LAW REFORM

RACIAL VILIFICATION • PROSTITUTION

WORDS THAT WOUND

These days, the question what role the law should play in protecting people from verbal abuse on the basis of their ethnic identity or religious beliefs looms large and vexing. The rights to freedom of speech, to religious freedom, to a dignified existence, to freedom from discrimination and harassment all jostle for primacy. To illustrate the sort of passions that are aroused in some quarters by suggestions for law reform in the areas of race relations and religious freedom, consider this vitriolic editorial in a Queensland newspaper:

> The Australian Law Reform Commission has published a discussion paper in which it recommends that racist violence and vilification and their incitement be made specific criminal offences. It also recommends the removal of all references to blasphemy from federal law. This will mean, presumably, that it will be acceptable to call Jesus Christ a wog bastard but not, say, Saddam Hussein.
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> *Townsville Bulletin* 16.5.1991

This bizarre summary of the ALRC's provisional proposals reflects the media hysteria that attended the Gulf War and contributed to the harassment of many Arab-Australians and Muslims. The ALRC's final report on *Multiculturalism and the Law* is in the hands of the Federal Attorney-General and will be published shortly. Meanwhile, the NSW Law Reform Commission has released a discussion paper canvassing options for reform of the law of blasphemy (DP 24, 1992), and the Victorian Committee to Advise the Attorney-General on Racial Vilification has recommended new provisions to deal with racist abuses and harassment (March 1992).

Deriving from England in the 17th to 19th centuries, the offences of blasphemy and blasphemous libel are of dubious relevance to Australian society today. Unlike England, where an attack on the Church has been viewed as an attack on the security of the State, Australia has always maintained a separation between Church and State. There is some doubt about whether the English common law of blasphemy was ever received into Australia and the offence was abolished in most of the Code States and has been modified by statute in Tasmania and NSW. In New South Wales a person will not be liable for blasphemy unless the words or matter published are 'scoffing or reviling', violate public decency or tend to a breach of the peace (*Crimes Act* 1900 s. 574). There has not been a single successful prosecution for blasphemy in Australia this century. Because it protects only Christianity, and in particular Anglican doctrine, existing blasphemy law amounts to religious discrimination against those of other faiths. This was confirmed in a recent English case arising out of the publication of Salman Rushdie's *The Satanic Verses*, which arguably vilifies Islam. Whereas racial hatred laws may afford protection to 'ethnic groups' such as Jews and Sikhs, Muslims do not have the benefit of such protection because they do not constitute an ethnic group. The NSW LRC has considered four options for reform:

- retention of the existing law,
- 'progressive codification' of a blasphemy offence,
- creating replacement offences such as incitement of religious hatred, or
- abolition of the existing offence without specific replacement.

Various policy rationales for the offence — the protection of religion and religious beliefs from offensive abuse, protection of the fabric of society, protection of individual feelings and protection of public order — are considered and rejected. The Commission suggests that the criminal law is not an appropriate instrument for promoting religious values or respect for religious views. Indeed the use of the criminal law to assert the pre-eminence of one religion over others undermines the fabric of a secular and multi-faith society. If it is important for the law to protect people's religious beliefs from ridicule, then all such beliefs should be protected equally. However, extending the offence to other religions would be extremely problematic — because of the difficulty of defining 'religion' — and restrictive — because one person's faith is another's blasphemy. Objections to the existing offence are:

- uncertainty over its current status because of prolonged disuse,
- limitation to Christianity makes it discriminatory,
- uncertainty as to the elements of the offence, especially the mental element,
- lack of appropriate penalty structure.

In short, it is archaic, defective and discriminatory. Although the legal concerns may be dealt with by codification, the policy objections would remain. At present, the Commission favours express abolition of the common law offence without specific replacement. It considered the possibility of introducing new offences to protect religious sensibilities from serious affront and suggests amending the racial vilification provisions in the NSW *Anti-Discrimination Act* 1977 to ensure they apply to religious or ethno-religious groups.

The Committee to Advise the Attorney-General on Racial Vilification was established in March 1990 to assess the nature and extent of racial vilification in Victoria and to propose measures to counter it. Racial vilification is defined as a statement which expresses or promotes hatred, contempt or ridicule of a person or group of people on the basis of race, or a statement which offends a person or group on the basis of race'. The report uses the broad definition of race found in both the Commonwealth *Racial Discrimination Act* 1975 and the Victorian *Equal Opportunity Act* 1984 and acknowledges the overlap between race or ethnic origin and religion. The effects of racist abuse on its victims range from wounded feelings to profound distress, alienation, humiliation and intimidation. As this report points out, many different approaches to combat prejudice and discrimination have been tried both here and overseas but their relative merits have not been systematically evaluated.

