PARLIAMENT OF WESTERN AUSTRALIA

LEGISLATIVE COUNCIL

REPORT

OF

STANDING COMMITTEE

ON

LEGISLATION

IN RELATION TO THE

CRIMINAL CODE AMENDMENT (INCITEMENT TO RACIAL HATRED) BILL

Presented by the Hon Garry KELLY (CHAIRMAN) AUGUST 1990

COMMITTEE MEMBERS

Chairman:	Honourable Garry Kelly MLC
Members:	Honourable John Caldwell MLC
	Honourable Cheryl Davenport MLC
	Honourable Peter Foss MLC
	Honourable Derrick Tomlinson MLC

Address:
Parliament House
Perth WA 6000
Telephone 222 7222

CONTENTS

LEGISLATION COMMITTEE

REPORT ON

INCITEMENT TO RACIAL HATRED BILL

RECOMMENDATIONS

The recommendations of the Committee are:

That the short title of the bill and the Chapter heading be amended to include reference to Racist Harassment

That the words "or would be likely to" be deleted from the bill in that they are undesirable in themselves and lead to most of the practical problems with the bill

That the offences in Sections 79 and 80 be rephrased so as to remove the reference to display which is " intended by that person to cause serious harassment, alarm or fear" and replace it with "that person intends any racial group to be harassed by the display".

That the defined term become "racial group" and that the definition itself be altered to make it clear that the group is to be defined by reference to the terms used and that nationality and citizenship be removed

That in the definition of "written or pictorial material" the word "includes" be deleted and "means" substituted and that after the word "placard" the word "newspaper" be inserted.

There be no recommendation for amendment to require the Attorney General's consent to prosecutions. However, we recommend that this aspect be kept under close review and if necessary the matter brought back to Parliament for amendment if there is abuse.

SOME PRELIMINARY MATTERS

The task for the Committee

1. From the outset, the whole of the committee accepted the goal of the Criminal Code Amendment (Incitement to Racial Hatred) Bill 1990 as both laudable and desirable.

2. The committee recognised the right of members of ethnic minorities to go about their business free from

the threats and intimidation occasioned by the display of racist posters, graffiti, leaflets etc.

3. The committee also recognised some difficulties caused by the form of words used in some clauses of the Bill.

4. The problem was to settle upon the optimum legislative device to achieve what was set out in the Minister's Second Reading Speech without unnecessarily and unreasonably circumscribing the rights of free speech and free expression or proscribing conduct that was beyond the mischief that the Bill was intended to prevent.

Meetings and Witnesses

5. Prior to deliberating on the bill, the committee advertised in the "West Australian" on two occasions seeking submissions from the public.

6. A total of 26 submissions have been received and these are detailed in Appendix A to this Report.

7. As was to be expected, these submissions ranged from strongly in favour of the bill to those strongly opposed. They included standard form letters supporting the bill in its present form.

8. The committee met on 5 occasions for a total of 14 hours including sitting for a whole day of public hearings on Friday 27th July, 1990. The transcript of evidence given at the public hearing is included as Appendix B to this Report.

9. The committee heard evidence from:-

Charles Ogilvie Law Reform Commission Commissioner
Dr Peter Handford senior research officer Law Reform Commission
George Syrota Law Reform Commission Commissioner(who had made a dissenting report)
Mr Eric Tan, formerly President of the Chung Wah Association and a member of the Press Council
Doron Ur, Jewish spokesperson
Chris Smyth, Secretary, Australian Journalists Association
Bob Cronin, Editor in Chief of the "West Australian" and
Dan O'Sullivan of the Press Council.

10. All witnesses presented valuable perspectives on the subject matter of the bill. We consider ourselves

fortunate in having this opportunity to learn firsthand from interested members of the public and to develop our ideas by direct discussion. In particular the Committee appreciated the insight given it by Mr Eric Tan and Mr Doron Ur as members of groups which have been subject to campaigns of racial hatred and harassment

11. In the course of its deliberations, the Committee has had the able assistance of Parliamentary Counsel, Mr Greg Calcutt.

Areas of problems

12. Although like the Committee itself the witnesses have been fairly united in the spirit that they wish the legislation to express, the evidence from the public hearing crystallised the problems of some aspects of the bill which at one stage appeared insoluble.

13. In summary the matters to be resolved were:

1. the actual meaning and effect of certain provisions in the bill

2. the breadth of the circumstances under which the bill might apply

3. the effectiveness of and necessity for certain defences or exceptions and the degree to which they might open avenues for evasion of the policy of the bill

4. whether the Act might be used to oppress racial minorities

5. the meaning of the term "identifiable group"

6. confusion between racist harassment and incitement to racial hatred

Haste

14. It was suggested that there were problems arising from the hasty conclusion of the Law Reform Commission report to meet a legislative deadline. This was contained in the submissions from the Law Society and the Criminal Law Association and also from the Law Reform Commissioner Mr George Syrota.

15. This is a pity because we consider that had the matter not been so hurried, some of the problems that faced the Committee may have been avoided or at least better enunciated before coming to Parliament.

The Law Reform Commission

16. It may be helpful to members to note the evidence of Mr Syrota on the role and history of the Law Reform Commission.

> "The Law Reform Commission ... was originally within a Government department but in 1972 it was set up by independent Statute... (It was) set up 20 years ago to deal with technical, black-letter law - we are great at that. We have been so good at it that the Government has said, 'Oh well, let us give the commission these tougher issues'; but the make-up of the commission has not changed. It is still composed of narrow-minded lawyers, if I can put it like that, yet we are expected to get to grips with the right to die ...We have a lot of work in the medico-legal field, plus this issue, but the composition has not changed to give us more time"

17. Members may not have been conscious that the Commission has moved away from what can be termed "black letter" law - ie where they consider issues which are purely a matter of determining what the law is, what problems have been expressed judicially, how the matter has been dealt with in the laws in other jurisdictions and then coming to what is generally a non-contentious strictly legalistic solution. With a change to dealing with more socio-political issues the Commission may find itself embroiled in controversy and accused of polemic.

The Responsible Minister

18. As this was the first bill where the prime responsibility and interest was with a Minister in another House, the Committee did offer to the Minister in the other House the opportunity to appear before the Committee should he wish to. This offer was made before the Houses rose so that a message might be sent, but the offer was declined.

19. The Committee has found it necessary for the Minister to explain and amplify the policy of the bill if it is not to spend excessive time speculating upon what policy it is meant to follow.

The Committee will give further consideration to recommending that there be a more regular arrangement with the other House with regard to Ministers from that House assisting the Committee.

