THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/CLC/PWak:1268430

31 March 2017

Mr Stepan Kerkyasharian AO
Vilification Consultation
NSW Department of Justice
Henry Deane Building
Level 3, 20 Lee St
SYDNEY 2000 NSW

By email: vilificationconsultation@justice.nsw.gov.au

Dear Mr Kerkyasharian,

Consultation on serious vilification laws in NSW

Thank you for the opportunity to provide a submission to your consultation on behalf of the NSW Government on serious vilification laws in NSW. The Law Society's Human Rights and Criminal Law Committees have contributed to this submission.

The Law Society previously made a submission to the NSW Legislative Council Standing Committee on Law and Justice's inquiry into racial vilification law in NSW.[1] We note that many of the inquiry's recommendations were consistent with the Law Society's submission. We have also provided a submission in support of the Shadow Attorney General's Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill 2016. These submissions are attached, for your information.

We provide the following responses to the specific questions set out in your consultation letter.

Whether the threshold for prosecuting the offence of serious racial vilification in the *Anti-Discrimination Act 1977* (*incite hatred towards, serious contempt for, or severe ridicule*) should be amended

We note that previously, the Law Society's 2013 and 2016 submissions supported lowering the test for the offence of serious vilification to "promote" rather than "incite" in the *Anti-Discrimination Act 1977*(NSW) (*Anti-Discrimination Act*). The NSW Legislative Council's inquiry report acknowledged that there are difficulties with proving incitement, and noted that the challenge of proving this element had repeatedly been cited as a reason why there have been no prosecutions instituted under section 20D of the *Anti-Discrimination Act.*[2]

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[1] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), accessed at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2260#tab-reports.

[2] Ibid, [4.69].

The Legislative Council Committee ultimately agreed that, bearing in mind evidence presented to the inquiry that there is very little practical difference between the words "incite" and "promote or express" or "cause", no amendments to the provision were proposed.[3]

However, some members of our committees have expressed concern regarding the potential for further ambiguity in defining the term "promote", and the need to ensure that any new definition only captures sufficiently serious conduct to warrant a criminal sanction. Conversely, other members have acknowledged that the use of the term "promote" in similar Canadian legislation for example,[4] highlights that the terms "promote" and "incite" can work harmoniously. On this reading, consideration could be given to how an alternative or additional limb of "promote" could be included in the existing section 20D offence, to strengthen the provision.

As noted in the Legislative Council Committee's report, there have been no prosecutions for serious racial vilification.[5] We also understand that although there have been a number of referrals to the Office of the Director of Public Prosecutions (ODPP), none of those cases met the legal threshold for prosecution under the specific provision, according to the ODPP. However, as we do not have the benefit of the specific details of the case examples that were referred to the ODPP, nor do we have access to the legal advice provided, it is difficult to make an assessment of the current barriers to prosecution.

In our consultation meeting, some examples of serious racial vilification were provided, and there was broad agreement that there is certain serious behaviour that does warrant a criminal sanction, and therefore if such behaviour is not captured by existing legislation, then legislative amendment should be considered. On this basis, the Law Society is not opposed in-principle to considering alternative definitions to "incite", as long as any proposed alternatives do not further add to current uncertainty around the application of the offence. The Law Society also supports limiting the offence to intentional acts only.

To ensure proper consideration of the types of behaviour that should be covered by the existing offence, it would be helpful if the consultation report could give particular case examples, including any analysis of why the conduct did not meet the current legal threshold.

The Law Society also submits that the legislation should provide that the offence applies whether or not the person or members of the group vilified have the characteristic that was the ground for the promotion of hatred, contempt or ridicule concerned. This is consistent with section 10 of the *Racial and Religious Tolerance Act 2001* (Vic), which provides that, for the purposes of determining whether the unlawful conduct occurred, "*it is irrelevant whether or not the person made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place.*"

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[3] Ibid, [4.70]. See also, discussion at paras [4.59-4.60] and [4.64-4.67].
[4] Section 319(2), *Criminal Code 1985* (Canada).
[5] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), xi.

