**Submission No 32**

# INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

**Organisation**: NSW Young Lawyers

**Date received**: 13/03/2013

THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Human Rights Committee

# Submission - NSW Legislative Council's inquiry into the racial vilification law in NSW

**13 March 2013**

**Submission by the NSW Young Lawyers Human Rights Committee**

*Standing Committee on Law and Justice – NSW Legislative Council*


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# About NSW Young Lawyers and the Human Rights Committee

1. NSW Young Lawyers (**NSWYL**) is the largest body of young and newly practising lawyers, and law students in Australia, with around 15,000 members. NSWYL supports practitioners in their early career development in numerous ways, including by encouraging involvement in its 15 separate committees, each dedicated to a particular area of practice. Membership is automatic for all NSW lawyers under the age of 36 and/or in their first five years of practice, as well as law students.
2. The YLHRC comprises a group of over 600 lawyers and law students interested in Australian and international human rights issues. The objectives of the Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights. Members of the Committee share a commitment to effectively promoting and protecting human rights.

# Introduction

3. The NSW Young Lawyers Human Rights Committee (**YLHRC**) welcomes the opportunity to make a submission to the NSW Legislative Council's inquiry into racial vilification law in NSW.
4. Anti-discrimination laws are vital to making members of the community feel safer, and confident that they can conduct their life free from abuse, harassment, hostile and threatening behaviour. Anti-discrimination protections are therefore vital to the good health of our communities.
5. The YLHRC welcomes the discussion which the inquiry is generating about the balancing of competing rights.

# Recommendations

6. The YLHRC recommends the following:
    A. Amend section 20D(1) in the following manner:

    *A person shall not **recklessly or intentionally**, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include*

    B. Increase the penalty for committing the section 20D offence intentionally to at least 3 years.

    C. Amend section 20D(2) by either:

        a. replacing 'Attorney General' with 'Director of Public Prosecutions'; or

        b. repeal section 20D(2).

# Australia's international human rights obligations

7. Australia is party to several international conventions which impose obligations on Australia to prevent racial discrimination.[1]

## The obligation to criminalise racial vilification or hatred

8. Australia has an obligation to prohibit racial hatred under Article 20(2) of the *International Convention on Civil and Political Rights,* which provides that:

> "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

9. The *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**) was ratified by Australia on 30 September 1975. In doing so, Australia undertook to eliminate racial discrimination and promote understanding among people of all races and backgrounds.

10. Article 4(a) provides:

> *States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, inter alia:*
>
> *(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;*

11. Article 4(a) of ICERD obliges states parties to take this prohibition a step further and criminalise the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination as well as acts of violence or incitement to such acts against any race.

12. Australia's declaration to Article 4(a) reads:

> *"The Government of Australia ... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of*

[1] *International Convention on the Elimination of All Forms of Racial Discrimination* (1965)*; International Covenant on Economic, Social and Cultural Rights* (1966), Article 13; *International Covenant on Civil and Political Rights* (1966), Article 26; *Convention on the Rights of the Child* (1989), Article 20.

*the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)."*

13. The Australian Government has maintained its declaration to Article 4(a) of ICERD, despite consistent recommendations from the CERD Committee to withdraw it.[2]

14. In New South Wales under the *Anti-Discrimination Act (1977)* (NSW) (**NSW Anti-Discrimination Act**) racial discrimination is unlawful in the areas of education, employment, the provision of goods and services, accommodation and registered clubs. Notwithstanding Australia's declaration to Article 4(a) of ICERD, section 20D of the NSW Anti-Discrimination Act makes it an offence to undertake a public act of racial vilification.

15. Section 20D provides:

> *(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:*
>
> *(a) threatening physical harm towards, or towards any property of, the person or group of persons, or*
>
> *(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.*
>
> *Maximum penalty:*
>
> *In the case of an individual—50 penalty units or imprisonment for 6 months, or both.*
>
> *In the case of a corporation—100 penalty units.*
>
> *(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.*

16. Section 20D only complies to some extent with the Article 4(a) obligation. It does not completely satisfy Article 4(a) because:

> (a) Article 4(a) requires the criminalisation of financing of racist activities which is not caught be s 20D;
>
> (b) section 20D is restricted to offences which are 'public acts'. Racial vilification which is not conducted as a 'public act' but in private, is behaviour which is required to be criminalised under Article 4(a) of ICERD, but cannot be prosecuted under s 20D; and

[2] CERD Committee, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia,[14] CERD/C/304/Add.101, (April 2000); CERD Committee, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, [12], CERD/C/AUS/CO/14, (14 April 2005); CERD Committee, Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, [17] CERD/C/AUS/CO/15-17 (August 2010).

