THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 86

Incitement To Racial Hatred

ISSUES PAPER

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

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Preface

The Commission has been asked to consider what changes to the law, if any, are needed to deter adequately acts which incite racial hatred.

The Commission has not formed a final view on the issues raised in this Issues Paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by Friday, 6 October 1989.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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Abbreviations

HRC	Human Rights Commission
NSW bill	New South Wales Anti-Discrimination (Amendment) Bill 1989

Chapter 1
INTRODUCTION

1. THE TERMS OF REFERENCE

1.1 The Attorney General has asked the Commission to consider:

- what changes to the law, if any, are needed to deter adequately acts which incite racial hatred.

1.2 The reference raises three basic questions:

- Do existing laws apply to acts which incite racial hatred? If so,
- Do they adequately deter such acts? In either case, if not,
- Should laws be enacted to deal specifically with acts which incite racial hatred?

2. THE SCOPE OF THE REFERENCE

1.3 The immediate problem giving rise to the reference is the placing of inflammatory posters (and graffiti) in public places in Perth, Fremantle and metropolitan suburbs from 1983 to the present time. The posters appear to be part of campaigns to ensure a continuing level of racism in the community. They refer to three particular groups: Asians, "Coloureds" and Jews.[1] The Commission decided to focus primarily on 'acts' which comprise the campaigns just described, but this paper also discusses wider issues, such as racial harassment.

1.4 A proper interpretation of the terms of reference confines the Commission to an examination of those laws which have a **deterrent** function. By 'adequately deter', the Commission has not assumed any unrealistic standards of *absolute* deterrence; what the Commission has in mind are laws which can reasonably be expected to minimize the particular mischief(s) concerned.

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[1] A recent cover story on the posters and the persons responsible for them appears in *Harvest of Hate* Lyndall Crisp, *The Bulletin* 4.4.1989 p 42.

1.5 For the purpose of the present reference, **hatred** includes:

> The condition or state of relations in which one person hates another; the emotion of hate; active dislike, detestation; enmity, ill-will, malevolence,[2]

and racial hatred has a corresponding meaning. In this context, the term racial is of central importance. It may be given two interpretations deriving from the following discrete theories ascribed to the corresponding term 'racism':

> Racism is the dogma that one ethnic group is condemned by nature to congenital inferiority and another group is destined to congenital superiority.[3]

More recently, it has been proposed[4] that 'the belief in the inferiority of the outgroup is not crucial'[5] to racism; 'it is the non-negotiable nature of ... cultural difference'[6] which must set races apart. On this construction:

> [T]he character of the new racism ... is a theory that I shall call biological, or better, pseudo-biological culturalism. Nations on this view are not built out of politics and economics, but out of human nature. It is in our biology, our instincts, to defend our way of life, traditions and customs against outsiders - not because they are inferior but because they are part of different cultures.[7]

3. NATURE OF THE PROBLEM

1.6 Some of the statements contained in the posters are as follows:

> Asians Out Or Racial War
>
> 400,000 Jobless 400,000 Asians Out!

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2 *The Shorter Oxford English Dictionary* (3rd ed 1944). The *Public Order Act 1986* (UK) employs the concept of 'racial hatred', ch 3 paras 3.6ff below. The related concepts of 'racial vilification' and 'racial disharmony' are employed in the Anti-Discrimination (Amendment) Bill 1989 (NSW), ch 3 para 3.11 and paras 3.3ff below, and the *Race Relations Act 1971* (NZ), ch 3 fn 35 below, respectively.

3 R Benedict *Race and Racism* (1940) cited in S Zubaida *Race and Racialism* (1970).

4 M Barker *The New Racism* (1981).

5 C Husband *RACE in Britain* (1987) 319 - referring to Barker, ibid.

6 Ibid.

7 M Barker (1981) 23.

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

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 organised 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. The Commission has noted with concern public reports[8] of violent incidents allegedly associated with citizens' attempts to prevent racist bill posting or to remove or deface posters already on public display. The Commission's notice has also been drawn to incidents of verbal abuse and physically threatening behaviour which might have been engendered or emboldened by messages conveyed in poster campaigns.[9]

1.7 It must be stressed that incitement to violence or disorder should not be confused with incitement to racial hatred. Poster campaigns are such that any racial hostility or ill-will they cause is not likely to result in immediate acts of public disorder or violence.[10] They are not usually personally distributed but affixed to public property surreptitiously. The targets of the posters may be intimidated, as their messages intend, from protesting. However, racial hatred can manifest itself in other unacceptable or antisocial ways.

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8 "Police hunt racist gang after bashings" Robyn Cash, *The West Australian* 7.1.1989 p 3; "Terror gangs target stores" Frazer Guild, *The Daily News* 9.6.1988 p 8.

9 West Australians for Racial Equality *Towards a just society: Facing Racism* (Seminar Proceedings 1986): "...at the beginning of 1986, I went shopping with my husband on a Thursday night. My husband stopped at traffic lights and as we turned left a car turned towards us and blew its horn... In the other car there were three children and two women, one mature lady and one about 20 years old. They stopped next to our ear and shouted very loudly at us 'Go back to your country!'. They kept following us and yelling 'You have to go back to your country'. We wanted to reply something, but we couldn't because the three children in the car were still shouting at us".

10 Cf the disorders in the UK: Lord Scarman *Report on the Red Lion Square Disorders* (1975) Cmnd 5919.

1.8 The posters and their racist messages have been appearing in large numbers in public places (particularly along school bus routes) over a long period of time. There is particular concern about the effects such messages might have on the views and behaviour of children and young people. For instance, the Commission has been told of incidents where children in playgrounds have mimicked the slogans appearing on posters and of racist playground behaviour, particularly towards children of Asian origin. The Commission has also been told that some jobless young people are voicing similar sentiments to those found in the poster campaigns.

4. THE FINANCIAL COST

1.9 In addition to any social costs to the community, the poster campaigns have also been a financial burden, ultimately to tax and rate-payers. This is because the posters have been plastered on public property and public utilities such as lightpoles, bus shelters, telephone boxes, traffic lightboxes, buildings, fences and walls etc.[11] They have been fixed to property by means of a strong glueing agent which makes them virtually impossible to remove without defacing the surfaces they are adhered to. State and federal government agencies whose property is or has been subject to damage from 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. The total cost of removing racist posters between 1983 and the present time is not known but it cost the Perth City Council alone $10,000 to remove them between May 1987 and June 1988.

5. THE MISCHIEFS IN ISSUE

1.10 From the foregoing discussion, three main mischiefs may now be identified:

(1) The problem of the inflammatory poster campaigns consisting of high volume, continuing and frequent expressions of racist propaganda;

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[11] For instance, see: "Racist welcome to city" *The Daily News* 26.5.1989 p 3; "Racist posters get a pasting" *The West Australian* 8.12.1988 p 13; "Racist slogans daubed on city office" Bill Lang, *The Daily News* 27.7.1988 p 2; "Storm Brews Over Anti-Asian Posters" *The Daily News* 8.12.1987 p 6; "Racist slogans daubed on car" *The West Australian* 7.12.1987 12; "Racists strike at buses" Peter Hooker, *The West Australian* 1.12.1987 p 4.

(2) The problem of the poster campaigns consisting of ongoing damage to public property at significant expense to tax and ratepayers; and

(3) The general problem of racist statements and expressions in the community generally.[12]

6. SOME COMMUNITY ATTITUDES[13]

1.11 In 1988, the Commonwealth Advisory Council on Multicultural Affairs released a discussion paper[14] which was informed by an extensive process of community consultation and public participation. The paper said[15] of the appearance of inflammatory posters (attacking Asians, Jews and Freemasons) in a number of capital cities during the consultation period:[16]

> Tacitly to allow such behaviour implies tolerance, to the point of acceptability. It could even encourage illegal and perhaps violent reprisals. Outlawing such behaviour may prevent reactions of this kind. It may eliminate provocation, reinforce the unacceptability of such behaviour, and other individuals to live without overt prejudice, fear of harassment or unfair stereotyping.

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12 The kinds of racist statements and expressions which fall for consideration under this mischief have been well summarised elsewhere - (a) *Offensive words*: e.g. 'wog', 'Pom', '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 crime, 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 a some racial groups are more animal an human:* Human Rights Commission* P*roposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation* (Report No 7 1983) para 19. *The Human Rights Commission has since been reconstituted as the Human Rights and Equal Opportunity Commission. References in the present paper to Report No 7 are cited to the former ascription.

13 Newspaper reports of public reactions to the posters appear from time to time including "Hill to toughen up racism laws" *The Sunday Times* 19.2.1989 25: The Minister for Multicultural and Ethnic Affairs, Mr Gordon Hill MLA, was reported as saying that in response to the appearance of anti-Asian posters on bus and train stations "members of the Chinese community had told him they were afraid to travel overseas because of the possibility of violence acts against their families"; "Racist posters distress patients attending clinic" Cathy O'Leary, *The West Australian* 21.1.1988; "Racist posters anger Asians" *The West Australian* 19.1.1988 p 15; "Asians told to ignore taunts" Anne Merbel, *The Sunday Times* 27.9.1987 p 20; "Youth council fears more racial conflict" *The West Australian* 30.7.1987; "Fear Grips Perth Asians" Frazer Guild, *The Daily News* 28.7.1987 p 1.

14 Advisory Council on Multicultural Affairs *Towards a National Agenda For A Multicultural Australia* (A Discussion Paper 1988).

15 Id para 2.6.

16 Ibid.

A policy options paper was also released in 1988.[17] Commissioned by the Commonwealth Office of Multicultural Affairs, it discusses the problem of race propaganda and concludes with the following assessment:[18]

> It is clear that public order laws as they are currently framed in most States have limited potential to control race propaganda. They do little to inhibit the dissemination of inflammatory materials or to control racist poster campaigns in public places. Penalties for littering and vandalism are relatively light and in any case rely on the offender either being caught in the act or otherwise positively identified. Anti-discrimination legislation at Commonwealth and State levels is overtly cumbersome and difficult to pursue in court, the onus being on the plaintiff to demonstrate that dissemination was due to racial prejudice, rather than some other cause. It is important that some effective avenue of redress is made available to those who have been racially defamed or against groups who deliberately set out to incite hatred against ethnic minority groups.

A public seminar in Perth in 1986 recommended that: "Legislation be enacted to protect individuals and groups" with reference to racial hatred activities.[19] Grassroots responses from otherwise law-abiding citizens have included attempts to spray out the racist messages on the posters and to remove the posters.[20]

7. PUBLIC COMMENT INVITED

1.12 The Commission invites comment on racist materials (and graffiti) in general, and in particular on

- the effects they may have had on members of the public, their children and families, and the effects on citizens as neighbours and members of communities, and

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17 M Allbrook *Community Relations In A Multicultural Society* (1988).

18 Id 15.

19 West Australians for Racial Equality *Towards a just society: Facing Racism* (Seminar Proceedings 1986) 18.

20 As reported for instance, in 'A one-man race war' *The Sunday Times* 8.1.1989 and 'Group tackles racist posters' *The West Australian* 27.8.1987.

- whether any of the circulars (or graffiti) incite (or potentially incite) racial hatred.

