

EXCITING RACIAL DISHARMONY

DISCUSSION PAPER

ON

SECTION 9A OF THE RACE RELATIONS
ACT 1971 WHICH MAKES IT UNLAWFUL
TO EXCITE RACIAL DISHARMONY

BACKGROUND AND DISCUSSION PAPER ON SECTION 9A OF THE RACE RELATIONS ACT, 1971
(WHICH MAKES IT UNLAWFUL TO EXCITE RACIAL DISHARMONY)

1. SECTION 9A (RACIAL DISHARMONY):

The aim of this paper is to clarify some of the issues relative to complaints of exciting racial disharmony under Section 9A of the Race Relations Act, 1971 and to remove possible misunderstandings with regard to them.

In the last two years more than half the total complaints received by the Race Relations Conciliator have been Section 9A complaints - as opposed to complaints of racial discrimination in the fields of employment, education, accommodation, provision of services and access to public places. This is clearly a high number of complaints for a Section in respect of which very specific criteria have to be established before a person can be held in breach.

Section 9A provides:

Racial Disharmony - (1) It shall be unlawful for any person -

- (a) To publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or
- (b) To use in any public place (as defined in Section 40 of the Police Offences Act, 1972), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting -

being matter or words likely to excite hostility or ill will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

(2) For the purposes of this section, the terms "publishes", "distributes", and "written matter" have the respective meanings given to them by Section 25(2) of this Act.

When a complaint under Section 9A appears to be of a serious nature it can be referred by the Race Relations Conciliator to the Human Rights Commission with a request that the full seven member Commission consider and deal with it. The Race Relations Conciliator may, for example, wish to refer a complaint under Section 9A if it involves complex and difficult issues concerning freedom of speech. Such issues are important for our whole community because freedom of speech is vital to a democracy and must not be unduly circumscribed.

2. INTERNATIONAL COVENANTS & INTERNATIONAL SITUATION:

Section 9A is in fact in accord with Article 29(2) of the Universal Declaration of Human Rights which provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Article 29(2) expresses the possibility of some need for limited restriction of our basic freedoms (in the interests of others). This is carried forward into Articles 19 and 20 of the International Covenant on Civil and Political Rights, to which New Zealand is a party. Article 19 provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

complainant must be advised and given the reasons for that decision.

In considering a complaint under Section 9A the test is whether the words used (being threatening, abusive, or insulting) were likely to excite hostility or ill will against, or bring into contempt or ridicule any group of persons in New Zealand on the ground of the colour, race or ethnic or national origins of that group, i.e. the test under Section 9A is one of likelihood rather than of intention - as distinct from the criminal sanction provided by Section 25 where proof of intention is required.

If the Conciliator or the Commission considers that a complaint relative to the Section has substance, then the Conciliator or the Commission must endeavour to secure a settlement between any parties concerned and/or seek an assurance against repetition.

It is important to appreciate that neither the Commission nor the Conciliator has any power to impose a solution on the parties or to enforce a settlement. If a settlement cannot be reached, the Conciliator or the Commission may request the Proceedings Commissioner to consider whether proceedings should be taken before the Equal Opportunities Tribunal. If the Proceedings Commissioner declines to take proceedings then an aggrieved person may himself or herself take proceedings before the Tribunal. The Equal Opportunities Tribunal is an independent judicial body chaired by a leading lawyer (the present Chairman being a Queen's Counsel). It decides whether there has, in fact, been any breach and whether the complainant is entitled to any of the remedies specified in Section 38(6) of the Human Rights Commission Act, including the right to damages. In the case of damages for humiliation, loss of dignity and injury to the feelings of an aggrieved person (to the extent that an individual may come within this category in respect of a Section 9A complaint) such damages shall not exceed \$2,000.

4. THE EXTENT TO WHICH SECTION 9A INHIBITS FREEDOM OF SPEECH:(a) For Individuals:

Section 9A is not a "catch-all" Section permitting a remedy to any person who thinks he or she is aggrieved or insulted. Rather the Section represents an attempt by the legislature to provide a remedy where racial disharmony is excited against any group of persons. Parliament has refrained from interfering with freedom of speech, except to a limited extent. It is for the Equal Opportunities Tribunal and the Courts to determine precisely where the Section requires the line to be drawn.

As mentioned above, the task of the Race Relations Conciliator or the Commission is to determine whether a complaint made under Section 9A has substance and, if so, to seek a settlement between the parties. The task is not an easy one. In this area there is also a tendency for incidents to become escalated out of all proportion with the further result that both sides adopt entrenched positions from which they have difficulty in publicly retreating. As a result, matters which could be dealt with by the issue of a simple explanation, clarification or suitable expression of regret, become extremely difficult to resolve.

(b) For the News Media:

Section 9A renders unlawful the publishing or distribution of words which are in the category and which are likely to have the effects set out in the Section (i.e. words which are threatening, abusive, or insulting and are likely to excite hostility or ill will against or

bring into contempt or ridicule, any group of persons in New Zealand on the grounds of the colour, race or ethnic or national origins of that group).