The Law Society also supports clarifying which public acts constitute such unlawful vilification, to also include any communication or conduct observable by the public, even if it takes place on private land.[6]

We also note that, where similar conduct results in a charge for a different criminal offence, section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that, 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.

Whether the element of the offence of serious racial vilification of "inciting others to threaten" in the *Anti-Discrimination Act* should be amended

The Law Society does not provide any comments on this question.

The appropriate penalty for the offence of serious racial vilification

The Law Society supports the recommendation of the NSW inquiry into racial vilification, that the NSW Government review the adequacy of the penalty for the existing offence in the *Anti-Discrimination Act*, taking into account the maximum penalty for comparable offences in the *Crimes Act 1900* (NSW) (*Crimes Act*) and for similar offences in other Australian jurisdictions.[7]

Whether the *Anti-Discrimination Act* should be extended to cover serious vilification specifically on the grounds of "religious belief or affiliation"

The Law Society supports extending the offence of serious vilification to include "religious belief or affiliation" or "ethnic or ethno-religious origin", in light of recent examples of vitriolic rhetoric directed towards religious groups, particularly those coming from Jewish and Muslim backgrounds. These groups would be classed as "religious" rather than "racial".

We understand that there has been some consideration by various community groups to consider including the term "ethnic or ethno-religious origin" in both the *Anti-Discrimination Act* and *Crimes Act*, particularly where the terms "race" and "racial" fall short of identifying prejudicial behaviour against a religious group under the *Anti-Discrimination Act*. This recommendation was considered (but ultimately rejected) by the NSW Parliamentary inquiry into racial vilification law in NSW.[8]

We note that in most other states and territories it is against the law to discriminate against someone because of their religion (ACT,[9] Western Australia,[10] Queensland,[11] the Northern Territory,[12] Tasmania[13] and Victoria[14]). There are also provisions protecting

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[6] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), Recommendation 1.
[7] Ibid, 73.
[8] Ibid, [4.138-4.147].
[9] Section 7, *Discrimination Act 1991* (ACT)
[10] Section 53, *Equal Opportunity Act 1984* (WA)
[11] Section 7, *Anti-Discrimination Act 1991* (Qld)
[12] Section 19, *Anti-Discrimination Act 1996* (NT)
[13] Section 16, *Anti-Discrimination Act 1998* (Tas)
[14] Section 6, *Equal Opportunity Act 2010* (Vic)

persons from vilification (or incitement of hatred) based on their religion in Queensland,[15] Tasmania[16] and Victoria.[17]

Currently, religious groups who have a sufficient 'ethno-religious' quality can be captured by the racial vilification provisions in the *Anti-Discrimination Act*. However, there is conflicting case law on what is and is not considered a 'race' or an 'ethno-religious' group. For example, in *Toben v Jones* (2003) 129 FCR 515, the Federal Court accepted that Jewish people can be considered a race for the purpose of the Commonwealth *Racial Discrimination Act 1975* (Cth).

To address confusion over the extent to which religious groups could make claims under the *Anti-Discrimination Act*, the definition of "race" was amended to also include concepts of "descent" and "ethno-religion" as aspects of race for racial discrimination and vilification purposes.[18] The second reading speech for this amendment stated that:[19]

> The proposed amendment to the definition of race will not allow members of ethno-religious groups such as Jews, Muslims and Sikhs to lodge complaints in respect of discrimination on the basis of their religion, but will protect such groups from discrimination based on their membership of a group which shares a historical identity in terms of their racial national or ethnic origin.