THE PARTICULAR ISSUES

Racist harassment, Incitement to Racial Hatred

20. The bill envisages two categories of offences:-

    (a) incitement to racial hatred, and

    (b) racist harassment

21. The former category relates to conduct which is intended to affect the minds of others so as to raise within them a feeling of hatred for a "racial" group.

22. The latter category deals with conduct that results in persons within a "racial" group feeling "serious harassment, alarm or fear".

23. The legislation relating to incitement to racial hatred seemed to pose no problems. There were some who submitted that as a policy it should not exist, but the Committee was not able, and in any event, was not minded, to question the policy of the bill relating to the creation of that offence.

24. Nearly all the problems with the bill related to the drafting of the racist harassment offences. However, much of the evidence supporting the legislation was directed to the racial hatred issues over which there was really no problem.

25. It appeared to us that it was unfortunate that the short title of the bill referred to only one of the aspects of the bill. We consider that amongst the general public who had no knowledge of the content of the bill, this could lead to a false impression as to what the bill was about.

26. The advice of Parliamentary Counsel was that the titles (long or short) of bills amending the Criminal Code should make no reference to the particular provisions being amended but that if Parliament decided to, then it would be preferable to make it more accurately reflect the content. The long title contains both categories of offences.

The Committee recommends that the short title of the bill and the Chapter heading be amended to include reference to Racist Harassment

"Or would be likely to"

27. These words are found in the harassment offences but not in the incitement to racial hatred offences.

28. The Law Reform Commission in paragraph 6.3 of the majority report at page 20 indicated that it was not merely a matter of proof that these words were added. They said

> "The offences are cast in different formulations because ... in some cases actual or intended display of racially inflammatory material might not be accompanied by a specific intent to incite hatred, but the display might still have serious consequences which warrant the intervention of the criminal law"

29. This was not accepted by the Government when outlining the policy of the bill. In the second reading speech the Minister (at page 3 of the printed version) says when referring to some amendments to the bill (which incidentally relate both to racial hatred and racist harassment)

> "The Government believes that these amendments preserve the intentions of the bill that all Members of this Parliament want - namely, to catch and prosecute all persons who **deliberately and knowingly** incite racial hatred in our State, whilst effectively ensuring that innocent parties will not be caught and prosecuted by the proposed legislation."

30. And again at page 6 specifically referring to these words

> "If these words are not included, then people who are <u>intending</u> to incite racial hatred, serious harassment, alarm and fear of any group and were producing materials for this purpose, would have to be caught in the act in order to prove such intent. In order to deal with such malicious person, the words "or likely to" remain"

31. It then went on to say that a defence had been added to overcome the problems seen by the media, legal persons and others.

> "It does not want to catch and prosecute 'innocent' and 'honest' people with this legislation; or create situations where responsible citizens are included (sic) in costly litigation. Consequently, the Government

has introduced a number of defence clauses aimed at protecting innocent and responsible parties such as media, scholars, academics and booksellers based around the proven experience of similar defence clauses in the UK."

32. It is quite clear from this that the policy of the bill was to catch only intended harassment but that these words were added for evidentiary reasons - that is to make it easier to prosecute. The defence clauses on the other hand were intended to offset the undesirable side effects.

33. It should be stated firstly that the addition of these words make proof of intent unnecessary. For instance, an offence would be proved if it was shown that a person -

(a) had displayed written abusive material and

(b) the display was likely to cause fear to an identifiable group

irrespective of the fact that the person never intended or realised that it might cause such fear.

34. Both the Law Society and the Criminal Law Association drew attention to the undesirability of using the substantive law to cure an enforcement problem. It says that this is a philosophical flaw.

35. The Law Reform Commission saw the creation of the possession offences as the use of substantive law to overcome enforcement problems. They were included both for racial hatred and racist harassment offences. This we accept despite the Law Society's reservations. The possession offences are sufficient for enforcement.

36. To look upon the words "or is likely to" as assisting further in enforcement is a mistake because:

1. There is no reason to distinguish between racial hatred and racist harassment in this respect

2. It misses the point that these words do not just make it easier to convict, but remove the element of intent in the offence

3. It was not recommended by the Law Reform Commission in order to make it easier to prove but as a substantive change.This has not been accepted by the Government as the policy of the bill.

As seen by the witnesses

37. The representatives of the 4th Estate were concerned that the bill as printed would have the effect of limiting the legitimate activities of the print media. While the representatives were sure that in most cases a newspaper could successfully defend itself against the charge brought under the proposed act, the prospect of being repeatedly dragged into Court did not recommend itself as being in any way desirable.

38. There was also a real chance that they might be successfully prosecuted for reporting incidents of incitement to racial hatred even when the purpose of the report was to expose it to the public for condemnation.

39. Whilst the bill contained the words "or is likely to" the "West Australian" favoured the inclusion of the "fair report" provision found in the New South Wales Anti Discrimination Racial Vilification Amendment Act.

40. However, representatives of ethnic communities felt that the "fair report" proposition may leave the way open for a racist group to set up a newspaper and report its own activities in a provocative manner with impunity.

41. Representatives of the ethnic communities were concerned that there be a strong statement from Parliament that public incitement of racial hatred, and racist harassment was unacceptable behaviour, and that prosecution should not be evaded on technicalities

42. A defence had been incorporated in the bill to try to overcome these problems but in the opinion of the Committee it does little to help.

43. First, and this is an important matter of principle, it leaves the defendants having to prove their state of mind. This is contrary to the basic rule of common law of the presumption of innocence. Second it does not serve the Government's stated intent of not exposing people to costly litigation.

44. It is truly a defence - that is, it must be proved by the defendant. Because an innocent state of mind has to be proven a defendant may well be put to the expense of doing so. The word 'defence' is sometimes used to describe what is more properly referred to as an exception - where the prosecution must negative the existence of the exception.

45. What is more, it is very limited and does not as was apparently intended, deal with the person who did not intend to commit the offence. It is only related to not knowing that the material was abusive.

46. This might help booksellers who had not read the material but it is pretty hard to see how this could be so if it is the **display** which is causing the fear. It is of no use to a newspaper proprietor who **knows** that it is abusive and publishes it **because** it is abusive so that the public can be aware of its existence and so as to raise public indignation against it. If the display by the newspaper proprietor is likely to cause alarm (which it may well do) it is of no use to prove that the proprietor did not **intend** to cause that alarm. The defence relates only to knowledge of the abusive character.

47. As the representatives of the press pointed out, this defence is really an admission of incompetence on their part - that they do not know the character of what they are writing. This is hardly likely to have any real effect and is not much help to a newspaper proprietor who wishes to report, say, Enoch Powell's "Rivers of Blood" speech (Birmingham 20th April, 1968; "Like the Roman I see 'the River Tiber foaming with much blood'") so as to abhor it.

