HUMAN
RIGHTS
COMMISSION

REPORT NO. 7

PROPOSAL FOR AMENDMENTS TO THE RACIAL DISCRIMINATION ACT TO COVER INCITEMENT TO RACIAL HATRED AND RACIAL DEFAMATION

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Human Rights Commission
G.P.O. Box 629
Canberra, A.C.T. 2601

23 November 1983

Senator the Hon. Gareth Evans
Attorney-General
Parliament House
Canberra, A.C.T. 2600

Dear Attorney-General,

Pursuant to section 9 (1) (c) of the *Human Rights Commission Act 1981*, this report is presented to you following the Human Rights Commission's inquiry into the possible need for amendments to the *Racial Discrimination Act 1975* to cover incitement to racial hatred and racial defamation.

Yours sincerely,

Chairman
for and on behalf of the
Human Rights Commission

Members of the Human Rights Commission

Chairman

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Deputy Chairman

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* A more detailed statistical analysis of the complaints made to the Commission, together with examples of the materials complained of, is available from the Commission on request.

THE FUNCTIONS OF THE COMMISSION

Section 9 of the *Human Rights Commission Act 1981* reads:

9. (1) The functions of the Commission are—

(a) to examine enactments, and (when requested to do so by the Minister) proposed enactments, for the purpose of ascertaining whether the enactments or proposed enactments are, or would be, inconsistent with or contrary to any human rights, and to report to the Minister the results of any such examination;

(b) to inquire into any act or practice that may be inconsistent with or contrary to any human right, and-

(i) where the Commission considers it appropriate to do so—endeavour to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect a settlement of those matters—to report to the Minister the results of its inquiry and of any endeavours it has made to effect such a settlement;

(c) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to human rights;

(d) when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant, of the Declarations or of any relevant international instrument;

(e) on its own initiative or when requested by the Minister, to examine any relevant international instrument for the purpose of ascertaining whether there are any inconsistencies between that instrument and the Covenant, the Declarations or any other relevant international instrument, and to report to the Minister the results of any such examination;

(f) to promote an understanding and acceptance, and the public discussion, of human rights in Australia and the external Territories;

(g) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting human rights and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth;

(h) to perform-

(i) any functions conferred on the Commission by any other enactment;

(ii) any functions conferred on the Commission pursuant to any arrangement in force under section 11; and

(iii) any functions conferred on the Commission by any State Act or Northern Territory enactment, being functions that are declared by the Minister, by notice published in the *Gazette,* to be complementary to other functions of the Commission; and

(j) to do anything incidental or conducive to the performance of any of the preceding functions.

(2) The Commission shall not—

(a) regard an enactment or proposed enactment as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) by reason of a provision of the enactment or proposed enactment that is included solely for the purpose of securing adequate advancement of particular persons or groups of persons in order to enable them to enjoy or exercise human rights equally with other persons; or

(b) regard an act or practice as being inconsistent with or contrary to any human right for the purposes of paragraph (1) (a) or (b) where the act or practice is done or engaged in solely for the purpose referred to in paragraph (a).

(3) For the purpose of the performance of its functions, the Commission may work with and consult appropriate non-governmental organizations.

I. THE PROBLEM STATED

1. The hallmark of a true democracy is the preservation and promotion of the right of free speech. The Human Rights Commission is absolutely committed to the protection of freedom of expression as a basic right which can never be curtailed unless it comes into conflict with another basic human right.

2. The classic, rational position was: 'I disapprove of what you say, but I will defend to the death your right to say it'. The contingency which Voltaire did not discuss was the abuse of freedom of speech by members of the majority to destroy the rights of defenceless minorities. The European experience of the 1930s and 1940s has shown that, even if truth may prevail in the long run, in the meantime a great many lives may be lost. Thus the question which societies now have to decide is whether to defend to the ultimate the right to advocate the destruction of the rights of another racial group, and whether to give free reign to those who argue for the destruction of a society where everyone has the same human rights. The International Covenant on Civil and Political Rights makes it quite clear that freedom of expression may be restricted where this is necessary to protect the rights of others and that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law' (Article 20).

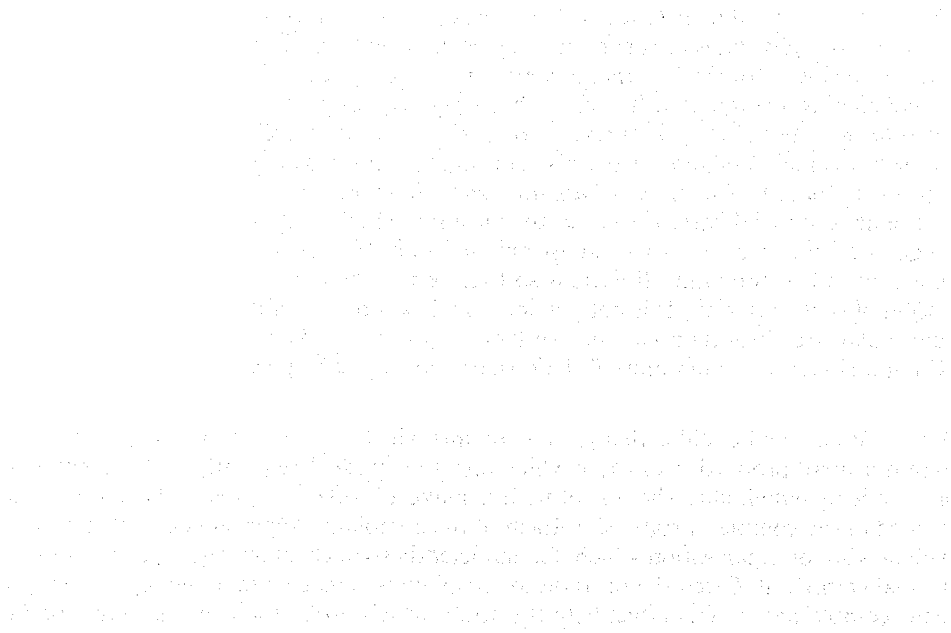
3. Australia was once a country where citizenship and the vote were denied to Aborigines and where the desire for a white Australia was the determinant of national immigration policy. Although there was always a minority opposed to all forms of racism, the change in attitudes and policy since World War II has been dramatic in its rapidity. Australia now takes pride in being a multicultural society. Yet it remains true that many older Australians grew up in a society where racial intolerance and the assumption of the inferiority of anyone not from an Anglo-Saxon background was taken for granted. Many would argue that the time has now come to make a break with the past and for Australia to take a clear stand and declare through legislation that incitement to racial hatred and racial defamation are not acceptable behaviour.

4. In Australia racial violence is now an exceptional occurrence. However, there are two risks in inaction. One is that some members of the majority will be spurred on to attack members of minority groups. The other is that where racial and ethnic minorities feel that their rights are not protected, racial violence may be the ultimate outcome of pent up frustration. One approach to legislation in this area is to argue that until widespread violence develops freedom of expression is so vital that no constraint should be placed upon it. The flaw in this strategy is that once violence has occurred then the remedies which will be needed will be much more powerful than those which would have sufficed at an earlier stage in the escalation of racial tensions. Also in the meantime many individuals will have suffered grave hurts which could have been avoided by earlier action. The law already recognises that verbal attacks on individuals may be so damaging that they must be restrained by defamation laws but attacks on racial groups may be far more damaging where they rend the social fabric and create the conditions in which discrimination and injustice flourish.

5. The original draft of the *Racial Discrimination Bill 1975* contained provisions making incitement to racial hatred or promotion of racial superiority an offence. The section was broadly worded and created considerable apprehension at a time when no one could foresee exactly how the legislation as a whole would operate and when the post of Commissioner for Community Relations was being attacked as a Frankenstein creation with Star Chamber-like powers. Almost a decade of practical experience has

shown just how exaggerated those fears were. Indeed, the problem has emerged as being a lack of powers rather than an excess of authority.

