REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

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At Sydney on Friday 5 April 2013

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The Committee met at 9.30 a.m.

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PRESENT

The Hon. D. J. Clarke (Chair)

The Hon. S. MacDonald
The Hon. S. Mitchell
The Hon. S. Moselmane
The Hon. P. T. Primrose (Deputy Chair)
Mr D. Shoebridge

CHAIR: I welcome everybody to the first public hearing of the Standing Committee on Law and Justice into racial vilification law in New South Wales. The Premier the Hon. Barry O'Farrell, MP, has asked the Committee to examine section 20D of the Anti-discrimination Act 1977, which creates the offence of serious racial vilification. The Committee will give particular attention to the effectiveness of this provision and whether it establishes a realistic test for racial vilification in line with the expectations of the New South Wales community. The Committee will also consider whether any improvements could be made to this provision having regard to the importance of freedom of speech.

The Committee has received 42 submissions to date and we thank those individuals and organisations for taking the time to share their views with us. We will be hearing today from witnesses from the Anti-Discrimination Board of NSW, who are with us now, the International Commission of Jurists Australia, the Law Society of New South Wales, the New South Wales Society of Labor Lawyers and the Australian Lawyers Alliance. The Committee is holding a second public hearing on Monday 8 April 2013 to hear from more stakeholders.

I would like to make some procedural announcements. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing broadcast of proceedings are available from the table by the door. In accordance with the guidelines a member of the Committee and witnesses may be filmed or recorded, however, people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee members of the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee.

Witnesses, members and their staff are advised that any messages should be delivered through the attendants or the Committee clerks. Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings and I request that witnesses avoid the mention of other individuals unless it is absolutely necessary and essential to address the terms of reference. Could everybody turn off their mobile phones for the duration of the hearing, not just place them on silent, as they will interfere with *Hansard* recordings of proceedings. I welcome our witnesses representing the Anti-Discrimination Board of NSW.

ELIZABETH PAMELA WING, Manager, Inquiries and Conciliation, Anti-Discrimination Board of NSW, and

JACQUELINE AVERIL LYNE, Legal Officer, Anti-Discrimination Board of NSW, affirmed and examined:

STEPAN KERKYASHARIAN, President, Anti-Discrimination Board of NSW, sworn and examined:

CHAIR: If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider that request. Due to our tight reporting timeframe if you receive any questions on notice we would appreciate if you could give us a response to them within a period of 14 days. Would you like to make a short introductory statement?

Mr KERKYASHARIAN: I thank the Committee for the opportunity to speak about racial vilification law in New South Wales and in particular about section 20D of the Anti-Discrimination Act 1977 which creates the criminal offence of serious racial vilification. As president of the Anti-Discrimination Board and on behalf of the board I welcome this inquiry into the effectiveness of section 20D and thank you for the opportunity to briefly address the inquiry's terms of reference through an opening statement.

The first term of reference is the effectiveness of section 20D. Our view is that in its current form section 20D is ineffective. The purpose of section 20D when it was enacted in 1989 was to impose criminal sanctions upon those who incite racial hatred and violence. The criminal offence was always intended to apply only to the most serious cases of vilification. In spite of the board having referred some extreme examples of racist expression to the Attorney General not one case of serious racial vilification has ever been prosecuted and those responsible have never been held to account for preaching prejudice and violence.

We are of the view 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. To succeed a claim of racial vilification under this section must satisfy each of the following criteria: it must be a public act which incites hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of their race, by means which include either threatening physical harm to the person or property of the vilified group or inciting others to threaten such physical harm.

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. Amendment, however, is necessary to enable section 20D to serve its intended purpose for which it was enacted and to ensure that it does not sit unused or unusable on the statute book for a further 20 years.

The second term of reference establishes a realistic test for the offence in line with community expectations, and I think that is also an important aspect, the community expectation part of it. There is no question that when it comes to race or issues associated with race our community profile and demography have significantly changed in the past 20 years since this particular piece of legislation or the racial vilification amendments were enacted. There has been a significant change not only in the demography of our community, particularly from an ethno-religious point of view, which would form part of race, but also because of the impact of international events and faster communication on our society and the way that people react to some of those international events.

At an international level, Australia is a party to international human rights treaties which require us to criminalise racial vilification, yet currently there is no Federal legislation which meets this obligation. So in the absence of Federal legislation, the States and Territories play an important contributory role in meeting our international obligations. Australia currently has a reservation at the Federal level to both article 4 of the ICRD and article 20 of the ICCPR. The United Nations Human Rights Committee has recommended that Australia withdraw its reservation and the Anti-Discrimination Board is in favour of this withdrawal. Your Committee might consider making such a recommendation also to the Federal Government.

At a national level, it is undeniable that modern Australian society is extremely diverse and multicultural. Our diverse multiracial community is a result of successive government policies and positive

strategies to promote multiculturalism over the years. Whether we trace our ancestors to first Australians, the First Fleet, or to more recent migration, Australians have rich and diverse cultural ties and it is vital to our social cohesion and wellbeing that all of us feel equally able to participate in public life without fear of racist violence, oppression and prejudice. In fact, the New South Wales Parliament in 2000 passed the Community Relations Commission and Principles of Multiculturalism Act, which enshrined in legislation the principles of multiculturalism and that clearly states inter alia that there should be an acceptance and respect of ethnicity, race, et cetera.

Some may look at the low number of complaints referred to the DPP over the years and conclude that the levels of racism and racial vilification must also be low. However, the board is of the view that the complaints we receive are the tip of the iceberg. Australian Bureau of Statistics data shows that 25 per cent of Aboriginal people report having experienced discrimination. We feel that wider education and effective sanctions are necessary to demonstrate to our community the standards expected by society. And when individuals see these standards being upheld through the imposition of criminal sanctions where appropriate, it is likely to encourage others to come forward offering further opportunities for education and resolution and, where appropriate, dealing with it through prosecution.

In this context 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. If someone vilifies me because of my race, I suggest that that person is in fact vilifying and potentially threatening and may even potentially cause physical harm to any one of another 10,000, 20,000 people who belong to that particular race.

The final term of reference asks what improvements could be made to section 20D, having regard to the continued importance of freedom of speech. It is important that allegations of serious vilification are properly investigated. 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.

The Anti-Discrimination Board has a 30-year history of dealing with complaints of discrimination and vilification. It is trusted by the community as offering impartial, confidential and sensitive advice, education and complaint resolution services in cases of discrimination and vilification. We do not, however, have any significant powers to gather or compel production of evidence. In contrast, 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. I am making these comments in the context of preparing a prosecution brief under section 20D.

Certainly, the Anti-Discrimination Board does give the president some powers to acquire information but they are not the type of powers which would satisfy a successful investigation to prepare a prosecution brief. It is important to note that the police can only deal with one aspect of a crime, which is enforcement. The board's functions include research, education and consultation to address the systemic causes of discrimination, as well as the powers to attempt to resolve complaints through conciliation. The board was established with a much wider purpose than mere enforcement. Its purpose is the elimination of discrimination and the promotion of equality and equal treatment of all human beings. Whether or not the offence of serious vilification remains in the Anti-Discrimination Act or moves to the Crimes Act or otherwise, it is vital that the functions and powers of the board ought not be corroded.

Criminal penalties are not the only avenue by which to address racism, and education and effective handling of civil complaints. They still remain important tools in the promotion of racial harmony. The administrative functions of the board are essential mechanisms for the protection of the human rights of the people of New South Wales. So we have some suggestions for improvements. Clarify the definition of "public act". That should include cyberspace as well. In that context, remove the requirement for knowledge from the definition of "public act" in the legislation. More to the point, remove the words "means used to incite" element of the offence in section 20D. 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.

I guess it removes the political element from the process and it is important for a criminal prosecution to have such a distancing. It is also necessary to clarify whether a criminal intent is there—being an intention or recklessness; to extend the protection to persons presumed to be of a particular race and revise time limits to allow thorough investigation worthy of the seriousness of the offence. To clarify some of those points, reform is needed for the scope of the provision to be extended to those who are presumed to be of a particular race. This kind of protection exists in other areas of the Anti-Discrimination Act. For example, a reference to a person's homosexuality includes a reference to the person being thought to be a homosexual person whether or not he or she is in fact homosexual. That is under section 49ZF, but if a person is vilified because they are thought to be Aboriginal or Jewish or Lebanese, they are not protected under the Act.

By way of example, there were media reports last weekend about some Korean tourists who were subjected to abuse on a Sydney bus by a man who thought they were Japanese and who allegedly referred to bombings carried out by the Japanese during World War II. The problem is that those who preach racial hatred and those who carry out racist violence are not necessarily going to check their facts. If someone fits their preconceived stereotype of what a particular racist group should look like, that person may find themselves the victim of vilification without any recourse under the racial vilification provisions of the Act.

There are two competing time limits which contribute to the difficulty in successfully prosecuting the offence. As President I have to refer to the Attorney General any complaint I am of the view should be prosecuted within 28 days of receipt. That is too short a time period for a well-considered referral to be made. The second conflict has arisen in that the criminal offence is considered to be a summary offence and therefore if it is not dealt with within six months, then it is out of time and yet the Anti-Discrimination Act says that a person may lodge a complaint within 12 months. Therefore that is also an important deficiency. The last point of course I referred to earlier is the lack of investigative powers.

To summarise very quickly, Mr Chairman, we have to take into account the fact that we have to make amendments to the legislation so that it moves from being an offence about motivation and consider the impact the offence has on the individual; so it is not about the motivation but what impact it has had on an individual or a group of individuals, and, secondly, that there should be some mechanism which would enable an independent prosecution brief to be prepared. It does not exist at the moment.

CHAIR: Thank you. I will open up the questioning. You said at the beginning that you were not seeking to lower the threshold. So you say you would want to clarify the threshold, that there are confusing standards or conflicting things that make it unclear as to how the threshold operates, would that be a summary of what you were alluding to?

Mr KERKYASHARIAN: Yes, I think the issue is not about making a lesser offence like lowering the bar—

CHAIR: But making it clearer?

Mr KERKYASHARIAN: Making it clearer and I think basically what I am referring to there is that at the moment section 20D says that it is by means of—

Mr DAVID SHOEBRIDGE: "By means which include".

Mr KERKYASHARIAN: "By means", and the suggestion is that we remove the word "means" and that will then have the impact of shifting it from being motivation towards making it an impact on an individual.

CHAIR: In reference to your submission at 4.21 you talk about the racial vilification provisions in the Act not extending to persons who are vilified because they are presumed to be members of a racial group of which they are not and you gave the example of the Koreans who were vilified and who have suffered as a consequence of that vilification. Even though they were not members of that group under the law as it presently stands they have no recourse under section 20D, is that a summary of what you are saying?

Mr KERKYASHARIAN: That is correct, because even to be able to lodge a complaint someone has to belong to the vilified group. If someone is a Korean and is mistaken to be Japanese and is vilified for being Japanese, that person cannot even lodge a complaint. It is doubted.

CHAIR: They have suffered everything that vilification involves without any recourse under the law?

Mr KERKYASHARIAN: Yes, that is right.

CHAIR: You also referred to the Attorney General being cut out of the equation in that matters should be referred directly to the DPP?

Mr KERKYASHARIAN: Yes.

CHAIR: But I think that they are automatically referred nevertheless so what would be the practical difference of amending it to remove the Attorney General and go directly to the DPP when that can be done already?

Mr KERKYASHARIAN: I am proposing a raft of actions around that in that at the moment it is referred to the Attorney General who automatically refers it to the DPP. To put it in layman's terms, 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.

CHAIR: But that is going to be the situation even if you refer it direct to the DPP, is it not? That is not going to change?

Mr KERKYASHARIAN: That is why I said it is a raft of actions. If it is not going to move into the Crimes Act, which means that the police can prepare the prosecution brief, then I would very strongly suggest to the Committee that the Anti-Discrimination Board be given powers, with the agreement of the DPP, to engage an independent body to prepare the prosecution brief.

CHAIR: But that would be a separate issue from cutting the Attorney General out anyway?

Mr KERKYASHARIAN: Yes, it is separate.

CHAIR: You could do that without cutting the Attorney General out as these matters go directly to the DPP in practice in any event?

Mr KERKYASHARIAN: Yes, that can be, Mr Chairman, yes.

The Hon. SCOT MacDONALD: I think I read somewhere that there were 27 attempted prosecutions. Have any of those attempted prosecutions been repeat offenders? Have they come back before you again?

Mr KERKYASHARIAN: I do not think so. I do not have the answer to that, sorry. I am not 100 per cent sure. I can take that on notice, if I may.

The Hon. SCOT MacDONALD: Does the Anti-Discrimination Board have a congress? Do you meet annually or every six months? How do you meet as a group? Is it a small council?

Mr KERKYASHARIAN: The board has five members, including the president. It is essentially an advisory board because most of the powers of the board are vested in the president and the board meets monthly.

The Hon. SCOT MacDONALD: I want to try to get a feel for whether your constituency, or the people that you represent, for want of a better word, have been bringing section 20D to your attention for the past 10 or 20 years or so? Is it something that has been a concern? Is there a lot of debate internally?

Mr KERKYASHARIAN: The board has three advisory committees; they are not formal committees, they are just advisory groups that I meet with. One of them is the lesbian advisory group, the other is transgender, the third is the Aboriginal Indigenous people's group. The issue of vilification, I can say, is always on the agenda.

The Hon. SCOT MacDONALD: Is that because of our inquiry or has it been an ongoing sore for a while?

Mr KERKYASHARIAN: I have been the president now for about nine years and I cannot think of a meeting I went to where the issue of vilification was not raised.

The Hon. SCOT MacDONALD: I cannot remember which one but in one of your submissions you raise the internet. The internet, to me, seems challenging. How do we successfully bring section 20D to bear on the internet, in relation to resources and prosecution? How far do you throw the net? There is such a broad reach there. One can type something in Ireland or New Zealand and pretend to be from Australia or Sydney. How do we ever bring section 20D to bear on a communication tool that is just ballooning?