Chapter 2
EXISTING LAWS

A. CRIMINAL LAWS

1. NO LEGISLATIVE POLICY

2.1 There are no existing criminal laws[1] specifically making acts which incite racial hatred unlawful. The question of whether any Western Australia laws apply to such acts invites the preliminary observation that Parliament never intended any of the potentially applicable provisions under existing criminal law to serve a comprehensive policy of addressing any or all the mischiefs specifically caused by acts which incite racial hatred. Consequently, if present laws apply to particular incidents of such mischief, then they do so only in an indirect and haphazard way and only when expressions of racial hatred happen to take the form of acts or consequences presently proscribed.

2. THE RELEVANT ACTIVITIES

2.2 The poster campaigns encompass several discrete activities in the chain of events leading to poster display on public property:

(1) the printing of posters;

(2) the possession and/or distribution of the posters;

(3) the act of attaching such material (and by analogy, graffiti) on walls, bus stops and other public property; and

(4) the phenomenon of racist posters (or graffiti) being on public display and in continuing view to members of the public, *after* the activities of publication and posting have been completed.

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[1] There is no legislation of any kind in any Australian jurisdiction which directly deals with incitement to racial hatred or racial defamation. The exception is the Australian Broadcasting Tribunal's Radio Program Standard 3 prohibiting broadcast material which "is likely to incite or perpetuate hatred against, or gratuitously vilifies any person or group on the basis of ethnicity, nationality, race, gender, sexual preference, religion or physical or mental disability".

3. POLICE ACT APPLICATIONS

2.3 Incitement to racial hatred is not of itself an offence under the *Police Act 1892*. Overtly racist conduct may be punishable under the Act as disorderly conduct[2] or wilful damage to property.[3]

4. DISORDERLY CONDUCT

2.4 Some racially provocative acts will come within the ambit of the disorderly conduct provisions of the Act. Sections 44, 54 and 59 of the Act all deal generally with offences related to disorderly conduct. They include 'disorderly conduct',[4] using 'profane, indecent or obscene language' or 'threatening, abusive or insulting words or behaviour' with 'intent'[5] to breach the peace or 'whether calculated to lead to a breach of the peace, or not'.[6] They are

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2 Ss 44, 54 and 59.

3 S 80(1): Every person who destroys or damages any real or personal property of any kind, whether owned by Her Majesty or any public or local authority or by any other person, is guilty of an offence. Penalty: A fine not exceeding five hundred dollars or imprisonment for any term not exceeding six months or both.

4 S 54: Every person who shall be guilty of any *disorderly conduct* on any street, public place, or in any passenger boat or vehicle, any Police Station, or lock-up, shall, on conviction, be liable to a penalty of not more than five hundred dollars for every such offence, or to imprisonment, with or without hard labour, for any term not exceeding six calendar months, or to both fine and imprisonment. [Emphases added]
Disorderly conduct has been interpreted to include behaviour which is sufficiently ill-mannered or in such bad taste as to meet with the disapproval of a well conducted and reasonable person and which also tends to annoy or insult such persons as are faced with it sufficiently deeply and seriously to warrant the interference of criminal law: *Melser v Police* [1967] NZLR 437.

5 S 44: Any constable, when so ordered by any officer of police, and any officer or constable of the force whenever called upon by the master or any officer of any ship or vessel (not being then actually employed in Her Majesty's Service and not being a vessel of war, the commanding officer whereof shall hold a commission from any foreign Government or Power), lying in any of the waters of the State or any dock thereto adjacent may enter into and upon such ship or vessel, and without any warrant other than this Act, apprehend any person whom he may find drunk, or behaving himself in an indecent or *disorderly manner*, or using profane, indecent, or obscene language, or *using any threatening, abusive, or insulting words or behaviour, with intent or calculated to provoke a breach of the peace*; and any officer or constable of the force may enter at any hour of the day or night into any house licensed for the sale of fermented or spirituous liquors, or any licensed boarding, eating, or lodging house, and without any warrant other than this Act, apprehend any person whom he may find drunk, or behaving himself in an indecent or disorderly manner, or using any such language as aforesaid or words or behaviour as aforesaid, with intent or calculated to provoke a breach of the peace; and to search therein for offenders and otherwise perform his duty, using as little annoyance to the inmates as possible; and any person so apprehended shall be detained in custody until he can be brought before a Justice to be dealt with for such offence; and every such person so apprehended shall unless a different penalty for his offence be prescribed by this Act be liable on conviction to a fine not exceeding one hundred dollars, or imprisonment for a term not exceeding one month. [Emphases added]

6 S 59: Every person who in any street or public place or to the annoyance of the inhabitants or passengers, shall sing any obscene song or ballad, or write or draw any indecent or obscene word, figure, or representation, or use any profane, indecent, or obscene language, shall be deemed guilty of disorderly conduct and be punishable accordingly, and any common prostitute who shall solicit, importune or accost any person or persons for the purpose of prostitution or loiter about for the purpose of prostitution in any street, or place, or within the view or hearing of any person passing therein, and *any person who shall use any threatening, abusive, or insulting words or behaviour in any public or private place, whether*

used to regulate standards of public behaviour, order and decency.[7] They have been used against protesters,[8] unruly sports spectators[9] and entertainers who transgress acceptable standards of language and conduct.[10] In fairly extreme circumstances, they might be used against those who make racist remarks or display racist insignia on their persons or on posters or flags.[11] It is not sufficient to prove only that the behaviour in question is offensive or disrespectful or gives rise to remonstration, or in fact offends the dignity of the hearer, or in fact causes affront. What is 'insulting' depends on the objective interpretation given to the particular words or behaviour by the trier of fact in each case.[12]

2.5 Words or behaviour which incite racial hatred might sometimes constitute offences under these public order rules when such words or behaviour can be characterised as 'disorderly' or 'threatening, abusive or insulting'. However, any application of existing public order rules to inflammatory poster campaigns is severely confined by the following limitations:

(1) From the history of decisions dealing with these rules, it seems unlikely that it would be appropriate to charge a person under these provisions if the 'words' complained of were written, rather than oral. Therefore, it is uncertain whether these offences encompass written forms of 'insulting' conduct such as posters, graffiti, signs, placards, pamphlets or circulars.

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calculated to lead to a breach of the peace, or not, or who shall extinguish wantonly any light set up for public convenience, shall forfeit and pay on conviction any sum not exceeding forty dollars, or may be committed to gaol for any period not exceeding one calendar month. [Emphases added]

7 In 1984-85 there were 1,708 charges under s 54 in Perth and East Perth Courts of Petty Sessions. These included cases of insulting words, threatening words, obscene language, street drinking, urinating in the street and other disorderly conduct of an unspecified nature. There were 227 charges under s 59 (excluding five charges for soliciting). These charges covered broadly similar conduct: insulting words or behaviour, obscene language, threatening words or behaviour or disorderly conduct generally. In a number of cases charges were brought under both sections. There were three charges under s 44, one for disorderly conduct and two for threatening words.

8 *Gerritsen v Smith* (unreported) Supreme Court of Western Australia 16 October 1985 Appeal No 212 of 1985.

9 *Green v Rolfe* (unreported) Supreme Court of Western Australia 14 February 1983 Appeal No 340 of 1982.

10 For instance, against comedians for using obscene language, striptease artists and other performers: Refer 'Have You Heard The One About Our Prude City?' *The West Australian* 10.11.84; 'Baby Doll Defies Ruling On Strip Act' *The West Australian* 26.11.86.

11 In *Jordan v Burgoyne* [1963] 2 QB 744, an equivalent United Kingdom offence (s 5 of the *Public Order Act 1936*) used against a speaker from the 'National Front' who made statements that "Hitler was right" which were insulting to Jews in his audience.

12 *Moran v Stack* (unreported) Supreme Court of Western Australia 31 March 1983 Appeal No 333 of 1982; *Brutus v Cozens* [1973] AC 854.

(2) To found a charge under the rules, it is not clear whether the words or behaviour in question must insult, abuse or threaten someone who is actually present.[13]

(3) To prove a breach of the rules, it is not clear whether the 'insulting' quality of the words or behaviour must objectively be insulting to a majority or a sizeable group of the public.[14]

(4) Section 44 requires proof of an intent to provoke a breach of the peace or that the words or behaviour in question were likely to occasion such breach. Section 59 is not as restricted. Nevertheless, both provisions are under public order provisions and are aimed at preventing and punishing threats to the peace. They might therefore not apply to racist posters which might incite racial hatred while falling short of threatening the peace or causing public disorder.

(5) In any event, the public order policy underlying sections 54 and 59 is such that law enforcement authorities are likely to interpret the proper application of these rules as being limited to situations where the public is immediately exposed to 'disorderly or insulting words' and/or a breach of the peace is imminent. These sections are unlikely to be used against a person who is found putting up racist posters unless a formal complaint is made by a member of the public. If these provisions were interpreted otherwise, in the present absence of any legislative direction police would have to decide if the racist posters were *prima facie* 'threatening, abusive or insulting'.

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13 D Williams *Keeping The Peace* (1967) 163: Chief Justice Street of New South Wales said in 1932 that what the legislature had In mind, in speaking of insulting words, was something provocative, something that would be offensive to some person to whose hearing the words would come'. That person, he said, must be present.
Compare *Parkin v Norman* [1983] QB 92. That decision is authority for a different conclusion, namely that insulting behavour does not lose its insulting character because the persons who have witnessed it have not been insulted. Also, by persuasive authority *Masterson v Holden* [1986] 3 All ER 39, behaviour may be insulting even though it is not deliberately aimed at a particular person or persons if in fact it could be insulting to any member of the public who might see it.

14 *Melser v Police* [1967] NZLR 437.

5. DAMAGE TO PROPERTY

2.6 Attaching material to public property thereby causing damage, is unlawful. Regardless of the content, the posting of notices and writing of graffiti will generally constitute damage to the property defaced, giving rise to a breach either of section 80[15] of the *Police Act* (penalty $500 fine or imprisonment for 6 months or both) or of section 453[16] of the *Criminal Code* (imprisonment for 2 years or if committed by night, 3 years). But there are evidential difficulties in connecting an offender with an act of posting (or writing) which undermine the usefulness of these provisions. These difficulties are not overcome by the fact that a name and address or telephone number often appears on the face of the posters. For similar reasons, applicable local government by-laws under section 218 of the *Local Government Act* and provisions under the *Litter Act* are also largely ineffective.[17]

6. LITTER ACT AND LOCAL GOVERNMENT BY-LAWS

(a) Clear and certain application

2.7 The *Litter Act 1979,* and various local government signs (and reserves) by-laws made pursuant to the *Local Government Act 1960*, clearly and certainly prohibit bill posting.[18]

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15 Reproduced in footnote 3 above.

16 *Criminal Code* s 453; Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and he is liable, if no other punishment is provided, to imprisonment with hard labour for two years, or, if the offence is committed by night, to imprisonment with hard labour for three years.

