidence to a criminal standard of proof. Moreover, our current processes are unsuited to a prosecutorial role. Many of the submissions to the Inquiry, as we see, have suggested that the offence of serious vilification should be relocated to the Crimes Act and there is a divergence of opinion even among the members of the Anti-Discrimination Board – my own board – as to whether this would be the best outcome.<sup>333</sup>

**5.81** Mr Beckett believed that the most effective way to overcome confusion about police involvement in the investigation of serious racial vilification matters, as raised by the Department of Attorney General and Justice, was to move s 20D to the *Crimes Act*.<sup>334</sup> Mr Beckett acknowledged the argument that there are many crimes not included in the *Crimes Act*, such as numerous common law and statutory offences, but countered that police often ignore many of these crimes.<sup>335</sup>

**5.82** Similarly, the Law Society of NSW was in favour of moving the provision to ensure alleged offenders would be subject to ordinary criminal processes as opposed to the current ‘clunky procedure’ for prosecutions.<sup>336</sup> They added that the police may not be aware about their responsibilities in relation to potential serious racial vilification offences because s 20D lay outside of the *Crimes Act*. The Law Society remarked: “... police tend to have a copy of the *Crimes Act* in their back pocket ... if it is not there, they sometimes do not know about it.”<sup>337</sup>

**5.83** Likewise, Mr Stone commented:

... in terms of police – this I put no higher than a suspicion based on human nature – you tend to work most with that with which you are most familiar. When the police are looking at what charges to lay, they tend to work out of the central playbook rather than reach for the more exotic Acts when they are looking at what charges to lay. The Crimes Act is their fundamental playbook, if I may use that analogy. I suspect ... that they would tend ... to stick with the assault and the aggravating factor rather than go looking for the more untested offences.<sup>338</sup>

**5.84** The role of police in investigating and prosecuting offences of serious racial vilification is considered in more detail in Chapter 6.

**5.85** The NSW Council for Civil Liberties supported moving s 20D to the *Crimes Act* in an effort to regularise the offence:

... [moving s 20D] would regularise the offence and, rather than require in this case the Director of Public Prosecutions [DPP] as we know with the informal requirement to commence inquiries or commence an investigation, it would become a matter for a

---

<sup>333</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 3.

<sup>334</sup> Evidence, Mr Beckett, 8 April 2013, p 55.

<sup>335</sup> Evidence, Mr Beckett, 8 April 2013, p 56.

<sup>336</sup> Evidence, Mr McKenzie, 5 April 2013, p 21.

<sup>337</sup> Evidence, Mr McKenzie, 5 April 2013, p 20 and Evidence, Professor Rice and Professor Rees, 8 April 2013, p 26.

<sup>338</sup> Evidence, Mr Andrew Stone, Barrister, Australian Lawyers Alliance, 5 April 2013, p 39.

police officer or a station commander to begin investigations and make inquiries as to whether a prosecution could take place.<sup>339</sup>

**5.86** Professor Rice considered there to be significant procedural and resourcing advantages with relocating s 20D:

Procedurally, it will make a significant difference because the expertise and resources available to those with responsibility under the Crimes Act—the Director of Public Prosecutions—to pursue this, to have the external agency making a referral under the Anti-Discrimination Act is perhaps demonstrably inadequate because nothing has eventuated. This is criminal conduct and it belongs in the Crimes Act because of the procedural and resource implication that it has by putting it in that piece of legislation.<sup>340</sup>

**5.87** The Chinese Australian Forum believed relocating s 20D to the *Crimes Act 1900* would remove the current prosecutorial obstacles associated with the offence and would highlight the seriousness of the offence, thereby discouraging racial vilification.<sup>341</sup>

**5.88** The Australian Lawyers Alliance was also in favour of relocating s 20D. Mr Dale said that moving s 20D to the *Crimes Act* “... would give it the teeth and wider acknowledgment and educative value by identifying it specifically as a crime as opposed to putting it in the *Anti-Discrimination Act* where people may not draw their attention to.”<sup>342</sup>

**5.89** On the other hand, several inquiry participants expressed that the location of s 20D was not a key issue. For example, while Mr Breheny considered that 20D might be better suited in the *Crimes Act* “[s]imply because it is a crime”, he emphasised that he did not feel strongly either way.<sup>343</sup>

**5.90** Similarly, Mr Blanks and Mr Stone generally supported moving s 20D to the *Crimes Act*, however agreed that it was a “lower level issue”.<sup>344</sup>

**5.91** Mr McKenzie told the Committee that if police received additional training about the offence of serious racial vilification in s 20D the Law Society of NSW would not be concerned if the provision remained in the *Anti-Discrimination Act*.<sup>345</sup>

**5.92** The NSW Reconciliation Council did not consider the location of s 20D outside of the *Crimes Act* to be an issue. However, the Council said it was necessary to provide clearer direction to the police and government agencies about their responsibility to enact the section.<sup>346</sup>

<sup>339</sup> Evidence, Mr Jackson Rogers, Executive Member, NSW Council for Civil Liberties, 8 April 2013, p 6.

<sup>340</sup> Evidence, Professor Rice, Director, 8 April 2013, p 23.

<sup>341</sup> Answers to questions on notice, Chinese Australian Forum, 24 April 2013, p 1.

<sup>342</sup> Evidence, Mr Dale, 5 April 2013, pp 34-35.

<sup>343</sup> Evidence, Mr Breheny, 8 April 2013, p 13.

<sup>344</sup> Evidence, Mr Blanks, 8 April 2013, p 6; Evidence, Mr Stone, 5 April 2013, p 36 and p 39.

<sup>345</sup> Evidence, Mr McKenzie, 5 April 2013, p 23.

<sup>346</sup> Submission 25, NSW Reconciliation Council, p 5.

- 5.93** Other inquiry participants were adamant that s 20D should remain within the *Anti-Discrimination Act*. One inquiry participant expressed concern that relocating s 20D may result in Aboriginal people, for instance, being prosecuted rather than protected.<sup>347</sup> The inquiry participant explained this view, suggesting that is not uncommon for Aboriginal people to use racial taunts against each other or for police to allege that these taunts are accompanied by threats to the police, and that "... it is difficult to see why the police will not start adding a racial vilification offence as a stand-alone charge or back-up charge to common assault, affray, intimidation and/or assault/resist/intimidate police charges."<sup>348</sup>
- 5.94** The inquiry participant also feared that allowing the police to investigate and prosecute racial vilification would discourage Aboriginal victims of the offence from seeking assistance due to the long standing cultural distrust that many Aboriginal people have for the police.<sup>349</sup>
- 5.95** Another point, raised by Mr John McKenzie, Chief Legal Officer for the Aboriginal Legal Centre, was that it was appropriate for s 20D to remain in the *Anti-Discrimination Act* because it is where the civil remedy, s 20C, is located.<sup>350</sup>

### ***Committee comment***

- 5.96** The Committee acknowledges that earlier reviews of the *Anti-Discrimination Act* recommended relocating serious racial vilification offences to the criminal code. Moving the offence was seen as a way to eliminate possible confusion surrounding the prosecution process, particularly the powers of the police, and potentially increasing the likelihood of prosecuting a serious racial vilification offence.
- 5.97** The Committee notes that police involvement in the investigation of serious racial vilification offences appears to be an issue for stakeholders who support relocating s 20D to the *Crimes Act*, as well as those who are against it. Most of those in favour of the move saw it as an opportunity to streamline the serious racial vilification complaints procedure. Additionally, increased police involvement was seen as an opportunity to 'regularise' the offence and enhance the educative function of the provision.
- 5.98** On the other hand, it was suggested that increased police involvement in serious racial vilification matters could inflame existing tensions with certain community groups and unintentionally lead to an increase in these groups being charged with s 20D offences. Similar arguments were raised during discussions about the proposed amendments for serious racial vilification prosecutions. See Chapter 6 for analysis of this issue.
- 5.99** We note that while the majority of inquiry participants expressed support for moving s 20D to the *Crimes Act*, a number of them agreed that it was a not significant issue.
- 5.100** The Committee makes a number of proposed amendments for serious racial vilification prosecutions in Chapter 6. We believe that these amendments will address concerns about the investigation process, particularly police involvement in matters. As such, at this time the Committee does not support relocating s 20D to the *Crimes Act*.

---

<sup>347</sup> Submission 43, Name suppressed, p 1.

<sup>348</sup> Submission 43, Name suppressed, p 1.

<sup>349</sup> Submission 43, Name suppressed, p 2.

<sup>350</sup> Evidence, Mr McKenzie, 8 April 2013, p 51.

## Chapter 6 Complaints procedure

This chapter discusses a number of issues raised about the serious racial vilification complaints procedure outlined in Part 9 of the *Anti-Discrimination Act*. The chapter examines the process for lodging complaints, including who has standing to complain and the timeframe for the lodgement of complaints. It also analyses the steps for prosecuting a serious racial vilification offence, including the timeframes for prosecution and the development of a prosecutorial brief.

### Serious racial vilification complaints procedure

- 6.1 Part 9 of the *Anti-Discrimination Act* sets out the functions of the Anti-Discrimination Board of NSW (the Board) and the President of the Board in relation to the procedure for lodging serious vilification complaints.
- 6.2 The Board's complaints handling process was briefly discussed in Chapter 2, which noted that the Board is the single entry point for both civil and criminal racial vilification complaints.
- 6.3 Several stakeholders expressed concern that there were too many layers of red tape involved in making a racial vilification complaint.<sup>351</sup> The following sections detail the process of making a serious racial vilification complaint and proposals for making the relevant provisions more effective.

