
Multiculturalism: criminal law

By Jenny Earle and Pauline Kearney

The ALRC proposes changes to the criminal law and criminal justice process to protect the cultural values of Australia's multicultural society. These proposals are being discussed at seminars and public hearings around Australia.

The Australian Law Reform Commission has been asked to look at Australian family law, criminal law and contract law to see whether they properly respect and protect the cultural values of Australia's multicultural society.

The ALRC's proposals on family law were discussed in the last issue of *Reform*. This article summarises the ALRC's proposals on changes to the criminal law and aspects of the criminal justice process which were published recently in a discussion paper (ALRC DP 48). The summary has been translated into many different languages. Translations are available from the ALRC.

The Commission's approach to criminal law

The Commission's approach to criminal law in a multicultural society is that the law should not obstruct the expression of different cultural values unless it is necessary to protect the rights and freedoms of individuals and to protect public safety. Everyone is entitled to equal treatment by the law and equal protection of the law. The Commission suggests

ways that the law can allow for conflicting values, and practical measures to remove language or cultural barriers which hinder equality before the law.

Accommodating cultural diversity

The paper accepts that the criminal law should apply the same standards to all without discrimination. However, people have the right to religious and cultural freedom and the law should not restrict these rights and freedoms further than is necessary to protect others from harm or oppression.

Exemptions from criminal liability

The law can exempt a person from fulfilling a particular duty imposed by the law if he or she has moral or religious objections to doing the act in question. For example, conscientious objectors can be exempted from compulsory military service. Religious methods of killing animals for human consumption are allowed although they do not comply with the general laws regulating animal slaughter. The law should provide

for exemption from criminal prosecution in appropriate cases. Parliament should consider the implications of proposed laws for different cultures and religions. It should seek advice on the significance of the particular religious or cultural practice and the harm the law seeks to prevent. It can then decide whether to allow exemptions from the particular law. Clearly, there will be circumstances when no exemption can be considered — for example laws designed to protect people from violence.

The 'reasonableness test' in determining criminal liability

As a general rule, the law will only find a person criminally liable for their actions if the person caused harm intentionally or without thinking about the nature or likely effects of their actions. The court concentrates on the defendant's actual state of mind in deciding whether he or she was at fault. But a court often has to decide whether the defendant's conduct was reasonable, according to general community standards. The courts

apply the 'reasonableness test' to help decide whether a person is at fault, or how much they are at fault. In interpreting reasonableness, courts may not pay enough attention to values which have special cultural importance for the individual. These cultural values may have strong influences on behaviour, for example the values of honour and shame, identification with, or loyalty to, a wider social or family group, and deeply-felt commitment to cultural or religious traditions. The Commission thinks that a broader view should be taken of the concept of 'reasonableness' in the criminal law. Legislation should provide that where a court has to determine the intention or state of mind of the accused or the reasonableness of an act or omission or belief, the court should have regard to the cultural values, beliefs and practices of the accused. Evidence should be admissible for this purpose.

Ignorance of the law

It is a general principle of the common law that ignorance of the law is no defence to a criminal prosecution. Except in very limited circumstances, the law does not excuse a person because he or she did not know that what he or she did is an offence. It may lessen the punishment. It is difficult for anyone to know the full extent of the law. It is even harder for people who come from countries with different values and laws and whose first language is not English.

Proposals

The Commission proposes that

- Laws creating offences that directly affect many people in their daily lives should be summarised accurately in plain English and made readily available.

- Governments should provide multilingual information about the criminal law. The Commission asks for suggestions about what sort of information is most important for different communities and how it can be most effectively publicised.
- In deciding whether to prosecute, the authorities (for example, police) should take into account the fact that a person did not know that what he or she did was an offence and could not reasonably be expected to have known.
- The fact that a person did not know that what he or she did is an offence should be taken into account by the court when sentence is being imposed, in particular when deciding whether to release the offender without recording a conviction.

Maintaining harmony and peaceful co-existence

The Commission asks how far the criminal law should be used to prohibit and punish conduct that threatens the religious and cultural freedom of individuals and communities. In answering this question people need to consider what balance should be struck between this freedom, the freedom of expression and the right to peaceful coexistence. The findings of the National Inquiry into Racist Violence show that racist attacks, both verbal and physical, occur against people of Aboriginal and non-English speaking background. The Commission proposes that the federal Crimes Act should be changed to create two new offences, one prohibiting racist violence and the other prohibiting incitement to (urging or encouraging) racist violence. They would apply when the violence is directed at a person because of their race, colour, religion or ethnic

background. The Commission has not decided whether an offence of incitement to racial hatred should be created and is particularly interested in hearing views on this question. It also provisionally proposes that all references to 'blasphemous' material in federal law should be removed. This is because the offence of blasphemy protects only Christianity and not other religious beliefs.