48. This can lead to even more peculiar situations with the possession offence in Section 79. If for instance, a public library had a copy of 'Mein Kampf', which it was conceded was both threatening and abusive this would meet the first part of the offence. It could be said to be intending to display it which would meet the second element. 'Mein Kampf' is sufficiently well known that its mere display could reasonably cause alarm in the minds of certain persons thus satisfying the third element.

49. This could also apply to private libraries if ever a person intended to display the book publicly, say for instance to read an appropriate excerpt in Parliament.

50. All witnesses made it quite clear that this was not the intention.

51. It was also possible that a minority group seeking to obtain redress for past indignities could indulge in abusive language that was taken by the receiving group to be alarming.

52. An instance of this would be Aboriginal groups drawing attention to the abuse by white settlers which deprived them of their traditional lands and calling

for redress and the grant of substantial land rights. White persons could easily regard this as alarming.

53. Mr Syrota drew our attention to Masterson v Holden [1986] 3 All ER 39 an English case which suggests that in such a case if merely one white person felt genuinely alarmed then the offence would be proved. It would not be necessary to prove that a majority or sizeable proportion felt so alarmed.

54. As we went through the various problems that arose with regard to the bill, and as we tried to envisage defences that overcame them and then encountered further problems that could arise because these defences could lead to evasion it became quite clear -

    1. that all these problems were derived from the fact that these words had the effect of catching people **who did not intend** to cause racist harassment, whatever might be the stated reason for including them, and

    2. those persons who were concerned about racist harassment had no wish to catch those who did not intend to harass but had been told that these words were essential to catch the ones who did intend them

55. We seriously question that these words are essential. Most offences in the Criminal Code contain an element of intent on the part of the defendant. It would be hard, for instance, to consider that any jury would acquit a person who displayed the "Asians Out" posters on the basis that he did not intend to cause harassment.

56. We consider that the problem that has been seen has been given excessive emphasis and that problems that it causes make it even less justifiable.

57. After much discussion, the committee came to the conclusion that with the deletion of the words "or is likely to" from Clauses 79 and 80, most, if not all of the problems associated with freedom of expression and freedom of the press, melt away. The committee has in fact recommended this way.

We recommend that the words "or would be likely to" be deleted from the bill in that they are undesirable in themselves and lead to most of the practical problems with the bill

"serious harassment, alarm or fear"

58. A number of questions arise with regard to these words but were eventually resolved by consideration of one - Is the harassment referred to actually to be derived from the display or does it mean that it will ultimately lead to others harassing those at whom it is directed?

59. From the second reading speech it was clear that it was intended that the display itself should harass. Once that is decided then it seems better to use the verbal form that was adopted in the UK Act.

60. This sentence construction was not only incompatible with retaining "alarm or fear" but also resolved two other questions that had previously arisen:-

    1. do the words "alarm or fear" add anything to the understanding of the offence or are they mere literary devices?

    2. does the word "serious" govern all three words and should it?

61. One member of the committee had a particular difficulty with the notion of "serious fear".

62. It was considered that, for the type of conduct that the Committee believed (and the witnesses indicated) was intended to be covered by the bill, "harass" did cover "alarm or fear". Some of the problems that arose with regard to the type of conduct that was to be covered came from how mild a reaction was envisaged by "alarm or fear". Furthermore, "harass" carries with it some element of interaction between the conduct and the reaction.

63. The Committee considered that the conduct should be serious. The fact that the offences have been included in the Criminal Code rather than the Police Act as was at one time contemplated by the Law Reform Commission indicates that they are serious offences.

64. The Courts will treat both this and the penalty suggested as such indications. The Parliament has to make up its mind as to what it wants to constitute that serious offence. The offence is related to the effect that it has on members of an identifiable group and we consider that it should be a real and serious effect. We consider that "harass" has that effect and has it without the need for a qualifier.

65. Mr Calcutt drew our attention to the element of repetitiveness in harassment. See Shorter Oxford English Dictionary:-

> "**Harass** 1. to wear out or exhaust with fatigue 2. to harry, lay waste 3. to trouble or vex by repeated attacks 4. to worry distress with annoying ... importunity, misfortune etc."

66. This element of repetitiveness has been lost in more modern usage (such as in some aspects of sexual harassment). Mr Ogilvie drew our attention to the decision of Einfeld J in the Equal Opportunity Commission in the case of Bennet v Everitt (1988) EOC 92-244 which he summarised for us as saying "that sexual harassment, while normally involving persistence, might exceptionally be of such a nature that a single act or statement might constitute harassment"

67. We adopt that interpretation. This means that the conduct can be judged in its context.

68. For instance a person who reads "Mein Kampf" on the bus once is unlikely to be accused of breaking this law. However, to read it on the bus every day whilst sitting next to a person whom you know to be jewish could well be seen to be harassment. To place a poster on a bus stop where it is unavoidably seen on a daily basis could be harassment. Possession of one pamphlet would not be likely to indicate an intention to harass but possession in bulk could.

We recommend that the offences in Sections 79 and 80 be rephrased so as to remove the reference to display which is "intended by that person to cause, serious harassment, alarm or fear" and replace it with "that person intends any racial group to be harassed by the display"

"identifiable group"

69. Although the bill speaks of Racial Hatred it encompasses more than that. It deals with hatred of what is called an "identifiable group". By definition such groups include those distinguished by ethnicity nationality origin nationality and citizenship.

70. Much of what is called 'racial' is in fact ethnic. As Mr Doron Ur pointed out, antisemitism was a term coined to refer to anti-Jewishness but both Jews and Arabs are now considered to be semites. It would be strange if that rivalry could not be caught by this legislation.

71. Races have been so intermixed that defining what is a race is also an enormous task - one that would be beyond the compass of most criminal cases.

72. Another problem was that even if 'race' were a clear term, how is it to be applied in this legislation. It was felt desirable that it be made quite clear in the bill that the reference to race was definitive rather than coincidental.

73. Another problem is that because "identifiable group" can be defined by nationality or citizenship, the bill could encompass what are essentially international political disputes. Some examples may assist.

> A campaign based on nuclear weapon testing in the South Pacific may be abusive and call upon citizens to boycott French products and people and take action could lead to harassment of French nationals living here (especially if they sell French products)
>
> Anti nuclear weapon protesters demonstrating at Fremantle when the US fleet arrives hold up placards saying "Yank sailors go home" with an illustration showing Uncle Sam being hanged. US sailors have indicated to the press that they like coming to Perth because of the friendly welcome they receive here. A large campaign of this nature may constitute harassment. They are an identifiable group.