### Lodgement of complaints

- 6.4 This section discusses who has standing to lodge vilifications complaints and the timeframe for lodging complaints. These issues attracted attention from participants who were concerned with the restrictive nature of the lodgement process.

#### Standing to lodge vilification complaints

- 6.5 Section 88 of the *Anti-Discrimination Act* sets out who can lodge a vilification complaint as follows:

A vilification complaint cannot be made unless each person on whose behalf the complaint is made:

- (a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or
- (b) claims to have that characteristic and there is no sufficient reason to doubt that claim.

- 6.6 The Department of Attorney General and Justice advised the Committee that s 88 only allows an alleged victim of an offence to lodge a complaint, and as such there is significant potential for serious racial vilification incidents to go unpunished as individuals may themselves be reluctant to make a complaint for a number of reasons, including:

---

<sup>351</sup> Submission 37, Mr Anthony Pang, p 6.

- language difficulties
- fear of reprisals
- cultural barriers
- lack of understanding of the justice system
- fear that reporting could affect visa status, and
- perceptions of the value of conciliating vilification complaints and the prospects of a prosecution.<sup>352</sup>

**6.7** The Department of Attorney General and Justice noted that vilification laws are often justified as a way to address potential threats to social cohesion and public order and suggested that the State should therefore be actively involved in enforcing the law and prosecuting alleged offenders, rather than leaving it up to victims to complain.<sup>353</sup>

**6.8** Another option, proposed by the NSW Society for Labor Lawyers, is to have an open standing for serious racial vilification complaints: "... if we consider that racial vilification to be such an extraordinary awful aspect in our society... then there should be no restriction on who may lay a complaint."<sup>354</sup>

**6.9** Mr Andrew Stone, Barrister, Australian Lawyers Alliance noted that the advantage of an open standing would be allowing a community group to lodge a complaint where there had been vilification of its members. However Mr Stone cautioned that an open standing could become "... tit and tat and ... a forum for revisiting ancient hatreds."<sup>355</sup>

**6.10** Community groups were also mentioned by Mr John McKenzie, Chief Legal Officer for the Aboriginal Legal Service, who similarly recommended that these groups be able to lodge complaints on behalf of members. Mr McKenzie elaborated on this proposal, explaining that minority groups such as Aboriginal people can feel overwhelmed by the complaints process (particularly if the police are involved) and gain greater confidence if they are assisted by a representative. In addition, he noted the corrosive effect that vilification can have on a person's self-esteem and indicated this was another reason to allow complaints to be lodged on a person's behalf.<sup>356</sup>

**6.11** Other inquiry participants offered more specific suggestions of who should be able to lodge complaints. For example, the Redfern Legal Centre, the Executive Council of Australian Jewry and the Community Relations Commission for a Multicultural NSW believed that the President of the Board should be empowered to refer a matter to the Attorney General if

---

<sup>352</sup> Submission 26, Department of Attorney General and Justice, pp 11-12.

<sup>353</sup> Submission 26, Department of Attorney General and Justice, pp 11-12.

<sup>354</sup> Evidence, Ms Catherine Mathews, General Executive of NSW Society of Labor Lawyers, 5 April 2013, p 27.

<sup>355</sup> Evidence, Mr Andrew Stone, Australian Lawyers Alliance, 5 April 2013, p 40.

<sup>356</sup> Evidence, Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, 8 April 2013, p 49.

he/she believes that a serious racial vilification incident has occurred, whether or not a formal complaint has been received.<sup>357</sup>

- 6.12** Section 88 of the *Anti-Discrimination Act* also attracted criticism during the Inquiry as it does not allow people of a presumed or imputed race to lodge racial vilification complaints. (The issue of presumed or imputed race was also considered in Chapter 4 in relation to the ‘race’ element in s 20D (see 4.122-4.134)). The NSW Council for Civil Liberties was concerned that as such the provision may curtail the scope of the serious racial vilification provision in s 20D:

The Act may, in its current form, prohibit a victim of serious racial vilification from making submissions regarding the vilification by virtue of s.88, which requires that a person “has the characteristic that forms the basis” of the vilification. In addition to this, we consider that the current wording of the Section emphasizes this “membership requirement” by requiring that the incitement, contempt or ridicule be directed towards “a person or a group of persons on the ground of the race of the person or members of the group.”<sup>358</sup>

- 6.13** Similarly, the NSW Jewish Board of Deputies noted that s 88 precludes a vilification complaint from being made by anyone who does not have, or reasonably claim to have, the characteristic that was the ground of the alleged vilification which is at odds with analogous provisions contained in Chapter XI of the Western Australian *Criminal Code Compilation Act 1913*, and also in the United Kingdom.<sup>359</sup>
- 6.14** The NSW Council for Civil Liberties proposed that the complaints process be made available to persons of a presumed race.<sup>360</sup>

### *Committee comment*

- 6.15** The Committee acknowledges that s 88 of the *Anti-Discrimination Act* is perceived to be overly restrictive. Under this provision only an alleged victim of an offence can make a complaint to the Anti-Discrimination Board of NSW. However the Committee heard that there are a number of reasons why an individual may be reluctant to pursue a complaint themselves. In light of this, stakeholders offered a range of proposals to widen the scope of the provision.
- 6.16** We note the suggestion that there should be open standing for the lodgement of racial vilification complaints and we acknowledge the proposals for community groups or the President of the Anti-Discrimination Board to have standing to lodge vilification complaints. However in our view an open standing or lodgement by third parties may widen the scope of s 88 too far and possibly encourage the lodgement of frivolous claims.
- 6.17** The Committee does however agree that persons of a presumed or imputed race should be able to lodge serious racial vilification complaints with the Board as not only are these individuals equally affected by race hate acts, but similar coverage is already extended to other

<sup>357</sup> Submission 34, Redfern Legal Centre, p 8 and Evidence, Mr Peter Wertheim, Executive Director, Executive Council of Australian Jewry, 8 April 2013, p 41; Submission 8, Community Relations Commission for a Multicultural NSW, p 8.

<sup>358</sup> Submission 39, NSW Council for Civil Liberties, p 3.

<sup>359</sup> Submission 5, NSW Jewish Board of Deputies, p 8.

<sup>360</sup> Evidence, Mr Jackson Rogers, Executive Member, NSW Council for Liberties, 8 April 2013, p 7.

groups protected by the *Anti-Discrimination Act*. This issue was also discussed in Chapter 4. Therefore, in line with our earlier Recommendation 4, we recommend that the NSW Government amend s 88 to include persons of a presumed or imputed race.

---

### **Recommendation 8**

That the NSW Government amend the standing for the lodgement of complaints provision in section 88 of the *Anti-Discrimination Act 1977* to include persons of a presumed or imputed race.

---

### **Timeframe for lodging complaints**

**6.18** The Board alerted the Committee to a significant discrepancy concerning the timeframe for lodgement of serious racial vilification complaints:

- under s 89B of the *Anti-Discrimination Act* a vilification complaint must be lodged in writing within 12 months of the incident occurring
- under s 179 of the *Criminal Procedure Act 1986* proceedings for a summary offence must commence no later than six months from when the offence was alleged to have been committed.<sup>361</sup>

**6.19** The Board was concerned that these conflicting timeframes can result in some serious vilification complaints not being pursued:

The different time limits required for commencing criminal proceedings under the *Criminal Procedure Act* (6 months), and that for lodging a vilification complaint with the Board (12 months) can result in individuals who have been vilified being unable to pursue a complaint of serious vilification.<sup>362</sup>

**6.20** The Board referred to a recent case involving homosexual vilification, *Simon Margan v Director of Public Prosecutions & Anor* [2013] NSWSC 44, which illustrated the potential issues surrounding the timeframe for lodging vilification complaints. In that case, Mr Margan lodged a complaint with the Anti-Discrimination Board of NSW within the 12 month timeframe required under s 89B of the *Anti-Discrimination Act*. However the Director of Prosecutions (DPP), and later the Supreme Court, dismissed the offence as statute barred as it was a summary offence and proceedings were required to be commenced within six months.<sup>363</sup>

### **Committee comment**

**6.21** The Committee understands that there is a significant discrepancy between the timeframes for lodging complaints under s 89B of the *Anti-Discrimination Act* (12 months of an incident occurring) and s 179 of the *Criminal Procedure Act 1986* (summary offences must commence within six months of an incident occurring). The case of *Simon Margan v Director of Public*

---

<sup>361</sup> Submission 10, Anti-Discrimination Board of NSW, p 5.

<sup>362</sup> Submission 10, Anti-Discrimination Board of NSW, p 5.

<sup>363</sup> Crown Solicitor's Office, *Client News*, April 2013, p 12.

*Prosecutions & Anor* highlighted the injurious impact that this discrepancy can have on vilification complaints.

- 6.22** It appears sensible to align the above timeframes. Therefore the Committee recommends that the NSW Government extend the time limit for prosecutions under section 179 of the *Criminal Procedure Act* to 12 months to be consistent with the time limit for lodging complaints under section 89B of the *Anti-Discrimination Act*.

