Racist violence: a plethora of proposals for reform

Jenny Earle discusses proposals to curb racist violence in Australia.

It couldn't happen here?

In Mareeba (Qld) an elderly Aboriginal man was abducted by two persons wearing KKK outfits . . . In Murray Bridge (SA) it was stated that whole Aboriginal groups were removed from parks if there was misbehaviour involving one person . . . Evidence indicated that Aboriginal girls in New South Wales, Western Australia and Queensland had been abused with sexist and racist language by police officers . . . A 16 year old Aboriginal girl stated that she was anklecuffed to a table and smacked and punched at an inner-metropolitan Sydney police station . . . Muslim women have had their hijabs pulled off in the street . . . Arabs and Muslims have been spat on in shopping centres . . . Mosques and synagogues have been vandalised, fire-bombed and robbed . . . These are a few of the hundreds of incidents catalogued in the report of the National Inquiry into Racist Violence, and by no means the most serious.

The debate hots up

Debate about what role the law can and should play in preventing public acts and expressions of racism, punishing offenders and providing remedies for those victimised, has intensified with the release of the Human Rights and Equal Opportunity Commission's report on the subject, the final report of the Royal Commission on Aboriginal Deaths in Custody (see article on reconciliation in this issue) and the ALRC's discussion paper, *Multiculturalism: Criminal law* (ALRC 48), released in May. All contain proposals for major reform in this area. In addition, the Fifth Interim Report of the Review of Commonwealth Criminal Law (June 1991) recommends a new offence of incitement to racial violence as part of the proposed modernisation of the law relating to sedition. This article is mainly about the National Inquiry's findings but also refers to recent ALRC proposals.

A public inquiry

As well as responding to individual complaints of discrimination or abuse of human rights, the Human Rights and Equal Opportunity Commission has the power to conduct inquiries into alleged breaches of human rights on its own initiative. When HREOC resolved in December 1988 to investigate racist violence it was the third time that it exercised its public inquiry function — the first being 'the Toomelah Inquiry' into the Social and Material Needs of the Residents of 3 NSW/Queensland border-towns, followed by the inquiry into the plight of homeless children, both in 1987. The National Inquiry into Racist Violence (NIRV) was established in response to intense community concern about an apparent increase in the incidence of racially motivated violence. After two years of research and consultation the final report of the Inquiry was released and tabled in federal Parliament on 18 April 91. Although long, the report makes compelling reading.

Defining the terms

The Inquiry defined racist violence as a specific act of violence, intimidation or harassment carried out against an individual, group or organisation, or their property, on the basis of race, colour, descent or national or ethnic origin, and/or their support for non-racist policies. Violence is defined broadly so as to include not only physical attack on people and property but also verbal and non-verbal intimidation, harassment, and incitement to racial hatred. This accords with the experiences of people subjected to such treatment, who report that

continual exposure to abusive and insulting language and other forms of intimidation can be as damaging as physical assault, and may in fact have worse longterm effects. As well as looking at the problems, the Inquiry's terms of reference required it to examine current or prospective government measures for dealing with the problems.

Racist violence against Aborigines

The report distinguishes racist violence against Aboriginal and Torres Strait Islander people, which has specific historical roots and was found to be particularly widespread and severe, from other forms of such violence. The evidence of abuse and harassment of Aboriginal people — in shops, parks, streets and their own homes and neighborhoods — was so consistent across the country that the Inquiry concluded that 'the climate of racist violence against Aboriginal people permeates Australian social life.' Many Land Council offices have been the target of racist attacks. The evidence presented to the inquiry in submissions, oral testimony and independent research — of racist violence against Aboriginal people by police officers is particularly disturbing. Aboriginal women in police custody are vulnerable to sexual abuse and racist violence. Formal complaints are rarely made because victims are traumatised and lack confidence in the system's ability or willingness to respond effectively. When the agents of law and order are the alleged offenders, the victims feel especially powerless. 'How do you report violence by police to police?' they ask. As well as violent and abusive behaviour by individual officers the inquiry found that there was systematic overpolicing of Aboriginal communities — that is, unreasonable levels and types of surveillance and intervention in Aboriginal life. (See previous *Reform* article on Redfern raid [1990] *Reform* 119-121 and the article in this issue on the final report of the Royal Commission into Aboriginal Deaths in Custody, tabled in federal Parliament on 9 May 1991.)

