

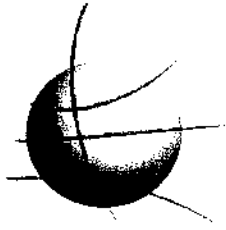
**Submission  
No 30**

## **INQUIRY INTO RACIAL VILIFICATION LAW IN NSW**

**Organisation:** International Commission of Jurists

**Date received:** 11/03/2013

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INTERNATIONAL  
COMMISSION  
OF JURISTS

11 March 2013

The Director  
Standing Committee on Law and Justice  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

Dear Sir/Madam,

**Submission to the inquiry by the Legislative Council into racial vilification law in NSW, in particular, in relation to section 20D of the *Anti-Discrimination Act 1977* (NSW), which creates the offence of serious racial vilification**

The International Commission of Jurists (ICJ), founded in 1952, has as its mandate, the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-governmental organisation it has many national sections and affiliates in all regions of the world, each of whom adhere to the ICJ mandate. The Australian Section of the ICJ (the ICJA) has branches in most states and territories.

The ICJA wishes to respond to the call by the Legislative Council's Standing Committee on Law and Justice in relation to its inquiry into racial vilification law in NSW.

The ICJA notes that the Terms of Reference for this inquiry limit its scope to matters concerning section 20D of the *Anti-Discrimination Act 1977* (NSW) (the Act), which creates the offence of serious racial vilification.

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This must be distinguished from section 20C of the Act, which renders racial vilification ‘unlawful’. Complaints under section 20C are investigated and if appropriate, resolved through conciliation by the NSW Anti-Discrimination Board.

Conversely, the offence created by section 20D is punishable by a fine and/or imprisonment. Accordingly, the application of section 20D has the potential to result in serious penalties, with very far-reaching consequences for individuals.

As such, when inquiring into section 20D of the Act, it must be kept in mind that where legislation imposes restrictions on freedom of speech and creates a criminal offence, the bar must be set very high.

### **1. The effectiveness of section 20D of the Act**

The ICJA notes that the Premier has indicated that a basis for the launch of this inquiry was that there have not been any successful prosecutions under section 20D since its introduction in 1989.<sup>1</sup>

The ICJA submits that conclusions as to the effectiveness of section 20D cannot be drawn from the absence of prosecutions. Rather, this may be an indication of the effectiveness of other mechanisms in the Act, designed to deal with the appropriate resolution of complaints regarding racial vilification. The lack of prosecution may also signify that section 20D is a valuable deterrent against the commission of the offence of serious racial vilification.

As such, the ICJA submits that section 20D of the Act can be regarded as potentially very effective.

### **2. A realistic test for the offence of racial vilification in line with community expectations**

The ICJA submits that given the very serious penalties that may result following a successful prosecution for serious racial vilification under section 20D of the Act, the test for this offence must be a demanding one. Community expectations would similarly recognise that the potential consequences arising from a conviction would necessitate a high threshold.

The ICJA therefore submits that the current test for the offence of racial vilification is realistic and is in line with community expectations.

### **3. Any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech**

The ICJA does not consider that it is necessary to make any amendments to section 20D of the Act.

The ICJA recognises that while the Act defines ‘race’ to include ‘ethno-religious or national origin’ the Act does not specifically prohibit ‘religious vilification’. The ICJA is aware that other jurisdictions do create an offence of ‘religious vilification’<sup>2</sup>, however the ICJA does not consider that it is appropriate to include this offence in the Act.

<sup>1</sup> Sean Nicholls, ‘Look behind Premier’s motive’, *Sydney Morning Herald*, 26 January 2013 <http://www.smh.com.au/opinion/politics/look-behind-premiers-motive-20130125-2dbz9.html>, retrieved 18 February 2013.

<sup>2</sup> *Anti-Discrimination Act 1991 (QLD)*, s131A; *Racial and Religious Tolerance Act 2001 (VIC)*, s 25.

The ICJA submits that expanding section 20D to cover 'religious vilification' would create the potential for intra-religious and quasi-religious disputes to come under the Act, as well as other types of disputes that are not appropriately dealt with under the Act.

The ICJA considers that section 20D, in its current form, accords with the continued importance of freedom of speech.

Yours sincerely,

Steve Mark

**CHAIRMAN**  
**ICJ Australia**