

Reform Commission.

One question it will certainly be expected to "review" is whether the law of blasphemy should be extended to recognise the growing significance of a devout Muslim presence in Australia.

And if the answer to that question is no, because traditions of freedom of speech and expression should be accorded higher value, then our national commitment to multiculturalism will come back to haunt us.

Not because a commitment to "cultural diversity" requires affording Muslims such protection, but because multiculturalism will continue to be understood as meaning more than this manifesto says it means.

What more it will be understood as meaning is uncertain, and it is this uncertainty, more than any other consideration, that leads liberal pluralists who welcome and favour diversity to shudder at the term multiculturalism.

(SMH 1 August 1989)

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racial vilification

To live anywhere in the world today and be against equality because of race or colour, is like living in Alaska and being against snow.

William Faulkner, 1965

Legislation has been enacted by the New South Wales Parliament to amend the Anti-Discrimination Act 1977 by making it unlawful to vilify a person or group of persons on the ground of race. Racial vilification occurs when a person, by a public act incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. Racial vilification can be the basis of a complaint under the Act. Where serious racial vilification occurs, involving threatened violence, prosecution may follow. The Act is not yet in force.

background. The background to these moves includes the introduction of racist comments into the migration debate, and the increasing concern, particularly in the Sydney region, about violence and threats which appear to draw their inspiration from objection to the expression of racial tolerance. Among incidents reported in the media have been damage to cars bearing stickers supporting Aboriginal land rights, harassment and threats to members of a Uniting Church in the city, affixing racist stickers to letterboxes and racist graffiti in public places.

The Human Rights and Equal Opportunities Commission is conducting a national inquiry into racist violence and will examine acts of violence or intimidation based on racism directed at persons, organisations or property, including acts directed to such persons or organisations on the basis of their support for non-racist policies. Submissions have been called for. The responsible Commissioner was herself subjected to threats.

other responses. Some jurisdictions already have legislation dealing with racial vilification, including the UK, New Zealand and Canada. These laws were reviewed by the Western Australian Commissioner for Equal Opportunity in the report, *Legislation Against Incitement to Racial Hatred* published in May 1988.

The report concluded that proposals to legislate against incitement to racial hatred raise serious philosophical questions about the impact on freedom of speech, and that criminal sanctions in legislation dealing with incitement to racial hatred have been ineffective in overseas jurisdictions. It also concluded that community education and community relations programs are appropriate as long term strategies for endeavouring to change racist attitudes.

A Bill was introduced in New South Wales in 1987 to make unlawful public acts of racial vilification. That Bill differed in a number of significant respects from the current Act.

the issue. A central issue in moves to combat racial vilification is how to draw the line between the rights of persons to be protected from racial vilification and the right of freedom of speech. In introducing the Bill and moving the second reading, the Attorney-General, Mr Dowd spoke of the need to balance 'the right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification'. These competing concepts have their counterparts in the International Covenant on Civil and Political Rights which provides for freedom of opinion and expression on the one hand and prohibits advocacy of national or religious hatred that constitutes incitement to discrimination, hostility or violence.

The New South Wales Anti-Discrimination (Racial Vilification) Amendment Act 1989 (No 48) balances these concepts by drawing a distinction between acts of racial vilification which do not involve a threat of violence, from those that do involve such a threat. In the former case, certain exemptions of 'free speech' character are accorded and only civil remedies may be invoked. These exemptions do not apply to the offence of serious racial vilification which is created by the legislation. This offence arises only where there has been a threat of violence.

defining a public act. To attract the provisions of the Act, racial vilification must be by a public act. This includes most forms of publication, such as speaking, writing, printing, broadcasting, film and television, tapes and records. It extends to other conduct observable by the public, 'including actions and gestures and the wearing of display of clothing, signs,

flags, emblems and insignia'; it also includes the distribution or dissemination of matter to the public with knowledge that it promotes or expresses racial vilification. Acts of this kind which incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group are unlawful unless an exception applies.

The exemptions under the Act are of three kinds:

- The media may publish a fair report of a public act which itself amounts to unlawful racial vilification without attracting the new provisions.
- A communication of the publication of matter which would be subject to a defence of absolute privilege in proceedings for defamation is also exempted from the provision.
- The third exception covers public acts done reasonably and in good faith for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate. These exceptions do not apply to the offence of serious racial vilification.

effects of unlawful acts. Where it is alleged that an act of racial vilification has occurred which is unlawful under the proposed legislation, a complaint may be lodged with the President of the Anti-Discrimination Board by any person or group of persons who are members of the racial group concerned on their own behalf or on behalf of themselves and other members of the group, or by a representative body on behalf of one or more named members of the group concerned who have consented to the lodging of this complaint. A representative body is defined as a body which represents or purports to represent

a racial group of people in New South Wales (whether or not authorised by the group to do so) and which has as its primary object the promotion of the interests and welfare of the group. In his second reading speech, the Attorney-General explained that the ADB encounters many individuals who may be afraid to approach the board to complain and who need the assistance of their own community organisations or bodies.

