REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO RACIAL VILIFICATION LAW IN NEW SOUTH WALES

———

At Sydney on Monday 8 April 2013

———

The Committee met at 9.30 a.m.

———

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 today to the second public hearing of the inquiry of the Standing Committee on Law and Justice into racial vilification law in New South Wales. As outlined in the opening of the first public hearing, the inquiry will examine section 20D of the Anti-Discrimination Act 1977, which creates the offence of serious racial vilification. Particular consideration will be given to the effectiveness of this provision, whether it establishes a realistic test for racial vilification in line with community expectations and whether any improvements could be made to the provision having regard to the importance of freedom of speech.

Today we will be hearing from witnesses from the New South Wales Council for Civil Liberties, the Institute of Public Affairs, the Chinese Australian Forum of New South Wales, the New South Wales Jewish Board of Deputies, the Aboriginal Legal Service, and the New South Wales Bar Association, as well as Professors Simon Rice and Neil Rees.

Before we commence, I would like to make some comments on procedural issues. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of guidelines governing the 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 essential to address the terms of reference. Finally, would everybody turn off their mobile phones for the hearing because they interfere with the sound system.

RICHARD MARTIN BIBBY, Retired academic and committee member of the New South Wales Council for Civil Liberties, and

STEPHEN BLANKS, Solicitor and secretary of the New South Wales Council for Civil Liberties, affirmed and examined, and

JACKSON ROGERS, Solicitor and executive member of the New South Wales Council for Civil Liberties, sworn and examined:

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 by the Committee, please indicate that fact and the Committee will consider your request. Due to our reporting timeframe, if you receive any questions on notice we would appreciate it if you could get a response back to us within 14 days. Would you like to make a short opening statement?

Mr BLANKS: Yes, if I may, and this draws on comments which I think the Committee will be familiar with and other people have made. Although the Committee is looking at just one section of the Anti-Discrimination Act, that section is to be seen in a broader context both of legislation dealing with racial vilification, other criminal legislation dealing with incitement of violence and incitement to riot and affray, and also principles of free speech. There is a whole broader context in which this very specific inquiry is placed.

Broadly, the Council for Civil Liberties believes that the section has failed to achieve its legislative objective that it is legitimate to criminalise serious racial vilification. Serious racial vilification should be seen as a serious criminal offence and the Council for Civil Liberties believes that it is possible to do that and maintain the right to free speech. Although it is often thought that the two conflict with each other, there is a balance which can be struck. In our submission, the proscription of serious racial vilification should focus on communications which have an effect of breaching the peace, and it is those kinds of communications which are properly criminalised.

CHAIR: How should the Committee evaluate the effectiveness of section 20D of the Act?

Mr BLANKS: I think there are a couple of ways you can approach this. There have been, I think, 27 incidents referred to the Director of Public Prosecutions which have been thought to be worthy of serious consideration of prosecution, and no prosecution has been brought in any of those matters. Another way of looking at it is that there have been a number of serious incidents in New South Wales in the last decade or so which have had a racial element and none of those have resulted in any prosecution. I put at the top of the list the Cronulla riots in 2005, and also the riots in Hyde Park in 2012 which I think had a racial element, and there have been a number of other incidents. I think it is the case, unfortunately, that there is an element of our society which harbours racist views and is prepared to express them, and I think this section, in the context of a range of other measures or potential for criminalisation of communication, is part of a broader attack on racist elements within the society.

CHAIR: But there could be a whole series of reasons why prosecutions have not been commenced, could there not?

Mr BLANKS: Yes, of course. There are a lot of different elements certainly to the existing offence which have meant that prosecutions have not proceeded and I imagine that the reasons across those 27 cases which were referred vary a great deal. I am not saying that all 27 cases should have resulted in successful prosecutions, but that is just an indication as to how you can come to the view that the current section is not up to the task.

CHAIR: Are you aware of any details of any of those cases specifically that you can attribute to where the bar presently stands with regard to section 20D?

Mr BLANKS: I think one of the elements that causes a problem and a hurdle which is inappropriate is the requirement for intentional incitement of harm. The problem with racial vilification, as many of the submissions point out, is that statements which are racially vilifying can be crafted in ways which are not specific as to particular incidents but which create a very dangerous climate for vulnerable communities.

The Hon. SARAH MITCHELL: In section 2 on page 3 of your submission you refer to our third term of reference in relation to improvements that could be made. I was particularly interested in recommendation (b) where you say that the section should place the emphasis on the results of the act rather than the intention of the offender. Intent is something that we have spoken about, certainly in our hearing on Friday. Could you expand a little more on that recommendation and why you think that is necessary?

Mr ROGERS: I think that the way the section is currently drafted it places a lot of emphasis, as Stephen has pointed out, on the intention of the speaker, or I should say the intention of the communicator. I think there are a couple of levels of intention. The current section requires I think that the racial hatred or serious ridicule not only be intended to be incited but that that be by way of a threat, which also creates another level of intention, that you would inquire into the person intending to make a threat or, as the second means element requires, incitement for others to make a threat. There is a lot of inquiry into the mindset of the individual or individuals involved and we think that the emphasis should not be so much focused on that. We think that the results or the milieu that is created by the acts should be also looked into in an objective sense, and we think that in that regard the Canadian legislation has the right balance, that there is still a requirement to look into the mens rea of the individuals concerned, but it places more emphasis upon the circumstances created by the acts, and that is the appropriate way of looking at an offence like serious racial vilification.

The Hon. SARAH MITCHELL: We have also been asking witnesses whether they thought there were any other jurisdictions, in Australia or internationally, that were doing a better job that we could look to by way of example. Do you think that the Canadian model would be something that the Committee should consider?

Mr ROGERS: Yes, I think with the caveat that "breach of the peace" is not a phrase that is used commonly in New South Wales. I think there are some phrases, both in the offence of affray and riot, which may be more amenable to being included in this section, particularly given that there may also be case law around those particular phrases that would be helpful. I am not personally familiar with the case law around the expressions used in the offences of affray or riot, but I imagine that it may be more helpful to look at those types of phrases rather than the phrase, "breach of the peace", which as I understand it is not currently used in New South Wales law.

Mr SCOT MacDONALD: Can I ask more of a general question: I think your submissions touch on a lot of ideas that many people have repeated, but I want to go back to what Mr Blanks said, that in New South Wales we have had a couple of serious incidents—Cronulla, and then Martin Place last year. You represent the Council for Civil Liberties. Whatever tweaking we may do, even if it is reasonably minor tweaking, whether it be on intention or threats or any of those sorts of things, will inevitably restrict civil liberties, even if it is just another tiny little ratchet. How do you weigh up in your mind, as a council, a couple of incidents of racial disturbance, if you like—and yes they were serious and yes they were ugly and yes they were unfortunate—with the need to restrict civil liberties?

Dr BIBBY: The point in having freedom of speech is for the discovery of truth and for the improvement of human life thereby, and that is very important. But racism is different, and it is different for more than one reason. We do not like to argue for restrictions on freedom of speech, as you can imagine, but racism is special. For one thing, you cannot change your genes. Although it is manifest from both history and from genetics that the concept of distinct race is observed, racism remains a problem that requires dealing with. Then there is the dismal history that if it is not dealt with racial vilification becomes normal—the unquestioned assumptions and formed attitudes and behaviour.

You have only got to look at beliefs about Australians of Lebanese origin adopted by some contributors to respectable blogs such as online opinion to see that racism is at work in Australia. Racism continues in spite of all the efforts of education systems, all the efforts of all education systems. Then of course there are other historical examples, with which you will be thoroughly familiar. Racism is special and extreme racist vilification is particularly special.

Mr BLANKS: If I can add to that answer? Civil liberties is not just free speech; it is part of civil liberties to be able to live one's life in a civil society free from racist attack and free from racial vilification. So I think we do not accept that tweaking this section to make it easier to criminally prosecute people involves a reduction of civil liberties; rather we would say that tweaking the section to properly prosecute serious racial vilification increases civil liberties because it will make people freer from attacks which ought to be proscribed.

I know there are other people in the civil liberties movement perhaps who take different views, but the New South Wales Council for Civil Liberties certainly sees it that way.

Mr SCOT MacDONALD: Can I just ask you a question on that? We will never be able to legislate for stupidity and offensive conduct and offensive people, silly, stupid people, and they are out there in the public and they are out there on the airwaves and they are out there on blogs and in newspapers and whatever. So what are we asking to do? Are we trying to legislate to cover every single little possibility of base stupidity, if you like, and offensive behaviour? Is the problem that manifest out there?

Mr BLANKS: This section, as I said in my opening remarks, is to be seen within a broader context of legislation, both Commonwealth and State, dealing with discrimination and racial vilification. Section 20C, of course, has its own provisions for complaints to be taken, which are not criminal; they are dealt with through the Anti-Discrimination Board and the Equal Opportunities Tribunal, and that is a process for a different level of racial vilification, perhaps the kind of level that you are alluding to in that question. This section is reserved for serious racial vilification—this is conduct which is not merely offensive and not of a minor nature; it is conduct which society properly should consider should not be ignored and should be prosecuted.

CHAIR: A quick question: As you are aware, the Attorney General has delegated his authority to the DPP with regard to consent to bring prosecutions, yet you say that "we consider it is certainly a bar to investigation by the police". How is it a bar to investigation by police that the consent of the Attorney General has been delegated to the DPP? How is that a restriction? You also say "it has the effect of relegating the offence to a lesser role in the State's laws". How is it relegating it to a lesser role when it is the Attorney General himself—the chief law officer in the State—who is referring the matters? How is that relegating it to a lesser role in the State's laws?

Mr BLANKS: I think the answer is that it adds a barrier to prosecutions; it acts as a deterrent to police who may be investigating a matter.

CHAIR: But the DPP has in fact that role; that role has been delegated to him. How is that impeding investigation?

Mr BLANKS: As I understand it, while the delegation to the DPP is an informal arrangement, which can be undone at any time—

CHAIR: But it has not been undone.

Mr BLANKS: No, it has not been, but we are addressing the form of the legislation as it is. I think from the public perception point of view, the requirement for Attorney General consent to a prosecution can be perceived to add a political element to any prosecution, and that is undesirable. The DPP has inherent within his functions the obligation to consider whether a prosecution would be in the public interest and it is better from a public perception point of view for that consideration to be seen as non-political rather than political. I am not saying that the Attorney General would act in a political way necessarily, but—

CHAIR: And, indeed, there is no evidence of that ever having occurred.

Mr BLANKS: No, that is right.

CHAIR: So you are going purely on it may be perceived in that way?

Mr BLANKS: Correct.

CHAIR: Even though the DPP effectively has that power to begin with?

Mr BLANKS: Correct.

The Hon. SHAOQUETT MOSELMANE: A lot of the submissions or witnesses that came through commenced with the premise that section 20D has failed to achieve its objectives. However, we have heard the then Attorney General the Hon. John Dowd say that it really has not because in actual fact this offence is aimed at very serious and blatant forms of racial vilification. The Attorney General who moved it at the time says it has

not failed but you say it has. Where do we define "very serious and blatant forms of racial vilification" in this regard in terms of your submission?

Mr BLANKS: I think perhaps one way into that analysis is to have a look at the penalty that applies to this offence: it is a penalty of a maximum of six months imprisonment, which places it on the scale of criminal offences into a fairly minor criminal offence category. We think, and we say in our submission, that a greater penalty should apply—racial vilification is more serious than a minor criminal offence—and the way the section has been crafted, I think one of the reasons why there have been no prosecutions is because this offence is wholly subsumed within the incitement to riot kind of offences, which are already in the Crimes Act and which have much more serious penalties attaching to them—seven years, for example.

I simply disagree with the view that this section has achieved its purpose, unless you take a very cynical view that the purpose of this section was to be symbolic in the Anti-Discrimination Act and not actually ever be available for use. But I think that that is not the preferable view. The preferable view is to recognise that serious racial vilification is a problem in our society, which in part ought to be addressed through appropriate criminal sanction, and this section is to perform that role and has not done so.

The Hon. SHAOQUETT MOSELMANE: In relation to your first paragraph you say that "this organisation champions the right of all to express their views and beliefs and without suppression". Could I just go to Mr SCOT MacDonald's questioning? There seems to be a duality or a contradiction in some of what you say and this very strong comment that you are an organisation that protects the rights of all views and beliefs without suppression. Can you explain that?

Mr BLANKS: Certainly nothing that we propose in relation to this section would impinge on the right to express racialist views without the added element of creating a disturbance of the peace. People can have views that different races should not be treated equally, but those views have to be very carefully expressed in a society, and as the Council for Civil Liberties we do not say that expressions of racial hatred against races is properly within the scope of discussion about racial differences that might legitimately be had.

The Hon. PETER PRIMROSE: Could I ask a question that follows on from that? It relates to a proposal in the submission we have received from the Jewish Board of Deputies. They are seeking to have an addendum in section 20D to include a provision concerning "conduct intended to harass on the grounds of race". What they suggest as a definition for "harass" is to include behaviours that "threaten, intimidate or seriously and substantially abuse". Can I ask for your comments on that?

Mr BLANKS: We think that goes a little bit too far. To focus on the intention solely without there being a requirement for an element of effect or consequence we think goes too far. So we would strike the balance a little bit differently: that there has to be some consequence in society. There is some argument that the best way to deal with those sorts of extremist views, race hatred views, is to ignore them and not give them any platform, and if you were to prosecute some of the anti-Semitic material that the Jewish Board of Deputies is concerned about you would have the effect of providing a platform, and that is not the best way, I think, to deal with that material. So yes that sort of material is of concern, but it should only be able to be prosecuted when it has an actual effect.

Mr DAVID SHOEBRIDGE: You have got the civil proceedings available.

Mr BLANKS: Yes, that is right.

Mr DAVID SHOEBRIDGE: You have got to look at it as a package. Is that not part of what you are saying?

Mr BLANKS: Yes, that is right.

The Hon. SHAOQUETT MOSELMANE: Would you support a further amendment to section 20D that extends its operation beyond serious racial vilification on the grounds of other important protected attributes such as religious belief?

Mr BLANKS: No, although one has to be very careful here because we are dealing with significant issues both with the Jewish community and with the Islamic community in New South Wales. One has to be very careful in drawing a distinction between the religious aspect of vilification and the racial aspect of

vilification, which can apply in both cases. But one should be free to criticise religion. Although one might not agree with different views, religions are subject to criticism; race—

The Hon. SHAOQUETT MOSELMANE: So if a Muslim walks by and someone says, "All you Muslims are terrorists" that is okay?

Mr BLANKS: No, that is certainly not okay. That is like saying "All Jews are international bankers and designers of conspiracy".

The Hon. SHAOQUETT MOSELMANE: Jews fall under race; Islam or religion does not, so how do you protect them from that sort of religious vilification or abuse?

Mr BLANKS: I think that is an anomaly, that vilification directed at Muslims is not treated in the same way as vilification directed at Jews is an anomaly.

Mr DAVID SHOEBRIDGE: I think that is the nub of the Hon. Shaoquett Moselmane's question. Should it be wrapped up in this?

Mr BLANKS: Not for religious reasons, but in the same way that Jews are treated as a racial group. Although Muslims are not from a single race, the way they are treated in society sometimes effectively puts them that way. It is difficult, I accept.

The Hon. SHAOQUETT MOSELMANE: Perhaps you might want to take that on notice and maybe think about a response.

Mr BLANKS: Yes.

The Hon. PETER PRIMROSE: The very last recommendation in your submission says that the offence should be removed from the Anti-Discrimination Act [ADA] and placed into the criminal code. Could you expand on why?

Mr ROGERS: I think that is the same reason as Mr Blanks was talking about before to the chairperson, which is that it would regularise the offence and, rather than require in this case the Director of Public Prosecutions [DPP] as we know with the informal requirement to commence inquiries or commence an investigation, it would become a matter for a police officer or a station commander to begin investigations and make inquiries as to whether a prosecution could take place.

The Hon. PETER PRIMROSE: On the same basis, however, would you suggest that we remove all other matters that are subject to criminal sanction from other pieces of legislation and put all of them into the Crimes Act?

Mr ROGERS: No. I am not really in a position to talk to the other sections that you are talking about, but I would just say that I think things need to be taken on a case-by-case basis. In this instance I think there is ground to remove it from the ADA and put it into the criminal code.

Mr BLANKS: I should add that I gave an interview this morning on the ABC where I said I thought that was a lower level issue. It did not really matter where it was, but we have said what we have said in our submission, but that is not the most important issue that I think this Committee needs to deal with.

The Hon. PETER PRIMROSE: I give weight equally to everything in your submission, hence the question.

The Hon. SHAOQUETT MOSELMANE: How can the Committee evaluate community expectations in relation to this matter? What is community expectation, how do you define it, who determines it?

Mr BLANKS: I think everybody in this room is a member of the community and has a sense of what—

The Hon. SHAOQUETT MOSELMANE: Everybody has their own sense.

Mr BLANKS: Their own sense of things. But in the New South Wales Council for Civil Liberties we do have a function. We will receive complaints from members of the public. We do not have any powers to deal with those complaints of course, but we do get a number of complaints from people who believe that they have been subject to vilification on the grounds of their race or discriminatory treatment on the grounds of their race and they are quite indignant about it. The sense that we have is that there is widespread interest in the community in ensuring that racial vilification is dealt with.

Mr DAVID SHOEBRIDGE: I will ask you a couple of quick questions about the nuts and bolts. The current provisions limit it to incitement of contempt or ridicule on the grounds of a person's race, but if the bigot gets the race wrong and says someone is an appalling Filipino when in fact the person they are abusing is Malaysian, or if someone denigrates someone when they perceive them to be Chinese when in fact they are Korean, then arguably the Act does not apply. I assume you would agree to broadening it to be "race or perceived race"?

Mr ROGERS: Absolutely. I think the way that the current section is worded there is no doubt that it would not apply, on my view, and that the membership requirement does present a serious problem on the current drafting.

Mr DAVID SHOEBRIDGE: You would open up the same to allow that complainant—a person who was abused on the basis of their perceived race—to also bring a complaint?

Mr ROGERS: Yes. Whether or not that should be applied more broadly to the ADA and in particular to the civil provisions is something that could be considered.

Mr DAVID SHOEBRIDGE: If the rationale is good for section 20D it is probably as good for section 20C?

Mr ROGERS: Absolutely.

Mr DAVID SHOEBRIDGE: One of the concerns the president of the Anti-Discrimination Board [ADB] had was the very short time frame in which he had to refer a matter and also for prosecution to be commenced. I think he has 28 days or so to refer it to the DPP after receiving the complaint and then six months to get the prosecution on because it is a summary. These matters can be complex. Would you be supporting his call for a longer period of time, something in the order of two years?

Mr BLANKS: I think yes.

Mr DAVID SHOEBRIDGE: One of the other matters the president of the ADB raised was that he and his organisation do not really have the skills to get together a brief of evidence. I think in part this is where you are referring it off to the Crimes Act; you put it with the police who have the skills to get a brief of evidence together. One other option is to explicitly grant the president of the ADB the power to refer it to the police for the preparation of a brief of evidence when he or she forms the view that there is serious potential for serious vilification. What about that as an option?

Mr BLANKS: Yes, I think we would support that, giving the President of the ADB that power, yes.

Mr DAVID SHOEBRIDGE: The nub of the concern as I see it is how we in a tolerant society go about tolerating intolerant people. That is really where we have got the difficulty in crafting these laws. I will give you an example. I am not necessarily saying these people are intolerant, but it an example of where freedom of speech and speaking in terms of race and nationality can conflict in the public debate. Many people in the Armenian community are extremely distraught about what they perceive to have been genocide against the Armenians and the Hellenic people by the then regime in Turkey at the beginning of World War I. They describe it as genocide and they run a public campaign to recognise that genocide.

The Turkish community is deeply offended by that. They think it is enormously derogatory of them as a group, they deny the genocide and they push back and claim that the Armenians are denigrating their race and their nationality. How do we craft a law that allows that debate, which I think is a legitimate debate, to continue when the Armenian community might for example be seeking to have a protest out the front of the Turkish consulate which gets untidy, becomes a breach of the peace and may then lead to criminalisation on the basis of your test?

Mr BLANKS: I think certainly section 20C has the constitutional exception for reasonable expressions of speech in the context of a political debate.

Mr DAVID SHOEBRIDGE: The good faith provision? That is not in 20D.

Mr BLANKS: That is not in 20D and perhaps there is room for it in 20D.

Mr DAVID SHOEBRIDGE: That example I gave you would not fall within necessarily academic, artistic, scientific or research purposes.

Mr ROGERS: I think the answer may be that a serious breach of the peace that has those racial elements is something that is not to be tolerated. I think the example you gave is hypothetical and—

Mr DAVID SHOEBRIDGE: It is actually not hypothetical. Protests have been held out the front of the Turkish consulate, they have been quite passionate.

The Hon. SHAOQUETT MOSELMANE: It is real.

CHAIR: Are you saying the Armenian protest should not be tolerated?

Mr ROGERS: It would depend how we would define "breach of the peace", but I think that serious breaches of the peace based on statements or acts which are capable of being understood as serious racial vilification should not be tolerated.

Mr DAVID SHOEBRIDGE: We already have laws against affray and we have laws against riot. In fact, if an element of the affray or the riot contains an element of race that is an aggravating factor under the Crimes (Sentencing Procedure) Act. That can lead to a stiffer sentence, and it ordinarily would lead to a stiffer sentence if there was an element of race in it. How would having an alternate regime to deal with affray and riot under the Anti-Discrimination Act assist matters if you have already got the ability to increase the penalty on the basis of race in those circumstances?

Dr BIBBY: It is important symbolic significance. It is important symbolic and educative significance to have a separate thing about race.

Mr DAVID SHOEBRIDGE: But if I understood the submission earlier, we cannot allow this just to be symbolic. Part of the concern is that sitting just as a symbol—

Dr BIBBY: I am not suggesting it should just be symbolic.

Mr DAVID SHOEBRIDGE: Can I ask you to think about the intersection between that kind of public debate and where this law might potentially go in your model and, if you wish to, maybe you could provide a further response on notice?