However, a 2002 Anti-Discrimination Tribunal (ADT) decision found that Muslims, generally, are not considered to be an ethno-religious group because it is not clear that they share common racial, national or ethnic origins.[20] The ADT noted that, as an example, "Bosnian Muslims" might be an ethno-religious group, but Muslims more generally would not be considered in this class.[21]

The Law Society submits that extending vilification on the grounds of "religious belief or affiliation" would remove some of this uncertainty and ensure protection for religious groups. We note a number of submissions to the NSW inquiry into racial vilification, which supported this amendment. For example, 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*, require 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.*" [22] The proposed amendment would be consistent with this obligation.

A number of other submissions to the NSW inquiry also 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.[23]

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[15] Section 131A, *Anti-Discrimination Act 1991* (Qld)
[16] Section 19, *Anti-Discrimination Act 1998* (Tas)
[17] Section 25, *Racial and Religion Tolerance Act 2001* (Vic)
[18] Schedule 1, Anti-Discrimination (Amendment) Bill 1994.
[19] New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1828 (J. P. Hannaford, Attorney General).
[20] *Khan v Commissioner, Department of Corrective Services and Anor* [2002] NSWADT 131 at [18].
[21] Ibid at [19].
[22] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), 55 [4.139].
[23] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), 55.

However, the Law Society also acknowledges concerns raised by stakeholders to the NSW inquiry, in regard to extending coverage to religious vilification. These submissions were concerned that it presented a number of challenges, including critiquing religious belief. For example one submission noted that:

> ... 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 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.[24]

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...[25]

The Law Society submits that, if coverage is to be extended to religious vilification, then the offence should be limited to serious, intentional acts.

We note that the current offence of serious racial vilification in section 20D of the *Anti-Discrimination Act* appears to be limited to such serious acts:

> 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.

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

The Law Society supports consistent offence elements, investigation and prosecution processes, including consistent penalties, for the existing offences of serious vilification on the basis of transgender,[26] homosexuality[27] and HIV/AIDS status in the *Anti-Discrimination Act.*[28]

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[24] Ibid at [4.146].
[25] Ibid at [4.142].
[26] Section 38T, *Anti-Discrimination Act 1977* (NSW).
[27] Section 49ZTA, *Anti-Discrimination Act 1977* (NSW).
[28] Section 49ZXC, *Anti-Discrimination Act 1977* (NSW).

Whether all serious vilification offences should be moved from the Anti-Discrimination Act to the *Crimes Act 1900*

As noted above, for consistency, the Law Society also supports moving the offences of serious vilification on the grounds of race, transgender, homosexuality or HIV/AIDS status by means of threat or incitement of physical harm into the *Crimes Act* from the *Anti-Discrimination Act*.

The Law Society also supports extending the time within which prosecutions for such offences may be commenced to not later than 12 months from the date when the offence was alleged to have been committed, rather than six months, which is the limitation period that currently applies under the *Criminal Procedure Act 1986* (NSW). This was recommended by the NSW inquiry into racial vilification laws in NSW.[29]

The Law Society also supports providing that the President of the Anti-Discrimination Board, after accepting a vilification complaint under the *Anti-Discrimination Act*, is to refer the complaint to the Commissioner of Police if the President considers that the offence of serious racial, transgender, homosexual or HIV/AIDS vilification may have been committed.

Finally, the Law Society's previous submissions have supported removing the requirement for the Attorney General to consent to the prosecution. This is consistent with the NSW Bar Association's submission to the NSW Legislative Council inquiry.[30] However, we understand that in practice, this power is delegated to the Director of Public Prosecutions. On that basis, we are not opposed to the legislation requiring the ODPP's consent to a prosecution for the offence.

Thank you for the opportunity to provide comments to this inquiry. I would be grateful if questions can be directed at first instance to Anastasia Krivenkova, Principal Policy Lawyer, on 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,

Pauline Wright
President

Encl.