6 Even though it is widely known that racist statements are not covered by the existing legislation, fully one-quarter of all complaints concern racist statements. Whilst some of these complaints concern relatively minor, though still hurtful, matters, others concern gross racist propaganda and powerful attacks on the equal opportunities of minority groups. In two cases where there had been prior complaints to the Commissioner, tension resulted in violence and the death of one of the protagonists. Such racial violence could become even rarer were there legislation to curb racist statements and to educate the public in the unacceptability of racist defamation.



II. THE IMMEDIATE OCCASION

7. The specific justification for legislation in this area is the 1700 formal complaints and the many more informal approaches which have been made to the Commissioner for Community Relations and the Human Rights Commission.

The Complaints Analysed

8. In May 1982 the Commission initiated a survey of the complaints concerning racist statements and materials received by the Commissioner for Community Relations and the Human Rights Commission over the period from October 1975 when the Racial Discrimination Act came into operation to April 1982. The total number of formal complaints was 1193. (These were complaints in which the principal matter of the complaint was said to be a statement which incited racial hatred or was defamatory of a racial or ethnic group. A large number of complaints, viz. 1700, involved such statements as a primary or secondary element.) Although the material had originally been thought of as referring to incitement to racial hatred or to racist propaganda, it became abundantly clear that a very broad spectrum of matters was involved. The range extended from blatant and deliberate incitement to racial hatred and other forms of racist propaganda at one end to unthinkingly racist statements, proverbs and jokes in poor taste at the other. All the files were reviewed and information on the nature of the behaviour complained of, together with details of the complainant, the respondent and the outcome, was placed on filing cards for ease of analysis. In the figures a single complaint signed by twenty individuals is counted as one complaint but if twenty persons around the country wrote in to object to a single radio broadcast this is recorded as twenty complaints. Although it was generally known that racial defamation was still not covered by the existing legislation, the Commission received a further 165 complaints concerning racist propaganda and racial defamation between July 1982 and August 1983.

The Representativeness of the Complaints

9. It is very difficult to assess the representativeness of the complaints which are sent in. For individuals or organisations who are aggrieved to register a complaint they have to be aware of the fact that a complaint can be made and believe that it is worthwhile making a complaint. It is clear that where the Commissioner has made a speech or otherwise been active a flurry of complaints will often follow. It is also clear that some individuals, and more especially some organisations, do not complain because they are aware that the *Racial Discrimination Act 1975* does not cover racist propaganda or incitement to racial hatred. Some of the most rabid racial hatred propaganda has never been the subject of a formal complaint: it has simply been presented to the Commissioner for Community Relations so that he may be aware of the continued circulation of such materials. It is not possible to tell whether an absence of complaints in a particular area reflects a lack of overt racism, a lack of awareness of the role of the Commissioner for Community Relations, or a feeling of helplessness in face of the lack of legislation.

10. What can be said is that the complaints which do reach the Commissioner represent a small proportion of those which might be made. Frequently verbal comments are made by individuals who do not wish to make a formal complaint (these are not included in the complaint statistics). Each of the complaints represents at least one individual who, or organisation which, felt sufficiently strongly about the matter to bring a formal complaint. Often the decision to complain was made where the particular incident complained of was effectively the straw which broke the camel's back, coming

after a series of prior irritations. It is not the first Irish joke which provokes a complaint but the fiftieth or the individual broadcaster who makes a specialty of such jokes.

11. At the beginning it seemed a relatively simple, if lengthy, task to analyse the 1193 complaints. Giving all complaints equal weight, statistics could easily be prepared without any need for subjective judgments. However, anything on this basis extending beyond very simple analysis proved to have little value since it was equivalent to evaluating the sourness of fruit by giving equal weight to peaches and lemons.

12. It became clear that all complaints could not realistically be given the same weight. The matters complained of ranged from the use of the term 'Porn' and Irish jokes to examples of racist obscenity accusing a named race of eating their children or of plotting to overthrow the Government. There was then an attempt to rank all matters complained of on a four-point scale: minor, moderate, serious, very serious. This showed that whilst those who were ranking the complaints showed a high level of independent agreement as to complaints falling into the 'very serious' category, there was little agreement as to the ranking of the remaining matters.

The Criteria for Ranking

13. An alternative and perhaps more useful approach was to look at what kind of legislation would be needed to cover the matters raised in the complaints. One way of doing this was to measure it against overseas legislation which is already in place. For example, under section 9A of the *New Zealand Race Relations Act 1971,* the unlawful publication involves 'matter which is threatening, abusive or insulting . . . being matter or words likely to excite hostility or ill will against or bring into contempt or ridicule' any group or persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons'. In Great Britain, under section 5A of the *Public Order Act 1936* (as amended in 1976), the written matter or words must be 'threatening, abusive or insulting' but the offence only comes into being 'where having regard to all the circumstances hatred is likely to be stirred up against any racial group in Great Britain.'

14. It would appear that 'hatred is a much stronger requirement than 'contempt or ridicule' but in either case there will be some difficulty in determining whether the words in question have the effect required by the legislation. In New Zealand the *Annual Reports of the Human Rights Commission* present a schedule of complaints showing that under the conciliation process some complaints of verbal racial abuse are found to be justified and some are not, although it is not possible to tell what the criteria are. Equally, some Irish jokes are held to be unlawful whilst others are not, but the dividing line is not laid down. Overall there has been an insufficient number of racial incitement cases in any English-speaking country to make it possible to build up a body of case law as to what would be unlawful in terms of the kind of language used.

Hatred as a Criterion

15. If stirring up hatred is the criterion, it would probably be reasonable to say that no more than 15 per cent of the complaints made to the Commissioner for Community Relations relate to matters which a court could be expected to find to stir up hatred. The great majority of these 'hatred' complaints are against organisations or individuals whose express aim is to promote racial hatred, usually against Jews. In many of their characteristics, those subjects of complaint are very different from the general run of persons complained of who might be called 'unthinking racists', because the latter 's racism stems from thoughtlessness and following the crowd rather than from a burning

I. Emphasis not in original.

faith in the concept of a master race. The fanatical racists are also distinctive because they are most unlikely to be influenced by any form of conciliation process. At the same time, whereas most of the remaining respondents could be expected to desist from racist statements if these were made illegal, the deliberate racists would be more likely to regard this as an ideal opportunity for martyrdom.

Hostility or Ill Will, Contempt or Ridicule as Criteria

16. Almost all the complaints brought to the Commissioner for Community Relations under the heading of racial incitement (viz. 1193) would be unlawful if the operative factor was contempt or ridicule rather than hatred. The question is whether it is desirable to have a provision which has a threshold as low as this.

17. The choice of criteria is very closely linked to the central issue of whom the legislation is meant to deter from undesirable behaviour. The general assumption tends to be that it should be aimed at hard-core racists and the extreme fringe. However, it may well be preferable to turn this idea upside down and focus upon the unthinking racists.

18. It is perhaps helpful to draw an analogy with a road speed limit. A speed limit restricts freedom of movement but only in terms of speed and not direction. It is aimed to catch not only road hogs who drive at 150km per hour regardless of legal limits, but in far greater numbers the ordinary motorist who is tempted to go a little faster than is safe for everyone concerned. Similarly, it could be argued that the laws on racist propaganda should be such as would catch—and influence—the unthinking racist who will abstain from racist expressions once these are deemed to be illegal, and not just the rabid racist. This would, however, mean lowering the threshold of unacceptable behaviour, and in this context conciliation rather than criminal penalities would seem more appropriate. One almost certainly would not wish to prosecute the unwitting shoe manufacturer who juxtaposes his shoes with images of the Buddha to the great offence of many Buddhists but one would certainly wish to have an effective conciliation procedure available to cover such a case. Conciliation avoids charges of using a sledge-hammer to crack a nut which would arise if creating ridicule were to be treated as a criminal offence.