While most members of our society would regard freedom of the press as just as precious and inviolate as individual freedom of speech, the news media are also subject to Section 9A. Perhaps few complaints will be received about fair and accurate reports of public statements which have the nature and the likely effects set out in the Section (taking into account the over-riding importance of public knowledge of what people in positions of influence or responsibility are saying). But an inaccurate report, or a misleading one with statements out of context or with qualifying or balancing words omitted, may well become the subject of a complaint.

5. GENERAL COMMENTS:

(a) Sensitivity:

Many people prefer to live and work in a robust and challenging society with virtually no limitation on comment of any sort. Reflecting that view, the law does not make either the Conciliator or the Commission an arbiter of good or bad taste. Remarks which are in bad taste do not, as such, offend against Section 9A. The only remarks affected by the Section are those "likely to excite hostility or ill will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons". The role of the Conciliator and the Commission is to consider possible breaches of that particular Section. Many tasteless and senseless remarks would not be in breach of the Section and neither the Commission nor the Conciliator has power to act in respect of such

remarks. The price we pay for freedom of speech is that the boundaries are not unduly circumscribed.

On the other hand it is surely reasonable to expect a degree of sensitivity and self-restraint from people who have achieved positions of responsibility and who know that their remarks are likely to receive wide coverage.

(b) Humour:

Again, except in extreme circumstances (at the point perhaps where "humour" is so sick that it can no longer be classified as humour) and except within the narrow parameters of Section 9A, the law does not make either the Commission or the Conciliator an arbiter of humour. Original and stimulating humour must be one of the greatest gifts that an individual can possess or develop. Even a bit of bite may do no harm. It is unquestionable that we all benefit from having the ability to laugh at ourselves.

A joke or slick comment at the expense of others, however, frequently takes little or no account of those at the receiving end. It is cheap and easy humour, which often aligns itself with the majority. What seems humorous to some, can be positively harmful to the recipients - frequently a single individual or a minority. This is particularly true of racist comments and racist jokes. An endeavour needs to be made to appreciate the feelings of, and to see things through the eyes of, minority groups.

(c) Stereotyping:

Whilst many people consider that groups and even races do have common characteristics and whilst many individuals are quick to claim the

positive attributes of a class (in the case of New Zealanders, such attributes as ingenuity, do-it-yourself attitudes and hospitality) few people like to be stereotyped when a slur or limitation is inherent. Some stereotyping can be both damaging and demeaning. It can also restrict the ability of an individual to progress. In some contexts and circumstances, stereotyping or labelling may be a breach of Section 9A, but as mentioned above, the line drawn by the Section is at a comparatively high threshold. Whatever the threshold, it is helpful to avoid unnecessary stereotyping.

(d) Current Attitudes:

The prevalence of Section 9A complaints indicates a quite widespread misunderstanding of the limits of the Section. It will not provide a remedy for everybody who takes umbrage. It is not intended to limit freedom of expression more than is necessary for its purpose. Although a comparatively large number of complaints alleging a breach of the Section have little or no regard to the wording of the Section itself (and accordingly are not ones that the Conciliator or the Commission can deal with), the Section is an important protection, particularly for minority groups.

The situation would be significantly helped if those who have attained positions of prominence and responsibility could exercise an appropriate degree of care in their comment on racial matters. Freedom of speech carries with it a duty of accuracy, and quite often of sensitivity and restraint as well. Without such the freedom is abused.

6. PUBLIC OPINION:

Racial problems have a high profile world-wide. They are certainly not peculiar to New Zealand. We do, however, have our special race-related

sensitivities, conflicts and problems which we clearly need to work through. The Race Relations Office and the Commission have an educative role in addition to their complaints and conciliation role. Both roles promote knowledge and awareness, which are key factors in reducing insensitivity and in promoting harmonious racial relationships.

Although the Conciliator and the Commission have comparatively well-defined roles, the public also has a role in these matters. Public opinion is continuously on the move in response to changing circumstances and events - as is both right and proper. It expresses itself in opinion polls, via the media, at the ballot box and in day to day correspondence and discussion. The broad spectrum of public opinion is, in many respects, the final arbiter of what is acceptable (as opposed to what is unlawful). It also ultimately determines not only the making, but the changing of the law.

The Human Rights Commission will welcome comment on this paper. Its principal address is P.O. Box 6751, Wellesley Street Post Office, Auckland 1.

.....

Professor Margaret Clark,
Commissioner.

Miss M M Hutchison,
Commissioner.

Ms Diana Shand
Commissioner.

Mr G R Laking,
Chief Ombudsman.

Mr K G MacCormick,
Proceedings Commissioner.

Mr E Te R Tauroa,
Race Relations Conciliator.

The Hon. Mr Justice Wallace,
Chairman.

April 1984