Mr KERKYASHARIAN: I accept that there are a lot of difficulties. As an example, something came to my attention yesterday where there is a Facebook page called, "Had a Dream I was in Africa, Woke Up, Still in Blacktown." It has a lot of derogatory statements on the page against people of African origin. Regrettably, there were 4,512 people who said they liked it. Obviously, what I am asking for here is not an absolute solution of what to do with the internet, because Facebook, for example, is outside our jurisdiction. There are other international operators who will not even recognise Australia's jurisdiction, let alone the jurisdiction of the Anti-Discrimination Board. But there is no reference to social media or to the internet at all in the legislation and I think this is a good opportunity at least to put that in there. There may be an occasion where someone has posted something on Facebook and that person can be identified. In that case, it may be possible to take some action against that person.

The Hon. SCOT MacDONALD: So the only supplement to that, if you want to take it away, is how do you resource its oversight? I will leave that with you for other people.

The Hon. SHAOQUETT MOSELMANE: Welcome and thank you very much for appearing before us. My question is directly to you, Stepan. You just said that you have been on the board as president for nine years and vilification has been an issue at almost every meeting. Can you tell me why it has taken nine years for you to bring this issue for us to address it?

Mr KERKYASHARIAN: I think this is the first time that there has been an inquiry.

The Hon. SHAOQUETT MOSELMANE: But you are the president. Why, as the president, is the onus not on you to lead, to make the issues known to the community so that members of Parliament and others can raise it?

Mr KERKYASHARIAN: As a public servant—I may be wrong—I do not think it is my duty to go and create a lobby. I consider that my responsibility is to follow correct channels of communication, which is up the line to my political masters, so to speak.

The Hon. SHAOQUETT MOSELMANE: So you have been directed to do these submissions? You have been directed to write these submissions by your political masters?

Mr KERKYASHARIAN: No, not at all. Maybe I misunderstood the question. The question was: Why did I not bring this to the attention of the public before?

The Hon. SHAOQUETT MOSELMANE: Yes, that there has been racial vilification.

Mr KERKYASHARIAN: I have made comments in the media many times about vilification. But I think, in asking for any changes to legislation, et cetera, that is something that the board and I do by following well-established procedures within the public service.

Mr DAVID SHOEBRIDGE: There is an obligation in your annual report for the board to report to the Minister on recommendations the board "considers appropriate for the elimination or modification" of the legislative provisions in relation to discrimination. That is an annual obligation. I wonder whether it has been raised in any of the annual reports where you have been president? It is an annual obligation to report to the Minister.

Mr KERKYASHARIAN: I have brought this issue to the attention of successive attorneys general.

Mr DAVID SHOEBRIDGE: The question was about annual reports—your statutory obligation in annual reports. It is section 122, the board's obligation in annual reports.

The Hon. SHAOQUETT MOSELMANE: Can we put that question on notice? Can I ask another question because of the time and I will need to pass on to my colleague. I have read both submissions—the Anti-Discrimination Board submission and also submission No. 8. Neither refers to religious vilification. Do you not agree that the Islamic community, for instance, over the past 10 or 12 years, has been the target of religious vilification, yet there is no reference to that whatsoever in your two submissions?

Mr KERKYASHARIAN: Because we addressed the terms of reference of this inquiry, which is about racial vilification.

The Hon. SHAOQUETT MOSELMANE: But you go beyond section 20D when you recommend some other amendments as well. Why is it that religious vilification—something that has been a significant issue to a significant community, for example, the Muslim community—has not been addressed in this submission?

CHAIR: I think we are starting to get away from the terms of reference. This is about racial vilification.

The Hon. SHAOQUETT MOSELMANE: But I have a right to ask questions.

CHAIR: Yes, but within the confines of the terms of reference. I ask you to keep that in mind.

The Hon. SHAOQUETT MOSELMANE: I am making reference to these submissions. These submissions do not make that.

Mr KERKYASHARIAN: As things stand at the moment, ethno-religious vilification forms part of racial vilification, so we took that into account. At this point in time, the Anti-Discrimination Board is not advocating the inclusion of pure religious discrimination.

The Hon. SHAOQUETT MOSELMANE: I do not think it ever would, given that for nine years on the board no motion has been moved. I will pass on to my colleague.

The Hon. PETER PRIMROSE: Given the time, can I ask you to take one question on notice and then I will ask another question.

Mr KERKYASHARIAN: Sure.

The Hon. PETER PRIMROSE: The first question is simply: Could you take on notice how you define "serious racial vilification"? I think that may include the issue of how you define "racial vilification" because I note that you mentioned ethno-religious aspects earlier in your address. Could come back to us with how you define "racial vilification" and "serious racial vilification"—basically those three words and the term.

Mr KERKYASHARIAN: Sure.

The Hon. PETER PRIMROSE: One of our terms of reference requires us to examine whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations. I am wondering whether you could give us some suggestions as to how the Committee should evaluate community expectations in relation to this matter.

Mr KERKYASHARIAN: If there is a piece of legislation that says you cannot hurt someone or cause damage to someone's assets through vilification I think that in itself creates an expectation in the community that if a person feels threatened to the extent that that person fears that he or she will be subjected to physical violence or thinks that anyone belonging to his or her race will be subjected to physical violence, that in itself is a serious offence and that is the expectation. So the community's expectation is that there is a piece of legislation here which says, "I will not feel threatened physically or I will not feel that my assets are threatened or my race community is threatened because of what someone has said". That is the expectation and, as the legislation stands at the moment, that expectation is not being met and the reasons for that, as I said earlier, are, number one, because the onus of proof is on motivation rather than the impact it has on the victim; number two, there is

no proper procedure established for the preparation of a prosecution brief, and there is also a lack of compensation.

Mr DAVID SHOEBRIDGE: What about the ability of you referring a matter to police to prepare a prosecution brief, if you thought that was appropriate, giving you that statutory power rather than engage a private investigator? If you think there is a sufficiently serious case raised you can refer it to the police to undertake an investigation. What about that method?

Mr KERKYASHARIAN: From my point of view the important thing is for an appropriate body with the necessary investigative powers—

Mr DAVID SHOEBRIDGE: I am suggesting the police because they are already there.

Mr KERKYASHARIAN: If it is going to be the police then let it be the police. We are not particularly against the police doing that. I will be quite happy with that, yes.

Mr DAVID SHOEBRIDGE: Referring to the provisions relating to a public act, the Act already says "Public act includes any form of communication to the public", and that includes speaking, writing, printing, displaying notices, broadcasting, telecasting, screening. It does not exclude the internet, as I read it; in fact, on almost any reasonable view that would include the internet, would it not? It is a communication to the public—maybe not a private email, but if you are doing a public Facebook page why would that not be communication to the public?

Mr KERKYASHARIAN: It may, but unfortunately there is no case law. But I think when it comes to the definition of "public act", to me of greater concern is section 20B (c), which includes the words "with knowledge". In other words, that is an even greater complication in that in some cases you have to also prove that the person knew exactly what they were doing.

Mr DAVID SHOEBRIDGE: But it is and, and, and—are you saying it is cumulative? First of all it says it includes, so the whole definition is an inclusive definition, and then you can be any of (a), (b) and (c). That is how I read it; so you are not limited in (c), you can be either (a) or (b) or (c) in 20B, can you not?

Mr KERKYASHARIAN: Yes, but if it comes to dissemination of any matter to the public "with knowledge".

Mr DAVID SHOEBRIDGE: But that does not limit (a), does it?

Mr KERKYASHARIAN: No, it does not.

Mr DAVID SHOEBRIDGE: I am just wondering if there is a big problem here. Have you had advice that it excludes the internet?

Mr KERKYASHARIAN: No, that was a separate point. I was making a generic point about the definition of "public act". But I think it would not hurt to insert a word in there about the internet.

Mr DAVID SHOEBRIDGE: As I understand your submission, you look at section 20D (1) and you chop out all the words after the word "group" in (1), is that right? "A person shall not by public act incite hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of race of the person or members of the group", and you get rid of "by means", which include (a) and (b), is that right? I am not saying that is your only remedy but that is one part of the solution?

Mr KERKYASHARIAN: Yes.

Mr DAVID SHOEBRIDGE: I just wonder then how you test for serious contempt or ridicule. You suggested to look at the person who is the subject or the group which is the subject of the offensive conduct, is that right?

Mr KERKYASHARIAN: Yes.

Mr DAVID SHOEBRIDGE: Is it a subjective or an objective test?

Mr KERKYASHARIAN: It would be an assessment of the level of damage that was caused to the individual.

Mr DAVID SHOEBRIDGE: So it is a subjective test; it is how that person feels?

Mr KERKYASHARIAN: That would be for the judge or the magistrate to come to the conclusion—

Mr DAVID SHOEBRIDGE: But do you understand this is a very important issue, whether it is a subjective test, how that person feels, or an objective view of how a reasonable person in that person's circumstances would feel. Is it objective or subjective? What are you suggesting?

Mr KERKYASHARIAN: I would opt for the objective.

Mr DAVID SHOEBRIDGE: So if you had a hypersensitive person who felt deeply offended from a relatively modest slight you are not suggesting that would be the subject—

Mr KERKYASHARIAN: I think the generic term of "reasonableness" should apply.

Mr DAVID SHOEBRIDGE: Are you suggesting offence or hurt, serious hurt or serious offence, would be a sufficient basis for a criminal prosecution?

Mr KERKYASHARIAN: I am suggesting that if the level of hurt was such that the individual would have a reasonable ground to feel threatened that he or she will be subjected to violence or that his or her property will be subjected to violence, then a reasonable test of that would be sufficient for criminal prosecution, otherwise—

Mr DAVID SHOEBRIDGE: Do you not then need to keep subsections (a) and (b)?

Mr KERKYASHARIAN: Sorry, maybe that was misunderstood. My suggestion was we delete "by means, which include" but keep the rest of it. In other words: "A person shall not by a public act incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons on the ground of the race of the person or members of the group, which includes threatening physical harm".

Mr DAVID SHOEBRIDGE: How do the means change that legally? If you get rid of the means, how does that change the prosecution test?

Ms LYNE: The means test in the definition simply refers to the type of threat that has to be made.

Mr DAVID SHOEBRIDGE: But Stepan is saying keep the type of threat but get rid of the word "means". How does that fix it?

Ms LYNE: In our submission I do not think we have actually suggested a form of words of redrafting—I know in many of the submissions people have attempted to redraft the legislation in different ways. When we talk about removing the means I think 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.

Mr DAVID SHOEBRIDGE: If you look at 20D (1) (a), if you had "threatening" or "placing someone in fear of", that is really what you are talking about: You are either threatening someone or placing someone in fear of a threat to their person or property. Is that what you are getting at?

Mr KERKYASHARIAN: Yes.

Mr DAVID SHOEBRIDGE: The other question that has been raised by a couple of people is the requirement to prove incitement—"A person shall not by public act incite hatred"—and sometimes prosecutions have failed because you have not been able to prove that someone has actually been incited; for example, that deeply offensive case about the persons making a reference to Jews and lampshades. It may be difficult to prove that someone was actually incited towards an act as a result of that, but I think many people would be deeply

offended at that kind of behaviour. Do you have a view about the requirement to prove incitement, or should the test be something like "actively encouraging", so the test is the motivation of the person in doing it or the encouragement of something rather than actually having to prove someone was motivated or incited?

Mr KERKYASHARIAN: 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.

Mr DAVID SHOEBRIDGE: Entirely removed or should there be a test like what you are doing is actively encouraging someone? You do not have to prove someone acted on it but you have to prove that kind of behaviour actively encourages that kind of offensive response?

CHAIR: Or justifying such conduct.

Mr DAVID SHOEBRIDGE: Yes, encouraging or justifying; rather than actively proving that someone was motivated or incited, prove that that behaviour justified, encouraged that kind of response?

Mr KERKYASHARIAN: To me, I think the main issue should be whether a person or a group of people feel threatened or frightened. To me, I think that is the key point. If a third party does that then it is not a question of whether the person was incited or not but that the person actually did that. I think it should really be not the motivation but the impact it has on the victim.

CHAIR: From an objective point of view?

Mr KERKYASHARIAN: Yes, from an objective point of view—from a reasonableness point of view. I know I did not answer Mr Shoebridge's question directly.

Mr DAVID SHOEBRIDGE: I was not actively encouraging you to do so.

CHAIR: Thank you all for being here and for your submissions and your evidence. They have been of great value to us.

Mr KERKYASHARIAN: We are available at any time to come back should you or your Committee wish us to do so.

CHAIR: Thank you. If there are any questions on notice we would appreciate responses within 14 days.

Mr KERKYASHARIAN: Yes. More than happy.

(The witnesses withdrew)

JOHN ROBERT ARTHUR DOWD, Company Director, representing the International Commission of Jurists, Australia, affirmed and examined:

CHAIR: Welcome and thank you for assisting us with our deliberations.

Mr DOWD: Thank you. I hope I can assist.

CHAIR: I am sure you will be able to. If you should consider at any time that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee please indicate that fact and the Committee will consider that request. Due to our reporting time frame, if there are any questions on notice we would appreciate a response within 14 days. Would you like to make a few short opening remarks or go straight to questions?

Mr DOWD: I have had the opportunity of looking at some of the submissions—and I do not want to prevent any questions—but there are some things that I think I could probably deal with having listened to some of the earlier debate and the other submissions. The first is that I support the Labor Lawyers' proposal—I think it was theirs—about the 28-day period being too short. That does not allow time for a proper examination of the matters and I think a period of six months would be more appropriate. I also support—we also support—the argument that the penalties are inadequate. I do not think they need to be massive penalties but they need to be revised, particularly in relation to a corporation where the amount would be just nuisance value for some companies. The penalties should be increased. In dealing with that, I think a distinction should be drawn to make section 20D into two sections with the incitement provision in the second half, or to perhaps be a separate offence with a separate higher penalty. I will deal with that later.

The other point I want to make is that I do not believe it should include, since the question is dealt with in the submissions, religions as such. It is very easy to work out what some of the major religions are, but in my experience there are a lot of cults, odd groups and so on that have built themselves into pseudo religions or they are not religions at all. You do not need to look at much history to know that it becomes impossible to determine what is religion and what is not. For instance, the Falun Gong came to me years ago to talk about genocide and I pointed out that there cannot be genocide because they are not a religion, and they do not say they are a religion although some, particularly in the People's Republic of China, would think they are. It is just a minefield and very few pure religious attacks would not be covered by racial vilification, so I would oppose any extension of that.

In relation to the internet and other electronic means, which I heard discussed, I think a little clarification would not hurt. There should not be, because so many people use it now and it is used overseas and sometimes here quite viciously and deliberately, where it is targeted—any means like that which is used should be specifically included to stop a prosecution falling or wasting time on issues of definition. Otherwise I think that would cover a number of matters.