---

### **Recommendation 9**

That, for the purposes of racial vilification proceedings only, the NSW Government extend the time limit for commencing prosecutions under section 179 of the *Criminal Procedure Act 1986* to 12 months to be consistent with the time limit for lodging complaints under section 89B of the *Anti-Discrimination Act 1977*.

---

## **Steps for prosecution of serious racial vilification offences**

- 6.23** This section examines the steps involved in prosecuting a serious racial vilification matter, including the timeframes involved in potential prosecutions and the development of a brief of evidence.
- 6.24** Section 91 of the *Anti-Discrimination Act* sets out the steps for prosecution of serious racial vilification matters:

### **91 Prosecution for serious vilification**

(1) The President:

(a) after investigating a vilification complaint, and

(b) before endeavouring to resolve the complaint by conciliation,

is to consider whether an offence may have been committed under section 20D... in respect of the matter the subject of the complaint.

(2) If the President considers that an offence may have been so committed, the President is to refer the complaint to the Attorney General.

(3) The President may only make such a referral within 28 days after receipt of the complaint.

(4) On making the referral, the President is to give notice in writing to the complainant of:

(a) the making of the referral, and

(b) the rights of the complainant under section 93A.

(5) The Tribunal may stay proceedings relating to the complaint until the conclusion of proceedings for the alleged offence under section 20D...

- 6.25** Mr Stepan Kerkyasharian, President of the Anti-Discrimination Board of NSW, explained the practical application of s 91A of the Act to his workload:

... I look at a complaint and I have 28 days to decide whether it is serious enough to be prosecuted. Essentially I form an opinion because I do not have any investigative powers so I put an opinion to the Attorney that this should be prosecuted. The Attorney then refers it to the DPP but there is no prosecution brief prepared for the DPP and the DPP can only go on what is in front of him or her, which is basically the opinion of the President of the Anti-Discrimination Board and probably a supporting remark from the Attorney.<sup>364</sup>

- 6.26** See Chapter 5 for recommendations concerning the Attorney General's consent power, including discussions about the appropriate roles of the Attorney General and the DPP.

### **Timeframes for prosecutions**

- 6.27** A large number of stakeholders expressed concern that s 91 of the *Anti-Discrimination Act* requires the President of the Board to refer complaints of serious racial vilification to the Attorney General within 28 days after receipt of the complaint. As previously mentioned, the Attorney General refers the complaint on to the DPP for prosecution.<sup>365</sup>
- 6.28** The Office of the Director of Public Prosecutions (ODPP) advised that the 28 day timeframe stems from "... the fact that any prosecution must be commenced within 6 months of the date of the alleged offence (s 179 of the *Criminal Procedure Act 1986*)."<sup>366</sup> However the ODPP suggested that consideration should be given to relaxing this time constraint.<sup>367</sup>
- 6.29** The Board described the 28 day timeframe for referral to the Attorney General as "... too short a time period for a well-considered referral to be made."<sup>368</sup> Furthermore, the Board was concerned that "... the time taken for the Attorney General to consider and refer complaints to the Director of Public Prosecutions further shortens the amount of time available for commencement of proceedings."<sup>369</sup>
- 6.30** Numerous other stakeholders were also critical of the 28 day referral timeframe and recommended that the timeframe either be extended or abolished.
- 6.31** For example, the Redfern Legal Centre and Australian Lawyers Alliance recommended extending the timeframe.<sup>370</sup> Mr McKenzie also considered it appropriate to extend the relevant

<sup>364</sup> Evidence, Mr Stepan Kerkyasharian, President, Anti-Discrimination Board of NSW, 5 April 2013, p 5.

<sup>365</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 5; Submission 6, Office of the Director of Public Prosecutions: The ODPP's submission to the Inquiry explained that as "[p]ursuant to s 11 (6) of the *Director of Public Prosecutions Act 1986* the DPP must advise the Attorney of any decision to commence or not commence a prosecution in relation to a matter so referred."

<sup>366</sup> Submission 6, Office of the Director of Public Prosecutions, p 6.

<sup>367</sup> Submission 6, Office of the Director of Public Prosecutions, p 6.

<sup>368</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 4.

<sup>369</sup> Submission 10, Anti-Discrimination Board of NSW, pp 5-6.

<sup>370</sup> Submission 34, Redfern Legal Centre, p 4; Evidence, Mr Joshua Dale, Chair, Sub-Committee on Human Rights, Australian Lawyers Alliance, 5 April 2013, p 36.

timelines to ensure there is no difference between serious racial vilification offences and other criminal offences.<sup>371</sup>

- 6.32** The NSW Bar Association went further and recommended that it be abolished, describing the clause as “an unjustified fetter” to prosecution.<sup>372</sup> The NSW Society of Labor Lawyers also recommended abolishing the timeframe, or at least extending it from time to time as required.<sup>373</sup>
- 6.33** Some stakeholders suggested specific timeframe extensions. For example, Mr John Dowd, President of the International Commission of Jurists Australia, recommended that the referral timeframe be extended to six months.<sup>374</sup> Mr Peter Wertheim, Executive Director of the Executive Council of Australian Jewry, suggested that it be 12 to 24 months.<sup>375</sup> Similarly, Mr Jackson Rogers, Solicitor and Executive Member, NSW Council for Civil Liberties, supported extending the investigative timeline from 28 days to two years.<sup>376</sup> However, in regard to the latter suggestions, it is noted that under s 179 of the *Criminal Procedure Act 1986* proceedings for a summary offence must commence no later than six months from when the offence was alleged to have been committed (as discussed at 6.18)<sup>377</sup>

### *Committee comment*

- 6.34** The Committee notes that s 91 of the *Anti-Discrimination Act* sets out the steps for prosecuting a serious vilification offence. The practicalities of this provision require the President of the Anti-Discrimination Board of NSW to evaluate the merits of a complaint and refer any potential serious racial vilification matters on to the Attorney General (despite the DPP having been vested power to consent to prosecution power in 1990) within 28 days of receipt of the complaint. The Attorney General in turn refers the matter on to the DPP for potential prosecution. Concerns about this process included the timeframes for prosecution and the development of a brief of evidence, which are discussed later in this chapter.
- 6.35** The Committee accepts the arguments presented by stakeholders that the current 28 day referral timeframe is too short as it does not allow the President of the Board to make a well-considered referral.
- 6.36** If the Committee’s earlier recommendation to repeal the Attorney General’s consent power (Recommendation 7) is not implemented (and thereby the Attorney General continues to play a role in the prosecution process), we recommend that the NSW Government extend the timeframe for referrals in section 91(3). As suggestions for timeframe extensions varied, the Committee considers it appropriate for the NSW Government to decide on a suitable timeframe.

<sup>371</sup> Evidence, Mr McKenzie, 8 April 2013, p 52.

<sup>372</sup> Evidence, Mr Simeon Beckett, Barrister, NSW Bar Association, 8 April 2013, p 54.

<sup>373</sup> Submission 41, NSW Society of Labor Lawyers, p 2.

<sup>374</sup> Evidence, Mr John Dowd, President, International Commission of Jurists Australia, 5 April 2013, p 11;

<sup>375</sup> Evidence, Mr Wertheim, 8 April 2013, p 43.

<sup>376</sup> Evidence, Mr Jackson Rogers, Solicitor and Executive Member, NSW Council for Civil Liberties, 8 April 2013, p 7.

<sup>377</sup> Submission 10, Anti-Discrimination Board of NSW, p 5.

---

### Recommendation 10

That, if Recommendation 7 is not implemented, the NSW Government extend the timeframe for the President of the Anti-Discrimination Board to refer complaints to the Attorney General under section 91(3) of the *Anti-Discrimination Act 1977*.

---

### Development of a brief of evidence

- 6.37** As mentioned, at present s 91 of the *Anti-Discrimination Act* requires that the President of the Board refer a potential serious racial vilification complaint on to the Attorney General. The Attorney General then refers the matter to the DPP for further investigation and potential prosecution. However there is currently no mechanism in place for the development of a brief of evidence for the DPP.<sup>378</sup> This situation led to discussions during the Inquiry about the investigative powers of the President of the Board and the role of the police in investigating breaches of s 20D of the Act.
- 6.38** Sections 90A and 90B of the *Anti-Discrimination Act* vest certain powers in the President of the Anti-Discrimination Board to investigate possible serious racial vilification offences including:
- requiring any person to produce a copy of or transcript of any broadcast which is the subject of a vilification complaint, and
  - requiring complainants, respondents and certain third parties to provide relevant information or documents to the Board. However, a person with a “reasonable excuse” does not have to provide the material requested under section 90B.<sup>379</sup>
- 6.39** In contrast, the Board noted that “... the police have wide-ranging powers to investigate, arrest, interview, search and seize evidence and to compel production of information, together with established procedures and rules of evidence to govern those investigations.”<sup>380</sup>
- 6.40** The Board was concerned that its limited powers and resources to prepare a brief of evidence would mean that a prosecution for a breach of s 20D of the *Anti-Discrimination Act* will never eventuate.<sup>381</sup>
- 6.41** The Department of Attorney General and Justice raised a similar issue, advising that while the President of the Board is capable of compiling sufficient evidence to determine a potential breach of s 20D of the Act, it may be an inadequate basis for prosecution. In these circumstances the DPP can request the police to carry out further investigations.<sup>382</sup>
- 6.42** The ODPP advised the Committee that two of the 11 serious racial vilification matters referred by the Board since 1992 were sent to the police for such investigation:

---

<sup>378</sup> Submission 8, Community Relations Commission for a Multicultural NSW, p 9.