17 Further discussion of the *Litter Act* and local government by-laws appears in paras 2.7-2.8 below.

18 For instance, sub by-law 559 Municipality of the City of Stirling, *Local Government Act 1960*, by-laws relating to signs, hoardings and bill postings provides: A person shall not bill post within the District of the City of Stirling except on a hoarding approved for that purpose.
"Bill posting" is defined by sub by-law 543 as: The sticking or posting of any bill or painting, stencilling, placing, sticking, posting or affixing of any advertisement on any building, structure, fence, wall, hoarding, sign post, pole, blind or awning or on any tree, rock or other like place or thing so as to be visible to any person in a street, public place, reserve or other land and 'bill post' has a like meaning.
Penalties for conviction of an offence against this by-law include a fine not exceeding $200 or where the offence is one of a continuing nature, a daily penalty not exceeding $20: sub by-law 578. Under the by-laws the council may remove and dispose of posters at the expense of the person or persons responsible for their deposit and recover the expense incurred in the removal and disposal in a court of competent jurisdiction: sub by-law 579.
For variations on the Stirling by-law see: Schedule, *Local Government Model By-Laws (Signs, Hoardings and Billposting)* No 13 (*Government Gazette* (GG) No 42 11.6.1963) and, amendment, (GG No 103 10.12.1964); *City of Perth, By-Laws Relating to Signs*, By-Law No 40 (GG 25.2.1983); *Shire of Wanneroo, By-Laws Relating to Signs, Hoardings and Billposting* (GG 24.8.1984); City of Perth, By-Law No 9 -Parks and Public Reserves, sub by-law 17 (GG 7.9.1966): No person shall deface or write upon or post, stick, stamp, stencil, paint or otherwise affix or cause to be posted...any placard, handbill, notice...writing or picture... upon any tree, building, fence, post, gate, wall - in or around any park or public reserve, without the written consent of the Town Clerk first obtained (GG 7.9.1966); City of

2.8 The *Litter Act 1979* makes unsolicited distribution of publicity material unlawful:[19]

> Except with the consent of the owner or occupier a person shall not leave or post publicity material on any building, fence, furniture, pillar, screen, structure or wall on or adjacent to a public place or vacant land or on or in any unoccupied vehicle in a public place.

'Publicity material' includes "any printed, written, typewritten, embossed or drawn material and includes handbills, leaflets, vouchers, coupons, cards, posters or stickers". [20]

Contravention of the Act entails liability to a maximum penalty of $400.[21]

(b) Deterrent value of Litter Act

2.9 Vigorous and various efforts by the Keep Australia Beautiful Council, the Local Government Association[22] and its members[23] and by local government officers and rangers have been unable to stem the bill posting campaigns and the damage to public property which they cause. In relation to efforts to enforce the *Litter Act*, the Commission has been advised that in 1987 a person who had been served with 10 infringement notices under the *Litter Act* for illegal bill posting was subsequently charged under the Act and pleaded guilty. The court imposed a fine of $500 plus $525 costs.[24] The fine was not paid and in default the court ordered the defendant to serve a custodial sentence of 21 days.[25] On the issue of a bench warrant, the person concerned was taken to Wooroloo Prison Farm where, after discounting for remissions, he served 3 days of the sentence. In a different effort, a city billed certain persons for the cost of removal of posters from city locations, in the amounts of $1,562.97 and $4,297.68. Neither bill was paid, but returned with a card[26] on which was drawn a black man

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Fremantle, By-Law Relating to Parks, Recreation Grounds and Public Reserves, sub by-law 3(c) (GG 6.12.1985).

19 *Litter Act 1979 Regulation* 7.

20 *Litter Act 1979 Regulation* 2.

21 *Litter Act 1979 Regulation* 9(1).

22 "War on graffiti" *The West Australian* 15.3.1989 p 23.

23 As reported in for instance, "Warning on race posters" Carmelo Amalfi, *The West Australian* 16.8.88 p 7; "Bid to ban movement" *The West Australian* 21.8.87 (2nd ed) p 22.

24 Reported in "Nationalist defies court after fines" Julie Walters, *The West Australian* 21.8.1987 p 22.

25 Refer "Racist-poster man says he will go to gaol" *The West Australian* 21.8.87 (2nd ed) p 22.

26 The inscription on the card read "Shove it".

with a bone through his nose together with other caricatured representations of people from other cultures.

2.10 Despite the clear and certain application of the *Litter Act* and the efforts of local government officers to enforce it, the law has not deterred those persons responsible for the racist poster campaigns. Part of the explanation lies in the sheer volume of the racist posters and that they are usually put up under cover of night.[27] Neither the *Litter Act* nor the equivalent offences under relevant by-laws were ever intended to combat organised bill posting campaigns.

7. PROBLEMS OF PROOF AND DETECTION

2.11 The major practical obstacle to any application of present rules to the poster campaigns is one of detecting and proving actual incidents of bill posting.[28] If they are not caught in the act, it would be virtually impossible to prove satisfactorily alleged offenders' connection with the breach complained of under the rule(s) in question. Since most of the inflammatory posters are put up under cover of night, detection would be difficult.

8. ADEQUACY OF EXISTING LAWS

2.12 The existing criminal laws were not enacted to combat specifically racist bill posting and the racial hatred, fear or intimidation which may thereby be engendered. Existing laws do not reach the relevant conduct at each site of the chain of activities leading to the display of racist posters and graffiti. There are no specific laws against the printing, possession or distribution of racist material for the purposes of public display. The activity of posting (racist) bills, which might be proscribed by existing rules, of its nature admits critical problems of detection and proof. In the absence of express legislative provision directed at racial hatred, the application of existing public order rules to acts which incite racial hatred remains uncertain, unclear and ambiguous to citizens and law enforcement officers alike.

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27 In relation to a recent arrest of individuals suspected of billposting, it was reported that they 'were spotted on the roof at 10 pm by a passing police patrol': *Daily News* 5 April 1989 p 3.

28 There is a possibility of laying a charge of conspiracy to damage property against a person found in possession of posters of the type presently distributed on public property throughout the State: *Criminal Code* ss 8, 558-560; 465.

9. PUBLIC COMMENT INVITED

2.13 The Commission invites comment on the need for a clear legislative policy incorporated in new criminal laws which are specifically directed at the punishment of acts which incite racial hatred.

10. OTHER CRIMINAL LAWS OF MORE GENERAL APPLICATION

(a) Sedition

2.14 Chapter 7 of the *Criminal Code* makes a person guilty of sedition if they conspire to effect a seditious enterprise or advisedly publish any seditious words or writings.[29] Seditious words are 'words expressive of a seditious intention'.[30] A seditious intention includes an intention to 'raise discontent or disaffection amongst Her Majesty's subjects' or to 'promote feelings of ill-will and enmity between different classes of Her Majesty's subjects'.[31] In England, it is a crime at common law deliberately to incite class hatred, religious hatred or any other sort of hatred between groups of British subjects. One issue that arises is whether the term 'class' in the definition of seditious intention includes incitement to racial hatred.

(b) Criminal defamation

2.15 Publication of defamatory matter is a criminal offence.[32] Defamatory matter is defined as:[33]

> Any imputation concerning any person or any member of his family, whether living or dead by which the reputation of that person is likely to be injured, by which is likely to be injured in his professional trade, or by which other persons are likely to be induced

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29 *Criminal Code* s 52. The federal *Crimes Act 1914* also contains sedition offences: ss 24C and 24D. High Court cases on these sections include *Burns v Ransley* (1949) 79 CLR 101, and *R v Sharkey* (1949) 79 CLR 121. *Cooper v The Queen* (1961) 105 CLR 177 is a case of sedition brought under the Queensland *Criminal Code*. There is also a Privy Council case arising out of a prosecution under a provision of the Criminal Code of the Gold Coast colony: *Wallace-Johnson v The Queen* [1940] 1 All ER 241.

30 *Criminal Code* s 46.

31 *Criminal Code* ss 44(d) and (e).

32 *Criminal Code* s 360: Any person who unlawfully publishes any defamatory matter concerning another is guilty of a misdemeanour, and is liable to imprisonment for twelve months, and to a fine of $600. If the offender knows that the defamatory matter to be false, he is liable to imprisonment with hard labour for two years, and to a fine of $1,000.

33 *Criminal Code* s 346.

> to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter.

Whether defamatory matter is unlawful if the material relates to a group rather than an individual is uncertain.[34] There is old authority for the proposition that an indictment lies where the object of publication was to excite public hatred against a class of persons.[35] There is also authority to the contrary.[36] The most recent trials for criminal defamation in Perth took place in 1977.[37]

(c) Road Traffic Code 1975

2.16 Road signs and traffic control boxes have been used for racist poster displays. The *Road Traffic Code 1975* makes such activity illegal.[38]

B. CIVIL LAWS

11. DEFAMATION

2.17 As a general rule a defamatory statement is not actionable in civil law if it refers to a large body or class of persons,[39] unless the group or class defamed is so small that the statement can reasonably be taken to refer to each and every member.[40]

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34 In civil law, the general rule is that a group cannot maintain a civil action for defamation unless the group is so small that the defamatory statement can reasonably be taken to refer to each and every member of it, when those individuals may sue in their own right. *Knupffer v London Express Newspapers Ltd* [1944] 1 All ER 495, *Dowding v Ockerby* [1962] WAR 110. Gatley *On Libel and Slander* (8th ed 1981) paras 285-290; Fleming *The Law of Torts* (7th ed 1987) p 510.

35 *R v Osborn* (1732) 2 Barn KB 166; 94 ER 425 and *R v Williams* (1822) 5 B and Ald 595; 106 ER 1308.

36 *R v Orme and Nutt* (1699) 1 Ld Raym 486; 91 ER 1224 and *R v Gathercole* (1838) 2 Lewin 237; 168 ER 1140. *Archbold* 41st ed (1982) paras 25-52 (7) takes the view that some individual must be defamed, directly or by Implication, but adds: 'Possibly a writing which is defamatory of a corporation in the way of its business, and a writing which is defamatory of a body of men which is clearly designated and identifiable may also be indictable.'
Contra *Kenny's Outlines of Criminal Law* (19th ed 1966) 235 cited in Australian Law Reform Commission *Unfair Publication: Defamation and privacy* (Report No 11 1979) para 194 n 3.

37 Although the trials arose out of a number of allegations made in the form of statutory declarations against certain members of the police, it was explained during the trial that criminal defamation proceedings were instituted because the allegations touched on the good name of the whole police force and could weaken the community's confidence in it. For a brief note see Australian Law Reform Commission *Unfair Publication: Defamation and privacy* (Report No 11 1979) paras 199-200.

38 s 301(3): A person shall not, without the consent of the Commissioner of Main Roads, remove, take down, damage, deface or interfere with any traffic sign or traffic-control signal.

39 *Eastwood v Holmes* [1858] 1 F & F 347.

40 *Knupffer v London Express Newspaper Ltd* [1944] 1 All ER 495.

12. EQUALITY-BASED RIGHTS LEGISLATION

2.18 There are no anti-discrimination or equal opportunity laws in Australia which make incitement to racial hatred unlawful.[41]

41 The Human Rights Commission recommended amendments to the *Racial Discrimination Act 1975* (Cth) to cover incitement to racial hatred and racial defamation. The New South Wales Anti-Discrimination (Amendment) Bill 1989 makes provision for civil liability and criminal sanction for racial vilification. Both proposals are discussed in ch 3.

Chapter 3
LEGISLATIVE OPTIONS

A. CRIMINAL REMEDIES

1. TWO MAIN ALTERNATIVES

3.1 The previous chapter identified certain defects which limit the existing criminal law's capacity to combat incitement to racial hatred effectively. From that discussion, two main legislative options arise:

(i) Amendment to existing public order rules; and

(ii) Creation of independent incitement to racial hatred offences.

