



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 86

Incitement to Racial Hatred

REPORT

OCTOBER 1989

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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To: **THE HON J M BERINSON QC MLC**

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on incitement to racial hatred.

M E RAYNER

Chairman

17 October 1989

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1. THE REFERENCE

In November 1988, the Attorney General asked the Commission to consider "what changes to the law, if any, are needed to deter adequately acts which incite racial hatred". The principal problem out of which the reference arose is the occurrence of large scale racist poster and graffiti campaigns¹ on public property in most metropolitan and some rural areas of Western Australia from 1983 to the present time.²

2. ISSUES PAPER

To provide a framework for public discussion the Commission published an Issues Paper, *Incitement to Racial Hatred*, in May 1989. The Paper identified three attendant harms of the poster campaigns: incitement of hatred, fear or intimidation in the community; damage to public property;³ and secondary effects in the form of verbal or physical racial harassment

¹ Some of the statements in the posters are as follows:

Asians Out or Racial War
400,000 Jobless 400,000 Asians Out
700,000 Unemployed 700,000 Asians Why More Asians?
Jews Are Ruining Your Life
No Asians
No Coloureds
White Revolution The Only Solution
Media Cover-Up Holocaust A Lie! Seek The Truth
12 Million Jews Never Died
The Facts About Jewish Zionism and Freemasons
Join The ANM and Injure Ninjas.

Some posters prominently display a gross caricature of what purports to be a member of the targeted group. One recent poster attempts to blame Australians of Asian origin for problems such as AIDS, heroin use and organized crime. In brief, the contents of the posters consist of messages which express causal links between unwanted economic and social phenomena, such as unemployment, and the presence of members of the community from, for instance, "Asian" backgrounds. A cover story on the posters appears in *Harvest of Hate* Lyndall Crisp, *The Bulletin* 4.4.89, 42.

² Expressions of public concern about the problem preceded the Attorney General's reference to the Commission: West Australians for Racial Equality *Towards a just society: Facing Racism* (Seminar Proceedings 1986); M Allbrook *Community Relations In A Multicultural Society* (1988); Advisory Council on Multicultural Affairs *Towards a National Agenda For A Multicultural Australia* (A Discussion Paper 1988); *Racist posters distress patients attending Clinic* *The West Australian* 21.1.1988; *Racist posters anger Asians* *The West Australian* 19.1.1988; *Asians told to ignore taunts* *The Sunday Times* 27.9.1987; *Youth council fears more racial conflict* *The West Australian* 30.7.1987; *Fear Grips Perth Asians* *Daily News* 28.7.1987.

³ It has been reported that local government councils alone spend about \$100,000 a year removing racist posters from public property: *Race hate bill hits \$130,000* *The West Australian* 6.5.89; *Posters help sought* *The West Australian* 3.10.89 (report of a request to Belmont Council finance committee from the Main Roads Department asking for assistance to keep MRD property free of racist posters). The posters have been plastered on public property and public utilities such as lightpoles, bus shelters, telephone boxes, traffic lightboxes, buildings, fences and walls. For instance, see: *Racist welcome to city* *Daily News* 26.5.1989; *Racist posters get a pasting* *The West Australian* 8.12.1988; *Racist slogans daubed on city office* *Daily News* 27.7.1988; *Storm Brews Over Anti-Asian Posters* *Daily News* 8.12.1987; *Racist slogans daubed on car* *The West Australian* 7.12.1987; *Racists strike at buses* *The West Australian* 1.12.1987 State and Federal government agencies whose property is or has been subject to damage from

engendered or exacerbated by exposure to the slogans and caricatures exhibited in the posters. With reference to the third effect, the Commission noted that the posters and their racist messages appeared in large numbers along school bus routes. The Paper concluded that the posters and graffiti activities constitute breaches of laws under the *Criminal Code*, the *Police Act 1892* and the *Litter Act 1979*.

However, prosecutions for such offences have been frustrated by the need to catch offenders in the act. Since most posters have been put up late at night, detection is extremely difficult. For this reason, together with the scale of the problem, the enforcement of existing applicable laws has been undermined. Accordingly legislative options within the terms of reference (including the option of no change) were articulated in the Issues Paper: minor amendments to relevant public order rules; the creation of new indictable racial incitement offences; the creation of a statutory cause of action in individual civil proceedings for defamation of a group; and the creation of an express ground of "racial harassment" in the *Equal Opportunity Act 1984*.

3. COMMUNITY CONSULTATION

3.1 Seminars, media, personal consultations

The Commission has carried out extensive community consultation. The Issues Paper was published contemporaneously with the Equal Opportunity Commissioner's Occasional Report No.2 *Legislation Against Incitement to Racial Hatred*. Both publications received feature article coverage in local print media⁴ and over 1,000 copies of the Issues Paper were circulated to individuals and organizations in Western Australia, interstate and overseas. Subsequently the Commission participated in several State and national radio and television programmes on issues raised by the reference including possible legislative responses to racially inflammatory activity.⁵

the posters include the Main Roads Department, Transperth, Westrail, State Electricity Commission and Telecom. These bodies now have a policy of systematic routine removal of racist propaganda, as also have local authorities in whose areas the poster campaigns have taken place. The removal of posters has been difficult, time-consuming and expensive.

⁴ *Anti-racism moves target hate posters* The West Australian 5.5.89; *Hatred sets poster for law* The West Australian 8.5.89; *Violence fear In poster war* The West Australian 8.5.89.

⁵ 'Drive Time' Radio 6WF 8.5.89; '7.30 Report' ABC TV 8.5.89; 'The Sattler File' Radio 6PR 9.5.89; Radio 6NR 9.5.89; 'Nightline' Radio 6PR 17.5.89; 'Background Briefing' Radio 6WN 4.6.89; 'Diana Warnock' Radio 6WF 8.6.89; 'The World Today' Radio 6WF 9.6.89; Golden West TV Bunbury 5.7.89; Radio West

The reference has been the subject of seminars⁶ addressed by the Commission, and the Commission has also consulted with senior representatives of pertinent state, interstate and overseas government⁷ and non-government⁸ agencies. Papers on the Commission's preliminary work were presented to the Australasian Law Reform Agencies Conference (*Incitement to Racial Hatred in Western Australia*) in Sydney in August 1989, and written for the Human Rights Congress (*Targeting Racial Hatred in Western Australia*) in Melbourne in September 1989. The Commission has been formally involved in a community consultation in Western Australia administered by the Commonwealth Office of Multicultural Affairs as part of the Human Rights and Equal Opportunity Commission's current national Inquiry into Racist Violence.⁹

5.7.79; ABC Radio Bunbury 5.7.89; 'The Law Report' ABC Radio National 11.7.89; Radio 6BS 28.8.89; ABC Radio Geraldton 26.9.89.

