THE AUSTRALIAN

NSW Anti-Discrimination Act's 20D impossible to apply

CHRIS MERRITT THE AUSTRALIAN 12:00AM September 16, 2016

In a rational world, there would be little debate about whether a law is needed to prevent the incitement of violence against people based on their race.

Yet in NSW, 26 community groups have found it necessary to form a lobby group aimed at persuading the state government that such a law should also be workable.

Their target is section 20D of the NSW Anti-Discrimination Act, a provision that is supposed to target incitement to racial violence, but has proved ineffective.

Three years ago, a committee of the state's upper house produced a report that shows that this law, despite the best of intentions, is impossible to apply.

The standing committee on law and justice found that since 1992 11 matters had been referred to the state Director of Public Prosecutions under section 20D but not one case had gone to court.

The DPP referred those matters to the police but they were unable to find enough evidence to justify a prosecution.

In isolation, this seems odd. But when seen in context it is bizarre.

Section 20D, which does not work, targets words that incite violence. Yet right now, a different law that targets hurt feelings is working so well that students from Queensland University of Technology are being sued for $250,000.

That law is section 18C of the federal Racial Discrimination Act, which targets language that offends, insults, intimidates or humiliates.

It suffers none of the procedural problems associated with section 20D and the test for liability under section 18C has even been skewed so it favours those who say they have been offended.

The conclusion is obvious: the lawmakers of this country have got things backwards. They have fashioned a system that makes it impossible to punish those who incite racial violence in NSW while making it easy to punish those who cause hurt feelings. It makes no sense.

The coalition of community groups known as Keep NSW Safe is not asking the NSW government to replicate the unfair structure of section 18C. Their concern, which is entirely understandable, is all about speech that threatens their safety.

One notorious example came to light last year in Sydney when a leader of the extremist Islamic group Hizb ut-Tahrir urged Muslims to "rid" the world of "Jewish hidden evil".

That statement was made in a public sermon by Ismail al-Wahwah who also said: "Tomorrow you Jews will see what will become of you — an eye for an eye, blood for blood, destruction for destruction." Police investigated but no action was taken.

One of the problems with reforming section 20D is that the offence created by this provision is officially — but inaccurately — described as serious racial vilification, which implies that it is merely concerned with words that cause offence.

In fact, the statute makes it clear that it is intended to outlaw public incitement of violence based on race.

This misleading terminology was on show in state parliament this month. When Attorney-General Gabrielle Upton was asked about the lack of action on reforming section 20D she responded by referring to "hate speech" and appeared to equate reform of this provision to the furore over efforts to reform section 18C.

Section 18C is all about an unjustified erosion of freedom of speech in order to protect people's feelings. Section 20D by contrast, is about preventing organisations like Hizb ut-Tahrir from inciting violence on the basis of race.

Yet on September 1, Upton floated the strange idea of striking a balance between inciting violence and freedom of speech. This raises the question of exactly how much incitement to violence the Attorney-General would permit. A lot or a little?

This is what she told parliament: “It is important that a government consults and takes views across the community, and any reform in this area must strike a balance between both principles of protection from violence in speech and free speech.”

Freedom of speech is a fundamental right. But so is personal safety. If a balance is to be struck, it should favour safety — not the other way around.

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