2. AMENDMENTS TO EXISTING PUBLIC ORDER RULES

3.2 Three amendments may be made to clarify certain terms and elements in existing offences. First, a definition could be inserted which would provide that the proscribed 'words' or 'conduct' includes the display of [threatening, abusive or insulting] **writing, sign or other visible representation**.[1] Such an amendment would go some way to redressing the uncertainty of the current law's application to written forms of insulting behaviour in public.[2]

3.3 Secondly, words or behaviour which incite racial hatred could be deemed to be 'insulting' under relevant provisions in existing rules. Of course, whether or not a particular act or sequence of acts incites or might incite racial hatred would still be left to be determined on the evidence from case to case, by the trier of fact. A variation on this proposal could take the form of an insertion into the present rules of some such clause as "or words or behaviour inciting hatred of any racial group" or "or words or behaviour inciting racial hatred" at appropriate places in the existing rules. For instance, section 59(1) of the *Police Act 1892* would then read:

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1 A similar clause was inserted into the former *Public Order Act 1936* (UK) and has been retained in the *Public Order Act 1986* (UK) where in relation to racial hatred offences, "written material" includes any sign or other visible representation - s 29.

2 Ch 2 para 2.5.

> ...and any person who shall use any threatening, abusive, or insulting words or behaviour, **or words or behaviour inciting racial hatred**, whether calculated to lead to a breach of the peace or not, ...[3]

An amendment along either of these lines would to some extent meet one of the criticisms levelled at existing laws, namely the present absence of Parliamentary expression of disapproval of acts which incite racial hatred. It would also help police in the exercise of their discretion since it would expressly identify racial abuse as a form of language which offends against the section.[4]

3.4 Thirdly, words or behaviour which might otherwise not be found insulting to the mainstream or a majority of citizens, but which are capable of being found on the facts of any particular case to be 'insulting' to a minority of the community, could be presumed to be 'insulting' by an appropriate deeming provision. Such an amendment would clarify one of the existing uncertainties identified in the preceding chapter.[5]

3. INTRODUCTION OF INCITEMENT TO RACIAL HATRED OFFENCES

3.5 It may be preferable to enact new provisions in the *Police Act* which specifically apply to conduct which incites or is likely to incite racial hatred. Models for such specific offences may be found from Canada and the United Kingdom. In 1970, the Canadian Parliament added certain hate propaganda offences to the *Criminal Code*.[6] These include advocating genocide, public incitement of hatred, and wilful promotion of hatred. The Code prohibits public incitement of hatred.[7] The basis of this offence is the incitement of hatred in a 'public place' which is likely to bring about a breach of the peace. By contrast, the separate offence of

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3 A brief history of a similar amendment proposed for the *Public Order Act 1936* (UK) may be found in D Williams *Keeping The Peace* (1967) 169-171.

4 Ch 2 para 2.5.

5 Ibid.
The Canadian *Criminal Code* prohibits public incitement of hatred: RSC 1970, c C-34, s 281.2(1). There the concept of inciting hatred against any "identifiable group" is used. For the purpose of that law, "identifiable group" includes "any section of the public distinguished by colour, race, religion or ethnic origin" - s 281.1(4).

6 An Act to amend the *Criminal Code*, RSC 1970 (lst Supp), c 11, amending *Criminal Code* RSC 1970, c C - 34 - s 281.2(1) hereinafter referred to as the Code.

7 S 281.2(1): Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of (a) an indictable offence and is liable to imprisonment for two years; or (b) an offence punishable on summary conviction.

wilfully promoting hatred[8] does not require that the activity in question be likely to bring about a breach of the peace.[9] In addition, no prosecution may be instituted for that offence without the consent of the Attorney General.[10] Two other elements in the public incitement of hatred offence are 'communicating statements' and 'identifiable group'. Communicating includes communicating by telephone, broadcasting or other audible or visible means.[11] Statements includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations.[12] Identifiable group is defined as any section of the public distinguished by colour, race, religion or ethnic origin.[13] On conviction for public incitement of hatred, the court may order anything by means of or in relation to which the offence was committed, to be forfeited.[14] In addition, a warrant of seizure may be issued by a judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court is hate propaganda.[15]

3.6 Part III of the United Kingdom *Public Order Act 1986* makes it an offence for a person to use words or behaviour, or display written material, which are or is threatening, abusive or insulting if he intends to stir up racial hatred or racial hatred is likely to be stirred up.[16] This provision clearly proscribes the display of written racially inflammatory material which is threatening, abusive or insulting. The offence penalises conduct which is **intended to**

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8 S 281.2(2): Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for two years; or (b) an offence punishable on summary conviction.

9 Law Reform Commission of Canada *Hate Propaganda* (Working Paper 50 1986) 9: For this offence, Parliament enacted certain defences in order to guarantee that freedom of expression would be respected. Subsection 281.2(3) of the *Criminal Code* provides that the person who wilfully promotes hatred shall not be convicted: (a) if he establishes that the statements communicated were true; (b) if, in good faith, he expressed or attempted to establish by argument an opinion upon a religious subject; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred towards an identifiable group in Canada.

10 S 281.2(6).

11 S 281.2(7).

12 Ibid.

13 S 281.1(4).

14 S 281.2(4).

15 S 281.3.
"Hate propaganda" is defined in s 281(3)(8): any writing, sign or visible representation that… the communication of which by any person would constitute an offence under section 281.2.

16 *Public Order Act 1986* (UK) c 64 Part III: Racial hatred: s 18(1) A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if - (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

stir up racial hatred or which is likely to stir up such hatred.[17] The Act defines racial hatred as "hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins".[18] The offence may be committed in a public or private place.[19] However, no offence is committed where the words or behaviour or the written material displayed by a person inside a dwelling are not heard or seen except by other persons in that or another dwelling; and it is a defence for the accused to prove that he was inside a dwelling and had no reason to believe that the words or behaviour used or the written material displayed would be heard or seen by a person outside that or any other dwelling.[20] Where a person is convicted for the display of written material the relevant material may be forfeited by order of the court.[21]

3.7 The introduction of specific legislation somewhat along the lines of the Canadian and United Kingdom provisions described in the preceding paragraphs, would certainly demonstrate Parliament's disapproval of public acts inciting racial hatred including poster campaigns which target particular groups in the community identifiable by a differential socio-cultural background. Such legislation would also serve as a symbol of Parliament and the community's commitment to the fundamental value of human dignity. However, without more, such legislation would still face the same practical difficulties confronting existing public order rules specifically, the problems of detection and proof. Public order rules which proscribe insulting words or conduct, (whether or not they refer to inciting racial hatred) are reactive to a problem whose diminution requires pro-active measures. Various activities in the causal chain leading to the poster campaigns were identified in chapter 2.[22] Reactive laws can

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17 This consequence-based element with its two-armed *disjunctive* alternatives of 'intent' and 'likely effect' may be compared with its analogue in the equivalent racial disharmony offence of the Race Relations Act 1971 (NZ). S 25(1) (reproduced in full in footnote 87 below) prohibits the publication or distribution of written matter, or use of words in public places being matter or words which are threatening, abusive or insulting. The essential elements of the offence require proof of: (1) *intent* 'to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race or ethnic or national origins of that group of persons' AND (2) *effect* of the matter or words being 'likely to excite hostility or ill-will against ... any such group of persons … on the ground of colour, race etc ...': s 18(5).
"In New Zealand it has been observed that the criminal provision will only be able to be applied to the worst cases due to the requirement of proof of intention. Justice Wallace pointed out in his paper *Balancing majorities and minorities* at the Australian National Human Rights Congress, 1987 that 'the difficulty of proving intent under s 25 is so great that the section is only able to be used in a limited number of cases. It may also often be difficult to convince the police that it is desirable to undertake lengthy and difficult prosecutions'": K Sperling and D Maron *Racism In The Media: If Legislation, What Kind?* (1988) Migration Monitor 16, 17.

18 S 17.

19 S 18(2).

20 Ss 18(2), (4).

21 S 25.

22 See para 2.2.

only respond to site (3) in the causal chain namely, the activity of physically posting or displaying inflammatory material on public property. Pro-active laws would target the activity sites (1) - the publication and/or distribution of racist posters and (2) - the possession of the posters. An example of pro-active provisions along these lines is also provided by the 1986 United Kingdom *Public Order Act*.

4. PROACTIVE MEASURES

(a) Publication of racially inflammatory material

3.8 Publishing or distributing written material which is threatening, abusive or insulting and which is intended or which in all the circumstances is likely to stir up racial hatred is an offence under the United Kingdom Act.[23] It is a defence for an accused who is not shown to have intended to stir up racial hatred "to prove that he was not aware of the content of the material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting".[24] 'Publication' and 'distribution' of written material under this section include references to the publication or distribution of offending material to the public or a section of the public.[25] Thus, material circulated to members of an association is no longer excluded from the definition of 'publication' and 'distribution'. Again, conviction under this section may lead to the relevant material being forfeited by order of the court.[26]

(b) Possession of racially inflammatory material

3.9 As proposed in the White Paper on the *Review of Public Order Law*, one of the most radical changes brought about in the 1986 Act was the introduction of a new offence of possessing racially inflammatory material.[27] Section 23 makes it illegal to possess material

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23 *Public Order Act 1986* (UK) Publishing or distributing written material s 19: (1) A person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if - (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

24 S 19(2).

25 S 19(3).

26 S 25.

27 (1985 Cmnd 9510) para 6.8-6.9: There has also been some difficulty in making section 5A [of the *Public Order Act 1986*] effective against those who manufacture or supply racially inflammatory material unless a specific instance of distribution can be proved against them. The government proposes to create an offence of *possessing* racially inflammatory material *with a view to distribution or publication*. Under this proposal, if a person was charged with possessing threatening, abusive or insulting material likely or intended to stir up racial hatred, the court would be required to draw such inferences as seemed reasonable from an actual quantity of material in his possession, and to consider the likely or intended

which is threatening, abusive or insulting in all the circumstances, with a view to display, publication, distribution, etc, and with the intention or likelihood of stirring up racial hatred.[28] "Written material" encompasses any sign or other visible representation.[29] In proceedings for an offence under this section if the prosecution does not rely on proof of intention to stir up racial hatred then it is a defence for an accused to prove that he was not aware of the content of the written material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. The formulation of this defence is identical to that in the publishing offence and similarly, is narrower than the equivalent defence in the 'use or display' offence.[30] The possession offence is backed up by an enter and search provision in the Act[31] which empowers a justice of the peace to issue a search warrant where there are reasonable grounds for suspecting that an offence of possessing racially inflammatory material is being committed. Again, conviction for an offence under this section may lead to a court ordering the forfeiture of any written material to which the offence relates.[32] Persons found guilty of the offences just described are liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both; or on summary conviction

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consequence of its distribution. This would mean that someone handed a racially inflammatory leaflet in the street would not be committing the offence, but that someone keeping several hundred leaflets for distribution might well come within the scope of the provision. At present, even where a source of such material is located, there is little that can be done to obtain the evidence needed to bring proceedings. Investigations often depend on the willingness of suspects to allow premises to be searched. This is unsatisfactory, and it would be more so for the new offence of possessing racially inflammatory material described above to be dependent on the co-operation of those whose conduct it seeks to catch. To make the proposed new offence enforceable, the government considers that there should be an associated power of search, seizure and forfeiture in respect of racially inflammatory material. [Emphases added]

28 Possession of racially inflammatory material s 23: (1) A person who has in his possession written material which is threatening, abusive or insulting, or a recording of visual images or sounds which are threatening, abusive or insulting, with a view to – (a) In the case of written material, its being displayed, published, distributed, broadcast or included in a cable programme service, whether by himself or another, or (b) in the case of the recording, its being distributed, shown, played, broadcast or included in a cable programme service, whether by himself or another, is guilty of an offence if he intends racial hatred to be stirred up thereby or, having regard to all the circumstances, racial hatred is likely to be stirred up thereby. (2) For this purpose regard shall be had to such display, publication, distribution, showing, playing, broadcasting or inclusion in a cable programme service as he has, or it may recently have been inferred that he has, in view. (3) In proceedings for an offence under this section it is a defence for an accused who is not shown to have intended to stir up racial hatred to prove that he was not aware of the content of the written material or recording and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting.