<sup>379</sup> Submission 10, Anti-Discrimination Board of NSW, pp 5-6.

<sup>380</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 3.

<sup>381</sup> Submission 10, Anti-Discrimination Board of NSW, p 7.

<sup>382</sup> Submission 26, Department of Attorney General and Justice, p 11.

Pursuant to section 18 of the *Director of Public Prosecution Act 1986* if the DPP is considering instituting or taking over conduct of a prosecution for an offence the DPP may request police to carry out further investigation. In two of the matters referred by the ADB the ODPP referred the matter to the police for further investigation; however the results of those investigations did not produce evidence warranting prosecution for an offence.<sup>383</sup>

- 6.43 The NSW Council for Reconciliation was also concerned that the Board was not adequately resourced to provide a comprehensive brief of evidence.<sup>384</sup>
- 6.44 It was suggested that the police could develop briefs of evidence. This is considered below in the context of introducing a new prosecution process for serious racial vilification offences.

### Police involvement in s 20D prosecutions

- 6.45 A number of inquiry participants suggested that to overcome the issue of the Board being unable to develop a brief for the DPP, the police should be given the power to prepare a brief of evidence, as per other criminal investigations.
- 6.46 As previously noted, in certain circumstances the police can investigate serious racial vilification allegations, and have done so in the past.<sup>385</sup>
- 6.47 During the Inquiry the Board initially proposed that it be given the power to engage an independent body to prepare a prosecutorial brief, unless s 20D of the *Anti-Discrimination Act* was moved to the *Crimes Act* (in which case the police could prepare the prosecution brief. Suggestions to relocate s 20D were discussed in Chapter 5).<sup>386</sup> However in response to questioning from the Committee, Mr Kerkyasharian agreed that the police could be given the power to prepare a prosecution brief without requiring the provision to be moved to the *Crimes Act*.<sup>387</sup>
- 6.48 During the Inquiry it became apparent that a new model for vilification prosecutions was desirable. One Committee member proposed a model which would see:
- the Board as the single entry point for vilification complaints (as per the current situation)
  - the President of the Board complete a basic merits assessment of vilification complaints and refer potential serious racial vilification matters on to the police
  - the police investigate matters and compile a brief of evidence for the DPP, and

<sup>383</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

<sup>384</sup> Submission 25, NSW Reconciliation Council, p 6. S

<sup>385</sup> Submission 6, Office of the Director of Public Prosecutions, p 1.

<sup>386</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 5. The Community Relations Commission for a Multicultural NSW also recommended that the Board should be given investigative powers under the *Anti-Discrimination Act* to enable it to appoint an independent third party to prepare a prosecution brief for the DPP; Submission 8, Community Relations Commission for a Multicultural NSW, p 9.

<sup>387</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 8.

- the DPP have responsibility for any potential prosecutions.<sup>388</sup>

**6.49** The Attorney General would not have a role in this model.

**6.50** In response to the above proposal, Mr Stone cautioned that maintaining the Board as a single point of entry for all vilification complaints may discourage the police from investigating breaches of s 20D:

The only risk – and I am not speaking against that proposition – is that you have just got to be careful that that does not then create among police the mindset that we only investigate and we only look when it is referred to us, which then tends to lead to the attitude that if we do not get any complaints, that means we do not have to do anything.<sup>389</sup>

**6.51** However some inquiry participants were apprehensive about police involvement in the investigation of serious racial vilification matters. For example, Ms Catherine Mathews Executive Director, NSW Society of Labor Lawyers, expressed concern that certain community groups, such as Aboriginal and Torres Strait Islanders, might be reluctant to approach police about potential breaches of s 20D of the *Anti-Discrimination Act* due to existing tensions between the two groups.<sup>390</sup>

**6.52** The Board noted a recommendation in a 2009 paper by the then DPP, Mr Nicholas Cowdery AM QC, that police should receive training about vilification if they are to be involved in the investigation of potential serious racial vilification offences:

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.<sup>391</sup>

**6.53** Mr Stone suggested that to overcome apprehensions about police involvement in serious racial vilification matters, there should be a parallel track of investigation to allow individuals to take their complaint directly to the police or to the Board.<sup>392</sup>

**6.54** Mr Peter Wertheim, Executive Director of the Executive Council of Australian Jewry, also supported opening a parallel avenue of investigation,<sup>393</sup> as did Professor Simon Rice OAM, Director, Law Reform and Social Justice, College of Law at the Australian National University, who expressed concern over the current ‘gatekeeping’ role held by the President of the Board:

---

<sup>388</sup> Evidence, Mr David Shoebridge MLC, Member, Standing Committee on Law and Justice, 8 April 2013, pp 39-40.

<sup>389</sup> Evidence, Mr Andrew Stone, Barrister, Australian Lawyers Alliance, 5 April 2013, p 40.

<sup>390</sup> Evidence, Ms Mathews, 5 April 2013, p 29.

<sup>391</sup> Submission 10, Anti-Discrimination Board of NSW, p 8.

<sup>392</sup> Evidence, Mr Stone, Barrister, 5 April 2013, p 40.

<sup>393</sup> Evidence, Mr Wertheim, 8 April 2013, p 44.

I hesitate to say that anybody should have a gatekeeping role in relation to the prosecution of a crime. If we are talking about the commission of a crime, it is a matter for the State through its normal processes to assess whether or not it should prosecute that crime.<sup>394</sup>

- 6.55** However Mr Kerkyasharian maintained that the ‘gatekeeping’ function of the President of the Board was desirable as the Board has significant standing and respect in the community. Mr Kerkyasharian implored to the Committee that any amendments to process for prosecuting serious racial vilification matters not corrode its current powers.<sup>395</sup>
- 6.56** Mr McKenzie also supported all complaints being lodged with the Board, asserting that it would be most appropriate for people to lodge their initial complaints with the Board as not all individuals will know whether their complaint falls into the civil or criminal process. He also agreed that the Board should then pass on more serious complaints to the police.<sup>396</sup>
- 6.57** Likewise, Mr Rogers and Mr Dowd supported allowing the President of the Board to directly refer matters on to the police for further investigation.<sup>397</sup>
- 6.58** The final consideration for the proposed new investigative model for serious racial vilification complaints was that the DPP have sole discretion to prosecute an offence. The Law Society of NSW was adamant that the DPP and not the police prosecutor be responsible for prosecuting potential serious vilification offences.<sup>398</sup> Mr Kirk McKenzie, Chair of the Human Rights Committee for the Law Society of NSW, elaborated on this argument during his evidence to the Committee:

We think that because of the sensitivity of the offence and the potential seriousness of the offence, if it is to be dealt with in the Local Court it should be dealt with by the DPP in the ordinary course of events. Part of the reason for that is because the Law Society has had a longstanding view that the DPP is the appropriate person to prosecute all criminal offences.<sup>399</sup>

### *Committee comment*

- 6.59** The Committee acknowledges that the powers currently proscribed to the President of the Anti-Discrimination Board of NSW under Part 9 of the Anti-Discrimination Act are insufficient to prepare a detailed brief of evidence for the DPP. The Board does not have the broad-ranging evidence-gathering and arrest powers of the police, nor does it have established procedures and rules for evidence to govern investigations.
- 6.60** The Committee understands that under the current provision there is some scope for the police to be involved in the investigation of serious racial vilification matters, and that in two

<sup>394</sup> Evidence, Professor Simon Rice OAM, Director, Law Reform and Social Justice, College of Law, Australian National University, 8 April 2013, p 27.

<sup>395</sup> Evidence, Mr Kerkyasharian, 5 April 2013, p 3.

<sup>396</sup> Evidence, Mr McKenzie, 8 April 2013, pp 52-53.

<sup>397</sup> Evidence, Mr Rogers, 8 April 2013, p 7 and Evidence, Mr Dowd, 5 April 2013, p 12.

<sup>398</sup> Submission 12, Law Society of NSW, p 5.

<sup>399</sup> Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, 5 April 2013, p 20.

of the 11 serious racial vilification referrals from the Board to the DPP the police have been requested to carry out further investigations.

- 6.61** A number of stakeholders supported a proposal for a new prosecution model that would see the Board remain as the single entry point for vilification complaints, but which would allow the President of the Board to complete an initial merits assessment of the complaint and refer potential serious racial vilification matters directly on to the police. In turn, the police would be responsible for investigating matters and preparing a brief of evidence for the DPP, who would maintain responsibility for any potential prosecutions.
- 6.62** The Committee also supports this proposal. We therefore recommend that the NSW Government allow the President of the Board to directly refer serious racial vilification complaints to the police, and that following such a referral the police should then investigate the allegation and prepare a brief of evidence for the DPP.
- 

#### **Recommendation 11**

That the NSW Government amend section 91 of the *Anti-Discrimination Act 1977* to allow the President of the Anti-Discrimination Board of NSW to directly refer serious racial vilification complaints to the NSW Police Force.

#### **Recommendation 12**

That the NSW Government amend the *Anti-Discrimination Act 1977* to allow the NSW Police Force to prepare a brief of evidence for the Director of Public Prosecutions, following the referral of a serious racial vilification complaint.