What Behaviour should be Unlawful?

19. Looking at the complaints which have been made there is obviously a very wide range of behaviour which complainants believe should be outlawed. Items which appear regularly (although they should not necessarily all be covered—and are not—by the Commission's proposals) include:

(a) *Offensive words:* e.g. 'wog', Tom', `Abo', `boong', 'black', 'yellow belly', 'nigger'.

(b) *Ethnic jokes:* especially Irish jokes but also cartoons featuring money-grabbing Jews, drunken Aborigines etc.

(c) *Stereotyping:* e.g. articles on Mediterranean back, Italians and crirhe, Aboriginal unemployment—all dealing unsympathetically with the ethnic group involved and implying (not necessarily intentionally) that every individual member is involved.

(d) *Reporting designed to aggravate tension:* especially in relation to Aborigines in rural areas and Asian migrants in towns.

(e) *Reports of racist statements by politicians and prominent public figures:* approximately six out of ten complaints against individuals concern prominent

figures who attract media attention or government officials who are in positions where they have some power over members of the public.

(f) *Denials of the reality of racial extermination campaigns during World War II or of historical massacres of Aborigines.*

(g) *Claims that some racial groups are more animal than human.*

The Current Situation in Australia

20. The Commission's experience shows that almost a quarter of all the complaints relating to racist statements and materials concern racism directed towards Aborigines, who are also most exposed to direct discrimination. The next largest group of complaints relate to the English, with Asians following close behind. The complaints are no more likely to concern attacks upon the Jews than upon the Irish and the Italians, although a much higher proportion of the really virulent racism focuses upon Jews. Almost every ethnic group in Australia has some cause for complaint. Although the Commissioner for Community Relations is generally thought of as dealing with racial and ethnic discrimination, a number of complaints concerning the incitement of hatred towards members of specific religious groups have also been received.

21. Many of the complaints registered as 'non-specified' come from Australians who feel that they are being singled out for attack. There is a strong groundswell of feeling that Multicultural Australia is intended for everyone except those whose forebears were born in Australia. Some of those who subscribe to this view would certainly wish to see any anti-incitement legislation used against over-enthusiastic individuals from other cultural backgrounds who attack what are perceived as core Australian values. It should be noted that ethnocentrism is certainly not a vice restricted to dinkum Aussies'; it also flourishes amongst many other ethnic groups in Australia who believe in the superiority of their own group and the inferiority of other groups.

22. Although most people in Australia would be aware that Aborigines face the greatest risk of discrimination in our society, fewer would appreciate the extent to which media presentation of Aboriginal stereotypes contributes to this discrimination. Aborigines cannot get jobs because it is believed by those who consciously or unconsciously denigrate them that they are all unreliable, drunken, no-hopers. With the Jews the position is very different—it is their success that is the object of attack. Whilst anti-semitic remarks are no longer a common occurrence in the mass media, more than half of the really rabid racist propaganda which comes to the attention of the Commission is aimed at Jews. 'Asians' are attacked both for their successes and their failures: on the one hand they are seen as not being real refugees because they succeed in buying cars and houses; on the other hand they are vilified as dole bludgers and cheats. Many of the attacks on 'Asians' reveal extraordinary, blinkered ignorance. For example, a common implication is that no 'Asian fought in Vietnam. However, it is over simple to suggest that education and time alone will solve this problem because in the meantime the 'Asians' have to go on living in the cities and facing a barrage of verbal attacks and graffiti.

23. Many of the submissions to the Commission opposing legislation on racial defamation have come from people who regard themselves as being true Australians (but tend to exclude Aborigines from their definition of a true Australian). They do not accept that any legislation would equally apply to racist attacks on Australians. Rather they see racial discrimination legislation as being exclusively for ethnic minorities. Some of the more frank even state their belief that they have a right to defame ethnic minorities. Yet more than a third of all complaints of racist statements involve statements either specifically attacking the English and the Irish or generally attacking Australians from English-speaking backgrounds.

III. CONSULTATION

24. The Commission has been concerned with this issue since its inception in December 1981. A prolonged process of consultation with concerned parties was deliberately undertaken in order to allow time for presentation of a full range of viewpoints; drafting and circulation of proposals; incorporation of comments and recirculation of revised proposals.

25. As part of its investigation of possible remedies for racist statements/ propaganda and racial defamation, the Commission has to date circulated four publications:

(a) *Incitement to Racial Hatred: Issues and Analysis* (Occasional Paper No. 1) October 1982

(b) *Incitement to Racial Hatred: The International Experience* (Occasional Paper No 2) October 1982

(c) *Words that Wound: Proceedings of the Conference on Freedom of Expression and Racist Propaganda* (Occasional Paper No. 3) February 1983

(d) *Proposed Amendments to the Racial Discrimination Act concerning Racial Defamation* (Discussion Paper No. 3) September 1983

26. Aside from the Conference, which provided a special focus with discussion workshops, the Commission has also engaged in a continuing dialogue with various groups and individuals who have a particular interest in the problem of racist propaganda and racist statements and racial defamation. Whilst the ultimate conclusions have differed, the Commission has also been represented at meetings of the New South Wales Race Relations Consultative Group for the discussion of draft racial incitement provisions.

27. **It** is perhaps a hopeful sign that during the past two years the level of debate on this issue has risen significantly. Recent detailed submissions concerning the Commission's proposed amendments to the Racial Discrimination Act have been thoughtful, well informed and well argued. Positions on both sides are now backed by reason as well as instinct and, whilst full consensus has certainly not been achieved, a clearer understanding of the opposing viewpoints has become possible. Some people are unshakeable in their conviction that freedom of expression should have priority over equality of opportunity for minorities. Others argue that the level of social unrest where intervention would be appropriate has yet to be reached. Amongst the proponents of legislation there is general agreement, with the major unresolved issue being the question of criminal sanctions (which is discussed further below).

28. One general comment which should be made about the consultative process relates to the backgrounds of the proponents and opponents of legislative restraints upon racist statements. The opponents of legislation are almost invariably members of the majority culture of persons descended from English-speaking ancestors. They are in a situation where they run very little risk of being the targets of hurtful racist abuse or have access to means of reply. In contrast, the proponents of legislation come from a broad range of cultural backgrounds. Most members of minority groups who have considered the issue would appear to favour legislation. There are also members of the majority group who believe that action is needed to preserve social cohesion within Australian society, but the issue is clearly unlikely to have the same urgency for them as for those who find themselves regularly under attack.

IV. DISCUSSION

Words that wound

'Sticks and stones may break my bones but words will never hurt me'—English saying.
'Words hurt more than fists'—Samoan saying.
'The shaft of the spear may be parried but the shaft of the word cannot'—Maori saying.

29. Australian defamation law has always recognised that words can seriously injure individuals and their social and economic well-being. Equally, breaches of the peace can be caused by words alone. Awareness of the damage which can be caused to individuals and groups through incitement to racial hatred or through racial defamation is only a recent development. Until the 1960s Australia's Constitution excluded Aborigines from federal power, and the public justification for Australia's immigration policy was unabashedly racist. In many ways changes within the last two decades have been both rapid and dramatic and it is not surprising that some individuals have been slower than others to appreciate the changing definition of unacceptable behaviour. In this situation, legislation through its educative role can hasten the speed of change and achieve more rapid alterations than could be attained by education alone. At the same time it can also serve as a protective shield for minority groups which are currently under attack.