Mr BLANKS: We will provide a further response on that, because I think it is an area which is real. I was involved many years ago in a case between a Macedonian group and a Hellenic group over the time that the Former Yugoslav Republic of Macedonia broke away. I think those kinds of matters, the Anti-Discrimination Board, the Equal Opportunity Tribunal, under section 20C are good places to mediate between serious communities who are arguing serious things. That is a separate—

Mr DAVID SHOEBRIDGE: But you would take away that mediating role of the ADB if you took it out of the Anti-Discrimination Act and plonked it in the Crimes Act. Do you think that might be a good argument for retaining it within the Anti-Discrimination Act and retaining the role of the ADB in being that mediator, even if then it goes through a referral to police?

Mr ROGERS: We will have to take that on notice, I would suggest. But I think that as a political community New South Wales has decided that the particular crime of racial vilification or serious racial vilification should be made an offence in accordance with international norms and I think that that is something that we support.

Mr DAVID SHOEBRIDGE: No-one is arguing against that. The question is what is racial vilification and when does it become appropriate that the criminal law come in and impose a sanction. My other question is that a number of submissions have looked at the word "incite" in section 20D. It commences, "A person shall not by a public act incite hatred towards, serious contempt for, or severe ridicule of", et cetera. The word "incite" when you look at the parliamentary debate was sort of lobbed in at the last minute. It would appear that it was lobbed in to limit the scope of 20D. The Law Society and a number of others have suggested going back to the original wording, which was instead of "incite" to use the term "promote or express hatred towards". Would you support that?

Mr BLANKS: Yes we would, so long as there is the element of there being an effect.

Mr DAVID SHOEBRIDGE: I am not taking that alone, I am taking it with the balance of 20D.

Mr BLANKS: Yes, and we are not wedded in our view to the word "incite".

Mr DAVID SHOEBRIDGE: Currently there needs to be an actual threat of physical harm or the incitement of others to create physical harm either to a person or to property. What about where there are no specific words of threat and no specific harm but a reasonable person is placed in fear of their safety? I will give you the example of a small woman of a particular ethnic origin sitting on a public bus, who has a person leaning over them and just abusing them on the basis of their race; not threatening them physically but just saying, "I can't bear people like you" and just being grossly abusive towards them on the bus. No words of threat, no threat of violence, but you could reasonably expect a person in that situation, the woman in that situation, to be in fear and to be concerned about being in the public space. Would you think we should be criminalising that expressly, placing a reasonable person in fear of their safety?

Mr BLANKS: Yes, but when you express it in those terms, placing a reasonable person in fear of their safety, I would have thought that is already criminalised somewhere.

Mr DAVID SHOEBRIDGE: Breach of the peace.

Mr ROGERS: It is an assault, I think.

Mr DAVID SHOEBRIDGE: No, you are not assaulting them. There is no assault; you are just grossly abusing them.

Mr BLANKS: We will go back to our law books and we will look at that.

Mr DAVID SHOEBRIDGE: I am happy for you to take that on notice. Even if it is not an assault it is gross racial abuse directed at someone in public such that you would look at the intent to abuse and the result of the abuse on the person placing them in reasonable fear and apprehension: Would that be sufficient in the minds of the Council for Civil Liberties to ground criminality under section 20D, or should it be?

Mr BLANKS: If it was an assault it would engage the race hate expansion provisions that are already there.

Mr DAVID SHOEBRIDGE: I am talking about no physical threat, no touching, just gross verbal abuse?

Mr ROGERS: This goes back to the idea of racial harassment as a separate offence if you are abusing someone on the grounds of their race and whether that ought to be a criminal offence. I think the council's position is that sets the bar a bit too low in terms of serious racial vilification. We do not support at this stage the idea of racial harassment.

Mr BLANKS: We will take that on notice.

Mr DAVID SHOEBRIDGE: This goes beyond mere abuse.

Mr BLANKS: Once it is placing someone in fear of their safety I would have thought that was a criminal offence whether there is a racial element or not and if there is a racial element that is an aggravating factor.

Mr DAVID SHOEBRIDGE: I will give you an example: Someone is walking home from the railway station and is followed by someone quite closely, which may cause anxiety and a reasonable person may say they are in fear of their safety but the person following them may be of an entirely benign intent. That would not of itself create a criminal offence. I would like a considered response from the Council for Civil Liberties [CCL]. The other aspect I would ask you about is the question of mens rea. It would be unusual if an element of a criminal offence could be proven without having to prove intent. As I understand it your position is that there needs to be mens rea in terms of the racial abuse or there needs to be an intent to abuse or ridicule on the grounds of race but you are suggesting the intent should not have to be proved for the public unrest element—intent for the first half but not for the second half?

Mr BLANKS: That is right. Recklessness for the second half—a reckless disregard of the consequence.

Mr DAVID SHOEBRIDGE: It is not at large, there needs to be an element of recklessness?

Mr BLANKS: Yes.

Mr SCOT MacDONALD: Are you going to consider sentencing in that question on notice from Mr Shoebridge?

Mr BLANKS: In our submission we made a comment about sentencing which suggested a penalty of three years for this offence.

Mr DAVID SHOEBRIDGE: The element of race in the Crimes (Sentencing Procedure) Act for common assault.

Mr SCOT MacDONALD: Would it affect the sentence if race was a factor?

Mr BLANKS: It is already an aggravating factor in the Crimes Act.

CHAIR: We are out of time. I would like to thank you for your written submission and for being with us today for your verbal submissions as well. The Committee will take it into account in its deliberations.

(The witnesses withdrew)

SIMON BREHENY, Director, Legal Rights Project, Institute of Public Affairs, sworn and examined:

CHAIR: I welcome our next witness from the institute of public affairs. Would you like to make an opening statement?

Mr BREHENY: This inquiry into racial vilification law in New South Wales risks opening the door to changes that could have serious consequences for freedom of speech. The current criminal law in this area is based on physical harm. The concept is a simple one. Threats of physical violence are unacceptable and should be outlawed. The law as it stands is appropriate. However, it must not be expanded to catch any form of conduct less than specific threats of physical violence. To do so risks undermining one of our most important liberal democratic rights, freedom of speech. Other submissions to the inquiry have recommended such regressive changes which could make it possible for a person to be fined or imprisoned merely for expressing a certain opinion. Lowering the bar to include, for instance, conduct that offends, insults or humiliates would be a dangerous step in the wrong direction. Such restrictions on free speech are completely unacceptable.

More broadly, this inquiry appears to be based on the idea that a criminal law that has not resulted in any convictions is not good law. In fact, the opposite is much closer to the truth. The law is a success because it is being obeyed. No one is threatening physical harm towards others on the basis of their race. Surely we would prefer a legal system where no convictions are ever recorded. In this case the provisions should be seen as a successful law not one that requires amendment. If any change is to be recommended by this Committee it should involve the repeal of section 20D of the Anti-Discrimination Act 1977 and a reversion to common law actions based on intimidation rather than race. At the national level the Gillard Government has recently been forced to back down over two proposed pieces of legislation that would have restricted free speech. Namely, the dangerous overhaul of anti-discrimination law and the introduction of a misconceived regulatory regime to oversee Australia's news media. It is disappointing that a Coalition government in New South Wales is opening the door to further incursions on our human right to freedom of speech.

CHAIR: I will start with the first question. I do not know whether you were here when Mr Shoebridge raised an example of a Malaysian person who was abused for being of Indonesian background. Under the current law that person cannot bring any claim. Let us assume that there is a situation of racial vilification, threats and incitement, should the law be amended to cover that situation?

Mr BREHENY: It is an interesting hypothetical.

Mr DAVID SHOEBRIDGE: It is not hypothetical. Elements of it happened on a bus in Sydney last week.

Mr BREHENY: It is an interesting case to consider. The problem is what if it is me being abused because I am Somalian. Why is it that we use a particular racial background? If you like, they come from the same part of the world. Why then would that be not more broadly applied?

CHAIR: Let us take somebody who is abused for being Jewish and they are not Jewish.

Mr BREHENY: When they are not?

CHAIR: But they are married to somebody known to be Jewish. What would you do in a situation like that?

Mr BREHENY: Are we talking here about a change to section 20D that would involve—

Mr DAVID SHOEBRIDGE: We are talking about the bigot getting it wrong. The bigot gets the race wrong but the abuse, vilification, insults and threats are all the same, it is just that the bigot got the race wrong.

Mr BREHENY: So the important thing in that case is that an insult has taken place?

CHAIR: Let us assume that it is racial vilification and it has all the components in section 20D except that in the case of the person being abused he is Malaysian and but was abused as Indonesian, what do we do about that situation?

Mr BREHENY: I do not think it is a controversial issue. It seems to me you insert a provision that includes perceived race and you overcome that problem. There are some changes you might have to think about at the margins which include what if it is obviously not true. They might have gotten it wrong. What if they abuse me on the basis of the colour of my skin and they get it wrong because they have never seen me and they make a presumption, it is not going to cause any offence to me because I know it is absurd. Including perceived as opposed to actual race is something relatively uncontroversial.

CHAIR: Subject to those things on the edges you would have no problem with an amendment in that regard?

Mr BREHENY: I would agree with an amendment like that, yes.

Mr SCOT MacDONALD: How was the Murdoch lunch?

Mr BREHENY: The dinner was excellent.

Mr SCOT MacDONALD: Do you think Australia is a successful multicultural country?

Mr BREHENY: Yes, I think it is a very successful multicultural country.

Mr SCOT MacDONALD: Would you attribute it to our laws and regulations?

Mr BREHENY: I certainly do not think it is because of the legislation that we have passed.

Mr SCOT MacDONALD: At a State or Federal level?

Mr BREHENY: Or even because of our common law. I think it is a range of factors. I am not a sociologist but I would presume—

Mr DAVID SHOEBRIDGE: —the tolerant editorial line for the Murdoch press?

Mr BREHENY: I do not work for the Murdoch press. I would presume it is because of the fact that we have had such a range of people from various ethnic backgrounds for quite a long of time, generations and generations of people living and working together, which has produced the kind of society we see today.

Mr SCOT MacDONALD: Can I ask you to compare and contrast that to experiences overseas. It would only be my perception but I perceive Europe as heavily codified in this area of human rights. Maybe you have American experiences you are aware of but particularly in Europe has codification assisted their multiculturalism or not?

Mr BREHENY: What we are driving at here is the perceived educative function that legislation might have and I think there is none or next to none.

Mr SCOT MacDONALD: In Europe?

Mr BREHENY: Whether it is in Europe or Australia or anywhere else. I think generally what happens is that community expectations get to a certain stage and we pass legislation in line with those community expectations. It is values and the way we perceive these things that come first and then it is legislators—I am sorry to say—that come along second and put those things into law. It is very rare, in fact I do not think it really ever happens, that the law acts as educator and, if you like, shapes those values to move in certain directions. I think it is the values that come first and they are shaped by a range of other things and rarely is that law. If law is a factor it is one among many factors that shape those values.

Mr SCOT MacDONALD: I read a bit about Europe and to me it is heavily codified and yet you still have the emergence of far right and far left racially intolerant groups of people to the point where some people have lost their lives in Holland. There is the emergence, by any definition, of very intolerant groups of people and yet Europe has very heavy civil and criminal penalties, from the little I understand.

Mr BREHENY: I have not done a comparative of Australia versus Europe or Australia versus the United Kingdom, but one thing that I think is clear, as I have said, law is not a very good educator. It is other

elements in society that does that. Therefore, when you are looking at changes like this, particularly with regard to the criminal law, are you doing this to shape those values and change people's minds to effectively eliminate racial vilification through the law, or are you attempting to punish people after the fact for racially vilifying others?

Mr SCOT MacDONALD: If in some people's minds we improve this or make it more effective and get prosecutions, does that mean we drop the ball elsewhere? By codifying it, by regulating it, have we done our job by protecting people and being inclusive?

Mr BREHENY: As I have said, I think this is a successful law. It is extraordinary that we are holding an inquiry into a law that, by all accounts, has been successful. It is successful because people are obeying it. When the Director of Public Prosecutions says in 23 years or 24 years of this law's existence we have not had a successful prosecution—despite the fact that complaints have been made the determination has always been that the threshold under this legislation would not have been met—to me that clearly signifies that people have not been doing what this provision sets to outlaw. Therefore it is a successful provision; people are obeying the law. If we want to change the law, fine, but it is not because this provision has been unsuccessful.

CHAIR: Following on from that, some people have suggested, including representatives from the Council for Civil Liberties, that the offences contained in section 20D should be transferred to the Crimes Act. What would your view be of that proposition?

Mr BREHENY: I do not have a strong view one way or the other. One thing I would say is that simplification of the law is something that is a good idea. Whether or not you think it is more simple to include this provision in antidiscrimination legislation because you are talking about racial vilification, or whether it is more simple to include it in the Crimes Act because it is a crime of racial vilification, I do not have a strong view one way or another on that. As a general rule, it would be better to include it in the Crimes Act, simply because it is a crime. I would hesitate to put a strong view on that one way or another because of implications that that might have for the specific regime that has been set up under the Anti-Discrimination Act more broadly.

CHAIR: Although there are many crimes that are not contained in the Crimes Act; they are in other legislation.

Mr BREHENY: Yes.

The Hon. SARAH MITCHELL: Going back to the issue of community expectation, it seems to me that what you are saying is that no-one has been prosecuted under this law, therefore, it is effective and community expectation is being met. Is that what you believe?

Mr BREHENY: You run into the problem of asking the question: What are community expectations?

The Hon. SARAH MITCHELL: That is what I was getting to.

Mr BREHENY: I say that this is a successful provision in the sense that the words of this provision have created a law that has not been broken in 23 years. I do not know whether the law, as it stands, reflects community expectations, though. At the end of the day, community expectations are quite a difficult thing to put your finger on. It is difficult to say what they are. Whether or not it meets community expectations—I am one member of the community, you are another, and we have got millions of others in this State. One of the difficulties we have with this inquiry is that the terms of reference are quite ambiguous. It makes it quite difficult for us to determine which way the law is going. Reading those terms of reference, we could be asking here for a tightening of the law rather than an expansion of the law.

Mr DAVID SHOEBRIDGE: You would be one out on that. Yours would be the only submission so far asking for a tightening of the law.

Mr BREHENY: Sure.

Mr DAVID SHOEBRIDGE: I can let you know that none of the other submissions has proposed a tightening of the law.

Mr BREHENY: I am not surprised by that.

The Hon. SARAH MITCHELL: In its submission the Council for Civil Liberties raised a recommendation that the section place the emphasis on the results of the Act rather than the intention of the offender. Would you have an opinion on that?

Mr BREHENY: This is criminal law, so you must have a mens rea and actus reus. If you weaken the mens rea side of things, then why do we not make this into a civil provision rather than a criminal one?

The Hon. SARAH MITCHELL: What would you like the recommendation to be?

Mr BREHENY: I think that a much better way of dealing with this would be to repeal section 20D and rather than focus on intimidation or threats of physical violence based on race, just make it threats of violence. Whether it is based on race, whether you are from the country or the city, or whether you are a male or female, it should not matter what particular attributes you have. Surely a threat of physical harm in one case is equal to a threat of physical harm in another. It seems strange to me that we single out particular attributes that people might have when we already have a threat of physical harm offence in the common law. It is a cleaner way of dealing with this. It is a more simple way of dealing with it. I do not see enough value in us picking out particular victim groups that we create legislation around.

The Hon. SHAOQUETT MOSELMANE: We did not receive a submission from you. I would like to know more about the Institute of Public Affairs. Will you tell us about the background of that organisation?

Mr BREHENY: Yes, the Institute of Public Affairs is a free market think tank. We conduct research and get into the public debate as much as we can and push for values of individual freedom for the free market and free enterprise. These are the values that we stand up for in inquiries like this and in the media and this is what our research is focused on.

The Hon. SHAOQUETT MOSELMANE: Your position would be to champion the rights of all to express their views and beliefs without suppression?

Mr BREHENY: Yes, correct.

The Hon. SHAOQUETT MOSELMANE: That is what the Council for Civil Liberties say is the bottom line?

Mr BREHENY: Yes, I would agree with that.

The Hon. SHAOQUETT MOSELMANE: Your comments have been that there has not been a breach of the racial vilification rules under section 20D, therefore, there is no need to amend it. Effectively there is no need to tamper with it; it has worked.

Mr BREHENY: Not necessarily. My submission is more that this law does not need to be amended because it is has been an unsuccessful law. There may be other reasons. "Community expectations" has been written into the terms of reference, but it is such an ambiguous term. It is very difficult to put your finger on what it is we are getting at with community expectations. It really does not mean anything. It is a term that is used by a wide range of people and they can be talking about outcomes that are completely different from one another. We need something other than community expectations on which to judge (a) the success of this provision and (b) whether or not it needs amending.

The Hon. SHAOQUETT MOSELMANE: You spoke earlier about the law being merely educative. Do you not think that the law has a significant role to play, not only being educative but also to put regulations in place in which society is ordered and everybody respects the positions of others so as not to harm and impede on the rights of others? Do you not think there is a value in the laws being in place?

Mr BREHENY: As I said, if there is a value, it is one factor among many factors. Because the law often follows after, if you like, morals and the community has progressed, I do not think it has an educative function.

The Hon. SHAOQUETT MOSELMANE: You mentioned that we do not want to mould laws to protect various groupies. What did you mean by that?

Mr BREHENY: As I have said, I think threats based on physical harm should be outlawed in all cases. It should be a crime for me to threaten you whether or not it is based on race or anything else. Another thing to consider here, if we have included race, why do we not include religion or gender or sexuality or any number of other attributes that are protected in the Anti-Discrimination Act more generally? Why have we singled out race as being one of those that we are going to put into the criminal law and we have not brought out any of the other things? I am not suggesting we go down that path, but threatening physical harm to anyone, whether it is on the basis of race or anything else, should be unlawful and it is unlawful. If this provision were removed, we would probably have a very similar criminal law regime to what we currently have with this provision there. It is just that we feel as though we are doing something by putting this into the law. Most cases that you could bring up would be covered by the law already.

The Hon. SHAOQUETT MOSELMANE: Can you identify anything that gets near or close enough to what you determine is extreme or serious racial vilification?

Mr BREHENY: There must be a connection between what someone does or says and harm, so some form of physical harm.

The Hon. SHAOQUETT MOSELMANE: Is there an example that you have seen in society? For example would the 2005 Cronulla riots fall under serious racial vilification?

Mr BREHENY: Clearly there were people at the Cronulla riots who were both physically abused and others who would have been in a position where they feared either for their safety or the safety of—

The Hon. SHAOQUETT MOSELMANE: They were physically abused because of their particular race.

Mr BREHENY: Sure. Whether or not we have a racial element to the criminal law, they would have been captured. I assume arrests were made and people were convicted for that.

The Hon. SHAOQUETT MOSELMANE: Irrespective of whether it is race, religion, ethnicity, a threat of violence is a threat of violence, and it should be dealt with as such?

Mr BREHENY: Correct.

The Hon. PETER PRIMROSE: My role in these inquiries is to ask questions based upon submissions that have been made by witnesses. This witness has made no submission, so I cannot ask any questions. I am not going to make up a question.

Mr DAVID SHOEBRIDGE: Thanks for coming and making an oral submission. It is interesting to hear the other perspective. You say there are no grounds to protect one aspect of a person's identity, which is race, as opposed to a panoply of other aspects of their identity: their gender, whether they are tall or short, or their weight, et cetera. Is that your position?

Mr BREHENY: Yes, absolutely. As a general rule, we are talking here about laws that should apply to everyone. We clearly have situations such as section 20D of the Anti-Discrimination Act where the law applies only to particular groups of people. Equality before the law is something that I think is important and this, to some extent, undermines that.

Mr DAVID SHOEBRIDGE: The argument against you is human beings have a history of treating people appallingly on the basis of their race or perceived race. There is case after case in history of gross human rights abuse, genocide being visited by one racial grouping on another racial grouping, or by a group of racial groupings on one racial grouping, and that is why the law acts specifically to protect race. Do you think we should be blind to that history in our laws?

Mr BREHENY: Again, there is any number of particular attributes that you could pull out that would have that same history.

Mr DAVID SHOEBRIDGE: Name them.

Mr BREHENY: Gender.

Mr DAVID SHOEBRIDGE: You think there has been genocide on the basis of gender?

Mr BREHENY: No, but you are talking here about people being treated very poorly historically.

Mr DAVID SHOEBRIDGE: No, I am talking about gross human rights abuse and genocide on the basis of race.

Mr BREHENY: Genocide only occurs on the basis of race. The definition of genocide—

Mr DAVID SHOEBRIDGE: Mass slaughter within communities on the basis of race?

Mr BREHENY: Religion is another example.

Mr DAVID SHOEBRIDGE: There may well be an argument to protect people from religious vilification, but I am putting to you that there is a rationale, based on history, to take specific steps to protect communities and groups of communities from vilification and abuse on the grounds of race.

Mr BREHENY: I understand that.

Mr DAVID SHOEBRIDGE: What do you say to that historical argument?

Mr BREHENY: My point is why?

Mr DAVID SHOEBRIDGE: To prevent it.

Mr BREHENY: What is the outcome that you are hoping to achieve by having a provision in the legislation like this?

Mr DAVID SHOEBRIDGE: Allowing for extremely early intervention through the force of the criminal law to prevent a head of steam being brought in society that would tolerate that racist element.

Mr BREHENY: Why is that important on the basis of race and it is not important on the basis of any other attribute?

Mr DAVID SHOEBRIDGE: By reason of the history that I was speaking about earlier. We know that there is that potential in any human society. We are not perfect individuals. There is that potential, based on history, which is why we have the laws to have an early intervention to come down harshly on it so as we do not get that element built in in our society, and we do that based on history.

Mr BREHENY: I think it is bizarre that we treat this differently.

Mr DAVID SHOEBRIDGE: I find it bizarre that you do not address the history argument.

Mr BREHENY: If you want a regime where you are able to step in and have early intervention to stop these kinds of things happening, surely it does not matter whether they happen on the basis of race or anything else. The point is that you want to stop it happening. What I am saying is that there should be general provisions in the criminal law that allow for that to happen, not specific ones that are based on race. It should not matter whether it is racially motivated or whether it is motivated by anything else. These things should be outlawed. As I have said, I think the general provision in the common law against threats of physical harm is appropriate. It seems strange that we have section 20D as a specific provision dealing with race when there are so many other protected attributes that you could also include.

Mr DAVID SHOEBRIDGE: The view of the Institute of Public Affairs on free speech, does it take the absolutist view that you see expressed in parts of the United States, such as the Westboro Baptists, who will turn up at the funerals of soldiers from the United States military and scream quite vile anti-homosexual rants at

the family members, the military, and the public who are at those funerals? Does the Institute of Public Affairs say that we, in Australia, should craft laws to absolutely allow that kind of free speech?