---

- 6.63** In line with the Committee's recommendation in Chapter 5 to repeal the Attorney General's consent to prosecution power (Recommendation 7), the Attorney General would not play a role in the proposed new prosecution model. The Committee therefore recommends that if Recommendation 7 is implemented, that the NSW Government also repeal the requirement for the President of the Board to refer serious racial vilification complaints to the Attorney General in s 91(2) of the Act.
- 6.64** We acknowledge that s 91 deals with prosecutions for all serious vilification complaints. However the Committee only intends for this recommendation to impact on serious racial vilification complaints. Therefore if this recommendation (Recommendation 13) is adopted we encourage the Government to take the Committee's position into account when amending s 91.
- 

#### **Recommendation 13**

That, if Recommendation 7 is implemented, 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 *Anti-Discrimination Act 1977*.

---

- 6.65** The Committee considers that the new prosecution model will utilise the evidence-gathering powers of the police while maintaining the ‘gatekeeping’ function of the Board. The Committee supports the continuance of the Board’s ‘gatekeeping’ function, despite some opposition from inquiry participants, as the Board has extensive experience in these issues. It will also ensure that any potential civil prohibition complaints are dealt with appropriately.
- 6.66** Similarly, while the Committee acknowledges that there were some stakeholder concerns about police involvement in the proposed new model for prosecution, as previously mentioned, the police already can (and have) been involved in serious racial vilification investigations. The Committee nonetheless recommends that the NSW Police Force provide additional training to its members about its powers under the *Anti-Discrimination Act* to address any concerns about tensions with certain community groups, as well as to address any perceived view that the police may not be sufficiently aware of their responsibilities under s 20D.

---

**Recommendation 14**

That the NSW Police Force provide training to its members about the offence of serious racial vilification in section 20D of the *Anti-Discrimination Act 1977*.

- 
- 6.67** It is hoped that once these recommendations have been actioned by the NSW Government the procedural issues encountered by people lodging serious racial vilification complaints will be resolved. It is anticipated that this will then present a clearer view on whether change should be considered for the substantive issues relating to s 20D that were discussed in Chapter 4. We acknowledge that it will take some time to see the effects of any of the changes proposed in this report, which is why the Committee made its earlier recommendation (Recommendation 5) for there to be a further review of the racial vilification law in New South Wales in five years’ time.

**Reflecting proposed amendments in s 20C**

- 6.68** As discussed throughout this report, the civil prohibition for racial vilification set out in s 20C of the *Anti-Discrimination Act* includes many of the same elements as the criminal offence in s 20D. As such the Committee recommends that where sections 20C and 20D have identical provisions, that any amendments to s 20D be reflected in s 20C to ensure consistency.

---

**Recommendation 15**

That the NSW Government amend section 20C of the *Anti-Discrimination Act 1977*, where appropriate, to reflect any amendments made to section 20D.

---



## Appendix 1 Submissions

No	Author
1	Miss Sarah Pitney
2	Forum on Australia's Islamic Relations
3	Associate Professor Gail Mason
4	Kingsford Legal Centre
5	NSW Jewish Board of Deputies
6	Office of the Director of Public Prosecutions
7	Mr Luke Beck
8	Community Relations Commission for a Multicultural NSW
9	National Stolen Generations Alliance
10	Anti-Discrimination Board of NSW
11	Mr Safwan Zabalawi
12	Law Society of New South Wales
13	Mr Michael Sobb
14	The Cyprus Community of NSW
15	Australian Kurdish Democratic Committee
16	The Vietnamese Community in Australia NSW Chapter
17	Freedom 4 Faith
18	Chinese Community Council of Australia
19	Chinese Australian Forum of NSW
20	Ethnic Communities' Council of NSW
21	Australian Lawyers Alliance
22	Public Interest Advocacy Centre
23	NSW Aboriginal Land Council
24	Legal Aid NSW
25	NSW Reconciliation Council
26	Department of Attorney General and Justice
27	FamilyVoice Australia
28	Armenian National Committee of Australia
29	Liberal Democratic Party
30	International Commission of Jurists, Australia
31	New South Wales Bar Association
32	NSW Young Lawyers

---

<b>No</b>	<b>Author</b>
33	Australian Lawyers for Human Rights
34	Redfern Legal Centre
35	Human Rights Law Centre
36	Professor Simon Rice and Professor Neil Rees
37	Mr Anthony Pang
38	Mr Steve Hogan
39	NSW Council for Civil Liberties
40	Australian Hellenic Council (NSW)
41	NSW Society of Labor Lawyers
42	Aboriginal Legal Centre
43	Mr Ian Le Brenton
44	Mr Edward Lipsett
45	Confidential
46	Metro Migrant Resource Centre, Settlement Service International, Arab Council Australia, Western Sydney Community Forum

---

## Appendix 2 Witnesses

<b>Date</b>	<b>Name</b>	<b>Position and Organisation</b>	
<b>Friday 5 April 2013</b> <b>Macquarie Room</b> <b>Parliament House</b>	Hon John Dowd AO QC	President, International Commission of Jurists, Australia	
	Mr Kirk McKenzie	Chair, Law Society's Human Rights Committee, The Law Society of NSW	
	Ms Catherine Mathews	NSW Society of Labor Lawyers	
	Mr Wayne Zheng	NSW Society of Labor Lawyers	
	Mr Joshua Dale	Chair - NSW Human Rights Committee, Australian Lawyers Alliance	
	Mr Andrew Stone	Director - Australian Lawyers Alliance	
	Mr Stepan Kerkyasharian AO	President, Anti-Discrimination Board of NSW	
	Ms Jacqueline Lyne	Legal Officer, Anti-Discrimination Board of NSW	
	Ms Elizabeth Wing	Manager, Inquiries and Conciliation, Anti-Discrimination Board of NSW	
	<b>Monday 8 April 2013</b> <b>Macquarie Room</b> <b>Parliament House</b>	Mr Simon Breheny	Director, Legal Rights Project, Institute of Public Affairs
		Professor Neil Rees	Professor of Law, School of Law, University of the Sunshine Coast
		Professor Simon Rice OAM	Director, Law Reform and Social Justice, ANU College of Law
		Mr Peter Chan	Secretary, Chinese Australian Forum of NSW
Mr Kenrick Cheah		Vice President, Chinese Australian Forum of NSW	
Mr Patrick Voon		President, Chinese Australian Forum of NSW	
Mr Vic Alhadef		Chief Executive Officer, NSW Jewish Board of Deputies	
Mr David Knoll AM		Honorary Life Member, NSW Jewish Board of Deputies	
Mr Peter Wertheim AM		Executive Director, Executive Council of Australian Jewry	
Mr John McKenzie		Chief Legal Officer, Aboriginal Legal Service (NSW/ACT)	
Mr Simeon Beckett		Barrister, NSW Bar Association	
Ms Roshana Wikramanayake		NSW Bar Association	
Mr Stephen Blanks		Secretary, NSW Council for Civil Liberties	
Mr Jackson Rogers	Executive Manager, NSW Council for Civil Liberties		
Dr Martin Bibby	Committee Representative, NSW Council for Civil Liberties		

## Appendix 3 Tabled documents

**Friday 5 April 2013**

**Macquarie Room, Parliament House**

- 1 *Human Rights Day Oration* transcript, tendered by Hon James Spigelman AC QC.

**Monday 8 April 2013**

**Macquarie Room, Parliament House**

- 2 Opening statement, tendered by Mr David Knoll, NSW Jewish Board of Deputies.

## **Appendix 4 Answers to questions on notice**

- 19 April 2013 – NSW Jewish Board of Deputies
- 22 April 2013 – NSW Anti-Discrimination Board
- 24 April 2013 – NSW Society of Labor Lawyers
- 24 April 2013 – Human Rights Sub-Committee, Australian Lawyers Alliance
- 24 April 2013 – Aboriginal Legal Service
- 24 April 2013 – Chinese Australian Forum
- 3 May 2013 – Professor Simon Rice and Professor Neil Rees
- 3 May 2014 – NSW Bar Association
- 15 May 2013 – NSW Council for Civil Liberties.

## Appendix 5 Sections 18C and 18D of the *Racial Discrimination Act 1975* (Cth)

### SECTION 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.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

- (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.

## SECTION 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.

## Appendix 6 Minutes

### Minutes No. 17

Monday 17 December 2012

Standing Committee on Law and Justice

Room 1153, Parliament House, at 10.05 am

#### 1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald (*via teleconference*)

Mrs Mitchell (*via teleconference*)

Mr Shoebridge

#### 2. Apologies

Mr Moselmane

#### 3. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft Minutes No. 16 be confirmed.

#### 4. Correspondence

The Committee noted the following items of correspondence:

##### *Received*

- \*\*\*
- \*\*\*
- \*\*\*
- \*\*\*
- 20 November 2012 – from the Hon Barry O’Farrell, Premier, to the Committee Chair, requesting the Committee to consider conducting an inquiry into racial vilification law in NSW.