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[29] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), Recommendation 9.
[30] NSW Bar Association, *Submission to the inquiry into racial vilification law in NSW*, (12 March 2013), accessed at: http://www.nswbar.asn.au/docs/webdocs/racial1.pdf.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/CLC/GUak:1165970

22 August 2016

Mr Paul Lynch MP
Shadow Attorney General
100 Moore Street
LIVERPOOL NSW 2170

By email: liverpool@parliament.nsw.gov.au

Dear Mr Lynch,

Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill 2016

The Law Society of NSW writes to express its support for the Crimes and Anti-Discrimination Legislation Amendment (Vilification) Bill 2016 (the "Bill"), which implements a number of recommendations of the report of the Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*.[1]

The Law Society previously made a submission to the Inquiry into racial vilification law in NSW ("Inquiry"), which is attached for your information. We note that many of the Inquiry's recommendations, which are being implemented by this Bill, are consistent with the Law Society's submission.

In particular, the Law Society supports the following amendments contained in the Bill:

- Expanding the range of behaviours that are covered by the offence of vilification to also include vilification on the basis of transgender, homosexuality or HIV/AIDS status, as well as racial vilification.[2]
- Moving the offence of serious racial, transgender, homosexual or HIV/AIDS vilification by means of threat or incitement of physical harm into the *Crimes Act 1900* ("Crimes Act") from the *Anti-Discrimination Act 1977* ("ADA").[3]
- Lowering the test to "promote" rather than "incite" in the ADA: "by a public act, intentionally or recklessly promotes (rather than incites) hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on racial, transgender, homosexual and HIV/AIDS grounds."[4]
- Clarifying that the Part applies whether or not the person or members of the group vilified have the characteristic that was the ground for the promotion of hatred, contempt or ridicule concerned.[5]

[1] Legislative Council Standing Committee on Law and Justice, *Racial vilification law in NSW*, (December 2013), accessed at https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2260#tab-reports.
[2] Schedule 1, Division 15C, Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.
[3] Ibid.
[4] Clause 50AB, Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.
[5] Clause 50AB(2), Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.

- Clarifying which public acts constitute such unlawful vilification, to also include any communication or conduct observable by public, even if it takes place on private land.[6]
- Removing the requirement that the Attorney General consent to prosecution.[7]
- Extending the time within which prosecutions for such offences may be commenced to not later than 12 months from the date when the offence was alleged to have been committed, rather than six months, which is the limitation period that currently applies under the *Criminal Procedure Act 1986*.[8]
- Providing that the President of the Anti-Discrimination Board, after accepting a vilification complaint under the ADA, is to refer the complaint to the Commissioner of Police if the President considers that the offence of serious racial, transgender, homosexual or HIV/AIDS vilification may have been committed.[9]

The Law Society also makes the following recommendation for amendment to the Bill.

Definition of harm

The Law Society considers that the phrase "physical harm" in clause 91N of the Bill should be widened to "bodily harm". The latter phrase would cover mental or psychological harm in addition to purely physical harm. The Law Society notes that this definition is consistent with s 31 of the Crimes Act, which refers to "bodily harm" as the standard for documents containing threats.

The term "bodily harm" is also consistent with the language used in Article 5 of the *Convention on the Elimination of all Forms of Racial Discrimination* ("CERD"), which provides for (b) *the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.*[10]

Thank you for considering this submission. If you have any questions regarding this submission, please contact Anastasia Krivenkova, Principal Policy Lawyer, on (02) 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President

[6] Clause 50AA, Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.
[7] This is done by moving the offence of serious racial, transgender, homosexual of HIV/AIDS vilification by means of threat of incitement of physical harm into the *Crimes Act 1900* from the *Anti-Discrimination Act 1977*.
[8] Clause 91N(3), Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.
[9] Clause 94D, Anti-Discrimination Legislation Amendment (Vilification) Bill 2016.
[10] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, United Nations, 660 UNTS 195, entered into force 4 January 1969.