29 S 29.

30 See para 3.6 above.

31 Powers of entry and search s 24: (1) If in England and Wales a justice of the peace is satisfied by information on oath laid by a constable that there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of s 23, the justice may issue a warrant under his hand authorising any constable to enter and search the premises where it is suspected that the material or recording is situated.

32 Power to order forfeiture s 25: (1) A court by or before which a person is convicted of - (a) an offence under s 18 relating to the display of written material, or (b) an offence under section 19, 21 or 23, shall order to be forfeited any written material or recording produced to the court and shown to its satisfaction to be written material or a recording to which the offence relates.

to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both.[33]

5. ATTORNEY GENERAL'S CONSENT - BARRIER TO PROSECUTIONS

3.10 It may be too early to assess the effectiveness of these new or reformulated provisions.[34] As with the former 1936 Act, proceedings for offences under the 1986 Act cannot be instituted except by or with the consent of the Attorney General.[35] The previous analogous provisions of the 1936 Act (excepting the possession offence, which is entirely new) were the subject of criticism in relation to the requirement that the Attorney General consent to a prosecution. For instance, in its 1984 Annual Report,[36] the United Kingdom Commission for Racial Equality said:

> The Commission expressed the view, in its 1983 Annual Report, that the number of complaints had diminished because people had become disheartened following the reluctance of successive Attorneys-General to bring prosecution. Between January 1981 and July 1984, 30 individuals were prosecuted and 24 were convicted. Given the success rate of 80%, we take the view that the Attorney-General should be more ready to bring proceedings and strike a new balance with inevitably a lower success rate but with more convictions.

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33 S 27(3).

34 The 1986 Act came into force on 1 April 1987 in respect of ss 17 to 29. There have been no prosecutions under ss 18, 19 and 23 since that date. Under the 1936 Act, between 1979 and 1986 there were 65 prosecutions relating to incitement to racial hatred. These resulted in 43 convictions: Advice from (UK) Attorney General's Chambers in letter dated 5 April 1989.

35 s 27.
Attorney General consent is required for prosecution of the equivalent criminal offence under the *Race Relations Act 1971* (NZ) s 26. The Act makes it an offence to incite racial disharmony s 25(1): *Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine no exceeding $1,000, who with intent* to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons In New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons - (a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or (b) Uses in any public place (as defined in section 40 of the *Police Offences Act 1927*), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting, being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.
S 9A of the (NZ) Act creates civil liability for racial disharmony and is identical to s 25(1) reproduced above minus that part which is underlined. The principal differences between the corresponding civil and criminal provisions are that a mental element of 'intent' must be proved in criminal proceedings, where proof of such element is not required in a civil claim, and criminal proceedings require Attorney General consent. The only reported case of a prosecution under s 25(1) is *King-Ansell v Police* [1979] 2 NZLR 53.

36 Para 33.

The statutory requirement of Attorney-General consent to institute proceedings for racial hatred offences (both in the earlier provisions under the 1936 Act and under the present Act) is in addition to the Attorney General's existing exclusive power to enter a nolle prosequi in indictable offences.[37] Perhaps the policy behind the requirement was to reassure free speech advocates that prosecutorial powers under these provisions will not be misused or alternatively, to provide a mechanism for confining the legislation to a long-term educative role rather than an immediate deterrent-punitive one. Commenting on this feature of the United Kingdom racial incitement offences, one writer has suggested that:[38]

> Governments perhaps fear that too many prosecutions would undermine respect for these laws, and it is likely that on occasion political considerations have dictated a decision not to take legal proceedings, although the speech fell squarely within the terms of the state.[39]

The Australian Human Rights Commission has characterised the Attorney General's consent requirement as one of the disadvantages of a criminal law approach to the present problem:

> 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.[40]

6. THE PUBLIC ORDER CONTEXT

3.11 While the United Kingdom racial hatred offences are based on considerations of public order, their scope is not limited to any specific materialisation of public disorder such as for instance, threats of physical harm. By contrast, the proposed criminal offence of racial vilification under the 1989 New South Wales Anti-Discrimination (Amendment) Bill, is

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37 11 Halsbury *Laws of England* (4th ed 1976) paras 222-224. For a local commentary on the Australian Attorney General nolle prosequi power refer to S J Gibb *Promotion of The Public Interest: The Attorney-General's Role* (University of Western Australia Law Honours Thesis 1978) 11.

38 E Barendt *Freedom of Speech* (1985) 162.

39 Barendt footnotes this comment citing I A Macdonald *Race Relations The New Law* (1977) 138-9.

40 *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No 7 1983) para 61(c).

specifically confined to unlawful acts of racial hatred which directly employ threats of harm or incite others to threats of harm to persons or property.[41] However, as the 1986 United Kingdom does, the NSW bill requires Attorney General consent to prosecution.[42] The offence is formulated as a public order rule. Its proposed location in the NSW equal opportunity legislation[43] may confuse incitement to public disorder with incitement to racial hatred.[44] This possible confusion is further underscored by the Quasi-prosecutorial role which the bill invests in the President of the Anti-Discrimination Board.[45]

7. POTENTIAL ASPECTS OF SPECIFIC LEGISLATION IN SUMMARY

3.12 Assuming that it was thought desirable to recommend and adopt legislation specifically directed at incitement to racial hatred, in broad outline particular aspects of such legislation might include:

(1) that the use of words or behaviour or the display of written material which is threatening, abusive or insulting is an offence if it is intended or likely to incite racial hatred;

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41 (NSW) Anti-Discrimination (Amendment) 1989 Schedule 1(1) inserting Division 3A - Racial Vilification into the principal Act s 20D(1): It is unlawful for a person, by a public act to promote or express hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means of - (a) threatening physical harm towards, or towards any property of, the person or group of persons; or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

42 (NSW) bill Schedule 1(1) inserting s 20d(2) into principal act.

43 *Anti-Discrimination Act 1977* (NSW).

44 Although criminal and civil remedies for inciting racial disharmony are both provided in the *Race Relations Act 1971* (NZ), its original ambit and differential history excludes it from the same criticism. Similarly, the original draft of the Racial Discrimination Bill 1975 included a provision making incitement to racial hatred or promotion of racial superiority an offence requiring proof of 'intent's 28: A person shall not, with intent to promote hostility or ill-will against, or to bring into contempt or ridicule, persons included in a group of persons in Australia by reason of the race, colour or national or ethnic origin of the persons included in that group - (a) publish or distribute written matter; (b) broadcast words by means of radio or television; or (c) utter words in any public place, or within the hearing of persons in any public place, or at any meeting to which the public are invited or have access, being written matter that promotes, or words that promote, ideas based on - (d) the alleged superiority of persons of a particular race, colour or national or ethnic origin over persons of a different race, colour or national or ethnic origin; or (e) hatred of persons of a particular race, colour or national or ethnic origin. Penalty; $5,000.

45 (NSW) bill Schedule 1(4) Prosecution for serious racial vilification s 89B: (1) The President - (a) after investigating a racial vilification complaint; and (b) before endeavouring to resolve the complaint by conciliation, shall consider whether an offence may have been committed under section 20D in respect of the matter subject of the complaint. (2) If the President considers that an offence may have been committed under section 20D, the President shall refer the complaint to the Attorney-General.

(2) that the offence must be committed in a public place or the words communicated publicly;

(3) that racial hatred includes hostility or ill-will against any person or persons or a group of persons on the grounds of colour, race, ethnic or national origins;

(4) that publishing or distributing written material which is threatening, abusive or insulting is an offence if it is intended or likely to incite racial hatred. 'Publication' or 'distribution' means publication or distribution to the public or a section of the public (clauses (2) and (4) above to apply);

(5) that possession of racially inflammatory material which is threatening, abusive or insulting with a view to its being displayed, published, distributed in public or to a section of the public is an offence if it is intended or likely to incite racial hatred (clauses (2) and (4) above to apply);

(6) that powers of entry and search of premises where it is suspected that such material is in possession be granted to magistrates who may issue warrants if satisfied by certain information on oath;

(7) that where a person is convicted of one of the above kinds of offences a court have the power to order the forfeiture of any written material to which such offence in question relates;

(8) that such offences be triable on indictment or punishable summarily at the defendant's option.

8. PUBLIC COMMENT INVITED

3.13 The Commission invites comment on the alternative options outlined above. In particular, the Commission invites views as to whether there is a need for any changes to the criminal law at all or whether there could be negative consequences of introducing any new rules. For example, could such charges

(a) provide further opportunities to disseminate racist attitudes;

(b) make martyrs of those charged; or

(c) unduly interfere with the traditional liberties of the individual to express a particular viewpoint? This last might depend on the exact formulation of the legislation. The objection would have less force if the provision were confined to threatening, abusive or insulting words or behaviour, or to acts done with the *intent* of inciting racial hatred (as distinct from acts which are *likely* to do so).[46]

3.14 If there should be new laws, should they be limited to amending the existing public order rules or are new laws incorporating a clear legislative policy specifically directed at the punishment of acts which incite racial hatred necessary? If the latter alternative is preferred, the Commission further invites comment on how wide such specific laws should be; in particular whether they should prohibit only the use of words or behaviour or the display of written material or whether they should also target the publication or distribution of racially inflammatory written material, or reach further still, to the possession of such material intended for public distribution or display.

B. LITTER ACT & BY-LAW AMENDMENTS

(a) Amendment to the Litter Act

3.15 It might be suggested that 'publication' and 'possession' offences along the lines suggested in relation to the *Police Act 1892*[47] should also be considered under the *Litter Act* which prohibits the posting of publicity material on private or public property without the owner's consent. The Commission does not consider that this is a viable option, firstly because the *Litter Act* applies to 'public' acts, and possession and publication therefore fall outside its scope. Secondly, the material to which the Act applies does not become 'litter' until some act is done to it, namely its attachment to property without authority; neither possession nor publication come within the scope of the Act until that point. Thirdly, it might be hard to link possession or publication of publicity material with relevant acts of littering under the Act.

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46 A further discussion of (a), (b) and (c) is contained in ch 4.

