THE NEW SOUTH WALES BAR ASSOCIATION
SUBMISSION TO THE INQUIRY INTO RACIAL VILIFICATION LAW IN NEW SOUTH WALES

1. The NSW Bar Association welcomes the opportunity provided by the Standing Committee on Law and Justice to make submissions on the Committee's inquiry into racial vilification law in NSW.

2. The Bar Association notes that the terms of reference are as follows:

> "That the Committee inquire into and report on racial vilification law in NSW, in particular:
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> 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."

3. The Bar Association wishes to divide its submissions as follows: preliminary issues, background to the offence, and submissions on the terms of reference.

4. In short, the Bar Association recommends:

   a. The removal of the consent of the Attorney-General in s. 20D(2);

   b. The amendment of the test for incitement of racial hatred so that it is whether the natural or ordinary effect of the conduct is to incite hatred, serious contempt, or severe ridicule *in the circumstances of the case*;

   c. The removal of the 28 day limit for referral to the DPP of matters for prosecution in s. 91(3) of the *Anti-Discrimination Act* 1977; and 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 in the circumstances of the case.

   d. The transfer of the offence of racial vilification to the *Crimes Act* 1900;

Preliminary Matters

5. As a preliminary point the Bar Association notes that the inquiry is limited to a consideration of s. 20D of the *Anti-Discrimination Act* 1977 and does not include

consideration of s. 20C of the *Anti-Discrimination Act* 1977 which makes it 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."

6. It may be observed that s. 20D adopts the formulation of racial vilification found in s. 20C but adds a further element to make such acts an offence. That element is put in the alternative: s. 20D(1)(a) or (b). Either the racially vilifying conduct must include the threatening of physical harm towards, or towards any property of, the person or group of persons vilified (s. 20D(1)(a)) or it must include incitement of others to threaten to perform such acts (s. 20D(1)(b)).

7. One may also observe that the "defences" found in s. 20C(2) are not to be found in s. 20D. It is readily apparent from the context of the *Anti-Discrimination Act* 1977 that the reason is that the offence requires the additional element of threatening violence or inciting others to threaten such violence. There is no rational basis for providing a defence similar to those found in s. 20C(2) because the element of violence changes the nature of the vilification from one of speech to one of violent speech.

8. The focus of the inquiry then logically falls on the criminalization of vilifying conduct.

Background

9. Section 20D was introduced by the Greiner Government into the *Anti-Discrimination Act* 1977 by the *Anti-Discrimination (Racial Vilification) Amendment Act* 1989 and commenced on 1 October 1989. It retains the form it had in the 1989 amending Act save that the penalty for an individual was increased from 10 to 50 units in 1994.[1]

10. The then Attorney-General, the Hon John Dowd MLA, said the following about s. 20D in the second reading speech:

> "This offence is aimed at very serious and blatant forms of racial vilification such as the threatening or inciting others to physical harm to people or property. The requirement for intention in the offence of serious racial vilification also 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."[2]

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[1] *Anti-Discrimination Amendment Act* 1994, s. 3, Schedule 1 (2)
[2] *Hansard* Legislative Assembly, 4 May 1989 pp 7488-7490 at 7490

11. Section 20D reflects similar or identical provisions in the majority of the other States and Territories:

a. *Anti-Discrimination Act* 1991 (Qld), s. 131A;

b. *Racial Vilification Act* 1996 (SA), s. 4;

c. *Racial and Religious Tolerance Act* 2001 (Vic), ss, 24(1);

d. *Discrimination Act* 1991 (ACT), s. 67(1)(c); and

e. *Criminal Code Act Compilation Act* 1913 (WA), ss. 76-80 and 80A-80D.

12. The most comprehensive State protections against racist conduct including vilification are those found in Western Australia which makes it an offence: to incite racial animosity or racist harassment; to possess material for dissemination with intent, or likely to, incite racial animosity or racist harassment; to engage in conduct intended to racially harass; and to possess material for display with intent to racially harass.[3] There was a successful prosecution for possession of racist material in WA in 2005 arising from numerous acts of racist graffiti on a synagogue and a Chinese restaurant.[4] However, it would appear that such prosecutions are rare in Australia.

13. The then Attorney-General said in his second reading speech to the Bill introducing s. 20D that the NSW Government enacted the provision "in the spirit of" the *International Covenant on Civil and Political Rights* ("the ICCPR"). Article 20 of the ICCPR reads as follows,

> *"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."[5]

14. It is well recognised that this provision was included in the ICCPR to help prevent the recurrence of racial, religious and national hostility typified by the Holocaust and the atrocities of the Nazi regime during World War II. It provides a safeguard against the occurrence of such extreme conduct.

15. The Fraser Government ratified the ICCPR on 13 November 1980 and it has been incorporated into Australian domestic law as a schedule to the *Australian Human*

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[3] *Criminal Code Act Compilation Act* 1913 (WA), ss. 76-80 and 80A-80D referred to in K Gelber "The False Analogy Between Vilification and Sedition" [2009] Melbourne University Law Review 9

[4] See K Gelber op cit, at fn 130: "Jail for Race Hate Graffiti" *The Australian*, 20 May 2005 and "Green Plea Fails to Save Graffiti Racist", *The West Australian* 21 Dec 2005.