Mr BREHENY: What Westboro Baptist Church does is appalling. I think any sensible person would agree. Their views are out of step with 99 per cent of the community. As a general rule, though, when you are looking at laws like this, and particularly the criminal law, there must be a connection between what is being expressed and physical harm taking place. It is difficult to know whether the Westboro Baptist Church would be able to get away with that kind of thing here in Australia, but certainly in relation to something like section 20D, there must be a connection between those two things.

Mr DAVID SHOEBRIDGE: I am trying to work out where the Institute of Public Affairs comes from ideologically. Do you say that, as lawmakers, we should be neutral to that and not have a law that would in any way prevent or hinder the Westboro Baptist Church from doing similar activities here because your view of free speech is so absolute that it let that happen?

Mr BREHENY: Are you asking me about general limitations on freedom of speech? Yes, we agree that there are, and should be, general limitations on freedom of speech. As I have said, I think one of those limitations is that where there is a connection between me saying something and someone else going out and conducting a violent act, that should be unlawful. There are any number of other restrictions on freedom of speech. You have defamation and we have other restrictions on freedom of speech as well. It is appropriate that they are there. I suppose the question here is whether or not we water down section 20D so that it would include things like offensive and insulting conduct, which would be a completely unacceptable incursion on our right to freedom of speech. As to generally applicable rules on how far freedom of speech goes, yes, I believe that the Institute of Public Affairs would probably allow for laws that allow for people to go further with their speech than others would. This is because of the value that we place on civil society as a regulator rather than government.

Mr DAVID SHOEBRIDGE: The Council of Civil Liberties looked at section 20D and suggested two elements of mens rea. One is you have to have a conscious intention, a mens rea, to promote or express racial hatred, serious contempt or ridicule of a race, and then recklessness as to whether or not that could result in a threat or injury to a personal property. So you have a mens rea conscious intent as to the racial element of it and then a recklessness as to whether or not it would deliver injury or a threat of injury to person or property. What do you say to that proposition?

Mr BREHENY: I do not think I would disagree with having two separate mens rea. Recklessness is a fairly acceptable standard of mens rea in many other areas of criminal law, and I do not think it would be inappropriate to include that in this particular provision as well.

Mr DAVID SHOEBRIDGE: Do you think there is a role for criminalising this type of conduct where you have a man on a public bus standing over a woman who is sitting down and denigrating her, abusing her, castigating her, on the basis of her race and doing that loudly and openly in a public bus, and doing it in such a way as to not be threatening physical violence to her, not touching her and not in any of that language threatening physical violence or intimidating or touching her in any physical way, but placing that person in a reasonable fear of apprehension?

Mr BREHENY: You either have a situation where she is being intimidated and has a reasonable fear of apprehension, in which case it is assault, or there is no intimidation that takes place. If you are talking about someone who feels uncomfortable—

Mr DAVID SHOEBRIDGE: What about if the only reason the person feels intimidated is because their race has been brought into it? They know that their race can be an element which sees them marginalised and abused and insulted and hated, and it is their race that is the core element of the abuse?

Mr BREHENY: Are you talking about someone feeling uncomfortable in a public space?

Mr DAVID SHOEBRIDGE: I am talking about someone feeling threatened because they have been intimidated and abused on the basis of their race.

Mr BREHENY: So they are being intimidated. If they are being intimidated and abused—

Mr DAVID SHOEBRIDGE: Yelled at, abused.

Mr BREHENY: —and they fear for their safety, that is already caught by assault as opposed to battery. You do not have to touch someone, and that is assault if they fear for their safety.

Mr DAVID SHOEBRIDGE: But the bigot who is doing that says, "I never threatened their safety. I just said I didn't like them because of their race. I was never going to hurt them, it never entered my intent to hurt them, and never had any intention at all to hurt them. I just thoroughly despise them because of their race and I told them that."

Mr BREHENY: We live in a free society where people are able to express these kinds of views.

CHAIR: You would be saying that the law would come to a decision whether there is assault or not assault, based on all the circumstances of the incident?

Mr BREHENY: I think assault is completely appropriate.

Mr DAVID SHOEBRIDGE: But there is no intention to assault, and a magistrate is perfectly convinced that the person had no intent to assault. The person was just disgusted by their race and expressed it loudly and publicly, and the fact that the woman felt intimidated and threatened, mens rea cannot be proved and there would be no criminal prosecution. You say that society should say, "That's okay."

Mr BREHENY: This is no different to someone screaming assault at you on a bus on the basis of anything else. You know, I am from Melbourne and I could be on a bus in Sydney here and people could be screaming abuse at me because I am a southerner. That is no different. I have the same feelings of intimidation that someone else might have if those insults might be hurled at me on the basis of my race.

Mr DAVID SHOEBRIDGE: You equate being abused for being from Melbourne with being abused because of your race. Is that seriously your evidence? You equate those two factors?

Mr BREHENY: If those feelings are the same.

Mr DAVID SHOEBRIDGE: I have no further questions.

CHAIR: We have run out of time. Mr Breheny, I thank you for attending and giving us your thoughts and your verbal submissions.

Mr BREHENY: Thank you very much.

CHAIR: The Committee will certainly take those into account when we consider the whole issue.

(The witness withdrew)

(Short adjournment)

PROFESSOR SIMON RICE, OAM, Director, Law Reform and Social Justice, College of Law, Australian National University, affirmed and examined, and

PROFESSOR NEIL ROBERT REES, Professor of Law, School of Law, University of Sunshine Coast, sworn and examined:

CHAIR: Thank you for your attendance today and for your written submission. Would either of you like to make a short opening statement?

Professor REES: We thought about it and we have concluded that we think our written submission speaks for itself, so we will leave it to whatever questions the Committee might have for us.

CHAIR: You call for a criminal offence based on section 20D, which actually takes place in private. All of these offences of racial vilification, which are a crime, are public things. That is the idea that somebody has been racially vilified publicly. People have set out to humiliate them, embarrass them and denigrate them in public. You say on page 12 of your submission:

> Racially based private action, such as conversations within an apartment block, which causes another person to fear for their safety …

You say that that also should be a crime. I do not know if you have seen the submissions but I think yours is the only submission that calls for that.

Professor REES: I think you are putting words in our mouths. We did not say "in private". What we are proposing is that the private-public dividing line be moved a little bit. All we are proposing is that it be moved to where the Victorians have moved it. There is a long history of challenges in the whole field of anti-discrimination law, and I should not use this to plug our joint book but I will. In a number of pages in our book we discuss where you draw the line between public and private behaviour. All we are saying is that in an area such as this the line should be drawn a little bit further into the private domain than what it has been in the past. Places like the lobby of an apartment block, if people are engaging in the sort of behaviour there which would otherwise constitute an offence, why not make it an offence in that place? How does that differ from a train or a bus?

CHAIR: A train or a bus will be in a public place.

Professor RICE: Could I offer a clarification? When you read the whole of page 12, I acknowledge, in the so-called third comment—I suspect it is the fourth halfway down the page—there we say that "the proposed offence does not admit any defence". That is not strictly speaking true in light of what we said above, and I apologise for misstating it. It is not the case that it does not admit any defence. We have said in the first paragraph, which you started with, we are talking there about a legislative exception so that it is available to a person to establish objectively that their conduct was intended to be private and on establishing that it would then be, as Professor Rees said, private conduct and not caught by the Act. I just thought I would clarify the fact that we acknowledge the availability to a person to establish what they are doing is private rather than—and this is the shift that Professor Rees was talking about—saying that it is absolutely in so-called public space. It is in any space but if a person is able to establish that it was intended to be private then it will not be caught.

CHAIR: I think some people might have some difficulty in saying—let me rephrase that. It is either public space or it is private.

Professor RICE: That is the great difficulty. In fact, at the moment—

CHAIR: The court determines that.

Professor RICE: There is quite a bit of work being done on that, on what is public and what is private. Reasonable people will differ around this. Any example could be given and we would say, "is that public or private?" It is a shifting perception and the difficulty with saying it happens in public is it then creates confusion and uncertainty as to when the law is in operation and when people can rely on it, and what the Parliament's intention is. Whereas if we simply say this kind of conduct is not tolerated unless you can show it was private, it is very clear then from the Parliament's position that this conduct is not tolerated but if someone can show their

intention then it is accepted. It provides considerable clarity whereas to assert a uniformly understood public-private divide is very different.

CHAIR: If that is the case, it will not change the law. It does nothing to the law. Judges are there to make these interpretations all the time. There are always these grey areas in these laws. That is why judges are there and that is why matters go on appeal because people see things differently. But at the end of the day, despite that wording there, you are not suggesting in any way that matters that are—for instance, you say here "in an apartment block". So if I was in a private unit, an apartment in an apartment block, you are not suggesting that there could be an offence committed there unless it was loud enough that it was—

Professor REES: Precisely.

Professor RICE: We have both been involved in matters where in housing blocks of apartments in Sydney people screaming vilification, any of us would Sydney that should be caught by the legislation even though it happened in the foyer of a private apartment block. So yes, it is a question—

CHAIR: How do you know it has not been caught? How do you know that someone shouting so that 100 other people hear out the window—

Professor RICE: It may well be caught. What we are saying is that for clarity's sake it should be very clear that that will be caught.

CHAIR: So you are raising an issue that has not been an issue at all.

Professor REES: It is an avoidance of doubt provision. We have both been practising lawyers for long enough to know that very few people actually benefit by taking these things through to appeal courts. It is very expensive and the people involved have to wait for a long time. We are simply passing on to this Committee the benefit of our experience that we believe that it might benefit Parliament to clarify that.

Mr DAVID SHOEBRIDGE: Do you say in your experience this issue comes up—

Professor REES: Yes.

Mr DAVID SHOEBRIDGE: —and when it comes up it creates great uncertainty for people in making claims?

Professor REES: On both sides of the fence, yes.

CHAIR: Can you give us details of cases where this has come up, this has been an issue, so that we can consider it more fully in justice to what you are proposing? Could you take that on notice?

Professor REES: In relation to anti-discrimination law generally, there is a whole series of instances set out in our book and I am happy to provide a reference to the page numbers in this whole area. It only takes a moment's reflection. I would have thought that where I am sitting now is a public place. Ten minutes ago I was sitting in the morning tea room with a former staff member of mine in the same building probably 30 metres away. I would have thought that was a private place because I needed a pass to get in there.

CHAIR: And most people would agree with that.

Professor RICE: That is the point. We are offering the Parliament the opportunity to avoid your observation of most people and to make it very clear that an inquiry into whether or not some people will and some people will not can be avoided by simply saying that kind of behaviour is not to be tolerated whenever it happens, unless you can show that you intended it to be private. So we avoid the question and if I may just give the example—

CHAIR: If you could take that on notice and refer any details of cases that are out there where this has been an issue.

Mr DAVID SHOEBRIDGE: I think Professor Rice was in the middle of giving some further examples.

Professor RICE: I cannot remember the case name and I thank you for the invitation to take that on notice, but the Administrative Decisions Tribunal decided a case in the early 2000s where in the public housing mission blocks in Devonshire Street in Surry Hills there was a shouting of comments. Part of the case revolved around whether or not the conduct happened in public or in private. It was actually homosexual vilification but the point is the same whether it happened in public or private. It needed to go, with respect to the processes we have in New South Wales, through two to three years of waiting, conciliation, and ultimately a tribunal hearing for a tribunal member to decide whether or not it had happened in public or in private. This is where we invoke our experience in saying that that case could have been avoided had it been very clear at the outset that vilifying conduct is not tolerated.

CHAIR: All you are doing is saying that these things should occur publicly and you just want to clarify certain situations where it may be a grey area for certainty that it is either public or private.

Professor RICE: As Professor Rees said, it is just shifting the line.

CHAIR: You are not seeking to extend this to private circumstances but keep it in the public domain.

Professor RICE: I draw your attention to the first paragraph on age 12 where we say there would be "an exception to liability when the person concerned can establish, objectively, that his or her conduct was intended to be private".

Mr DAVID SHOEBRIDGE: But it is shifting the onus in large part, is it not?

Professor RICE: Yes, it is.

Mr DAVID SHOEBRIDGE: Rather than a complainant having to prove it was in public, the person who engaged in the vilifying conduct must prove it was in private.

Professor RICE: That they intended it to be private, yes.

Mr DAVID SHOEBRIDGE: They intended it to be in private.

Professor RICE: It may well have been heard publicly but if they can show that was not their intention, if it was a dispute between people inside an apartment with thin walls, then they may well be able to establish that.

The Hon. SARAH MITCHELL: Thank you not only for appearing today but for your very detailed and comprehensive submission. To take things back to the original terms of reference, we are talking about evaluating the effectiveness of section 20D. One issue we have come across while talking to many other witnesses and in other submissions relates to community expectations and how we measure that. Some have said that because there has been no prosecutions that shows that the law is working in line with what the community wants; others are arguing the other side of the case, saying that the fact that there has been no prosecutions shows that it is not effective enough because the bar is set too high. Can you talk a little about how you think the Committee should be evaluating whether community expectations are being met?

Professor REES: It is an incredibly difficult concept. Former Supreme Court Justice Dyson Hayden published a piece in Friday's *Financial Review* saying how challenging he found sitting on the High Court and determining what community expectations are. I think all one can do is the best one can in the circumstances and look at responses to incidents that have been drawn to our attention. Again, if I go back to Friday's newspapers, the well-known commentator Waleed Aly spoke of his life in Australia and being constantly on the receiving end. A former colleague of both Professor Rice and mine, Professor Ron Sackville, or Justice Sackville as he was, gave a paper recently at the University of New South Wales where he said growing up a Jewish person in his community he was regularly on the receiving end of vilifying behaviour.

If we have people like this, who are articulate, sensible, balanced members of the community, like Waleed Aly and Ron Sackville, saying, "My life's history has been experiencing this sort of behaviour from other people", I think it behoves the leaders of our community, our parliamentarians, to be standard setters. I think we tried very hard in New South Wales when we first introduced vilification legislation, and I think 20-odd years' experience is just demonstrating that we need to finetune it.

Professor RICE: A little further on that, if I may, I heard some of the evidence that Mr Breheny from the Institute of Public Affairs gave and I felt that a response to the position he was taking—I understood the position he was taking was why do we need a law specifically in relation to race and not more generally—is that the Parliament is making a statement of policy about where it sees race-based conduct in society, so when in our submission we draw attention to the symbolic nature of this legislation, I think that is in large part in response to concerns about effectiveness. At an extreme, and I do put this as an extreme to illustrate it, as long as the existence of the law is not harmful or causing anything from cost to harm, it is there as, at the very least, a symbolic statement, and whether or not its lack of enforcement indicates it is effective or it is ineffective is a subsidiary question to a public policy statement that race-based conduct is beyond the pale. I think the symbolic nature of the legislation is very important around questions of race, quite apart from effectiveness.

The Hon. SARAH MITCHELL: We have received that view from other witnesses as well. The second question I wanted to ask is this: In your submission you devoted quite a few paragraphs to other jurisdictions. The Western Australian model is mentioned, as well as the Canadian system, and they are examples that have been raised by other witnesses. Do you think there are other jurisdictions that are handling these issues better than New South Wales that the Committee should look to by way of example?

Professor RICE: I think it is fairly clear, I hope from what we have said and from what other submissions have said, that everybody is struggling with this. To get past the really important symbolic nature of the legislation is difficult. It is probably worth reflecting on the fact of how widely legislatures have taken this step to make a symbolic statement. There is very little doubt that legislatures around the world see this as a very important statement to make and everybody is struggling with how then to translate it into something that is effective. The United Kingdom experience does not help us a great deal. I cannot point to a jurisdiction where we can say, "Yes, they've nailed it." I think it is significant that a few places, and we make the suggestion, have moved away from trying to replicate the International Convention's language.

To prove incitement to hatred is elusive and the idea of stirring up, which they have in the United Kingdom, has not proved helpful to anybody; so people are grappling with ways, and we are offering a different way if you like. But what we are proposing is not going into new territory like stirring up, which the United Kingdom tried; it is really falling back on some fairly well established approaches to criminalising behaviour to try to translate international human rights obligations into language that makes sense in domestic criminal law. The Human Rights Law Centre's submission I think was helpful in pointing out that the United Nations approach is they are not prescriptive. It really is a matter of finding a local domestic solution, which is why you only get so far by looking at the way other countries have done it, but it does tell us that everyone is struggling to nail it down.

Professor REES: My only additional response would be that from my research there is no magic formula to adopt, and we simply have to learn from the experience in other jurisdictions and learn from the experience and other facets of our lives. I think our three-tiered response that we are proposing is an interesting move in a direction that New South Wales ought to be going in. I think our shared experiences, both as practitioners and as tribunal members, is that it is often an extraordinary ask to require people to run their own civil proceedings, and what people want is some arm of the State responding and saying, "This behaviour by this person is unacceptable." It is only going to be in very, very rare instances that there will be sufficient evidence to justify a criminal prosecution and the halfway house of the civil penalty we believe is a big step in the right direction.

The Hon. SHAOQUETT MOSELMANE: On page 14 of your submission you make the argument basically that it is often unreasonable to expect a person who has experienced racial vilification to simply accept conciliation, but rather have the vilifier or the perpetrator fined for their behaviour. On what basis do you say that it is unreasonable to expect a person who has been vilified to accept conciliation?

Professor REES: We are not saying that. We are saying that what might happen is that it is impossible to reach a conciliated solution. The person might simply require an apology, and I assure you that, as a tribunal member, I have been involved in numerous cases of mediating cases which have been resolved on the basis that the person who has engaged in vilifying conduct has apologised, people have shaken hands and everyone has gone home. That seems to be a good outcome in the circumstances, but sometimes people are not prepared to make that apology, or they will make a very qualified apology, so if the person who feels wronged wants to take it further, he or she has to run the proceedings before the tribunal, which is a very costly and tiring process for people.

The Hon. SHAOQUETT MOSELMANE: The act of vilification usually happens in public, but the act of apology does not. How do you satisfy the victim that the apology is now public?

Professor REES: That is one of the difficulties, and people are writing PhDs on this. What often happens in the discrimination jurisdiction is that the alleged wrongdoer will apologise, and in some instances pay some damages, but on the condition that it is all kept very private.

Professor RICE: And it can, of course, be made public, but your point is right in many cases. Could I come back to your first point and approach it from a slightly different perspective and say that what I hear you raising is a question that is raised about the whole discrimination jurisdiction, and that is that it is a complaint-based model which places the onus on the person who feels wronged to do something about it. One of the distinctive things about the discrimination jurisdiction is we are talking about people in a position of abusing power or of being abused by misuse of power, so we are talking about significant power differentials between somebody who is being treated differently because of an attribute and somebody who is in a position to be able to do that, and it is exacerbating vilification. It is fairly obvious. Somebody is attempting to belittle, humiliate or marginalise somebody because of their race.

The model we have expects that person to take on the person who has abused them in public and to pursue proceedings against them for no less than 18 months to two years, at their own cost, time and expense in order to get a remedy for what the Parliament has said is unacceptable conduct. What we are looking for here, and with the proposal of the civil penalties, is the State stepping in and saying, "Look, there is only so far we can go in expecting a disempowered person to take on the perpetrator themselves and seek a remedy." The State, having declared that this conduct is beyond the pale, has a role in actually doing something about it.

The Hon. SHAOQUETT MOSELMANE: What do you say to this view: Vilifying conduct only occurs when paired with threats and only then should it be criminalised?

Professor RICE: Is that a question of whether the criminal law is enough to look after it?

The Hon. SHAOQUETT MOSELMANE: Effectively, there has to be a feeling of threat before it is criminalised.

Professor REES: That is what we are saying in our submission, that the person has to have a reasonable fear of threat to their person or to their property, or to the person or property of their relatives or associates, so to be criminalised it is not just offensive behaviour; the harm being done is much more than that. It is using race as a vehicle—

The Hon. SHAOQUETT MOSELMANE: Otherwise it should remain under civil proceedings.

Professor REES: Or if there is the threat to person or property, but you cannot prove enough to get a criminal conviction, we are saying the halfway house of a civil penalty, otherwise yes, it is still continuing on with the existing civil provisions and the Anti-Discrimination Act.

The Hon. SHAOQUETT MOSELMANE: We have had a few witnesses and submissions that basically argue that section 20 would be better served in the Crimes Act, not in the Anti-Discrimination Act. Does it make any difference really? What is your view?

Professor RICE: You are right, you have received a number of submissions that say the same, and that proposition goes back a long way. The New South Wales Law Reform Commission said the same and I think Mr Samios's report said the same. Procedurally, it will make a significant difference because the expertise and resources available to those with responsibility under the Crimes Act—the Director of Public Prosecutions—to pursue this, to have the external agency making a referral under the Anti-Discrimination Act is perhaps demonstrably inadequate because nothing has eventuated. This is criminal conduct and it belongs in the Crimes Act because of the procedural and resource implication that it has by putting it in that piece of legislation.

The Hon. SHAOQUETT MOSELMANE: In terms of the Anti-Discrimination Act there is no definition of "incite". Would you recommend, if we do proceed with amendments or suggested amendments to section 20D, that we define every element or category? What would be your view?

Professor REES: The case law seems reasonably settled at the moment. I think we have both, with other hats on, had a reasonable go at the case law as members of the tribunal and I do not think there is a lot of dissention as to what it means. I am always one in the modern world for trying to clarify things in statutes, but your terms of reference did not really invite us to go down that path, which is why we did not.

Professor RICE: What we are proposing avoids use of the word "incite". We are offering what we think is accessible to anybody who reads it. "Incite" is not an easy word for people in the community who read the legislation to understand necessarily, not as easy as we find it, whereas if we use a word such as "cause", which clearly indicates conduct with consequence, which is what we are proposing, it is a much more accessible term, and we are proposing that that term be used.

The Hon. PETER PRIMROSE: Continuing on from Mr Moselmane's questions, I note towards the bottom of page 11 you outline the three elements of your proposed new section 20D. Could you give us some details about where you see that as being significantly different from the existing piece of legislation?