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Both Western Australia and New South Wales have created specific offences to deal with racial harassment and vilification respectively but there have been no prosecutions, although the problems that gave rise to the reforms have certainly not gone away.

The Victorian Committee has concluded that legislation can play an important role in combating racial and religious vilification but is concerned that, in the interests of free speech, its role should be strictly limited. It has recommended the creation of a number of new criminal offences, including an offence of speaking or behaving towards another person in a manner that threatens or abuses that person on the ground of his or her race or religion. The (summary) offence is intended to catch abuse directed at a specific individual rather than statements made at large. This Committee also recommends creating offences on the WA model of displaying threatening or abusive printed matter with the intention of inciting racial hatred, and enabling victims of racist or religious harassment to apply to the Equal Opportunity Board for a restraining order against the perpetrator.

The issue of resources to implement these reforms and improve victims' access to remedies is not overlooked. Recommendations made by the Law Reform Commission (Victoria) in a 1990 review of the *Equal Opportunity Act* are picked up and the Committee urges that funding of the Office of the Commissioner for Equal Opportunity should be increased as a matter of priority. If law reform is to amount to more than lip service, governments must provide such resources.

PROSTITUTION LAW REFORM

There is currently a Private Member's Bill to decriminalise and regulate prostitution before the South Australian Parliament, introduced by Ian Gilfillan (Democrat). In July 1991, shortly after the Bill was introduced, the South Australian Attorney General's Department published an information and issues paper on *The Law and Prostitution* by Mathew Goode. (Goode is from the University of Adelaide and has acted as a consultant to the Department in a range of law reform matters.) The basic approach of the paper is clearly in favour of decriminalisation — despite Goode's attempts to avoid 'taking a stand on what should or should not happen'. It adds to the growing number of Australian reports, papers etc. which have taken a position in favour of decriminalising prostitution. However, the timing seems unfortunate — rather than providing the basis for some constructive action, the paper criticises the current Bill which, while undoubtedly imperfect, is a step ahead of the Government's inaction. Successive governments have had time to consider the issue — there was a parliamentary report on the issue in 1980. Despite this, the paper is an intrinsically useful document. Goode's academic background is evident in the sections on the morality of prostitution. He challenges the view that prostitution is immoral, arguing that the values of individual freedom of expression and sexual autonomy need protection.[1]

Goode points out that there is 'no real probability that prostitution could or would ever be eradicated'. If the option of using the criminal law to control prostitution is pursued, he argues, there should be a radical shift in current policing policies. A decision to enforce the criminal law effectively would entail a massive erosion of civil liberties. Furthermore, the direct (and indirect) costs involved would be phenomenal.

The paper contains a useful list of (in)action in the various States — the number of unimplemented reports makes a mockery of our bureaucratic/legislative system. There is also an account of the various failed attempts at reform in South Australia. Given that the SA Government has proved so intractable about reform there is an impulse to argue that they should stop quibbling over the details and pass anything that will get through. A positive aspect of the Gilfillan Bill is that it would allow continuation of small brothels. In Victoria, where reforms put the regulation of prostitution into the hands of local government authorities and planning law, problems have resulted for sex workers. The reforms have made the industry less flexible and have left sex workers with less control over their work. However, the central feature of the Bill — which is the proposal for a licensing board — has been criticised by activists in the area. They maintain that licensing requirements are merely a revenue-raising device and that sex workers should not be subject to state control simply because they are working in the sex industry. They argue that the need for state regulation has not been established and that the onus should be on those seeking to introduce regulation. Goode suggests that the prostitution industry would benefit from unionisation rather than allowing its working conditions to be determined by the proposed licensing board. The difficulties of unionising this workforce are considerable and include the desire for secrecy and the transient nature of the industry. However, the benefits would be significant and could include the creation of additional pressure on the SA Government to act. It is interesting to contemplate the nature and consequences of industrial action by sex workers . . .

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Reference

1. The articles referred to look interesting: Freeman, 'The Feminist Debate over Prostitution Reform: Prostitutes Rights Groups, Radical Feminists and the (Impossibility of Consent', (1989), 5 Berkeley Women's Law Journal, 75; Richards, 'Commercial Sex and the Rights of the Person: Moral Arguments for the Decriminalisation of Prostitution', (1979), 127 U Pennsylvania LR, 1195.