

## LAW REFORM

Incitement to Racial Hatred. Project No. 86 Issues Paper, May 1989, Law Reform Commission of Western Australia.

Recent events in Western Australia have led the Attorney General of Western Australia to ask the Law Reform Commission to consider 'what changes to the law, if any, are need to deter adequately acts which incite racial hatred'.

The reference was made because of recent events involving the placement of posters and graffiti in and around Perth, directed primarily at Asians, Jews and 'Coloureds', containing such statements as:

Asians Out Or Racial War  
Jews are Ruining Your Life  
White Revolution The Only Solution  
12 Million Jews Never Died

The posters and their messages are affixed to public property in clearly visible places, and are usually placed during the night.

Similar events in Sydney, and to a lesser degree in Melbourne mean that legislative proposals to prevent such racist propaganda deserve examination. Moreover, Australia's responsibilities under the International Covenant on Civil and Political Rights (Article 20), and the Convention on the Elimination of All Forms of Racial Discrimination (Article 4) requires legislation against the incitement to racial hatred or discrimination.

A major policy concern with such legislation is the degree to which it interferes with the right of free speech. As in all situations where human rights conflict, it is necessary to balance the competing rights which are at stake and reach a conclusion which allows a reasonable exercise of each right.

The Issues Paper examines existing laws with respect to their effectiveness in dealing with the activities concerned. It concludes that existing criminal laws, such as disorderly conduct and anti-littering laws are inadequate because they were not enacted to combat specifically racist bill posting. It particularly points to the problems of proof and detection: because the activities are carried out surreptitiously it is difficult to locate those responsible and prove their connection to the bill posting.

The Paper points out that there are also no laws against the printing, possession or distribution of racist material, though these are easier to prove than the actual posting of the offending bills.

There are no available civil remedies for those targeted by such material. Defamation is not actionable if it refers to a large body or class of persons.

The Paper reviews legislative responses that have been made in other jurisdictions, particularly Canada and the United Kingdom. It concludes that legislation which merely proscribes the display of inciting material, while demonstrating

Parliament's disapproval of such activities is faced with problems of detection and proof. 'Pro-active' legislation on the other hand, would prohibit publication or possession of such material as well as its display and would make conviction of offenders much more likely.

The Paper does not make recommendations about the most appropriate response to the problem at this stage: the Commission is awaiting responses before presenting the Attorney General with its preferred option. It offers four possible options:

1) To amend existing public order rules to make them apply more specifically to the offence at hand. It points out that this solution would not deal with the difficulties involved in detection and proof in relation to the display of racist posters.

2) To create new offences outlawing words and conduct which incite racial hatred, and in particular to make publication and possession as well as display and distribution of racist material an offence. Intent to incite racial hatred might be a necessary element of this offence.

3) To create a statutory right of 'group defamation', which would have available the remedies of injunction and retraction. Damages would not be available because of either the problem of a multiplicity of claims against the defendant, or, if limits were placed on the amount of damages, the problem of 'first in, first served'.

4) To create a ground of 'racial harassment' in the Equal Opportunity Act, which would work along the same lines as sexual harassment provisions.

Incitement to Racial Hatred, Report, Project No. 86, October, 1989, Law Reform Commission of Western Australia.

Having conducted extensive surveys and consulted various concerned community groups, the Commission released its report on incitement to racial hatred in October, 1989.

The Commission recommended that the second of the four recommendations outlined in its Issues Paper (above) was the most appropriate legislative course to take, particularly in view of the necessity to balance the right to freedom of speech against the need to protect identifiable groups from public vilification.

The Report proposes amendments to the Western Australian Criminal Code making it an offence to possess (with a view to publication, distribution or display), publish, distribute or display racially inflammatory material with the intention of stirring up or promoting hatred of any identifiable group. It would also be an offence to possess for display or display racist material if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group. This second offence would not have the same requisite intention as the first offence.

The Commission does not recommend the creation of group defamation remedy, or of a 'racial harassment' ground into the Equal Opportunity Act.

The Commission concludes that the measures it has proposed will not resolve the fundamental problem of racism in the Australian community, and that they must be complementary to educational programmes to counter racism.

Informed Decisions About Medical Procedures, June 1989, Law Reform Commission of Victoria (Report 24), Australian Law Reform Commission (Report 50), New South Wales Law Reform Commission (Report 62).

This joint report of the Law Reform Commissions of Victoria, New South Wales and the Commonwealth deals with the provision of information concerning a proposed medical treatment by doctors to patients.

The changing nature of the relationship between doctors and patients, the increasing complexity of the medical procedures which are available and the greater range of options which medical practitioners can exercise in diagnosis and treatment have all contributed to the growing recognition that patients should have more information about their condition, prognosis and treatment options and should be entitled to make decisions about their treatment.

The report and recommendations focus on two areas.

Firstly, the report looks at the legal principles determining liability of doctors on the ground of failure to give information to patients. There is a detailed examination of the possible extent of actions in negligence against doctors who fail to disclose information to patients. The common law, the report concludes, does require 'reasonable disclosure' by doctors, with reasonableness dependent on factors such as the patient's level of understanding, the magnitude of possible harm to the patient, the urgency of the situation and the nature of the treatment proposed.

Because the common law already provides a satisfactory general standard of disclosure, the Commissions recommend that legislation is not necessary for the purpose of ensuring such disclosure.

Secondly, the report and recommendations look to ways in which the process of informing patients can be facilitated in practice. The commission considered that while doctors are in need of more specific and practical guidance than they have at present, legislation is not the most appropriate way to provide such guidance. Instead, the commission recommended that 'non-legislative guidelines, stating doctor's obligations in general and in particular cases, would be a more effective means of improving communications between doctors and patients.' The guidelines should be drafted by the National Health and Medical Research Council.

While the guidelines would not be enforced as legislation, the Commissions recommend that courts would consider them in deciding whether a doctor has acted reasonably in relation to the provision of information.

The final recommendation by the Commissions is that the law relating to professional misconduct in each jurisdiction be amended to provide specifically that failure to provide adequate information to a patient would amount to professional misconduct.

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