MINORITY REPORT - RACIAL HATRED BILL 1994

INTRODUCTION

Australia as a modern nation has literally drawn her population from the four corners of the world.

This diversity of race and culture has helped develop Australia into what she is today. Part of the Australian tradition has been tolerance and a "fair-go" for all.

Unfortunately, there is a small element within Australian society that seeks to instil fear in people based on ignorance concerning certain racial groupings within our society.

This activity is clearly and socially unacceptable to those who believe that people are equal irrespective of their race. It is especially so in Australia which has such a large proportion of its population drawn from all parts of the world. Whilst there is genuine consensus in the Committee about the evils of racial hatred and discrimination, there are different approaches and countervailing arguments that this dissenting report canvasses together with technical difficulties inherent in the proposed Bill.

CRIMINAL SANCTIONS

The creation of separate criminal offences for racially motivated crime has two major drawbacks.

The incalcitrant racist would wish for nothing more than to be sentenced because of beliefs held. Recently we have seen extremists of various persuasions prefer jail rather than comply with bail conditions to give publicity to their cause and to take a "moral stand." To provide racists with such a forum would be counter-productive.

As A A Borovoy says in *When Freedoms Collide: The Case for Our Civil Liberties* [1988] (at page 50):

> "Remarkably, pre-Hitler Germany had laws very much like the Canadian anti-hate law. Moreover, those laws were enforced with some vigour. During the 15 years before Hitler came to power there were more than 200 prosecutions based on anti-Semitic speech. And in the opinion of the leading Jewish organisation of that era, no more than ten percent of the cases were mishandled by the authorities. As subsequent history so painfully testifies, this type of legislation proved ineffectual on the one occasion when there was a real argument for it. Indeed, there is some indication that the Nazis of pre-Hitler Germany shrewdly exploited the criminal trials in order to increase the size of their constituency. They used the trials as platforms to propagate their message."

Now sixty years later, with the aid of mass communication, the platforms provided by such trials to propagate racist messages would be all the greater.

Secondly, there is the difficulty of proof. Recent world experience shows that very few successful prosecutions have been launched. When they fail on technical grounds, the racist walks free and claims to have been "vindicated" by the legal system.

In the view of the Coalition Senators it is far better that racists be treated as common criminals if they offend against the criminal laws.

Ms Wallace from the Victorian Council of Civil Liberties provided a cogent and enlightening example from Australia's recent social history when she said (*Hansard*, Legal and Constitutional, page 355):

Ms Wallace: "I would like to put the debate in a social context of what the community does about violence at large, because I think that reveals a great deal about our problem. Some 30 years ago we had chronic domestic violence. We still do, but we have decided in the interim that defining domestic violence as violence and prosecute the people who perpetrate the violence on members of their family. That has made the difference - not treating them as having a particular kind of violence, but treating them as ordinary perpetrators."

Ms Wallace of the VCCL later said (*Hansard*, Legal and Constitutional, p 387):

Ms Wallace: "And if there are levels of racial ignorance, you have a fertile ground for the growth of racism. We must address community ignorance about race and about victims, and we must do it with a budget and with a knowledge that the budget has to be commensurate with the difficulty of the task in front of us."

Legislation designed to increase the penalty when common criminal conduct is motivated by racial hatred would be the more appropriate legislative path. The Wisconsin example is worthy of consideration. Unfortunately, the lack of time has not enabled the Coalition Senators to consider this approach in detail. The following exchange discusses this proposal (*Hansard*, Legal and Constitutional, p 364):

Sen O'Chee: ".... I put to you the proposition that we could come up with an alternative solution which says that where somebody commits an offence, and one of the motivations of that offence is racism, and if the person is convicted of the simple criminal offence, the racist's motivation for that offence should be considered an aggravating factor and taken into consideration at sentencing. How would you feel about that approach?"

Mr Pearce: "I was about to put that very proposal. In relation to the existing law - the discretion open to a judge or a magistrate on sentencing, or he caters for that, and there is nothing to

stop prosecutors making that submission - those are the sorts of submissions that our Council would wholeheartedly support."