Professor REES: The existing legislation is based on somebody proselytising and criticising a particular racial group, and having an impact upon ordinary members of the community who are therefore incited to have hostility towards a particular group. I think that is a rather old-fashioned view of the wrong that is being done here. We say that the wrong is the sense of social exclusion that people feel about this and that we should cut out the middle person, if I can put it that way, of having somebody in the middle who has been incited by the behaviour of the person who is engaged in the alleged wrongdoing. We think you go directly from the behaviour of the wrongdoer to the impact that that has had upon the person who is the subject of that behaviour, and let us just cut out the middle person who is supposedly incited because that sends you down rather difficult paths, which again we have had to deal with as tribunal members. Can a reasonable member of this community in the twenty-first century be incited to feel ill will and hostility towards members of a particular racial group? That is not a very comfortable decision-making process to have to engage in and what we are proposing simply goes from the act of the alleged wrongdoer to the impact that that has upon the victim of that wrongdoing.

Professor RICE: An example of that was lengthy discussion in the tribunal, both in the first instance and I think on appeal, over what the reader of the *Financial Review* would think and whether what the reader of the *Financial Review* would think would be different from what someone who read a different paper would think. We are proposing that that kind of inquiry is not constructive when it comes to pursuing the legislative aim of addressing the conduct and the harm caused. As Professor Rees has said, that focuses on an intervening person and their status, which ought be marginal to the policy objective or not be relevant to the policy objective.

The Hon. PETER PRIMROSE: So the passenger on the bus, not the driver?

Professor REES: Not the independent passenger. You go straight from the wrongdoer to the victim; you are not asking how the independent passenger would have responded to these statements. To take the example that is, I suppose, fresh in people's minds: the newspaper reports of people being abused on public transport in Sydney and Melbourne. Under the existing law you have got to look at the impact that that behaviour would have upon an ordinary person sitting on the bus and say how would they have felt about the person who was the victim. Let us just put that independent person to one side and go straight from the perpetrator to the alleged victim and look at the impact.

CHAIR: In a sense there will be a notional person there, will there not?

Professor REES: You only get a notional person if you have to go down the path of having an inquiry of what a reasonable person would have thought in the circumstances. Would the reasonable wrongdoer have known that this behaviour was likely to cause the victim to—

CHAIR: And you are not suggesting that?

Professor REES: We are.

CHAIR: That is what I am saying: in effect, that person remains there but it is a notional person, the person has not been cut out.

Professor RICE: And for a different purpose. They are not there as the subject of an inquiry as to whether or not they would have been moved to think differently of someone else; that is not their purpose. Their purpose is only in the alternative if it is necessary to establish a reasonable likelihood of the causing of fear, which is really only a test for the direct causal link, not introducing another entire dynamic.

Mr DAVID SHOEBRIDGE: It is a test for the harm being caused.

Professor RICE: Yes. One of the, on its face, perverse aspects of the current drafting both of section 20D and the whole of the vilification provisions has been overcome by, I have to say, a sleight of hand in the jurisprudence. The legislation in New South Wales, both what we are looking at and the civil procedure, requires an incitement to hatred. The way the tribunal has dealt with it is by treating that as a likelihood test, because to actually prove incitement to hatred would mean getting into the tribunal room—if we go into the adversarial model—and a person who previously did not think badly of someone because of their race but having heard what was said now does think badly of them and comes and gives evidence for the person who has made the complaint and says, "Oh yes, I can help you prove that you were vilified because I now hate you".

The legislation actually requires proof of incitement, and clearly that is unworkable. So the jurisprudence puts a gloss on it, which is a problem with the drafting because people reading it do not understand that what is required is proof of the reasonable likelihood of incitement. That only adds to the reasoning process because you still have the intervening proselytiser, as Professor Rees put it. So if you take that out you are still simply left with only the proof of reasonable likelihood rather than having to prove as well the fact of somebody having you move to incitement.

Mr DAVID SHOEBRIDGE: A number of people have proposed getting rid of the word "incite" in section 20D and having "a person shall not by a public act promote or express hatred"—to use the phrase "promote or express" rather than "incite". Would that alleviate some of the slight of hand in the jurisprudence and allow more direct—

Professor REES: We think it has got to go further in that to make something a criminal offence you have got to do more than simply offend people.

Mr DAVID SHOEBRIDGE: I am not putting it in the context of the balance of 20D.

Professor RICE: If you took 20D now and if you did nothing more but clarify the point I just made that what is required is not proof of actually incitement but proof of lack of thought—

Mr DAVID SHOEBRIDGE: "Promoting or expressing", would that be an improvement?

Professor RICE: Yes, that would be an improvement. But we are proposing an entirely different focus in the offence. But you are right, that would be a step.

Mr DAVID SHOEBRIDGE: If it was "promote or express" hatred towards, serious contempt for, severe ridicule of a person, et cetera, on the grounds of race so as to threaten physical harm, incite another to cause physical harm or cause a person to have a reasonable fear in the circumstances of their own safety, if you had those three elements, would that go some way to addressing your model?

Professor RICE: Some way. A difficulty with it though is—and I am sorry if I did not follow what you recounted—if it turns entirely on the intention of the person then it will fail if the person can profess another intention of wilful blindness or ignorance. So if it all turns on intent then there will be a significant gap—and I suspect you will need to ask the DPP this—they would have difficulty deciding they could prosecute to establish intent absent a whole range of helpful circumstances.

Mr DAVID SHOEBRIDGE: The Council for Civil Liberties proposed two different mens rea, two different intentions: one was an actual intent to vilify, to ridicule or abuse someone on the grounds of race, but then in terms of the harm they were proposing recklessness as to the causing of the harm—so you may not have intended it but you were reckless, almost indifferent, to whether or not it caused harm, and if you could prove a reasonable person was in fear and recklessness, that would be sufficient for the offence.

Professor REES: There is little difference between the use of recklessness and our concept of a reasonable person being in fear. We are very much in the same territory there.

Professor RICE: In the reasonable likelihood—

Mr DAVID SHOEBRIDGE: A reasonable likelihood that someone is in fear.

Professor RICE: They are both addressing the same risk of relying only on intent and they are getting to the same result.

Mr DAVID SHOEBRIDGE: If I could just run through a couple of nuts and bolts things. Many people have said that the current time frames—the 28 days to refer and the six months for a prosecution—are grossly inadequate and that at a minimum they should be significantly increased. What do you say?

Professor REES: We agree with that.

Mr DAVID SHOEBRIDGE: Do you have an idea of a reasonable time frame for prosecution?

Professor REES: I would take what is in the Summary Offences Act, I think. From memory, it is 12 months.

Mr DAVID SHOEBRIDGE: At least 12 months?

Professor REES: Yes.

Mr DAVID SHOEBRIDGE: What about the concept of the president of the Anti-Discrimination Board being able to refer a matter to the police to prepare a brief of evidence?

Professor RICE: At the moment it is the only mechanism; that is part of the problem.

Mr DAVID SHOEBRIDGE: The problem at the moment is that the brief of evidence tends to be gathered together by the Anti-Discrimination Board and delivered to the DPP. What I am putting forward is an option where the president of the Anti-Discrimination Board could refer it to the police and say, "I have got very serious concerns here. We think prima facie there is serious racial vilification" and refer it to the police for the police then to prepare a brief of evidence.

Professor REES: That is entirely suitable we would say.

Mr DAVID SHOEBRIDGE: Would that be an option?

Professor REES: Certainly.

Mr DAVID SHOEBRIDGE: So you could leave it within the antidiscrimination Act but give that option for the president to refer it across?

Professor REES: Yes, because I think our experience is that people are more likely to make their complaint to the Anti-Discrimination Board than they are to the police and you have got experienced people at the Anti-Discrimination Board who would be able to make a decision as to the seriousness of the claim and whether one should go off to the police.

Professor RICE: But, as we have said, not as exclusive, otherwise people get the run-around: they go to the police and they are told, "No, no, we cannot talk to you; you have got to go to the board".

Mr DAVID SHOEBRIDGE: You would want a parallel power within the police?

Professor RICE: If it is under the Crimes Act, definitely yes, that would be the case.

Mr DAVID SHOEBRIDGE: Can I just ask you about the role of the president though as a sort of gatekeeper on community expectations and community concerns about this kind of offence? I have given the example before of the public dispute between elements of the Armenian community and elements of the Turkish community about whether or not the Armenian genocide occurred. Part of the Turkish community feel that that is deeply hurtful and hateful towards the Turkish community and they feel that when the Armenian community

raise it in public—perhaps they have a public demonstration, which may lead to some property damage at the Turkish consulate—that ticks all the boxes of racial vilification and a prosecution should occur. If it was just in the hands of the police and they were simply looking at the various elements of the offence, we would not have a gatekeeper like the president of the Anti-Discrimination Board. Is there a role for the president in that?

Professor RICE: I hesitate to say that anybody should have a gatekeeping role in relation to the prosecution of a crime. If we are talking about the commission of a crime, it is a matter for the State through its normal processes to assess whether or not it should prosecute that crime. We are proposing a middle ground that may pick up a lot of the gap, which are the civil penalty provisions. But my first response is that I understand your point about the useful gatekeeping role the president has in relation to complaints generally; to actually suggest that there ought to be no criminal prosecutions without the president's say so, if you like, strikes me as problematic in pursuing criminal conduct. At the same time, yes I suppose that might mean that the DPP is inundated with frivolous complaints of criminal conduct and has to keep palming them off, but we are talking about a three-tiered system where there is room for the board to pursue serious criminal matters.

Mr DAVID SHOEBRIDGE: The ability of a complainant to go straight to the police and avoid the ADB when there are longstanding historical animosities in parts of our community between one element and another may create division and may create more problems than it solves, as one option. Have you considered that?

Professor REES: I think there is a response to it and that would be to leave the law sufficiently open so that the Commissioner of Police and the president of the ADB establish protocols between the two organisations as to what they are going to do in the circumstances. I do not think you can be sufficiently restrictive in legislation and you would want protocols in place between two bodies when the alleged conduct was longstanding enmity between groups within the community.

Professor RICE: Particularly if there is then a civil penalty provision, which would be available for the regulatory authority to pursue. So in light of the protocol Professor Rees just suggested, there is room then to discuss where it might fall.

Mr DAVID SHOEBRIDGE: Just turning to the civil penalty provisions, when this inquiry first started I was interested in exploring the concept of a civil penalty as a kind of halfway house because people were very anxious about degrading the criminal standard and criminal prosecutions; people were uncomfortable about having complainants having to run entirely their own case when they first of all might be of a marginal group and they may have poor resources. Can you explain how a civil penalty provision would operate?

Professor REES: I think they exist far more commonly in the community than many of us are aware of and they exist predominantly under Commonwealth legislation.

Mr DAVID SHOEBRIDGE: Industrial matters, corporate matters—

Professor REES: Corporate matters. Our marketplace is very much now regulated by civil penalties. So both the ACCC and ASIC have very significant powers in relation to civil penalty proceedings. Perhaps the most notorious civil penalty case that Australia has seen in the last decade is the proceedings that the ACCC took against the late Mr Richard Pratt in relation to price fixing. It was obviously clear on the evidence that they were going to not have sufficient evidence to get a criminal prosecution there but there was sufficient evidence to succeed in civil penalty proceedings.

Mr DAVID SHOEBRIDGE: Can you explain why that might be, how the difference in the proof between a civil penalty and a criminal penalty regime would allow for prosecutions to be made?

Professor REES: You have got to prove criminal proceedings beyond reasonable doubt or civil proceedings are proved on the balance of probabilities. In criminal proceedings there is a complete right to silence—people cannot be required to provide any information whatsoever; whereas in civil penalty proceedings the regulator can require the alleged wrongdoer to provide information. I think the important point is that you can never go to jail for being convicted for a civil penalty but you can be fined, and it is a very appropriate, modern midway point of demonstrating public disapproval of particular behaviour.

Mr DAVID SHOEBRIDGE: Who would you be proposing to be the prosecutor of a civil penalty regime?

Professor REES: Moving party, I think I would prefer to call them.

Mr DAVID SHOEBRIDGE: Sorry, the moving party.

Professor RICE: The regulatory body.

Professor REES: That would be the ADB.

Professor RICE: We said at the end of our submission that it certainly warrants more exploration, perhaps if you could do it with the board. In the model, if we look at the Commonwealth approach, the regulatory body has that role but, significantly, they also have the resources to pursue that role—it is a resource-intensive activity. We know from our longstanding and quite close working relationship with the board that the board does not have the capacity to do that, and we are not proposing that it simply, with the legislative stroke of a pen, be loaded up with this role; it would need to be a resourced capacity. But, in principle, yes it would sit with the regulatory body, which is the board.

Mr DAVID SHOEBRIDGE: Do you have a concept of what would be a range of penalties, what you would be thinking?

Professor REES: No, I think you have got to seek advice from Parliamentary Counsel in relation to that. Looking at similar matters in the marketplace, there are very, very high penalties for some of the wrongdoing. I do not think in this area one wants to be imposing outrageously high fines. What one is seeking to achieve is a statement by a court or tribunal that you have behaved wrongfully and we are going to impose a monetary penalty on you.

Mr DAVID SHOEBRIDGE: But fundamentally also allowing for the State to be the moving party.

Professor REES: Certainly.

Mr DAVID SHOEBRIDGE: And not having to depend upon potentially a vulnerable, poorly resourced complainant to run the matter through. Can you explain why that might be important, given your experience?

Professor RICE: I wanted to connect it if I could with Mr Moselmane's point. You drew our attention, Mr Moselmane, to where we had said that it is unreasonable to expect a person to see this complaint all the way through and we are saying that we think it is unreasonable because of the onus. Where you misunderstood us, but I think it is worth clarifying, is that we did not think we were saying that people did not want to do that. My experience is in discrimination matters, vilification and harassment matters people much more frequently want to have the conduct recognised and condemned for what it was than they want a remedy for themselves. They want to know that what happened to them is not conscionable.

The Hon. SHAOQUETT MOSELMANE: That is where I was arguing about the publicity.

Professor RICE: That is right. So a civil co-provision means the State takes on the responsibility of stating publicly that this conduct is beyond the pale. There is no remedy that comes back to the person involved. There is a penalty and that, in my experience, is very often what a wronged person wants. I have not represented clients who are in this for the money. You would not; there are easier ways of making money. They are there because they are deeply hurt and aggrieved and they want to know that that is acknowledged. The civil complaint process we have is deeply unsatisfying for somebody who feels that because of their race they have been dehumanised. There is no remedy available. They want to know that the conduct is seen as wrong. The civil co-penalty would deliver that to them in a way that they are not getting at the moment.

Mr DAVID SHOEBRIDGE: Could you give a basic thumbnail time frame and a sketch of how the civil proceedings operate? Obviously each one will have its own dynamics, but if a civil complainant took it all the way through under 20C to a hearing and a judgement what are we talking about?

Professor RICE: Time periods?

Mr DAVID SHOEBRIDGE: Yes.

Professor REES: You are looking at two to three years by the time you lodge a complaint with the Anti-Discrimination Board [ADB] and then before it is allocated to somebody at the ADB there is a waiting period. Then the ADB is going to write to the alleged wrongdoer, get their side of the story. Only after they have either waited sufficient time or got some response from the wrongdoer do they then call the parties together for conciliation. That could be a year from the time you first lodge the complaint.

Professor RICE: Just to step you through the calendar: A person, even if they acted quickly, if it happened this morning and they went to the board this afternoon, the board would open the file, take the details and then, as Professor Rees said, the first thing they are going to do it what they call investigation. That is, they write to the other party if the other party is known. It is a letter. It gets posted, it gets delivered and you wait for a reply. If you do not get a reply then you write another letter. Eventually if the other person writes back, you say thank you very much. You then go back to the complainant and see what they think. You then write back and you invite them to come in for a meeting.

It is not hard to imagine six months have passed already and all we have done after six months is get an agreement that they might come in and sit down around the table. That happens once, maybe twice, maybe it gets adjourned, maybe they are sick and they come back. It could be twelve months. The board has its own delays for want of resources.

Mr DAVID SHOEBRIDGE: Then there might be a certificate issued after the conciliation.

Professor RICE: Which is to say it cannot be resolved, we will refer it to the tribunal. It then gets in the mail sent down to the tribunal. It gets listed and it starts afresh in the tribunal's hearing.

Mr DAVID SHOEBRIDGE: The complaint is lodged, you might have pleadings orders.

Professor RICE: A fresh application, yes. Sitting in the tribunal, Professor Rees and I, our first contact with a complainant's matter, we open up the file on the first conference that we have in the tribunal and we see that this one-off incident happened at least two years before. We have to start all over again trying to get the parties to gather evidence and revisit it all. It is unsatisfying.

Mr DAVID SHOEBRIDGE: Which is why you say a person of ordinary resilience in the circumstances of a complainant would take enormous fortitude to take it all the way through and why the civil penalty might be valid.

Professor RICE: At worse enormous fortitude and, sadly, it is almost inducing a degree of obsessiveness in people.

The Hon. SHAOQUETT MOSELMANE: Recently a doctor called to say that he was attacked because of his Greek background by a police officer but he did not want me to take any action or refer it. Then two days later he said, "Look, I have cooled down. I am not going to follow this matter." Some people resist taking action but others have a real persistence to take on these types of cases.

Professor RICE: And it is to their credit. We would not have the jurisprudence that we have, we would not have the standards being set without people being determined to see it through, but it is perfectly understandable why many would not.

Mr SCOT MacDONALD: Your third point in your argument against criminalising racial vilification is basically about giving people a platform. I would be concerned whether if we lower the bar, so to speak, whether it be civil or criminal, putting people up on the court platform is going to be a perverse outcome of all of this.

Professor REES: It is always a risk that people are going to want to make martyrs of themselves. But as we say there, the other side of the coin is that it is an opportunity for the State to be saying to both the person concerned and the entire community that we believe that this behaviour is wrong and we, and not the harmed person, believe it is so wrong that we are taking action against this particular person. This is the big step that we are inviting you to take; to move what has been an incredibly difficult task for private individuals and put it in the hands of the State.

Mr SCOT MacDONALD: Take for example, as has been raised a couple of times during today and the other hearing, the guys on the bus, including the one who did not have a very good sense of geography. All of a sudden we are going to give him a platform, he is probably going to be interviewed on radio, he is going to be in the newspaper. Instead of it being a one or two day social media phenomenon it becomes for the next 18 months, two years or three years a prolonged public action.

Professor RICE: But we have shifted the focus. I understand the point and we have acknowledged that is a risk, but perhaps it is no greater risk than prosecuting anybody for antisocial behaviour and giving them a forum, which happens already. But the offence we are talking about now shifts the focus away from them and what they believe in into the harm that they have caused. They are being prosecuted for having caused harm; not prosecuted for having views. At the moment we give them a platform because the focus is on what they think and say. We suggest rather if the focus is on the harm they have caused there is much less opportunity for them to have their say in the public space.

CHAIR: Unfortunately we are out of time for this segment. I thank you both for your written submission and your verbal submissions today. We will certainly take your submissions into account in our deliberations. Thank you for being with us today.

(The witnesses withdrew)

PATRICK VOON, President, Chinese Australian Forum of NSW,

PETER CHAN, Secretary, Chinese Australian Forum of NSW, and

KENRICK CHEAH, Vice-President, Chinese Australian Forum of NSW, affirmed and examined:

CHAIR: Could you please state your name and occupation?

Mr VOON: Patrick Voon, accountant in private practice.

Mr CHAN: Peter Chan, retired engineer.

Mr CHEAH: Kenrick Cheah, political adviser.

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

Mr VOON: I think we will do what most people do and sail straight into question time, thank you.

CHAIR: In your written submission you state that your organisation questions the value of a process where individuals and associations are expected to attend costly court processes to stand up for their rights. Are you talking about proceedings under section 20D, criminal proceedings?

Mr VOON: Yes, we are. But we actually lodged a process through the Australian Human Rights Commission, which is the Federal counterpart, and not through section 20D. But substantially I think the processes are similar in the sense that we went through a conciliation process with the Australian Human Rights Commission and the next step would have been for us to take legal action against the respondent, which is Mr Laws.

CHAIR: I think procedures under section 20D involve criminal procedures and I do not think that alleged victims, as far as I am aware, have any costly court fees.

Mr VOON: No, we were advised that there will be costs issues.

CHAIR: You are not talking about civil proceedings, are you, under the State legislation?

Mr VOON: Sorry, I am talking about the Federal section 18C.

Mr DAVID SHOEBRIDGE: There has to be a complaint initiated by a private individual, which has some costs associated with it, before the president can refer it off. Once it becomes a criminal proceeding there is no cost to the complainant, but that initial complaint to the Anti-Discrimination Board [ADB] would be a minor impediment on costs.

CHAIR: So any costs involved would not be the responsibility of the complainant in criminal proceedings under section 20D.

Mr VOON: Section 20D, right.

CHAIR: That involves criminal proceedings.

Mr VOON: Right.

CHAIR: You have recommended that offences under section 20D be relocated to the Crimes Act. Would you like to expand on why you think that and how in a practical way that will make a difference?

Mr CHAN: If I may just wind back a little bit. The Chinese Australian Forum's interest is to strengthen the Anti-Discrimination Act in the discrimination aspect, the harassment aspect, as well as the vilification aspects. I guess it is premised on the point that prejudice and harassment is fuelled by vilification. When we speak of popular radio announcers on air ridiculing, belittling and inciting dislike if not hatred of people of Asian descent, appearance or nationality we would like to see the Anti-Discrimination Act be a practical

resource to address that kind of conduct. Whether it is section 20A or 20C or 20B, I guess we are not lawyers; we do not really have the expertise to debate the technical points. But our experience has been that in the case of Mr Laws on radio in 2011 saying that Asian women drivers with slanted eyes probably have inferior peripheral vision, with the inference that they should not be allowed to be on the road, is really quite unacceptable. I think public comments by public figures through public channels can, on their own or in combination with other utterances of this kind, create bad feeling towards Asian people. Our experience dates back to the 1990s. Mr Voon made reference to the case of Castle Hill Excelsior Public School where there was racial bullying. That was in Pauline Hanson's heyday.

CHAIR: We have to be a bit careful here because Committee hearings are not intended to provide a forum for people to make adverse reflections about others. Can we talk of general principles without mentioning names?

Mr CHAN: Thank you Mr Chair. The community that we represent feel very frustrated about the lack of power within the Anti-Discrimination Act to address issues such as those that Patrick Voon has raised in his submission. Namely, the case of ZG at Excelsior Public School, Castle Hill, and the failure of duty of care on the part of the education department at that time to provide a safe environment for children.