In addition there have been many media reports (both before and after the release of the Commission's Issues Paper) advertent to the racist poster problem, the need for racial incitement legislation and the fact of the Commission's reference on these themes, including the following programmes and articles (since publication of the Issues Paper): Radio and television - 'Hinch' 15.5.89; News Channel 10 5.30 pm 15.5.89; News Channel 7 6pm 15.5.89; 'Des Guilfoyle' Radio 6WF May 1989; News Radio 6WN 7.15 am 30.5.89; News Radio 6WF 6.30 am 7.6.89. 'Des Guilfoyle' Radio 6WF 8.8.89. Print Media -The West Australian: *Victims of racism urged to speak up* 9.5.89, *Dowding to check race law* 16.5.89, *State plans crack down on racists* 8.6.89, *Bid to stop hate posters*, 19.6.89, *Race law aim to curb extremists* 3.7.89, *Racism guide released* 4.7.89, *Harder poster laws sought* 13.7.89, *Migrant findings 'a whitewash'* 18.7.89. ANM *scumbags, says Dowding* 19.7.89, WA condemned as 'racist State' 22.7.89, *New survey backs WA racism claims* 25.7.89 *WA's image in Asia gets a battering* 5.8.89, *Racist posters removed* 7.8.89, *Minister caught racists defacing sign, court told* 8.8.89, *Bid to rid WA of racist tag* 9.8.89, *Group will aid 'born losers'* 22.8.89, *Grill accuses media of exaggerating racism* 14.9.89. The Australian: *WA racism out of control says Opposition* 29.5.89, *Chinese leader backs claims of WA racism* 24.7.89, *WA minister gives evidence against 'racist' group leader* 8.8.89. The Daily News: *Minister In Racism Alert* 5.5.89, *Editorial* 5.7.89, *Dowding blasts race hate group* 18.7.89, *Ethnic Minister and racist in court clash*, *Hill launches racism fight* 7.8.89, *Jack In The Box* 14.8.89. *School plastered with racist posters* The West Australian June 1989. Letters to the editor - The West Australian: 9.5.89, 11.5.89, 12.5.89, 16.5.89, 29.5.89, 14.7.89, 11.8.89, The Sunday Times: 28.5.89; The Daily News 2.8.89. Further print media reports (published) in the same period are cited in footnotes 18, 21, 22 and 23 below.

⁶ Seminar with Asian community organisations, Multicultural and Ethnic Affairs Commission, Perth 8 July 1989; Churches' Peace Coalition, Office of the Equal Opportunity Commission, Perth 27 July 1989; Seminar with MEAC Commissioners, Multicultural and Ethnic Affairs Commission, Perth. 27 August 1989; Workshop, Australasian Law Reform Agencies Conference, Sydney 12 August 1989. The Commission also attended a seminar 'Strategies For Dealing With Racist Violence' organised by West Australians for Racial Equality, Perth 8 May 1989. In relation to issues arising from the reference, it has also addressed: Youth Work Studies students, Western Australian College of Advanced Education, 24 August 1989; Year 12 students Methodist Ladies College. 29 June 1989; Year 12 students Mandurah Senior High School, 27 July 1989.

⁷ Office of Equal Opportunity Commission of WA; Police Department of WA; Multicultural and Ethnic Affairs Commission; Local Government Association of WA; WA Office of Multicultural Affairs; Human Rights and Equal Opportunity Commission; NSW Anti-Discrimination Board; NSW Community Justice Centres; Law Reform Commission of Victoria; United Kingdom Commission for Racial Equality.

⁸ Ethnic Communities Council of NSW.

⁹ The Report is an overview of a number of group facilitations organised by the Office of Multicultural Affairs (OMA) in Western Australia. The method adopted for the Report's community consultation was qualitative and involved the use of group facilitators who arranged informal meetings and administered a questionnaire in various communities using the language of the group participants. The relevant demographic details of the participants are provided in the Report para 3.2:

3.2 Surveys

The Commission conducted two distinct sample community surveys on the phenomenon of the racist poster campaigns.¹⁰ The survey instruments in each survey expressly posed the specific options for legislative change (including no change) identified in the Commission's Issues Paper.

(a) Melville Survey

One sample survey was conducted in the state electorate of Melville (Melville Survey).¹¹ It consisted of personal interviews, by five experienced interviewers, of 250 electors from 250

"Eight ethnic groups participated in the consultations from the metropolitan, eastern goldfields and south west regions of Western Australia. One hundred and twenty people participated in the consultation and were from Vietnamese, Cambodian, Filipino, Indian, Iranian, Indonesian, Polish and Italian backgrounds. There were equal numbers of male and female participants and they varied in ages from 15 - 65 years."

Participants' responses on the subject of the racist posters are documented later in the Report (para 4.10):

"The racist poster campaign was unanimously condemned by the groups consulted as promoting incitement to racial hatred. The majority believed it was a catalyst to the increased incidence of racial violence experienced in W.A. It would appear that this campaign has been organized in a militaristic way by the Australian Nationalist Movement, targeting "Asians", "Coloureds", and "Jews", in all metropolitan areas of Perth, since 1983.

This campaign has had a very damaging effect on the target groups and the community as a whole. The target groups have been constantly made to feel denigrated, isolated, and victimized, by the daily visibility of the posters, as well as hearing their mimicked messages in the form of verbal abuse. Large sections of the "Australian" community are also offended by their content, and the ANM's ability to flout the law.

Most of the concern expressed about the racist posters specifically related to the effects on children. Most groups reported that their children were vulnerable at school, where most incidents of racial intimidation and violence occurred. Children would report to their parents stories of abuse and ridicule by their peers on a daily basis. Others expressed refusal to attend school or to wait at a bus stop where racist posters appeared, for fear of being assaulted. Some children said that they mistrusted their friends at school and thus withdrew from social contacts and activities with others. High school students seemed to be subject to more intimidation and harassment than primary school students. As a result, most parent were concerned for their children's safety and academic performance at school.

The perception from most of the groups consulted was that criminal laws should be introduced to overcome incitement to racial hatred, all it was felt that the mental cruelty suffered by the targets of the racist posters is as bad as physical injury and should thus be viewed as a criminal act."

¹⁰ 1. The Melville Survey - see para 3.2(a) ff below, and 2. The Target Survey - see para 3.2(b) below. The method and result of the Melville Survey are described in Report to the Law Reform Commission of W A: A Survey of Attitudes to Racist Posters By Residents of The Melville Electorate (1989). The method and results of the Target Survey are recorded in the Report to The Law Reform Commission of WA: Incitement to Racial Hatred reference - Target Survey (1989). Copies of both reports are available from the Commission on request.

¹¹ Financial Resources and time constraints dictated that the sample size would be limited to about 250 individuals, the consequence for the reliability of the findings being that the error would be unacceptably high should the survey area aim to cover the entire metropolitan area, Consequently it was decided to focus on a particular geographic area so as to improve the validity of the findings. The State electoral division of Melville was selected because it takes in a range of socio-economic circumstances, from expensive river-front dwellings in Alfred Cove to Homeswest accommodation in Willagee. Much of the area is well-established suburbia, with light industrial/commercial precincts in Myaree and O'Connor, and new residential developments in Samson. It includes parts of the Melville and Fremantle local

(randomly chosen) households in that electorate. In addition to specific legislative options to deter racist posters, the questionnaire in this survey canvassed the subject of observation of racist posters, attitudes towards posters and effects of racist posters.