##### *Sent*

- \*\*\*

\*\*\*

\*\*\*

#### 5. Consideration of new terms of reference: Inquiry into racial vilification law in NSW

Resolved, on the motion of Mrs Mitchell: That,

- the Committee note the correspondence received from the Premier, the Hon Barry O’Farrell MP on 20 November 2012, requesting the Committee to conduct an inquiry into racial vilification law in NSW
- the Committee adopt the following terms of reference:
  - That the Standing Committee on Law and Justice inquire into and report on racial vilification in NSW, and, in particular:
    1. The effectiveness of section 20D of the Anti-Discrimination Act 1977 which creates the offence of serious racial vilification;
    2. Whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and
    3. Any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech.

- the Chair report the terms of reference to the House on the next sitting day.
- the commencement of the Inquiry be publicised by the Secretariat on the Committee's web site and through a press release on 17 December 2012
- the call for submissions be advertised on Wednesday 23 January 2013 in *The Sydney Morning Herald* and *The Daily Telegraph*
- the closing date for submission be Friday 8 March 2013
- the Committee write to the following stakeholders informing them of the Inquiry and inviting them to make a submission, and that committee members provide any additional stakeholders to the Secretariat by COB Thursday 20 December 2013:

**Government agencies and regulatory bodies**

- Australian Communications and Media Authority
- Australian Human Rights Commission
- Department of Attorney General and Justice
- Department of Education and Training
- Department of Premier and Cabinet
- Equal Opportunity Division, New South Wales Administrative Decisions Tribunal
- NSW Community Relations Commission
- NSW Police
- Office of the Director of Public Prosecution
- The Anti-Discrimination Board of NSW.

**Legal and public interest groups**

- Aboriginal Legal Service (NSW/ACT) Limited
- Australian Institute of Criminology
- Australian Lawyers Alliance
- Community Legal Centres NSW
- Ethnic Communities' Council of NSW
- Institute of Public Affairs
- Legal Aid NSW
- NSW Aboriginal Land Council
- NSW Bar Association
- NSW Council for Civil Liberties
- Racism, No way!
- Redfern Legal Centre
- St James Ethics Centre
- The Law Society of NSW
- The Public Interest Advocacy Centre.

**Academic**

- Mr Luke McNamara, Associate Professor, Faculty of Law, University of Wollongong
- Prof Andrew Jakubowicz, Department of Sociology, University of Technology Sydney
- Prof Larissa Behrendt, University of Technology Sydney.

**Others**

- Sporting groups
  - Community groups and leaders
  - Jewish Board of Deputies
  - Major media outlets:
  - Mr Alan Jones
  - Mr Andrew Bolt
  - Mr David Flint
  - Mr James Spigelman, ABC chairman and former senior judge
  - Mr Nicholas Cowdery AM QC, former Director of Public Prosecutions
  - Political Parties.
- 
- the Committee authorise the publication of all submissions to the Inquiry into racial vilification law in NSW, subject to the Committee Clerk checking for confidentiality, adverse mention and other issues.
  - the Committee hold two days of public hearings on 3 and 4 April 2013 and a reserve day to be determined.
  - The Committee meet on 27 May 2013 to consider the Chair's draft report.

6. \*\*\*

7. **Adjournment**

The Committee adjourned at 10.45 am *sine die*.

Rachel Callinan

**Clerk to the Committee**

**Minutes No. 18**

Thursday 21 March 2013

Standing Committee on Law and Justice

Members' Lounge, Parliament House, at 1.05 pm

1. **Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Shoebridge

2. **Previous minutes**

Resolved, on the motion of Mr Shoebridge: That draft Minutes No. 17 be confirmed.

3. **Correspondence**

The Committee noted the following items of correspondence:

***Received***

- \*\*\*
- \*\*\*
- \*\*\*

**Sent:**

- \*\*\*
- \*\*\*

\*\*\*

#### 4. Inquiry into racial vilification law in NSW

##### 4.1. Submissions

The Committee has received 29 submissions to date. These submissions have been distributed to Members and published under the authorisation of the Committee's resolution of 17 December 2012.

##### 4.2. Hearing dates

Resolved, on the motion of Mrs Mitchell: That the Committee:

- hold two days of public hearings on 5 and 8 April with a reserve day on 9 April 2013;
- invite representatives from organisations on the proposed witness list, as amended;
- Members advise the secretariat of any additional witnesses by close of business on 22 March 2013.

Resolved, on the motion of Mr Shoebridge: That the Committee grant Commercial Radio Australia an extension on the submission deadline until 2 April 2013.

5. \*\*\*

6. \*\*\*

#### 7. Next meeting

5 April 2013 (Hearing for inquiry into racial vilification law in NSW)

#### 8. Adjournment

The Committee adjourned at 1.34 pm *sine die*.

Beverly Duffy

**Clerk to the Committee**

#### Minutes No. 19

Friday 5 April 2013

Standing Committee on Law and Justice

Macquarie Room, Parliament House, at 9:18 am

#### 1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

#### 2. Previous minutes

Resolved, on the motion of Mr Shoebridge: That draft Minutes No. 18 be confirmed.

### 3. Correspondence

The Committee noted the following items of correspondence:

**Received:**

- 22 March 2013 – Ms Sarah Herbert, Head of Legal & Regulation, Commercial Radio Australia to Principal Council Officer, declining to make a submission to the Inquiry into racial vilification law in NSW (D13/07388).
- 22 March 2013 – Ms Johanna Pheils, A/Deputy Solicitor (Legal), Office of the Director of Public Prosecutions to Principal Council Officer, declining the Committee's invitation to appear as a witness at a racial vilification law hearing (D13/07517).
- 22 March 2013 – Professor Ross Fitzgerald to Principal Council Officer, declining the Committee's invitation to appear as a witness at a racial vilification law hearing (D13/07535).
- \*\*\*
- 27 March 2013 – Ms Sarah Herbert, Head of Legal & Regulation, Commercial Radio Australia to Principal Council Officer, declining the Committee's invitation to appear as a witness at a racial vilification law hearing (D13/08246).
- 28 March 2013 – Ms Kathrina Lo, Director, Legislation, Policy & Criminal Law Review Division, Department of Attorney General and Justice to Principal Council Officer, declining the Committee's invitation to appear as a witness at a racial vilification law hearing (D13/08335).
- 28 March 2013 – Ms Nicole Rose, Director, Office of the Commissioner, New South Wales Police Force to Principal Council Officer, declining the Committee's invitation to appear as a witness at a racial vilification law hearing (D13/08338).

**Sent:**

- \*\*\*

### 4. Inquiry into racial vilification law in NSW

#### 4.1 Submissions

The Committee has received 42 submissions to date. These submissions have been distributed to Members and published under the authorisation of the Committee's resolution of 17 December 2012.

#### 4.2 Questions on notice

Resolved, on the motion of Mrs Mitchell: That the answers to questions on notice be provided within 14 days of receipt of the questions, and that members provide any additional questions on notice to the secretariat by close of business Tuesday 9 April.

#### 4.3 Allocation of time for questions during hearings

Resolved on the motion of Mr MacDonald: That the timing of questioning for the hearing will be divided evenly among members.

#### 4.4 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings.

The following witnesses from the Anti-Discrimination Board of NSW were sworn and examined:

- Mr Stepan Kerkyasharian AO, President
- Ms Jacqueline Lyne, Legal Officer
- Ms Elizabeth Wing, Manager, Inquiries and Conciliation.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Hon John Dowd AO QC, President, International Commission of Jurists, Australia.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Kirk McKenzie, Chair, Law Society's Human Rights Committee, The Law Society of NSW

Mr Kirk McKenzie tendered the following document:

- Hon James Spigelman AC QC, Human Rights Day Oration transcript.

The evidence concluded and the witness withdrew.

The following witnesses from the NSW Society of Labor Lawyers were sworn and examined:

- Mr Wayne Zheng, General Executive
- Ms Catherine Mathews, General Executive

The evidence concluded and the witnesses withdrew.

The following witnesses from the Australian Lawyers Alliance were sworn and examined:

- Mr Joshua Dale, Chair, NSW Committee
- Mr Andrew Stone, Director.

The evidence concluded and the witnesses withdrew.

#### **4.5 Tendered documents**

Resolved, on the motion of Mr Moselmann: That the Committee accept the following document tendered by Mr Kirk McKenzie at the hearing:

- Hon James Spigelman AC QC, Human Rights Day Oration transcript.

#### **5. Chinese Australian Forum seeking to play John Laws audio clip at public hearing**

Resolved, on the motion of Mr Primrose: That the secretariat circulate to members the link to John Laws' audio clip referenced in the Chinese Australian Forum's submission and that the organisation be advised that they do not need to play the audio clip at the public hearing as members already have access to the link.

#### **6. Briefing paper and further hearing day**

Resolved, on the motion of Mr Shoebridge: That the secretariat draft a briefing paper outlining the Commonwealth and NSW civil remedies for racial vilification including case studies of the Bolt and Jones cases, and that the Committee defer a decision on the need for a further hearing until after receiving the briefing paper.

#### **7. Adjournment**

The Committee adjourned at 1:36 pm until Monday 8 April 2013, 9.25am.

Rebecca Main  
Committee Clerk

**Minutes No. 20**

Monday 8 April 2013

Standing Committee on Law and Justice

Macquarie Room, Parliament House, at 9:29 am

**1. Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Inquiry into racial vilification law in NSW**

**2.1 Hearing**

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings.