[5] Schedule 2, *Australian Human Rights Commission Act* 1986 (Cth)

Rights Act 1986 (Cth). Australia recognises that it is bound by international law to ensure to all individuals within its territory enjoy the rights recognised in the Covenant without distinction of any kind including on the basis of race, national or social origin or other status.[6] Australia similarly has an obligation to adopt legislative or other means to give effect to the rights in the Covenant.[7] Owing to Australia's federal structure the Commonwealth relies upon the States and Territories to enact laws which allow Australia to comply with its obligations under international law particularly where the matters fall more appropriately within the jurisdictions of those States and Territories.[8]

16. Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") expands on Article 20 of the ICCPR to require States to make the following conduct an offence punishable by law: the "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 Commonwealth similarly relies on State and Territory laws to implement this provision of CERD.[9]

17. The NSW Bar Association accepts the lawful and legitimate nature of Australia's obligations under the ICCPR and CERD. Accordingly, it approaches the consideration of s. 20D of the *Anti-Discrimination Act* 1977 from the perspective of ensuring that Australia meets its obligations under international law.

18. Finally, the *Anti-Discrimination Act* 1977 was reviewed by the NSW Law Reform Commission in 1999.[10] The prosecution of serious vilification was considered at paragraphs [7.141] - [7.148] and two recommendations made. They are discussed below.

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[6] Article 2(1) ICCPR
[7] Article 2(2) ICCPR
[8] See Australia's declaration to Article 20 of the ICCPR
[9] See Australia's declaration to Article 4(a) of CERD
[10] NSW Law Reform Commission *Report 92: Review of the Anti-Discrimination Act 1977*, November 1999

Terms of Reference

Effectiveness of Section 20D

19. The approach of the Bar Association to this issue is whether the provision appropriately reflects the policy intent behind s. 20D.

20. From a drafting perspective the language employed in s. 20D(1) is straightforward. Each of the terms such as "hatred", "contempt" and "ridicule" are ordinary English terms. It is appropriate to leave interpretation of the words "serious" and "severe" to a judicial officer who is best placed to determine whether the relevant acts falls within those categories according to the facts and circumstances of the case. The phrase "threatening physical harm" is also straightforward, clear and appropriate for judicial application.

21. 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. In that way the independence of the Director of Public Prosecutions (DPP) is compromised and such a compromise of independence is best avoided. This was recognised as early as 1990 when the Attorney-General's power was delegated to the Director of Public Prosecutions.[11] The recent transfer of power from the Attorney General to the DPP in relation to the conduct of special hearings for persons found unfit to be tried, is consistent with the concept of determinations for the initiation of prosecutions being made by an independent statutory decision-maker.[12] It would therefore be appropriate to remove the Attorney-General's consent and repeal s. 20D(2).

22. The Bar Association is aware that, according to the NSW Law Reform Commission 1999 report, 15 potential prosecutions had been referred by the President of the Anti-Discrimination Board to the Attorney-General by 1999.[13] Five of those were refused consent and 10 were pending at the date of the report. This would appear to indicate that acts which are prima facie offences under s. 20D have occurred but either consent for prosecution has been refused or there has been insufficient evidence to prosecute. Anecdotal evidence from the former DPP, Nick Cowdery QC, is that the problem is the requirement in s. 20D(1) to establish incitement. A mere expression of

[11] Government Gazette, 10 July 1990, s. 11(2) of the *Director of Public Prosecutions Act* 1986.
[12] *Mental Health (Forensic Provisions) Act 1990*, s 19.
[13] NSW Law Reform Commission [7.144]

hatred, no matter how offensive, is not sufficient to "urge on, stimulate or prompt to action" (being the definition of incite). Further, in New South Wales, one must ignore any special characteristics or proclivities to which the audience or potential audience of the alleged offender might be subject; the activities of the alleged offender must be assessed by reference to the standard of the "ordinary reasonable reader".[14] This test for construing the meaning of "incite hatred" has been disapproved of by the Victorian Court of Appeal, which has preferred the view that regard should be had to the nature of the audience to whom the offending conduct is directed.[15] In Victoria, the test is "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 "include both the characteristics of the audience to which the words or conduct are directed and the historical and social context in which the words are spoken or the conduct occurs". The Bar Association recommends that the same approach be taken here and that s 20D be modified accordingly.

23. The Annual Report of the Anti-Discrimination Board for 2010-11 reveals that allegations of racial vilification are not uncommon, with 59 enquiries and 21 complaints of racial vilification in that year.[16]

24. The location of the offence in the *Anti-Discrimination Act* 1977 impliedly indicates that it is in a different or lesser category of importance to other criminal offences. As was recommended by the NSW Law Reform Commission, at Recommendation 96, s. 20D should be moved to the *Crimes Act* 1900.

