

Incitement to Racial Hatred

Terms of Reference

In November 1988 the Commission was asked to consider what changes to the law, if any, were needed to adequately deter acts that incite racial hatred.

Background of Reference

The reference arose from the problem of large-scale racist poster and graffiti campaigns inflicted upon public property in metropolitan and some rural areas. Although these activities breached certain provisions of the *Police Act 1892 (WA)* and the *Litter Act 1979 (WA)*, authorities were often frustrated in their attempts to enforce the applicable laws. This was largely due to the scale of the activity, as well as the fact that most of the inflammatory material was being posted late at night. The issue had received a high degree of publicity and was the subject of intense public debate that evidenced concern about both the social and financial¹ costs attaching to this problem.

In May 1989 the Commission (jointly with the Equal Opportunity Commission) released an issues paper² that focused on the acts that comprised the campaigns. A major consideration was the effect any reform may have on the fundamental right to freedom of speech. The Commission attempted to strike a balance by confining the criminal law proposals to extremely serious occurrences of racist speech. The Commission considered that the poster campaign did constitute such a serious occurrence.

The paper suggested numerous options for legislative reform with the primary proposal addressing the creation of an incitement to racial hatred offence or offences. The paper also considered the creation of a statutory cause of action in individual civil proceedings for defamation of a group and the creation of an express ground of racial harassment in the *Equal Opportunity Act 1984 (WA)*.

Nature and Extent of Consultation

The Commission initiated a comprehensive public consultation programme that included the circulation of over 1300 copies of the issues paper to individuals and organizations in Western Australia, interstate and overseas. The Commission was further involved in numerous print and electronic media interviews, seminars and conferences.³ The Commission consulted with ethnic community representatives and government agencies⁴ with a special interest in the reference and was formally involved with the Commonwealth Office of Multicultural Affairs' community consultation.⁵ Ongoing contact was maintained with other law reform agencies, in particular the Victorian Law Reform Commission (which had a current equal opportunity reference) and the Australian Law Reform Commission (which had a current reference on multiculturalism and the law⁶). The Commission also recognised a petition to Parliament, with 667 signatures, which urged the government to introduce legislation making these posters illegal.⁷

The Commission engaged Helen Cattalini and Associates and Mr Claudio Pierluigi to conduct two distinct community surveys posing the specific options for legislative change. Both surveys evidenced the concern

1 For instance, Perth City Council spent over \$10,000 on the removal of racist poster materials between May 1987 and June 1988.

2 Law Reform Commission of Western Australia and Equal Opportunity Commission, *Legislation Against Incitement to Racial Hatred*, Occasional Report No 2 (1988).

3 Law Reform Commission of Western Australia, 'Incitement to Racial Hatred in Western Australia' (Paper presented at the Australasian Law Reform Agencies Conference, Sydney, August 1989); Law Reform Commission of Western Australia, 'Targeting Racial Hatred in Western Australia' (Paper presented at the Human Rights Congress, Melbourne, September 1989).

4 Such as the Equal Opportunity Commissioner, the Police Department and the Multicultural and Ethnic Affairs Commission.

5 As part of the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence.

6 See Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

7 Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 August 1989, 1378.

of the community about the problem and showed considerable support for the introduction of some form of incitement to racial hatred offence.⁸

The Commission received many submissions, both before and after publication of the issues paper, including over 30 self-initiated submissions from members of the public and submissions from professional associations and ethnic communities. The final report was released in October 1989.⁹

Recommendations

The Commission recommended four amendments to the *Criminal Code Act Compilation Act 1913* (WA) ("the *Criminal Code*") to outlaw certain kinds of racially inflammatory material.

1. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being published, distributed or displayed whether by himself or another, guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby.
2. An amendment to the *Criminal Code* making a person who publishes, distributes or displays written material which is threatening, abusive or insulting guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby
3. An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being displayed whether by himself or another, guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.
4. An amendment to the *Criminal Code* making a person who displays written material which is threatening, abusive or insulting guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.

The Commission also made recommendations as to the interpretation of and penalties for these offences.¹⁰ The Commission recommended against the inclusion of a requirement for the Attorney-General's consent to initiate proceedings and the creation of a group defamation remedy.¹¹

A comprehensive outline of recommendations may be found at pages 16–25 of the Commission's final report.

Legislative or Other Action Undertaken

The Criminal Code Amendment (Incitement to Racial Hatred) Bill ("the Bill"),¹² which sought to implement the Commission's recommendations, was introduced into the Legislative Assembly in October 1989. Its

8 The 'Melville Survey' had a sample size of 250 with 90% favouring the introduction of some form of incitement to racial hatred offence. The 'Target Survey' was aimed at people with a special interest. Of the 367 government and community organizations that were invited to participate, 113 returned the questionnaires. Of that sample, 76% favoured some form of law addressing the problem of incitement to racial hatred.

9 Law Reform Commission of Western Australia, *Incitement to Racial Hatred*, Project No 86 (1989). It should be noted that a member of the Commission, Mr George Syrota, dissented.

10 For the first two offences — on conviction on indictment a term of imprisonment not exceeding two years or a fine of up to \$7,500 or both; and on conviction for a summary offence six months' imprisonment or a \$2000 fine or both. For the third and fourth offences — on conviction on indictment for a term not exceeding twelve months or a \$3000 fine or both; and for conviction of a summary offence, three months' imprisonment or a \$1000 fine or both.

11 The creation of a group defamation remedy was considered and rejected in the Law Reform Commission of Western Australia, *Defamation*, Project No 8 (1979) and Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979). Further, it would rely on existing defamation laws for remedies, which these reports, as well as New South Wales Law Reform Commission, *Defamation*, Report No 11 (1971), had found in need of comprehensive legislative reform.

12 The name of the Bill later changed to Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Bill.

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passage was marked by wide ranging debate.¹³ The Bill passed the Legislative Assembly but was amended in the Legislative Council by limiting the first and second offences to 'threatening and abusive conduct' and the third and fourth offences to the causing of 'serious harassment, alarm or fear'. The Bill was referred to the Legislative Council's Standing Committee on Legislation ("the Committee"). The Committee received submissions, including submissions from Commission staff, and reported in August 1990 recommending substantial amendments to the Bill, principally by limiting the third and fourth offences to instances where it could be shown that the accused 'intended to cause serious harassment' and referred to a specific racial group rather than merely an identifiable group.

The Bill was eventually passed and the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* ("the Act") received the Royal Assent on 9 October 1990. The Act now constitutes Chapter XI of the Criminal Code.

The Commission's recommendations were substantially implemented by the Act. However, the element of 'threatening, abusive or insulting' was reduced to simply 'threatening or abusive' in respect of all four enacted offences. Further, the Commission's recommendation for the third and fourth offences to include 'intended or likely to cause serious harassment, alarm, fear or distress' was limited by Parliament to 'intends any racial group to be harassed'. In view of these small but nevertheless significant changes to the nature and scope of the Commission's proposed offences, the question whether the legislation sufficiently deters acts that incite racial hatred remains.

¹³ See Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 December 1989, 6154–6184; Western Australia, *Parliamentary Debates*, Legislative Council, 19 June 1990, 2111–2151; Western Australia, *Parliamentary Debates*, Legislative Council, 19 September 1990, 5310–5318; Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 September 1990, 5914–5938.