Generally, in Australia this week there will probably be a billion contracts and the number of those that get to a court would be a hatful. There would in that period be several billion conversations. People do not carry law books with them and they should not have to worry—it is a bit like privacy—about whether they are getting it wrong or saying something wrong, or whatever. New South Wales led Australia in anti-discrimination legislation and it has been a tremendous educative force. I think we can be very proud of what we did. This legislation was primarily intended as a prohibition, and the number of complaints that have come up shows that people are conscious of this. But the test of the success of legislation is not how many convictions there have been, because these are very subjective areas. The test is: are we a better State in terms of our obligation to freedom of speech, with some deterrents for people who cause serious offence?

In relation to some of the questions I have heard I point out that we have lived with the offence of offensive behaviour for a long time. The courts have long dealt with offensive behaviour. It is a "reasonable man" test and I think we need to look closely that we do not set up too great a tool. A criminal prosecution is a very serious matter. It is on your record and you have to disclose it for all sorts of reasons, which is why I introduced the Criminal Records Act to make sure that someone who committed a tiny offence a long time ago does not have to fill it out on an insurance form every time. To give you an example, my father as a driver was convicted of speeding. He was doing 33 miles an hour in a 30 mile zone. He had two convictions in that period. The speed limit is in fact higher than that now, it is about 36.7, but for 40 years he had to fill out every insurance

policy. That is one close example but there are lots, so we ought to not lightly burden people with criminal prosecutions.

The mechanism of anti-discrimination means a lot of problems are conciliated by the board. That is a very important sanction within the framework; that there is a prosecution so that the board in fact gets rid of a lot of problems and in fact solves a lot of problems. Not every court case that is started or complaint that starts ends up in a prosecution. But I do think it is important that the board, in an appropriate case, refer the matter to the police—I think Mr Shoebridge's question is quite apposite—where in fact it is considered that there is a matter within the board's view. It is a matter for the police then and ultimately for the Director of Public Prosecutions [DPP].

If I can I say about prosecutions that one of the least understood parts of the criminal prosecution process is prosecutorial discretion. Prosecutors, and I have now seen several prosecutors, operate with a very high level of integrity and without political interference. That discretion goes as to whether a jury is likely to convict as well as all the legal problems of a prosecution. I think that ought to be left with it. Originally it was the Attorney General, but the Parliament has correctly handed that over to the DPP because they have got the staff and the expertise to deal with criminal prosecutions.

I think the word "serious" should come out of the heading and the word "serious" should come out of the offence itself. I do not like the word "incite" where it appears. I think consideration should be given to another word, whether it is "cause" or "induce" or whatever. "Incite" is not a great word but one can live with it, but I think it ought to be the offence of racial vilification.

The final point I want to say in these opening remarks is that taking into account the whole structure of the Act, and 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. Laws are there to solve problems. There is not a lot of evidence of major problems here. I think we are a better educated State because of it. I think it should remain there, but some of the technical problems I have dealt with might help this Committee to make a recommendation to make it more effective.

CHAIR: A previous witness, Mr Kerkyasharian, referred to an incident where a Korean couple were racially vilified. They were mistaken for Japanese. They were vilified as Japanese, but they were vilified nevertheless. But because they were not Japanese there could be no prosecution under section 20D. Do you think that is an anomaly and that it is something that needs to be rectified? Should a person who is in fact not of the group, race or community that has been vilified still be able to bring a complaint under section 20D even though they have been seriously vilified?

Mr DOWD: I saw that in the press. Thinking about it at the time, I think if for instance you are a Chinese and you are accused of being a Japanese or vice versa it still is offensive behaviour. I think, clearly, words can be incorporated to say looking at the objective effect on the person even though they have not got the race right. There a lot of people in south-east Asia that can be taken for an Indian, a Nepali, a Myanmar person can be taken for Cambodian. I think a form of words could cure that.

The Hon. SARAH MITCHELL: In your submission you talk about how a lack of prosecutions may be proof that already there is quite a significant deterrent through 20D. You also mentioned in your opening remarks potentially looking at increasing the penalties as well, which I assume would lead to it being even more of a deterrent. I wondered whether you had any examples in mind. The previous witnesses in their submissions talked about the Western Australian model and the penalties that are available there. They noted that is the only State in Australia where there has been a successful prosecution on serious racial vilification. Do you think the WA model in terms of penalties is something that the Committee should be considering, or are there other jurisdictions that might be better placed?

Mr DOWD: Most people are not aware of the size of a penalty and are not deterred by the size of the penalty, unless it is massive. People know it is a minor penalty or it is a massive penalty. Most people do not understand what the penalty unit is anyway. All I think, looking at the number of penalty units, is that it is too small for the nature of the offence and it should be considerably increased. It will have some deterrent effect.

The Hon. SARAH MITCHELL: Are you familiar with the Western Australian model?

Mr DOWD: Only generally.

The Hon. SARAH MITCHELL: The submission from the Crime Research Centre [CRC] said to increase for individuals to 250 penalty units or three years imprisonment and for a corporation up to 1,250 penalty units, which is significantly larger than New South Wales currently has.

Mr DOWD: I would have thought the corporation sounds fairly right. I do not agree with the jail penalty. I do not think it is warranted because (a) the fact of conviction and (b) the fact of someone having to defend the matter and that gets very expensive, plus a substantial financial fine is sufficient. People think they have been maligned or vilified and so on in a lot of cases where they have not. The criminal law is a very heavy sanction. I think people ought to remember that a conviction is a very big thing and it will affect employment and people for the rest of their lives.

Penalties should be proportionate to the offence. Although a lot of magistrates' penalties I find inadequate, you have got to remember you are dealing with the whole panoply of offences in our society and this is not at the higher end. There are a lot of others. It should be proportionate to the offence and there are a lot of matters uncovered by the law that are more serious.

The Hon. SCOT MacDONALD: I was interested to hear you say that the Anti-Discrimination Act has an educational role and the problem in society is not huge. Therefore, the question that has been put to us—maybe in a referral—is why have section 20D in the Act? If we are addressing the problem in other ways, if our norms are reacting appropriately—perhaps not as fast as some people would want—why have that part of the Act?

Mr DOWD: 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.

CHAIR: There has been concern that the power of the Attorney General granting consent to prosecutions should be formally transferred to the Director of Public Prosecutions?

Mr DOWD: I thought that had happened.

Mr DAVID SHOEBRIDGE: It is by a delegated instrument.

CHAIR: It is by delegation.

Mr DOWD: I thought it was by Act. If it is only by delegation, 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.

CHAIR: Are there any public policy issues that would dictate otherwise?

Mr DOWD: No. It was put in as a safeguard. Some people will bring a complaint for mischievous reasons and so on. I can see no problem of public policy that this would be a crime, like every other crime, to be dealt with by the Director of Public Prosecutions.

The Hon. SHAOQUETT MOSELMANE: How do the proposed changes, in your view, impact on freedom of speech?

Mr DOWD: It is like privacy. Any restriction on what you say means that a person in a normal conversation who has been brought up to believe that a lot of bad things—the nigger in the wood pile and a whole range of things—that were considered perfectly all right a long time ago are now not all right because of

educative legislation such as this. It does have an effect on freedom of speech because people do not always have a legal adviser in the middle of a conversation. Therefore, we can only generally limit freedom of speech where it is offensive to others. The ultimate test is offensive behaviour and whether it is likely to cause a breach of the peace or cause harm to somebody. We therefore have to balance that need to say how people should conduct themselves, but not unduly limit freedom of speech. Subject to the amendments that I propose, this goes a long way towards that role.

The Hon. SHAOQUETT MOSELMANE: Is it fair to say that from your submission in relation to section 20D you are saying, "If it ain't broke why fix it?"

Mr DOWD: As always, you have an eloquent way of putting things. First, all legislation must identify what the problem is, and you do not gauge the problem by lack of convictions. You have to have evidence before you that it is a massive problem in our society, and I do not think there is evidence that it is a massive problem. The fact that people make complaints may be a matter of undue sensitivity. They may in fact be troublemakers. There has not been a crime for every criminal prosecution, particularly since we brought in victims compensation. In my 50-plus years in the law I have seen a lot of prosecutions brought that were based on absolutely nothing, for various reasons. It is that balance we need to achieve.

The Hon. SHAOQUETT MOSELMANE: I note that your submission is the only one that makes reference to religious vilification. The majority of other States and Territories in Australia, bar New South Wales and another one, have religion in their Anti-Discrimination Act. There has not been a flood of cults using that Act to make their cases in the relevant courts. I am interested in your comments in relation to that. Will you tell me how, where and what part of the New South Wales Anti-Discrimination Act protects religion? You said it does.

Mr DOWD: It does, only where it is involved in a racial component. Sammy Davis Junior was a Jew, but I do not think he ever got attacked for being a Jew; he got attacked for being black.

The Hon. SHAOQUETT MOSELMANE: If a person was attacked because he or she was Muslim and someone said, "You are a Muslim terrorist", how would that person use this Act to bring a case?

Mr DOWD: 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 was at a function recently where most of the people there were Muslims, but the attack on them came from a separate Muslim sect.

The Hon. SHAOQUETT MOSELMANE: That does not justify it.

Mr DOWD: No, it does not justify it, but we do not want to create police investigations into remarks that may or may not be offensive. Again, on your point, I do not see that in our society there is a sufficient attack within this legislation to warrant the inclusion of religion.

The Hon. SHAOQUETT MOSELMANE: In respect of the penalties, you say it should be increased. It is recommended that the penalties be increased up to three years. What, in your view, is a sufficient penalty for a serious breach of section 20D?

Mr DOWD: The amounts that the Hon. Sarah Mitchell talked about is getting fairly close to what I think is appropriate.

The Hon. SHAOQUETT MOSELMANE: Thank you.

Mr DOWD: Except for the jail sentence—the amounts.

The Hon. PETER PRIMROSE: I will go to the submission that we have received from the Jewish Board of Deputies. One of their recommendations is to amend section 20D to include a provision:

> Conduct intended to harass on the grounds of race.

They suggest that the definition of "harass" include behaviour that threatens, intimidates or seriously and substantially abuses. Will you comment on that proposal?

Mr DOWD: I do not know how much further that takes it from the original section. I have not read their submission. Introducing new words like "harass" is tricky, because there will have to be some judicial determination of what that means. The terms used in this existing section have some words of general meaning that need to be defined. I do not see particularly a need for what they have suggested, but I do not say that it is highly unreasonable because it is of the genre of the existing section.

CHAIR: To racially vilify, you referred to needing a lawyer and I can see that point, but to incite others to violence as a result of it is pretty straightforward and people have an understanding of what to incite to violence is, so you do not really need a lawyer.

Mr DOWD: Yes.

CHAIR: Even though they may need some assistance as to what constitutes racial vilification, with the additional element needed for section 20D, most people would objectively understand what incitement to violence would be. Do you agree with that?

Mr DOWD: Yes, I do. As I have said, it is my view that the second part of the section should create a separate offence with higher penalties, but it is a word of common usage in the law and not a problem.

CHAIR: There are two parts, the vilification and incitement to violence, which is a serious matter.

Mr DAVID SHOEBRIDGE: You say other language, such as "cause" or "induce", which effectively has the same meaning as "incite" might be clarification.

Mr DOWD: Yes.

Mr DAVID SHOEBRIDGE: One of the issues raised is that having to prove incitement, having to prove a third party was incited or caused or induced to act, makes it next to impossible to prosecute.

Mr DOWD: Yes.

Mr DAVID SHOEBRIDGE: Someone may be promoting, such as putting a deeply offensive billboard out and promoting serious racial vilification—

CHAIR: Or justifying it.

Mr DAVID SHOEBRIDGE: —or justifying it, but is there an argument that that should be roped in, the promoting or justifying of racial vilification?

Mr DOWD: Yes. The offence is doing an act which is likely to cause violence, the same as offensive behaviour or the keeping of the peace, and I think having to prove that someone was incited and so on is an unnecessary part of the offence. I think it ought to be that doing an act which is likely to cause violence is the offence, and the fact that someone was not incited—I mean they may be, people accumulate statements and it may come to fruition very much later in a heated situation, but I do not think you should have to prove that incitement.

Mr DAVID SHOEBRIDGE: It makes it a next to impossible task in that delayed instance to prove the incitement was caused by the act anyhow.

Mr DOWD: That is right and I am sure as the Committee is well aware, that sort of issue prevents prosecutions occurring. I think the sort of suggestions that I have made will bring about a number of prosecutions. We do not need to have many prosecutions for the public to get the message, but at the moment prosecutorial discretion will mean that that sort of offence is not prosecuted when in fact it ought to be. I think if we get rid of some of the hurdles then there will be some prosecutions, and it is publicity of prosecutions which may in fact cause better education for the public where it is reprehensible conduct such as that which is in fact the subject of the legislation.

Mr DAVID SHOEBRIDGE: Mr Kerkyasharian was suggesting in his evidence, and I do not quite see how it gels with his written submissions, that we retain the elements in section 20D (1) (a) and (b), which is threatening physical harm and inciting others to threaten physical harm, and get rid of the phrase "means which include", suggesting that that would make a more appropriate test.

Mr DOWD: I am sorry, I did not have the section in front of me when I heard his evidence. What was it that he suggested?

Mr DAVID SHOEBRIDGE: He was proposing that we get rid of the words "means which include" before subsection (a).

Mr DOWD: In legislative drafting, as most of you will realise, some definitions are not definitions. Some show that X shall include, and then it does a series of things which do not define it. The use of the word "means" here is I think clumsy.

Mr DAVID SHOEBRIDGE: It is meant to pick up actions or propriety of actions.

Mr DOWD: Yes. We need a generic term to cover this sort of thing, of which these are examples. As a matter of legal interpretation of this, you do not create a class. There is no sui generis by just creating the two and 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".

Mr DAVID SHOEBRIDGE: Yes, "conduct such as".

Mr DOWD: "Such as", but that is not a good way of drafting.

Mr DAVID SHOEBRIDGE: No, I am not suggesting that.

Mr DOWD: But I think "shall include" is, in effect, what this section means, but it may be that there is a better way of drafting it to widen the offence and not just limit it to these two, although they clearly cover most of the concerns.