47 See paras 3.8-3.10 above.

(b) Create model by-laws under Local Government Act

3.16 It might be suggested that model by-laws under the Local Government Act should be created to clarify and improve the uniformity of existing by-laws which ban bill posting and require prior approval from local government authorities to be obtained before bills may be posted on public and private property; Such might strengthen present by-laws which require council approval for bill-posting, by a further requirement that they include an 'authorisation clause' to be printed at the bottom of such bill together with a deeming provision making the 'authorised person' liable for indemnification of all costs for poster removal and related repairs to property damage thereby. By-laws could require the faces of posters and handbills to include a warning that bill posting on public property is unlawful without prior consent of the owner.[48] A law of this kind would be outside the scope of the *Litter Act* and *Local Government Act* by-laws because it would need to be directed at poster publishers in general. In any event, such amendments would not improve the marginal deterrence value of existing and applicable by-laws because the people who are responsible for the inflammatory poster campaigns are highly unlikely to comply with such requirements.

C. CIVIL REMEDIES

9. NON-CRIMINAL REMEDIES

3.16 An examination of non-criminal remedies, specifically the civil law options below benefits from a shift in focus from the mischief of the poster campaigns to the mischief of racist statements generally. Amendments to defamation law and equality-based rights legislation might address the latter problem. The primary purpose of such legislation is to attach certain forms of civil liability to public expressions of racist statements and to provide civil relief for persons injured thereby.

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48 Submission, Keep Australia Beautiful Council, 14 April 1989.

(a) Statutory right of action for defamation of a group

3.17 At the moment, public statements which defame groups of people are not actionable in civil law. Some people believe that such statements should be actionable not only by an **individual** affected by the statement but by the whole **group** to which the defamatory statement refers. The latter option[49] would involve creating a 'class' action or group proceeding. Under the present rules a class action does not exist except in the form of a representative action[50] in which damages cannot be claimed. It would be hard to justify the creation of such a procedural mechanism unless it were to apply to all civil rights of action. That option is outside the terms of reference and is not considered. In relation to the former option, creating a substantive right in an individual to bring an action for defamation of a group where such individual can show membership of the group defamed, it is within these terms of reference to propose the creation of a statutory right of action for defamation of a group in individual proceedings.

3.18 This option has been raised in other contexts.[51] In its *Unfair Publication Report*, the Australian Law Reform Commission said that:

> The suggestion attracted considerable support, particularly among persons concerned with ethnic groups. Its prime use would, undoubtedly, be to give redress to ethnic or religious groups affected by some adverse generalisation.[52]

3.19 The Human Rights Commission[53] has recommended that a racial defamation provision be inserted into the federal *Racial Discrimination Act*[54] so as:

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49 Discussed in Law Reform Commission of Western Australia *Report on Defamation* (Project No 8) paras 10.2-10.6.

50 Western Australia *Rules of the Supreme Court* O 18 R 12.

51 Human Rights Commission *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No 7 1983); Australian Law Reform Commission *Unfair Publication: Defamation and privacy* (Report No 11 1979); Australian Law Reform Commission *Defamation – Options for Reform* (Discussion Paper 1 1977).

52 Id para 96.

53 The former Human Rights Commission has since been reconstituted as the Human Rights and Equal Opportunity Commission. Only the views and recommendations of the former Commission are involved in the present paper. Thus, to save confusion, it is hereinafter referred to as the Human Rights Commission.

54 *Racial Discrimination Act 1975* (Cth).

> [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.[55]

3.20 Appropriate remedies for group defamation would include an injunction against repetition or an order for correction or declaration of falsity of the defamatory statement(s). Relief of these kinds benefit all members of the group defamed. It might be necessary to exclude damages from any statutory-based claim, in fairness to potential defendants who might otherwise face a multiplicity of individual actions for damages. The present procedural bar to class actions for damages would be effectively bypassed and plaintiffs would have an unfair advantage of forcing settlement. Finally, the possibility of allowing damages but putting a statutory ceiling on the aggregate amount, as proposed in the New South Wales racial vilification bill involves further problems unless further qualifications are included. since any ceiling amount may be absorbed by one or a few members of the group defamed who happen to get to the court before other group members have initiated proceedings.

(b) Equality based rights legislation

(i) Amendments to the Equal Opportunity Act

3.21 Another legislative option would be to introduce the concept of unlawful 'racial harassment' into the *Equal Opportunity Act*. The definition would include verbal and written racist statements and other forms of racial harassment. It would constitute a ground of complaint under areas currently protected by the Act, namely employment, accommodation and education. Support for this proposal is found in recent state and federal case law where unlawful racial and sexual 'discrimination' has been interpreted to include acts of verbal harassment.

3.22 Sexual discrimination has been interpreted as including "the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner".[56] Sexual harassment has been found to include the

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55 HRC (Report No 7 1983) para 53.

56 Nathan J in *R v Equal Opportunity Board; ex parte Burns and another* [1985] VR 317, 329.

display of offensive posters.[57] Einfeld J in that case said that to be actionable sexual harassment must be either persistent or (exceptionally) of such a nature or made in such circumstances or between such people that a single act or statement might constitute harassment. Racial harassment can take similar forms to sexual discrimination and harassment: in a recent Victorian action[58] the plaintiff complained that he was subjected at work to a regular and constant barrage of racial taunts such as 'wog', 'Greek bastard' and 'black Greek wog', found by the court to have been made with malice and venom by fellow employees. He was found to have been the victim of racial discrimination under section 9(1) of the Commonwealth *Racial Discrimination Act*, and awarded $7,000 damages for his ordeal.

3.23 In the Western Australian case of *Kwa v Secretary for Local Government and others*,[59] the complainant alleged that he had been discriminated against in his employment, and that he had been subjected to detriment.[60] He gave evidence that his supervisor had placed a scandalous poem on his desk and had made various insulting remarks, such as telling him to go back to where he came from, and telephoning him and saying "Sorry I wing the wong number". The Equal Opportunity Tribunal found the complaint substantiated that the complainant had been treated differently because of his race, that at least some of the racially insulting remarks had been made and that the incident of the racially offensive poem placed on Mr Kwa's desk had been deeply insulting to him. The Tribunal found that as a result the complainant suffered hurt, humiliation and some ill-health and awarded damages of $5,000.

3.24 One of the advantages of using 'racial harassment' as a gateway concept is that it generally precludes trivial complaints (in the sense of singular or isolated incidents) while admitting serious causes either because of their frequency or persistence or, exceptionally, per Einfeld J's dictum.[61]

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57 *Bennet v Everitt* (1988) EOC 92-244 per Einfeld J at 278. Id, 77, 280. Media comments on this aspect of the judgment appear in "Defending my right to put pin-ups on my walls" Professor P Singer, *The Herald* December 1988, and "What Einfeld said on proof and dirty posters" J Hall, *The Herald* 13.12.1988.

58 *Peter Kordos v Plumrose (Australia) Limited* (unreported) County Court of Victoria, 10 March 1989, No 86602688 1986.

59 (1987) EOC 92-213.

60 *Equal Opportunity Act 1984* (WA) s 37(2): It is unlawful for an employer to discriminate against an employee on the ground of the race of the employee - … (d) by subjecting the employee to any other detriment.

61 See *Bennet v Everitt* above. The New Zealand Human Rights Commission definition of the analogous concept 'sexual harassment' includes, *inter alia*, conduct which is of a serious nature or which is persistent: cited in CCH A*ustralian and New Zealand Equal Opportunity Law and Practice* vol 1 58-200.

3.25 The proposal to introduce an express ground of unlawful 'racial harassment' into the *Equal Opportunity Act* merely formalises recent case law. If implemented it would clarify the status of racist or race-based verbal and written harassment in areas currently protected under the Act. But should the proposed ground of unlawful racial harassment apply beyond currently protected areas to other areas or public places generally? The ground of complaint of racial vilification in the New South Wales Bill[62] applies to certain public acts generally. The justification for extending the scope of the present Act in relation to the proposed ground of racial harassment, lies partly in the Commission's concern[63] that incidents of racist abuse might be occurring in neighbourhoods and schoolyards which are not presently covered by the Act. Consideration should be given to introducing an express ground of unlawful racial harassment into the *Equal Opportunity Act*, and to extending the ambit of such ground beyond the currently protected areas under the Act.

3.26 Finally, because racist abuse often intimidates people to silence and inaction, a third potential amendment to the *Equal Opportunity Act* should be considered, namely giving the Commissioner an initiatory power in order to investigate complaints.[64] The New South Wales bill makes provision for this contingency in another way, by allowing community organisations and bodies to lodge racial vilification complaints on behalf of an individual or individuals.[65]

3.27 The last two of the three suggested amendments to the *Equal Opportunity Act* might require further consideration because extending the operation of 'harassment' into the public arena and granting an initiatory power could have ramifications beyond the scope of this reference. The first suggestion made above could, however, be brought into the Act without such effects. Notwithstanding the differential terminology - 'incitement to racial hatred' and

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62 See para 3.32 below. The civil provision against exciting racial disharmony in the *Race Relations Act 1971* (NZ) applies to 'public places' (as defined in the *Police Offences Act* (NZ) s 40).

63 See ch 1 para 1.9.

64 The need for initiatory powers was flagged in the Equal Opportunity Commission Annual Report (1988); the Parliamentary Commissioner has power to investigate complaints on his or her own motion: *Parliamentary Commissioner Act 1971* s 16.

65 Schedule 1(3) inserting s 88(1A): A racial vilification complaint in writing may be lodged with the President - (a) ...; or (b) by a representative body on behalf of a named person who is a member, or named persons who are members, of the racial group concerned.
Schedule 1(Z) inserting definitions into s 87 of the principal Act: 'Representative body' means a body (whether incorporated or unincorporated) which represents or purports to represent a racial group of people within New South Wales (whether or not the body is authorised to do so by the group concerned) and which has as its primary object the promotion of the interests and welfare of the group.

'racial vilification' - the federal and New South Wales examples which might affect the proposed 'racial harassment' amendment are briefly discussed below.

(ii) Federal Racial Discrimination Act 1975

3.28 In order to cover racist statements or propaganda of a serious and damaging kind,[66] the Human Rights Commission recommended an amendment to the federal *Racial Discrimination Act 1975*. It proposed the introduction of a new provision to make it unlawful:[67]

> [F]or 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.[68]

3.29 The criterion proposed by the Commission for making words unlawful is based on their consequence; namely the likely effect of such words resulting in hatred, or contempt for or violence towards a person. This may be contrasted with the contents-based formulation under the New South Wales bill.[69] The HRC proposal excludes certain 'valid' activities.[70]

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66 HRC *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No 7) para 55: Examples would include the leaflets placed in letterboxes by extremist organisations nominating certain races as plotting to overthrow the government or public speeches calling for the forceful repatriation of certain ethnic groups. The Commission has received many complaints relating to actions of this kind.

67 Id, para 53. Prior to Report No 7, the HRC published the following documents: *Incitement to Racial Hatred: Issues and Analysis* (Occasional Paper No 1 1982); *Incitement to Racial Hatred: The International Experience* (Occasional Paper No 2 1982); *Words That Wound* Proceedings of the conference on Freedom of Expression and Racist Propaganda, Melbourne 1982 (Occasional Paper No 3 1983).