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRights:JD:VK:687420

1 March 2013

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Director,

Inquiry into Racial Vilification Law in NSW

I am writing on behalf of the Human Rights Committee of the Law Society of NSW ("Committee") which is responsible for considering and monitoring Australia's obligations under international law in respect of human rights; considering reform proposals and draft legislation with respect to issues of human rights; and advising the Law Society accordingly.

The Committee's view is that the criminal offence in section 20D of the *Anti-Discrimination Act 1977* (NSW) (ADA) should be maintained so that NSW continues to fulfil its international obligations to criminalise the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and the provision of any assistance to racist activities (Article 4(a), *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)).

The Committee submits that because section 20D of the ADA has not yet led to any successful prosecutions, it appears necessary to amend the section or the means of enforcement of the section or both, in order that it be more effective.

The Committee's views are set out more fully below.

1. Australia's international obligations

The Committee notes that Australia as a nation (and its constituent parliaments) has an obligation under international law to make it a criminal offence to engage in racial hatred or vilification.

This obligation arises from the ICERD, a treaty ratified by 175 countries, including Australia, with effect from 30 September 1975. As a result of that ratification all tiers of Australian governments have an obligation under international law to implement the treaty's terms into their laws.

Article 4(a) of that treaty is the relevant part and requires that States which are parties to the ICERD:

> Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

The *Racial Discrimination Act* (Cth) was passed in 1975 (RDA). However, neither the RDA nor any other Federal laws contain a criminal offence of racial hatred or vilification. Section 18(c) of the RDA prohibits such conduct, but no criminal offence arises.[1]

Section 20D of the ADA however does provide for criminal consequences for the offence of serious racial vilification. Section 20D provides as follows:

> **20D Offence of serious racial vilification**
>
> (1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:
>
> (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
>
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.
>
> *Maximum penalty:*
> *In the case of an individual-50 penalty units or imprisonment for 6 months, or both.*
> *In the case of a corporation-100 penalty units.*
>
> (2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution"

For this reason, the Committee submits that the criminal offence in section 20D of the ADA should be maintained.

2. Improving the efficacy of section 20D of the ADA

At the outset, the Committee submits that section 20D should not be amended to catch conduct which is merely insulting or offensive. The ICERD does not require the criminalisation of such conduct and if the section was so amended, it is likely to encroach on free speech principles, which are also binding on Australia under international law.

The Committee notes that the terms of section 20D are considerably narrower than Article 4(a) of the ICERD requires, because of concerns when it was introduced in 1989 that it should not unduly limit free speech. It is the Committee's view that free speech can still be adequately protected while having an effective criminal deterrent to racial hate speech in a revised section 20D. The

[1] The proceedings brought against journalist Andrew Bolt (*Eatock v Bolt* [2011] FCA 1103) under that section were civil only.

Committee notes that this view is consistent with the view of the UN Committee on the Elimination of all forms of Racial Discrimination.[2]

As noted previously, the Committee understands that no one has ever been prosecuted under section 20D of the ADA. The Committee makes several suggestions below in relation to the elements of the offence.

2.1. Relevant mental element

The Committee notes that there is a very similar section in the *Anti-Discrimination Act 1991* (QLD), in section 131A. The terms of that section are set out below:

> **131A Offence of serious racial, religious, sexuality or gender identity vilification**
>
> (1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes—
>
> (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
>
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.
>
> *Maximum penalty—*
> *(a) for an individual—70 penalty units or 6 months imprisonment; or*
> *(b) for a corporation—350 penalty units.*
>
> (2) A Crown Law Officer's written consent must be obtained before a proceeding is started by complaint under the *Justices Act 1886* in relation to an offence under subsection (1).
>
> (3) An offence under subsection (1) is not an offence for section 155(2) or 226.
>
> (4) In this section—
> Crown Law Officer means the Attorney-General or Director of Public Prosecutions.

The Committee notes that this section specifically refers to "knowingly or recklessly" as being the relevant mental element for the offence. The Queensland Director of Public Prosecutions can consent to a prosecution, in addition to the Attorney-General.