Mr DAVID SHOEBRIDGE: Mr Kerkyasharian suggested that the inquiry should be into the impact on the subject, rather than the motivation—

Mr DOWD: Yes, and I am sorry I interrupted you. We cannot take the lowest common denominator test, such as the sensitivity of the most sensitive person in their society. It has to be an objective test, which is what happens with offensive behaviour.

Mr DAVID SHOEBRIDGE: But what about that concept, because currently it does not seem to be looking at the impact on the subject, it is more of an entirely separate objective test: was physical harm threatened, or was it vilification. It does not seem to be focusing on the subject. What do you think about that idea of focusing on the subject?

Mr DOWD: It is very difficult. Some people, for historical reasons—the Jewish community particularly—have had centuries of attacks on them and are therefore likely to be more sensitive about such attacks because they have occurred and still occur. I do not find it easy, however, to make it a subjective test because you have to cover the whole infinite variety of human beings, people with mental disorders, people that are sensitive about their mothers or other things in their society. If we do it too subjectively, it becomes a maze and there will be a number of prosecutions. I think the problem is that it exists and exists for particular people, particular religions and particular races, who have had to live with it. Some of us have made the mistake of being Anglo-Celtic and no-one ever attacks people on that count alone, therefore those of us that are Anglo-Celtic are not used to racial vilification. A Jew is, because they have had to live with it from their earliest days in the playground. So I understand that test, but I do not think we can go that far to solve that problem because I think section 20D, subject to the amendments I have proposed, covers most of those offences.

Mr DAVID SHOEBRIDGE: The last thing I would like to ask about is the concept of not just threatening physical harm towards somebody, but Mr Kerkyasharian also talked about where a reasonable person is placed in fear of physical harm, so there is an implied threat from overbearing, deeply offensive conduct where someone might shrink away from them and feel anxious or frightened in a public place. What

about if a reasonable person was placed in fear of their physical safety? Would that be one of the appropriate kinds of entrees into section 20D?

Mr DOWD: I think that warrants serious consideration. I keep referring to offensive behaviour, but the whole purpose of the law is that people should be able to go about their lives without serious offensive behaviour in the non-legislative sense. I think fear of action is something that people have to live with, but should not have to live with. Therefore I think extending it to that extent, rather than the actual fact of incitement, is desirable.

CHAIR: As there are no other questions, I thank you very much for being with us today. I have no doubt that your contribution will greatly assist us in our deliberations. Once again, thank you for being with us.

Mr DOWD: Mr Chairman, I thank you and the members of your Committee for the very courteous and effective way, if I may say, in which you are dealing with the matter. I confess, if I may presume to say, to being very impressed.

CHAIR: Thank you very much.

(The witness withdrew)

(Short adjournment)

KIRK STEWART McKENZIE, Chair, Human Rights Committee, Law Society of New South Wales, affirmed and examined:

CHAIR: I now welcome our next witness, Mr Kirk McKenzie, from the Law Society of New South Wales. Mr McKenzie, you are here representing the Law Society of New South Wales?

Mr McKENZIE: I am a practising solicitor and I am here representing the Law Society of New South Wales. I am the Chair of the Law Society's human rights committee.

CHAIR: If you should consider at any stage that certain evidence you wish to give, or documents you may wish to tender, should be heard or seen only the Committee, please indicate that to us, and we will give consideration to that.

Mr McKENZIE: Certainly.

CHAIR: If there are any questions taken on notice, because of our time frame, we would appreciate it if you could get a response to us within 14 days.

Mr McKENZIE: Certainly.

CHAIR: Would you like to make an opening short statement?

Mr McKENZIE: I would, if I have the opportunity, yes. Firstly, on behalf of the society, I thank the Committee for providing this opportunity to address you and to answer any questions. Our president, John Dobson, had a prior engagement this morning. He apologises for not being available, but has authorised me, as the chair of the committee that drafted the submission, to attend on the society's behalf. I would like to make several fairly brief points, in clarification and briefly in addition to the submission we have put to the inquiry.

Firstly, we put the view that the New South Wales Parliament has an obligation under international law, along with all Australian parliaments, to maintain an effective racial vilification offence arising from the provisions of Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination. The Federal Parliament has not complied with that obligation, and for that reason alone we submit that the New South Wales Parliament should maintain its offence in section 20D and, for the reasons set out in our submission, should amend it to make it more effective.

We understand that the lack of a Federal offence and the narrow terms of section 20D result from a desire to protect freedom of speech. It is important therefore to note that the preamble to Article 4 (a) requires "due regard" to be had to the rights set out in Article 5 of the convention including "The right to freedom of opinion and expression". It follows that Article 4 (a) itself implicitly recognises that those two rights, which are the right to be free of racial vilification and the right to free speech, are both to be respected, and that neither is an absolute right.

Secondly, we recommend to the Committee the speech of the former Chief Justice James Spigelman made to the Human Rights Commission on 10 December last year in which Mr Spigelman argued that legislation criminalising racial vilification is justified, but should not attempt to outlaw speech, which merely offends or insults. I have provided the secretariat with eight copies of that speech, which I commend to you as the views of someone who has great authority in this area, given that he has had a long association both with the media and with racial discrimination issues dating back for almost 50 years.

Thirdly, the United Nations committee, which monitors compliance with the racial discrimination convention entitled the Committee on the Elimination of Racial Discrimination, has made it clear on several occasions over the last 30 years that the implementation of a racial vilification offence under Article 4 (a) is a mandatory requirement for state parties to the convention under international law. Of course, Australia as a whole has been a state party to the convention since September 1975. The same committee's report, dated 27 August 2010, which is the last report dealing with Australia's compliance with the convention, repeated a prior request for "information on complaints, prosecution and sentencing regarding acts of racial hatred or incitement to racial hatred in States and Territories with legislation specifying such offences". That passage seems to suggest that for some time the committee had been concerned about whether the vilification offences that do exist in the Australian States are effective, and further suggests that Australia may have been reluctant to detail

for that committee the paucity of successful prosecutions across the nation. We submit that the appropriate amendment of section 20D may remedy these perceived shortcomings for New South Wales.

Finally, at the time when our submission was completed, our committee was unaware that in practice the Attorney General delegates to the Director of Public Prosecutions prosecution decisions in relation to section 20D. That is pleasing to note, but we still think the delegation should be formalised by removing from section 20D the Attorney General's role in prosecution decisions in favour of the Director of Public Prosecutions supervising police involvement and/or acting alone. Chair, those are our additional remarks. I can expand on them or the issues raised by our submission as the Committee requires.

CHAIR: Would it be fair to say that what you are proposing, changes to section 20D, involve not so much a lowering of the bar but more a clarification of what the bar is meant to be?

Mr DAVID SHOEBRIDGE: Everybody says that.

CHAIR: I am asking whether Mr McKenzie agrees.

Mr McKENZIE: I suspect we are lowering the bar somewhat because you will see from some of the other submissions made, including the submission of the Department of Public Prosecutions itself, that the view of the Department 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. Former Chief Justice Spiegelman makes the argument extremely well in his article. He distinguishes between conduct or words which intimidate or humiliate as against speech that merely offends or insults. There has been some controversy about the Federal section which prohibits racial hate speech. It is not a criminal sanction but it is a civil prohibition and that civil prohibition includes the words "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. From a strictly legal point of view of international law Chief Justice Spigelman says that the Federal prohibition, section 18C of the Racial Discrimination Act, goes a little too far. In that article he criticised the provisions of the now defunct Federal bill recently under discussion which extended that section to other protected attributes. Really 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.

CHAIR: We heard earlier in evidence the example of a Korean couple who were mistaken for Japanese and publically racially vilified. They were Korean therefore there could not be a prosecution initiated under section 20D because they were not of the community that was being vilified. Do you believe that the law should be amended to extend protection to persons presumed to be of a particular race to cover that situation?

Mr McKENZIE: That is not something that our committee considered but I have read one or two of the other submissions to the inquiry in that respect. My personal view is that I see no reason the law should not extend to the prevention of intimidation or humiliation of people under those circumstances.

CHAIR: As you would be aware a serious racial vilification under section 20D requires that it be conducted by a means that includes threatening physical harm to the person or property or inciting others to threaten such physical harm. Let us take an example from one of the submissions of a sign on property that said, "Jews make good lamp shades." What do we do about a situation like that?

Mr McKENZIE: I did see that example given. There is a difficulty with that in that unless you are aware of the source of that sign, I think a deplorable—

CHAIR: Let us say we are aware of the source of the sign and someone has attached their name to it; let us say that is the situation.

Mr McKENZIE: I am not sure we can assume that people know about it. That statement is somewhat equivocal. Someone who was unaware of what happened during World War Two might scratch their head as to the meaning of that sign. It seems on the face of it a very strange statement. You could, for example, interpret

that to mean that the harsh light is tempered by Jewish influence. It might even be a positive statement. I find that example somewhat difficult to deal with. The society's view is that racial vilification offences should be restricted to serious racial hate speech or serious dissemination of ideas of racial superiority.

CHAIR: There also needs to be the inclusion of a threat of physical harm or inciting others?

Mr McKENZIE: Certainly the society does not agree that should be the case. We think that is too restrictive. You can humiliate or intimidate someone, for example, without necessarily inflicting physical harm on them.

CHAIR: That is covered by lesser provisions. What I am saying is for the most serious racial vilification to be covered under section 20D there needs to be that additional ingredient of threatening physical harm or inciting others to do likewise.

Mr McKENZIE: We have recommended in our submission that the means part of that section be amended to include "by those means and other means"—I will look at the submission itself.

CHAIR: To include, for instance, justifying physical harm?

Mr McKENZIE: We suggested "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)", so we certainly do think that threats of physical harm should be covered by the offence.

The Hon. SARAH MITCHELL: I refer to paragraph 3.2 of your submission where you talk about bringing prosecutions. One of the comments the submission makes is that your committee is saying that basically there have not been any prosecutions because of the lack of clarity between the defined role of both the police and the DPP. You then go on to talk about how either one or both of those groups should have the discretion to initiate prosecution. Can you expand on that for the Committee and why you think that is necessary?

Mr McKENZIE: The difficulty is that traditionally the police are the investigators of crime and the police could have a role in this but for practical reasons they do not because currently a prosecution does not proceed unless the Attorney General consents to it and, secondly, because the offence is not under the Crimes Act police tend to have a copy of the Crimes Act in their back pocket and if it is not there, they sometimes do not know about it.

What we are saying is that as a matter of principle we submit that the Attorney General should not have a role in this. We are aware that the DPP practically makes the decision. We think that the DPP is the appropriate person to supervise these matters. The DPP, of course, conducts all prosecutions in the Supreme and District Courts. In the Local Court they do have an involvement in the more serious criminal offences but in general terms the Police Prosecuting Branch prosecutes those. The current offence is a summary offence and it is dealt with in the Local Court if it was ever to be dealt with.

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. I think there have been five royal commissions since the 1960s that have recommended abolition of the Police Prosecuting Branch. We are not suggesting that that is likely to be something that happens in the near distant future because every time the issue is raised there is usually some strong objections made by the police, who jealously guard their role in the Local Court but as a matter of principle we think that for the more serious offences in the Local Court the DPP is the appropriate organ to conduct prosecutions and the legal profession would submit that since the DPP was established in the 1980s the prosecution process has been enhanced.

The Hon. SCOT MacDONALD: Can I ask you about paragraph 3 of your submission where you submit that section 20D should be included in the Crimes Act. Evidence from Mr Dowd and other submissions say that even though there have not been any prosecutions, section 20D has an educational role and is a statement of our society's values. I still have trouble in understanding why, if you have criminal sanctions elsewhere—misdemeanours in those sorts of things—we should retain a section that has not had a prosecution?

Mr McKENZIE: There probably is some value in the current section because it is a statement to the public that serious racial vilification is something that is offensive and that there is a criminal sanction there, even though it might be difficult to prove currently. We say the section should be amended. We also think it should be included in the Crimes Act and dealt with according to the ordinary criminal processes because there are established processes as to how criminal offences are prosecuted and we see no reason why there should be a clunky procedure which effectively means that the Anti-Discrimination Board has to refer a matter to the Attorney General or the DPP.

The Hon. SCOT MacDONALD: And put it in the Crimes Act?

Mr McKENZIE: We do say it should be put in the Crimes Act, yes, but there is another aspect to that and that is that there is a fairly short time limit for summary offences of six months. I think one of the submissions refers to the fact that there have been occasions when potential offences have been referred to the DPP too late because the Anti-Discrimination Board is dealing with it and the DPP is dealing with it and it meant that it could not be prosecuted within that period. If you are going to maintain it as a summary offence, then you really have got to have a more efficient way of prosecuting it. The traditional way is that the police prosecute it and then the DPP comes in and supervises the prosecution to see whether or not it has really got legs, so to speak.

The Hon. SCOT MacDONALD: If it sat in the Crimes Act it would still have that educational value and still be a strong statement. Do you think you would see more successful actions?

Mr McKENZIE: If it was not amended I do not think you would, because it is so narrowly drafted at present. Perhaps Mr Dowd has told you earlier but, on the face of it, looking at that section from the point of view of a lawyer, it looks as though it has been drafted so that few, if any, prosecutions would take place. That is not necessarily criticism because, as you have said, its mere existence does have some benefit as a declaration that such conduct is to be deplored but there are limits to the effect of that as a declaratory statement. If it is not prosecuted then people think they can get away with this sort of behaviour, particularly if it becomes known that it is not being prosecuted.

The Hon. SHAOQUETT MOSELMANE: Thank you for coming in. On page 2 at paragraph 2 you state "At the outset, the Committee submits that section 20D should not be amended to catch conduct which is merely insulting or offensive" and you say that if it is, it is likely to encroach on free speech principles. Can you elaborate a little bit on that?

Mr McKENZIE: Yes. Free speech is not an absolute right because otherwise you would never have defamation laws, you would never have contempt of Parliament laws, you would never have contempt of court laws, you would not have censorship of newspapers in wartime or anything like that. But Australia has a long tradition of respecting freedom of speech and the question is: how do you balance the need not to have people inciting civil unrest through racial slurs with the need to maintain freedom of speech. It is a bit of a balancing act but I refer you to Mr Spigelman's article, which you might have an opportunity to read later. He refers to a book recently published by an Oxford professor, Professor Jeremy Waldron.