68 Ibid.

69 See para 3.32 below.

70 HRC (Report No 7 1983) at para 53, valid activities instanced by the Commission included the publication or performance of bona fide works of art; genuine academic discussions; news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of issues of public policy. "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 are 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 1930's 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

Breach of the proposed amendment in the first instance would give rise to conciliation procedures under the *Racial Discrimination Act*. In the event of conciliation failing, the matter may be referred for determination to the Human Rights and Equal Opportunity Commission.[71] The Commission may grant various forms of relief including orders restraining repetition, and granting (excepting representative complaints) damages or restitution.[72] Where a respondent fails to comply with the Commission's determinations, enforcement proceedings in the Federal Court may be instituted by the complainant or the Commission.[73]

(iii) New South Wales racial vilification bill

3.30 In December 1988 the Premier and the Attorney General of New South Wales released for public discussion a draft bill which would make racial vilification unlawful.[74] The bill proposes amendments to the New South Wales *Anti-Discrimination Act 1977*.[75] The bill prohibits acts of racial vilification by making it unlawful:

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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 causes for justifiable publications may 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." id, para 55.

71 *Racial Discrimination Act* (Cth) ss 24E, 25A.

72 S 25Z: After holding an inquiry, the Commission may - (a) dismiss the complaint the subject of the inquiry; or (b) find the complaint substantiated and make a determination, which may include anyone or more of the following: (i) a declaration that the respondent has engaged in conduct rendered unlawful by this Act and should not repeat or continue such unlawful conduct; (ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant; (iii) a declaration that the respondent should employ or re-employ the complainant; (iv) except where the complaint was dealt with as a representative complaint - a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered by reason of the conduct of the respondent; (v) a declaration that the respondent should promote the complainant; (vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant; (vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

73 S 25ZA.

74 Anti-Discrimination (Amendment) Bill (NSW) 1989.

75 The Victorian *Equal Opportunity Act 1984* is also undergoing a current review by the Victorian Law Reform Commission. However, the Victorian Commission is not examining the issue of racist incitement, harassment or vilification by words or conduct. The terms of the reference are: To inquire into and report on the efficiency and effectiveness of the *Equal Opportunity Act* in eliminating discriminatory behaviour in the community; providing the public with appropriate and speedy redress of complaints; in particular to review: (i) the functions, powers and procedures of the Equal Opportunity Commissioner and the Equal Opportunity Board; (ii) the scope and definition of the existing grounds of unlawful discrimination; and (iii) whether additional jurisdictions should be given to the Commissioner and Board to deal with discrimination on the grounds of sexual preference, age and spent convictions.

for a person, by a public act to promote or express hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.[76]

'Public act' is defined as:

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material; and

(b) any conduct, not being a form of communication referred to in paragraph (a) (observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia); and

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or groups of persons on the ground of the race of the person or members of the group.[77]

3.31 The New South Wales bill[78] and the HRC Report both adopt a formula of a general prohibition with exclusion of certain activities. It is worth contrasting this approach with the equivalent New Zealand civil provision.[79] Under that provision, there is no cause of action unless the words or matter in question are 'threatening, abusive or insulting'. That gateway requirement avoids the need for express defences and exclusions as rendered in the New South Wales bill and HRC proposal. The need to prove that the words or matter in issue were

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76 NSW Anti-Discrimination (Amendment) Bill 1989 Schedule 1(1) inserting Division IIIA - Racial Vilification s 20C into the principal Act.

77 Anti-Discrimination (Amendment) Bill (New South Wales) 1989 Schedule 1 inserting Division IIIA - Racial Vilification, definition section 20B, into principal Act.

78 The section expressly excludes the following acts from the scope of unlawful racial vilification: Schedule 1(1) inserting s 20C(2) into the principal Act: Nothing in this section renders unlawful - (a) a fair report of a public act referred to in subsection (1); or (b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division III of Part III of the *Defamation Act 1974* or which is otherwise subject to a defence of absolute privilege in proceedings for defamation; or (c) a public act, done recently and in good faith, for academic, artistic, scientific, research or religious purposes or for other purposes in the public interest, including discussion or debate about expositions of any act or matter.

79 Reproduced in ch 3 footnote 35.

or are 'threatening, abusive or insulting' probably excludes most statements of facts and most political debate which touches on racial issues.[80]

> Simply to report high Aboriginal rates of imprisonment, for example, might excite racial hostility... but unless some conclusion denigrating Aboriginal people were drawn, or factual material were presented in an insulting way, such a report would not be 'threatening, abusive or insulting' matter. This formulation means that some publications, which in fact increase racial tension, would not be covered...[81]

3.32 In addition to remedies already available under the Act[82] the proposed bill makes additional types of orders, specific to racial vilification, available to the Tribunal, in particular, orders for published apologies and retractions.[83] In relation to the Tribunal's existing power to order awards of damages the bill makes three significant changes to the Tribunal's powers of relief. First, it limits the **aggregate** amount awarded against a defendant, where two or more complaints are grounded on the same breach, to $40,000 (the existing ceiling of awards of damages for individual claims under the Act).[84] Secondly, the Tribunal is given a wide discretion to make orders for damages 'as it thinks fit'[85] including the power to direct how awards are to be applied. The discussion paper accompanying the bill gives the example of the Tribunal exercising this power by directing that an award of damages be applied to the funding of a community education programme in a particular area or sector.[86]

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80 K Sperling and D Mason *Racism In The Media: If Legislation, What Kind?* (1988) Migration Monitor 16, 18.

81 Ibid.

82 s 113: After holding an inquiry, the Tribunal may - (a) dismiss the complaint the subject of that inquiry; or (b) find the complaint substantiated and do anyone or more of the following: - (i) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 95, order the respondent to pay to the complainant damages not exceeding $40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct; (ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act or the regulations; (iii) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 95, order the respondent to perform any reasonable act or course of conduct to redress any loss or damage Buffered by the complainant; (iv) make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of this Act or the regulations; or (v) decline to take any further action in the matter.

83 Schedule 1(6) inserting s 113(6)(iiia) into the principal Act.

84 Schedule 1(6) inserting s 113(2) into principal Act.

85 Ibid.

86 New South Wales Government *Discussion Paper On Racial Vilification And Proposed Amendments To The Anti-Discrimination Act 1977* (December 1988). The Discussion paper a so moots the idea of giving the Tribunal a specific power to order a respondent organisation (in the case of large employers, educational institutions, and other large organisations) to institute an education programme to provide information on discrimination, particularly with reference to the ground of race. As envisaged, such an order would be made by the Tribunal in appropriate circumstances, for example, where the conduct

No criteria by which the Tribunal is to exercise its discretion appear in the bill. No guidance is given as to how the discretion is to operate in for instance, individual proceedings for damages arising from racial vilification of a group. In that case, there is the problem of damages equity as between eligible group members. In individual proceedings unless any damages awarded is directed to be paid to all members of the group affected or to a suitable representative body (for example, for specific community purposes), the damages award to any particular complainants may be at the expense of related group members' claims which are still outstanding or have yet to be brought. Thirdly, the bill empowers the Tribunal to award damages in complaints brought by representative bodies. This changes the present Act which excepts damages in representative complaints.[87]

3.33 If it is thought desirable to allow damages in individual or representative proceedings[88] for complaints founded on the proposed ground of racial harassment in cases where the cause is racial harassment of a group,[89] then in addition to any statutory provision for an aggregate ceiling award, consideration should be given amount to (1) a mandatory requirement that in such actions, damages awards must be directed by the Tribunal to be applied to a specific community purpose. The choice of beneficiary under such direction could be left to the court's discretion from case to case or alternatively, certain community purposes or community organisations could be made eligible by proclamation in regulations under the principal Act; or (2) excepting relief in the form of damages from claims brought in individual or representative proceedings for racial harassment of a group. For this purpose further consideration should be given to defining the word 'group' as a class of persons with more than seven members.

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complained of arises mainly out of a general lack of awareness and understanding of race issues and the members, staff and leadership of the organisation will clearly benefit from such education.

87 *Anti-Discrimination Act 1977* (NSW) s 113(b)(i) reproduced in footnote 87 above.

88 Which would constitute an exception to the scope of the damages remedy currently available under the *Equal Opportunity Act 1984* (WA) s 127: After holding an inquiry, the Tribunal may - (a) dismiss the complaint that is the subject of the inquiry; or find the complaint substantiated and do anyone or more of the following - (i) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 107(1), order the respondent to pay to the complainant damages not exceeding $40000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct; (ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act; (iii) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 107(1), order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant; (iv) make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of this Act; or (v) decline to take any further action in the matter.

89 In contrast to racial harassment of an *individual*.

10. PUBLIC COMMENT INVITED

3.34 The Commission invites comment on the alternative civil remedies addressed above with particular reference to:

(1) the creation of a statutory right of action in individual proceedings for defamation of a group; and

(2) introduction of 'racial harassment' as an independent ground into the *Equal Opportunity Act*. Two main issues are raised by this proposal:

(i) formalise existing case law, thus giving 'racial harassment' an operation within areas currently protected under the Act;

(ii) in addition to (i) extend areas of application of 'racial harassment' beyond the present ambit of Act.

Chapter 4
POLICY CONSIDERATIONS

1. THE FUNDAMENTAL ISSUE

4.1 The fundamental issue is whether it is ultimately desirable to prohibit or restrict racist statements made in public. In the resolution of this issue, consideration must be given to competing policy justifications which underlie respective positions supporting and opposing legal measures in this area. The relevant alternative arguments and counter-arguments are set out briefly below.

2. RIGHTS BASED ARGUMENTS

4.2 One of the arguments raised against legal prohibition or regulation of racist statements is that such laws limit freedom of speech. The fundamental merits, value and public interest in the promotion of freedom of speech is undeniable. It is not with the merits of the free speech principle but rather with its scope that differences of opinion lie. Freedom of speech is not an absolute right and is not recognised as such at local, state, federal or international level. In all democratic jurisdictions, free speech is qualified by laws which protect other rights or other public interests,[1] even in societies which guarantee freedom of speech by a written constitution (the United States), or by custom and common law (the United Kingdom and Australia). In determining whether or to what extent freedom of speech should limit the creation of legal prohibitions on racist speech some argue that the line should be drawn at the point where incitement to racial hatred results in violence or imminent violence to the person.[2] Alternatively, the scope could be determined, it might be argued, by reference to the quality of the contents of the speech sought to be regulated. For example, courts and commentators

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1 For instance, contempt law - reflecting the public interest in protecting the administration of justice; the duty of confidentiality whereby the law restrains information communication in certain circumstances because of the public interest in the protection of individuals' confidentiality and privacy; and defamation law underscored by the public interest in protecting individuals' reputation and privacy.

2 *Contra* HRC *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No 7 1983) para 4: 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 rent the social fabric and create the conditions in which discrimination and injustice flourish.

have drawn distinctions between 'political' and 'commercial' and 'cultural or artistic' speech. Historically, courts have accorded speech characterised as 'political' the greatest ambit of protection.[3] As a limiting principle on the application of laws, freedom of speech most especially applies to all forms of political speech.[4] However, even among free speech theorists, no clear definition or description of 'political' speech is available. The question whether racist speech is 'political', invites conflicting replies.

4.3 In the Commission's view, the scope of the free speech principle is best established by consideration of the relevant and competing public interests involved in the present problem. Two principal points arise: first, racist statements themselves intimidate persons to silence. Thus, if the free speech right of persons to express racist opinions in public is upheld it might be at the expense of the rights of others who are effectively silenced. Secondly, the public interest in freedom of speech must be weighed against the public interest in equality-based rights including the right to equality before the law. The best expression of these potentially competing interests is found in the International Covenant on Civil and Political Rights[5] and the International Convention on the Elimination of all Forms of Racial Discrimination.[6]

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3 See generally E Barendt *Freedom of Speech* (1985).

