

HUMAN RIGHTS COMMISSION
Discussion Paper No. 3

**PROPOSED AMENDMENTS TO THE
RACIAL DISCRIMINATION ACT
CONCERNING RACIAL DEFAMATION**

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This is the third of the Human Rights Commission's Discussion series.

It is being circulated to inform interested persons of the proposals for amendments to the Racial Discrimination Act to cover racial defamation which the Commission has in mind. Any comments or suggested alterations are welcome and will be considered by the Commission in making final recommendations to the Attorney-General.

The Commission intends to submit its report by the end of October and therefore requests that comments be returned by 15 October.

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PROPOSED AMENDMENTS TO THE RACIAL DISCRIMINATION ACT
CONCERNING RACIAL DEFAMATION

Introduction

Since its inception in December 1981, the Human Rights Commission has been concerned with the twin issues of racist propaganda and racial defamation. In the seven years of Mr Grassby's service as Commissioner for Community Relations, one quarter of all complaints, i.e. some 1,700, involved such statements.

The sense of hurt and outrage conveyed by the complaints, and their volume, point to a social malaise that needs serious attention. Words do wound. However, the Racial Discrimination Act does not make racist propaganda or racial defamation an unlawful act. Accordingly there is no direct remedy available for such statements. The offence of incitement (section 17) only relates to the unlawful actions defined in the Act. Racial discrimination does create division within the society and destroys opportunities for those who are maligned.

Although the number of approaches to the Commission has inevitably diminished as the concerned public has become aware that there is no remedy, numerous complaints are still received.

As part of its investigation of possible remedies for racist statements/propaganda and racial defamation, the Commission has to date issued three publications (available in limited numbers from the Commission):

1. Incitement to Racial Hatred:
Issues and Analysis
(Occasional Paper No. 1)
2. Incitement to Racial Hatred:
The International Experience
(Occasional Paper No. 2)

3. Words that Wound: Proceedings of the Conference
on Freedom of Expression and Racist
Propaganda.
(Occasional Paper No. 3)

Apart from holding this Conference, the Commission has engaged in a continuing dialogue with various groups and individuals who have a special interest in the problem of racist propaganda and racist statements and racial defamation.

After more than a year of discussion and introspection the Commission now feels the time has come to issue for discussion its proposals for an amendment to the Racial Discrimination Act to cover this problem, or at least as much of it as can be met without placing an undue restraint upon freedom of expression.

The Proposed Amendments

It is suggested that the amendment should take the form of two additional provisions and one definition to be incorporated into the Racial Discrimination Act:

- (1) would be a provision to make it unlawful for a person to publicly utter or publish words which, having regard to all the circumstances, are likely to result in hatred, intolerance or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin;
- (2) would be a provision to make it unlawful to publicly insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of their race, colour, descent or national or ethnic origin;

(3) would be a definitional clause to make it clear that publication should be defined in a very broad way to cover the print and electronic media, sign boards, abusive telephone calls etc and that both the individual making the statement and the owners and controllers of the issuing medium would be covered by the two provisions outlined above.

Approach

This brief discussion does not explore the reasons for taking action in this area - these will be addressed in the Commission's report to the Attorney-General. Rather, it focuses on the justification for the particular amendments suggested above. The Commission has considered more than twenty other legislative options, but prefers these for the reasons set out below.

Reasons for Amending the Racial Discrimination Act

- (1) An amendment to the Racial Discrimination Act is a relatively simple matter, clearly within the jurisdiction of the Commonwealth, and would be justified by the Racial Discrimination Convention (particularly Article 4).
- (2) Setting the provisions within the ambit of the Racial Discrimination Act makes it possible to retain the very considerable advantages of adopting conciliation procedures in such cases.
- (3) Avoiding a criminal law approach maintains the parallel with the defamation of individuals and increases the educative role of the law.
- (4) The advantages of instituting a form of action for group defamation are achieved without having to go into the very complex issues related to group defamation in general.