The whole book is designed to investigate to what extent racial vilification laws infringe on free speech and how you can confine it so that there is a proper balance there. As far as insulting or offending conduct is concerned, there is an element of subjectivity to that if you have got a criminal offence or even civil prohibition that prevents people from insulting or offending other people. There are many people in society, probably not including most politicians, who are offended or insulted easily.

The Hon. SHAOQUETT MOSELMANE: Before, Mr Kerkyasharian proposed—and I hope I am not getting it wrong—removing the element of knowledge, knowing. In your submission I think you are saying you would like "knowing" or "reckless" to be added. Are you in conflict with the president of the Anti-Discrimination Board?

Mr DAVID SHOEBRIDGE: I do not know that it is a fair question to ask if this witness is in conflict with another. Maybe ask him about why include "knowing" or "reckless".

The Hon. SHAOQUETT MOSELMANE: The fact is that the president said that he wants to remove "knowing"; you want to add "knowing" and "reckless". Why?

Mr McKENZIE: I think I can explain that. 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. All we want to do is make sure that that is the interpretation of section 20D, and I would refer to the Queensland section, which is very similarly drafted, which does include intentional recklessness.

However, I think—and correct me if I am wrong—there is another reference to "knowledge" in the definition of "public act". The problem with that is that it is very hard to know what people know–it is like you have to crawl inside their ear to determine what a person knows, unless they actually state what they know, which is pretty rare, and that is seen as one of the real stumbling blocks to a successful prosecution in that it is very, very hard to prove knowledge. So we did not actually deal with that particular aspect of the definition of "public act". But I think the other submissions that have been made, including by the board and the Community Relations Commission, to the effect that that word "knowledge" should be removed, I think that has a fair degree of force to it.

The Hon. SHAOQUETT MOSELMANE: The reason I asked that question is assuming the scenario where you have an Armenian putting out information about the fact that there was genocide against the Armenian people and a member of the Australian Turkish community takes offence. Where does the element of knowledge or knowing lead to an action being taken against the Armenian who is distributing the information without any knowledge or intent to cause racial vilification of the Turks, for example? I am not sure whether I put it right; I am not sure whether you got the gist of my point.

Mr McKENZIE: I am familiar with the tension between the two communities over that issue. It is not easy. Sometimes in this area there are some fine judgements to be made. The intention of the racial discrimination convention is to prevent 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". A statement that merely offends someone may not fall within those aims. This is an aim really of a fairly public nature: to prevent the dissemination of ideas of racial superiority or racial hatred. Of course, the ideas for racial vilification legislation arose out of the experiences of World War II, which of course, in part, was incited by the dissemination of ideas of racial superiority not only in Europe but in the Pacific. So it is a bit difficult to comment on a general question as to where you draw the line.

The Hon. SHAOQUETT MOSELMANE: But there is the potential for the Turkish Australian citizen to take action for feeling that they have been racially vilified by the Armenian in that regard.

Mr McKENZIE: Not at the moment there is not.

The Hon. SHAOQUETT MOSELMANE: Not at the moment, but with the amendments?

Mr McKENZIE: If the Parliament accepted the amendments that we are suggesting, if that person was only insulted or offended, this offence would not cover that behaviour. Insult 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.

The Hon. SHAOQUETT MOSELMANE: I note that on page 5 in your final point about relocation to the Crimes Act you recommend that it would be appropriate to remove section 20D from the Anti-Discrimination Act and put it into the Crimes Act. Would it not be better, in terms of highlighting this aspect in the Anti-Discrimination Act, if it remains within that Act rather than taking it into the Crimes Act?

Mr McKENZIE: It is probably not. We were following the recommendation of the Law Reform Commission in its 2000 report in that respect. The reason we recommend that is that it just means that it is likely to be dealt with as an ordinary criminal prosecution and therefore probably likely to be considered more than it is at present. Just to take another example: There are offences in other Acts that the police really do not see as their purview; for example, offending the electoral funding laws. In the 30 years since electoral funding laws have come into being there have been very few prosecutions, only in the last year or two, and part of the reason for that is that the police do not really regard themselves as having any role in those matters.

Mr DAVID SHOEBRIDGE: And politicians do not want them prosecuted.

Mr McKENZIE: You said that, Mr Shoebridge. So we are just saying that we think there may be an argument that it should be treated more like an ordinary criminal offence. However, I do not think that is a hugely important point. If an appropriately drafted offence was inserted in the Anti-Discrimination Act, and I think the former DPP Mr Cowdery suggested that the police be re-educated to consider these sorts of matters: rather than just charging people with offensive language or common assault or assaulting police, they might consider these sorts of offences and then it may not matter so much. We would not be concerned if it was retained in the Anti-Discrimination Act.

The Hon. PETER PRIMROSE: Going back to the conduct element in section 2.2, you make a recommendation to replace "public acts" with the term "public communications". Could you comment on that please?

Mr McKENZIE: We had a lengthy discussion about that and some of our recommendation in that case may be somewhat opaque. 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.

We suggested that rather than use the term "public act", it should refer to public communications simply because "public act" tends to suggest that we are not talking about speech, but really it is the communication that we see as the essence of it. We think that there might be some intention, if you are going to use public communication—I know that the word "public act" does include public communications at the moment in its definition, but we would prefer that the word "public communication" be used and that that be appropriately defined and not as narrowly defined as it is

The Hon. PETER PRIMROSE: That is a term that is already defined in sections of the Crimes Act. Is that the point that you are making in that paragraph underneath that section?

Mr McKENZIE: The word "public" has been defined in many areas of the law. For example, in corporate law if you are making a share offer you have to make an offer to the public and public has been defined to include a section of the public. A public communication does not have to be made to the whole of the public, it can be made to a broad section of the public, and it has generally been defined fairly widely. We see two problems with the use of the term "public act". We just think it does not give the right impression of what you are really talking about, which is a communication. Secondly, we do think, although I do not think we have said it in the submission, that there is some force in the criticism of the use of the word "knowledge" in that definition of public act.

Mr DAVID SHOEBRIDGE: The issue about replacing the test of incite in 20D (1), instead of having "a person shall not, by a public act, incite hatred", et cetera, you are suggesting it be replaced by "promote or express". Is that because of the difficulty in proving a third party was actually incited?

Mr McKENZIE: Partly. The difficulty with using the word "incite" is that it is not clear as to whether you have to prove that the speaker is the inciter and that the person to whom the communication was directed was incited by that. We suggest if you use the words "promote or express" that is probably a better way. It is more plain English and a better way of expressing it and it also removes that uncertainty.

Mr DAVID SHOEBRIDGE: For me it is very complicated to work out how you could be inciting. You would have to prove incitement as well as, if you look at 20D (1) (a), threatening physical harm. The person could be threatening physical harm themselves but that may not be enough unless there is some incitement as well.

Mr McKENZIE: Yes, I think that is a problem.

Mr DAVID SHOEBRIDGE: But removing the limitation about threatening physical harm or putting someone in fear of physical harm to their property and the like and just having a test of inciting or promoting racial hatred leaves it a very open law. I was thinking of examples. There have been many examples over the past few decades where there have been terrible conflicts around the world which often have a direct ethnic

element to them, whether it is the Balkans, the Middle East, Burma, Tibet, or parts of Africa. You often find one community feeling very much as though they were victimised by another community.

We might have refugees come here whose family has been killed by a military which is controlled by one ethnic group. They may then come out and express very strong statements about that ethnic group, such as, "That ethnic group are all bloody murderers." That could be seen to be expressing racial hatred. If that were the beginning and the end of the test it might be the subject of a criminal prosecution. I was wondering what you think about that.

Mr McKENZIE: I think the section as it is suggests inciting hatred towards, or serious contempt for, or severe ridicule of.

Mr DAVID SHOEBRIDGE: "...by means which include".

Mr McKENZIE: "...by means which include". The difficulty is this: There has to be some restriction on this sort of language because it could lead to very serious conflict. It could lead to civil unrest. It could lead to mass violence. The difficulty is drawing the line. The Law Society is not opposed to this offence being restricted to serious matters. We are concerned that spats between individuals or criticism of other people should not fall within this offence necessarily, but it is a question of line drawing.

Mr DAVID SHOEBRIDGE: I am putting to you that line. You have got a distraught mother whose children were all killed by an army controlled by a particular ethnic group. She is now in Australia and deeply distraught and she says, "You're all murderous bastards." Is that where we have a criminal prosecution?

Mr McKENZIE: That would not seem necessarily to have a racial element to it.

Mr DAVID SHOEBRIDGE: "You are all"—and then insert ethnic group in here—"murderous bastards".

Mr McKENZIE: A statement like that in those circumstances, people say things they do not mean and in a cooler situation it may well be that a court looking at that would say that there is not the requisite intention or requisite degree of recklessness in relation to such an offence. These matters are not easy and the Law Society is not suggesting that the offence be watered down to the extent that husbands and wives start accusing each other in family law proceedings of racial vilification.

Mr DAVID SHOEBRIDGE: You have got the public issue, which is separate.

Mr McKENZIE: It has to be public, it has to be serious and of course you do not necessarily have to have a lengthy period of years as a maximum custodial penalty. We did not address this but, for example, the Jewish Board of Deputies recommends a two-year maximum penalty, which is the same as for common assault. There is a view that the wider criminal law does deal with incitement to violence in any event. The Director of Public Prosecutions submission says the need for a racial vilification offence is really because there are not many offences of a public nature and that is the reason why we need this offence. I am not sure that answers your question. It is not easy to draw a line with these matters, but we would nevertheless say that merely offensive or insulting acts or words are not enough or should not be enough to ground an offence like this.

Mr DAVID SHOEBRIDGE: Saying merely insulting or offensive but then including racial hatred as a sort of standalone element, I am not saying it is wrong but it makes it a very subjective kind of element. Currently there is clear indication about threatening physical harm or inciting others to cause to threaten physical harm. That kind of grounds or limits it, although I know with language which is inclusive arguably, but it sets a sort of class of conduct there. Would you suggest removing that entirely or including those as two descriptive elements but with a much broader statement?

Mr McKENZIE: If I may refer to the way in which Mr Spigelman deals with it in his speech. He draws a distinction between insulting or offensive language and intimidating or humiliating language, but he also refers to the other conduct which could ground a racial hate prosecution. He says:

> When rights conflict, drawing the line too far in favour of one degrades the other right. Words such as "offend" and "insult" impinge on freedom of speech in a way that words such as "humiliate", "denigrate", "intimidate", "incite hostility" or "hatred" or "contempt" do not. To go beyond the language of the latter character, in my opinion, goes too far.

It is not easy to draw the line here, but the racial discrimination prevention is really designed to restrict actions and speech based on views of racial superiority or racial hatred in a wider public sense.

Mr DAVID SHOEBRIDGE: What about the concept of changing the focus from the intention or recklessness of the person doing the conduct to the impact on the person who is the subject of the conduct? A number of submissions have suggested that that is the way the law should be remodelled. What do you think of that?

Mr McKENZIE: I am not sure that that is really appropriate for a criminal offence because it is the mind of the actor that—

Mr DAVID SHOEBRIDGE: The mens rea.

Mr McKENZIE: The mens rea, that strange Latin term that lawyers use. The mental element of an offence is, generally speaking, that the person who is to be convicted has to be proven to have intended or at least be reckless to the elements of the offence. That does not mean that you cannot have a prohibition section like, for example, section 20C or section 18C of the Racial Discrimination Act, which is simply a prohibition section.

Mr DAVID SHOEBRIDGE: So you think you have to look at this as a package; you have the civil elements and the prohibition in the civil elements, but the criminal elements should have the classic elements of intent or recklessness?

Mr McKENZIE: Yes.

CHAIR: Thank you, Mr McKenzie, for coming along today and giving us your valuable contribution, and also thanks to the Law Society for its written submission. I am quite sure that both are going to be of great importance to us in our deliberations.

Mr McKENZIE: Thank you for the opportunity.

(The witness withdrew)

WAYNE ZHENG, General Executive, New South Wales Society of Labor Lawyers, and

CATHERINE MATHEWS, General Executive, New South Wales Society of Labor Lawyers, affirmed and examined:

CHAIR: I welcome you both as representing the New South Wales Society of Labor Lawyers. Would you state your occupations?

Mr ZHENG: I am a current student at Macquarie University as well as the editor of Macquarie Law Journal.

Ms MATHEWS: I am a solicitor admitted in the Supreme Court of New South Wales.

CHAIR: If you consider at any stage that there is certain evidence that you wish to give, or documents that you may wish to tender, that should only be heard by this Committee, would you please indicate that fact and we will consider that request. If you receive any questions on notice, we would ask that you endeavour to get a response to us within 14 days because of our time restraints. Do either of you wish to make an opening statement?

Ms MATHEWS: We could make a few brief remarks, not taking five minutes, but a few minutes.

CHAIR: By all means.

Ms MATHEWS: For the Committee's assistance, we feel that we will not take the full time allocated to us, but we are happy to try to assist, if that may be the case. The few remarks are only a little bit of form and also to try to assist as best we can. From my personal point of view, with respect, I would like to adopt the Parliament's standing order 39, including the prayer that the Parliament's deliberations prosper the true welfare of Australia and the people of New South Wales. I would also like to acknowledge the traditional owners, the Gadigal people of the Eora nation. I would like to pay my respect to the Elders, past and present, of the Eora nation and extend that respect to other Indigenous Australians who are present.

We very much commend the Parliament for convening the inquiry, and thank the Committee for the opportunity to appear today. We have our written submissions dated 22 March, which will be with the Committee, and we thank the committee staff for assisting us in extending the time in which those were made available. If the Committee may be assisted by further information that we might be able to provide, or any other submission, we would be happy to try to assist as best we can. We have a role, in some respects, as the Society of New South Wales Labor Lawyers, fairly recently reconvened although with a longer history, to try to aim through scholarship and advocacy to effect positive and equitable change, and substantive and procedural law, in the administration of justice for the legal profession, provision of legal services and legal aid, and legal education, particularly in New South Wales but with a broader aspect.