CHAIR: We only have a few minutes left. Would you take on notice my question as to what you see the value would be of placing section 20D within the Crimes Act. Could you take that question on notice and come back to us?

Mr CHAN: Yes.

Mr SCOT MacDONALD: Reading your submission and listening to your evidence I wonder if we are separating a desire to stop stupidity, buffoonery and ill-considered comments and the next step, as the second reading clearly stated, of racial vilification. Section 20D is about serious racial vilification. Reading your submission and listening to you today I wonder whether in your mind that is clearly separate. I hear clearly that there are people out there in the public domain who are cruel, unfair and cause you hurt but it is another step altogether, is it not, to look at section 20D and serious racial vilification where people fear physical harm?

Mr CHAN: I thank you for your comments. It is true that section 20D is about serious racial vilification and that involves physical harm being done to the victims. We support the removal of that section to the Crimes Act because history has shown over the last 30 years of the life of the Anti-Discrimination Act there have been relatively few prosecutions and no convictions. I understand that is because the standard of proof is too onerous: It relies on intent, conduct and harm being inflicted. First, someone could racially vilify someone with the intent of arousing people to behave in a way that can cause harm. Second, if people are incited to cause harm but there is no serious physical harm and it could not be proven there was physical harm it would fail the serious vilification test. The first question is whether it should stay with the Anti-Discrimination Act or move to the Crimes Act. The second question is the test that requires satisfaction. Our view and the view of other people in the community is that the test should be made less onerous.

The Hon. PETER PRIMROSE: You mentioned the test and in your submission you propose a change from the "comparability" test to the test of "detriment". Could you outline an example or explain what that means?

Mr CHAN: The Excelsior Public School, Castle Hill, case was very frustrating. The father of the two children went to the Anti-Discrimination Board in 2000 and six years later the case was heard and found in favour of the father. The education department appealed and won the appeal. The education department won the appeal because even though the second tribunal accepted that there were racial taunts and a failure to follow the education department's procedures on anti-racism it could not be found to be discriminatory because the first tribunal failed to apply the comparability test, which is to say if the teacher had been confronted with a similar case with a non-Chinese student victim would that person have acted differently?

That would be impossible to test because you do not have the physical events to measure whether there was or was not any difference. We came across the 1999 New South Wales Law Reform Commission report wherein it made this very point: that the definition of direct discrimination is too restrictive and the test of comparability is too onerous. The Law Reform Commission at that time recommended that the test be changed from "comparability" to a simple one of "detriment". In other words, has there been a racial taunt or harassment and has there been harm caused to the person experiencing that harassment? If that was the test it would be

enough and there would not be a comparability test asking if the person who acted or failed to act would have done differently if the person was not a Chinese person. I thought that was terrific solution to the problem of the comparability test that brought down the ZG case.

Mr DAVID SHOEBRIDGE: That is the enormously complicated convoluted section 7 of the Anti-Discrimination Act about the definition of race discrimination, which is thankfully not used in the question of racial vilification that this tribunal is looking at. That is a test found, I think, in section 7 as to what constitutes racial discrimination and that comparator is required when there is a civil case about plain racial discrimination with all the problems you put. But it does not bubble to the surface with racial vilification, which is what this Committee is looking at.

Mr CHAN: Yes, I understand.

The Hon. SARAH MITCHELL: I have one question. You spoke, in response to an earlier question, of the frustrations that the Chinese community feel with the current laws. You have given us two examples in your submission. Are the issues with the racial vilification laws, and specifically section 20D under the terms of reference, issues that are brought up regularly amongst people you talk to in your roles as leaders in the forum? Are there people who are particularly frustrated with the complaints procedure? Given the system currently in place as to where a complaint goes when it is made, is that an impediment for people to take some of those issues further?

Mr VOON: Absolutely. There have been many cases of incidents like this that are not followed through. We are aware of many cases, it has been happening for many years and it is still happening. The process becomes too difficult, it is clunky, it is goes through too many hands and from what I am told, even though there is not too much cost involved, people think it is costly. People think they will have to get legal representation. There are too many obstacles to people seeking redress. The redress is fairly simple; most people are looking for a retraction or an apology for a statement which is reckless and we get the run around from people who make these comments. It is frustrating, yes, and it happens a lot.

Mr CHEAH: It comes to a point where it is so ingrained in society that you take it for granted that is how life is and that is not what a fair and equal society should be like. You get treated on some occasions like an inferior Australian and there is no reason why you should be. I am not a lawyer and I do not know the legal ramifications of fixing that but it is not a good thing. I was born here. My parents were migrants and I grew up knowing that certain things that happen to you you have to accept because you look different or sound different and that is not fair.

Mr CHAN: Could I add one more comment. The Cronulla riot was directed at Muslims—from a lay perspective—but it is never far from the minds of the Chinese that they could be next. It can come back again because racial harassment has been going on for many decades, if not half a century or more. I do not think we are ever free from the feeling that we can take nothing for granted: one day it could be us. When we have strong laws to protect current victims or targets it protects everybody. If your question was do we now experience frequent episodes of serious vilification, maybe not this year, maybe not in the last two or three years, but in the late 1990s, yes.

The Chinese Australian Forum, in conjunction with the Chinese media, did a survey at the time of Pauline Hanson. It went to all States—Queensland, Victoria and New South Wales mainly. There were more than a thousand replies stating people were being verbally abused, spat on and having things thrown at them. It can happen. My own personal experience of life in Australia, and I have been here 52 years, has been predominantly very positive. There is so much generosity, kindness and goodwill but it does not stop me from every year or couple of years having an episode of my own where a person driving past me winds the window down and yells at me, "Go back where you come from." I accept that as part of life here but as Kenrick said, it does not have to be.

The Hon. SHAOQUETT MOSELMANE: As somebody who is a new migrant from an Islamic background I personally appreciate what you are saying and some of the treatment you speak of is true not only for the community I come from but for many other communities. I can tangibly appreciate what you say. I welcome you here and congratulate you for stepping forward and making a submission. I declare I am a member of the Australian Chinese forum. Mr Voon, or any of you who would like to answer, in your point of view, what would make a serious racial vilification? Would the case of John Laws, for example, be what you would consider as a serious racial vilification?

Mr VOON: In the case of John Laws, we look at the case as one which satisfies the definition of ridicule, contempt and also, partially, that it can incite hatred amongst his audience, his listeners. Yes, definitely. That is my view.

Mr CHAN: Under the current definition of law within the Anti-Discrimination Act, serious vilification means there has to be harm that results from the incitement. I guess it would be very difficult for us to assert or prove that in the John Laws case. It could lead to harm but the harm has not actually happened, as far as we know. We understand under the current law that is not viewed as serious vilification because of this aspect of physical harm that has to be proven.

The Hon. SHAOQUETT MOSELMANE: What I understand from your presentation is that you want to remove that physical harm aspect so that you can lower the bar, so that racial vilification can then be captured and those vilifiers can be punished?

Mr CHAN: Yes, they should be held to account.

Mr DAVID SHOEBRIDGE: I will ask you to take this question on notice. We have a submission from Professor Rice and Professor Rees, who gave evidence before you came in. They spoke about a civil penalty regime. You have got the criminal regime that potentially leads to jail, then you have individuals running their own cases, and you have said that is resource intensive and difficult. Then there is a halfway house that would have the State run a set of proceedings against someone for a civil penalty, which might see a fine imposed and a finding of vilification but would not lead to jail. Could you review that submission and see whether or not that civil penalty regime might accommodate some of your concerns and might allow for some of the real issues that you have experienced being responded to by the Anti-Discrimination Act?

Mr VOON: Yes, we will, definitely.

Mr DAVID SHOEBRIDGE: Your submission is that racism continues to be a part of our society. It can come in waves of intolerance and we should have the laws in place to deal with it if we get another wave of intolerance at some point. Is that what you are saying?

Mr VOON: Exactly, right, yes. We believe that it comes in waves and it can happen again. There is always adverse publicity circulating and there is some displeasure of some sort. The Chinese community can, in the future, cop one of these things, so we would like to see processes in place that work to allow us to perhaps nip it in the bud, so to speak.

Mr DAVID SHOEBRIDGE: The background abuse and low-level insult that occurs in society, remarks such as "go back home"—I have to say that very insult was made to someone extremely close to me only a fortnight ago; she was told to go back home when was she just out shopping—you are not suggesting that should be criminalised?

Mr VOON: No.

Mr DAVID SHOEBRIDGE: Are you saying that the laws are not adequately dealing with that at the moment?

Mr CHAN: Can I make a comment? The conduct that we described, which is people winding the windows down and yelling at people like me to go home, that conduct stems from statements of vilification that they hear. It comes from somewhere. It is fuelled by people of public standing, like a radio announcer. They feel that sense of dislike or blame.

Mr DAVID SHOEBRIDGE: They are almost given a social licence to insult because of what they hear on broadcasts.

Mr CHAN: Yes. We believe that to be the case. Therefore, if we could make vilification stronger, you reduce if not cut off the fuel that fuels that behaviour.

The Hon. SHAOQUETT MOSELMANE: Some people argue that no matter how tough the sentence is in criminal law, criminals will always be criminals.

Mr CHAN: That is true. A minority will always hold that view and conduct themselves in the way that they have always done. If you look at sexual harassment, it became illegal in 2005, I think. At that time, it was endemic. You do not hear much of it anymore because I think the employers have taken a point of duty of care. They set the culture and the standards at the workplace. In turn, that translates to the rest of society. This is why the magistrate who sat on the appeals tribunal of the case of the Excelsior school at Castle Hill said that racial harassment should be made illegal in the same way that sexual harassment was. We felt that was a very helpful sentiment. Whether the New South Wales law makers choose to go down that track or some other track such as making vilification stronger—doing something with section 20D—we are in your capable hands, but certainly sexual harassment, to us, seems to be very much a success in terms of standing and reducing the level of sexual harassment.

Mr VOON: Regarding Mr Shoebridge's question, the Chinese Australian Forum is concerned about public cases, where announcements are made in public through any medium that vilifies a race. The lower level examples such as people winding down car windows and shouting abuse at you, that is, again, a slightly different issue. That is overall racism tolerance, I suppose, that can be dealt with through other means.

Mr CHAN: Including public education.

Mr VOON: Education and things like this, so we are talking about public acts of vilifying races, and radio announcers is one good example. Having proper processes and legislation will set a benchmark for the community, because it is a bit of a carrot-and-stick type thing, which does not always work, but sometimes it does work. Having something there is better than not.

The Hon. SHAOQUETT MOSELMANE: In relation to the Castle Hill case, was that a racial taunt by another child or was it a teacher?

Mr CHEAH: By another student.

Mr CHAN: This is a child against a child. They were 10 or 11 years old at that time.

Mr DAVID SHOEBRIDGE: The case was that the school failed to act to stop it.

Mr CHAN: Correct.

Mr DAVID SHOEBRIDGE: It was not one child to another; it was the school failing to stop it?

The Hon. SHAOQUETT MOSELMANE: That case went against the school.

Mr CHAN: In the first tribunal, and the education department appealed and the appeal was upheld because of a legal point that they had not applied the comparability test, which they ought to under the current law.

The Hon. SHAOQUETT MOSELMANE: Do you think there has been a spike in racial attacks on the Australian-Chinese community, for example, in the past few years?

Mr CHAN: We do not actively monitor that all the time. There was the issue of attacks on Chinese students on the trains. It turned out to be a one-off, thank goodness. We are glad of that. There was mention of the bus incident this week or last week. Patrick also made reference to Jeremy Fernandez, the ABC announcer, being abused in a bus. I do not know whether there has been any upsurge. We do not monitor it.

The Hon. SHAOQUETT MOSELMANE: The reason we have got this inquiry is because there was a spike in racial vilification.

Mr VOON: There have been at least three incidents on public buses: one in Perth where a Chinese woman was abused; then there was last Easter's incident in Sydney; and the Melbourne incident involving the French-speaking woman. To answer your other question on Castle Hill, the mother of the aggressive boy was a teacher at the school. The boy was made vice-captain of the school, despite all this happening, so there is something more happening than we can see, so we are not happy about that. There were some physical threats at the school whereby the boy was attacked with a pair of scissors in class, so it is not great. It is ugly.

CHAIR: Thank you very much for coming along today and for your written and verbal submissions. We appreciate your contribution and will be taking into account the submissions that you have put forward to us.

Mr CHAN: Thank you very much.

Mr VOON: Thank you.

Mr CHEAH: Thank you.

Mr CHAN: We will make a response to those questions on notice.

(The witnesses withdrew)

(Luncheon adjournment)

VIC ALHADEFF, Chief Executive Officer, New South Wales Jewish Board of Deputies, and

PETER JOHN WERTHEIM, Executive Director, Executive Council of Australian Jewry, and

DAVID KNOLL, Barrister, New South Wales Jewish Board of Deputies, sworn and examined:

CHAIR: I welcome our first witnesses for this afternoon, Mr Alhadeff, Mr Wertheim and Mr Knoll, and thank them for attending as well as for their written submissions. If at any stage you wish to present documents, you may approach the Committee and we will give consideration to that request. If there are any questions taken on notice, we request that you send the responses to us within 14 days because of our time constraints. Would any of you like to make an opening statement?

Mr KNOLL: Yes, Chairman. I will do so. I have brought copies of the opening statement to facilitate members following it, which I will give to the clerk of the Committee.

Mr SCOT MacDONALD: Chair, I make the point that we have only three-quarters of an hour. I am happy to take the statement away and read it. I make the point that we would like to ask the witnesses questions.

CHAIR: How long do you think it will take you to read this?

Mr KNOLL: This has been prepared on the basis of three and a half minutes.

CHAIR: That is fine.

Mr DAVID SHOEBRIDGE: And, as a general rule, the quicker we start—sorry for arriving late.

Mr KNOLL: Mr Chairman, the Hon. David Clarke, MLC, and members of the Law and Justice Committee, my colleagues with me today are Peter Wertheim, AM, who, as he has indicated, is the executive director of the Executive Council of Australian Jewry and is also a statutory member of the Anti Discrimination Board. He, like me, is a past president of the New South Wales Jewish Board of Deputies, and Vic is our current chief executive officer. We are limited to three representatives. Mr Miller, the current president, tenders his apologies to the Committee. We note that we make this presentation on the seventieth anniversary of the Warsaw ghetto uprising—the day, Yom HaShoah, each year that the Holocaust is remembered across the world. I propose to speak for less than five minutes, and then we look forward to engaging with you to address questions that you no doubt have for us. My colleague, Peter Wertheim, will answer questions together with me. Both Peter and I have been involved in racial vilification cases over many years in our other lives as practising lawyers.

I propose to commence with a practical example that is based on, but different to, actual cases to illustrate where the current law works and where it does not work in order to illustrate the reforms that are needed. Shopkeepers in and around a middle-class area of Sydney put up posters in their shops saying: "Don't do business with Indians. Indian students not welcome in enter this shop." The typographical error is intended. The poster is plainly a public act. It seems equally clear that an ordinary reasonable reader of the posters would understand that he or she is being incited to hatred towards, or serious contempt for, Indians on the ground of race. The posters do more than merely convey hatred; they incite it by urging people not to do business with Indians. The following week the posters come down and instead at the shopkeepers put up posters which have the following additional words on them: "If you see Indians, tell them that they are not welcome in Australia."

Under the current section 20D of the Anti-Discrimination Act, it would be very difficult to conceive of a prosecution of the shopkeepers. They will say that they are not inciting anyone and they will say that they acted thoughtlessly, but not intentionally. But the fact that they put up to posters in succession is evidence that they may have acted intentionally or with reckless disregard for the consequences of their actions. Let us go to the elements: assume for the moment that the conduct was reckless or intentional. It is reasonably likely that a court would find that there was, firstly, an intention, secondly, to incite hatred and, thirdly, on the basis of race. Even though the language and message of the posters and the fact that they are displayed in multiple shop windows would tend to indicate an intention to stir up hatred in the community against Indians because of their race, and even though a hypothetical audience of reasonable people would be incited to hatred, no prosecution would be conceived under section 20D.

Requiring proof of actual or likely intimidation or harassment, or of a direct connection between a threat and likely harm to a persona or property, constitute as a practical matter an insurmountable obstacle to prosecution which the previous Director of Public Prosecutions, Nicholas Cowdrey, cited in his paper published in 2009. That is the weakness in the current law. The wrong is not merely to people of Indian background. It has been done to the whole community—a community with more than 300 different ancestries. The fabric of racial harmony, which generally does prevail in Australian society, and our normal civic relations have been undermined. That there has been no immediate act or threat of violence is fortuitous and is irrelevant to whether or not the State ought to intervene. The shopkeepers have the right to determine who they will or will not do business with, but they have no right to wilfully stir up racial hatred in the community.

It is important to emphasise that adopting our recommendations will involve no lowering of the bar. Criminal intent or recklessness must be proved, and proved it to the criminal standard—beyond reasonable doubt. A jury trial should be required so that ordinary Australians make the critical decision. These limits ensure that a prosecution would arise only for serious cases. When the law is ineffective over a protracted number of years, the problem is not limited to crimes being committed without being punished. It extends to members of the public feeling powerless to intervene when racial abuse occurs, as the recent well-publicised incidents on Sydney buses well illustrate. Vilification also occurs over the internet, and there is no reason the internet ought to be exempt. We adopt the suggestion made before this inquiry by a former Attorney General, John Dowd, that examples of definition would be very helpful. We suggest that the concepts of "threaten", "intimidate", and "seriously and substantially abuse" could be adapted from the Western Australian model.

There also appears to be a building consensus that it is necessary to increase the penalty points to the level of three years imprisonment in order to make clear that the crime of racial vilification should be treated as—and we emphasise this—no less serious than an ordinary assault. In short, we live in a society in which serious displays of racial hatred continue to occur. Our community experiences many incidents of racial vilification every year, and the number is increasing. That is a matter of public record. The evidence of vilification in relation to other racial groups in our community is also palpable and contradicts the suggestion in some of the submissions that there is a lack of evidence to support the need for a workable and measured criminal law. History has taught us that when incitement is undeterred, violence too often follows even if not directly and immediately. It does not have to be that way. We should not be defenceless against public incitement of racial hatred. We have a racial vilification law that is not working as intended. We invite the Parliament of New South Wales to amend the law so that it can work.

CHAIR: What you are saying, Mr Knoll, is that this offence must be proved to the criminal standard. You are saying that there is no lowering of the bar here.

Mr KNOLL: Correct.

CHAIR: It is to the same standard as for all criminal cases.

Mr KNOLL: As any other criminal offence.

Mr WERTHEIM: And that the elements of the offence are, as with any other criminal offence, an act that arose from a mens rea.

CHAIR: Absolutely.

Mr DAVID SHOEBRIDGE: It is the elements of the offence that you want changed.

Mr WERTHEIM: Indeed.

CHAIR: Can I give you an example that I think was in the news? A Korean couple were on a bus and they were racially vilified. They were vilified as Japanese, but they were vilified nevertheless. Under the law as it presently is—

Mr WERTHEIM: They have no standing to bring a complaint.

CHAIR: There cannot be a successful criminal prosecution because they do not conform to the provisions as they are.

Mr WERTHEIM: They cannot even bring a civil complaint.

CHAIR: Would you speak to this issue: That the law should be amended so that it takes account of those situations and so that those people, who have in fact been vilified although mistakenly so, can bring a complaint?

Mr WERTHEIM: Yes.

Mr DAVID SHOEBRIDGE: That is your Recommendation 4.

Mr WERTHEIM: Yes, it is our Recommendation 4—presumed race, as well as actual.

CHAIR: Have you come across incidents like this in your own community?

Mr WERTHEIM: I have come across incidents in which a person I knew very well, who I thought was Jewish but was not in fact Jewish, was vilified and harassed on the presumption that he was Jewish. Yes, I have come across that situation at least once.

CHAIR: What about your colleagues?

Mr KNOLL: I have acted for a Spanish couple who were abused on the basis that they were Jewish in a social club. Fortunately that was resolved by sitting down with the club management, who arranged a conciliation, but they could not have brought their claim before the Anti Discrimination Board, even at a civil level, under the current law.

Mr DAVID SHOEBRIDGE: Every witness we have asked has supported that change to the law.

CHAIR: That is right.

The Hon. SHAOQUETT MOSELMANE: If they felt that that was serious racial vilification, would they rather have brought that under the criminal law?

Mr KNOLL: No. The same provision in the current Act that prevents the bringing of a civil claim prevents the bringing of a prosecution.

CHAIR: You mentioned the internet. Are you saying that the internet is treated differently to the way normal media are treated—the newspapers and so forth?

Mr WERTHEIM: No. The way the case law has developed, the internet is regarded as being in the public domain. That is a general rule; there are exceptions to that, of course. But the way the legislation is framed at the moment—understandably, given that it was 1989—this is not made explicit. We are simply recommending that what has developed in the case law be made explicit in the legislation.

CHAIR: You are saying that there should be a tweaking of the law to put it beyond any doubt?

Mr WERTHEIM: And to bring it into conformity with the case law.

CHAIR: That the law shows what in fact it is—a form of media.

Mr WERTHEIM: Yes.

Mr SCOT MacDONALD: I am still trying to understand the depth of the problem.

Mr WERTHEIM: Yes.

Mr SCOT MacDONALD: I really do not have a good grip on it at all. You refer in your submission on pages 11 and 12 to "developments have included", so obviously there are more than the eight probably better-known incidences, such as another bus incident we talked about the other day. Can you give me some idea how widespread you think the issue is? I note your comment in your opening address that you think it is increasing. Is it increasing or are we just more aware of it? Is it being reported?

Mr WERTHEIM: The answer to your question is yes. Every year my organisation, the Executive Council of Australia Jewry, produces a report about recorded incidents of anti-Semitism in Australia. The criteria applied are stringent. The report has been published I think every year for the last 23 years. It is a document that is sought every year from us by the national library, the Australian Human Rights Commission, the State Library, academics and international organisations. So there is a well-established process in our community for recording reported instances of anti-Jewish hatred and that can be something as small as an email or acts of serious violence against individuals and many gradations in between. The statistics are divided according to gradations of seriousness. I would say that the gross numbers have increased and they have increased beyond increases in the population over the past 23 years.