(i) Observation of posters

Of the 250 persons interviewed the majority (62.8%) indicated they had seen racist posters in the Perth metropolitan area. A vast majority (78.8%) had read newspaper reports, heard radio reports or seen television reports about the racist posters and their perpetrators. Bus stops were the most commonly observed location of posters while walls were also common. It was clear from responses that posters had been observed, as one person commented, "almost anywhere that would hold them". No respondents reported having observed posters on privately-owned structures.

(ii) Attitudes to posters

Questions on respondents' attitudes to the posters were prefaced by one which asked them whether they were aware that the removal of posters had already cost the taxpayer thousands of dollars. The vast majority (76.8%) were aware of the cost of removing the posters. One of the most telling responses was to the question of whether respondents thought the posters constituted a problem; 89.6% answered in the affirmative. When asked why this was so, a variety of responses, numbering 461,¹² were given. Most (42.3%) indicated that the problem lay in the messages and slogans conveyed by the posters, while 29.5% suggested that the damage to property was an important issue and 26.7% complained of the racist posters' unsightliness.

(iii) Perceived effects of posters

A total of 984 responses were made to a question asking respondents to define ways in which racist posters affected members of the community. Most expressed views that the posters could affect community relations:

government areas. According to the State Electoral Roll for Melville the total population of electors as of 13 January 1989 was 21,651. Thus, a sample of 250 residents of voting age made up 1.2% of the population.

¹² Respondents were able to give multiple responses.

- * 15.3% indicated concern about the potential of the posters to encourage hatred between citizens,
- * 19.8% expressed a fear that they may intimidate those targeted by the posters,
- * 18.6% objected because they make some members of the community feel like second class citizens,
- * 17.5% were worried about the possibility that the messages of the posters would have an adverse impact upon the attitudes and behaviour of children and adults. Some stressed that it was children they were most concerned about - they were sure that most adults would see them for what they were but that impressionable children might be influenced,
- * 15.5% thought that the posters could affect the way members of the community relate to each other, and
- * 11.9% feared that the posters encouraged people to violent behaviour.

The obvious message is that the racist poster campaigns are unpopular and most of the electors interviewed strongly objected to them. Many were not only opposed but were offended by and indignant about the posters. The interviewers reported that this was so even among those who objected to 'Asian' immigration or multiculturalism. They were concerned that the posters promoted a false image of Perth as an unwelcoming and prejudiced city. This would affect tourism, as the "message would spread overseas".¹³ Opposition to the posters was compounded by their unsightliness, their defacement of public buildings/structures and the knowledge that their removal costs a substantial amount, funded ultimately by the taxpayer.

(iv) Support for legislation

Each of the legislative options canvassed by the questionnaire drew majority support:

¹³ A belief reflected in recent media reports: *WA fights racist tag* Daily News 26.9.89; *Immigrants put off by 'racist'* WA The West Australian 30.9.89; *Uni lecturer warns on racist image* The West Australian 11.10.89.

- * 90.8% favoured the introduction of some form of incitement to racial hatred offences (specific aspects of this support are addressed in paragraphs 4.2 and 4.3 below);
- * 90.4% favoured amendments to the *Police Act*;¹⁴
- * 80.0% favoured amending the *Equal Opportunity Act*; and
- * 61.2% favoured the introduction of a civil action for group defamation.

The survey confirms that there is likely to be widespread support in the community for legislative measures against the promotion of racial hatred. Criminal sanctions were strongly supported, particularly in the context of the racist poster campaign, which was widely perceived as an unwanted problem for the people of Perth.

(b) Target Survey

The other (distinct) survey of 113 government and community organisations was conducted by mail. That survey is referred to as the Target Survey since the groups comprising the survey sample were specifically targeted on the presumption of their having a special interest in the racist poster problem; either because their locality or ethnic identity had been the subject of racist poster display at some time, or because their responsibility for public property had brought them into contact with the problem due to the property damage caused by posters. Thirteen local government areas were identified as having been affected by racist posters. A questionnaire in the form of a standard form Submission Document was mailed to all local government councils, religious groups and community service clubs in those areas, certain ethnic minority groups, relevant ethnic groups, and peak non-government groups and statutory agencies. The Submission Document canvassed the same legislative options for new criminal laws as were raised in the Melville survey instrument: in fact in relation to these options, the number and content of the corresponding questions in both questionnaires were identical. Of the 367 organizations invited to participate, 113 returned completed Submission

¹⁴ Specifying that existing offences of using "threatening, abusive or insulting" words in public should include written forms.

Documents. A list of participating organizations is set out in the Appendix. Support for each of the legislative options was indicated as follows:

- * 76.4% favoured some form of new incitement to racial hatred laws;
- * 87.2% favoured amendment to the *Police Act*;
- * 76.7% favoured amendment to the *Equal Opportunity Act*; and
- * 50.5% favoured creating a civil right of action for group defamation.

(c) Self-initiated submissions

The Commission also received 64 completed Submission Documents from interested members of the public who mainly prompted by hearing or seeing a media item on the reference initiated contact with the Commission indicating a desire to participate in the consultation program.

Most of this group (73.4%) indicated support for some type of racial hatred legislation. Specific aspects of their support are taken up below.¹⁵ In addition, 29 submissions by way of correspondence from the public were sent to the Commission, of whom 7 favoured and 11 opposed the introduction of some form of criminal legislation. Self-initiated submissions are listed in the Appendix.

(d) Petition to Parliament

The Commission has also noted the recent tabling, in the Legislative Assembly of a petition bearing 667 signatures urging the State Government to introduce legislation to make posters of a racist nature illegal and to allow for the prosecution of groups and individuals promoting such material.¹⁶

¹⁵ See paras 4.2 and 4.3.

¹⁶ Western Australian *Parliamentary Debates* (Legislative Assembly) 30 August 1989, p 1378.

4. THE COMMISSION'S APPROACH

4.1 Seriousness of problem

The Commission has concluded that the problem causing the reference to be given to it, that is, large scale public display of racially inflammatory material and its attendant harms, is so serious as to warrant legislative intervention by way of amendments to the *Criminal Code*. Specific proposals for new offences are made below.¹⁷

The Commission emphasizes that this problem is not one of isolated racist invective or spontaneous racist epithets. In characterizing the racist poster campaigns and their attendant harms as serious the Commission has given weight to such factors as the para-militaristic¹⁸ organization¹⁹ of the campaigns, their continuing recurrence and consequent accumulative effects²⁰ on those exposed to the racist slogans in them, the number of racist statements and gross pictorial images communicated by the high volume of posters publicly displayed, and in relation thereto the wide geographical area covered and the long period of time over which the campaigns have been maintained. During the course of the reference, evidence has increasingly emerged of a direct association between the racist poster phenomenon and actual or threatened incidents of violence or public disorder. The development of a self-defence group offering to protect those intimidated by race hatred propaganda or harassment has been

¹⁷ See paras 5.1ff.