Plainly this was not intended to be caught.

74. In recommending a solution to these two problems we have again resorted to UK legislation, in this case the Race Relations Act 1976.

75. We have recommended a change of the defined group from "identifiable group" to "racial group". This we also hope indicates that it is harassment in the nature of racist harassment that the legislation is aimed at even if the particular group is not strictly speaking a 'racial' group. A drafting objection to this is that it is rather like defining the word "horse" to include "cow" but in the present context we consider that it is justified because it clarifies what Parliament intends.

76. This follows the UK wording. Also from the UK wording is the phrase "defined by reference to". This again emphasises the necessary rather than incidental nature of the relationship between the harassment and the racial origins of the persons harassed.

77. Our final amendment differs from the UK Act. We have removed the reference to nationality and citizenship. We consider that nationality and citizenship are matters of political status rather than a characteristic that a person has.

78. The words "national origin" pick up the type of harassment that is derived from the person's cultural background derived from nationality. Adding the words "nationality" or "citizenship" adds nothing useful to defining that type of harassment and can lead to prohibiting legitimate political conduct.

79. We are conscious that this definition differs from the Equal Opportunity Act 1984 where race includes nationality but consider that there are legitimate reasons for preventing employment discrimination on the basis of nationality.

We recommend that the defined term become "racial group" and that the definition itself be altered to make it clear that the group is to be defined by reference to the terms used and that nationality and citizenship be removed

'Display' constituting the offence

80. The Law Reform Commission Report clearly indicates that it was only intending to catch those cases where the public attention was drawn involuntarily to the offending material. See page 20 paragraph 6.3 and page 22 paragraph 6.8. This is not said in the second reading speech.

81. Evidence given by representatives of the Law Reform Commission said that the bill should apply only to the covers or outside of a book, newspaper or other publications and not its contents. It is not betraying any secrets to say that the committee had some difficulty in accepting this proposition.

82. The difficulty is in large part due to the fact that this concept is not mentioned in the Second Reading Speech and cannot be construed from the bill as drafted.

83. On the fact of it, the proposition is illogical but the committee concedes it is one way around the problem of catching whole libraries of books when it is mainly "the display" or external appearance of a document that is trying to be controlled.

84. We do have some qualifications on the statement that a book will not be caught.

85. When a book is displayed it is the entire book that is on display. However, it is generally unlikely that

the mere display will cause alarm or fear unless the person **already knows** the contents are offensive.

86. There are books that are notorious as to their content. 'Mein Kampf' mentioned before is one such book. The display of it even with the most innocuous cover would likely cause alarm or fear unless the occasion plainly offset that fear. Similarly, a racist newspaper could gain itself a reputation so that sight of it would cause fear. Provided that a particular edition contained abusive matter then its mere display could bring it within the purview of the bill.

87. Mr Ogilvie of the Law Reform Commission was extremely concerned at the suggestion that the necessary consequential powers of police search should extend to private bookshelves. He had serious reservations as to whether there should be any possession offences if the content of books were included.

88. We consider that this can be met by, in part adopting the Law Society's recommendation. They suggested changing the definition from an inclusive to an exclusive one. They also suggested cutting off the definition at "handbill". We are not prepared to go that far. We propose to add the word "newpaper" after the word "placard" and by the omission of the word "book" and the application of the *iusdem generis* rule of interpretation leave out the contents of books.

We recommend that in the definition of "written or pictorial material" the word "includes" be deleted and "means" substituted and that after the word "placard" the word "newspaper" be inserted.

Consent of the Attorney General

89. Mr Syrota gave evidence that the equivalent UK legislation was initially used by some groups to harass racial minorities.

To avoid this we contemplated recommending that prosecutions could only be commenced if they were official or with the consent of the Attorney General.

90. We are conscious that the Attorney General has made a policy of proposing that such provisions be removed from the Criminal Code and in general we accept that policy.

Accordingly, we make no recommendation for amendment to require the Attorney General's consent to prosecutions. We do however, recommend that this aspect be kept under close review and if necessary the matter brought back to Parliament for amendment if there is abuse.

FINALLY

91. We consider that this reference has amply illustrated the use of the Standing Committee system.

92. It has meant that the work of Parliament has been able to continue even during the Parliamentary recess.

93. The public have had the opportunity to make their submissions directly to the Parliament

94. The members have had the opportunity to understand the problems better by talking directly to those concerned

95. The members have had the opportunity to clarify drafting matters with Parliamentary Counsel

96. The Committee has proved an ideal venue for members to argue out the essence of the legislation and to take time in consideration in a manner that would be impracticable with a Committee of the Whole

97. It has been able to do this in a manner directed to obtaining good and workable legislation in an atmosphere little affected by politics.

98. The intent of the Parliament, unanimously expressed by the House in setting up this committee, that the people of Western Australia be better served and have better legislation has, we trust, been carried out in this reference.

LC008/TXTPGF: 16/08/90 14 17 23

APPENDIX A

CRIMINAL CODE AMENDMENT (INCITEMENT TO RACIAL HATRED) BILL

SUBMISSIONS

1. Chung Wah Assn, Indian Society of WA, Bangladesh Australia Assn of WA, Malaysia Singapore Australia Society, Indo Chinese Support Group, Council of WA Jewry, Burmese Assn of WA & Pakistan Assn of WA.
2. Mr M Roberts
3. Mr W F Morris
4. Ron Edwards MP
5. Mr J Slattery
6. Ann Davis
7. E Bennett
8. People against racism
9. Australian Press Council
10. Mr B W White
11. M E & J C Pope
12. Mr K McCaffery
13. B & M Dellaca
14. Mrs V McCallum
15. Mr D Thangarajah
16. Chung Wah Assn
17. Mrs B M MacIntyre
18. Mr E G C Tan
19. WA Newspapers
20. Malaysian/Singapore Australian Society
21. 19 signatories to publication cutout
22. L & L Goldflam
23. Indian Society of WA
24. Mr P W Nichols
25. Ms D Koppman
26. E J Wall

APPENDIX B

CRIMINAL CODE AMENDMENT (INCITEMENT TO RACIAL HATRED) BILL

TRANSCRIPT OF EVIDENCE GIVEN AT PUBLIC HEARING

A Public Hearing was held in the Legislative Council Chamber on July 27 1990 when the following persons gave evidence:

OGILVIE, Mr CHARLES WILLIAM

Lawyer,
residing at 22 Hewitt Way,
Booragoon, examined:

HANDFORD, Dr PETER ROBERT

Legal officer,
residing at Kingswood College,
Hampden Road,
Nedlands, examined:

The CHAIRMAN: I welcome those members of the public who are here. The idea of the public hearings is to give members of the community the opportunity of putting their point of view to the Committee in reasonably informal surroundings, and for the Committee to find out the facts in respect of legislation that has been referred to it by the House. This legislation is fairly controversial and is the result of a report presented by the Law Reform Commission in October last year. That report was amended after its initial introduction to the Parliament, and the Committee is now considering that second draft. Our first witness is Mr Charles Ogilvie from the Law Reform Commission, and he is assisted by Dr Handford. Mr Ogilvie, would you like to make some comments about the legislation?