Racist violence against ethnic minorities

Racist violence is also directed at people on the basis of their (actual or presumed) ethnic identity. Some ethnic groups face greater hostility than others. Those who are 'visibly different' — by physical appearance, or clothing, for example — are particularly vulnerable to racist attack. The Inquiry received evidence of violence against people of Asian background, Jewish people and their institutions, and of attacks on Arab and Muslim Australians, particularly during the recent Gulf War. Many of the victims of racist harassment in public places have been women; schoolchildren have suffered; places of public worship have been vandalised. New arrivals — such as refugees from Central and South America — are at risk of racist harassment from their neighbors. Evidence to the Inquiry shows racist violence and harassment creates an environment of fear and intimidation, affecting such fundamental choices as where people live or work, whether they socialise outside the home, and how they engage in their religious observances. It is dangerous to stereotype the perpetrators any more than the victims but in discussions organised for the Inquiry by the Office of Multicultural Affairs, 87% of respondents described their abusers or assailants as 'white', 'english', 'aussie', or 'anglo-celtic' and in 65% of cases as male.

Racist violence against people opposed to racism

The Inquiry found that extremist groups often target members of anti-racist organisations — one of the most infamous examples being the campaign of terror by National Action against the Reverend Dorothy McMahon of the Pitt Street Uniting Church in Sydney in 1987-88. Harassment has included abusive and threatening phone-calls, graffiti, offensive posters, damage to property, disruption of meetings and congregations. It is clearly intended to deter the work of anti-racists. The Inquiry notes the view of the Australian Security and Intelligence Organisation (ASIO) on the threat posed by extremists:

> The only discernible domestic threat of politically motivated violence comes from the racist right. . . they appear to have established themselves as fairly durable political entities and will probably persist for some time as sources of communal and politically motivated violence. (ASIO *Annual Report* 1989-90)

However, the Inquiry decided that creating criminal penalties for membership of organisations formed for racist purposes would be 'an excessive and unneccessary infringement of the right of association.'

What is to be done?

The Inquiry found that, on the whole, public authorities do not respond effectively to reports of racist violence. It concluded that, although compared to much overseas experience Australia has been relatively free of racial tensions, 'the potential threat posed by racist violence cannot be ignored'. Proposing a package of social and legal reforms to combat racist violence and the racism that fosters it, the Inquiry's report emphasises that:

> change requires recognising racist violence as a social problem, removing the toleration of racism and making racism and racist violence totally unacceptable in contemporary Australia. Political leaders and opinion makers must work to break the silence and build a culture which condemns racism and racist violence and encourages respect for cultural difference. (p 268)

About half of the Inquiry's recommendations advocate reform of the law and law enforcement processes. The rest are concerned with structural changes to eliminate institutional racism and to provide equal access and appropriate services for the victims of racist violence, the development of education and community relations strategies. Many recommendations address racism in the media which was a frequent cause for complaint to the Inquiry. The incidence of racist violence demonstrated in the report demands positive action by all levels of government - legislative reforms are seen as a necessary adjunct to changes in the areas of law enforcement, employment, housing and education.

Isn't there already a law against it?

Evidence to the Inquiry indicated that existing laws are failing to deal with the problems of racist violence and intimidation. Gaps, ambiguities and weaknesses are identified in both civil and criminal law. Legislative change was seen by many individuals and groups as an essential part of the solution to the violence they suffered, and the Inquiry recommends a number of reforms.