In summary, from our submission, with two qualifications, we would recommend no amendment to section 20 of the Anti-Discrimination Act 1977. Those two qualifications are that we would recommend that the word "serious" be removed from the heading of section 20D and we would recommend a review of penalties that might be available for any breach of section 20D, that most recent amendment being to penalties enacted back in 1995. Outside of section 20D, there are other suggestions that we do make in our submissions. We would recommend, if possible, that the 28-day time limit imposed in section 91 (3) of the Act should be abolished or able to be extended from time to time as required. We would also recommend, as set out in our submission, that section 20D be examined within the overall framework of racial vilification in anti-racial discrimination law both in New South Wales and in Australia, and as an aside to that that there be sufficient funding and perhaps support for organisations such as the Anti-Discrimination Board in New South Wales to deal with the aspects of racial vilification that they are required to deal with.

It might be further said that we feel that the Committee has probably heard significant evidence from a range of people, more qualified than we are and perhaps with more experience, but we would like perhaps to speak on aspects that may not have been fully considered, if that may assist the Committee. While we might be able to talk about aspects of intention and criminal law, and so forth, perhaps we might speak outside of the strict considerations of section 20D to look at other things that might be more practical in the way that section 20D and a criminal aspect of racial vilification might be addressed. For example, although it is not proposed in

our submission, the limitation that is apparent from section 88 of the Act as to the person who may lay a complaint is seen in some submissions to be restrictive. It is suggested in some submissions that a person who may be entitled to lay a complaint should be seen as a person not necessarily of a group, but is perceived to be a member of that group.

One possibility in fact is that the basis of laying a complaint might be distinguished to a prosecution under section 20D and the section 88 considerations may not necessarily be a restriction. However, I would suggest that the basis for laying a complaint, which may lead all the way through the framework towards section 20D, might be considered so there ought be no restriction upon that at all. As an individual, I may be quite offended by somebody who is racially vilified, even if I am not a member of any particular group. Additionally, on another aspect, a person who is a member of a particular group may feel that they are not in a position to lay a complaint for fear of themselves being concerned. An example would be people from the Tamil community who feel that they would not necessarily be able to lay a complaint with the Anti Discrimination Board if they themselves are going to be the subject of further investigation or review by persons both in Australia and back in Sri Lanka as to their safety and their welfare.

It may be that if we consider that racial vilification to be such an extraordinary awful aspect in our society, and I think that that would be very much accepted, then there should be no restriction on who may lay a complaint. It will then be a subject, for example, for the Anti Discrimination Board to consider what aspect of it should be addressed, not then from a subjective point of view but an aspect to do with a more objective point of view. Other perhaps usual aspects to look at in a procedural sense might be considerations, if we can use this example, from the law in New South Wales dealt with in the criminal law but also considered to be civil proceedings, which are dealt with for domestic violence and personal violence orders. One regime that is adopted there is that people are entitled to accept the terms of an order, sometimes by an order of the court and sometimes by an undertaking to the court, when no admission is made. That may be a practical aspect where some aspects of racial vilification are seen as one-off events.

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. In that regard perhaps, and as seen in our submission, we would like to see additional research addressed to try to see whether this Committee might be assisted by more information about the effectiveness per se of section 20. It may be now that I will leave it to Wayne to speak further or deal with any questions that might be raised by the Committee.

Mr ZHENG: I have nothing to add to the opening statement.

CHAIR: I address this question to either of you. Are there any other Australian or international jurisdictions that deal with the issues of serious racial vilification that are more effective than New South Wales? If so, which jurisdictions would you point to in this regard?

Mr ZHENG: There are a number of submissions from a number of other experts on that point, and they invariably point to the United Kingdom and to Canada. I am not very well aware of the United Kingdom experience, but from reading the literature by Associate Professor Luke McNamara from the University of Wollongong it seems that, similar to the Australian experience, in Canada even though their threshold is significantly lower than in New South Wales, there are not many prosecutions undertaken pursuant to an equivalent provision in Canada either. There could be a variety of reasons for that, but one of the reasons noted was that, similar to Australia, the United Kingdom and Canada, before a prosecution can be undertaken it requires a referral by the Attorney General. Often in such cases, there is a variety of other concerns associated with high profile and serious racial vilification acts that obviously would cause significant concerns. Part of the concern was by prosecuting them, through a specific anti-vilification law, that might actually give them a bigger forum and inflame the issue rather than actually address it.

Ms MATHEWS: If I might add this: The Canada experience has with it an underpinning area of law that is not as well reflected in New South Wales, which are considerations that have to do both with what the Canadians might similarly refer to as freedom of speech from the United States but also regimes to do with human rights. It means that therefore there are not immediate parallels between the Canadian experience and New South Wales. Similarly with the United Kingdom experience, the underlying regime of human rights law is not necessarily available in New South Wales. That does not mean that we are not more effective as a provision; it just means that the direct parallel, as an example, is difficult necessarily to make.

If we look at the Western Australia provision, there have been quite proper prosecutions in Western Australia, and I think the word "successful" might be applied to that. A publication made on YouTube was the subject of a prosecution. Mr O'Connell was then entitled to, and did bring, an appeal on that prosecution and that appeal was unsuccessful. There is another matter in Western Australia where, on appeal from a decision from a Magistrates Court, the prosecution raised that the magistrate had not applied the criminal provisions correctly. The Court of Appeal upheld that decision and reverted the matter to the Magistrates Court to be heard again, the magistrate having originally dismissed the offence. There are procedural aspects that are difficult with any prosecution that come to light in jurisdictions where, as we have in Western Australia, there are criminal provisions. Again, though, it would be difficult to assess the effectiveness of those.

It might be argued that the similar facts circumstances in those two Western Australia decisions might be dealt with in New South Wales by laws to do with publication on telecommunications. Part of the consideration that this Committee may have is looking at how communications are made—sometimes technologically, sometimes orally and sometimes there are other aspects. It is very difficult then to ask this particular racial vilification provision to try to address continually changed modes of telecommunications, but one suggestion is that offences under telecommunications might be dealt with under telecommunications legislation as offensive material rather than having to amend, as technology changes, provisions which are quite fundamental, as I feel that section 20D is.

I am concerned, however, that in terms of the overall framework in Australia, there have been slow steps taken at the Federal level to deal with racial vilification and announcements made—and it does matter to me whether they are either political party—that they would consider abolishing Federal racial vilification offences. Whether that is under pressures from Federal speech applications or otherwise, that I think would be a great difficulty to be addressed. It may be that our submission might be considered to be a submission that says, "Please consider not amending section 20D" or "Please consider not amending section 20D yet, while that overall framework is being looked at." We do not want to have a gap in the legislation but the educative value of section 20D I feel should stand and, in the meantime, some of those procedural aspects that seem to be of concern might otherwise be addressed.

The Hon. SCOT MacDONALD: Thank you for that. Actually, you just touched on what I was going to raise. I think it is your point 25, which states, " … may bring unintended and undesirable repercussion, such as giving [somebody] a forum in which to express their views". I guess I am thinking about Bolt or Jones, the original issue, that was out there in the public domain. Then a prosecution was brought under the Federal and New South Wales provisions. Then we had another year, or 18 months or two years and I think in Jones' case it might have been three years or so, giving the issue oxygen and it was thrown around. We might have the best of intentions but are we giving people platforms that are greater than the original issue?

Mr ZHENG: Not necessarily, I believe, because any litigation has a public aspect. It is a public act, in a sense. It is in the public sphere. There is nothing much we can hide from media scrutiny these days, but I think in essence having proceedings against racial vilification outweighs some of the downside.

Ms MATHEWS: I would like to add that it is interesting that both of those matters are publications made by people who are actually members of the media. As I understand from the annual reports of the New South Wales Anti-Discrimination Board the number of complaints made and inquiries about racial vilification have continued to drop in New South Wales. One explanation in part over recent years is that complaints about the media have now gone into the Federal regime. I think it is a coincidence that the two publishers were members of the media. They had an easier platform but their views were clearly something of concern. The legal system then fosters—as a solicitor can tell you that we will do this all day every day—an opportunity to talk to the tribunal over and over again about the meaning of a particular word and what a piece of legislation means so that the outcome can never be certain. That is a concern.

It seems in some respects as an educative provision section 20D stands as a standard for which we would like to aspire. Mr Shoebridge raised during Mr McKenzie's evidence an example of a person who may say, "I would say all members of that community are murderers"; and that would be a concern. As a society we would be very concerned with that statement—and quite rightly—but I think as a society we would also not prosecute in circumstances where a mother had lost her child. The example is very good but I think we would look at it in that overall framework. That mother would be a person trying to express their views in a great period of sorrow in their lives also having some racial discrimination embedded in that statement.

It is a framework that is difficult but section 20D provides a standard to which we can recognise that some of those things are inappropriate. What we might be dealing with is difficulties where there are different groups of people who are making the publications. A mother is a very different person to Mr Jones and Mr Bolt and therefore it is difficult to say that one law, no doubt applying to everyone, will be applied in the same way, which is notwithstanding the cost involved.

The Hon. SHAOQUETT MOSELMANE: I declare that I am a member of the New South Wales Society of Labor Lawyers. In your submission in the introduction you make reference to funding of the Anti-Discrimination Board. The Committee has not heard witnesses speak about a shortage of funding for the Anti-Discrimination Board at all. Why do you raise that?

Ms MATHEWS: I think that there would be financial pressures, although there is nothing in the most recent annual report—which I physically had to go and get because it is not on their website—of 2011-12. I question the capacity of the board to look at things within the short timeframe, the 28 days that is required in the legislation with investigations that may involve aspects that should be coordinated with the police and the need for some training of police to deal with particular aspects of racial vilification not presently dealt with by the Anti-Discrimination Board [ADB].

The Anti-Discrimination Board does seem to have a significant educative role and they are to be applauded for that. I anticipate the investigation provision is a difficulty for them to deal with within the confines of their budget. If it is relevant that recent annual reports show that they are outside of their budget but that may be an overall perspective rather than a particular one. It may be that you might like to see if Mr Kerkyasharian is able to assist the Committee with that. That would be a concern: that there is a role to be played in the investigation of these complaints and that would take significant funding.

In terms of having the police investigate matters, there is no doubt that would be of valid assistance to the Anti-Discrimination Board and the Department of Public Prosecutions. I think you will find, for example, there would be concerns that the police would need to receive considerable training to assist them with understanding some aspects of racial vilification. There have been concerns raised to the Anti-Discrimination Board, shown in its annual reports and elsewhere, by particular members of society that the police have raised racial issues against them as a group. This, for example, would be best expressed by the Aboriginal and Torres Strait Islander groups.

In Victoria during the last month in a criminal prosecution dealt with by the Victorian police it was said that they were racially profiling representatives from the Sudanese community. It has been acknowledged that there has to be greater understanding by the Victorian police when addressing those concerns. There have been recent newspaper articles about that. Funding seems to be a matter that needs to be addressed not only as to investigation but also education for the investigators themselves. My concern would be that whatever is being published is going to be investigated by the security members of the community without anyone knowing what they are doing: None of it being passed on to the Anti-Discrimination Board, the police or the Department of Public Prosecutions.

The Hon. SHAOQUETT MOSELMANE: On page 6 of your submission, with regard to the effectiveness of section 20D, you refer to the symbolic aspects and you say symbolism is an important part of that section. Later in your submission you make reference to the 642 racial vilification complaints received by the Anti-Discrimination Board between 1989 and 1997 and in the same period it received 2,236 inquiries about racial vilification. For the public it seems it is more than just symbolic issue, they want something to act on and they want this section to give them some power to level claims against people perpetrating racial vilification. What do you say to that?

Mr ZHENG: Just to understand the question: You are right in saying that it is something that is more than a symbolic provision but at the same time we cannot under estimate the importance of section 36C, which is the civil provision. Section 20D is a criminal provision and therefore would necessarily have a higher threshold than a similar civil provision. Some of the complaints that come through to the Anti-Discrimination Board may not reach a level of seriousness that warrants prosecution under section 20D so they might be dealt with under section 36C instead, which might be appropriate in some circumstances.

Ms MATHEWS: This may not have been addressed and it may not be a valid consideration for the Committee but 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.

Looking at it from the other side that is a matter where a conviction would be something that would be wanted by society. There is a symbolic provision in allowing that racial vilification is completely unlawful but a publication made, whether considered or off-the-cuff, that ends in a conviction for racial vilification for that person and their family would be a serious matter for a long period of time. Ironically, it would be a matter that if they were discriminated against in their employment on the basis of a criminal conviction the Anti-Discrimination Board has no jurisdiction to deal with it because they do not deal with criminal convictions.

In that aspect of the further outcome of section 20D its symbolic provision is very important but its impacts and its effectiveness should be looked at in society generally but also perhaps for particular cases by the complainants and the person against whom it is dealt with. Its symbolic benefit comes through being part of civil provisions that might apply initially and civil provisions can be as expensive and as difficult to deal with and therefore have that symbolic sanction as well.

The Hon. PETER PRIMROSE: We are running out of time so I ask you to take this question on notice. First, I would like to disclose that as a non-lawyer I am not a member of the New South Wales Society of Labor Lawyers but I do enjoy reading many aspects of the *Macquarie Law Journal*, which I find very accessible and I say thank you to you, Mr Zheng, for your work. As a non-lawyer I find it very useful as a legislator.

Mr ZHENG: Thank you.

The Hon. PETER PRIMROSE: The question I would like you to take on notice is that the Jewish Board of Deputies is in favour of significantly amending section 20D to include a provision concerning conduct intended to harass on the grounds of race. It is suggested that the definition of "harass" include behaviours that threaten, intimidate or seriously and substantially abuse. Can you please detail what issues, if any, may transpire should such a provision be included in section 20D? I ask you to take that question on notice and have a look at their submission. Your comments would be valuable.

Ms MATHEWS: We would be assisted with that. We can have a look at, for example, in Western Australia the recommendations of the Law Reform Commission and what was subsequently enacted in the Parliament and also the review five years after the New South Wales legislation was passed, which gives some comments on that. We will refer back to you with a written submission.

Mr DAVID SHOEBRIDGE: To either Ms Mathews or Mr Zheng, is part of the reason why you feel relative comfort with section 20D in its current form because underneath it is section 20C, which has a lower test and allows for civil claims to be made? Is that how I understand at least one part of your submission?

Mr ZHENG: I do not think that tells the full story. I think part of our submission's point is that we cannot view section 20D in isolation; it is part of a broader anti-racial discrimination framework. At the same time we need to look at the Federal approach, as Ms Mathews said, and at the same time we need to look at section 20C and also other aspects of criminal law. In our submission— I cannot recall exactly which provision of the Crimes Act but there are provisions within the Crimes Act that also deal with offences that would be caught under section 20D. At the same time we also made the point that racial intent will be considered as an aggravating factor in determining sentencing, so we do not say that because of section 30C we do not think we need a strong section 36D but we believe that the whole framework needs to be assessed in its totality.