There are some graphs available which readily demonstrate that proposition. As to racism in the wider community beyond our own, I cannot speak with the same authority obviously but I am aware of inquiries and obviously of incidents that have become notorious over time. We have itemised some of them in our submission. But as far as our own community is concerned, I have no hesitation in saying that there is a strong evidentiary basis for the contention that racism exists and it has worsened over time.

Mr SCOT MacDONALD: So even though—I am not aware of all of them—we have fairly comprehensive Federal anti-discrimination laws, comprehensive State laws, the Anti-Discrimination Board, and a full range of non-government organisations and bodies that are looking at this—they are prosecuting, they have anti-discrimination cases but maybe not section 20D—why would someone like me think strengthening section 20D will turn that around?

Mr WERTHEIM: I think that is one tool of many that is needed to address the problem. I would argue that the primary tool that is available to deal with racism is education. Australia has done very little in that area in the last 20 or 30 years to address the problem. There is at the moment a national anti-racism campaign which I assisted to get up and running, but it is starved of resources, to be frank. That is my assessment. It has very little money behind it and it is, in my view, too little too late. The intentions of the people behind it and the conception behind it are good. This is the "Racism—it stops with me" campaign. But it needs much more, and we need to address the problem at the educational level as well as at the legal level. But we will not succeed just by doing one or the other; we need to do both. Education and the law go hand in hand. The law is critical because it sets the standards. The law itself performs an educative role by setting the standard or by declaring the standard. I believe the standard already exists in the community but the law must encapsulate it and give expression to it, and at the moment it fails to do so.

The Hon. SARAH MITCHELL: In evidence that we received earlier today and in other submissions we have had discussions about the current process in terms of making complaints. On Friday we heard from a number of people who talked about whether or not the ADB perhaps had the resources it needed to fully investigate. I know Mr David Shoebridge has asked questions about whether the ADB is the correct body to be looking at evidence and preparing briefs in that way. Do you think that for those who you represent there are complaints that perhaps are not being taken further or actions are not being taken because the process currently is perceived as being too onerous and too lengthy in time and therefore the current figures that we are working off in terms of number of complaints is not reflective of how serious the issue is in reality?

Mr WERTHEIM: I have no doubt that the number of complaints is the tip of the iceberg and not just for this particular problem but in the whole spread of antidiscrimination remedies. I see the statistics every month of the New South Wales Anti-Discrimination Board. It is clear to me that many people either are not aware of their rights because, again, of lack of education or are too reluctant to come forward out of fear or out of lack of familiarity with the system or for all sorts of reasons. So I do not think there is too much doubt that the incidence of racism in the wider community is much wider, much more thorough going than is reflected merely in the number of complaints. I would agree, by the way, that the Anti-Discrimination Board is not the appropriate body to be prosecuting criminal offences. It is not geared to do so. It is a social relations body in a way.

The Hon. SHAOQUETT MOSELMANE: But they would be referring to the DPP?

Mr WERTHEIM: It can do that, certainly. It should be able to do that, but from where I sit I just do not think it is adequately resourced to prosecute crimes. It does not have the staff. It does not have the training. It is not the sort of thing that the Anti-Discrimination Board does; it is the sort of thing the police and the DPP do. Our entire like motive with this particular problem is that serious racial vilification should be dealt with in

the same way as any other crime. In other words, it should be a matter for the police and the DPP and they should be the ones ultimately to make the decision as to whether there is sufficient evidence to warrant a prosecution. If there is sufficient evidence in their view, then the matter should be tried, and in our view tried before a jury. The reason we say it should be tried before a jury is because the jury system provides a mechanism for input of public values, what is publicly acceptable, into the actual operation of the law case by case. We think that that is a very desirable mechanism, particularly when decisions have to be made about what a reasonable person would perceive in a particular set of circumstances. That is quintessentially the sort of thing that a jury should be deciding, in our view.

The Hon. PETER PRIMROSE: Your recommendation number five proposes repealing the means test and replacing it with another test. Can you outline what that is and how the test would operate?

Mr WERTHEIM: We just simply believe the means element should be repealed because we do not believe there is any justification for it in principle or in logic. In our view—again, this is the theme of our submission—we are looking at two general types of offences within the rubric of serious racial vilification. One is a harassment-type offence where there is a defined individual or individuals who personally are the victims and can be identified as the victims, people who have been a target of verbal abuse or other forms of abuse because of their race. The bus cases provide a very apt illustration. We say that those sorts of things should be capable of prosecution so that the victims can be protected even if there is no urging of violence, a threat of violence, or an act of violence. The mere act of harassment because of race in a situation like that should be sufficient to invoke the protection of the State for the victims. We think that is a very clear-cut situation. We do not have that protection at the moment. We recommend the kinds of protection that are afforded in those sorts of circumstances in Western Australia.

The other type of case that we think should be protected under the law is where there is a more general vilification out there in the whole community where an entire minority group, such as Indians in the example that Mr Knoll gave you, being targeted for incitement to hatred by the general community. There again we think the State needs to step in because the reality is that we are a multicultural society. We have 300 different ancestries represented in our population. That includes I think more then 140 different ethnic, cultural, linguistic and religious groups. In that sort of situation where you get the kind of example that Mr Knoll gave you it is important that the State step in to present normal social intercourse, the normal cohesion and harmony that characterises life in Australia to ensure that that is protected against those who intentionally or recklessly seek to undermine or destroy it.

We know from historical experience, and particularly our own historical experience, that if you do not nip it in the bud, even if there is no immediate act of violence in a situation like that, violence follows at some point down the track, not in a way that you could prove to a jury beyond reasonable doubt in a criminal trial but simply from historical experience. Rather than let it fester and develop and become a problem, to answer your question, our approach is to recommend that the State step in at the very beginning and say, "Look, if you are urging people to hate others because of their race" and you are doing that intentionally or with a conscious disregard for what the consequences might be—in other words, recklessness—then you have stepped over the line and you should be prosecuted. What the penalty should be in each case will of course depend on the severity and the circumstances of each case, but the principle that that kind of tearing up of the social fabric should not be allowed and should be dealt with as a criminal offence is something that has been recognised in other jurisdictions and should be recognised in New South Wales as well.

The Hon. PETER PRIMROSE: Who would initiate that action?

Mr WERTHEIM: Who would initiate the prosecution?

The Hon. PETER PRIMROSE: Yes.

Mr WERTHEIM: It could be the police or the DPP and that could be on the complaint of a member of a community or of an organisation or indeed the President of the Anti-Discrimination Board.

The Hon. SHAOQUETT MOSELMANE: In the overview to your submission you say that the evidentiary bar for a successful prosecution should not be too low, and in this case it is too high. Where do you find the middle line? What is the middle line for you?

Mr WERTHEIM: The middle line again is to treat this offence in exactly the same fashion as any other criminal offence, as any ordinary garden variety criminal offence where there is a need to prove an act and that act could mean the publication of words or it could mean some other act, and also intent or recklessness. It is a classic criminal law approach and by dealing with this particular offence in the same fashion as other criminal offences I think is sending an important message to the community that this is behaviour that is beyond the pale and will not be tolerated.

Mr KNOLL: Might I add that the message is very important to newly arrived migrant communities. I do some work with newly arrived Sudanese immigrants who have arrived in Australia. Some are in Blacktown; some are in Orange. I work with both groups. They are not articulate and able to express themselves very easily. So the message is not for them but for them to know there is now a criminal law that inciting hatred against them because they are Africans has been passed would send a very powerful message to them that you are welcome and you will not suffer as you suffered in the country from which you fled.

The Hon. SHAOQUETT MOSELMANE: This point about community expectation, I know the Jewish community, the Muslim community and the Chinese Asian community, because of the sensitivities of their situation, have a higher expectation that the law will protect them. How do you define that community expectation with the rest of the mainstream community?

Mr WERTHEIM: I would approach it this way. We know of 11 referrals that have been made by successive Attorneys General from both of the major sides of politics under this particular section. Clearly those Attorneys General, the first law officers of the State, from both major sides of politics over a period of time have had an expectation that the law will work in a particular way. That is why they referred them to the Director of Public Prosecutions for prosecution. It is either a succession of attorneys general who are out of touch with community values and community expectations, or it is the law itself which fails to meet those values and expectations. That is for you to make a decision about, but I think I would say it is a very easy call to make. If successive attorneys general—responsible people, all of them—from both of the major sides of politics have had an expectation that the law would work in a particular way, and it did not, then it is the law that is out of touch, not the attorneys general.

Mr DAVID SHOEBRIDGE: A referral is not necessarily an expectation that there will be a prosecution; a referral is sending it off to an independent body to work out if there are grounds for prosecution. It is probably a slightly lower—

Mr WERTHEIM: It may not be, as you say, a complete expectation that there will be certainty of prosecution.

Mr DAVID SHOEBRIDGE: But your point is zero outcome from multiple referrals.

Mr WERTHEIM: Exactly, and I think it can be inferred from that that there is at least some level of disappointment on both sides of politics, because the referrals have come from both sides, in the way the law has operated.

The Hon. SHAOQUETT MOSELMANE: Can you give us a hypothetical of what you would define as a case of serious racial vilification?

Mr KNOLL: May I refer you to the example we have given, which is actually a collection of more than one actual example, where repetitive conduct occurs inciting a community to engage in racial hatred and exclusion of Indians from the normal fabric of society. You have repetitive conduct, and that is the usual evidence that people look for for incitement or reckless behaviour. The words are clear that it is on the grounds of race. The hatred and invective is plain. The second poster makes it very clear, "You are not welcome". It is precisely the sort of conduct that should be proscribed.

Mr WERTHEIM: There are also three examples given in the last two paragraphs of page 12 and the first paragraph of page 13.

The Hon. SHAOQUETT MOSELMANE: That is what you would define as serious racial vilification?

Mr WERTHEIM: Yes.

The Hon. SHAOQUETT MOSELMANE: On page 5 of its submission, the New South Wales Bar Association maintains that it is appropriate to leave interpretation of the words "serious" or "severe" to a judicial officer. Do you agree, or should we, as legislators, look at it?

Mr WERTHEIM: Should it be defined in the legislation?

The Hon. SHAOQUETT MOSELMANE: Yes.

Mr WERTHEIM: I think it is desirable that there is as much definition as possible within the legislation, simply because this is not a new area of the law. In one form or another it is an area that has been legislated in English-speaking countries all over the world. There is a body of jurisprudence that has arisen as a consequence and I think it would be appropriate at this juncture, when the legislation is being reviewed, to incorporate that jurisprudence as far as is reasonable within the legislation.

Mr KNOLL: May I add that there is a second aspect to that. The sort of conduct that we are talking about ought to be proscribed by every Australian State. You have a very good precedent in the set of definitions included in the Western Australian Criminal Code. It does not define the word "serious" to which you refer, honourable member, but it does define "seriously or substantially abuse", and that is the important term.

Mr WERTHEIM: And that would cover a case like the bus incident that we discussed earlier.

The Hon. SHAOQUETT MOSELMANE: Would you support a further amendment to section 20D that extends its operation beyond serious racial vilification on the grounds of other important protected attributes, such as religious vilification?

Mr WERTHEIM: We do not advocate religious vilification laws per se. That is because, even though we are a religious community—

The Hon. SHAOQUETT MOSELMANE: You are covered under race as well.

Mr WERTHEIM: We are, but we also believe that other considerations apply with regard to religious vilification laws that do not apply with regard to racial vilification laws. In particular, when you start to deal with religious vilification and you get to a situation of critiques of religious belief, for example, you are cutting very dangerously close to trying to regulate debate about religious belief and we believe that any belief—whether it is religious, ideological, philosophical, scientific, artistic—ought to be capable of robust debate. It is just too hard to define where simply, for example, critiquing a religion is going to be regarded as denigrating it and vilifying people. I think that is too hard a line to draw and certainly it raises a very important issue as to where you do draw the line in a situation like that. Those sorts of questions do not arise when you are talking about vilification based on race.

The Hon. SHAOQUETT MOSELMANE: But complexity should not mean barring discussion on it.

Mr WERTHEIM: I am all in favour of discussion. All I am saying is that this is a discrete and different area of inquiry and it raises different issues, in my view, and it is not our brief and certainly not our submission that that particular reform should be included in any reform of section 20D or the cognate sections.

Mr DAVID SHOEBRIDGE: I might just ask a couple of nuts and bolts questions. What about the current timeframes, the need for a very quick referral from the President of the Anti-Discrimination Board and a prosecution within six months. Do you think they are inadequate?

Mr WERTHEIM: I just think they should be scrapped altogether and they should be dealt with like any other offence. Our approach, as you have probably gathered, is that we do not believe the whole process that is currently prescribed is appropriate.

Mr DAVID SHOEBRIDGE: Yes, but just looking at the time frames, a more reasonable time frame for a prosecution would be something like 12 or 24 months. What would you think?

Mr WERTHEIM: Yes.

Mr KNOLL: That is typical, and equally importantly, if you were going to have the typical timeframes, you need as we have submitted the power to make an interim order to preserve evidence to benefit the prosecution.

Mr DAVID SHOEBRIDGE: What about giving the President of the Anti-Discrimination Board the explicit statutory power to refer a matter to the police for the preparation of a brief of evidence and then have the police refer it to the Director of Public Prosecutions?

Mr WERTHEIM: We would have no objection to the President of the Anti-Discrimination Board having that power, but we would object if that was the only means by which a matter could be referred to the police or—

Mr DAVID SHOEBRIDGE: You would want a parallel ability directly through raising a complaint with the police?

Mr WERTHEIM: Through a complaint from the public as with any other criminal offence.

Mr DAVID SHOEBRIDGE: To the police, and then investigated by the police?

Mr WERTHEIM: Correct, as with any other criminal offence.

Mr DAVID SHOEBRIDGE: As I understand it, you propose a twofold test for serious racial vilification or racial vilification. One is where there is public incitement to hatred.

Mr WERTHEIM: Yes.

Mr DAVID SHOEBRIDGE: And you have to prove an intent?

Mr WERTHEIM: Yes.

Mr DAVID SHOEBRIDGE: The other one is racial harassment.

Mr WERTHEIM: Yes.

Mr DAVID SHOEBRIDGE: Again you have to prove whether it was intentional or reckless.

Mr WERTHEIM: Correct.

Mr DAVID SHOEBRIDGE: The definition of "harassment" you are proposing is the Western Australian definition, which is, "including"—so it is an inclusive definition—"threaten, intimidate or seriously and substantially abuse."

Mr WERTHEIM: That is correct.

Mr DAVID SHOEBRIDGE: We had a submission from the Chinese community just before lunch and they said it is a common experience for members of the Chinese community to be insulted on the streets, car windows wound down, "Go back home." I know people close to me have had that insult, "Go back home", made to them and it is really offensive, and in fact I would suggest it is quite substantial abuse to be told to go back home or, if you live here, to be told that this country is not your home. Would that fit your definition of harassment and criminality?

Mr WERTHEIM: Yes, and I would say that it parallels the Western Australian legislation, which quite recently, in the last few years, was tested in front of a jury and the jury convicted.

Mr DAVID SHOEBRIDGE: I think there is genuine unease in some parts of the community about setting the test there because you could potentially see many criminal prosecutions and potentially set up a place where you have individuals putting themselves forward as martyrs to some horrible racist cause, that they have been victimised by this terrible state and what was said was something about immigration. There is a tenor of concern in a number of submissions about that.

Mr KNOLL: Can I deal with that in two ways. The first is that we agree with the submission of the former Attorney General, John Dowd, on behalf of the Commission of Jurists that the principal break is prosecutorial discretion. Prosecutors are not going to expend public money on all but the most serious cases.

Mr DAVID SHOEBRIDGE: Mr Dowd did not suggest this model.

Mr KNOLL: No.

Mr DAVID SHOEBRIDGE: In fact his submission was it is basically working.

Mr KNOLL: He identified areas where he did not think it was working, with which we agree, but he also perhaps has not had the same degree of exposure to ongoing cases as Peter and I have had over years of practice. However, the critical point is that there are a number of important filters. One is prosecutorial discretion and obviously using public resources of the Director of Public Prosecutions appropriately. The second is that if you have a law that educates, which was one of the key elements of his submission, and an education process that backs it up, the community will begin to understand that this conduct is unacceptable. The other aspect of it is conduct which is repetitive, which targets a particular racial group and which is designed to intimidate them to the point where they are fearful of engaging in social interaction. That is precisely the sort of conduct that the State ought to protect—

Mr DAVID SHOEBRIDGE: But repetition is not part of your test.

Mr KNOLL: Repetition is the typical test to demonstrate intent or reckless disregard.

Mr DAVID SHOEBRIDGE: Your test would be threaten, intimidate or seriously and substantially abuse.

Mr WERTHEIM: Yes.

Mr DAVID SHOEBRIDGE: And you would need intent to threaten, intimidate or seriously and substantially abuse.

Mr WERTHEIM: Correct.

Mr DAVID SHOEBRIDGE: And I do not see a requirement for repetition.

Mr WERTHEIM: I think the words "seriously and substantially" introduce the safeguard that you are perhaps looking for. A simple giving vent to racial prejudice in the street in a one-off situation may not satisfy those criteria. In fact in Western Australia, in the one case that has been prosecuted, to come back to the other point you made about racists grandstanding and using the charge as an opportunity to publicise their views—

Mr DAVID SHOEBRIDGE: It is not my position; I am just saying that that has been raised by people.

Mr WERTHEIM: It is a reasonable point, and in fact the defendant in that case sought to do precisely that and abused the judge, sacked his lawyer, abused his lawyer and did all sorts of things of that nature, but at the end of the day it did not help him. The jury convicted, and that conviction by a jury sent a very powerful message. You are, I think, worried about a floodgates situation where, if you have a test of the kind that we have proposed, you are worried that that might allow incidental—

Mr DAVID SHOEBRIDGE: It is not a floodgates concern; it is a community perception of broad-ranging criminal prosecutions in that area.

Mr WERTHEIM: Again I think that the community perception—

Mr DAVID SHOEBRIDGE: My concern is definitely not about resources or flooding the courts; it is quite different.

Mr WERTHEIM: I follow that. The community perception I think could be alleviated—

Mr DAVID SHOEBRIDGE: Community reaction.

Mr WERTHEIM: The community reaction could be alleviated firstly by the need to prove intent. A mere sounding off and giving vent to racial hatred of itself would not suffice to secure a conviction. One would have to prove intent. Secondly, the nature of abuse or verbal barrage, or whatever the facts required in a particular situation, would need to satisfy the serious and substantial abuse criterion, and I think that puts it out of the range of what you are suggesting that the community might be concerned about.

Mr DAVID SHOEBRIDGE: One suggestion put forward by Professors Rice and Rees in their evidence before lunch—and their submission is very detailed; it is submission No. 36—is what they described as a halfway house, but the idea of a civil penalty, so you have a civil penalty regime where you have racial vilification that is very serious but does not involve the threat of violence or the fear of violence to a person or property, and that civil penalty regime would operate similar to the civil penalty regime under the corporations laws or under environmental regulation. It is a civil standard and requires a defence to be filed. It would not involve prison, but would involve a civil penalty in the form of a fine. Have you considered that as a model?

Mr WERTHEIM: Yes, it is something we have thought about. It does complicate the situation perhaps more than we would like it to be complicated. It is less easily understood by the public than having a civil remedy and a criminal remedy, but it is something that could be considered.

Mr DAVID SHOEBRIDGE: Could I ask you to take it on board and perhaps respond on notice to that issue, with particular regard to submission No. 36?

Mr KNOLL: Can I give one example that might assist, not to do necessarily with racial behaviour but with non-compliance with an order of the Administrative Decisions Tribunal. Assume for a moment that the tribunal determined that a civil penalty ought to be imposed and the person expected to pay the penalty simply ignored the order. Then the relevant applicant has to go to the Supreme Court to seek an order for contempt with the usual punishments that might apply for contempt and a judge might have to threaten the person with jail.

Mr DAVID SHOEBRIDGE: We are getting a whole new NCAT [NSW Civil and Administrative Tribunal], you will be pleased to know, early next year, and we will have improved contempt powers I am sure.

Mr KNOLL: I sincerely hope so, because the present ones are inadequate. But the point I make is that what you have now got is a four-step process, and that is complicated—it takes significant public resources. They are the issues to be considered.

Mr DAVID SHOEBRIDGE: A number of people have said—and I am not suggesting this is your preferred model, I am just suggesting you could consider it might be an improvement—section 20D currently talks about inciting hatred for serious contempt or severe ridicule, and people have been proposing changing it to "promote or express hatred", so you do not have to prove the incitement as such but the promotion or expression of hatred, as a better form of words than "incite". Other people have said that should still carry those secondary elements of means, which I will not discuss with you at this point. What do you think about that as an improved wording?

Mr WERTHEIM: Certainly we would not have any objection to it. The reason we preserve the word "incite" is because of the jurisprudence that has developed around it. I think it is dealt with on page five of our submission. If you look at the way tribunals have interpreted the meaning of "incite", there is very little practical difference between it and the words "promote or express" that you are suggesting.

Mr DAVID SHOEBRIDGE: Another potential reform would be to include within 20D if you have promoting or expressing racial vilification, which is either inciting physical violence or a threat of physical violence or conduct which is reasonably likely to cause a person to have a reasonable fear in the circumstances of their own safety or security of property, of their family or associates. So you have that as a separate entree, if you like. Would that be an improvement in the law?

Mr WERTHEIM: I do not think the latter would, because causing a reasonable person to have a reasonable fear for their safety or the safety of their family—

Mr DAVID SHOEBRIDGE: Reasonably likely to cause a person to have a reasonable fear in the circumstances for their own safety, as an additional entree.

Mr WERTHEIM: How would that differ from apprehended violence?

Mr DAVID SHOEBRIDGE: You do not see that being at all beneficial?

Mr WERTHEIM: We have apprehended violence laws, which operate perfectly well. There are problems in enforcement but in terms of the concept, they operate and have operated for many years.

Mr DAVID SHOEBRIDGE: But an apprehended violence order does not carry a criminal penalty, does it?

Mr WERTHEIM: No, but—

Mr DAVID SHOEBRIDGE: We are talking here about racial vilification. If you say it is of no assistance I understand your response.

Mr WERTHEIM: I just think that it carries with it the danger of overlapping into other areas of the criminal law, which are easier to prove. True it is they do not have penalties attached to them immediately, other than stay away orders and the like; they do not have prison sentences attached to them. I am just saying that it does carry with it the danger of confusing different offences and making—

Mr DAVID SHOEBRIDGE: This whole area has overlaps: it has overlaps with assault and, as you know, race can be an element in sentencing in any of those criminal offences.