Extending civil remedies

The Inquiry has proposed that the scope of the *Racial Discrimination Act 1975 (Cth)* be enlarged by amending it:

- It should prohibit racist harassment. This would make unlawful 'conduct which is so abusive, threatening, or intimidatory as to constitute harassment on ground of race, colour, descent or national or ethnic origin'. Victims of such abuse would then be able to seek a civil remedy under the RDA in the same way as those subjected to other forms of racial discrimination covered by the Act. The Sex Discrimination Act 1984 already covers sexual harassment.

- It should prohibit incitement of racial hostility by public acts or expression. This is intended to deal with certain kinds of racist propaganda, like racist graffiti and poster campaigns. The proposal is similar to the civil provisions regarding incitement to racial hatred in the *Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW) s 20C*. Savings clauses would ensure that genuine public debate, fair reporting and artistic or academic expression are not restricted. The Inquiry prefers the term 'racial hostility' in this context to the more commonly used 'racial hatred' because it indicates a lower threshold and "conveys the level and degree of conduct with which the legislation would be concerned."

- It should extend the Act's protection and remedies to advocates of anti-racism who may be discriminated against because of their public stance; coverage at the moment is focussed on those who are themselves members of a racial or ethnic minority.

- It should prohibit discrimination or harassment on account of a person's religious belief where the belief is commonly associated with persons of a particular race or ethnic group and is used as a surrogate for such discrimination on the basis of race or ethnicity.

The last annual report of the Human Rights and Equal Opportunity Commission (1989-90) indicated that the National Inquiry has already had a 'very positive educative impact in focusing community attention on discrimination issues and promoting awareness of the complaint provisions available under the Race Discrimination Act'.

Creating new criminal offences

There are various criminal offences both at common law and under statutes or codes which may be used against racist violence and intimidation, including murder, assault, malicious injury to property, riot, affray and sedition. None of these offences is designed to deal with racist activities. Racist motivation is not identified as a relevant circumstance to be taken into account by authorities responsible for investigating and prosecuting crimes and cannot be taken into account in sentencing in a systematic way. The Inquiry concluded that this makes for a less effective response. It found that enforcement of existing laws by investigating, prosecuting and even judicial authorities has been inadequate and at times entirely lacking. It therefore recommends that *s 16A Crimes Act 1914 (Cth)*, and State and Territory Crimes Acts, should be amended to enable courts to impose higher penalties where there is racist motivation in the commission of an offence. The Inquiry also recommends that acts of racist violence should be treated as distinctive, serious, criminal offences, in the same way as other specific types of assault such as aggravated assault or sexual assault. Two new federal offences for

incorporation into the *Crimes Act 1914 (Cth)* are proposed: one prohibiting racist violence and intimidation, the other prohibiting incitement to racist violence and to racial hatred which is likely to lead to violence.

What form should these offences take?

The Inquiry examined different models of anti-racist legislation, looking at the approaches taken in various State jurisdictions and overseas and their relative effectiveness, although this is of course hard to measure. Drawing on this material, there is some discussion in the report of the various elements of the proposed offences - how much stress on intention, whether there should be a requirement of Attorney-General's consent to prosecution, for example. Selected proposals are further developed in the ALRC's discussion paper, *Multiculturalism: criminal law*, May 1991. In a chapter on 'Maintaining harmony and peaceful co-existence' the following offences have been drafted for public comment:

> Incitement to racist violence - this would prohibit the incitement or encouragement by a public act of violence against a person because of the person's colour, race, religion or ethnic origin.
>
> Racist violence - this offence would prohibit acts of violence against a person or their property because of the person's colour, race, religion or ethnic origin, or against anyone where the intention is to cause fear and alarm in such persons distinguished by colour, race, religion or ethnic origin.

The ALRC has not reached a decision on whether the Crimes Act 1914 (Cth) should be amended to create an offence of incitement to racial hatred, and has indicated that it especially welcomes submissions on this issue.