This approach would leave the universality of the offence and would not allow the perpetrator to make a hero out of him/herself. It is also not beyond the realms of possibility that criminal conduct based on racial hatred could also be engaged in forms other than that referred to in the proposed sections 58-60.

Proposed sections 58 and 59 seek to create new crimes. However, these are already covered by the existing laws of every State and Territory. The following dialogue is recorded (*Hansard*, Legal and Constitutional, p 261),:

Senator Abetz: "Do you accept that all the types of behaviour irrespective of motivation are already covered by criminal law in every single State and Territory of the Commonwealth?"

Mrs Jackson: "Yes, that's true."

And (*Hansard*, Legal and Constitutional, p 262):

Senator Ellison: "... What Senator Abetz is saying is that all of this is covered by the law at the moment and it is much easier to prove... so why not just forget the race bit and hit them with a threat to cause harm, damage or whatever? Is that not a much easier path for prosecution?"

Mrs Jackson: "That is certainly true. A number of examples that you have given do postulate actual damage or actual violence, and it is not envisaged that these provisions would encompass that."

Senator Ellison: "Let us deal with threats only."

Mrs Jackson: "In the case of threats, it is certainly true that in the general run of cases it is more difficult to prove. We can see that the bulk of prosecutors would shy away from that difficulty...."

The practical situation is that the behaviour(s) that will create an offence under proposed Sections 58 and 59 will virtually always come within the province of State and Territorial police. Mrs Jackson from the Attorney-General's Department, (*Hansard*, Legal and Constitutional, p 261) said:

Mrs Jackson: "As a matter of practical reality, I think the situation you postulate is probably right."

Further Mr Neave (*Hansard*, Legal and Constitutional, p 265) indicated the way the legislation might be used in the future:

Mr Neave: "....It is envisaged that this legislation will deal with some of the more obvious high-profile cases which - judging by the reports from various royal commissions, law reform commissions and others - in the past have not been dealt with...."

So there are practical enforcement difficulties and the real potential to provide martyrdom status to common criminals.

Throughout the hearing, the Committee was urged to consider the educational value of the legislation. Clearly, that cannot be discounted. However there is an anomaly which will mean that the proposed federal legislation will have a lower penalty for criminal activity if motivated by racism than State legislation which simply outlaws the same criminal activity irrespective of motivation. [See for example Section 199 of the New South Wales Crimes Act]. Also, Mr Pearce (*Hansard*, Legal and Constitutional, p 342) said:

Mr Pearce: "But let me make this point about it, Senator. Under Section 198 of the Crimes Act in Victoria for example, for the threat to damage property the penalty is 10 years. Under this legislation I think it is two years. Under this legislation you get time off for being a racist."

The educational value of such an anomaly is in direct contrast to what this Bill seeks to effect.

Proposed Section 60 is cause for great alarm. The principle of freedom of speech demands protection if we are to have a tolerant society. And in the context of this Bill, this principle needs to be examined closely. Coalition Senators believe freedom of speech ought to prevail in this situation.

Many columnists and Sir Maurice Byers QC, former Solicitor-General, (*The Australian*, 21.11.1994, p.11) have expressed their reservations about this aspect of the legislation on freedom of speech grounds.

Further, the proposed Section 60 will only make incitement to racial hatred a criminal offence if done "otherwise than in private." This would allow the insidious activity of inciting racial hatred in private, but not publicly. One wonders where the rationale for that distinction lies? Clearly the legislation must be aimed at the outworking of racial hatred once instilled as opposed to the thought process pure and simple. Racial hatred will not manifest itself in a different form if the incitement was in private as opposed to public.

Mr Bailey (*Hansard*, Legal and Constitutional, p 293) suggests that Section 60 ought become part of the civil aspect of this legislation:

Mr Bailey: ".....But for my own experience of working with the Racial Discrimination Act in the 1980s, quite a lot are amenable to

some kind of discussion and talk if you can approach them, not saying, 'You are going to be put before the police and the Crimes Act,' but saying, 'This kind of thing is not appropriate.' You can explain it to them, you can have a conciliation, and you can often bring about what we are really trying to achieve, which is the community that is comfortable with itself more than often results from criminal proceedings."