Mr WERTHEIM: Indeed, but the police have to make a final decision as to whether or not to prosecute or to recommend a prosecution, and I just think it is putting them in a situation which they will find very difficult to live with.

Mr KNOLL: I have one other aspect. Professors Rice and Rees in their written submission—I am sorry I was not present for their oral submission—very carefully analyse the difference between an effects test type approach, which is the Commonwealth model, from an intent type of approach, which was the Western Australian criminal model, and they differentiate the two parts. If you choose to go down the effects test approach and you have an intent layer on it, all you have done is substitute one difficult proof of impact with another difficult proof of impact. We currently have an almost insurmountable impact requirement and a means test. If you adopted the effects test type approach that is canvassed in their paper, and quite appropriately not pushed but just canvassed, then all you are going to do is replace one problem with another.

Mr DAVID SHOEBRIDGE: I do not think that is a fair reading of their submission, but I do not think there is time to engage in that debate now.

The Hon. PETER PRIMROSE: I would also like you to take that on notice. It would be valuable to get your feedback.

Mr WERTHEIM: About the civil penalties?

The Hon. PETER PRIMROSE: Yes.

Mr KNOLL: Civil penalties and the effects test issue.

CHAIR: I thank you for coming along today and presenting your submissions and also for your written submission—it was a very detailed submission. There may well be some further questions that come from the Committee. It would be much appreciated if you could endeavour to get a response back to us within 14 days. We will certainly be taking on board your submissions.

(The witnesses withdrew)

JOHN MCKENZIE, Chief Legal Officer, Aboriginal Legal Service, affirmed and examined:

CHAIR: I would like to welcome you, Mr McKenzie, and thank you for your written submission. Would you like to make a short opening statement?

Mr J. McKENZIE: I think it is important that I say from the outset that we at the Aboriginal Legal Service are very aware of the problem and of the great harm that is done by racial vilification, but because of the fact that we do not operate in a civil practice, we are not going to pretend that we are in any way expert in relation to the procedure of any complaints. It is the situation that a lot of our lawyers hear on an almost daily basis some accounts of the sorts of inflammatory language that is often given to us as instructions as to what happened in the lead-up to a particular criminal offence with which the person we are representing is charged. So we become aware of it in that way, and quite often it is in a way or in circumstances where there are no independent witnesses to back-up their view as to what was said or done in the lead-up to perhaps an act of retaliation, and that act of retaliation is, in fact, the behaviour that brings the person before the criminal court.

That is the usual, normal way that we come across this issue, and it is very much a case that one cannot escape but notice on a recurring basis how incredibly hurtful it is to an individual person to be vilified because of their race or their presumed race—and I say "presumed race" because a lot of people who hurl some very nasty racial language are very loose and free with who they assume the ethnic group that you may be coming from. So even though we represent only Aboriginal and Torres Strait Islander people, a number of them have been very much verbally castigated on the assumption that they are from the Indian subcontinent, for instance, or from New Guinea. It really does not matter to the person who has been vilified in that way as to whether there has been a wrong assumption; in fact, it actually adds to the harm that they personally feel.

Mr DAVID SHOEBRIDGE: Bigots are not good researchers.

Mr J. McKENZIE: Indeed, and they are not giving any great real thought before they speak, almost by definition sometimes. I really just want to put that into context. But I will perhaps finish off my introduction by saying this: At the same time as we are very concerned that it is a big problem for Aboriginal people, we also want to very respectfully submit to this inquiry that the criminal sanction should be kept for only the most serious and nasty of these situations. We believe at the Aboriginal Legal Service that there is a long way to go in order to bring mainstream society with us in a better understanding and appreciation of Aboriginal people and their culture, and one of the things that I think needs to have been learnt from the last 30 or 40 years of Australian political history is that the Australian people will react in a very adverse and negative way if they feel the Government is intruding too far into the field of civil relations.

I say that because it would be in some ways perhaps understandable for a person coming from the Aboriginal Legal Service to come along here and say, "Widen it. Completely lock up everyone you can". That is not our position, because in the end that is not really going to achieve what we think needs to be achieved, and that is the gradual enlightenment of the greater part of society so that only the very, very worst elements of this, where there is actually an incitement towards physical harm or property harm, are the subject of criminal sanctions. We certainly agree that there needs to be a lesser step, which we understand really is already there by way of the provisions of 20C, but we just want to say that, please, from our point of view we have made some, we think, fairly modest suggestions about how it could be broadened a little bit, but we are also mindful of the fact that it is very important here that really what we are doing is setting the absolute last case, if you like, in which the State will exercise its coercive powers. But in all other situations it will be a matter of civil wrong that can be righted through the ordinary sort of civil law processes.

In other words, we think it could be a big mistake to try and go too big on this issue, and the backlash that could come from mainstream Australia is such that "government is intruding too far and we disagree with it" and there is a push back against these laws. That, in the end, becomes a very negative outcome for all people who may be racially vilified, but I am speaking here on behalf of the Aboriginal people of this State. We genuinely appreciate this very subtle requirement to do a balancing act when you come to a subject such as this. But I will leave it at that.

CHAIR: Following on from those comments, you would deem it appropriate that it would fit within that framework that you are talking about, point four of the submission of Legal Aid NSW, which you have endorsed, introducing an objective test into section 20D so that it covers conduct that is reasonably likely to threaten physical harm to persons or property or incite others to do so?

Mr J. McKENZIE: That is right. I can say that with some background as a criminal defence lawyer for most of my professional life in that us criminal lawyers—as is our job—will look for ways around criminal sanction laws, and where there is a situation, such as currently the case with 20D, that it calls for that outright branding of the conduct with no other possibilities involved, it then becomes the possibility: is there any other possible logically acceptable alternative reason as to why these certain words or conduct were given? What I am suggesting in that part of our endorsement, the effect of that legal aid proposal, is that we think that the current wording is just slightly too tight in that there are far too many ways in which a person, either of their own devices or with good legal representation, will always—not always but more often than not—be able to find a way out of a completely strict liability test, like it appears to be at the moment. What we are suggesting there is we do not think opening the dam gates too far at all, but it is introducing a reasonableness so that if it is to go to a single judge or a magistrate or to a jury there is that test of is this reasonable in all the circumstances, not simply on the basis of a subjective test of what the victim says they felt, because that of course is very skewed.

CHAIR: Point 5 is to replace the Attorney General with a Director of Public Prosecutions [DPP]. As the DPP has delegated power from the Attorney General already, how will that change the current regime in a practical way?

Mr J. McKENZIE: In a way it is more of a symbolic change than anything else. We think it is really important that this issue be seen as not in the political domain. We have great confidence in our system of laws and criminal laws and we greatly respect the fine work that the Office of the Director of Public Prosecutions does. We think that it is simply an unnecessary possible distraction, if you like, to the community that they will think the Attorney General of the day has got some say in this. We would prefer it to be a system where you can look everyone in the eye and say that this has got nothing to do with politics; this is the law. This is the body that prosecutes all breaches of the criminal law and this is how it is done—in other words, to not differentiate it from other criminal offences.

The Hon. SARAH MITCHELL: I wanted to touch on an issue which you have raised and I have spoken to some other witnesses about it in terms of how onerous the current system is and some of the impediments that are in place. Others have indicated that they believe the number of incidences and actions that are taken are probably only the tip of the iceberg because some people feel as if the process they need to go through is beyond their reach. In your submission in recommendation 1 you ask that there be a provision for organisations with a special interest to take up the issue on behalf of an individual or group. Could you expand a little more as to why you think that is necessary and how that might work in practice?

Mr J. McKENZIE: I am happy to, because that is the one very specific Aboriginal recommendation that we are making. It could apply to any other groups too. As far as our client group goes, through a combination sometimes of ignorance of the proper processes but also, and perhaps many times more importantly, an appreciation and awareness of a history that is not exactly a pretty history as far as prosecution and especially police and Aboriginal people goes. We are working to try to turn that around, but the fact of the matter is that Aboriginal people, when they get told that there is an avenue for them to pursue what they see as a very aggrieved wrong but they are going to have to go in to a police station by themselves or a Director of Public Prosecutions solicitor's office by themselves, they get very nervous. They lose confidence. They feel that they might possibly be made to look silly by someone clever with words and those sorts of assumptions.

I cannot emphasise how much it helps those people to have someone, even if it is a field officer from the Aboriginal Legal Service or perhaps a lawyer, sitting there beside them. Not telling them what to say, simply there in support, having spoken through the issues before they walk in. If there is some curly question that comes up during the course of that interaction they can seek advice there and then. It may be difficult for some people to realise this because when Aboriginal people are pushed too far they react really stridently. But there is a huge gap between that strident almost losing of self-control and the way they might react in that way and often end up being criminally charged because of their strident reaction to a position a lot further back along the spectrum whereby they are really upset and want to try to work out what is the best way of going forward but they do not have the confidence that they are going to get the words out right. That is one of the ways it is always put to us. It is a matter of confidence, it is a matter of the psychological damage done to someone who has been racially vilified, I suppose it goes to the very heart of the fact that it eats away at their confidence as an actual person. I know other forms of vilification might do that too, but I am only talking about racial vilification.

The Hon. SHAOQUETT MOSELMANE: I appreciate your reasonable and moderate approach to this subject matter. At page 1 of your submission you refer to the National Inquiry into Racist Violence 1991

report into the endemic problem relating to racist violence and racial vilification against Aboriginal people. Are you aware of any recommendation and action following that report?

Mr J. McKENZIE: No.

The Hon. SHAOQUETT MOSELMANE: None? They made significant findings, but no action was subsequently taken?

Mr J. McKENZIE: Not that I am aware of, I must say. I must be clear that once I received the invitation to come here I have really looked at this in the last week. Myself and a researcher have done some looking and that is when we came across that. I am not wanting to pretend that something has been sitting in our minds. I thought it was a useful marker to show that this has been an issue for a long time. The other marker I would like to say is that in the then Attorney General's own second reading speech back in 1989 he made reference to the fact himself that the Anti-Discrimination Board then had advised him that there are many individuals who lack the confidence or ability or who may be afraid to approach the board to complain directly and that this is particularly so in relation to the ground of race. It does appear from the expert commentary that it is the racial vilification and discrimination that has an almost extra effect on people's sense of self-worth than many of the other forms of discrimination and vilification.

The Hon. SHAOQUETT MOSELMANE: You also state in relation to section 20D that since 1989 there has been a number of matters referred to the Anti-Discrimination Board [ADB]. Can you tell me whether any of the 27 relate to the Aboriginal community?

Mr J. McKENZIE: We have not been involved in the process, but I understand that some five to six of them do.

The Hon. SHAOQUETT MOSELMANE: None of them were—

Mr J. McKENZIE: None of them actually went into a prosecution case. That is right.

The Hon. SHAOQUETT MOSELMANE: You stated earlier on that you warn that we should not take steps that would criminalise some behaviour.

Mr J. McKENZIE: Lesser forms, yes. I am saying keep it to the most serious. I think the present law does target the most serious, being physical harm.

The Hon. SHAOQUETT MOSELMANE: What do you define as most serious?

Mr J. McKENZIE: Physical harm, a threat, a serious incitement.

The Hon. SHAOQUETT MOSELMANE: What about psychological harm?

Mr J. McKENZIE: That is serious too. I am not sitting here defending that. I am simply saying I think if you are going to use a criminal sanction, keep it to that form of behaviour that the greatest groundswell of mainstream Australia will support you in saying that is so bad that it deserves to possibly end up in jail.

The Hon. SHAOQUETT MOSELMANE: The previous witnesses told us of a case of a poster that was displayed at a shop saying to not do business with Indians and that Indian students were not welcome to enter the shop. Further it said that if you see Indians tell them they are not welcome in Australia. The Jewish Board of Deputies determined that was serious racial vilification. Is that what you would see as a serious racial vilification case?

Mr J. McKENZIE: Not such that it would put it in the criminal sanction field, no. We would say that we think that the right target is there about threats to a person's physical safety and to their own property. We say that that is an appropriate targeting at the most serious end of the dreadful things that are said. But I want to stress that is not in any way resiling from the fact that there needs to be some civil remedies against the situation that you have described in relation to Indian students. But balancing all of the societal interests that I think need to be balanced in this, we would not see that as suitable for the criminal sanction.

The Hon. SHAOQUETT MOSELMANE: Do you think it is better for section 20D to remain in the Anti-Discrimination Act rather than put it into the Crimes Act?

Mr J. McKENZIE: I had not thought about that until now. I think it is appropriate, yes, especially because of the 20C part of the regime that allows that civil remedy. On that basis I would say I would agree with you.

The Hon. PETER PRIMROSE: I note that 20D requires a public act and that is defined in 20B. Your recommendation 2 is to widen the definition to include any conduct that is within the hearing of people who are in a public place. Can you talk about that, where that would actually fit in?

Mr J. McKENZIE: A case that comes to mind is a criminal client from some years back, a young woman. She reacted badly in the end and got into trouble with police. But what had happened was, as I recall it, that she was at a sideshow of some sort. It might have been the royal show or thereabouts. As I understand it, it was a situation in the ghost train. If they still have ghost trains now I do not know. But on entry to there she complained about one of the operators just inside the gate of the ghost train construct who had said basically, "All you black c's, you are all the same", and I think words to the effect of, "I feel like I should punch you but I will hold back this time." I am using nicer language than what was complained to me.

Now her problem was that there was no other witness and the fellow denied it, but part of her instructions were that it was screamed at the top of his voice. Unfortunately no other witnesses were even canvassed to see if someone heard it out there. It has remained in my mind as the sort of thing that someone can really just tread a very fine line sometimes so that even though it is a very public place, the Royal Easter Show sideshow alley, I think that it is important for that occasional instance of really bad racial vilification, if it is yelled loud enough and clearly enough that people on the public street can hear it then I think that is a public act. That is why I would support that broadening of it.

Mr DAVID SHOEBRIDGE: Professors Rice and Rees in their presentation suggested getting rid of the explicit requirement about having to prove a public act and instead allowing a defence where the defendant can prove that the conduct was intended to be private. Do you think that might go some way, or is that one of those steps too far?

Mr J. McKENZIE: I will be honest, I think that is one of those steps too far. Please, when I say this, it is on the balance. I can see a lot of good merit in such a suggestion, but I can also see some real dangers again that people are going to think where is the intrusion going to stop here? I think it is a very different thing when you are talking about criminal sanction intrusion as opposed to a civil liability intrusion. I think the general public has a very well appreciated and well deserved differentiation between those two different uses of powers of the State.

One of the things that I think is important here is that when it comes to any discrimination law one of the things that people who push back against them say is, "In my workplace I want to be able to run things the way I want them to be run." Sure, if it is a workplace in which it is by definition a public place, like a public retailer or whatever, okay, that is going to happen in the public place. But I think it would be probably a step too far to be saying that in a non-public workplace situation this criminal sanction could come in. By all means keep the civil liabilities there but I think as far as getting acceptance—

Mr DAVID SHOEBRIDGE: This is not your submission about a perfected law; this is about the kinds of laws that would lead to social harmony and do something to reduce discrimination.

Mr J. McKENZIE: That is right, indeed. And that is the goal. As far as we are concerned, that is the goal. If you simply bring in a set of very draconian sanctions we believe that the overall result in some years time could be negative rather than positive.

Mr DAVID SHOEBRIDGE: Your submission is that it is the second element—to prove to a criminal standard the incitement or the threat—where we should be addressing our potential reform?

Mr J. McKENZIE: Yes.

Mr DAVID SHOEBRIDGE: And change that test to "where the conduct had the reasonable likelihood of threatening or inciting"?

Mr J. McKENZIE: The defendant cannot come up and win consistently by—

Mr DAVID SHOEBRIDGE: —putting up a straw argument.

Mr J. McKENZIE: That was never contemplated in the heat of the moment but on detailed reflection afterwards there is a possibility that there is a play of words involved and that could mean this. That is how lawyers work when we are dealing about criminal sanctions and quite rightly so because it is the ultimate sanction of the State against a person's freedom.

Mr DAVID SHOEBRIDGE: That is one of the benefits of having this exchange with a criminal lawyer. The other potential additional avenue into section 20D that has been raised is the possibility of where the vilifying words, the serious contempt or the racial ridicule was reasonably likely to cause a person to have a reasonable fear in the circumstances for their own safety or security?

Mr J. McKENZIE: I do not think that is very different to what I am proposing as to the reasonably likely test; they are double dipping in a way.

Mr DAVID SHOEBRIDGE: That it is not threatening someone's property or person, it is also causing a person to have a reasonable fear in the circumstances for their safety. You do not see a problem with that?

Mr J. McKENZIE: No, so as long as there is this unbelievably destructive threat of personal injury to you of what I perceive to be your race.

Mr DAVID SHOEBRIDGE: What about giving someone a reasonable fear for their own safety. The words may not be threatening but the way they are conveyed and the tenor of the event puts a reasonable person in the circumstances of the person being abused in fear of their safety?

Mr J. McKENZIE: I do not want to get into too much of a word debate but I believe in short sharp legislation. I think the more you tie it in knots the more loopholes lawyers will find in it. My suggestion is you simply make it very plainly "reasonably likely to" and leave the rest of the stuff out.

Mr DAVID SHOEBRIDGE: Can you shed any light on whether the current timeframes are reasonable: 28 days from receipt of a complaint by the president to refer the matter to the Department of Public Prosecutions and six months for prosecution?

Mr J. McKENZIE: I think they are a bit tight. I think that it probably would be better to extend some of those time lines. There is a lot of value to be had in not creating any great differentiation between this as a criminal offence and every other stock standard criminal offence. Anything that does that, in my view, is probably not helpful to the overall acceptance and behavioural change we are looking for out of this.

Mr DAVID SHOEBRIDGE: You would include in that the current requirement to get the consent of the Attorney General?

Mr J. McKENZIE: Absolutely. That is a step that does not need to be there. Quite frankly, I can understand why it might have been inserted 24 years ago, thereabouts, but I think we as a society have come far enough now that we do not need to have that seeming protection from misuse. The idea now is that if it is a crime it is a crime and there are no politicians involved. I think that is a really good rule of thumb.

Mr DAVID SHOEBRIDGE: What about the Anti-Discrimination Board?

Mr J. McKENZIE: They can refer but it will be up to the Director of Public Prosecutions as to whether that office lays a prosecution or not. I am happy for the Anti-Discrimination Board to refer matters and to say "consider prosecuting this", as well as the police doing the same thing.

Mr DAVID SHOEBRIDGE: You want the parallel?

Mr J. McKENZIE: I think that is fine and wise in this area given that we have this civil process and criminal process and not every person who has been abused is going to know which category their situation is going to fall into. I think it is good that they go to the Anti-Discrimination Board in general.

Mr DAVID SHOEBRIDGE: And the Anti-Discrimination Board may then winnow off the more serious cases?

Mr J. McKENZIE: Yes.

Mr DAVID SHOEBRIDGE: Could I ask you to take on notice the issue of the civil penalty regime as a halfway house. That was picked up by professors Rice and Rees. If you have any thoughts as to whether a civil penalty regime might be a halfway house that would see the State run those civil complaints and not have to rely upon an often vulnerable complainant to run them?

Mr J. McKENZIE: I am happy to take that on notice. I had not considered that.

CHAIR: Thank you, Mr McKenzie, your views will be taken on board by this Committee.

(The witness withdrew)

(Short adjournment)

SIMEON BECKETT, Barrister, New South Wales Bar Association, and

ROSHANA WIKRAMANAYAKE, Executive member, New South Wales Bar Association, affirmed and examined:

CHAIR: Welcome, Mr Beckett. You are the last witness for the day and the last witness in the inquiry. We appreciate your coming along and providing a written submission. Would you like to start by making a short statement?

Mr BECKETT: Yes, I would. What I would like to do, with the Committee's indulgence, is touch upon the four recommendations that we have in the submission. If I could summarise, namely, the New South Wales Bar Association proposes some important but, we think, modest changes to the current law of vilification. We note that the terms of reference are narrow and focused upon section 20D of the Anti-Discrimination Act, which covers the criminalisation of certain forms of racial vilification. The focus of our submissions, which we have tried to keep short, is upon those matters.

At paragraph 4, which is page 1 of our submission after the cover page, you will see that there are four issues set out there. I will go through each of those in turn. First of all is the consent of the Attorney General to prosecute. This seems to be an outdated and anachronistic provision with respect to racial vilification. As we understand it, back in 1990 the power was delegated to the Director of Public Prosecutions. It is he or she who makes that particular decision in terms of prosecution. The utility of retaining that part of section 20D, namely subsection 2, seems to have passed a long time ago. We are recommending the repeal of that particular subsection. Of course, the fundamental issue with respect to that provision is that it removes or at least influences the independence of the prosecuting authority, namely the Director of Public Prosecutions. I am sure the Committee is well aware of that particular criticism.

The second recommendation we had was with respect to amending the incitement provision; the way in which a court might determine what is incitement. We have taken some time to explain that in the submission, but if I can summarise it, this may well be one of the log jams to prosecution. If the test for incitement, namely to urge on, to stimulate, or to prompt a person to engage in hatred is an ordinary reasonable reader, then that has created a number of difficulties. The Catch the Fires Ministries case in Victoria, which no doubt the Committee is well aware of by now, proposed an amendment, if you like, an interpretation of that particular provision, which clarified the issue of incitement so that the court could take into account the relevant circumstances. In other words, the test is not so much the reasonable reader, not the ordinary man or woman in the street, whether they would be incited to hatred, but you needed to take into account the circumstances such as, for example, a rally of Nazi supporters where they are inciting people to hatred against Jews at a public gathering. In other words, would the people who are at that particular gathering be incited to hate Jewish people as a result of what was said at that particular meeting?

Another way in which circumstances might be construed is, for example, material that was related to the holocaust where there is a clear incitement by way of graffiti. The example is "Hitler was right", which is a clear reference to the holocaust perpetrated by the Nazis and led by Hitler. In other words, if you could place the particular vilification within an historical context that would be understood by those threatened by it, then that would amount to incitement.

Mr DAVID SHOEBRIDGE: Is it in the context of the person being threatened or in the context of the person being incited?