(c) the requirement that the Attorney General approve prosecutions is not a requirement of Article 4(a).

17. Notwithstanding that section 20D falls short of complying with Article 4(a) of ICERD, it is submitted that section 20D should not be repealed. Retaining section 20D strengthens Australia's compliance with its obligation to comply with Article 4(a) not otherwise met by Commonwealth legislation.

# Comparative analysis

## Consent to Prosecute

18. Section 20D(2) provides that consent of the Attorney General be obtained as a precondition to prosecution of serious racial vilification.
19. There is a similar requirement in s 27(1) of the *Public Order Act 1986* (UK) which provides that proceedings for racial hatred offences may not be commenced in England or Wales without consent of the Attorney-General.
20. In 1999, the NSW Law Reform Commission (**Commission**) expressed concern that the Attorney General's consent politicized the decision to prosecute. The Commission recommended that instead consent of the Anti-Discrimination Board ought to be required.
21. In other jurisdictions such as Victoria, the consent of the Director of Public Prosecutions is required as a precondition to commencing a prosecution for racial vilification (s 24(4) of the *Racial and Religious Tolerance Act 2001* (Vic)).
22. It is submitted that in order to ensure that all victims of racial vilification are granted equal opportunity to seek legal recourse, s 20D should be amended to either abolish the consent requirement or require consent of an independent body such as the Director of Public Prosecutions instead of consent of the Attorney General.

## Maximum Penalty

23. The maximum penalty available for the offence of serious racial vilification under s 20D is, in the case of an individual, 50 penalty units ($5,500) or imprisonment for 6 months or both.
24. This penalty is consistent for analogous offences in other jurisdictions; for example, both Victoria and the UK impose a maximum term of 6 months imprisonment, and Victoria imposes a maximum fine of $8,450.40 (s 24(1) of the *Racial and Religious Tolerance Act 2001* (Vic); s 27(3) of the *Public Order Act 1986* (UK)).
25. Unlike in Victoria and the UK, in NSW the vilifying conduct must be accompanied by threats of violence or the incitement of others to violence (**threatening element**).
26. If the threatening element of the required conduct in s 20D is to be retained, it may be appropriate to increase the maximum penalty prescribed in line with other jurisdictions such as Western Australia or South Australia, where longer terms of 14 or 3 years imprisonment respectively are available for

similar conduct.[3] This will both assist in deterring potential offenders from engaging in conduct of such severity and demonstrate the community's opprobrium towards the vilifying behaviour which infringes the right to be free from discrimination.

## Intent or recklessness and incitement

27. As explained by Attorney General Dowd in the Second Reading Speech[4], section 20D requires the prosecution establish on the part of the accused:

    (a) intent to carry out the relevant conduct; and

    (b) intent that the conduct incite hatred, serious contempt or severe ridicule.

28. However, section 20D does not explicitly refer to 'intent' as being an element of the offence. If Parliament intended for intent as to the consequence of the conduct to be an element of the offence to be proved beyond reasonable doubt, it is a unique hurdle imposed in NSW legislation that may be a contributing factor to the lack of prosecutions under s 20D.

29. Rather than placing an onerous burden on the prosecution to prove intent as to the vilifying consequences of the conduct, it is submitted that it should be sufficient, as it is in both Victoria and the UK, for the prosecution to establish advertent recklessness on the part of the accused in this respect.[5]

30. Alternatively, Western Australian legislation contains two separate offences carrying penalties of different severity - one of engaging in conduct 'intended' to incite racial animosity and the other where racial animosity was merely a 'likely' consequence.[6] Incorporating a lower standard by following either of these legislative models will enable racial vilification to be prosecuted more effectively, enabling the rights of racially vilified individuals to be acknowledged and providing a deterrent to potential offenders.

We thank the Standing Committee on Law and Justice for the opportunity to make a submission to the Inquiry. If you have any further questions or require further information please contact us using the contact details below.

**Greg Johnson | President**

**NSW Young Lawyers | The Law Society of New South Wales**

**Nathan Kennedy | Chair, Human Rights Committee**

**NSW Young Lawyers | The Law Society of New South Wales**

[3] *Criminal Code* (WA); s 4 *Racial Vilification Act 1996* (SA), s 77.
[4] New South Wales, Parliamentary Debates, Legislative Assembly, 4 May 1989, 7490.
[5] *Racial and Religious Tolerance Act 2001* (Vic), s 24(1)-(2); *Public Order Act 1986* (UK), s 18(1), (5).
[6] *Criminal Code* (WA), ss 77-78.