Mr DAVID SHOEBRIDGE: What about the consequences where you are not necessarily threatening physical harm but you have some racial vilification, deep racial insults; you are not necessarily threatening physical harm or necessarily inciting someone else to threaten physical harm but let us say you have a loud, angry man standing over a young woman on a bus yelling racially insulting language at her, not physically threatening her, but that woman would likely feel threatened and most reasonable people would believe that they would feel threatened. What about including as part of one of the elements of a criminal test where you place someone in reasonable fear of their own physical safety?

Ms MATHEWS: Sometimes it might be referred to as an apprehension, whether violence or otherwise.

Mr DAVID SHOEBRIDGE: Yes, that is right, a reasonable apprehension.

Ms MATHEWS: That is right.

Mr DAVID SHOEBRIDGE: They are not necessarily saying, "I am going to hit you or I am going to physically beat you" but standing over someone, screaming at them or abusing them racially, even though none of the language conveys a threat but the fact of how it is happening puts in that person a reasonable fear?

Ms MATHEWS: It is certainly within contemplation that this is not acceptable behaviour but trying to modify behaviour by a criminal provision in the Anti-Discrimination Act or even civil provisions is sometimes a difficult aspect.

Mr DAVID SHOEBRIDGE: Placing a reasonable person in fear of their own physical safety?

Ms MATHEWS: I accept that. So therefore you would look necessarily at the crimes legislation, particularly the Crimes Act where there is an apprehension of concern about physical violence. If that expression was also racially motivated, then on sentencing, particularly to do with any other offence, those aspects of racial motivation would be brought in but to amend, for example, section 20 to try to address these behavioural aspects brings with it a framework that does not assist with the educative provision or the symbolic provision in some respects for which the legislation was initially enacted.

Mr DAVID SHOEBRIDGE: Why do you say that because in many ways there are more educative and symbolic elements of it if it is in section 20D because it goes through the Anti-Discrimination Board, it goes through the conciliation provisions potentially of the Anti-Discrimination Board, it becomes a part of the working of the principal body concerned about racial discrimination; in many ways it has a much more educative effect if it goes through section 20D than if it just goes off to the police, does it not?

Ms MATHEWS: If we are looking at educative provisions, perhaps then we need to look at educative provisions for society more generally and educative provisions for the persons the subject of the publication and the abuse. Therefore there is a multiple aspect and sometimes in criminal law it might be looked at as what they call general deterrence and specific deterrence and trying to address both of those fields is an important aspect of any sanction. It is an important educative role to take. It is an educative role that would take by investigation even if no section 20C provision was found. It was an educative role that would take by investigation by the police so that it has that specific educative assistance there but the general educative value might be seen to come from not tolerating behaviour of that nature, both in the anti-discrimination legislation and within the general law.

Mr DAVID SHOEBRIDGE: People have a right, surely, to be in a public place and not by reason of their race or perceived race or ethnicity be placed in fear of their safety. What is the argument against expanding section 20D to make that kind of action the subject of a criminal sanction?

Ms MATHEWS: I would not necessarily argue that it not be extended but I would suggest that it is covered by the general criminal law in any event and therefore it is not the case that there has to be a threshold established that this is a racially motivated basis for an offence. It is an offence, full stop, to be so intimating to a person.

Mr DAVID SHOEBRIDGE: Could I ask you to take on notice the question about incitement? A number of submissions and witnesses say inciting a third party to do something is one of the major flaws in this legislation. Could you have a look at that and consider what the society's position is on that element?

Ms MATHEWS: Certainly, and again I think that has been raised by the Western Australian Law Reform Commission and was not enacted in Western Australia but we will happily provide something in writing to the Committee on that. Again I am sorry for the time this has taken up but these are, as you have raised, very important issues, and we will try and address them as we can.

CHAIR: Thank you for being with us today, for giving evidence and for your thoughtful written submission. We will certainly take these into account; they will assist us in our deliberations. Once again thank you for coming along. There is least one question taken on notice and there may be others. If you can try to get an answer back to us in 14 days that would be deeply appreciated.

Ms MATHEWS: Thank you, Chair. Perhaps I should have said earlier—and I apologise that this is now coming at the end—not necessarily for the NSW Society of Labor Lawyers but through non-government organisations [NGO] generally, there may be aspects of the matter that could be dealt with also by the Commonwealth Parliament and we will probably try and raise it as part of the NGO organisation consultation with the Commonwealth Parliament. We would commend the New South Wales Parliament to look at a similar consultation process which is comparable to what this Committee is doing now. It seems that both the NGO community and the legal practitioners might be able to assist to see where these matters might be dealt with.

CHAIR: Thank you. We will note those comments too.

(The witnesses withdrew)

JOSHUA MARK DALE, Solicitor, Chair, Human Rights Sub-Committee, Australian Lawyers Alliance, sworn and examined:

ANDREW JOHN STONE, Barrister, New South Wales Director, Australian Lawyers Alliance, affirmed and examined:

CHAIR: I welcome you both. Thank you for being with us today and thank you for your written submission. If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact to us and we will consider that request. Any questions you take on notice could you endeavour to get an answer back to us within 14 days? Would you like to make an opening statement?

Mr DALE: Thank you on behalf of the Australian Lawyers Alliance for having us here today. The relevance of this inquiry I think arises specifically from recent events on a public bus but also from other events in the past since 2005 and also public comments made by members of the media. Racial vilification largely derives, as I am sure would have been presented and has been presented in other submissions, in international law and Australia's obligations under the convention on the elimination of all forms of racism. What I do not think has been presented to the Committee is that there is a reservation that has been put forward by Australia particularly on Article 4A, which creates the obligation to specifically outlaw as a crime racial vilification. In saying that though I think there is a general obligation to uphold the words of the convention itself.

In our recommendations we put forward some very brief recommendations and they are designed to be broad, but we welcome questions outside of that and, in particular, where we recommend a greater punishment or an increase in the severity of punishment for the offence. I think what would flow on from that is a more detailed legislative regime dealing with different levels of the severity of the offence itself, whether it is circumstances where actual physical assault arises or the threat of physical assault or inciting or creating that kind of belief amongst a group or an individual.

CHAIR: I want to give you an example that was given to us earlier today. A Korean couple were very seriously racially vilified on the basis that they were thought to be Japanese. They still suffered racial vilification nevertheless, yet the Act, as it is presently written, does not cover them. What do we do about a situation like that?

Mr DALE: 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.

CHAIR: What is your view of matters being referred directly to the DPP rather than going to the Attorney General?

Mr DALE: I think the difficulty here, and particularly with having the Attorney General involved, is that it threatens to blur the lines between the separation of powers, and in circumstances where it is quite difficult to investigate these matters due to time limitations—whether or not it be a complaint lodged within 28 days—the requirement to go to the Attorney General takes up time for that complaint to take place and I think the appropriate form of investigation should be more proactive in that the legal tests are established immediately by the DPP and even at police level as well.

An earlier submission was that training be provided to police to identify these types of things. I will give an example: where a police officer would be presented with a common assault and evidence might arise that that assault was committed as a result of someone's race, police should be able to action that from that level and identify that there may be a more severe involvement here of racial vilification and it should be taken into account and forwarded to the DPP for guidance and investigation.

Mr STONE: If I can shortly add to that that we have come a long way in this State in the last 30 years in creating and protecting the independence of the DPP in removing the Attorney General from the prosecution process and, in the very simplest terms, if it is a crime it is a crime and the Attorney General should not be

involved. It is just not the role of the Attorney General to make prosecutorial decisions. We have removed that from every other aspect of prosecutions and this should not stand apart.

Mr DAVID SHOEBRIDGE: It might have been a political safeguard when this law was first brought in; people were more sensitive about the concept of prosecution on the basis of race and that might have been a political safeguard at the time.

Mr STONE: But, 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.

The Hon. SARAH MITCHELL: I want to ask you about community expectations. Obviously that is one of our terms of reference, and it has been brought up by a number of witnesses both today and in the written submissions. In your submission you talk about how you think the community at large would be surprised to learn that there have not been any prosecutions under section 20D, and I agree with you in that respect. Do you think that that in itself perhaps has an influence on community expectation that maybe they are not being met and that is something the Committee should take into account quite seriously?

Mr DALE: I think so, and this is where our recommendation comes for the punishment where an act of serious racial vilification is committed. In circumstances I think it would be generally accepted by society as a whole that someone who commits an assault, whether or not it be a bar assault or something like that over an altercation there, compared with someone who actively goes out and commits an assault, finding someone because of their race, I think generally as a society we can look at that and think that that is a more severe instance where someone is going out blindly seeking someone out for that, and I think it should be represented in the punishment specifically. In circumstances where there has not been a prosecution I think it comes down to the actual wording of the legislation that prevents that from happening.

The Hon. SARAH MITCHELL: Do you think it is, not problematic but we have certainly received evidence from other submissions showing that across both Australian and international jurisdictions there have not been a lot of prosecutions under racial vilification law, and you spoke about the human rights obligations earlier. How do you think Australian, or more specifically New South Wales, circumstances play into the international role?

Mr DALE: I think the difficulty here is that the framework in New South Wales is quite different to other international frameworks. For example, in the UK they have a Human Rights Act and they also have the ability to have a final act of appeal to the European Court of Human Rights. Comparatively to those sorts of jurisdictions it is quite difficult to compare the frameworks they have with what we have here. I think generally from a human rights perspective and international law perspective we need to take on that as obviously the conventions that we are signatory to, and that is that we have a serious obligation to outlaw serious racial vilification in New South Wales. In saying that, I think it also needs to be an effective outlaw of serious racial vilification.

Mr STONE: We really are speaking to both ends. That is, make the bottom end work in terms of it has got to be functional to prosecute for what I will call the modest offences. We say that at the extreme if individuals, whether from a pulpit or from behind a microphone or now using social media, can create, for those with longer memories, a Watts or a Brixton or, in more modern parlance, a Cronulla, where those things can be trigged by individuals or groups of individuals through any of those forums—at the serious end if you are responsible for widespread mayhem and injury that is a very serious offence and there are other ways in which it can be dealt with, but we are saying do not backdoor it. Have as front and centre of the prosecutorial process the racial element to it.

The Hon. SCOT MacDONALD: You have touched on something here that I puzzle over. You say that it is difficult to assert that section 20D realistically reduces the prevalence of racial vilification, yet we heard this morning that it has value because it is educational and it is a statement and things like that. As a non-lawyer, I puzzle that you have got something sitting on the statute that is not effective. It seems to me that it must have some sort of negative consequence. Would we be better off putting it into the Crimes Act? Would you be more likely to see success? Would it have more of a deterrent value?

Mr DALE: I certainly think that would be the appropriate course to take. We are dealing with a situation here where serious racial vilification we are deeming it a crime but placing it in a completely different Act. The Crimes Act I think 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.

The Hon. SCOT MacDONALD: Can I take you back to an earlier part of your submission then. Would that more likely see scarce public resources, as I think you call them, being used? Are you more likely to get the police applying themselves and putting prosecution people and resources into it? I guess that is a pretty general question.

Mr DALE: 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.

Mr STONE: To expand a little upon your original question in relation to deterrence, 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.

CHAIR: You mentioned the teeth if we put this into the Crimes Act. Just elaborate on what those teeth are.

Mr DALE: Again I think that falls within increasing the punishment because within the Crimes Act we already have sections that deal with similar sort of punishments with crimes that have a lower burden of proof.

CHAIR: We can still increase the penalties without moving it into the Crimes Act.

Mr DALE: Certainly, but in the Crimes Act I think we have the benefit of specifically identifying it as a crime, whereas in the Anti-Discrimination Act if someone or the public were to look at it from that perspective then they may not define it in the same way. But certainly from a legal perspective you would. But in the Crimes Act—

CHAIR: It is just from a general perspective, is it not? It is not from the legal perspective; it is still a crime.

Mr DALE: Certainly.

CHAIR: It is a crime whether it is here or there.

Mr DAVID SHOEBRIDGE: There are hundreds of criminal offences outside of the Crimes Act. Environmental laws, planning laws, corporate laws, many of those are riddled with criminal offences.

CHAIR: I just want to see what the teeth are apart from just public perception as to why we would move it.

Mr STONE: I think it is a lesser priority. Following on from the comments I made about where the deterrent effect is: the deterrent effect of it being on the books and where it is on the books, in which piece of legislation you find it, is less than the deterrent effect of people being prosecuted for it. In terms of the order of importance you attach to things, making prosecutions work is a far higher order of priority than where it is located.

The Hon. SHAOQUETT MOSELMANE: I cannot go without being part of this teeth issue. Where we are highlighting anti-discrimination and vilification I think we should give the Anti-Discrimination Act some teeth. If we were to recommend the changes that would be the best place for it, I would have thought.

CHAIR: In the Crimes Act?

The Hon. SHAOQUETT MOSELMANE: No, the Anti-Discrimination Act.

Mr STONE: If I can interrupt there, I think we can accept that there are legitimate arguments either way for where you locate it. There is an argument for a deterrent effect having it in the Crimes Act because it has got the word "crime" over the top of it. There is also a deterrent effect in having it in the Anti-Discrimination Act because it gives real punch to anti-discrimination. We accept that there are competing arguments either way.

The Hon. SHAOQUETT MOSELMANE: Earlier on Justice Dowd, on behalf of the International Commission of Jurists, submitted:

> The ICJA submits that the conclusions as to the effectiveness of section 20D cannot be drawn from the absence of prosecutions... The lack of prosecution may also signify that section 20D is a valuable deterrent against the commission of the offence of serious racial vilification.

Do you agree with that?

Mr STONE: At the risk of using a very old joke for children, there is the one about here is the elephant spray, it keeps elephants away. The fact that I spray it around me proves that it is very effective because there are no elephants in Australia. With the greatest respect to his Honour, I do not suggest that the absence of prosecution means that we have been successful in eliminating discrimination. I think it identifies a number of other features which we have talked about in terms of the difficulty of prosecution and the ease of police in using an alternate means to get to the same result in terms of the common action of assault. I do not think any of us pretend that this problem has been fixed.

