Submission No 12

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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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 a

Yours sincerely

John Dobson
President