STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

RESPONSE OF THE NEW SOUTH WALES BAR ASSOCIATION TO SUPPLEMENTARY QUESTIONS

1. What is the view of the New South Wales Bar Association on the potential option for amendment to s 20D outlined below:

   20D Serious Racial Vilification

   A person must not by a public act, promote or express 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 that is intended, or reasonably likely in the circumstance of the case to:

   a. *Threaten physical harm towards, or towards any property of, the person or group of persons, or*
   b. *Incite others to threaten harm towards, or towards any property of, the person or group of persons, or*
   c. *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.*

   The definition of race would be expanded in s4(1) to include presumed race.

Answer:

The New South Wales Bar Association's original recommendation for an amendment to s 20D of the *Anti-Discrimination Act 1977* was that "*the test for incitement of racial hatred* [be changed] *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*". Such amendment would make quite clear that there is no requirement of intention.

The potential option for amendment to s 20D outlined above means that it would be an offence where a person "*promotes*" or "*expresses*" hatred, serious contempt or severe ridicule. 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 s 20D. Rather, it criminalises the *expression* of hatred, serious contempt or severe ridicule (as well as the promotion of the same).

This represents a reversion to the language contained in the original proposal for s 20D: When the *Anti-Discrimination (Racial Vilification) Bill 1989* was first introduced, it contained the words "*promote or express*". The higher standard of incitement was later substituted: see New South Wales Law Reform Commission, Report 92 (1999) - *Review of the Anti-Discrimination Act 1977 (NSW)* at [7.115].

In *Harou-Sourdon v TCN Channel Nine Pty Ltd* [1994] EOC 92-604 the EOT adopted the plain meaning of "*incite*", quoting the definition in the Macquarie Concise Dictionary as to "*urge on; stimulate or prompt to action*". The EOT quoted with approval the Australian Broadcasting Tribunal's decision in the *Inquiry into Broadcasts by Ron Casey* (1989) 3 BR 351.

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 and also article 4 of CERD.

The civil wrong of racial vilification in s 20C does not go so far as the proposed amendment to s 20D, and is committed only where the offender *incites* hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the persons or members of the group. Section 20C(1) provides:

> "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."

In *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701the EOT noted that s 20C does not make unlawful the use of words that merely convey hatred towards a person, or the expression of serious contempt or severe ridicule on the ground of race.

As to the proposed addition of the words "*or reasonably likely in the circumstance of the case*", such amendment accords with the Association's recommendation that words similar to "*in the circumstances of the case*" be added to s 20D so that the test for incitement of racial hatred 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.* This would make clear that there is no requirement for intention.

It is also to be noted that there is an additional element of the proposed offence – that the public act is "*intended, or reasonably likely in the circumstance of the case to* [(a), (b) or (c)]." This is different to the current s 20D, which only requires that the respondent "*uses means which include*" (a) or (b). The proposal does not require *use* of such means, but requires either an intention that the public act will result in one of the 3 alternatives, or a finding by the court that the public act was reasonably likely in the circumstance of the case to result in one of the 3 alternatives. It follows that under the proposal, the respondent need not actually make threats (or incite others to make threats), but it must be intended or reasonably likely that this will be the result (or cause reasonable fear etc). Thus, the proposed offence could be established if there was an intentional expression of hatred etc which was reasonably likely to result in a person holding a reasonable fear etc.

2. What is the view of the New South Wales Bar Association regarding an extension to the time within which proceedings must be commenced? Summary proceedings are currently required to be commenced within 6 months pursuant to s 179 *Criminal Procedure Act 1986*?

Answer: The 6 month time limit applies to summary offences and not just to s 20D offences. The relaxation of the 6 month period should be considered as part of a wider inquiry into whether the 6 month limit is appropriate.

3. The NSW Jewish Board of Deputies has made a proposal to amend s 20D to include a provision concerning *"conduct intended to harass on the grounds of race"*. They suggest that the definition of *"harass"* would include behaviours that *"threaten, intimidate or seriously and substantially abuse"*.

   What is the view of the New South Wales Bar Association?

Answer: 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.*

4. It has been suggested that the maximum sentence for an offence could be between 2 and 5 years. Some organisations have submitted that the sentence should be 3 years.

   What is the position of the New South Wales Bar Association?

Answer: Comparable sentencing is a difficult and complex issue. Subject to what is said below, the Association does not wish to be drawn into making a submission about the appropriate criminal penalty save to say that no objection is taken to the current penalty for s 20D.

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 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.*

5. Mr McKenzie of the Aboriginal Legal Service has suggested that it in practice it may be impossible to prove that an offence has been committed based upon the current test. An alternative test of *"reasonably likely to incite"* has been proposed as prosecutions may be more achievable based upon that test.

   What is the view of the New South Wales Bar Association?

Answer: This issue is encapsulated in the Association's recommendation that "*in the circumstance of the case*" be added to s 20D.

The Association accepts that, on its face, s 20D in its current form appears to require an applicant to prove intention. However, the cases have apparently interpreted s 20D so as not to require an applicant to prove actual incitement: *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 at [13]. Rather, the applicant must prove that the audience was likely to be relevantly incited: *John Fairfax Publications Pty Ltd v Kazak* (EOD) [2002] NSWADTAP 35 at [16]; *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2004] NSWADT 267 at [14].

However, to remove doubt, either the New South Wales Bar Association's recommended language, or that of the Aboriginal Legal Service, should be adopted.

3 May 2013