4 Ibid. See also (Cth) Constitutional Commission *Report of the Advisory Committee On Individual & Democratic Rights Under The Constitution* (1981) at p 54: In the area of speech, there are obviously substantial fields in which governments should properly be permitted to retain the capacity to regular various forms of speech. Thus, for example, the area of defamation law is complex and should not be outlawed, or regulated as such through a Constitutional provision. Equally, the preservation of the functioning of the court process requires laws which deal with contempt of court. The right of the media to publish any material which they wish must take account of matters such as the interests of individuals who are subject to unwarranted interference in their lives by powerful media groups. In balancing these considerations, the Committee has concluded that the area of speech and expression which is deserving of Constitutional protection from interference by governmental actions, is the field of "political" speech. It is an essential component of the democratic process that there should be a restriction on the capacity of governments to interfere with any form of speech which deals with the political process and with issues which concern the functioning of government, public policy and administration, and politics. By providing that neither the Commonwealth nor a State may interfere with freedom of such speech, the other areas of speech which are subject to various forms of appropriate restrictions in areas such as obscenity, copyright or incitement to racial hatred may be left for debate within the ordinary political process. However, the political process itself will be preserved by the prevention of any interference with speech which concerns matters affecting the processes of government. The Committee assumes that the proposed wording of the freedom of expression provision would not be interpreted narrowly, so as merely to protect matters of immediate political concern. It would encompass all speech and expression, in any form, dealing with the structure of government and issues concerning the functioning of matters which bear upon public administration. The Committee also has proceeded upon the assumption that the word "expression" would be interpreted widely so as to encompass all forms of communication. The Committee recognises that the exercise of such freedom of expression will be subject to the defence power of the Commonwealth and has drafted its suggested amendment accordingly. The Committee recommends that a new subsection 116A(ii) be included in the Constitution in the following terms: 116A. Subject to Section 51(vi) the Commonwealth or a State shall not... (ii) restrict freedom of expression concerning government, public policy and administration, and politics.

5 This Covenant forms one of the Schedules to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The Covenant was ratified by Australia on 13 August 1980, with several reservations and

3. GOALS BASED CONSIDERATIONS

4.4 One of the pragmatic objections to laws prohibiting racist speech is that without the outlet of speech the prejudice that drives such statements may be channelled into more serious forms of racist expression, in particular into forms of physical violence. In short, the argument here is that free speech for racists has a cathartic effect and that having been given the opportunity to voice their prejudice, that is the end of it. The other side of this argument is that such laws reduce violence in the long term because they affect long-term popular attitudes even if prosecutions for the offence occur only occasionally.[7] It is also argued that "to tolerate speech abusing racial, ethnic, or religious groups is to lend respectability to racist attitudes, which in their turn may foster an eventual breakdown of public order".[8] Advocates for no legal regulation in this area say that the best remedy to racist speech is more speech which points out the desirable aspects of a multiracial society. Thus, there is disagreement among advocates and opponents of laws which restrict racist speech as to the foreseeable long-term outcomes of such laws. For some "suppression of [racist] propaganda is in the long run more likely to expose society to the risk of violence than is its dissemination".[9]

4.5 Another goal-based argument is that "legislation might unintentionally make free speech martyrs out of those who publicly extol race hatred".[10] By this argument the prosecution of a hate monger is counterproductive because it plays directly into the hands of the accused:

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declarations. All but 3 of the reservations were removed by Australia on 6 November 1984. The relevant parts of the Convention appear in the Appendix.

6 This Convention was ratified by Australia on 30 September 1915 and is the Schedule to the *Racial Discrimination Act 1975* (Cth). Under the Convention, discrimination includes 'any' distinction based on race and thus, potentially it refers to all human rights, whatever their source. This is in contradistinction to the International Covenant on Civil and Political Rights, which only addresses distinctions in the enjoyment of rights listed in the Covenant itself. The relevant parts of the Convention appear in the Appendix.

7 Refer ch 3 para 3.7.

8 E Barendt *Freedom of Speech* (1985) 161. K Serling and D Mason *Racism In The Media*: *If Legislation, What Kind'?* (1988) Migration Monitor 16, 17: [D]eterrence is not the sole purpose of criminal law, and no-one suggests that there should not be penalties for murder or rape simply because these fail to deter, Criminal penalties serve the purpose of vindicating the victim and expressing social disapproval of the crime.

9 E Barendt *Freedom of Speech* (1985) 162.

10 *Inter alia*, HRC *Proposal for Amendments to the Racial Discrimination Act to cover Incitement to Racial Hatred and Racial Defamation* (Report No 7 1983) para 61; Advisory Council of Multicultural Affairs, *Towards a National Agenda for a Multicultural Australia*: (A Discussion Paper 1988) para 2.6.

> The courtroom will provide him [hate monger] with a forum, with the help of the media, to enable him to spread his ideas to a wider audience than he would otherwise be able to reach. By the same token, the accused hate propagandist will be able to wrap himself in the martyr's cloak and thereby elevate his cause to a matter of even higher principle than he initially thought it to be.[11]

4. STRIKING A BALANCE

4.6 In the Commission's view freedom of speech considerations have most weight in the context of criminal law proposals and liability for words which incite racist hatred should be confined to extremely serious occurrences of racist speech. What makes an occurrence more or less serious is difficult to say in abstract. However, in the Commission's view the phenomenon of the inflammatory poster campaigns in Perth and metropolitan areas constitutes a serious instance because of the following accompanying circumstances:

- The implicit threat of continuing breaches;
- The para-militaristic organisation of the campaigns;
- The number of racist statements communicated by the high volume of posters displayed;
- The continuity of the poster displays from one campaign to another and their consequent accumulative effects on members of the public exposed to them;
- The geographical area covered and the long period of time over which the campaigns have been conducted.

4.7 Moving away from the mischief of the inflammatory poster campaigns to the mischief of expressions of racist speech in the community generally, it is the Commission's view that the civil law might have a role to play in relation to this mischief. A certain degree of risk in the form of civil liability might properly attach to racist statements which defame or harass persons who are or might be assumed to be members of the group thereby impugned.

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[11] Canadian Bar Association *Report of the Special Committee on Racial and Religious Hatred* (Winnipeg 1984) 6.

Chapter 5
SUMMARY OF ISSUES

5.1 The Commission has not assumed that there should necessarily be any change to the existing law at all and has formed no final view. Some might feel that the problems discussed can be satisfactorily dealt with by enforcement of the existing law. Comment is invited on this view. If, however legislation is required, the following alternatives are available.

1. LEGISLATIVE OPTIONS

(a) Criminal remedies

(i) Summarily punishable offences

5.2 Amend relevant public order rules so as to clarify certain existing terms and formulations. This option does not overcome the problems of detection and proof in relation to the display of racist posters. The rules by their history and in their terms do not lend themselves to the particular problem at hand but rather to police powers to stem imminent or immediate public violence or disorder.

(ii) Indictable racial incitement offences

5.3 Create new offences which specifically outlaw words and conduct which incite racial hatred; in particular, make not only the public distribution or display of racist material unlawful but also its possession and publication. Specific rules along these lines should be indictable offences summarily punishable at the option of the defendant. Trial on indictment gives a potential defendant the option of putting his or her case to the jury. Since such rules would apply to the most serious cases of the expression of racist statements, as for example the continuing posting of racist posters in public, any formulation might require proof of 'intent' to incite racial hatred.

5.4 Isolated and less serious expressions of racist opinions should not be within the proscription of such specific offences, Civil proceedings instituted by individual citizens for

non-criminal remedies would appear more appropriate. Avenues for the latter are now suggested.

(b) Non-criminal remedies

(i) Statutory claim for group defamation

5.5 *Create a statutory right of action for defamation of a group*. Such a right would create a cause of action where none now exists for an individual to bring proceedings for defamation of a group of which such individual can show membership. A statutory right would create a new substantive right and not a procedural mechanism.[1] Claims for damages should be expressly excluded in the statute creating the right of action. The reason is that without such an exclusion clause potential defendants would face a multiplicity of actions for damages, creating an unfair burden for defendants. If such a statutory right of action included a claim for damages, then (given the 'group' quality of the defamation), it would effectively operate as a class action for damages which are not otherwise generally available and which potential plaintiffs could use as an unfair settlement weapon. However, a statutory right of action for defamation of a group should expressly include the remedies of injunction and retraction. Where, in individual proceedings, such orders were sought and found in favour of the plaintiff, clearly the benefit of such orders would extend to all other members of the group impugned by the same incident which gave cause to the individual proceedings.

(ii) Equality based rights legislation

5.6 *Create ground of racial harassment in Equal Opportunity Act*. Introduce a ground of 'racial harassment' into the *Equal Opportunity Act* so as to apply to currently protected areas; or go further and give 'racial harassment' a general application so as to cover public areas generally, including neighbourhoods and schoolyards. Give the Commissioner of Equal Opportunity an initiatory power in order to investigate complaints, since the nature of racist statements is to intimidate people into silence. The latter two of the three possible amendments to the *Equal Opportunity Act* suggested here have a logical application generally

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[1] The phrase "defamation of a group" and "group defamation" are sometimes used interchangeably. The statutory right suggested here distinguishes between "group defamation" in the sense of group proceedings and "group defamation" in the sense of a cause of action in *individual* proceedings. The latter meaning is applicable here.

to other parts of the Act and thus, might require further consideration beyond the scope of this reference. However, the first suggestion could be brought into the Act without further implications for currently existing provisions.

2. PUBLIC COMMENT INVITED

5.7 The Commission invites comment on the following summary of issues:

- Whether there is a need to enact legislation specifically in relation to the racist poster campaigns; and/or racist statements generally

and if so, with particular reference to the legislative options discussed in the present paper,

- What type of law or laws should be enacted.

Appendix

1. Relevant parts of the *International Convention on Civil and Political Rights*[1] is as follows:

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 or reputations of others;

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

Article 20

1. Any propaganda for war shall be prohibited by law.

2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

2. The Convention on the *Elimination of all Forms of Racial Discrimination* in its relevant parts provides:

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[1] Emphasis is added.

Article 4[2]

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia:*

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

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[2] Australia made a reservation to this provision when ratifying the treaty and thus, article 4 is not binding on Australia. In its 1983 *Report on Incitement to Racial Hatred*, the Human Rights Commission recommended the removal of the reservation. More recently, an 18 member International Committee on the Elimination of Racial Discrimination (established by Article 8 of the Convention) put a number of questions to representatives of the Australian government in Geneva, August 1988. As reported by G Nettheim and T Simpson, *Australia Reports to CERD* (1988) 2 ALB 6: There was discussion of Australia's decision not to implement Article 4 of the Convention which, among other things, requires that incitement to racial discrimination be made an offence and that certain organisations be declared unlawful. The Ambassador indicated that Australia is reconsidering its position on Article 4(a), but is still unlikely to implement it in light of considerations of freedom of expression in the international Convention on Civil and Political Rights. Various members of the Committee were not persuaded.

Article 5[3]

In compliance with the fundamental obligations laid down in article 2 of this Convention. State Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by an individual, group or institution;

(c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal land equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level; and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

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[3] Article 5 is incorporated into the *Racial Discrimination Act 1975* (Cth) by s 9(2): The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention. s 9(1) provides: It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public such as transport, hotels, restaurants, cafes, theatres and parks.