Mr DALE: I think there are other elements as well with some of the cases that have been refused by the DPP being that they have been subject to time limits and have not been able to be prosecuted because of that reason as well. The fact that they have not made it on to the papers I think is not indicative of it being successful.

Mr DAVID SHOEBRIDGE: You would recommend increasing the time limits, I assume, from the 28 days, because almost everybody said that is impossible.

Mr DALE: Yes.

Mr STONE: Yes.

The Hon. SHAOQUETT MOSELMANE: The Law Society of New South Wales appeared before us this morning. They make the point that section 20D should not be amended to catch conduct which is merely insulting or offensive because if the section was so amended it is likely to encroach on free speech principles. What is your reaction to that?

Mr DALE: The freedom of speech principles, I think you would find it in article 18 of the International Covenant on Civil and Political Rights. There is an exemption in there when we are talking about controlling public awareness and the rights of individuals. If there is something that is going to protect those rights then elements of our international obligations for free speech would still be preserved under that covenant. Does that address your question from the international obligation perspective?

The Hon. SHAOQUETT MOSELMANE: I was just interested in your view with regard to free speech because you highlighted it in your submission, but I wanted you to elaborate on that.

Mr DALE: I think again if we are looking to ensure the rights of the individual there is certainly an exception in our international obligations from that, and I do not think the way that it is framed to prevent people with serious racial vilification from violence, whether or not that be actual violence or threatened violence, I certainly think that far outweighs those elements that may prevent free speech, particularly if that speech is inciting that kind of response.

Mr STONE: I think it was the hypothetical raised by Mr Shoebridge in front of earlier witnesses that you can rely to an extent on a degree of prosecutorial common sense in that they do not like to prosecute cases they do not think they can win. In fact we say that has gone too far in this field, that they are not prosecuting at

all, but in terms of it being free speech I think there are adequate protections there in the process to preserve free speech principles.

The Hon. PETER PRIMROSE: In light of your recommendations regarding a harsher sentencing regime, and talking about the educative role of the law, what is your view on deleting the word "serious" in relation to "serious racial vilification"?

Mr DALE: I think there still need to be levels to the offence in that in circumstances where a particular idea or speech creates actual violence—something like the Cronulla riots, to give an example—that is a serious sort of indication of racial vilification, but I think there are other aspects that need to be dealt with. There are serious aspects and then there are those that have a smaller effect, whether it be on a large scale like that or an individual who is actually assaulted, or someone who may be in fear of being physically harmed in some way. I think the word "serious" needs to remain particularly for instances such as the Cronulla riots and wide-scale aspects of racial vilification.

The Hon. PETER PRIMROSE: So you would recommend against deleting that as an offence, the adverb "serious"?

Mr DALE: I believe we would, yes.

The Hon. PETER PRIMROSE: More broadly, and acknowledging your response to the Hon. Sarah Mitchell's earlier question, are there any other Australian or international jurisdictions which you believe are doing it better than us, taking account of the fact of the different legislative regimes? Is there somewhere else you would point to and say, "Look, you should really look at what these guys are doing"?

Mr STONE: I will let Josh Dale answer it, but can I work into your question an assumption we cannot have a bill of rights—which our organisation supports, I simply throw it out there as a preamble to that.

Mr DALE: Certainly what works from the perspective of my knowledge comes from the United Kingdom system in that they have the Human Rights Act and they have quite a comprehensive approach to human rights, and I think in supporting a bill of rights that would strengthen the framework for this type of area, and also the differences, that whilst they have that Act, they also have that final aspect of appeal beyond the court system to the European Court of Human Rights, so there is difficulty in comparison with that jurisdiction. I am aware that some other submissions cover Canadian approaches, which we are not opposed to but my knowledge is limited to the United Kingdom model.

The Hon. PETER PRIMROSE: My next question reads like an essay, so you may wish to take it on notice or comment, or both. If I go to submission 36, which I do not expect you have read, Professor Rice and Professor Rees recommended in their submission to the Committee that the criminal offence of racial vilification should be this:

> … an act engaged in on the basis of race, that is intended, or is reasonably likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of property of their family or associates.

Basically, there are two parts to the question: Do you think that is viable in terms of New South Wales, and what would be the ramifications, if any, for freedom of speech, of adopting that type of definition?

Mr DALE: I think we will take that question on notice, and I am happy to provide written submissions.

Mr DAVID SHOEBRIDGE: What about the question of incitement and the requirement as it currently reads that a person must not, by a public act, incite hatred, contempt or severe ridicule? A number of people have said that that incitement element is one of the major impediments to prosecution, and people have suggested words such as "cause, induce or promote hatred", so you do not have to prove a third party was incited, but that the action might promote such behaviour. What do you think of that?

Mr DALE: I think the original wording that was adopted in the initial drafting of the legislation was "promote or express" and incitement was introduced as a means of limiting the scope of how it would apply. In regard to "incitement", there is little guidance in the legislation as to how that should apply, and I think we are left with some civil case law in the Administrative Appeals Tribunal that specifically deals with the word

"incitement" and what a group of reasonable people would perceive, but whether or not that would apply here I think is difficult from a criminal aspect.

Mr DAVID SHOEBRIDGE: The Law Society has suggested going back to "promote or express".

Mr DALE: We agree with that. I think it does create less confusion and I think more guidance could be found.

Mr DAVID SHOEBRIDGE: What about including another part in section 20D (1), maybe a new subsection (c), which is "by means which include placing a reasonable person in fear of their safety"? The example I would give would be an overbearing racist rant directed towards someone on a bus. None of it may have actually been threatening language, threatening physical violence or threatening property, but the fact of the rant placed that person in a reasonable sense of apprehension. What about including that?

Mr DALE: This is where it comes to different levels of seriousness of the offence. Where someone is fearing that they might be harmed, there should be that aspect of what a reasonable person would determine. In the example you used earlier, where someone overlooked someone or was standing over the top of someone, I think it is quite reasonable to expect that they would be in fear of some kind of physical altercation arising.

Mr DAVID SHOEBRIDGE: Even if none of the overt language was a threat?

Mr DALE: I think the mere action of standing over someone would be enough.

Mr DAVID SHOEBRIDGE: And racially abusing them.

Mr DALE: Yes, certainly.

Mr STONE: They are acting in an irrational way and the real fear is where does their irrationality end? It is not knowing. They are irrational enough to engage in this conduct that is overbearing and that is offensive. It is the fear of what comes next.

The Hon. SHAOQUETT MOSELMANE: Where is the racial connection?

Mr STONE: It is in the language that motivates. There is a reason for this—it is an additional hate factor that comes into it.

Mr DAVID SHOEBRIDGE: They are expressing hatred or serious contempt.

Mr STONE: They hate me enough to express hateful thoughts and their hateful thoughts are couched in a particularly hateful way.

Mr DAVID SHOEBRIDGE: Perhaps one of the reasons why we are not getting prosecutions under section 20D is because if you have a threatened physical violence you effectively have an assault, and if race was part of the motivation of the assault that is an aggravating factor under the Sentencing Act, in section 22A I think. One of the sub-clauses has race as an aggravating factor. Do you know of any study of the extent to which that aggravating factor has been used?

Mr DALE: I can take it on notice and respond, but I am not aware of any study specifically that deals with the number of that sort of provision being used.

CHAIR: Do you have a view on what was just put by Mr Shoebridge?

Mr DALE: In terms of whether or not there should be?

CHAIR: No, whether in fact that might be a reason for the number of matters that go under the Anti-Discrimination Act?

Mr DALE: I think it goes to my earlier comment. Where there is a lower burden of proof to proceed with other crimes with the same sort of punishment, that would be pursued over the higher burden of proof. Certainly when we are looking at the sentencing elements in the sentencing Act to increase punishment and we

are looking at the same maximum penalty under both crimes—one being common assault and the other being serious racial vilification—then again we could still apply that section and bring in those aspects. However, I think if serious racial vilification was put in a different category and at a higher punishment, then you could still use the same section effectively but then have that higher punishment to work with. As I said earlier as well, I think it would be generally accepted that an assault committed on racial grounds as opposed to other grounds would be more serious and would correspond to the higher punishment.

Mr STONE: And 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, but cannot raise to the level of assertion of proof, that they would tend, as Josh said, to stick with the assault and the aggravating factor rather than go looking for the more untested offences.

Mr DAVID SHOEBRIDGE: And, in most circumstances, common assault with an aggravating factor is vastly easier to prove on sentence.

Mr STONE: Yes, correct.

Mr DAVID SHOEBRIDGE: Under the current legislation, it might lead to a more severe penalty for a racially motivated assault.

Mr DALE: Yes.

Mr DAVID SHOEBRIDGE: Is that part of the reason why you say the penalty should be increased? I think you give a range of something in the region of two to five years for serious racial vilification.

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: So you make it a very clear social program attached to it?

Mr DALE: I—

The Hon. SCOT MacDONALD: Could I put a supplement to that?

Mr DAVID SHOEBRIDGE: Sure.

The Hon. SCOT MacDONALD: The thrust of my query is that we have talked about raising penalties and all that sort of thing, but in my mind you are still sitting in the discrimination Act, which is exotic to use your words, and that seems to be the real fact. If you are looking for evidence, the evidence is there—no prosecutions. That is the fact. Can we not raise the penalties to whatever you want to raise them to, or whatever we think we want to raise them to, but at the end of the day it is still out of the prosecutor's comfort zone?

Mr STONE: It is that competing policy argument that I think I alluded to earlier. There are different arguments. Do you put it where the police find it more easily, or do you put it where it sends a clearer message because it is under particular legislation with its own heading? There are competing policy arguments either way. We recommended one coming from a particular perspective, which is the prosecution rate. To be frank, we think the better message or the more effective message is fear and prosecution, unfortunately, rather than education. But there is a competing argument.

Mr DAVID SHOEBRIDGE: What about the model where you allow the President of the Anti Discrimination Board, if he or she forms the view that there is a substantive case or at least a substantive case to investigate, referring it to the police, who then undertake a more thorough investigation and potentially prepare a brief of evidence for the Director of Public Prosecutions? What about that as a model?

Mr DALE: I think we would certainly support the ability for the Anti Discrimination Board to be engaged in that process.

Mr DAVID SHOEBRIDGE: Yes.

Mr DALE: They receive these complaints and I think they are the appropriate body to be able to identify that.

Mr DAVID SHOEBRIDGE: They do an initial basic merits assessment and then refer it on to the police, potentially, for further investigation, and ultimately it goes to the Director of Public Prosecutions.

Mr DALE: I would certainly agree with that.

Mr STONE: 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. You want to retain the duality of the police still taking it as an offence where they find it occurring, independently of the referral source, as well as having the referral source; otherwise you, in effect, just take it off the police agenda until it is referred to them.

Mr DAVID SHOEBRIDGE: Currently, racial vilification does not go through the police track. You are suggesting a dual track, allowing just a plain police investigation—a police-initiated prosecution?

Mr STONE: The police should be able to enforce the law without having to wait for a third party referral, if it is an appropriate serious offence. And this is an appropriate offence.

Mr DAVID SHOEBRIDGE: I think the Labor Lawyers were promoting an open standing for the making of complaints, not prosecutions. They supported an opening standing for making of complaints for the Anti Discrimination Board, which might then allow a prosecution to be initiated. What do you think about the open standing concept? The person who makes the complaint does not have to be of a particular race or ethnicity or group who are being denigrated, or allegedly denigrated?

Mr DALE: I certainly think that covers the position that the Chair put to me earlier where someone is identified to be from a certain background, but is not. It would allow them to put—

Mr DAVID SHOEBRIDGE: It would go well beyond that, though, would it not?

Mr STONE: Yes.

Mr DALE: Certainly a bystander as well, if you were particularly offended or had seen a particular action. Take the example of the recent events on the Sydney bus. Someone standing by might put in a complaint about that.

Mr DAVID SHOEBRIDGE: That is a narrow standing. A witness or a participant is a narrower standing.

Mr STONE: Yes.

Mr DAVID SHOEBRIDGE: What about the concept of open standing?

Mr STONE: It would certainly have the advantage of allowing, for example, a community group to lodge a complaint where there had been vilification of members of their community. It would give them standing to act which would get around, for example, the Tamil problem that was alluded to earlier. I can see the advantages in it.

Mr DAVID SHOEBRIDGE: What about the disadvantages?

Mr STONE: I can see some reservations as well in terms of tit and tat and it becoming a forum for revisiting ancient hatreds.

Mr DAVID SHOEBRIDGE: Yes.

Mr STONE: Any time you give people the right to do something, you give them the right to abuse it as well.

Mr DAVID SHOEBRIDGE: Yes.

The Hon. SCOT MacDONALD: I still just want to understand how the Crimes Act would work in practice. I am not down at Downing Street every day to see how this works. If racial vilification went over to the Crimes Act, would you foresee, say, the police at a big incident downtown getting someone for affray, and they throw property damages and assault at them. Do they not tend to throw a few offences together? Practically, would they throw racial vilification in there if it is in the Crimes Act? Is that something you would foresee happening, in your experiences?

Mr STONE: If I can paraphrase your question, does it form a new troika along with the old favourite that used to be bundled together of offensive language, assault police and resist arrest?

The Hon. SCOT MacDONALD: All of that.

Mr STONE: I think that you would see, where they were investigating and prosecuting for the actions if it was in the Crimes Act, that one advantage might be that (a) they would add it to charges there but (b) as against others who had not committed those offences but had been, in effect, prior participants in geeing-up the events, you might then see them prepared to reach further back to look at the inciters and to add them to the group with that charge. However, if it is not part of their investigative process to look at the whys, the hows and who is ultimately responsible, and they have to go off to a different Act to find that charge, I think that might be a reason why it would be less commonly done.

The Hon. SHAOQUETT MOSELMANE: Ms Catherine Mathews, who appeared earlier, made the point that, even if she was not present at the time a racial vilification attack is made, she would find it offensive. If you broaden the scope for people to make complaints, then she would be one of those people who obviously would want to make a complaint as well.

Mr STONE: And there are people who would do that from good and pure motives, and there would be people who would do that to continue ancient vengeances.

CHAIR: Thank you very much for attending today and for your contribution to our deliberations. We very much appreciate your being here.

Mr STONE: Thank you very much for having us.

CHAIR: That concludes this session. We will resume Monday morning.

(The witnesses withdrew)

(The Committee adjourned at 1.19 p.m.)