¹⁸ *Racists accused of military training* The West Australian 3.7.89.

¹⁹ 'Organization' is an essential hallmark of propaganda. 'Propaganda' is defined in the Concise Oxford Dictionary (7th ed 1982) as "Association or organized scheme for propagation of a doctrine or practice."

²⁰ This aspect of racist propaganda is highlighted in the English case of *Relf* (1979) 1 Cr App R (S) 111, the only case to go to the Court of Appeal which concerned racialist incitement (a breach of section 5A of the UK *Public Order Act 1936* for distributing racialist leaflets). There Lawton LJ said: "[I]n this class of case, constant repetition of lies might in the end lead some people into thinking that the lies are true. It is a matter of recent history that the constant repetition of lies in Central Europe led to the tragedy which came about in the years 1939 to 1945." And elsewhere in his judgment: "He (Relf) is entitled to have what opinion he likes about the immigrant population. But what he is not entitled to do is to behave the way he did, publishing and distributing leaflets which were abusive and insulting. It is sometimes forgotten that the common law in England for centuries has taken the view that it is an offence for anyone to stir up hostility against any section of the sovereign's subjects. Most of the immigrants are now British citizens and those who are not are living under the protection of the Crown, and they too are entitled to be protected from those who wish to stir up hostility against them. Relf clearly does. We find it difficult to think of more abusive and insulting leaflets and notices than those with which the court is concerned with this case. The sooner it is appreciated by those who think as Relf does that they cannot go around behaving in this sort of way, the better it will be for law and order in this country."

widely reported by local media.²¹ Further, the public display of racist posters invariably stimulates responses from persons motivated by anti-racist sentiment. Such responses include attempts to remove or deface the offending material or to post bills with anti-racist messages (on public property).²² Notwithstanding that a meritorious purpose motivates some counter-activity, these attempts themselves entail breaches of property damage and billposting laws. In at least one instance their efforts have resulted in conviction for assault on members of an anti-racist counter-group.²³ Since the publication of the Issues Paper, there have been wide reports of charges of criminal offences against persons allegedly linked with a racist group.²⁴

4.2 Purpose or proposals

The fundamental purpose of the Commission's proposals is to stem the problem in question. Two policy bases underpin those proposals: first, the prevention of public disorder,²⁵ and secondly, the prevention of serious interference with the right to a dignified and peaceful existence free from racist harassment and vilification.²⁶

²¹ The West Australian: *Ninjas warn racists* 10.6.89, *Ninjas to combat racism* 11.6.89, *Asians gun-licence protest* 8.7.89, Editorial *'No to Ninjas'* 24.8.89. The Weekend Australian: *Hatred spawns Ninja racist-busters* 13.5.89. Sunday Times: *Ninjas v Racists* 28.5.89.

²² *Suburb rid of racist signs* The West Australian 11.9.89.

²³ *Skinhead jailed for gang raid on house* The West Australian 13.7.89.

²⁴ The West Australian: *Racism theory on bombing* 26.5.89, *Action urged over racism* 29.5.89, *Racists accused of military training* 3.7.89, *Race bombing fears* 3.7.89, *We shoot blanks, say racists, Pair faces theft, firearms charges* 7.7.89, *Racist fined over explosives charge* 29.7.89, *Van Tongeren held after police raise* 15.8.89, *ANM leader remanded on conspiracy charge* 16.8.89, *Van Tongeren on fire bomb charge* 18.8.89, *Accused pair extradited to WA* 21.8.89, *Court freezes asset of anti-Asian campaigners* 22.8.89, *ANM buried guns: lawyer* 2.9.89, *Police hunt for murder clues grows* 5.9.89, *ANM men charged with killing* 6.9.89, *Killing was to gag ANM man: Crown* 7.9.89, *ANM accused fails to get bail* 7.9.89. The Australian: *Neo-Nazi leader charged* 27.5.89, *Racists threatened us: police* 16.8.89, *WA racists group 'on crime spree for funds'* 18.8.89, *Judge freezes assets of supremacists* 22.8.89. The Sunday Times: *Hate backed by arsenal* 14.5.59. The Daily News: *Racists face gun charges* 6.7.89, *Racist Links In Brutal Killing* 4.9.89.

²⁵ Public order considerations underscore UK racial incitement offences, the recognition of which has been given expression in successive White Papers: *Review of Public Order Law* (1985 Cmnd 9510) paras 1.8 and 6.5; *Racial Discrimination* (1975 Cmnd 6234) paras 125-126. The Canadian Law Reform Commission's *On Recodifying Criminal Law* characterizes its new formulations of existing incitement to hatred offences as either crimes against public order or crimes against social harmony - Report 31, 1987, model code clauses 21(1), 22(2), 100-103. Public order elements appear in the definitions of the Commission's proposed offences - see para 6.5 below.

²⁶ See eg Article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination. This international treaty has been implemented by the *Racial Discrimination Act 1975* (Cth). This consideration underlies the NSW *Anti-Discrimination (Racial Vilification) Amendment Act 1989*: see Discussion Paper to NSW Anti-Discrimination (Amendment) Bill, December 1988.

Confirmation that public disorder and social disharmony are among the perceived harms of the racist poster campaigns is found in the Melville Survey.²⁷ The connection between public order considerations and racial incitement laws was reflected elsewhere in the surveys. Of a total of 427 respondents in the Melville Survey, Target Survey and self-initiated Submission Documents, 51.4% indicated that laws against incitement to racial hatred should be defined by reference to threats of physical harm to people or property.²⁸ In the present context, to require proof of such threats of harm as an essential part of the definition of any proposed offences would defeat the fundamental purpose of having such offences. For this reason, while there are harm elements in the proposed offences, they are defined by reference to other thresholds.²⁹

4.3 Measure of efficacy

Legislation may serve deterrent, educative or symbolic functions or some combination of these. In the Commission's view deterrence is the function which warrants the greatest emphasis. The Commission's judgment of the probable efficacy of any proposed offences in deterring racist poster campaigns and similar displays is what has determined the precise formulation of those offences in these recommendations.

The Commission's recommendations are premised on the view that to deter racist propaganda campaigns "possession" offences of the kind proposed are necessary to overcome the obstacle which has frustrated the application of existing laws which prohibit bill-posting, namely the problem of detecting offenders in the act.

Mere possession of racially inflammatory material (in private or public) is not of itself made illegal under the proposed offences.

Rather, it is the activity of possession *with a view to publication, distribution or display to the public* which might give rise to liability. The Commission believes that, formulated in these terms, the ambit of the proposed offences meets the concern expressed by those survey

²⁷ See para 3.2(iii) above.

²⁸ Melville Survey 65.6%, Target Survey 31.8%, and self-initiated Submission Documents 31.2%.