The criminal justice process

The criminal justice system consists of procedures to investigate crimes and identify offenders, determine formally that an offence has been committed and punish the offender. In the ALRC's consultations concern has been expressed about how the criminal justice system works and how it treats people of non-English speaking background.

Investigating crime

A police officer is usually a person's first point of contact with the criminal justice system. It is important to ensure that police powers are exercised fairly, with appropriate safeguards for those who may be vulnerable to abuse of power because of language or cultural differences. All citizens should have equal access to police protection.

- *Notification of rights.* Should a person be notified of his or her rights in relation to police investigation in a language in which he or she is fluent?
- *Recording all interviews involving an interpreter.* Should all interviews, including cautions, be audiotaped so that any mistakes of interpretation would be apparent to the court?
- *Access to interpreters for victims.* Should victims of alleged crime have the same right to an interpreter as the suspect?

- *Model guidelines for the description of suspects.* Should there be guidelines which prevent police and the media from referring to the alleged ethnic background of a suspect when issuing a description?

Launching a prosecution

The decision to prosecute is generally made by the police or by the Director of Public Prosecutions (DPP). The Commonwealth DPP has guidelines which set out the factors to be considered in making the decision to prosecute. The policy emphasises that the race, religion, sex or national origin of the alleged offender or anyone else involved should not influence decision-making. The ALRC provisionally proposes that prosecution guidelines should require authorities to take into account the fact that a person did not know that what he or she did was an offence when deciding whether or not to prosecute.

Arrest or summons

A person charged with a criminal offence can be brought before a court either by way of arrest or by way of summons (a postal notice to come to court). The Commission points out that proceeding by way of summons is preferable, but that all the paperwork involved should be in plain language and translations should be available. Audio and videotapes should be available. A person arrested and charged with a criminal offence may be released from custody if he or she enters into an undertaking to appear at court on a later date. The Commission proposes that a person in custody should be fully informed in a language he or she understands of the right to apply for bail and how to do so. Legislation should list all the factors that are relevant to the question

whether or not the accused will turn up to court if released and direct that only these factors should be considered.

The trial

The ALRC has made a number of suggestions about the trial process:

- *Extending the court's control of proceedings.* The essential features of the court system should not be changed in criminal trials, but the court should have a duty to do what is necessary to overcome any disadvantage a defendant may suffer because he or she is unrepresented, does not speak English or does not understand court procedures. The court should have the power to question witnesses and a duty to obtain all relevant evidence from the witnesses called by the prosecution and defence. There should be a court support service to explain the system to people, refer them to community services and to organise interpreters.
- *Swearing witnesses.* Witnesses should still be sworn and the religious oath should be retained. But the judge should tell them they have the option of affirming (making a declaration without oath) and do not have to justify their choice. The form of words should be simplified. Swearing on a religious text should not be required.
- *Witness demeanour.* In summing up for the jury, the court should warn the jury that when they evaluate the evidence they should be cautious in drawing conclusions from their observations of demeanour (body-language) of the witness. This is because cultural differences in demeanour may be misunderstood.

- *Composition of the jury.* Policies and procedures should be reviewed to ensure that people of non-English speaking background have a real opportunity to serve on juries. They should not be excluded from serving unless they do not have an adequate command of English. The Commission would like to know how to ensure greater participation of citizens of non-English speaking background in juries.

A new procedure for regulatory offences

Behaviour that may be punished through the criminal law ranges from the most serious criminal offences — such as murder — to minor breaches of regulations governing social conduct — such as fishing or street-trading without a licence. The number of 'regulatory' offences is increasing and they are prosecuted in the criminal courts just like the more serious offences. People are distressed because they are treated like criminals for minor offences. It is an expensive way of enforcing the law. The ALRC has been told that non-English speakers are more likely to be prosecuted for these sorts of offences. It proposes a new procedure to deal with minor regulatory offences. An alleged offender would be given an infringement notice imposing a fixed monetary penalty (like a traffic notice) and would only have to go to court if he or she wished to argue about the reasons why the notice was issued. In either case, no conviction would be recorded. The Commission wants to know what sort of offences people think should be dealt with in this way, and what safeguards are necessary to protect individual rights.

Sentencing issues

The law gives the courts a lot of freedom to decide how to punish an offender in a particular case, although certain factors must be taken into account — such as the

nature and effects of the offence. The Commission proposes that the federal Crimes Act should be changed so that the court must take into account the offender's cultural values and beliefs when

deciding what sentence to impose. The Commission also proposes that an offender's ignorance of the law should be taken into account when sentence is being determined. □

You can help

The Commission would like to know what you think about these proposals. You can write, or put your ideas on tape. You can do this in your own language. You do not have to be an expert in law. We are interested in hearing from anyone who has ideas about these proposals. We will send you the full discussion paper in English if you want more details. Please send your comments to:

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**Litigation, n. A machine which you go into as a pig
and come out of as a sausage.**
Ambrose Bierce, The Devil's Dictionary