30. Proponents of the argument that freedom of expression is a value to be maintained at all costs would argue that the minorities should bear the hurt of defamation until public education works its way through the ranks of society. But as Soskice has argued in England, 'I would earnestly ask those who entertain sincere anxieties . . . (for free speech) to consider again whether their anxieties are justified. What is the loss of liberty they fear? . . . Is it other than the loss of liberty by the use of outrageous language, not privately but publicly, to seek to stir up actual hatred against mostly completely harmless groups of people . . . for something they cannot possibly help?"

Equality of Opportunity

31. Equality of opportunity is unlikely to be a reality in an atmosphere of racial hatred or tension. To quote Mr Justice Frankfurter's majority decision in *Beauharnais v. Illinois,* a case in which the United States Supreme Court found for a justifiable constraint on freedom of speech in areas of racial tension:

> . . . if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group, unless we can say that this is a wilful and purposeless restriction unrelated to the peace and well-being of the State . . . wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free ordered life in a metropolitan polyglot community . . . we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact.
>
> It would be . . . arrogant dogmatism . . . for us to deny that the Illinois legislature may warrantably believe that a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. This being so, we are precluded

I. Sir Frank Soskice, House of Commons, *Hansard,vol.* 711, col. 938,3 May 1965.

from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.'

32. Similarly in Canada, McAlpine, in his conclusion to his report on the need for legislation to prohibit the promotion of racial hatred or contempt, argued that the issue was not simply one of 'civil disorder as against individual freedom'. It involved the choice between attributing an overwhelming weight to the individual value of free speech and the recognition of the 'dignity and worth of each person to live without discrimination . . . the inherent right every citizen has of equal opportunity . . . the right to make his or her life and to feel part of the community, without being hindered . . . to grow up and live in a climate of understanding and mutual respece.[3]

33. It should be noted that Article 17 of the International Covenant on Civil and Political Rights provides that everyone has the right to the protection of the law against attacks upon their honour or reputation. In the Commission's view this protection should cover attacks upon the individual as a member of a group.

Limits to Freedom of Expression under the International Covenant on Civil and Political Rights and Obligations under the International Convention on the Elimination of All Forms of Racial Discrimination

34. Article 19 of the International Covenant on Civil and Political Rights makes it quite plain that the right to freedom of expression is not absolute:

Article 19

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights and reputations of others;

(b) For the protection of national security or of public order *(ordre public),* or of public health or morals.

The justification for racial defamation legislation is that it is necessary for respect of the rights or reputations of others—and for the protection of public morals in the broadest sense of the term. Equally, legislation to restrict incitement to racial hatred is likely to be covered by the public order limitation.

35. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination obliges state parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'. Australia was only able to sign the Convention subject to a reservation with respect to Article 4. Since, in many ways, the Articles of the Convention go together to create a comprehensive scheme for the elim-

2. *Beauharnais v. Illinois* 343 US 250 (1952) at pp. 259-61.

3. J. McAlpine, 'Report arising out of the Activities of the Ku Klux Klan in British Columbia', Vancouver, 30 April 1981.

ination of racial discrimination, the effectiveness of Australia's implementation of the Convention is weakened by the reservation. It seems desirable if at all practicable to reach a point where this reservation can be removed. As has been argued above, equality of opportunity is unlikely to come about when incitement to racial intolerance is allowed free reign.

36. In 1979 the European Commission of Human Rights dismissed the appeal of a Dutch politician who argued that his freedom of expression had been violated by a conviction for distributing racist pamphlets.[4] The Commission found that promotion of racial discrimination was not a form of freedom of expression protected by the European Convention (whose wording is very close to that of the ICCPR). The commission further pointed out that the formulation of Article 5 of the ICCPR was expressly designed to prevent totalitarian groups from exploiting in their own interests the principles of the Covenant. Article 5 states that:

> Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

That is to say that one cannot abuse one's own right of freedom of expression to campaign for the destruction of the rights of others.

Overseas Experience

The United Kingdom

37. In Great Britain incitement to racial hatred was first made a specific crime in 1965. Introducing section 6 of the Race Relations Act, Lord Stonham pointed out that 'the problem, as always in matters of this kind, is to frame a provision which will penalise indefensibly scurrilous and inflammatory speeches and publications without curtailing legitimate freedom of comment and controversy'.[5] The legislation was essentially concerned with incitement to racial hatred which was conducive to a breach of the peace. Its impact was to modify the way in which racist debaters cast their arguments and to give birth to a minute number of racist book-clubs immune from the application of the Act.

38. A National Front rally in Red Lion Square in 1974 highlighted the extent to which, in Lord Scarman's words, the legislation was no more than an 'embarrassment . . . hedged about with restrictions' which made it 'useless to a policeman on the streee.[6] As a result a new Race Relations Act was passed in 1976. This moved the incitement provisions to the Public Order statutes and removed the requirement of proof of intent: 'the language used for an offence to arise has to be threatening, abusive or insulting. This is, it seems to the Government, a tight test which justifies placing the responsibility on someone using such language to take into account the likely effect of his words'.[7]

39. There have been very few prosecutions under the new Act, in part because the Director of Public Prosecutions only agrees to one prosecution in seven out of those referred to him by the Commission for Racial Equality. Dissatisfaction both with the legislation and with the way in which it is administered is widespread amongst minority groups. Many commentators have argued that the belief that the Government did not

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4 *Glimmerveen and Hagenbeek v. The Netherlands*, 4 *European Human Rights Reports* 160, 1979.

5. Lord of Stonham, House of Lords, *Hansard*, Vol. 268, col. 1010, 26 July 1965.
6. Lord Scarman Cmnd. 5919, paragraph 125.
7. Lord Harris of Greenwich, House of Lords, *Hansard*, vol. 374, col. 1050.

have a genuine concern to stem the flow of racist propaganda has been a major factor in racist tension and violence in recent years.'

Continental Europe

40. In 1966 the Consultative Assembly of the Council of Europe drafted a Model Law making it an offence to call for or incite 'hatred, intolerance, discrimination or violence' or to 'insult, slander or hold others up to contempt because of their colour, race, ethnic or national origin or religion'.[9] Austria, Belgium, Denmark, France, West Germany, The Netherlands, Norway and Sweden all have legislation in this area which attempts to strike a balance between freedom of expression and the protection of minorities. France has had laws against anti-semitic propaganda since 1939. The European Commission of Human Rights' support of these laws has been cited above.

The United States

41. In the United States the First Amendment protects freedom of speech. Only where a breach of the peace is imminent and public order is immediately under threat are American courts and legislators likely to countenance its restriction. The most significant case in this area involved the conviction of Joseph Beauharnais in 1952 under an Illinois statute which made it unlawful to make or sell a publication exposing the citizens of any race, colour, creed or religion to contempt, derision, or obloquy or which is productive of a breach of the peace or riots' because of its defamation of the group. Beauharnais appealed to the Supreme Court that the statute violated liberty of speech and should be void for vagueness. The appeal was quashed on a five to four vote, with the majority opinion being that the First Amendment did not protect group libel any more than individual libel.

42. It was also reaffirmed that fighting words 'which by their very utterance inflict injury or tend to incite to immediate breach of the peace" were also excluded from protection. As the Court had said in *Chaplinsky v. New Hampshire* in 1942, 'such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality'."

43. Since the Beauharnais decision the trend has swung ever more towards freedom of speech, with 'clear and present danger' of civil unrest being the only justification for its abrogation. What is not generally appreciated, however, is that in the United States freedom of expression is buttressed by a formal right of reply in the electronic media for groups which are attacked.[12] Thus, minorities are not left powerless because of lack of access to the media.