²⁹ See para 6.5 below.

respondents who otherwise indicated support for new offences but were not in favour³⁰ of making mere private possession of racist material illegal.

4.4 Freedom of speech

The Commission has given serious consideration to the question of freedom of speech and its relationship to the present reference. The relationship is controversial and complex. In the Commission's view the issue is not adequately defined by putting speech rights in one side of the balance and other human rights in the other, since there is evidence that in the case of the immediate targets of racist propaganda their speech right requires legal protection. Racist propaganda itself may interfere with freedom of speech to the extent that it intimidates to silence those citizens who are the butt of it. They may be reluctant to report personal incidents of racist harassment or violence for fear of reprisal or retaliation.³¹ The argument that racial incitement laws are undesirable because they unduly interfere with freedom of speech overlooks protection of the speech rights of citizens who are publicly harassed, vilified or intimidated as the butt or target of hate propaganda.

In the Commission's view two balances are at stake here. Not only must proposed legislation strike a balance between freedom of speech generally and the right to a dignified and peaceful existence free from racist harassment and vilification, but it must also strike a balance between the principle of free speech and the duties and responsibilities which properly attach to the exercise of that freedom.

³⁰ Of a total of 230 respondents (Melville and Target Surveys, and self-initiated Submission Documents) 127 (55.21%) were not in favour of prohibiting private possession of racially inflammatory material.

³¹ One of the reasons for providing a representative complaint procedure in the (NSW) *Anti-Discrimination (Racial Vilification) Act 1989* was that "The often intimidating nature of racial vilification will be a further deterrent to an individual stepping forward to pursue his or her rights": Discussion Paper to Bill, 1988. In the WA Report for the Human Rights and Equal Opportunity Commission's National Inquiry into Racist Violence it is recorded that: "Most participants reported that they felt impotent on a personal level to respond to acts of racial violence. Many reasons were given for this, ranging from alienation from the general community, lack of English language proficiency, cultural characteristics, shyness, vulnerability, and demoralization. Therefore, most would prefer to overlook minor incidents of racial violence or suffer quietly in desperation."

It was perhaps to counter such reluctance or fear that a booklet *Dealing with Racism: A Guide to Your Rights* was published by the Multicultural and Ethnic Affairs Commission in July 1989, one aim of which is to encourage citizens to report incidents motivated by race to the police or appropriate government departments.

The latter balance finds a mirror in the International Covenant On Civil And Political Rights, which is implemented by the Commonwealth *Human Rights and Equal Opportunity Commission Act 1986*. Article 19(1) provides that:

"Everyone should have the right to freedom of expression: this right should 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 articles or any other media of his choice."

Clause (2) of Article 19 of the covenant qualifies the absolute value of this right of freedom of expression:

"The exercise of the rights provided for ... carries with it special duties and responsibility. 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 or reputations of others,
- (b) for the protection of national security or of public order or of public health or morals."

In Australia freedom of speech is not guaranteed in any written laws, and its exercise is regulated by law including the common and statute law of defamation (civil and criminal);³² contempt;³³ perverting the course of justice; privacy;³⁴ media communications;³⁵ sedition; public order; and obscenity. For example, criminal and civil laws of defamation make oral and written communications unlawful if they are calculated to bring a person into 'hatred, contempt or ridicule'.³⁶

³² The subject of several Law Reform Commission reports: Western Australian Law Reform Commission *Report on Defamation* (Project No 8 1979); Australian Law Reform Commission *Unfair Publication: Defamation and Privacy* (Report No 11 1979); New South Wales Law Reform Commission *Report on Defamation* (Report No 11 1971).

³³ The subject of Australian Law Reform Commission *Contempt* (Report No 35 1987).

³⁴ The subject of Australian Law Reform Commission *Privacy* (Report No 22 1983).

³⁵ Under the Australian Broadcasting Tribunal Radio Program Standard 3 a licensee may not transmit a program which "is likely to incite or perpetuate hatred against; or gratuitously vilifies" a person or group on the basis of race. Under s 16(1)(d) of the *Broadcasting Act 1942*(Cth), the Australian Broadcasting Tribunal's functions include "by instrument in writing, to determine the standards to be observed by licensees in respect of the broadcasting of programs and in respect of programs to be broadcast". Alleged breaches of ABT program standards can result in a Tribunal inquiry (at the request of any person) in relation to which the Tribunal may exercise a range of powers from issuing a reprimand to the revocation of a broadcaster's licence. A full list of the Tribunal's powers may be found in s 17A(2) of the *Broadcasting Act*. For an inquiry in which the ABT found that breaches of Radio Program Standard 3 had occurred see ABT Public Inquiry Report (IP /88/196) Decisions and Reasons, November 1988-March 1989, and November 1988-May 1989 Stage 2; for a record of ABT powers exercised in that inquiry see Notice of Reprimand to 2KY regarding the Ron Casey Show, 18 May 1989, and Inquiry Into Broadcasts by Mr Ron Casey and Mr Les Thompson on 2KY -Notice of Directions. See also para 6.1.

³⁶ J G Fleming *Law of Torts* (7th ed 1987) 502.

By such laws, speech is already regulated in favour of other public or individual interests. The violation to human dignity involved in racial propaganda may be seen as being at least as significant and as deserving of the law's protection as these other public and individual interests.³⁷

The proposed laws focus on the probable results of certain types of public expression, rather than on the contents of those expressions. Thus liability under the proposed offences arises only if the material in question is expressed in a "threatening, abusive or insulting" fashion, and if the expression is not "threatening, abusive or insulting" liability cannot arise.

The Commission believes that the proposed offences, defined by the precondition that the material must be "threatening, abusive or insulting", do not extend the thresholds by which speech is regulated under existing law. For example, speech is already regulated by the *Police Act 1892* where it is "threatening, abusive or insulting".³⁸ In relation to the construction of those terms and free speech limits, in *Brutus v Cozens* Lord Reid said:³⁹

"Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond anyone of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded."

³⁷ M Weinberg QC *Anti-Semitism And The Law* Paper delivered to Mount Scopus Memorial College 5 March 1989.

³⁸ Ss 44, 59.

³⁹ [1973] AC 854, 862.

5. RECOMMENDATIONS

5.1 Proposed amendments

The Commission recommends that new provisions should be included in the criminal law to outlaw certain kinds of racially inflammatory activity, and that these offences should take the form of four amendments to the *Criminal Code* as appear below.

5.2 Racial hatred offences

(a) Possession of racially inflammatory material for publication, distribution or display

An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being published, distributed or displayed whether by himself or another, guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby.

(b) Publication, distribution or display of racially inflammatory material

An amendment to the *Criminal Code* making a person who publishes, distributes or displays written material which is threatening, abusive or insulting guilty of an offence if he intends hatred of any identifiable group to be stirred up or promoted thereby.

5.3 Harassment, alarm, fear or distress offences

(a) Possession of racially inflammatory material for display

An amendment to the *Criminal Code* making a person who has in his possession written material which is threatening, abusive or insulting, with a view to its being displayed whether by himself or another, guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.