25. Recommendation 97 of the NSW Law Reform Commission was that the President of the Anti-Discrimination Board be given a power to refer a matter to the Director of Public Prosecutions where he or she is of the opinion that it constitutes serious vilification. That recommendation was accepted and incorporated into the *Anti-Discrimination Act* 1977 at s. 91. However, the requirement that a referral to the Attorney-General more than 28 days of receipt (s. 91(3)) imposes an unjustified fetter upon the President and his or her ability to investigate a complaint of racial vilification. There are likely to be many circumstances where the President may form the view that a complaint is worthy of reference to the Attorney-General 28 days after receipt. The Bar supports the removal of s. 91(3). If the Bar's recommendation to

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[14] *Kazak v John Fairfax Publications Ltd* [2000] NSWADT 77 at [31].
[15] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 at [14] per Nettle JA (Ashley and Neave JJA agreeing at [129], [157].
[16] Anti-Discrimination Board, *Annual Report 2010-2011*, pp 13, 15. Referrals to the Attorney-General under s. 20D for prosecution are not revealed.

repeal s. 20D(2) is accepted then it would follow that the DPP should replace the Attorney-General at s. 91(2).

Whether Section 20D Establishes a 'Realistic Test' and Community Expectations

26. As mentioned above there is merit in reviewing the incitement elements of s. 20D(1). 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.

27. As the Committee may be aware, the DPP made recommendations to the then Attorney-General, the Hon Bob Debus, that s. 319(2) of the *Criminal Code of Canada* may provide an acceptable model (attached). Specifically s. 319(2) makes the following an offence: communications, other than in a private conversation, which wilfully[17] promote hatred against an identifiable group (eg a section of the public defined by race, colour or ethnic origin). Given the time limits for making of submissions the Bar Association is unable to fully explore this proposition but leaves it for consideration by the Committee.

28. With respect to community expectations, a number of comments may be made. The Bar Association expects protections at law to be provided so that Australia fulfils its international law obligations. One might legitimately question whether the entirety of Article 20 was covered by ss. 20C and 20D of the *Anti-Discrimination Act* 1977, but that question, insofar as it strays beyond race, is outside the terms of reference of the Committee.

29. Secondly, the offences caught by s. 20D are of such seriousness that the community expects to be protected from them. Section 20D is one part of an armoury of laws that the police have to use against violent conduct and acts which cause such violence. As such it is a safeguard for the community against acts of racist extremism which, although rare in Australia, are not absent. Accordingly, if s. 20D(1) is to be revisited then the Bar Association urges that a new offence along the lines of the Canadian model be created rather than replace s. 20D(1).

[17] In an Australian context wilfully is more appropriately replaced by the words "intended to" to include a specific mental requirement.

30. Addressing the second part of the issue first, it is well established in both international human rights law and Australian law that freedom of speech may be limited in appropriate circumstances. The criminalisation of child pornography, censorship and classification of publications and the law of defamation are obvious examples. Australians are accustomed to legitimate limits on freedom of speech where it involves violence.[18]

31. Similarly in international law, Article 19 of the ICCPR sets out that freedom of speech "carries with it special duties and responsibilities" and allows for States to limit the freedom for the purposes of public order, national security or for respecting the rights and reputations of others. Section 20D falls into the category of "public order" exceptions to freedom of expression because it is aimed at racial vilification *which threatens violence*. Section 20C makes racial vilification unlawful but does not criminalise it. It is only when such vilifying conduct is paired with threats of violence that it is criminalised. In the Bar Association's view that is an appropriate and justifiable limit upon freedom of expression[19] and one which accords with Australia's obligations under international law.

32. The Bar Association has set out above the appropriate amendments that should be made to s. 20D and also suggests the relocation of the criminal offence into the *Crimes Act* 1900.

33. While it would appear to be beyond the terms of the reference of the Committee's inquiry, the Bar Association would welcome consideration being given in due course to further amendments to s 20D that extend its operation beyond serious racial vilification to serious vilification on the grounds of other important protected attributes such as religious belief.

34. The Bar Association would welcome the opportunity to address the Committee should it wish.

12 March 2013

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[18] See, for example, s. 80G of the *Crimes Act* 1900 makes incitement to commit a sexual offence under Division 10 or 10A or incitement concerning child abuse material under Division 15A an offence.

[19] See, with regard to the civil protection against racial vilification, the successful reliance on *Lange v Australian Broadcasting Corporation* and the implied constitutional right of political communication in *Kazak v John Fairfax Publications Ltd* [2000] ADT 77. The opportunity to argue that the racial vilification provisions of the *Racial Discrimination Act* 1975 were unconstitutional based on *Lange v ABC* was not taken up in *Toben v Jones* [2003] FCAFC 137 at [147].

Public incitement of hatred

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.

Defences

(3) No person shall be convicted of an offence under subsection (2)

(*a*) if he establishes that the statements communicated were true;

(*b*) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;

(*c*) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(*d*) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Definitions

(7) In this section, "communicating" *« communiquer »* "communicating" includes communicating by telephone, broadcasting or other audible or visible means; "identifiable group" *« groupe identifiable »* "identifiable group" has the same meaning as in section 318; "public place" *« endroit public »* "public place" includes any place to which the public have access as of right or by invitation, express or implied; "statements" *« déclarations »* "statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.