- (5) New Zealand experience with both a criminal law provision and a race relations conciliation provision suggests the superiority of the latter approach.
- (6) After two years of consideration of possible amendments to New South Wales legislation, the New South Wales Race Relations Consultative Committee decided to recommend an amendment to the federal Racial Discrimination Act.

Explanation of the Proposed Amendments

- (1) The first provision is intended to cover racist statements/propaganda of a serious and damaging kind. Examples would include the leaflets placed in letter boxes by extremist organisations nominating certain races as plotting to overthrow the government or public speeches calling for the forcible repatriation of certain ethnic groups. The Commission has received many complaints relating to actions of this kind.
- (2) The second provision is intended to cover racial defamation: i.e. forms of racist statement which in effect defame a person by virtue of his or her membership of a racial group or defame the group itself. Statements which detract from the humanity of people, often by means of unfavourable stereotypes, are as damaging when they slander groups as when the reputation of individuals are attacked. Examples would include 'no X has ever done an honest day's work'; or 'Y's in this town are a mob of alcoholics with prison records'.
- (3) It should be noted that the unlawfulness of the actions covered by the provisions depends upon the likely impact of the actions and not upon the intentions of the perpetrators. British experience, which has used the criminal law, has highlighted the difficulty of

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proving intent except by way of the content and context of the statement, and has demonstrated the reluctance of the authorities to bring actions. In any case, the harm remains whatever the intent of the author of the statement.

- (4) The need for a broad-ranging definition of publication is very clearly demonstrated by the complaints received by the Commission. Slogans promoting racial violence have appeared on T-shirts, billboards and trade union noticeboards, as well as in in-house journals.
- (5) There are some areas which will not be covered, because freedom of speech should only be constrained in order to deal with significant violations of minorities' rights to be unmolested. Most ethnic jokes would probably not be covered. Isolated epithets such as 'wog bastard' would be another example of an excluded area.
- (6) The framework of the Racial Discrimination Act does not allow attacks on groups of persons for their religious beliefs to be made unlawful. However, if New Zealand precedents are followed, Jews would be included as members of an ethnic group, although Muslims would not.
- (7) One important reason for incorporating these amendments into the Racial Discrimination Act would be declaratory and educational. The amendments would establish that community opinion now holds such statements to be unacceptable and unlawful. Whatever else their impact, they should serve to restrain the statements of persons in public employment (one quarter of all complaints of racial defamation made to the Commissioner for Community Relations have been made against such persons as police, welfare officers and local council employees). The education would come through public discussion and through the conciliation process itself.

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(8) In the event of conciliation failing, section 25 of the Racial Discrimination Act provides that:

"Where, in a proceeding instituted under section 24, it is established to the reasonable satisfaction of the court that a person (in this section referred to as the "defendant") has done an act (in this section referred to as the "relevant act") that is unlawful by reason of a provision of Part II, the court may grant all or any of the following remedies:

- (a) an injunction restraining the defendant from repeating the relevant act, from doing an act of a similar kind or from causing or permitting others to do acts of the same or a similar kind;
- (b) an order directing the defendant to do a specified act, being an act directed to -
 - (i) placing a person aggrieved by the doing of the relevant act as nearly as practicable in the position in which he would be if the relevant act had not been done; or
 - (ii) otherwise avoiding a detriment to such a person resulting from the doing of the relevant act;
- (c) if the doing of the relevant act resulted in the making of a contract or the relevant act was done in pursuance of a contract - an order cancelling the contract, varying any of the terms of the contract or requiring the repayment, in whole or in part, of an amount paid in pursuance of the contract;
- (d) damages against the defendant in respect of
 - (i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that that person might reasonably have been expected to obtain if the relevant act had not been done; and
 - (ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act; and
- (e) such other relief as the court thinks just.

The extent to which a court would grant damages as distinct from injunctive relief would depend upon individual circumstances. It might, however, be envisaged that payments to welfare or public interest organisations serving the group defamed might be required, drawing on practice along these lines in Holland and France.