(b) Display of racially inflammatory material

An amendment to the *Criminal Code* making a person who displays written material which is threatening, abusive or insulting guilty of an offence if such display is intended or likely to cause serious harassment, alarm, fear or distress to any identifiable group.

5.4 Interpretation

The terms used in the provisions proposed above have the following interpretation:

"Display", and related expressions, in relation to written material means display in or within view of a public place.

"Distribute", and related expressions, in relation to written material means distribute to the public or a section of the public.

"Identifiable group" means any group of persons identifiable by race, colour, ethnic or national origin or nationality (including citizenship).

"Publish", and related expressions, in relation to written material means publish to the public or a section of the public.

"Written material" includes any poster, graffiti, sign, placard, leaflet, handbill, writing or other visible representation.⁴⁰

5.5 Mode of trial and penalties upon conviction

(a) Mode of trial

The Commission recommends that the proposed offences should be triable on indictment but that they should be triable summarily at the defendant's option.

⁴⁰ The Commission emphasizes that, in relation to the proposed "harassment, alarm, fear or distress" offences, those offences are intended to apply only to the face of such material and not to its contents. Further discussion of this aspect appears at paras 6.3 and 6.8 below.

(b) Penalties

The Commission recommends the following penalties:

(i) In relation to the proposed racial hatred offences:

on conviction on indictment a term of imprisonment not exceeding two years or a fine of up to \$7,500 or both; and

on conviction for a summary offence six months' imprisonment or a \$2,000 fine or both.

(ii) In relation to the proposed harassment, alarm, fear or distress offences:

on conviction on indictment, imprisonment for a term not exceeding twelve months or a \$3,000 fine or both; and

for conviction of a summary offence, three months' imprisonment or a \$1,000 fine or both.

6. EXPLANATION OF PROPOSED OFFENCES**6.1 Intention of proposed amendments**

The Commission has proposed a legislative response to the problem of incitement of racial hatred on a limited, rather than a general, basis. The proposed laws are intended to stop the intensive visual propaganda campaign demonstrated by racist posters and graffiti.

In other jurisdictions - the United Kingdom, for example⁴¹ - a more general approach renders unlawful not only the publication, distribution and display of visual or written propaganda but a variety of other "public acts" including oral racist remarks, the wearing of insignia and uniforms, the presentation of racist plays and broadcasts and the like.

⁴¹ *Public Order Act 1986* (UK) Part III.

The Commission has chosen to regulate only the publication, distribution and display of *written material* which incites racial hatred towards, or inspires serious harassment, alarm, fear, or distress in, racial groups.

The Commission has adopted this approach for a number of reasons. A primary reason is its concern for the implications of any restrictions on concepts of freedom of speech. In addition, the major acts which incite race hatred are already regulated to a substantial degree: in criminal laws such as those regulating disorderly conduct including threatening, abusive or insulting (spoken) words and behaviour,⁴² and in the Australian Broadcasting Tribunal's restrictions on the broadcasting on radio and television of race-hatred material.⁴³ Western Australia does not suffer from the racist political demonstrations or riots which have characterized the law's development in the United Kingdom or Canada, and our ethnic tensions are different from those suffered in jurisdictions such as New Zealand. It is therefore necessary to ensure that only actual problems so far apparent in this State be subject to a legislative response. Trying to enact a comprehensive legislative solution to 'hypothetical' situations risks over-reaction or overkill, and this would unnecessarily inhibit acceptable forms of expression or action.

The proposed amendments should not be taken as constituting the precise wording the legislation should contain. They have been cast in specific terms to indicate one way of achieving the intention of the Commission's recommendations.⁴⁴

6.2 Attorney General's consent to proceedings

The Commission recommends against the inclusion of any Attorney General consent requirement to initiate proceedings under any of the proposed laws. In general, the Attorney General's consent is not required for criminal prosecutions.⁴⁵ The Commission is of the view that the location of a discretionary power of this kind in the office of Attorney General is:

⁴² *Police Act 1892* ss 44, 54, 59.

⁴³ See footnote 35 above.

⁴⁴ Legislative models studied elsewhere include the following statutes or other legislative instruments: *Race Relations Act 1965* (UK) s 6; *Canadian Criminal Code* s 281.2(1) and s 281.2(2) (1970); *Race Relations Act 1971* (NZ) s 25; *Racial Discrimination Bill 1975* (Cwth) cl 28; *Public Order Act 1976* (UK) s 5A; *Public Order Act 1986* (UK) s 5 and Part III; *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW) s 20D; *Broadcasting and Television Act 1942* (Cwth) ABT Radio Program Standard 3, Interim Television Program Standard 2 (1986); *Children's Television Standard 12* (1984).

⁴⁵ Exceptions include prosecution for offences described in footnote 47 below

- * undesirable, as it is more likely than not to import a politicisation or a public perception of politicisation of the prosecution process;
- * unnecessary, given the Attorney General's traditional power of entering a *nolle prosequi* to proceedings;⁴⁶ and
- * unjustified by any parity with existing prosecutorial discretions or mechanisms in relation to the enforcement of other criminal laws similar in character to those proposed.⁴⁷

The need for the Attorney General's consent to initiate proceedings under racial hatred laws in comparable jurisdictions has been widely criticized. It has been identified as a major barrier to prosecutions under those laws⁴⁸ and as one of the principal reasons for their apparent under-utilization, lack of success and thus inefficacy. Moreover, the argument remains that regardless of whether cases do or do not proceed under the Attorney General's consent, notwithstanding the merits of any particular exercise of that discretion, the location of such a power to prosecute in the Attorney General is inevitably open to the various allegations that the application of such laws is selective, reluctant, ambivalent or lacking in genuine concern.

6.3 Tiered offences

Of the proposed offences one tier consists of **racial hatred** offences and the other comprises offences of **harassment, alarm, fear or distress**. The central distinction between the two tiers is that the proposed **racial hatred offences** require proof of a specific intent to stir up or promote hatred. By contrast, the **harassment, alarm, rear or distress** offences do not necessarily require the prosecution to prove any intent; instead, they require proof that the unlawful activity in question was either intended or likely to cause serious harassment, alarm, fear or distress. The offences are cast in different formulations because it is the Commission's conclusion that in some cases actual or intended display of racially inflammatory material

⁴⁶ *Criminal Code* s 581.

⁴⁷ Offences in Chapter LV of the *Criminal Code* (corruption of agents, trustees and others in whom confidence is reposed), prosecution for which requires the consent of the Attorney General (s 545), do not fall within this description.

⁴⁸ Human Rights Commission *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No. 7 1983) para 61; J Gibson *Racial Vilification: An Interventionist View* Paper Melbourne June 1989; E Barendt *Freedom of Speech* (1985).

might not be accompanied by a specific intent to incite hatred, but the display might still have serious consequences which warrant the intervention of the criminal law.

