Combating Racism: A Strategic Plan for WA

The release of documents by the WA Law Reform Commission and WA Equal Opportunity Commission on proposals for legislation dealing with incitement to racial hatred has generated considerable public interest on the issue of racial discrimination and racial violence. The recent well attended public forum organised by Western Australians for Racial Equality (WARE) and which I was privileged to chair indicated the deep community concern about the increasing incidence of racism in WA. The strong feeling expressed at this forum was that the State government should take urgent action to allay growing fears in the community on this matter.

It is in this connection that I write to outline a plan of action for government intervention. In the first place, it presupposes that the introduction of punitive State-based legislation is not the most desirable solution to the problem. Therefore, unlike the documents released for public comment, it proposes a broader approach which would allow legislation a somewhat limited role but provide a more balanced and realistic perspective than being demanded by some concerned community groups.

Let me preface my remarks by stating quite unequivocally that, given the degree of social unrest currently experienced as a result of activities of racist groups, not just in WA, but Australia-wide (see **Bulletin** Issue of April 4 1989 for this documentation), some form of legislative intervention is warranted. But anti-discrimination legislation already exists at the federal and state levels. What is at issue is not the need for more far-reaching legal intervention, but the nature and form of the special legislation which may be required within the framework of existing legislation, to deal with currently prevalent spate of racist activities.

Ever since the passage of the Racial Discrimination Act (1975) there has been in informed circles (see several Human Rights Commission [HRC] Papers of 1982/1983 and also the NSW document **'Preventing Racial Conflict'** in 1982), as well as the general public, especially among Aboriginal and ethnic minority groups, considerable degree of concern about the reluctance

of Federal and State governments to act on the specific issues of incitement to racial hatred and defamation of racial groups,

The inaction of governments on this issue, however, is understandable in the historical and political perspective which dates back to the passage of the amended Racial Discrimination Act in 1975, in the dying days of the Whitlam government. Much of the difficulty we have today on this score has risen because of Racial Discrimination Act, as passed in 1975, was subject to several amendments in order to gain its successful passage through Parliament. Amongst others, an important modification was made to the Act relates to Clause 29 dealing with incitement to racial disharmony (dropped in the 1974 Draft Bill). Another even more significant change was with respect of Clause 28 dealing with the dissemination of ideas based on racial superiority which was deleted in 1975.

The strong opposition expressed by the Liberal/National Parties to these two clauses was a key element in the debate surrounding the Racial Discrimination Bill in 1975. Eventually, this opposition led to the Australian government's entering a reservation on Article 4(a) as it endorsed the International Convention on the Elimination of All Forms of Racial Discrimination. This opposition was largely on grounds of the need to uphold the priority of the right to free speech as against other competing claims for any restriction on this Right (see page 11 of the WA Equal Opportunity Commission Report submitted to the WA Government for an account of the explanation given by the Australian government justifying its reservation on this Article).

In an important review of the operation of Racial Discrimination Act (incidentally, and regrettably, the only review currently available) Trlin (see Australian Journal of Social Issues, Vol 19 (4), 1984) observed that the

> most serious defect of the Act is the absence of provisions to deal with the publication and dissemination of racist material and ideas. Nor does the Act include the provisions prohibiting discrimination by private voluntary associations on the use of derogatory terms.

Trlin went on to observe that because of this limitation, a large number of complaints made under the Racial Discrimination Act dealing with the publication, broadcasting and dissemination of racist material are regarded as 'not unlawful'.

The importance attached to this specific question is vividly reflected by the priority assigned to the issue of incitement to racial hatred by the Human Rights Commission (HRC) established in 1981 and charged with the implementation and administration of the Racial Discrimination Act of 1975. The first three Occasional Papers published by the HRC deal with the issues of racial defamation and incitement to racism and hostility, and the first two Papers prepared by Dr R Pettman of the staff of the HRC on this issue are still unsurpassed as regards the thoroughness and clarity with which this complex issue has been examined. The influence of these several HRC documents is clearly evident in the material presented in the two recently released WA documents. Based on these studies, the HRC released its Report No 7 (1983) which set out its proposals for amending the Racial Discrimination Act to include incitement to racial hatred and racial defamation as offences under the provisions of the Act.

In defending its proposals the HRC felt that, whilst it stood firmly committed to the fundamental right of freedom of expression, the question it had to decide was

> whether to support the right if it is used to advocate the destruction of the rights of another racial group, and whether free rein should continue to be allowed to those who argue for the destruction of a society where everyone has the same human rights.

