

## CLARIFY THE BURDEN OF RAISING SPECIAL DEFENCES

This section examines three suggested amendments to the Criminal Code.

(1) A number of witnesses have urged the Committee to recommend that the public interest, good faith and religious controversy defences be removed from the hate propaganda provisions of the Criminal Code. If this were done, the effect would be, if the requirement for specific intent were also removed, to create a strict liability offence. This type of offence is not in keeping with the traditions of Canadian criminal law. It would also be susceptible to a potentially successful challenge under the Charter of Rights. The Committee does not believe that these defences should be eliminated. The Committee does believe that the Criminal Code should be amended so that it is made clear that the burden of raising such defences is on the accused at all times and that the Crown is at no time to be required to discharge a burden of disproving such a defence.

(2) Several witnesses have urged the Committee to recommend that the distortion or denial of historical fact for the purpose of incitement of hatred be a criminal offence. This type of historical distortion, in the guise of legitimate historical revision, reaches its zenith of disrepute in the form of Holocaust denial. This is only the most recent and most despicable form of hate propaganda. It is to be denounced in the strongest possible terms. The Committee believes that this type of material is not intended to advocate a new analysis of historical events but, rather, to misrepresent them in such a way as to incite race hatred. The Committee has no doubt that successful criminal prosecutions could be instituted against those responsible for this type of material. If Parliament adopts the recommended amendments to the Criminal Code proposed by the Committee, the provincial Attorneys General should waste no time in prosecuting in appropriate circumstances.

(3) The Attorney General of Ontario indicated to the Committee that he felt that the definition of "identifiable groups" as presently set out in Ss. 281.1(4) and 281.2(7) of the Criminal Code might enable hate propagandists to avoid prosecution by attacking only a part, but not all, of a racial group in their material. The Committee does not believe that the Criminal Code has to be amended to deal with this problem. This type of material is subject to criminal sanction because it defiles an identifiable group in a general sense and not because it attacks all members of such an identifiable group. Even if such hate propaganda purports to caricature only a part of a racial group, it should still be subject to prosecution under the present provisions of the Criminal Code in appropriate circumstances.

### **RECOMMENDATION:**

**Justice Canada should prepare amendments to the Criminal Code so that it is clear that the burden of raising special defences is on the accused.**

### RECOMMENDATION

# 37