Mr OGILVIE: The request to me to appear before this Committee was made through our current chairman, Dr Jim Thomson. We did not have in mind the idea of making submissions to the Committee on the Bill but simply to outline our recommendations and answer questions. Our report, which was presented in October last year, is our submission for legislation. I have prepared a fairly brief and shamefully oversimplified account of what the Law Reform Commission is and what we had to do in regard to the project relating to this legislation. It might help if I read that statement.

I should say also that the commission has a policy of appointing a specific commissioner to be in charge of a particular project, and also of instructing a particular research officer to work with the commissioner. It is his or her job to help the commissioner in preparing and drafting documents, in making summaries, and so forth. Those people have the main carriage of the project but of course that is always subject to commission's scrutiny and decision. Unfortunately the commissioner in charge of the Bill is no longer with the commission, and the research officer dealing with the project finishes today with the commission, and she has the flu. I was involved in all the discussions and I will certainly do what I can to assist the Committee. Peter Handford, the director of research, was also involved in all the discussions – but you will appreciate not to the same extent – as to the nature of the surveys we conducted and precisely whom we consulted.

I am a full time member of the Law Reform Commission of Western Australia, and have been a member since October 1979. It may help the Committee if I place the Bill you are considering in context and if I say something about the Law Reform Commission's consideration of this project. The Criminal Code Amendment (Incitement to Racial Hatred) Bill was introduced into the Legislative Assembly last year, and was based largely on recommendations made by a majority of the members of the commission in its report entitled "Report on Incitement to Racial Hatred". That report was submitted to the Attorney General in October 1989. The Bill was not passed by the time the session ended. The present Bill was introduced into the Legislative Council earlier this year. It has the same name as the 1989 Bill but contains some modifications designed to remove concerns of the media and others. In my view these changes are comparatively minor and do not affect the general thrust of the legislation.

The commission's formal involvement with the reference ended with the submission of its report, although of course representatives of the commission attended meetings or appeared on radio and TV to clarify, explain and discuss its recommendations. In particular, the commission was not involved in meetings organised with interested groups by the Government, and which have resulted in changes to the original Bill. The commission has also not considered these changes from last year's Bill to this year's Bill, although not doubt the members of the commission have individually formed views and some may have communicated them to others.

Origin of the Project: Pursuant to the Law Reform Commission Act 1972 the Attorney General asked the commission to consider "What changes to the law, if any, are needed to deter adequately acts which incite racial hatred?" The Attorney General asked the commission to deal with the reference as one of high priority. The principal problem which gave rise to the reference was the large scale and increasingly sophisticated poster and graffiti campaigns on public property in most metropolitan and some rural areas of Western Australia from 1983 until 1989. As most will be aware, the poster activity appears now to have stopped, but who knows where or when it will recommence? The commission's responsibility under the Law Reform Commission Act is to –

(a) examine critically the law with respect to the matter mentioned in the reference;

(b) report to the Attorney General on the results of the examination of that law and make any recommendations with respect to the form of that law that it considers to be desirable.

Although the Law Reform Commission Act does not, in terms, oblige the commission to do so, its practice has always been in these references to seek the views of the public and generally to engage in community consultation. This not only helps the commission to inform itself of the problems involved, but also provides an avenue for the public to share directly in the formulation of laws.

To help focus attention on the issues involved the commission released an issues paper in May 1989. Over 1 000 copies were distributed for comment. It also conducted surveys to obtain reactions to specific options for legislative change, including no change – that is, the Melville Survey – and what we call the Target Survey. The surveys were designed to elicit views of the public generally on the posters, the attitude of members of those groups who were the target of the posters, and those public authorities who were faced with the task of removing the posters. In addition, representatives of the commission participated in seminars, media interviews and personal consultations.

The issues paper and the surveys identified three intended harms of the poster campaigns; that is, incitement to hatred, fear or intimidation in the community, damage to public property and, finally, the secondary effects in the form of racial harassment engendered by the slogans and caricatures exhibited in the posters. Perhaps I may remind members of the Committee what the posters contained. Some examples of the wording follow –

Asians out or racial war

400 000 jobless, 400 000 Asians out

Jews are ruining your life

No Asians, no coloureds, white revolution the only solution

And then, and this was a late addition –

Join the ANM and injure Ninjas.

One piece of graffiti on a traffic sign outside a north west town – and I do not suggest this was part of the orchestrated campaign – simply said "Kill niggers". Some posters prominently displayed gross caricatures of what purported to be members of the target groups. The commission was informed that the caricatures were largely copies of those which appeared in the UK, though there were some local creations.

The issues paper outlined the existing legislation which could be used and suggested a number of new legislative options to deal with possible deficiencies, including clarification of certain sections of the Police Act, special provisions to deal with incitement to racial hatred and, on the civil side, laws to provide for group defamation and creation of a ground of racial harassment in the Equal Opportunity Act. It also put the case for no change, both on the ground of the effects on freedom of speech and on the ground that it might make political martyrs out of those prosecuted or otherwise proceeded against.

The Attorney General asked the commission whether it thought it could submit a final report in late October. The commission decided it could, and in the event met the deadline. The commission's report was a majority one – one member dissented – and recommended the creation of four indictable offences, of two types. The first type related to material which was intended to incite racial hatred and covered both the actual publication, distribution or display, and the possession of written material with the intention of publicly distributing or displaying it and intending racial hatred to be stirred up thereby.

The second type of offence was directed towards protecting members of groups targeted by the posters against serious harassment, alarm, etc, by being confronted in a public place with a poster of the sort referred to before. Analogously to the first type, both the act of publicly displaying the material and the possession of material with a view to its being publicly displayed were to be made offences. The first type of offence recommended or required that the defendant intended to stir up racial hatred. The second type of offence did not require a specific intention; it was to be sufficient if the display was likely to cause serious harassment, etc.