What is more, the HRC observed that:

> important reasons for incorporating these amendments into the Racial Discrimination Act are the <u>declaratory</u> and <u>educational</u> effects they would have. 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 of 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.

These amendments (see Attachment 1) proposed a general prohibition on public acts considered likely to incite racial hatred and/or be considered defamatory of racist groups or individuals associated with these groups as well as an exclusion of certain activities from these restrictions. Although these carefully thought out and eminently reasonable proposals were not acted upon by the Federal government, they have continued to be a major influence on thinking around this issue for nearly a decade. These were later considerably strengthened by similar legislative proposals coming from NSW relating to amendments to the NSW Anti-Discrimination Act (eg, the document entitled 'Preventing Racial Conflict' with an Introduction by Paul Stein QC, a former President of the NSW Anti-Discrimination Board).

The demand for legislative intervention in this area has intensified because of the endemic nature of racism, epitomised by the racist outburst following the Blainey debate on Asian Immigration (1984) and exacerbated further by the controversy in 1988 surrounding John Howard's comments on Asian immigration and multiculturalism. The anti-social forces unleashed by these controversies have been strengtened as a result of the downturn of the economy, and the growing militancy of the Aboriginal people. In short, as pointed out earlier, the Bulletin's cover story "Harvest of Hate" clearly indicates that the level of social unrest is so high that many are now convinced that some form of legal intervention is desirable and appropriate in order to make the expression of blatant and wilful acts of racial hostility and discrimination a 'public wrong'.

Somewhat surprisingly considering that it was the conservative political parties that opposed these very provisions in 1975 at the Federal level, (and one might even say ironically), the Liberal/National government of Nick Greiner in NSW has become the first conservative government to address these issues publicly. Admittedly, the Greiner government has benefitted from the groundwork laid by the previous Wran and Unsworth governments in NSW which had introduced a Draft Bill to make racial villification

unlawful. But, whatever the reasons that may have prompted these initiatives - political or humanitarian - there is no question that the NSW Bill on Racial Villification is a landmark piece of social legislation in the Australian context. This Bill, in my view, expresses a balanced and sensible approach to a complex social issue and attempts to resolve some of the thorny issues of legal principle and social practice that are inherent in dealing with this specific problem. The NSW legislation has benefitted from previous examinations of this matter here and overseas and although adapted to suit local conditions, it will be seen as a pioneering piece of social legislation in Australia.

Unfortunately, the two informative WA documents make only a passing reference to the Greiner government's legislation, and also fail to acknowledge that in many ways the terms of debate have been greatly changed as a result of the bold initiative taken by the NSW government. Furthermore, a major limitation of the WA documents, in my view, is that, particularly in the light of the NSW developments, the crucial issue of the respective roles of federal and state legislation in this general area of social legislation - an important omission, given the history of the evolution of Rights legislation at the State and Federal level.

Any action we may take in WA must be carefully and properly examined against this background. In this context, I believe that the best course of action for WA would be first to seek suitable remedial action at the federal level before embarking on radical state legislation. This is particularly important because we do not have Anti-Discrimination legislation of the kind NSW enjoys. Nor do we have the experience at the state level in dealing with complaints about racial discrimination, especially in adopting a conciliatory and educational approach. Equal Opportunity legislation in WA is of relatively recent origin, barely four years old; and its implementation has been largely focussed on sex discrimination issues.

Therefore, in the first instance, we should make strong representations, hopefully with the support of other States, such as South Australia, to the Federal government to implement the broad thrust of the changes to the

Racial Discrimination Act proposed by HRC in their 1983 Report, and embodied more recently in the NSW Racial Villification Act. The new Peacock led Liberal/National Opposition is unlikely to oppose these changes, especially in the light of the Greiner legislation on racial villification and also because of the new Liberal leader's enlightened stance on Immigration policies issues which dramatically change the course chartered by John Howard. Clearly, there is now the political support and strong public demand for removing a major shortcoming of the Federal legislation of 1975 which it should be remembered, has been a matter of embarrassment for Australia in several international forums.

One of the main reasons for advocating this as the preferred strategy for immediate action is that by following this track, ie, by incorporating incitement and defamation legislation within the scope of the federal legislation or racial discrimination, we would avoid adopting a strictly legalistic and punitive approach to a complex social and political problem since the philosophy underlying the federal racial discrimination act is to resolve claims and complaints by amicable persuasion and not coercion. Essentially it is oriented towards an educative approach to countering discrimination and prejudice to deal with conciliation and persuasion procedures. Admittedly, this approach may be quite ineffective and irrelevant in dealing with hard core racism; but this is an intractable problem which may have to be handled, however inadequately, by other means such as by recourse to public order legislation (cf UK) and other relevant legislation (eg, Litter laws etc).