Controversial crimes

Many will disagree with the proposals for special offences to deal with racist violence - insisting that violence is violence and to single out attacks motivated by racial hatred is unnecessary, divisive, counter-productive, and impractical. There are however strong arguments in favour of these reforms. The harm caused by racist violence is qualitatively different from that caused by random violence. It is damaging to the fabric of our multicultural society in that it creates a climate of fear and distrust, 'limiting the cultural expression and quality of life of members of our community'. Those who doubt the seriousness and extent of the problem, and the way it has been trivialised and ignored by a whole range of public authorities, would do well to read the report of the National Inquiry. The law cannot prevent or punish racist prejudice as such, but where this is acted out with consequences for individuals and communities the law has an important role to play. Creating specific offences of racist violence and its incitement would have an important educational and declaratory effect, signalling the state's resolve to deal with the problem. Such offences would underpin new policies, procedures and training programmes designed to monitor, police and prosecute these behaviours more effectively. They would not be meant to displace existing state criminal offences but to 'ensure the effective protection of fundamental human rights by Federal authorities in accordance with the Convention on the Elimination of All Forms of Racial Discrimination (ICEARD) and Australia's other international obligations'. Article 4(a) of ICEARD requires States Parties to:

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...

To date, Australia has not complied with this requirement.

Momentum for change

The report has been warmly received in most quarters, even those criticised have gone beyond defensiveness. The New South Wales Police Service, for example, announced that it will "change many of its procedures in response to a national inquiry into racist violence" (*Sydney Morning Herald*, 27 May 1991). The 67 recommendations cover most public institutions from schools to the media. Many of them are intended to improve the operation of the criminal justice system so that Aboriginal people and those of ethnic minority background are better protected from racist violence, and to reduce the level of institutionalised racism. Proposals for legislative reform are seen not as a panacea but as an important part of a broader anti-racist policy in all areas of government and community activity. The Inquiry's report has already had an effect in increasing public awareness of the impact of racism, discrimination and violence on individuals and communities, and in suggesting a range of strategies to confront racism. What is needed now is debate on the precise form that new federal

legislative provisions should take. The ALRC has kept the ball rolling with its proposals in its discussion paper: *Multiculturalism: Criminal Law*. There are precedents in two States (as well as overseas) on which to build or from which to learn, and a report is expected shortly from Victoria's Committee to advise the Attorney General on Racial Vilification. The challenge for the federal Government will be to initiate the necessary reforms at Commonwealth level before the momentum for change dissipates; the challenge for the community will be to maintain the momentum. □

Discrimination and the church

Kirsty Magarey questions the exemptions from equal opportunity legislation enjoyed by the church.

The principle of equality

The objects of equal opportunity legislation — 'to promote recognition and acceptance within the community of the principles of the equality of men and women' — have not yet been acheived. In the paid work force women earn 65¢ for every dollar earned by men. Australia has a more sex segregated work force than nearly all OECD countries. Women perform approximately 75% of housework and 67% of unpaid work. While women comprise 50—60% of law students, only 9% of women lawyers are partners in law firms compared with 41% of men. (These statistics are taken from the NSW Women's Advisory Council's series on Women and Work).

Equal opportunity legislation imposes legal sanctions for engaging in certain discriminatory behaviour regarded as harmful to others. The fact that sexual divisions and inequality are still entrenched after years of legislative intervention raises questions about why this discrimination is proving so intransigent.

The sources of sexism

A major limitation of equal opportunity legislation is that it confines itself to the 'public' arena — it steers clear of areas regarded as 'private'. Sex discrimination has its roots in the power structures of the patriarchal family — mirrored in so many public institutions. The profound and endemic nature of society's sexism indicates that its causes are deep-seated, and likely to be largely determined by what happens in the private sphere where people spend their formative years. Since the legislature rigorously avoids the so-called 'private areas' the aims of equal opportunity legislation are harder to achieve. To the extent that legislative measures fail to combat discrimination in the private sphere, it fails to deal with the source of the problem. Such measures attempt to close the gates after the horse has bolted.

Religion and the private sphere

Religion is treated by legislators as part of the private sphere. Every Australian jurisdiction with sex discrimination legislation provides exemptions for religious institutions. (Sex Discrimination Act, 1985 (Cth) s 37 and s 38, Equal Opportunity Act 1984 (Vic) s 38,