The majority of the commission considered that because the offence was to be limited to public display – that is, to what is visible in or in view of a public place – it was justifiable to place those creating the display on their guard against the likelihood of seriously affronting people of difference races who happened to be in or travelling through those public places. It is important to note that the commission intended that only what was visible was to be relevant. The contents of a book – for example, Salman Rushdie's *Satanic Verses* – was irrelevant. If the cover of a book displayed in a bookshop window is innocuous, then no offence is committed under the second type of offence, even though the contents might be threatening, etc, and likely to cause serious harassment, etc.

The majority was satisfied that in regard to both types of offence – that is, intending to incite racial hatred and displaying material likely to harass, etc – the possession of the material with the relevant intent should be included as offences. A major difficulty in catching offenders under the present law – for example, under the Litter Act and by–laws – was that the offenders operated late at night and could not be caught in the act. Including possession would help alleviate that problem to some extent. In the case of both types of offence the commission recommended that no offence would be committed unless the material was threatening, abusive, or insulting. These words are used in the public order sections of the Police Act of this State and also in the Public Order Act 1986 of the UK. All these words were included in the original 1989 Bill but, as reintroduced in the Legislative Council, the reference to "insulting" has been omitted, for the reason explained by the honourable Minister.

In the proposed offence of the display type, the commission recommended that an offence would be committed if display of the material was intended or likely to cause serious harassment, alarm, fear or distress to any identifiable racial group. These words again were based on the UK Public Order Act, and although the word "distress" was included in the

original Bill as per the commission's recommendation, it has not been carried forward into the present Bill.

The commission did not recommend any special defences in regard to either of the two types of offence. In the case of intention to incite racial hatred, it of course is not desirable that there should be a special defence or what could be a justifiable defence to intending to incite racial hatred, but in the case of the display offence where intention was not a necessary element, the commission considered but rejected a defence contained in section 23 of the UK Public Order Act 1986 which provides that it is a defence for the accused to prove that he or she was not aware of the contents of the material and had no reason to suspect that it was threatening, abusive or insulting.

In the case of the proposed display offence, the accused could scarcely fail to be aware of the contents of the material he was about to put up; that is, what was immediately visible, so the commission considered the UK defence was not appropriate. I note that the present Bill does enable the accused to put forward the defence that he or she did not know the material was threatening or abusive. Of course, the word "insulting" has disappeared. This defence certainly would help the person who put up the posters who thought it was inoffensive but because he was not aware of the special significance of the words, design, or photographs to a person of a different ethnic group he could seriously harass, insult, or distress that member.

Finally, the commission could have but did not suggest new civil remedies – that is, responses which did not attract criminal penalties. Our prime concern was to stem the tide of racial hatred, propaganda and so on, effectively now, and civil remedies would not have had this effect.

We suggested in our issues paper amending the Equal Opportunity Act would make it easier to complain of racial harassment but thought that other avenues, for example the New South Wales community justice centre system, should be explored to see whether it would be a better model. The commission also rejected the creation of a new civil action to deal with group defamation because this would require major changes to existing defamation law and procedure generally. I note that the Queensland Attorney General has put uniform defamation law back on the agenda of the Standing Committee of Attorneys General, and no doubt the option of group defamation will be considered by that committee in the course of that review.

That ends my statement.

The CHAIRMAN: Will the Bill pose any problems for the print media?

Mr OGILVIE: The print media covers a wide range. Recently I read a book called "The Turner Diaries" which is the most scurrilous and vicious document I have ever read. It purports to be a diary of a member of a secret brotherhood – much the same as a group here which I shall not mention because of sub judice considerations. Its plot concerns the taking over of the United States and the indiscriminate killing of blacks and Jews by what is initially a small but well organised, dedicated group. It ends up in a holocaust. I would think that the Bill would cause a problem, and rightly so, to anybody who published, distributed and presented that to the public. One has to distinguish between the responsible print media and something which could be put into print.

The CHAIRMAN: The term "media" is not used to describe the publication of books. I refer to newspapers.

Mr OGILVIE: Of course, but there could be analogous considerations.

The CHAIRMAN: The Press Council has suggested that a fair report provision should be made in the Bill, similar to the New South Wales legislation. The Press Council says it

could be caught by the Act if it reports comments and displays that on the front page of a newspaper.

Mr OGILVIE: I am not speaking for the commission at this point. If it is the intention to incite racial hatred – that is the essence of the first type of offence – it is difficult to see what would be the point of a defence of the reporting. The person who does the publishing must have an intent.

The CHAIRMAN: I do not speak for the Press Council but I imagine it refers to a case where Enoch Powell addresses a rally and that is reported – under this legislation it could not be reported.

Mr OGILVIE: Enoch Powell might be caught.

The CHAIRMAN: Would the newspaper be caught?

Mr OGILVIE: In my view, the newspaper would not be.

The CHAIRMAN: In 1960, Enoch Powell spoke about rivers of blood.

Mr OGILVIE: Yes, but all the newspaper is doing is reporting his speech. The newspaper proprietor is not intending to incite racial hatred.

Hon PETER FOSS: What about possession of written material prior to publication?

Mr OGILVIE: It is not simply possession; it is possession of something and, at that time, having the intention to publish –

Hon PETER FOSS: The words are "or would be likely to cause".

Mr OGILVIE: I am only talking about the first type of offence. That is what I thought the Chairman was referring to. I was referring to the reporting of the whole speech of Enoch Powell. The proprietor of the newspaper is not inciting racial hatred by publishing, distributing or displaying such material. I cannot see a fair report of someone else's vicious statement to be –

Hon PETER FOSS: The Press Council raises sections 79 and 80.

Mr OGILVIE: That refers to display.

Hon PETER FOSS: Section 79 is the more dangerous.

Mr OGILVIE: That only relates to display – that is what is visible –

Hon PETER FOSS: Not possession.

Mr OGILVIE: There are difficulties at the periphery, if you have newspaper headlines or billboards – and recently a headline in *The West Australian* got into hot water. The contents of Enoch Powell's speech would not be visible in the banner headline or the actual placard –

Hon PETER FOSS: It would be if printed on the front of the newspaper.

Mr OGILVIE: Yes, but that of itself would not have any intention to incite racial hatred. Whether it would of itself cause serious harassment is another matter.

Hon PETER FOSS: But the words "or is likely to cause" takes away the need for intent.

Mr OGILVIE: That is right in the case of a display.

Hon PETER FOSS: In limited circumstances.

MR OGILVIE: Limited by what is visible on the placard. I am trying to make a distinction.

Hon PETER FOSS: It does not say that.

Mr HANDFORD: You are looking at clauses 79 and 80?

Hon PETER FOSS: The Press Council raised clauses 79 and 80. These clauses were raised by a number of people regarding the display of material in public places which does not appear to mean only on the outside. If material is displayed in a public place, the legislation does not refer in the definition to the material being limited to the outside of the object. Therefore, if one was to display a newspaper in a public place, this would come under clause 80.