The essential factor in all offences is the public **display** of racist material and the adverse effect this will have on the intended targets and the community generally. The proposed **harassment, distress, fear, or alarm** offences relate to the display of racist material which is slightly less offensive. They proscribe a narrower range of offending behaviours characterized by the public's attention being involuntarily drawn to the material. For these lesser offences the intention is that only the display (that is only the face of that which is exposed to the field of vision of the public) would fall within the description of the offence. The contents of a book or leaflet, hidden from view unless there were some intervening act such as a person opening it, would not. Such contents would not affect members of the public unless they were already known to them; in that case any reaction would be caused by the previous knowledge, not the display.

Other distinctions between the two tiers are discussed below in relation to unwanted applications of the proposed laws and penalties.⁴⁹ In ascertaining the culpability element in either tier of the offences, the quantity of material in issue will be a relevant fact.

6.4 Possession of racially inflammatory material

The Commission wishes to emphasize that the mere possession of racially inflammatory material is not of itself made unlawful in the proposed amendments. Liability arises if, and only if, the material is possessed for the purpose of publication, distribution or display to the public. In assessing such purpose, an important factor would be the quantity of material found in the defendant's possession.

6.5 Public order elements

Public order elements appear in the definitions of each of the proposed offences in the requirements that:

- * the contents of the material be threatening, abusive or insulting; and

⁴⁹ See paras 6.8 and 6.10.

- * "hatred" should be an intended outcome; or, alternatively
- * "serious harassment, alarm or distress" should be a likely outcome of the conduct proscribed.

6.6 'Race' and related expressions not defined

The Commission has not attempted to define 'race' in the offences proposed as it is of the view expressed in the *Franklin Dam Case*⁵⁰ that "Race' is not a term of art; it is not a precise concept". Nor under the Commission's proposal does a need arise to define the related expression 'racial', as a quality of 'hatred', since the Commission has preferred to utilize the simpler term 'identifiable group' in defining the proposed offences.

6.7 'Religion'

'Religion' has not been included as an identifier since the present reference is confined to an examination of **racial hatred**. In any event, the distinction between 'race' and 'religion' is not definitive. A common religion might be a relevant factor in determining whether any group of persons is identifiable by 'race' or 'ethnic origin'. Thus in the New Zealand case of *King-Ansell v Police*,⁵¹ it was held that Jewish persons are protected by the phrase "ethnic origins", and in *Mandla v Dowell Lee*,⁵² the House of Lords identified a common religion and a common cultural tradition as two of the factors characteristic of the existence of a racial group. In that case, it was held that Sikhs are a racial group definable by reference to "ethnic origins".

6.8 Unwanted applications

The danger of unwanted applications of the proposed laws has been minimized in the Commission's proposals: in the **racial hatred** offences, by requiring proof of a specific intent and in, the **harassment, alarm, fear or distress** offences by restricting their ambit.

⁵⁰ *Commonwealth v Tasmania* (1983) 158 CLR I, 243 per Brennan J.

⁵¹ [1979] 2 NZLR 531.

⁵² [1983] AC 548.

In the case of the **racial hatred** provisions, the offences require an element of specific intent. This will preclude unintended applications of the legislation, for example against *bona fide* booksellers.

In the case of the **harassment, alarm, fear or distress** offences, which include an element of likely outcome, the device of limiting the range of activities falling within the operational ambit of those offences has been employed. This can be seen by comparing the two types of offences and the activities which they prohibit. The **racial hatred** offences apply to three modes of communicating racially inflammatory material - publication, distribution or display. *Bona fide* booksellers and other unintended targets will not be caught by these offences, because the offences are not concerned with the contents of books unless they are "threatening, abusive or insulting" AND intended to be published, distributed or displayed with the intention of thereby inciting racial hatred. In contrast liability under the **harassment, alarm, fear or distress** offences will not arise if the material is possessed merely for publication or distribution, but only if the person intends to display or actually displays such material to the public. The latter offences are concerned with external visible representations which are either possessed with a view to displaying them, or which are actually exposed or exhibited to the general field of vision of passers-by AND which are either intended or likely to cause serious harassment, alarm, fear or distress.

Some racist material will not be caught by the **harassment, alarm, fear or distress** offences, for example racist pamphlets whose covers are innocuous. If the contents of those pamphlets are intended to incite racial hatred they will fall under the provisions of the **racial hatred** offences. If not, if the innocuous cover is merely displayed to the public no offence will be committed. The Commission is not satisfied that this form of racist propaganda is likely to be a problem in practice.

In the Commission's view precise definitions of the proposed offences along the lines described above obviate the need for specific statutory defences. Accordingly, specific statutory defences are not provided in the Commission's formulation of the proposed offences.

6.9 Proceedings on indictment

Each of the proposed offences is triable on indictment. The reason for this recommendation is the Commission's view that, given the seriousness of the proposed offences and the nature of the prohibited activities, and the relationship of the activities and the offences to concepts of freedom of expression, defendants should have, if they wish, the benefit of a trial by jury.

6.10 Penalties

The Commission believes that offences which are defined by differential liability thresholds warrant differential sanctions. Since proof of a *likely* outcome is a lower threshold of liability than proof of a specific intent, the Commission has suggested lower penalties for the offences defined by the lower culpability.

7. NO RECOMMENDATIONS

The possibility of creating non-criminal remedies for racial incitement was raised in the Commission's Issues Paper. Two potential remedies were identified: first, the creation of a statutory right of action for defamation of a group and second, the introduction of "racial harassment" as a specific ground of complaint in the *Equal Opportunity Act*. Such remedies would be primarily aimed at certain secondary effects of the poster campaigns which have been postulated, for instance expressions of racist abuse in neighbourhoods and schoolyards.

7.1 Statutory claim for group defamation

The Commission does not recommend the creation of a group defamation remedy. In reaching this conclusion the Commission draws support from two main considerations. First, the possibility of creating such a claim has been previously considered and expressly rejected both in this Commission's Report on **Defamation**⁵³ and the Australian Law Reform Commission's Report on **Unfair Publication: Defamation and Privacy**.⁵⁴ The reasons given in those reports for not extending existing defamation law to claims for group defamation have equal cogency in the present context. Second, a statutory right of action for group defamation would rely for a remedy (or remedies) on existing defamation laws in Australia

⁵³ Project No 8 1979.

⁵⁴ Report No 11 1979.

which three Law Reform Commissions have found to be in need of comprehensive legislative reform.⁵⁵ Consequently the enactment of a statutory right for group defamation attaching as it would to existing defamation law would be at this stage inappropriate and untimely.

7.2 Racial harassment

Notwithstanding that an amendment along such lines has considerable merit the Commission does not recommend the introduction of "racial harassment" as a specific ground of complaint in the *Equal Opportunity Act*. The Commission believes that racial harassment and abuse in schoolyards and neighbourhoods would need to be the subject of a further and different inquiry which would investigate not only racially based harassment but other motivations for such disputes. Such an inquiry would properly involve a comprehensive examination of alternative dispute resolution legislation and structures and, in particular the New South Wales Community Justice Centres system. It could give careful consideration to the question of whether laws and mechanisms for neighbourhood dispute resolution would be more satisfactory and effective if located within the existing infrastructure of the Equal Opportunity conciliation jurisdiction or whether the New South Wales separate mediation model is to be preferred.