Canada

44. Canadians have been very conscious of the constitutional approach to such matters in the United States. However, in 1966 the Report of the Special Committee on Hate Propaganda was published by the Government in Ottawa. The Committee was especially concerned to provide groups with the same protection against libel as individuals. True freedom of expression for all required that a balance be struck between the 'social interest in the full and frank discussion necessary to a free society on the one hand, and the social interest in public order and individual and good reputation

8. National Council for Civil Liberties, *Civil Disorder and Civil Liberties, Evidence to the Scarman Enquiry,* NCCL, London, 1981; M. Barker, *The New Racism,* Junction Books, London, 1981.
9. Council of Europe Consultative Assembly, 4 October 1965, Draft Model Law (1966).
10. Chaplinsky V. New Hampshire, 315 US (I 942), pp. 571-2.
II Ibid.
12. See Chapter 4 of F. Haiman *Freedom of Speech,* National Text Book Co. and American Civil Liberties Union, New York, 1978.

on the ()thee." The Committee deliberately expressed 'a solemn public judgment that holding up of identifiable groups to hatred or contempt is inherently likely to dispose the rest of the public to violence against members of these groups and inherently likely to expose them to loss of respect among their fellow men '.'[4]

45. The recommendations of this Committee led to the amendment of the Canadian Criminal Code in 1970. Section 281.2 (2) deals with group defamation and applies to any statements made 'other than in private conversation'. However, there are a range of specified defences which considerably limit the scope of the provision. Section 281.3 actually provides for governmental seizure of hate propaganda, but it has never been used.

46. Section 13 of the Canadian Human Rights Act prohibits the use of the telephone repeatedly to expose minority groups to hatred or contempt. This provision followed the emergence of advertisements of a telephone number where callers could listen to a prerecorded anti-sernitic message. The hearing Tribunal had found, in this case, that 'certain kinds of speech had to be curtailed in the public good because the potential for harm outweighs the value to society in the guarantee of unrestricted freedom of speech. ' In addition the provincial legal codes of Manitoba, Saskatchewan and British Columbia all refer explicitly to incitement to group hatred. The Saskatchewan legislation extends to ridicule, belittling and affronts to dignity as well as hatred. In one reported case a sign which showed blacks as 'incompetent, childish and funny was held to show a discriminatory predilection' and the restaurant was ordered to remove it The court held that such stereotyping jeopardised the opportunities of the minority group in gaining responsible jobs and receiving their equal rights.'[6]

47. The British Columbia Civil Rights Protection Act 1981 prohibits the promotion of hatred or contempt or the superiority or inferiority of a group defined by colour, race, religion, ethnicity or place of origin. This legislation represents a direct reaction to the activities of the Ku Klux Klan in the province.

New Zealand

48. The New Zealand Race Relations Act passed in 1971 was modelled on the United Kingdom legislation but went beyond penalising incitement to racial hatred to impose criminal sanctions on incitement to racial disharmony (section 25). This provision resulted less from any belief that there was an urgent need for such measures than from the desire to make an appropriate gesture in recognition of the International Year on the Elimination of All Forms of Racial Discrimination. Once the legislation was enacted, however, it became evident that there were many potential complainants in New Zealand who had previously had no recourse against verbal racist attacks.

49. The first prosecution came in 1977 when King-Ansell was convicted for publishing an anti-sernitic pamphlet. His conviction was upheld despite an appeal which focused on the claim that Jews could not be categorised as an ethnic group.'[7] King-Ansell, who was prominent in the New Zealand National Socialist White People's Party, represented one extreme of the spectrum as a person who devoted much of his life to the propagation of racist defamation. Experience with the New Zealand legislation, however, showed that there was a much larger group of persons whose

13. Report of the Special Committee on Hate Propaganda in Canada, Ottawa, 1966, p. 60
14. ibid, pp. 64-5.
15. Canadian Human Rights Tribunal, *Decision*, 20 July 1979, p. 2.
16. Order from formal inquiry of Saskatchewan Human Rights Commission reaffirmed by Saskatchewan Court of Appeal in *re lwasyk and Saskatchewan Human Rights Commission (1978)* 87 DLR (3d) 289.
17. W. Hodge, 'Incitement to Racial Disharmony: King-Ansell v. Police', *New Zealand Law Journal*, No. 9,20 May 1980.

racism was unthinking or less deeply entrenched. For this majority the threat of criminal sanctions was inappropriate or even counter-productive and a procedure based on conciliation and removed from the ambit of police work appeared to be much more suitable. Thus experience with the criminal provision resulted in the introduction of a new section 9A to the Race Relations Act in 1977. Under section 9A incitement to racial disharmony could be investigated as an unlawful act by the Race Relations Conciliator, and the requirement of 'intent' in the criminal provision was waived.

50. New Zealand thus has two provisions dealing with incitement to racial disharmony: section 25 provides for criminal prosecutions at the discretion of the Attorney-General and section 9A provides for conciliation by the Race Relations Conciliator following up complaints. Since the introduction of the formal conciliation procedures section 25 has fallen into disuse. The Conciliator deals with a very broad spectrum of complaints ranging from racist pamphlets and offensive broadcasts to 'jokes and verbal racial abuse between neighbours. Often the complaints are conciliated and rectified without moving to a formal consideration of the legal status of the behaviour complained of Essentially, section 9A allows an educational and conciliatory approach to the issue, with education and conciliation being focused where they are most needed. In contrast to the situation in the United Kingdom, there would appear to be general satisfaction with the legal mechanisms for dealing with incitement to racial disharmony in New Zealand. Education and legislation are often presented as alternative approaches to the limitation of incitement to racial disharmony. The New Zealand experience would suggest that a combination of the two can be highly effective.

The Educational Role of the Law in Changing Public Attitudes

51. The role of the law as an educational force is often underestimated." The simple fact that an act is known to be unlawful will dissuade most citizens from performing that act unless they have a strong economic or personal interest in so doing. Laws can also change attitudes over time and it is not necessarily the case that an overall attitudinal change has to precede a change in the law. Indeed often when the major proportion of the population accepts that a particular behaviour (say, spitting in the street) is not acceptable, a law restraining the practice will then be highly effective in convincing the remainder of the population to conform to the new social standard.

52. One important group upon whom the law can be expected to have a very rapid educational effect is persons in official positions whose employment or tenure of office is dependent upon their observance of the law. It should be emphasised that fully one quarter of all complaints of racist statements which have been lodged with the Commission have concerned statements made by people in official positions such as government officials and members of the police force. Many of these people would be unthinking in their statements but understandably members of the minority groups whom they attack have little expectation of equal treatment when they hear such

remarks.

18. c.f. J. Stone, *Social Dimensions of Law and Justice,* Maitland, Sydney, 1966. UN Economic and Social Council, Commission on Human Rights, Report by the Secretary General E/CN A/1105 (14 November 1972) pp. 45 6,66 7. Also E. Littlejohn The Efficacy of Law in Promoting Social Change for Lawyers', *Detroit College of Law Review,* 1976, pp. 23-51; 0. Schachter, 'How effective are measures against racial discrimination' *Human Rights Journal,* vol. 4, No 2-3 (1971), pp. 293-310.

V. RECOMMENDATIONS

The Proposed Amendments

53. **It** is suggested that new provisions should be included in the law to outlaw certain kinds of racist statement, and that these should take the form of two additional provisions and one definition to be incorporated into the Racial Discrimination Act:

(1) *Incitement to racial hatred* A provision to make it unlawful for a person publicly to utter or publish words or engage in conduct which, having regard to **all** the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin: this provision should be drafted so as to ensure that certain valid activities are not brought within its scope, e.g. the publication or performance of bona fide works of art; genuine academic discussion; news reporting of demonstrations against particular countries; or the serious and non inflammatory discussion of issues of public policy.

(2) *Racial defamation* A provision to make it unlawful publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of race, colour, descent or national or ethnic origin.

(3) *Definition of publication* A definition clause to make it clear that publication is to be taken in a very broad way to cover the print and electronic media, sign boards, abusive telephone calls etc. and that both the individual making the statement and, where publication implies endorsement, the publisher would be covered by the two provisions outlined above.