Mr OGILVIE: That would involve the content of the newspaper being the subject of offence.

Hon PETER FOSS: It only has to be likely to cause offence. If Enoch Powell's speech was reported, it would be likely to cause offence because that would be the reason for it to be reported. The newspaper would report that a meeting took place and that Enoch Powell spoke and caused distress.

Mr OGILVIE: If display means content, it follows that –

Hon PETER FOSS: Or what is on the front page. Therefore, it is possible to report such a situation on the inside of a newspaper but not on the outside.

Mr OGILVIE: The commission was at pains to make it plain in the report that the legislation should refer simply to what was visible.

Hon PETER FOSS: So, if the Bill does not achieve that, it does not achieve what the commission intended?

Mr OGILVIE: Precisely. I hope that this has not been misreported, but I understand that the Government has received counsel's opinion that in this context the word "display" does not include content. The intention of the commission was to confine its definition to "display"; with that in mind, the Press Council does not have much of a case when the words "insulting or distressing" have been removed.

The CHAIRMAN: Could a newspaper report blatantly racist statements such as those made by Enoch Powell, or by the head of the Nazi party, on the front page and not be caught by the proposed Act?

Mr OGILVIE: The front page of the newspaper must be deemed to be visible in a public place. If a front page was placed in a shop window –

The CHAIRMAN: It could be used as a banner rather than a front page with some racist statement. If you are saying that the front page may not be visible, it could still contain a headline which states "See page 2".

Mr OGILVIE: The banner might state that Enoch Powell had made an inflammatory speech.

The CHAIRMAN: "Race wars" or something like that.

Hon PETER FOSS: Before we get into that, if you say that a newsagent is not a public place when he is open for business –

Mr OGILVIE: No, I did not say that.

Hon PETER FOSS: Frequently we have the newspaper dispensers on the footpaths in which money is placed into the top and a newspaper is taken. Without worrying about the fine detail of this, newspapers are frequently displayed in a public place – that is how they are sold – and often news boys sell newspapers on street corners. The Bill states that the material has only to be within view and not necessarily readable. Therefore, one could have a newspaper – even accepting that it is on the outside – which would be subject to the Bill, and I do not agree with that. The case of having a shop open with goods on display is a matter of content because what is being sold is on display. So, in selling a newspaper the written or pictorial material will be on display and this will be subject to clause 80. The newspaper may be reporting that this bloke Powell made a speech which was threatening and abusive and caused fear to an identifiable group, so it will fall within clause 80. It cannot be stated in defence that it did not cause fear because that fear was the reason for it to be reported in the first place.

Mr OGILVIE: The commission intended that the word "display" only related to what was immediately visible.

Hon PETER FOSS: If that was intended to be in the legislation, it would be better to make that patently clear.

Mr OGILVIE: In principle, all legislation should be as clear as possible. If there is any doubt at all, there is no reason that an appropriate amendment could not be made.

The CHAIRMAN: Mr Foss, could you give me a definition of "display"?

Hon PETER FOSS: There must be some additions to the word "display" so that it does not just relate to being in view. It should refer to the material being readable from a public place without being opened. However, we should not be drafting the Bill.

Mr OGILVIE: I am not a draftsman either; I had one or two attempts myself and I could not come up with a satisfactory way of dealing with this. Therefore, I did not pursue it because the counsel's opinion was that no problem existed.

Hon PETER FOSS: I respectfully disagree on that, especially in the case of an open shop. Another question following on from that relates to a question raised by George Syrota about the facile evasion of the problem by folding over the pamphlet or by having the nasty bits on the inside.

Mr OGILVIE: We looked at that and wondered how we could protect those who are passing by, especially young children, through the mechanics of the legislation. This applies particularly at bus stops with the distressingly vicious posters that were around. We felt that this was confined to the display of the material in the sense that I have tried to elucidate. We could justifiably omit any reference to intentional, but once one starts talking about what is inside the covers one is on a slippery slope and could end up in the situation in which Salman Rushdie could be proscribed under the legislation. We had to make a choice between what is visible with no intention or what is visible including the contents.

The CHAIRMAN: Sir Ronald Wilson, the President of the Equal Opportunities Commission, said in a speech last March that he was a little worried about the limitations to display. He said that the prospect of a person handing out pamphlets to children with Bugs Bunny on the cover, yet the pamphlet contained offensive material, might well require the services of the Law Reform Commission.

Mr OGILVIE: That is an arguable case. That would involve the mechanics of people walking around and confronting people with the pamphlets. My thoughts are that it is unlikely that there would be much in the way of innocuous pamphlets handed out to school children because somebody has to show himself in handing out the material.

The CHAIRMAN: It is not the pamphlet which would be innocuous as the content would be offensive.

Mr OGILVIE: Such a person could be charged for committing an offence of intending to incite racial hatred. It would be a risk for a person to present an innocuous covered pamphlet, with vicious material inside, and distribute it to school children in public places.

Hon PETER FOSS: I have a very fundamental question that has to be answered, which you have raised yourself. The Law Reform Commission report refers to "mischief" as an anonymous, public, uncalled for, abuse and insult. People who have no wish to be the recipients of vilification and racially offensive material have no alternative but to be presented with it because it is on their bus stops and signs. No matter where they went the recipients get this message. Therefore, it is objectionable for two reasons: The people who are the objects of it are intimidated and frightened; the people who are not the objects seek to convert others to an attitude which they would not normally hold. In fact, it is done in an unlawful manner. It is not offered to them; it is done anonymously; it is posted up at night. Had somebody been given a document such as that in the street it would already be covered under the law through breach of the peace. That person would be identifiable and you could arrest him then and there. The real mischief is that it is done in a way that is difficult to detect and is unwanted. That is the mischief you are seeking to address and that is how the thing started out. Am I correct in saying that that was the mischief or, as you went through the task, did you extend the mischief of the Act to something wider than was originally stated?

Mr OGILVIE: The second alternative is the more correct one. We did come across books – one I mentioned earlier was called "The Turner Diaries" – which we thought provided the incitement to racial hatred. There is no reason why that sort of activity should be permitted. It is certainly true that the prime focus of our consideratiion was on graffiti. Our terms of reference were wider and not confined to graffiti.

Hon PETER FOSS: I will give you a further example. Let us say that I belong to an Aboriginal group which is very concerned that due to the efforts of the white population Aborigines have been dispossessed of land and have had their lifestyle ruined and that they have been subjected to being on the lowest order of society in Australia. I wish to obtain redress for this state of affairs by publishing a book which shows the indignities to which the Aboriginal people have been subjected. My intention is to raise the ire of the readers and to cause a feeling of revulsion throughout the community towards what has happened to the Aboriginal people. Will that not fit within a number of definitions of racial vilification that are to be contained in here? It is intended to stir up emotion and hatred, but for a completely justifiable reason. Do you see that as falling within the mischief that you are seeking to deal with?