When a complaint is made, the President is required to investigate the complaint and to consider whether the offence of serious racial vilification has been committed. If the President does not consider that an offence may have been committed, the matter may proceed by way of conciliation before the President. In this case a representative body which has made a complaint may be required by the President to nominate a person to appear for that body in the conciliation proceedings. The matter may be resolved in such proceedings.

In certain circumstances the complainant may require that the matter be referred to the Equal Opportunity Tribunal. The Tribunal currently has power to order the respondent to redress any loss or damage to the complainant. These powers are expanded by the new Act to include an order that the respondent publish an apology and/or a retraction in respect of the matter the subject of the complaint, and power to give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both). The Tribunal will have power to order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination.

The Tribunal is given power to award damages, not to a representative body, but only to the person or persons on whose behalf the complaint is lodged. The total

damages that may be awarded cannot exceed \$40 000 in respect of any particular public act.

the offence. The offence created by the proposed legislation is referred to as 'serious racial vilification'. It comprises public acts which incite (and are intended to incite) racial hatred (as defined) by means which include

- threatening physical harm towards, or towards any property of, the person or group of persons, or
- inciting others to threaten physical harm towards, or towards any property of the person or group of persons.

If, after investigating a complaint, the President considers that an offence may have been committed and if it is less than 28 days since the receipt of the complaint, the complaint must be referred to the Attorney-General. The process of conciliation then comes to an end; the complainant is notified in writing of the right to require the President to refer the complaint to the E.O.T. If the complaint is so referred, the Tribunal may stay an inquiry into the complaint until any proceedings relating to the alleged offence have been concluded.

The Attorney-General's consent is necessary for a prosecution under the legislation. Proceedings are to be dealt with summarily before a Local Court constituted by a Magistrate sitting alone. The maximum penalty in the case of an individual is 10 penalty units (\$1,000) or imprisonment for 6 months or both. In the case of a corporation the maximum penalty is 100 penalty units (\$10,000, according to the Attorney-General's second reading speech.)

other developments. In June 1989 the Law Reform Commission of Western Australia published an issues paper, *Incitement to Racial Hatred*, (Project No. 86,

1989). The Commission seeks comments on these issues:

- Whether new criminal remedies should be introduced to deal with these matters
 - by amending relevant public order rules
 - by creating new offences of inciting racial hatred.
- Whether non-criminal remedies should be introduced, such as
 - a statutory claim for group defamation
 - creating a ground of racial harassment in the Equal Opportunity Act.

Public comment is also sought on the question whether there is a need to enact legislation specifically in relation to the racist poster campaign and/or to racist statements generally.

vive la france. In May 1989 a Paris Court awarded Anne Sinclair damages of 10 000 francs against a right-wing weekly for a publication found to be an abuse of press freedom and which encouraged readers to deny the claimant her rights as a French citizen because of her origins. The article had expressed shock that Anne Sinclair (whose Jewish origins were mentioned) had been chosen as a model for a bust of Marianne (the symbol of the French republic). The author of this article was fined 130 000 francs, suspended (*The Guardian*, 4 June 1989).

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company law

If you can build a business up big enough, it's respectable.

Will Rogers, *The Autobiography of Will Rogers*, 1949

legislation enacted. The federal Parliament has enacted the *Australian Securities Commission Bill* and the *Corporations Bill* which were put forward by the federal Attorney-General to bring the regulation of companies and securities under federal control (*Australian Financial Review*, 24 May 1989). The government accepted a recommendation by the Joint Select Committee on Corporations Legislation that the Australian Securities Commission be given the same powers in relation to law reform as the Companies and Securities Advisory Committee (*Australian Financial Review*, 24 May 1989). However, a recommendation made by a majority of the Joint Select Committee that the power to make declarations of unacceptable acquisition or conduct be vested in the Australian Securities Commission rather than the Corporations and Securities Panel was not accepted.

insolvency. One area for future reform of the corporations legislation involved insolvency. In a submission to the Joint Select Committee, the Western Australian Opposition Group expressed disappointment that the recommendations of the Australian Law Reform Commission's Report on Insolvency had not been adopted. These recommendations dealt with schemes of arrangement, receivers, official management and winding up. The Joint Select Committee pointed out that the Commission's Insolvency Report did not become public until after the legislation was drafted. However, the Committee recommended that the reforms