Further, Mr Bailey (*Hansard*, Legal and Constitutional, p 304) dealt with the practical difficulties in discussing Section 60 and said:

Mr Bailey: "....My first problem is the criminal proof beyond the balance of probabilities in this kind of case is extraordinarily difficult. It has been found difficult in New Zealand, in France, in the United Kingdom, in the United States and in Canada."

That world experience cannot simply be ignored. As Mr Pearce from the Victorian Council of Civil Liberties (VCCL) said (*Hansard*, Legal and Constitutional, p 341):

Mr Pearce: "...things which can today be said with impunity will, if this Bill is passed, become unlawful: ergo it imposes a restriction on free speech. The question about this Bill and the question for the Government is whether that restriction is justifiable. We in the VCCL say that no one has made out yet the case that it is justifiable."

In the light of the High Court decision in Theophanous v Herald and Weekly Times Limited it may well be possible that Section 60 will be considered to be unconstitutional.

CIVIL SANCTIONS

This bill also provides for civil sanctions which were to be enforced through the Human Rights and Equal Opportunity Commission along the same lines as the complaints of sexual harassment/discrimination and disability discrimination. Given the recent decision of the High Court in the case of Harry Brandy v HREOC (Unreported High Court Decision 02.03.1995), it will be necessary to await the Government's response to ascertain the mechanisms whereby enforceability for a complainant can be achieved.

There does not appear to be any similar legislation which is as broad as this current proposed legislation which deals with such terms as "offend" and "insult".

As Mr Pearce said (*Hansard*, Legal and Constitutional, p 341):

Mr Pearce: "....Dealing first of all with the civil side, essentially the effect of that legislation will be to protect people from hurt feelings. The legislation is designed specifically and in terms

to protect people from offence and insults. No other legislation or principle of law that we are aware of in this country has that effect.

"No other legislation or principle of the law that we are aware of seeks to protect people from hurt feelings. We say the Government has no role as the guardian of hurt feelings. We say that no case has been made out to give the Government that role, and we say further that no case has been made out as to why hurt feelings from racial abuse - as opposed to any of the many other forms of abuse to which people are subjected on a daily basis - ought to be singled out for special protection."

There appears no basis on which the majority report of the committee could be properly "satisfied" (see Majority Report, Racial Hatred Bill 1994, 1.61, p 21) as to the interpretation of "offend".

The case quoted in defence of the view provides no real precedent (HREOC & Shaw v Perpetual Trustee Tasmania).

It is not appropriate for the wording of the legislation to be based on the possibility that it maybe interpreted in the way the legislators would wish. The legislation itself should be clear.

The legislation then sets out certain criteria which is "safe ground." This safe ground area employs such phrases as "good faith", "scientific", "artistic", "reasonable" and "public interest". Any tribunal determining the civil liability of a respondent to proceedings would need to make determinations, such as whether the words complained about were said as part of a scientific pursuit or as part of an artistic performance. It would then need to determine whether they were done in good faith and whether it was reasonable to undertake that activity in the circumstances.

Further, the exclusion of artistic performances from the scope of the civil provision of the Bill makes it laughable. A comedian can, in the guise of an artistic performance, tell blatantly racist jokes on national television, and sell videotapes of the program for personal profit, but those some jokes told by an ordinary citizen in a public place such as a hotel or club, could render him/her subject to civil proceedings under the Bill.

If the Government is truly concerned to stamp out racism, then which is the greater evil: a racist joke told on national television, or, the same joke told in the relative confines of a hotel or club?

The legal minefield that this will create is inappropriate. It will clearly be a bonanza for lawyers and will keep the High Court employed for many years in determining the interpretations to be applied to such undefined phrases and words. As Mr Pearce so succinctly summarised the situation:

Mr Pearce: "This demonstrates graphically the difficulties which are encountered when you set about trying to make unlawful those things which are merely socially unacceptable." (*Hansard*, Legal and Constitutional, p 341)

There is another aspect of the civil sanction which provides for the vicarious liability of an employer. The legislation will make an employer vicariously liable for any offence or insult occasioned by an employee, even if the employer did not suspect that such a situation would, or might arise through an employee. This approach to vicarious liability seems somewhat harsh, although it seems to copy the vicarious liability in other discrimination legislation.