Approach

54. The Commission has considered more than twenty other legislative options, but prefers those specified above for the reasons set out below.

Reasons for Amending the Racial Discrimination Act

(a) An amendment to the Racial Discrimination Act is a relatively simple matter, clearly within the jurisdiction of the Commonwealth, and justified by the Racial Discrimination Convention (particularly Article 4).

(b) Setting the provisions within the ambit of the Racial Discrimination Act makes it possible to retain the very considerable advantage of adopting conciliation procedures and educational activities in such cases.

(c) Avoiding .a criminal law approach maintains the parallel with the defamation of individuals and increases the educative role of the law.

(d) The advantages of instituting a form of action for group defamation are in large part achieved without having to go into the very complex issues related to group defamation in general.

(e) New Zealand experience with both a criminal law provision and a race relations conciliation provision suggests that the latter approach is both more used and more effective.

(f) After two years of consideration of possible amendments to New South Wales legislation, the New South Wales Race Relations Consultative Committee decided to recommend an amendment to the federal Racial Discrimination Act.

Explanation of the Proposed Amendments

55. (a) The first provision is intended to cover racist statements/progaganda of a serious and damaging kind. Examples would include the leaflets placed- in letter boxes by extremist organisations nominating certain races as plotting to overthrow the government or public speeches calling for the forcible repatriation of certain ethnic groups. The Commission has received many complaints relating to actions of this kind.

It may be helpful to give an example of where it is envisaged that the dividing line between lawful and unlawful behaviour would fall. Republication in full .of .a nineteenth century book on Australia with some racist passages concerning Chinese and Aborigines but with an introduction placing the work in its historical context certainly would not be covered. On the other hand, publication of a pamphlet consisting exclusively of a selection of those same racist passages with an accompanying text advocating that all Chinese persons in Australia should be deported would be covered.

Discussions of migration policy would only be covered when couched in racist terms contending that particular racial or ethnic groups are innately inferior to others in terms of intelligence, 'civilisation' and moral qualities.

The Commission has considered the question of whether the best way to achieve the object of protecting reasonable discussion of sensitive racial issues is by drawing up exclusion provisions to cover, for example, scientific discourse. The difficulty with this approach is that scientists should not be immune from complaints of unlawful behaviour which could validly be brought against non-scientists. It is also the case that people who argue that one race is superior to another and therefore is entitled to deprive members of the inferior race of their rights always argue that their belief can be proved to be scientifically valid. Many academic scientists in Germany in the 1930s assented to the proposition that there was a valid scientific basis for anti-semitism. One of the complaints submitted to the Commission concerned a pamphlet advocating that Jews not be allowed to marry non-Jews because of the alleged risk of genetic disorders. Most of the text of the pamphlet was actually taken from a scientific publication on genetic disease published by the medical school of the Hebrew University in Jerusalem. By taking this material selectively and out of context the pamphlet's author was able to launch a virulent attack on the Jewish community as allegedly spreading disease amongst non-Jews.

On the other hand, not to proceed by way of exclusion clauses for justifiable publications many mean that the 'gateway words' (in the Commission's formulation, 'hatred, contempt or, violence') are too tightly limited to allow of an effective curb on racist defamation.

(b) The second provision is intended to cover racial defamation: i.e. forms of racist statement which in effect defame a person by virtue of his or her membership of a racial group or defame the group itself. Statements which detract from the humanity of people, often by means of unfavourable stereotypes, are as damaging when they slander groups as when the reputations of individuals are attacked. Examples would include 'no X has ever done an honest day's work'; or. 'Ys in this town are a mob of alcoholics with prison records'.

(c) It should be noted that the unlawfulness of the actions covered by the provisions would depend upon the likely impact of the actions and not upon the intentions of the perpetrators. In this way, the Commission's proposals would fit within the civil concept of unlawfulness on which the Racial Discrimination Act is based rather than within the criminal law tradition. British experience, which has used the criminal law, has highlighted the difficulty of proving intent except by way of the content and context of the statement, and has demonstrated the reluctance of the authorities to bring actions. Neither the United Kingdom nor New Zealand now requires proof of intent. Despite claims when the amendments are introduced that innocent persons would be

exposed, this has not occurred. With a conciliation process any unwitting offender can immediately explain and apologise where this is appropriate. Where there has been publication, the harm follows whatever the intent of the author of the statement.

(d) The need for a broad-ranging definition of publication is very clearly demonstrated by the complaints received by the Commission. Slogans promoting racial violence have appeared on T-shirts, billboards and trade union noticeboards, as well as in in-house journals. The use of mime, gesture and symbol should also be covered.

(e) There are some areas which it is intended will not be covered, because freedom of speech should be constrained only in order to deal with significant violations of minorities' rights to be unmolested. Isolated epithets such as 'wog bastard' would be another example of an area which would not be covered by the proposed amendment.

Most jokes about ethnic characteristics would probably not be covered. Thus in New Zealand the 'contempt or ridicule' provisions have been found to cover some but not all jokes relating to ethnic groups and a small proportion of verbal abuse. The Commission has received numerous submissions from people who believe that 'ethnic jokes' should be covered but believes that at present 'ethnic jokes' should largely remain beyond the scope of the law.

(f) One important reason for incorporating these amendments into the Racial Discrimination Act would be declaratory and educational. The amendments would establish that community opinion now holds such statements to be unacceptable and unlawful. Whatever else their impact, they should serve to restrain the statements of persons in public employment (one-quarter of all complaints of racial defamation made to the Commissioner for Community Relations have been made against such persons as police, welfare officers and local council employees). The education would come through public discussion and through the conciliation process itself.

(g) In the conciliation process people have the opportunity of coming to appreciate how their words and actions have affected others. In the case of racist statements the injury will often have come about because of a lack of thought rather than because of deliberate malice and such a situation is best resolved through quietly talking the matter out round a table.

(h) In the event of conciliation failing, section 25 of the Racial Discrimination Act provides that

> Where, in a proceeding instituted under section 24, it is established to the reasonable satisfaction of the court that a person (in this section referred to as the "defendant") has done an act (in this section referred to as the "relevant act") that is unlawful by reason of a provision of Part II, the court may grant all or any of the following remedies:
>
> (a) an injunction restraining the defendant from repeating the relevant act, from doing an act of a similar kind or from causing or permitting others to do acts of the same or a similar kind;
>
> (b) an order directing the defendant to a specified act, being an act directed to-
>
> (i) placing a person aggrieved by the doing of the relevant act as nearly as practicable in the position in which he would be if the relevant act had not been done; or
>
> (ii) otherwise avoiding a detriment to such a person resulting from the doing of the relevant act;
>
> (c) if the doing of the relevant act resulted in the making of a contract or the relevant act was done in pursuance of a contract—an order cancelling the contract, varying any of the terms of the contract or requiring the repayment, in whole or in part, of an amount paid in pursuance of the contract;

(d) damages against the defendant in respect of-

(i) loss suffered by a person aggrieved by the relevant act, including loss of any benefit that the person might reasonably have been expected to obtain if the relevant act had not been done; and

(ii) loss of dignity by, humiliation to, or injury to the feelings of, a person aggrieved by the relevant act; and

(e) such other relief as the court thinks just.

The extent to which a court would grant damages as distinct from injunctive relief would depend upon individual circumstances. It might, however, be envisaged that payments to welfare or public interest organisations serving the group defamed might be required, drawing on practice along these lines in The Netherlands and France. If the procedures provided in the Racial Discrimination Act for action following failure to conciliate are amended in line with those proposed in the Sex Discrimination Bill, there should be no difficulties with the proposals of the Commission as outlined above.