The following witnesses from the NSW Council for Civil Liberties were sworn and examined:

- Mr Stephen Blanks, Secretary
- Mr Jackson Rogers, Executive Member
- Dr Martin Bibby, Committee Representative.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Simon Breheny, Director, Legal Rights Project, Institute of Public Affairs.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Professor Simon Rice, Director, Law Reform and Social Justice, College of Law, Australian National University
- Professor Neil Rees, Professor of Law, School of Law, University of the Sunshine Coast.

The evidence concluded and the witnesses withdrew.

The following witnesses from the Chinese Australian Forum of NSW were sworn and examined:

- Mr Patrick Voon, President
- Mr Kenrick Cheah, Vice President
- Mr Peter Chan, Secretary

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Peter Wertheim AM, Executive Director, Executive Council of Australian Jewry
- Mr David Knoll AM, Honorary Life Member, NSW Jewish Board of Deputies
- Mr Vic Alhadeff, Chief Executive Officer, NSW Jewish Board of Deputies.

The evidence concluded and the witnesses withdrew.

The following witnesses was sworn and examined:

- Mr Simeon Beckett, Barrister, NSW Bar Association
- Ms Roshana Wikramanayake

The evidence concluded and the witness withdrew.

## 2.2 Tendered documents

Resolved, on the motion of Mrs Mitchell: That the Committee accept and publish the following document tendered by Mr David Knoll at the hearing:

- Mr Knoll's opening statement.

## 3. Adjournment

The Committee adjourned at 4:59 pm *sine die*.

Rebecca Main  
Committee Clerk

## Minutes No. 21

Thursday 9 May 2013

Standing Committee on Law and Justice

Members' Lounge, Parliament House, at 4.05 pm

### 1. Members present

Mr Clarke, *Chair*  
Mr Primrose, *Deputy Chair*  
Mr MacDonald  
Mr Moselmane  
Mr Shoebridge

### 2. Apologies

Mrs Mitchell

### 3. Draft minutes

Resolved, on the motion of Mr MacDonald: That draft Minutes Nos. 19 and 20 be confirmed.

### 4. Correspondence

The Committee noted the following items of correspondence:

#### *Received:*

- 19 April 2013 - From Mr Yair Miller, President of the NSW Jewish Board of Deputies, providing answers to questions on notice and to a supplementary question (D13/11337)
- 22 April 2013 – Submission author 45 – requesting that her submission to the Inquiry into racial vilification law in NSW be kept confidential (D13/11990)
- 22 April 2013 – from Ms Jacqueline Lyne, Legal Officer, NSW Anti-Discrimination Board, providing answers to questions on notice and to a supplementary question (D13/10734)
- 24 April 2013 – from Ms Catherine Mathews, NSW Society of Labor Lawyers, providing answers to questions on notice and to a supplementary question (D13/11061)
- 24 April 2013 – from Mr Joshua Dale, Chair of the Human Rights Sub-Committee, Australian Lawyers Alliance, providing answers to questions on notice (D13/11097)

- 24 April 2013 – from Mr John McKenzie, Chief Legal Officer, Aboriginal Legal Service, providing answers to questions on notice and to a supplementary question (D13/11098)
- 24 April 2013 – from Mr Patrick Voon, President of the Chinese Australian Forum, providing answers to questions on notice (D13/11095)
- 3 May 2013 – from Professor Simon Rice and Professor Neil Rees, providing answers to questions on notice and to a supplementary question (D13/11803)
- 3 May 2014 – from Ms Roshana Wikramanayake, Senior Policy Lawyer, NSW Bar Association, providing answers to questions on notice and to a supplementary question (D13/11800).

## **5. Inquiry into racial vilification law in NSW**

### **5.1 Submissions**

#### **Submission No. 44**

The Committee noted that Submission No. 44 was published under the authorisation of the Committee's resolution of 17 December 2012.

#### **Partially confidential Submission No. 43**

Resolved, on the motion of Mr MacDonald: That the Committee authorise the publication of Submission No. 43 with the exception of the name and other identifying details of the author which are to remain confidential.

#### **Confidential Submission No. 45**

Resolved, on the motion of Mr Shoebridge: That Submission No. 45 remain confidential.

### **5.2 Background paper**

The Committee noted the receipt of a background paper from the Secretariat outlining the Commonwealth and New South Wales civil racial vilification complaints procedures and remedies including case studies of the Jones and Bolt cases.

### **5.3 Further hearing**

The Committee has decided not to conduct any further hearings following consideration of the background paper.

### **5.4 Report deliberative date**

Resolved, on the motion of Mr Shoebridge: That the Committee reschedule the report deliberative for the Inquiry into racial vilification law in NSW to Friday 21 June 2013, and that the draft report be circulated to members the week prior.

## **6. Next meeting**

Friday 21 June 2013 at 10 am (report deliberative meeting).

## **7. Adjournment**

The Committee adjourned at 4.25 pm.

Teresa McMichael  
**Committee Clerk**

**Minutes No. 22**

Wednesday 19 June 2013

Standing Committee on Law and Justice

Room 1136, Parliament House, at 1:16 pm

**1. Members present**Mr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Previous minutes**

Resolved, on the motion of Mrs Mitchell: That draft Minutes No. 21 be confirmed.

**3. Correspondence**

The Committee noted the following item of correspondence:

***Received***

- 15 May 2013 - From Mr Jackson Rogers, Executive Member of the NSW Council for Civil Liberties, providing answers to questions on notice and to a supplementary question.

**4. Inquiry into racial vilification law in NSW**

Resolved, on the motion of Mr Moselmane: That the Committee vacate the report deliberative date of Friday 21 June 2013 for the Inquiry into racial vilification law, and that the Secretariat draft an issues paper for the Committee outlining stakeholders' key concerns which is to be circulated to members by Monday 24 June 2013.

**5. \*\*\*****6. \*\*\*****7. Adjournment**The Committee adjourned at 1.29 pm *sine die*.

Teresa McMichael

**Committee Clerk****Minutes No. 23**

Tuesday 10 September 2013

Standing Committee on Law and Justice

Members' Lounge, Parliament House, at 1:03 pm

**1. Members present**Mr Clarke, *Chair*Mr Primrose, *Deputy Chair*

Mr MacDonald

Mr Moselmane (1:10 pm)

Mr Shoebridge

**2. Apologies**

Mrs Mitchell

**3. Previous minutes**

Resolved, on the motion of Mr Shoebridge: That draft Minutes No. 22 be confirmed.

**4. Correspondence**

The Committee noted the following item of correspondence:

***Received***

- 2 September 2013 – from Mr Stepan Kerkyasharian AO, President of the Anti-Discrimination Board of NSW raising procedural problems with the serious vilification provisions in the *Anti-Discrimination Act 1977*.

5. \*\*\*

6. \*\*\*

Mr Moselmane joined the meeting.

**7. Inquiry into racial vilification law in NSW****7.1 Correspondence from the Anti-Discrimination Board of NSW**

Resolved, on the motion of Mr Shoebridge: That the Committee accept the correspondence from the Anti-Discrimination Board of NSW as a supplementary submission to the inquiry into racial vilification law in NSW.

**7.2 Consideration of issues paper**

Resolved, on the motion of Mr Macdonald: That the Committee meet on Monday 14 October 2013 at 2:30 pm to discuss the issues paper prepared by the Secretariat.

**8. Adjournment**

The Committee adjourned at 1.17 pm, until Monday 14 October 2013 at 2:30 pm.

Teresa McMichael  
**Committee Clerk**

**Minutes No. 24**

Monday 14 October 2013

Standing Committee on Law and Justice

Room 1153, Parliament House, at 2.35 pm

**1. Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Previous minutes**

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 24 be confirmed.

### 3. Inquiry into racial vilification law in NSW

#### 3.1 Supplementary submission

Resolved, on the motion of Mr Shoebridge: That Submission No. 10a be kept confidential, at the request of the author.

#### 3.2 Consideration of report deliberative date

Resolved, on the motion of Mr MacDonald: That the Committee meet to consider the Chair's draft report on Friday 15 November 2013 at 1.00pm.

#### 3.3 Briefing

The secretariat provided a briefing on issues regarding the racial vilification inquiry.

### 4. Adjournment

The Committee adjourned at 4.53 pm, until Friday 15 November 2013 at 10.00am (Workcover/Dust Diseases Board briefing).

Teresa McMichael  
Committee Clerk

### Minutes No. 26

15 November 2013

Standing Committee on Law and Justice

Room 1153, Parliament House, 10.00 am

#### 1. Members present

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

#### 2. \*\*\*

#### 3. Previous minutes

Resolved, on the motion of Mr MacDonald: That draft Minutes No. 25 be confirmed.

#### 4. \*\*\*

#### 5. \*\*\*

#### 6. \*\*\*

#### 7. Consideration of Chair's draft report

The Chair submitted his draft report entitled *Racial vilification law in NSW*, which, having been previously circulated, was taken as being read.

Chapter 1 read.

Resolved, on the motion of Mr Moselmane: That paragraph 1.10 be amended by inserting 'some' after the words 'concerns raised by'.

Resolved, on the motion of Mr MacDonald: That Chapter 1, as amended, be adopted in principle.

Chapter 2 read.

Resolved, on the motion of Mr Shoebridge: That paragraph 2.89 be omitted: ‘Canada has not successfully prosecuted many racial vilification offences.’

Resolved, on the motion of Mr MacDonald: That Chapter 2 be adopted in principle.