GENERAL COMMENTS

There are further difficulties with the legislation such as the definition of "ethnic." Although Ms Sheedy told the hearing at page 255 that there would be "no problem in interpretation" if the Courts were to follow the New Zealand interpretation, there is no guarantee that the Courts would necessarily adopt such an interpretation.

Although the Explanatory Memorandum and the Minister's speech may provide further clarification, legislation ought be clear on its face, and recourse to explanatory memoranda and Ministerial statement should only be required as a matter of last resort.

Even then, the High Court has recently shown itself perfectly willing to ignore such things when it can form a clear view of the legislation on its own.

Accordingly, when the Government is made aware of the difficulties of interpretation, then the legislation ought to adopt a definitions section outlining those definitions that the Government would wish the Courts to employ, rather than leaving the definitions open to legal challenge.

Whilst racist activities and beliefs are to be condemned, it is the view of the Coalition Senators that this is best addressed through educative processes.

Mr Pearce (*Hansard*, Legal and Constitutional, p 344) considered the legislation as "political window-dressing" and has suggested support be given to "educative and other community projects."

Mr Bartlett, a partner of the legal firm Minter Ellison, stated (*Hansard*, Legal and Constitutional, p 345):

Mr Bartlett: "I would say that in my view the Bill will do nothing to reduce or stop racial hatred. It seeks to take the easy approach of hitting any offender with a big stick, rather than the more difficult task of further encouraging multiculturalism through education and assimilation. The process of multiculturalism and assimilation is continuing in this country, and it would not be encouraged by harsh

criminal and civil remedies."

Mr Wakim, who is at the coalface of working with the Arab communities within Australia made the following point (*Hansard*, Legal and Constitutional, p 388):

> **Mr Wakim:** "I must say, as a bi-lingual person, that I have had enormous difficulty explaining the concept of racial vilification in Arabic. A lot of this discourse goes way over the heads of the people that I think we are supposed to be addressing."

And later in (*Hansard*, Legal and Constitutional, p 391) Mr Wakim says:

> **Mr Wakim:** "The thrust of what we really want to inject into this discourse is not so much about the legislation, but to try and have a look at the roots of the problem rather than the symptoms, and have a look at how we can redress the ignorance that is a fertile ground for the racism in the first place and we can redress the gap between the victim and the law, rather than the gap within the law."

SUMMARY

Given the difficulties of prosecuting the proposed Section 60 and the impact on freedom of speech, thus bringing into question the constitutionality of that criminal sanction, it is the Coalition view that this criminal aspect of the legislation should not be pursued.

In relation to the civil aspects of the legislation, the Harry Brandy v HREOC decision leaves in limbo the enforceability of any civil sanction. Given that there are very real difficulties with the legislation, it is the Coalition view that the legislation ought be withdrawn and reconsidered.

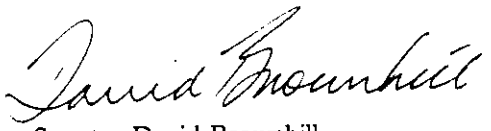
However, in the interim, there is nothing stopping the Government from embarking on an educational program to ensure that Australia's reputation as a tolerant and multicultural society is enhanced, and ensure the freedom for elements of its citizenry who feel threatened by, and are the victims of, unacceptable racially motivated behaviour.

Senator Chris Ellison

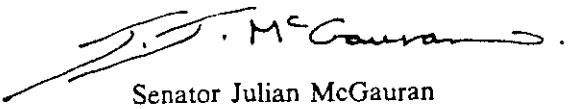
Senator Bill O'Chee

Senator Eric Abetz

Senator Michael Baume



Senator David Brownhill



Senator Julian McGauran

Senator Jim Short