Scope of the Amendments

56. As indicated earlier, the New South Wales Race Relations Consultative Committee has recommended changes to the Racial Discrimination Act to deal with the problem of racial defamation. However, that committee has differed from the proposals put forward by the Commission in two respects___relating to the coverage of religious intolerance and criminal sanctions—and these are discussed below because they are matters of some importance.

Religious Hatred

57. The Commission's current proposals do not cover abuse of, or incitement to hatred of, religious groups or individuals who are attacked on the grounds of their membership of such groups. This is essentially because the proposals concern amendments to the *Racial Discrimination Act 1975,* which is founded on the International Convention on the Elimination of All Forms of Racial Discrimination. This Convention does not cover religious discrimination. However, Article 20 of the ICCPR and Principle 10 of the Declaration of the Rights of the Child both cover religious hatred together with racial hatred as different facets of a single phenomenon. Article 20 is particularly explicit in providing that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.

58. If the Racial Discrimination Act were to be amended to cover discrimination on the grounds of religion, such an amendment should clearly apply to the Act as a whole and not simply to the provisions concerning hatred and incitement. The Commission believes that statements inciting religious hatred and defamation of religious groups should be unlawfull but considers that the Racial Discrimination Act is not the appropriate place for such a provision. The Commission notes that Australia fully supported the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religious Belief and considers that further action on this issue should be based on that Declaration.

59. Failure to cover discrimination associated with religion results in some highly undesirable inequities. If Jews are to be considered as an ethnic group (as in the King-Anse11 case in New Zealand) then Jews but not Muslims would be protected. If, on the other hand, being Jewish is regarded as a religious rather than an ethnic affiliation then the cruel irony results that anti-semitism is excluded from the scope of the legislation. Section 116 of the Australian Constitution prevents the Federal Government from establishing a religion but does not appear to preclude legislation outlawing religious discrimination (cf. the **Jehovah's Witnesses** case (1943) 67 CLR 116).

60. If religious discrimination is not to be included within the framework of the Racial Discrimination Act, one possible alternative would be to include a very broad definition of freedom of religion in the proposed Bill of Rights. This solution, however, would leave unresolved the problem of incitement to religious hatred. At present religious hatred is an issue for Jews and, to a lesser extent, Muslims. Almost half of the most serious complaints of group defamation received by the Commission relates to rabid anti-semitic propaganda. If racial defamation alone were to be covered by the amended legislation then there is a strong probability that those persons who deliberately inflame inter-community tensions in Australia would shift the focus of their attack to the religious affiliations of Asians, Jews and other minorities. British experience has shown that this is not a merely hypothetical prospect. The racist journals which once attacked Indians and Brownskins now use Hindu as an extreme term of abuse.

A Criminal Offence?

61. The Commission has devoted considerable attention to the question whether there should be a criminal offence of incitement to racial hatred. In favour of this proposal it can be said that it would:

(a) Give full weight to society's disapproval of such behaviour.
(b) Have greater deterrent weight than a lesser sanction.
(c) Ensure that the relevant issues are thrashed out in court.
(d) Provide for cases where it may be appropriate for the government itself to be seen to take action.
(e) Provide for cases which are simply not appopriate for any form of conciliation.

On the other hand, a criminal provision has the following disadvantage that it would:

(a) Destroy much of the benefit associated with a conciliatory approach to the problem.
(b) Make martyrs of racist propagandists who actually enjoy a day in court.
(c) Probably be little used if overseas experience is any guide. International experience clearly shows that criminal sanctions are little used. In most common law countries the Attorney-General or the Director of Public Prosecutions must authorise each such prosecution. He is reluctant to do so, in part because authorisation in these circumstances implies a particular official approval of the prosecution. Debates over failure to give approval then tend to move the entire matter into the political arena.
(d) Where there is a jury trial there is always the possibility that the jury's findings will be influenced by their own sympathies for the racist case. Where the defendant is found 'not guilty' in such circumstances, the minority group which was attacked will be left feeling even more defenceless than before.
(e) Arguments for unrestrained freedom of expression, which have a limited force in the case of a conciliation procedure, have much greater force with respect to making public statements the subject of criminal sanctions.

Possible Defences

62. Closely linked to the issue of criminal sanctions is the question of possible defences. In the absence of criminal sanctions the discussion of possible justifications can be left to the conciliation process. Defences which are to be found embodied in the legislation around the world include ignorance of the contents of the publications (U.K.); scientific discourse (The Netherlands); matters of history or contemporary affairs (West Germany); judicial or parliamentary reports (U.K.); truth, public interest and removal of injustices (Canada). Many of these defences are so broad as to

preclude almost anyone who fights the case from being convicted. There is also the issue of the purpose of the sanction: the damage of racist propaganda is the same whether the perpetrator believes what he says or not (although almost all do believe it). This is equally so with statements 'in the public interest': the whole point of having legislation is to make it plain that racist statements are not in the public interest.

63. The Commission's proposals, although not involving criminal law, would, in effect, provide for the following grounds of defence: the publication or performance of bona fide works of art; genuine academic discussion; straight media reporting of events; and the serious and non-inflammatory discussion of issues of public policy.

VI. FINAL NOTE

Removal of the Reservation to Article 4 of the Racial Discrimination Convention

64. Article 4 of the Racial Discrimination Convention provides for the adoption of positive measures to eradicate acts of incitement to racial discrimination.

65. It specifies three measures as needing to be taken by states parties:

(a) dissemination of racist ideas, incitement, acts of violence and assistance to racist activities to be offences;

(b) prohibition of organisations inciting racial discrimination, with membership being an offence; and

(c) prohibition against public authorities promoting or inciting racial discrimination.

Australia's reservation refers only to paragraph (a). It could be argued that (c) is already covered by Part **II** of the Racial Discrimination Act, whilst (b) is unlikely to be an approach that would be consistent with Australia's traditions of freedom of association. With regard to (a), Australia presently relies on current common law provisions.

66. In relation to its proposals for amendment of the Racial Discrimination Act, the Commission offers the following comments for consideration as to how they would meet the requirements of Article 4 of the Racial Discrimination Convention.

(a) proposed amendment 1—prohibition of utterances which would lead to distinctions on the basis of race.

This proposal is consistent with the requirement in Article 4 (a) that incitement to racial discrimination, and incitement to acts of violence on the basis of race, be made offences. It could, however, be argued that the criteria proposed by the Commission for making words unlawful, viz, their resulting in 'hatred, contempt or violence against a person', are not as extensive as the Convention's simpler formula of 'incitement to racial discrimination', and that the Commission is proposing the creation of an unlawful act rather than an offence.

(b) proposed amendment 2—prohibition of utterances which defame or insult people on the basis of race.

This proposal appears to take up the Convention's words: 'dissemination of ideas based on racial superiority or hatred'. Although certain words may defame or insult without actually inciting others to discriminate, the Commission's proposal would clearly cover situations which fall just short of such incitement.

67. **The** final measure specified in Article 4 (a), which is not the subject of a proposed amendment, is that prohibiting the provision of assistance, including financial, to racist activities. However, if amendments 1 and 2 are accepted to create two new offences in Part **II** of the Racial Discrimination Act, section 17 of the Act makes it.unlawful to assist or promote, including by financial assistance, or to incite the doing of an act which is unlawful under Part II.

68. As Australia's reservation is limited to Article 4 (a), and the proposed amendments are measures to cover offences there specified, the reservation should be removed to make the proposed amendments enforceable. Bearing in mind the practice of other countries, the Commission considers implementation of its proposals would satisfy the requirements for the removal of the reservation, and recommends accordingly.

VII. SUMMARY OF RECOMMENDATIONS

(1) *Incitement to racial hatred* A provision to make it unlawful for a person publicly to utter or publish words or engage in conduct which, having regard to all the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin: this provision should be drafted so as to ensure that certain valid activities are not brought within its scope, e.g. the publication or performance of bona fide works of art; genuine academic discussion; news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of issues of public policy.