7.3 Search and seizure

The efficacy of the proposed "possession" offences depends on search and seizure powers. The Commission recommends that there is no need to create a new power in relation to the proposed new offences since section 711 of the *Criminal Code* provides such a power.

7.4 Use of words or behaviour not prohibited

The use of inflammatory oral expressions or behaviour which incite racial hatred in public is not prohibited in the proposed offences.

This is because where these activities are threatening, abusive or insulting (in other words disorderly conduct) they already constitute breaches of the criminal law - for instance sections

⁵⁵ See footnote 82 above. See also *Judge attacks defamation law* The West Australian 9/8/89; *Judge criticises defamation laws* The Australian 4/8/89.

54 and 59 of the *Police Act 1892*⁵⁶ - and, unlike clandestine racist billposting and graffiti-writing activities, there is no problem of detecting offenders.

8. AFTERWORD

The Commission's recommendations do not attempt to deal with racism in all its manifestations. The recommendations are confined to the public dissemination of material by those whose aim is to stir up racial hatred or who by poster and similar public displays insult or harass particular racial groups. Although the proposed offences, in conjunction with already existing provisions, should reduce public displays of racism and to that extent diminish racial prejudice, it by no means follows that a racist organization so minded will not resort to other means of achieving its aims.⁵⁷ It is no part of the Commission's terms of reference to investigate the workings of racist groups in Australia. The National Inquiry into Racist Violence being conducted by the Commonwealth Race Discrimination Commissioner may result in more light being shed on racist groups and on the best way of dealing with them generally.

Finally, while the Commission's recommendations may serve some educational purpose by signalling the community's commitment to the fundamental value of human dignity, their value in this respect is complementary to any existing or future State and federal education programmes to counter racism.

M E RAYNER, *Chairman*

R L LE MIERE

C W OGILVIE

J A THOMSON

17 October 1989

⁵⁶ Proposals for reform of sections 54 and 59 of the *Police Act* are canvassed in the Commission's Discussion Paper on *Police Act Offences* (Project No 85 1989) paras 6.13-6.19.

⁵⁷ In this regard studies done in the United States on racist groups in that country and on their many and shifting forms indicate other unlawful activities undertaken by them. One such group - a small secretive body with strong millenarian overtones - engaged in murder, robbery and forgery. Arson, bombing and large scale destruction of public facilities were also planned or contemplated. For a study of the group and its activities see K Flynn and G Gehardt *The Silent Brotherhood* (1989); T Martinez and J Gunther *The Brotherhood of Murder* (1988). Martinez was a member of the group but turned informant.

Appendix

WRITTEN SUBMISSIONS*

Target Survey

Aboriginal Legal Service of Western Australia
St Andrew's Church, Subiaco
Apex Club of Eastern Hills
Apex Club of Floreat
Apex Club of Girrawheen
Apex Club of Hamersley
Apex Club of Victoria Park
St Augustine's of Canterbury, Bayswater
Australian Asian Association
Balga Catholic Parish
Balga Anglican Parish
Bayswater Anglican Parish
Bayswater City Council
Beaconsfield International Child Care Centre
Bioethics Centre Western Australia
Buddhist Society of W.A.
Burmese Association of Western Australia
Chinese Christian Church, Perth
Christmas and Cocos Island Welfare Association
St Christopher's Church, City Beach
Chung Wah Association
Churches of Christ People Concerned for Peace and Social Justice
Claremont Anglican Parish
Community Parish of Bedford and Inglewood
Cottesloe Uniting Church
Council for Civil Liberties in Western Australia
Curtin School of Social Work
Embleton Anglican Parish
Ethnic Communities Council of Western Australia - Youth Committee
St Francis Xavier's Parish, Armadale
City of Fremantle
Fremantle Migrant Resource Centre
City of Gosnells
Holy Rosary Parish, Shenton Park
Islamic Council of Western Australia
Indian Society of Western Australia
St Joachim's Parish, Victoria Park
St Joseph's Parish, Bassendean
St Joseph's Parish, Subiaco
St Jude's Parish, Langford
St Kieran's Parish, Tuart Hill
Leederville Catholic Parish
Lions Club of North Perth
St Luke's Church, Maylands
Main Roads Department

Malaysia Singapore Australia Society
St Mary's Cathedral, Perth
St Matthew's Church, Shenton Park
St Matthew's Church, Armadale
Migrant Welfare Workers Association of Western Australia
Shire of Mundaring
Nedlands Anglican Parish
New Burma Times
St Oswald's Church, Subiaco
City of Perth
St Peter's Church, Mount Hawthorn
St Peter's Church, Victoria Park
Race Watch Group
Rukmariwa - Indonesian Association of Western Australia
Sacred Heart Parish, Mount Lawley/Highgate
Shenton Park Catholic Parish
Special Government Committee on Aboriginal/Police and Community Relations
Sri Lanka (Ceylon) Association of Western Australia
State School Teachers Union of Western Australia
Tamil Association of Western Australia
Trades and Labor Council of Western Australia
Vietnamese Buddhist Association
City of Subiaco
Wesley Central Mission, Uniting Church, Perth
West Perth Catholic Parish
The Western Australian Chinese Chamber of Commerce
Western Australian Council of Jewry
Western Australian Council of Social Services
Western Australian Women's Advisory Council to the Premier
Western Australians for Racial Equality
Women's Electoral Lobby
Women's Information and Referral Centre
World Ninja Society

Self-initiated submission documents

T L Barrett
F J Boyle
A Boyle
M F Buonaiuto
S Cochrane
M Chiaz
J Cannard
W Carter
L Dassanayale
J D'Souza
M D'Souza
C De Silva
K M Fitzgerald
R Graham
S Gokari

L J Goody
B A Grein
R Hogben
P Kessly
A Kerth
N Mitchell
B McQuillan
B MacIntyre
G Perera
O Perera
F Perera
G Ranzetta
M Roberts
J M Vandervalk
M Watson
T Welan
M Ward
P Wearne

Submissions by letter

Australian Journalists' Association (WA)
Mr W G Burong
Dr J L Cameron
Dr D Chandraratna
Council of Hungarian Associations in Western Australia
Croatian National Congress
Mr B A Dockery
Keep Australia Beautiful Council (WA)
Mrs P Klacar
Mr B G Louvel
Mrs L McCallum
Macedonian Community of WA
Macedonian United Society of WA
Mrs B Macintyre
Ms N Maxwell
Men's Confraternity (Inc)
Mr J D Moody
Multicultural and Ethnic Affairs Commission
Mr and Mrs W Shilkiu
Mr S Suriyam
Dr K D Suter
Ms R Tapper
Dr M Tonkinson
Mr D Ur
Mr E Warner
Mr P R Weaver
Youth Legal Service

* Some submissions requested confidentiality and thus are not identified in this list.