Mr BECKETT: Yes, thank you, in respect of the incitement rather than the person. We have proposed a minor amendment to add to section 20D the circumstances of the case. In other words, to remove it from an objective test and to instead replace it with the circumstances of the case in concern, so that is the second point.

There are two more points: the 28-day time limit and the transfer to the Crimes Act. The 28-day time limit seems to be an unjustified fetter. When I say the "28-day time limit", I am referring of course to the requirement that the President of the Anti-Discrimination Board refer the prosecution to the Director of Public Prosecutions within those 28 days. I can understand why the Director of Public Prosecutions would want as long as possible in which to consider a prosecution, particularly given the restraint under section 179 of the Criminal Procedure Act. In other words, the Director of Public Prosecutions has to commence with the prosecution within six months. Therefore, the Director of Public Prosecutions would like to have that material sooner rather than

later. I am sure the President is completely aware of that. I do not think there is any need for the legislation to specifically require that to occur within 28 days. It is nice if it does. If it arises on the thirty-fifth day, I cannot see that as being a reason why a complaint should not go forward.

Mr DAVID SHOEBRIDGE: People have proposed both time frames to be extended.

Mr BECKETT: Yes.

Mr DAVID SHOEBRIDGE: You limit it to the 28 days?

Mr BECKETT: Yes, we focused only on the 28 days.

Mr DAVID SHOEBRIDGE: What do you think about both?

Mr BECKETT: We do not have a particular position on that. Unfortunately, there is a procedural issue with the New South Wales Bar Association in the sense that the proposals and the recommendations that you have in front of you here have been to the Bar council and approved by them. I am limited in respect of taking on those issues. If you are concerned about that, I can take it on notice and we can get the President to reply. I think that issue has been dealt with in the Attorney General's submission and in the submission of the Director of Public Prosecutions. No doubt you are aware of the pros and cons for that particular item. In other words, it sounds like that would be an exception to other summary offences that are required to be prosecuted within six months. The fourth point I wanted to address briefly was the transfer to the Crimes Act. We based our submission on the perception that if the offence is in the Anti-Discrimination Act rather than the Crimes Act, then there are people out there, perhaps the police, who would regard it as a matter for the Anti-Discrimination Board, not so much for the police, and that any prosecution should occur by way of referring it to the Anti-Discrimination Board and then they can take it up rather than the police officer at Armidale who receives information about such an offence pursuing it him or herself.

The submission from the Attorney General's Department, which I had an opportunity to read briefly today, seems to touch upon an issue in the most effective way. There seems to have been a misconception that all prosecutions need to go through the process of a complaint made to the Anti-Discrimination Board, considered by the President and then referred to the Attorney General—that of course has been delegated to the Director of Public Prosecutions—rather than it could commence by the police mounting a prosecution and doing it through the Director of Public Prosecutions without having to go through that process. That is one of the problems that arises as a result of if you place the offence within other related legislation, such as the Anti-Discrimination Act, it is not seen as core work by the police and perhaps by the Director of Public Prosecutions, although I have no basis to say that, but there seems to be a perception that it is a matter that goes through a different track. One way in which to dislodge it from that perception is to remove it from the Anti-Discrimination Act and place it squarely within the Crimes Act. They are the four points that we wanted to make in our submission.

CHAIR: Removal of consent of the Attorney General is fairly cosmetic, is it not?

Mr BECKETT: In respect of practice, yes, perhaps, but I think the legislation should also reflect the reality or the policy position. A person coming to the legislation—for example, a police officer—might look at that particular provision and say, "Well, if I am going to prosecute this person or prefer a prosecution, then I have got to go to the Attorney General to seek his or her permission." It is not without importance.

CHAIR: You do not think it is well known enough that this power has been delegated to the Director of Public Prosecutions?

Mr BECKETT: It is well known by the Director of Public Prosecutions, but I am not sure about the police.

Mr DAVID SHOEBRIDGE: I did not know until we started this inquiry, but about every police officer does, though.

CHAIR: They soon become aware of these things. Be that as it may, about putting it into the Crimes Act, there are many crimes that are not listed in the Crimes Act, are there not?

Mr BECKETT: Indeed.

CHAIR: That is right.

Mr BECKETT: Certainly there are common law crimes and there are a number of them.

CHAIR: And statutory crimes.

Mr BECKETT: But this is repeated across the legislative book, if you like. There are a number of offences that are taken out and put in allied legislation, which have the same weight and maybe even carry the same penalty as those matters, but they are seen outside of that process. No doubt the Committee has but I certainly have seen many examples in the law reform circumstances such as this where an offence has been ignored, if you like, and not pursued by the police because it is outside the Crimes Act. This is one that the Bar considers an important one that should be included in the Crimes Act for the reasons that I have stated.

CHAIR: You have referred to the Canadian model.

Mr BECKETT: Yes.

CHAIR: Would you like to expand on that and give us some insight?

Mr BECKETT: I think the answer to that is no, unfortunately. We simply did not have time to go into that in great detail. You will note the hesitation with which we put it forward, but it was something that I thought the Committee should know about. I note that I think it is the Attorney General's department and the submission from professors Rice and Rees who do go into some detail about the Canadian experience. I think they are far better qualified than I, or our committee, have been able to discover on that particular matter.

Mr SCOT MacDONALD: I still do not really understand the circumstances suggestion. I guess my fear is that it seems to me to be very subjective. A lot of circumstances that I think might be applicable for racial vilification that is out there in the public domain, or whatever you are trying to test, might involve you looking for witnesses and looking for an understanding of what actually happened in the supermarket in the train. That could be very problematic, it seems to me as a lay person.

Mr BECKETT: I do not think it is an issue that applies with respect to those sorts of things. For example, take the recent occurrences on Sydney buses. I think the relevant test is just the ordinary person in the street with respect to that particular instance. But I think the issue has been where you have a particular type of mob, if you like, or a protest, or a gathering of people who are sympathetic to people who racially vilify. I think the example of the Nazis is the one that that is intended to capture. Have a look at whether a particular provocative statement would insult those people, if they believe in a particular philosophy at the extreme end of matters or at the extreme end of politics. Would it incite them? I think that is a valid test to take. If you take it out of that context, most people would say, "Look, you know, we don't believe in that. I'm not incited to hatred just because some Nazi sympathiser gets up and starts to vilify."

Mr SCOT MacDONALD: Has a rant.

Mr BECKETT: They say, "I'm not incited to hatred by that." But those people who are sympathetic to it would be. That should be the test. In other words, it should be the circumstances of the case which would take into account the person or people to whom the statements of incitement are made. I would think that is what it is intended to capture.

Mr SCOT MacDONALD: My second question follows on from what the Chair was talking about, which is throwing it in there with the Crimes Act. The Chair made the point that there are lots of criminal sanctions out there that are outside the Crimes Act. I am trying to understand how it would work in practice. If you got your wish, and as quite a few other people have said, it happens to fall into the Crimes Act, what happens? I am thinking of an affray of one type or the other. Practically speaking, does that mean that you get the sergeant on the desk who is making an official decision about what to charge somebody with. Are you saying to the Committee that it is more likely, because it falls into the domain of that sergeant of police at the police station being more likely to throw in a property offence, an assault offence, some other sort of damage if you like, and by the way to throw in racial vilification, just to bundle it all in together? Is that what you are suggesting?

Mr BECKETT: Obviously, it depends on the facts as to which particular provisions would be caught by that particular act concerned, but certainly if it is available to the sergeant and he or she knows exactly what that offence is—

Mr SCOT MacDONALD: And they are used to dealing with it and they have seen it before, whereas at the moment it is unlikely they have said it before.

Mr BECKETT: Yes. Look, there are plenty of provisions in the Crimes Act that I am sure are very rarely used.

Mr SCOT MacDONALD: Someone used the term "exotic".

Mr BECKETT: Yes. There are a few. I think the ones about growing corn in your backyard have disappeared from the Crimes Act, finally, or hanging your washing out in public. But those sorts of things do disappear and there are obscure provisions in there, but this is an important one. I mean, one of the terms of reference as I understand it for the inquiry is whether the current provision is effective. If there is support by the Committee for a provision—by that I mean the policy behind the provision—then how is it best implemented? What is the best way in which conduct which falls clearly and closely within that particular provision may be taken forward in a prosecution?

The Hon. SARAH MITCHELL: Mr Beckett, I have just one question in relation to community expectations. This is something that has been raised with various other witnesses both today and last Friday. We are trying to determine the best way for the Committee to understand whether or not community expectations are being met and what they actually are. Some witnesses and submissions have indicated that because there have been no prosecutions under section 20D, that shows that the bar has been set too high and that community expectations are not being met. Others from the opposite side of the argument are saying that it is showing that it is working because it is such a good deterrent that there have been no prosecutions. Would you have a view on either of those, and in terms of how the Committee should consider community expectations for the purpose of this inquiry?

Mr BECKETT: I think this is an area where the Committee would be assisted if there were actually particular studies of community consultation about it to cover knowledge of the law and whether the law exists. I am sure there are plenty of people out there who just do not know that this is an offence. I understand that there are particular communities that are very aware of it. I think you heard from the Jewish Board of Deputies, who are obviously quite focused on this issue. I think there are particular communities who have experienced vilification of one sort or another over a very long period of time and they are quite focused on it, and then other parts of the community who are not focused on it at all for various reasons.

The Bar is in a difficult position. We are a group of 2,500 to 3,000 barristers. We are not representing the community. We are essentially representing people who appear in the courts of New South Wales. We come from quite a specialist point of view and so we are limited, I think, in being able to really assist you in terms of community consultation. But what we do know is that obviously it was Greiner Government legislation that was passed I understand it with the bipartisan support and that it represents the implementation of international covenants, which have stood the test of time really.

This is 1960s international covenants, such as the International Covenant on Civil and Political Rights, that were established, effectively, following on from the Charter of Human Rights after World War II. It is very well established, and the expectation, if you like, can come from that. It went through not just Australia but of course the nations of the world to become an international covenant. There is a good indication that there is widespread community support for those types of laws when you focus on it and when you take into account those parts of the community that are likely to be detrimentally affected by this sort of hate speech.

The Hon. SARAH MITCHELL: In regards to looking at increasing either the penalty units or the time for imprisonment, other witnesses have suggested looking at the Western Australian model, which I think increases quite substantially those figures. Would you have a view on that?

Mr BECKETT: We do not have a specific view on that. It is not an issue that we had a look at. That is a difficult issue in terms of the weighting you give these particular offences and a comparison with comparable offences. What might a comparable offence be? We did not look at that specifically. We looked really at the

efficiency and effectiveness issue. I guess it goes to effectiveness. You are right to look at it, obviously, but we did not look at it specifically, so I cannot help you with that. But it is a fair question.

CHAIR: Can you think of a comparable offence, if you are put on the spot to do so?

Mr BECKETT: I think there is a degree to which this is recognised in the sentencing provisions. In other words, if there is a threat, for example, and there is a super added element of racism in it, that is caught by the Crimes (Sentencing Procedure) Act and is made a matter of aggravation. I think that is a good indication of it. It is more than a straight threat, for example, or an incitement to hatred generally. Racism takes it into another band. Obviously, the degree to which an additional penalty is warranted has been recognised by the New South Wales Parliament. That is the way in which would approach it, but in terms of a specific example, I cannot pull one out of the box for you today.

The Hon. PETER PRIMROSE: You may wish to take this on notice, given your earlier comments about auspice. I am interested in whether you have any thoughts on the proposal by the Jewish Board of Deputies to amend section 20D to include a provision concerning "conduct intended to harass on the grounds of race"? What they suggest is definition of "harass" would include behaviours that "threaten, intimidate or seriously and substantially abuse".

Mr BECKETT: You have put me on the spot, obviously.

The Hon. PETER PRIMROSE: Yes.

Mr BECKETT: I think that is fair enough. I always feel uncomfortable replying to those sorts of questions when they are very specific and precisely worded.

The Hon. PETER PRIMROSE: Please, if you would, take it on notice. I would appreciate that.

Mr BECKETT: I am happy to take it on notice and perhaps we could write to the Committee about that. Thank you very much. My riding instructions to appear today are the submission that has been approved by the council; that is the limit of the approval, and if you want to go further, you should come back.

The Hon. PETER PRIMROSE: That is what I thought.

Mr BECKETT: I am hoping to assist within that remit.

The Hon. PETER PRIMROSE: In terms of your auspice, you may wish to take it on notice.

Mr BECKETT: Thank you for that opportunity.

The Hon. SHAOQUETT MOSELMANE: The Commissioner for Community Relations, Mr Stepan Kerkyasharian, makes the following point in his submission:

> In the CRC's view, the time has come to:
>
> (a) Simplify the threshold for prosecution, including modify the requirement of intent in section 20D and thus to make a clearer distinction between the threshold tests for vilification under sections 20C and 20D;

Is that your view?

Mr BECKETT: In terms of section 20D, as you know from our submission, we tried to stick to the terms of reference and not engage in section 20C. But in terms of 20D, that certainly accords with our submissions about the test on incitement. The answer to that is yes.

The Hon. SHAOQUETT MOSELMANE: Other submissions discuss the evidentiary bar. In one respect they do not want the evidentiary bar to be too low and too high, as it is at the moment. Where do you see the acceptable middle ground to be for an evidentiary bar?

Mr BECKETT: Obviously, evidence has to go to particular elements of the offence. If you change the definition of incitement, or amend it in the way we have sought to do so, that will allow in evidence, for example, to establish what the circumstances are of the case. To use the example I have talked about, somebody

might be watching what was going on. There might be videotape evidence of the particular incitement and of the mob that was there listening to what was going on at the particular speech or public gathering that occurred. Obviously, you would have that video speech, any police that might be in attendance, any third party witnesses and any members from the crowd who might come forward to give evidence in support of that prosecution. One thing I might say is, as I think I said at the beginning, we propose a modest amendment. I have not read all the submissions that have come forward to the Committee, but I certainly note, for example, that professors Rice and Rees have talked about a completely new provision that would take into account matters that I think would lower the bar, if that is the term, but at least people would be more effective in tackling that form of activity.

The Bar has not considered that particular provision. Instead, we came up with a short amendment that we thought would expand things to cover the issues that were raised in Catch the Fires ministry. But I cannot emphasise too strongly. I think there is a procedural hurdle there being the inclusion of the offence in the Anti-Discrimination Act and the perception, rightly or wrongly, that prosecutions need to begin with a complaint to the Anti-Discrimination Board, consideration by the President, then referral from the President to the DPP. I think the Attorney General's Department has said that all of that creates a delay, so that by the time it hits the DPP's desk a lot of the six months has been used up, which could have been used by police, for example, going out and getting the statements that they needed in order to prosecute. So it is a two part thing.

The Hon. SHAOQUETT MOSELMANE: There were suggestions today that they be referred directly by the President of the Anti-Discrimination Board and also the police.

Mr BECKETT: I think one of the issues is that it can be done like that at the moment but it is not being done at the moment. If you place it in the Crimes Act people will say, "We'll just treat it like any other common garden crime. We think here was a Nazi rally, certain statements were made. We think they fall within the provision. You're charged with that", or "We will refer it to the DPP for advice" and they mount the prosecution.

The Hon. SHAOQUETT MOSELMANE: Given that that is how people think, is it your view that section 20D should be under the Crimes Act, not under the Anti-Discrimination Act?

Mr BECKETT: Yes, that is correct.

The Hon. SHAOQUETT MOSELMANE: The Hon. John Dowd, in his submission for the International Commission of Jurists, still holds to the view that the lack of prosecution may also signify that section 20D is a valuable deterrent against the commission of the offence of serious racial vilification. What is your view on that?

Mr BECKETT: I think it is a valuable deterrent. We have not recommended it be repealed in the sense of done away with and not replaced with anything in particular. I think it is a very important matter.

The Hon. SHAOQUETT MOSELMANE: But some of the arguments are that it is an ineffective deterrent and it has not really worked.

Mr BECKETT: The two key statistics that I thought came out of the submissions made to the Committee and that we were able to establish is that there are a considerable number of complaints of vilification flowing through to the Anti-Discrimination Board and I think the Attorney General's Department sets out the number of those complaints that have flowed over the last four years. So I would be surprised that some of those—obviously I have not seen them—would not flow through to consideration for prosecution and perhaps also prosecution. But again without having a look at those specifically, I cannot say, "Yes, this person should have been prosecuted in these particular circumstances", because of course I do not know what occurred in that particular case.

In the absence of the sort of material that the Committee would be able to base a factual determination that there have been examples of vilification and those particular instances of vilification have not flowed through to prosecution would require the Committee to go into the detail of each of those, but I think we can determine that. If, like in Western Australia, there is some greater flexibility and appropriate amendments made to the vilification offences, then that will open up the possibility—again it is just a possibility—that there will be additional prosecutions in due course.

The Hon. SHAOQUETT MOSELMANE: For serious racial vilification, it was suggested that a maximum sentence could be between two and five and some suggested three years. What is your view?

Mr BECKETT: As I said before, we did not consider that specifically. That is a difficult task and again it depends very much on the criteria that are used.

Mr DAVID SHOEBRIDGE: It is common assault when it is tried on indictment, gets a two years maximum, I think. It would be at least within that bailiwick.

Mr BECKETT: I will not be drawn on that. That is a matter for you. You are the law makers here.

Mr DAVID SHOEBRIDGE: You belong to a profession that day in and day out deals with factual scenarios, throws them before courts, tests them, tries them out.

Mr BECKETT: Indeed, yes.

Mr DAVID SHOEBRIDGE: In light of that experience, that is why I am asking you.

Mr BECKETT: Again, the way in which those tariffs are set, they are set here in this place rather than down the road in the Supreme Court or in the other courts of New South Wales. I take your point but I am not in a position to be drawn on that particular aspect. In fact even if I had my own personal view about that issue I am not able to assist you.

Mr DAVID SHOEBRIDGE: Perhaps you could take that on notice and bounce it around the committee and see if they have a view.

Mr BECKETT: Sure, okay.

Mr DAVID SHOEBRIDGE: The amendment you are putting forward about "in the circumstances of the case", that is looking at whether or not there was the incitement, whether there was the threat or the incitement to cause someone to—

Mr BECKETT: Yes.

Mr DAVID SHOEBRIDGE: But it would require the proof of actual incitement in the case, would it not?

Mr BECKETT: Of course.

Mr DAVID SHOEBRIDGE: So you would still be caught with a prosecutor having to identify someone who was in that situation incited?

Mr BECKETT: No, I do not think—

Mr DAVID SHOEBRIDGE: Then explain to me how it would work.

Mr BECKETT: It is a bit like the ordinary person test. In other words, the person making the decision, namely, the judge or the jury in a particular circumstance, would be asked to determine in the relevant circumstances would people be incited—

Mr DAVID SHOEBRIDGE: Beyond reasonable doubt.

Mr BECKETT: —beyond reasonable doubt. It is a matter for judgement, if you like, by the determiner of the facts, be that the judge, the magistrate or the jury. It is not so much this person over here was incited to hatred and you have the person come forward and put up their hand and say, "I was incited as a result of those particular comments."

Mr DAVID SHOEBRIDGE: You can prove that by someone actually having done something.

Mr BECKETT: You certainly could. But that seems to have been a difficulty with prosecutions in this particular case. You can imagine why that would be. In other words, you would have to chase down those people who were incited and discover the acts they have done and then determine why they did them and without an actual acceptance by that person that I was incited by the particular comment, then it will obviously be very difficult.

Mr DAVID SHOEBRIDGE: But even on your model you would still have to prove beyond reasonable doubt that in the circumstances someone was incited.

Mr BECKETT: That is right, yes.

Mr DAVID SHOEBRIDGE: Mr McKenzie from the Aboriginal Legal Service was suggesting that that would effectively allow most defendants, any competent defendant council, to put up a potential other explanation for how it might have been read by the crowd or by the group and therefore make it next to impossible to prove in practice and he was proposing a test of "reasonably likely". "Was it reasonably likely to incite" as an alternative, which may be much more achievable in terms of prosecutions and more reflect reality. I can already hear your answer but I will say it. What do you say to that?

Mr BECKETT: Let me try and get this straight. The proposal is one element. Obviously it has to be beyond reasonable doubt because it is a criminal offence for the entirety of the offence. But one element would be "reasonably likely" to incite. The answer—I have to fall back on the answer I have given a number of times already. There are a number of ways in which you could do it. I think we have proposed one in all the circumstances which may in some ways dovetail with that in the sense that you could choose one or the other to achieve approximately the same result, depending on what factual scenario you are dealing with.

Mr DAVID SHOEBRIDGE: I do not mean to give you more work but if you are taking those other matters back to the committee, could you take that issue back?

Mr BECKETT: All right.

Mr DAVID SHOEBRIDGE: One of the concerns about watering down that aspect, not the words of contempt or vilification or abuse but the effect of those words, which is what we are talking about here, proving the effect of those words, is that it may open up longstanding ethnic enmities to exposure in the criminal law system, for example, there are longstanding concerns between the Armenian community and the Turkish community about genocide.

Mr BECKETT: Yes.

Mr DAVID SHOEBRIDGE: Large parts of the Armenian community make a strong case that there was genocide committed by the Ottoman regime from 1914 until the end of the World War I. Large parts of the Turkish community find that deeply offensive and insulting to them as a nation, as an ethnicity, and they could well and truly mount an argument that that was putting them in serious contempt and eventually vilification. Therefore if the Armenian community was to organise a protest outside the Turkish consulate and in the course of that a speech was given, people's passions were inflamed and the fence was damaged, on your test of "in the circumstances of the case"—

Mr BECKETT: What about the current law? It sounds like the current law could catch that sort of activity, depending on what was said.

Mr DAVID SHOEBRIDGE: Would that be an area where you think criminality should happen? Would that be criminal?

Mr BECKETT: I think it is already criminalised.

Mr DAVID SHOEBRIDGE: Do you think it is appropriate that it should be criminalised?

Mr BECKETT: Yes. If it falls within section 20D, the answer is yes. We support section 20D subject to the amendments that we propose and the amendments would make it easier to prosecute rather than less easier.

CHAIR: You seem to have answered satisfactorily.

Mr BECKETT: Save for three questions on notice.

CHAIR: Yes, that is right. If you do anything with those questions, we would appreciate it if you could get a response back to us within 14 days because of our time constraints. Thank you for submission and for being with us today. It has been very valuable to us and we will be taking that evidence on board in our deliberations.

(The witnesses withdrew)

(The Committee adjourned at 5.00 p.m.)