It is submitted that one appropriate amendment to section 20D would be to add the "knowingly or recklessly" phrase because at present the section may be interpreted to be confined to conduct where there is an intention only and not extend to reckless conduct.

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[2] CERD *General Recommendation XV on Organized violence based on ethnic origin (Art. 4)*, 23 March 1993, A/48/18, available at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e51277010496eb2cc12563ee004b9768 (accessed on 19 February 2013).

2.2. Conduct elements

A further appropriate amendment to help cure the narrow width of the section would be to change the word "incite" to the expression "promote or express". When the legislation was originally introduced in the NSW Parliament in 1989 the phrase "promote or express" was used in the Bill, but it was later amended to the narrower word "incite".

It is already the law in NSW that a person who incites the commission of a criminal offence can be charged with a separate offence – as a common law misdemeanour. The words "promote or express" appear consistent with the ICERD obligation and would not appear to infringe Australia's international free speech obligations, noting that conduct involving racial hatred has always been regarded as a legitimate exception to free speech principles.

In addition, section 20D requires the offences to be committed by "means" of threats or incitement of physical harm. This appears very restrictive and could be cured by adding the words "but not limited to" after the word "include" in sub-section (1).

A further amendment might be considered to the definition of "public act" in section 20B. The NSW Law Reform Commission in its 1999 Report on the Anti-Discrimination Act (Report No. 92) recommended that section 20D should apply to "public communications" and should not be confined to public acts. This recommendation has not yet been implemented.

The Committee notes there are very similar offences in relation to homosexuality, transgender status and HIV/AIDS status contained in section 49ZTA, section 38T and section 49ZXC of the ADA. Similar amendments to those above seem perfectly appropriate for these offences also.

2.3. Bringing prosecution

The Committee sees considerable problems with the enforcement regime of section 20D and, in particular, the requirement that the Attorney General must consent to a prosecution.

As a matter of principle, the NSW Attorney General should not be involved in deciding whether to prosecute criminal offences and generally the Attorney General has not had such powers in NSW since the position of Director of Public Prosecutions (DPP) was created in the 1980s, due to the perceived need to separate political considerations from the prosecution process.

The NSW Law Reform Commission in its 1999 report recommended the Attorney General's consent provision be changed and the Committee agrees that the change should be made.

It is likely that few if any prosecutions have occurred partly because the Police and DPP have no defined role in commencing prosecutions under the current section. Under the present regime, complaints are made to the President of the Anti-Discrimination Board who either accepts or rejects the complaint and if s/he takes the view that a criminal prosecution may be appropriate the matter is referred to the Attorney General.

The President of the Board has a conciliation function and a large number of such disputes are also conciliated.

Section 20D is a relatively serious offence and in the Committee's view the DPP should have a discretion to either initiate or terminate a prosecution but, noting that the provision is prosecuted in the Local Court as a summary offence, there seems to be no good reason why the Police should not have the right to initiate a prosecution, although subject to the supervision of the DPP.

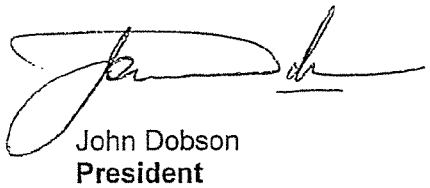
The Committee recommends that the Police should not have the sole right to prosecute in view of the serious nature of the offence and the possible potential for political pressure to be applied to Police prosecution decisions in relation to such offences.

3. Relocation to the *Crimes Act 1900* (NSW)

The Committee also submits that it would be appropriate to remove section 20D from the ADA and place it in the *Crimes Act 1900* with other criminal offences, as the Law Reform Commission also recommended in its report.

The Committee would be happy to assist the Inquiry further should that be thought necessary. Questions should be directed to Vicky Kuek, policy lawyer for the Committee at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely



John Dobson
President