(2) *Racial defamation* A provision to make it unlawful publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of race, colour, descent or national or ethnic origin.

(3) *Definition of publication* A definition clause to make it clear that publication is to be taken in a very broad way to cover the print and electronic media, sign boards, abusive telephone calls etc. and that both the individual making the statement and, where publication implies endorsement, the publisher would be covered by the two provisions outlined above.

(4) *Removal of reservation* Removal of Australia's reservation to Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination.

APPENDIX 1

Complaints of Racist Statements 1975-82: Number of Complaints against Specified Groups by Year

Number of complaints

Population/ethnic/ religious group discriminated against	*1975 Oct—Dec.*	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*1982 Jan—Apr.*	*Totals*
Aboriginal	2	19	21	55	46	45	77	19	284
Afghan							1		1
African			1		2		1		4
Albanian									1
American Indian									1
Arabic speaking		1			1	1	1	1	5
Argentinian						2			3
Asians		2	3	6	9	8	17	I	46
Austrian				1					1
Bangladesh									1
Belgian									1
Buddhist									1
Bulgarian									1
Chilean									1
Chinese		1	8	2		2	7	1	16
Croatian				3	1	1			8
Cypriot							1		1
Czechoslovakian			1						I
Dutch		2					1		6
Egyptian									1
English		9	12	17	9	16	17	3	86
Fijian	2	2					I		1
Filipino						1	2		4
French						1			1
German		5	6	8	6	3	2		31
Greek	2	6	4	8	2		3		25
Gypsies				1	1				2
Hungarian						2	1		8
Indian						2	3	1	11
Indonesian						1			1
Irish				7	11	8	18	2	59
Islanders									1
Italians				9	9	6	9	2	57
Japanese							1	1	4
Jewish				8	6	7	17	4	56
Lebanese						2	1		7
Macedonian									1
Malaysian									1
Maltese									8
Mauritian									1
Maori				0	1				2
Mexican					1				1
Mormon									1
Muslim				I	1				4
Negroes									2
New Guinea						1			1
New Zealanders					1	1	1		3
Non-specific (more than one group involved)				46	49	49	75	27	299
Not stated				9	7	8	12	4	51
Pakistani				1					3

APPENDIX 1

Complaints of Racist Statements 1975-82: Number of Complaints against Specified Groups by Year

Population/ethnic! religious group discriminated against	*Number of complaints*								
	1975 Oct.—Dec.	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*1982 Jan.—Apr.*	*Totals*
Portuguese									1
Palestinian									I
Polish		1		5	2	3			11
Roman Catholic							1		1
Russian									2
Scottish							2		3
Sicilian			1						1
South African (white)									1
South African (black)			3	1					4
South American			1						I
Spanish									1
Sri Lankan								1	2
Tibetan									1
Turkish .			1	3	1				5
Ukrainian				1					1
Uruguayan									1
US American		.	.	1	1	2	1	I	7
Venezuelan			1						1
Vietnamese			2				7		15
West Indian		.	.						1
Yugoslays			6	1	3	1			15
Zimbabwe									1
Number of complaints	22	105	142	206	181	183	280	74 1	193

APPENDIX 2

Complaints of Racist Statements 1975-82: Number of Complaints by Media Source or Maker of Statement

Complaint	Number of complaint matters received								
	Oct.—Dec. 1975	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*Jan.—Apr. 1982*	*Total*
				matter categorisation					
RACIST LITERATURE									
Offensive books, magazines or text books		1		1			2		4
Offensive newsletters, leaflets, pamphlets or letters		1		1			1		4
Offensive article in book, magazine, newsletter, leaflet or pamphlet					4	1	2	2	14
Offensive advertisement including vacancy in book, magazine, journal, newsletter, leaflet or pamphlet				2					2
Circulation of offensive community circular or poems							1		1
Offensive cartoon, joke, poem or ditty	1			4	1	1	2	2	11
Offensive application for employment, discriminatory item on form or office circular			1	1	1		4		7
Discriminatory Acts, regulations or rules		1		2	2	1	1	1	8
PRESS									
Offensive/sensational racist headline			1		1				
Offensive racist article, picture, letter or remark			5	5	13	11	5	3	47
Offensive racist advertisement including vacancy description				1			4		5
Offensive cartoon, comic strip, joke, poem or ditty					1	1	5		8
TELEVISION									
Offensive racist program or advertisement						1			3
Offensive racist remark			1		1		2		5

APPENDIX 2

Complaints of Racist Statements 1975-82: Number of Complaints by Media Source or Maker of Statement

Complaint matter categorisation	*Number of complaint matters received*								
	Oct.—Dec. 1975	*1976*	*1977*	*1978*	*1979*	*1980*	*1981*	*Jan.—Apr. 1982*	*Total*
RADIO									
Offensive racist program	..	..	..	..	..	..	1	..	1
Offensive racist remark or advertisement	..	..	..	4	1	..	1	..	6
GRAFFITI									
Drawing or writing offensive racist material				1		1			2
USE OF DEROGATORY TERMS OR STATEMENTS									
by police		4		4	6	2	4	3	23
by Federal Members of Parliament			1		1				2
by State Members of Parliament				..		2	5		9
by neighbours		3	2	3		1	2		11
by principals/teachers				1		1	3		5
by publicans				5	3	9	12		30
by judges/magistrates				..	1		1		2
by bus drivers/tour drivers		1					1		2
by government officials						2		1	4
by real estate agents/landlords			1	3	1	1	1	2	9
Miscellaneous			4	11	8	4	8	3	38
MISCELLANEOUS									
Offensive racist play or act					1		1		2
Offensive T-shirt							1		1
Offensive stickers, cards, postcards, posters, pictures or aerogrammes			1				1	1	3
Offensive signs			1						3
Offensive song			1						1
Offensive product advertising				1		4			5
Offensive animal name							1		1
Offensive souvenirs or novelties							1		

APPENDIX 3

List of Persons and Organisations who sent Comments on Incitement to Racial Hatred and Racial Defamation in Response to the Commission's Discussion Paper

John Bolt, Northern Territory
John Bonnett, Australian Capital Territory
B. Boyle, Secretary, the Irish Australian Association
Gary Brown, Australian Capital Territory John
Citizen, New South Wales
Sir Walter Crocker, South Australia
Doireann ni Dochartaigh, Australian Aid for Ireland
Dr Paul Gardner, Chairman, B'Nai B'rith Anti-Defamation Commission
Joe Gersh, Executive Council of Australian Jewry
J. Gulbis, President, Ethnic Communities Council of South Australian
Margaret Henrick, Australian Capital Territory
Dr Andrew Hiller, Vice-Chairman, Queensland Ethnic Communities Council
Michael Kirby, Chairman, Australian Law Reform Commission
H. Krygier, Secretary, Australian Association for Cultural Freedom
William Jones, Victoria
Margaret Jones, Victoria
Hugh and Kitty McDevitt, South Australia
Greg McIntyre, Queensland
C. McKenzie, Queensland
Alicia Lee, New South Wales
Pat O'Shane, Secretary, Ministry of Aboriginal Affairs, New South Wales
Queensland Members of the National Aboriginal Conference
Michael Radis and Michael Tsounis, United Ethnic Communities of South Australia
Dr W. D. Rubenstein, Victoria
Miriam Smith, New South Wales
Andrew Struik, Assistant Secretary, Department of Immigration and Ethnic Affairs
Trevor Sykes, Editor, The Bulletin, New South Wales
Alec Talbot, President, Primary Principals Assn, South Australia
Alfred Titchiner, New South Wales
Doron Ur, President, Council of Western Australian Jewry

In addition many other individuals and organizations have given helpful comments and suggestions on this topic over the years that this subject has been under consideration.