As the late Justice Murphy introducing the Racial Discrimination Bill in Federal Parliament in 1974, observed, '<u>laws prescribing discrimination are vital</u>' though they are not '<u>in themselves sufficient</u>'. He adds significantly

> the legislation recognises that there must also be effective and systematic enforcement of rights and promotion of education and research if the elimination of racial discrimination in this country is to be advocated in fact as well as in theory.

Fifteen years later, these words of a great Australian social reformer ring

true and have greater meaning and significance as we bemoan the fact that in Australia as elsewhere, neither legislation nor education by themselves have made any headway in combatting the menace of racism, particularly its extreme manifestations, acts of hostility and violence. We need a balanced and multifaceted strategy in which the punitive role of law must not be unduly exaggerated as a panacea for all ills of society. The emphasis on the law is often misplaced and arises from a misconception of its role and functional utility in dealing with social ills.

When considering the role of law and legal sanctions in this general area of racial discrimination it should be clearly recognised that such interventions are more relevant to dealing with direct discrimination than indirect discrimination. We in Australia and elsewhere have erred by failing to recognise that different forms of social intervention are needed in dealing with different kinds of discrimination. Moreover, the law can play only a limited, though a useful and constructive, role as a vehicle of social change if it is seen only as providing the means needed for altering deep seated values, social attitudes and belief systems. Laws are effective rather as a moral exemplar, embodying the values, norms and behavioural standards of society, demarcating the boundaries of what is regarded as acceptable and unacceptable social behaviour.

In brief, as Senator Gareth Evans rightly stated in 1983 (see HRC Occasional Paper No 3, page 95), discussing the issue of legislating against racial hatred, the law must be viewed primarily as declaratory statement, a way of embodying in codified statute, the expression of community values and standards of acceptable conduct in a socially and racially diverse society. But to be effective in this context the law must have broad based community support and wide political endorsement. It clearly must have the sort of support that is now being solicited by the NSW government for its new legislation dealing with incitement to racial hatred and racial defamation. These conditions certainly did not exist in 1975 at the time of the passage of Racial Discrimination Act.

Let me conclude by urging that we need to move quickly and decisively on this matter. The wider community will no longer tolerate continued

inaction, vaccillation and indecision on the part of governments, including the WA government, on this matter. For these reasons, the State government of WA should reassess its current strategy for dealing with this matter. The action taken so far, especially in commissioning a Report from the Equal Opportunity Commission and also a further reference to Law Reform Commission, has to a great extent been overtaken by the political events at federal and state levels, especially in NSW. Further protracted examination of this issue within an exclusively legalistic context is irrelevant and unnecessary as it can only lead to going over ground so well covered by previous documents and Reports of 1982/1983 and superceded by the recent NSW legislation.

In the light of these circumstances, I would strongly urge the WA government to give serious consideration to an alternative course of action which would provide a more satisfactory resolution of the several issues at stake. I give below a graduated plan of action based on the following steps in order of implementation.

A. To urge the federal government to take appropriate political and legislative action to remove Australia's reservation on Article 4 (a) of the Racial Discrimination Act (1975);

B. To seek broad based political support for the move recommended in (A) above by referring this recommendation to the State's Attorney's General for consideration;

C. At a State level, to make known widely the action contemplated in (A) and (B) above and the initiating role of the State government of Western Australia in this matter.

C. Concurrently, to establish a WA Council on Community Relations headed by a respected community leader and drawing on all sections of the community. This Council should be funded by Government but act independently of Government and its instrumentalities and Report directly to the Premier. Its main task will be one of advising Government on the measures that need to be taken with regard to:

i) promoting understanding, friendship and harmonious relations among racial and ethnic groups;

ii) combatting [illegible] discrimination and prejudices that lead to racial discrimination;

iii) propagating the purposes and principles of federal and state Government legislation relating to discrimination against racial and ethnic groups.

E. To refer WA documents on racial hostility to the WA Council on Community Relations for assessment and Report to Government.

F. To seek the services of a Consultant, preferably from overseas, to advise the newly established Council and Government on Community Education/Relations in relation to racial and ethnic groups; and

G. To explore the viability of adapting the Ombudsman model for dealing with racial harrassment and compliants as being currently developed in Sweden, and briefly canvassed by Justice Gobbo in 1983.

Finally, if this Plan is acceptable to Government, it is hoped that it will have bi-partisan endorsement, at least in principle and be promulgated as such.