Chapter 3 read.

Resolved, on the motion of Mr Shoebridge: That the following paragraph be inserted after paragraph 3.33:

‘The Committee believes that in addition to having educative and symbolic functions, s 20D must also have a real world application and be able to be applied by the courts. The remainder of this report contains a number of recommendations which aim to remove barriers to the practical application of the provision.’

Resolved, on the motion of Mrs Mitchell: That Chapter 3, as amended, be adopted in principle.

Chapter 4 read.

Resolved, on the motion of Mr Shoebridge: That the following paragraph be inserted after paragraph 4.19: ‘We also cannot exclude the possibility that another reason for the absence of prosecutions may be due to the inability of the Board to prepare a brief of evidence for the Director of Public Prosecutions. (This issue is discussed in more detail in chapter 6).’

Resolved, on the motion of Mr Shoebridge: That Recommendation 1 be amended by omitting the words ‘That the NSW Government amend section 20B of the *Anti-Discrimination Act 1977* to include conduct or communication that is capable of being seen or heard, without undue intrusion, by a non-participant’ and inserting instead ‘That the NSW Government consider amending section 20B of the *Anti-Discrimination Act 1977* to ensure that it covers communications that occur in quasi-public places, such as the lobby of a strata or company title apartment block.’

Resolved, on the motion of Mr Shoebridge: That Recommendation 2 be amended by omitting ‘amend’ and inserting instead the words ‘consider amending’.

Resolved, on the motion of Mr Shoebridge: That paragraph 4.107 be amended by omitting the words ‘, and noted that recklessness is a form of criminal intent. While we acknowledge the appeal of including a mens rea of recklessness when establishing intent, the Committee believes that this should be a matter for the courts. We have therefore’ and inserting instead the following words: ‘. The Committee accepts the view of the Law Society and the Jewish Board of Deputies that recklessness is a sufficient form of criminal intent. We cannot see why this general principle of criminal law would not apply to s 20D, therefore we have’ .

Resolved, on the motion of Mr Shoebridge: That the following new recommendation be inserted after paragraph 4.107:

‘That, for avoidance of doubt, the NSW Government amend section 20D of the *Anti-Discrimination Act 1977* to state that recklessness is sufficient to establish intention to incite.’

Mr Shoebridge moved: That paragraph 4.148 be amended by:

omitting the words ‘is a serious issue’ and inserting the words ‘there were divergent views in relation to the issue of’ after the words ‘acknowledges that’, and

omitting the words ‘The NSW Government may however consider referring this matter to the Committee for a separate inquiry and report’.

Question put.

The Committee divided.

Ayes: Mr Moselmane, Mr Primrose, Mr Shoebridge

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell.

Question resolved in the negative on the casting vote of the Chair.

Mr MacDonald moved: That paragraphs 4.147 and 4.148 be omitted: ‘The Committee notes that certain inquiry participants supported extending the coverage of s 20D of the *Anti-Discrimination Act* to include religious vilification as they did not consider the inclusion of the term ‘ethno-religious’ within the definition of race to adequately address the issue. While Australia has international human rights obligations to implement a criminal and civil prohibition on religious vilification, there was clear opposition to the introduction of such a provision.

The Committee acknowledges that religious vilification is a serious issue, however, the Committee will not be recommending an extension to the coverage of s 20D of the *Anti-Discrimination Act* to include religious vilification as it falls outside of the terms of reference for the Inquiry. The NSW Government may however consider referring this matter to the Committee for a separate inquiry and report’ and the following paragraph be inserted instead:

‘The Committee notes that the issue of religious vilification falls outside the terms of reference of the Inquiry’.

Question put.

The Committee divided.

Ayes: Mr Clarke, Mr MacDonald, Mrs Mitchell

Noes: Mr Moselmane, Mr Primrose, Mr Shoebridge.

Question resolved in the affirmative on the casting vote of the Chair.

Resolved, on the motion of Mr MacDonald: That Chapter 4, as amended, be adopted in principle.

Chapter 5 read.

Resolved, on the motion of Mrs Mitchell: That Chapter 5, be adopted in principle.

Chapter 6 read.

Resolved, on the motion of Mr Shoebridge: That Recommendation 8 be amended by omitting the words ‘That the NSW Government review the timeframes for lodging complaints under section 89B of the *Anti-Discrimination Act 1977* and section 179 of the *Criminal Procedure Act 1986*, with an aim to address the discrepancy between the two timeframes’ and inserting instead ‘That, for the purposes of racial vilification proceedings only, the NSW Government extend the time limit for commencing prosecutions under section 179 of the *Criminal Procedure Act 1986* to 12 months to be consistent with the time limit for lodging complaints under section 89B of the *Anti-Discrimination Act 1977*.’

Resolved, on the motion of Mr MacDonald: That Chapter 6, as amended, be adopted in principle.

Mr Shoebridge moved: That the following new recommendation be inserted after paragraph 2.92:

‘The Committee notes that while the terms of Commonwealth anti-discrimination laws were not the subject of this Inquiry, in light of the overwhelming support for the state provisions that prohibit racial discrimination, the Committee notes with genuine concern proposals to repeal section 18C of the *Commonwealth Racial Discrimination Act 1975*.’

Question put.

The Committee divided.

Ayes: Mr Moselmane, Mr Primrose, Mr Shoebridge

Noes: Mr Clarke, Mr MacDonald, Mrs Mitchell.

Question resolved in the negative on the casting vote of the Chair.

**8. Adjournment**

The Committee adjourned at 2.49 pm *sine die*.

Teresa McMichael  
**Clerk to the Committee**

**Draft Minutes No. 27**

27 November 2013

Standing Committee on Law and Justice

Members' Lounge, Parliament House, 1.11 pm

**1. Members present**

Mr Clarke, *Chair*

Mr Primrose, *Deputy Chair*

Mr MacDonald

Mrs Mitchell

Mr Moselmane

Mr Shoebridge

**2. Previous minutes**

Resolved, on the motion of Mrs Mitchell: That draft Minutes No. 26 be confirmed.

**3. \*\*\***

**4. \*\*\***

**5. Inquiry into racial vilification law in NSW**

**5.1 Further consideration of Chair's draft report**

The Committee resumed consideration of the Chair's draft report:

Resolved, on the motion of Mr Shoebridge: That paragraph 4.107 be amended by omitting the words 'have therefore not proposed any changes to s 20D regarding this matter' and inserting instead '

Resolved, on the motion of Mr Shoebridge: That paragraph 4.87 be amended by omitting the word 'discretion' and inserting instead 'determination'.

Resolved, on the motion of Mrs Mitchell:

- That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House;
- That the Committee's unanimous approach to the Inquiry be noted;
- That the transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry be tabled in the House with the report; and
- That upon tabling, all transcripts of evidence, submissions, tabled documents, answers to questions on notice, minutes of proceedings and correspondence relating to the Inquiry not already made public, be made public by the Committee, except for those documents kept confidential by resolution of the Committee.

Resolved, on the motion of Mr Shoebridge: That any dissenting statements be provided to the Secretariat by 4pm Thursday 28 November 2013.

Resolved, on the motion of Mr Shoebridge: That the report be tabled on Tuesday 3 December 2013.

Resolved, on the motion of Mr Primrose: That the secretariat be thanked for their professional work on the Inquiry and report.

**6. Adjournment**

The Committee adjourned at 1.47 pm until 7 March 2014 (public hearing into MAA12 and LTCSA5)

Teresa McMichael  
**Clerk to the Committee**

## Appendix 7 Dissenting statement

### **The Hon Shaoquett Moselmane MLC, The Hon Peter Primrose MLC and Mr David Shoebridge MLC**

The Committee's report is largely a product of consensus amongst the committee membership, and we commend the Chair for his efforts to achieve this. There are however two matters that we consider of sufficient importance to warrant this brief dissenting report.

We dissent on the decision by the majority in paragraph 4.147 to exclude the following statement, which had been in the draft report:

‘The Committee notes that certain inquiry participants supported extending the coverage of s 20D of the *Anti-Discrimination Act* to include religious vilification as they did not consider the inclusion of the term ‘ethno-religious’ within the definition of race to adequately address the issue. While Australia has international human rights obligations to implement a criminal and civil prohibition on religious vilification, there was clear opposition to the introduction of such a provision.

The Committee acknowledges that there were divergent views in relation to the issue of religious vilification, however, the Committee will not be recommending an extension to the coverage of s 20D of the *Anti-Discrimination Act* to include religious vilification as it falls outside of the terms of reference for the Inquiry. The NSW Government may however consider referring this matter to the Committee for a separate inquiry and report.’

We dissent on the decision by the majority not to insert a further statement after paragraph 2.91 as follows:

‘The Committee notes that while the terms of Commonwealth anti-discrimination laws were not the subject of this Inquiry, in light of the overwhelming support for the state provisions that prohibit racial discrimination, the Committee notes with genuine concern proposals to repeal section 18C of the Commonwealth *Racial Discrimination Act 1975*’.

We believe that all laws, but particularly those dealing with discrimination, are not only prescriptive but also have educative and symbolic functions. Any weakening of anti-discrimination law at the Commonwealth level would leave a significant gap in the necessary legal protections from discrimination. It would also place increasing pressure on this state’s anti-discrimination laws and institutions.