Mr OGILVIE: I would question the notion that it was intending to stir up racial hatred. It would be more that the hatred is stirred up by the catalogue of wrongs.

Hon PETER FOSS: Let us say, "is likely to cause".

Mr OGILVIE: Are we now on "display"?

Hon PETER FOSS: Or dispossession.

Mr OGILVIE: But with the necessary intent.

Hon PETER FOSS: No; one only has to intend that it be displayed. In sections 79 and 80 the intention to display does not require the absolute obligation to display, merely that it would be likely to display.

Mr OGILVIE: Mr Foss, I do not think I can take it further than this. The commission's intention in sections 79 and 80 was to cover what was immediately visible and a typical example is graffiti.

Hon PETER FOSS: As an Aboriginal group I can go out into the community and offer this pamphlet.

Mr OGILVIE: I cannot take it further; it does relate to the earlier discussion about the view taken by Sir Ronald Wilson, which is that an innocuous cover is free from any offence. That is why the commission suggested that the nasty material within the cover should be covered by sections 77 and 78.

Hon PETER FOSS: You have missed my point. I think that the pamphlet that I referred to would be covered by sections 79 and 80.

Mr OGILVIE: Yes I think so. I misunderstood the thrust of your remarks. I thought you were talking about a pamphlet in the sense of a booklet.

Hon PETER FOSS: Let us leave that problem aside and assume that this is one that we all agree falls within the meaning of the word "display". I am a member of an Aboriginal group and I hand this document out seeking to obtain redress for the wrongs to Aborigines.

Mr OGILVIE: The test is whether it is threatening or abusive.

Hon PETER FOSS: Let us assume that it is.

Mr OGILVIE: If it threatens a racial group and it is abusive.

Hon PETER FOSS: Aboriginals gather together to fight for their rights to have their land back. In fact, Charles Perkins many years ago made a statement that if the whites did not voluntarily give land rights then Aborigines should seize them.

Mr OGILVIE: It also has to pass through the gateway of serious harassment, alarm or fear.

Hon PETER FOSS: That certainly is cause for alarm or fear.

Mr OGILVIE: Had Mr Perkins intended to simply take land rights by force, that hypothetical pamphlet, provided it is a one page document, would be a candidate.

Hon PETER FOSS: It only has to be likely to cause, it does not have to be intended. If any one person suffers alarm or fear from it, that would be satisfied.

Mr OGILVIE: To any identifiable group.

The CHAIRMAN: Surely in the case of Charles Perkins he would run foul of other laws?

Hon PETER FOSS: At that stage all it is doing is promoting an attitude with a pamphlet.

The CHAIRMAN: In relation to the comments that you made about trial by indictment, Sir Ronald Wilson in his address last night said –

> I wonder if it's necessary to provide for trial by indictment.

He continued –

> . . . with respect to the Law Reform Commission, that there may be something to be said for regarding these offences primarily as public order offences and providing for summary hearings, to be dealt with summarily in all cases.

He closes on the following point –

> . . . when offences are disclosed, then they can be dealt with summarily, and the cancer can be removed from the body politic.

Why go to the lengths of trial by indictment rather than by summary procedure?

Mr OGILVIE: The commission recommended – it is included in the Bill – that the defendant can elect –

The CHAIRMAN: He makes that point, too. He recommends they should be dealt with summarily all the time.

Mr OGILVIE: Basically, our recommendation was made on constitutional grounds. Freedom of speech is so important a concept, that when this became an issue, the question should be decided by 12 men and women – a jury of peers – rather than by a magistrate or a justice of the peace.

The CHAIRMAN: Sir Ronald Wilson made the point in the rest of his comments that, with the congestion of the courts, it could take a long time to get a case heard whereas with posters going up around the city and it could be dealt with very quickly and expeditiously summarily.

Mr OGILVIE: It depends on the number of candidates being offered as defendants.

Dr HANDFORD: A general question that we have with the limitation of trial by jury arises in a number of contexts. It arises in offences involving dishonesty. We were concerned with some sort of mark about how serious these offences were – questions of penalty and so on.

Hon PETER FOSS: When I spoke to Moira Rayner on this matter when the first Bill was drafted she indicated that the reason was to indicate to the public and to the courts that this was a serious offence and not merely a police offence.

Mr OGILVIE: It was also the commission's view – maybe she did not focus on this – that it was a mechanism to help protect freedom of speech. There were famous constitutional cases on this point in the eighteenth century in England. We thought about the cost of cluttering up the courts to some extent, but that depends on how many defendants there are. The principle of trial by jury with the option of summary trial is very important.

The CHAIRMAN: Gentlemen, we have another witness waiting and we have gone overtime already by 10 minutes. Mr Ogilvie, would you return at 2 pm this afternoon to be further questioned?

Mr OGILVIE: Yes.

[The witnesses retired]

SYROTA, Mr George

Senior Lecturer in Law,
University of Western Australia,
member of the Law Reform Commission of WA,
residing at 146 Federation Street,
Mt Hawthorn, examined:

The CHAIRMAN: Welcome to the Committee. Will you make some opening comments and we will question you on your submission?

Mr SYROTA: Thank you, Mr Chairman. This morning I heard you on the radio talking with Marie Mills. You said that you have received many submissions on this matter, some totally supportive of the Bill, some totally against the Bill, and some in the middle. I fall into the middle category.

I think legislation should be put in place, hopefully before the end of this year. However, I do not think the original Bill – I know it has been slightly amended – should become law. It is too narrow in some respects. It does not offer proper protection to the ethnic communities, and it is hopelessly wide in other respects so that, without offering protection to ethnics, it manages to catch the newspaper editors. I was listening to the comments made by one of the previous witnesses and it is apparent that the main difficulty with the Bill as drafted is the layers of uncertainty contained in it and if it is not fixed up now, it will be fixed up by the courts. As the legislation will be in place for 30 or 40 years, we should spend a few weeks on it now and get it right.

What has gone wrong is that the legislation as originally put forward in the Legislative Assembly is based on two provisions contained in the English Public Order Act of 1986. I will go through those provisions in a moment. The commission has tinkered with the British legislation with a view to improving it but, with respect to my colleagues, the tinkering has made it worse rather than better. Perhaps it will be interpreted that I am defending the British legislation, but if the Committee were to decide to recommend to the Legislative Council that changes be made to the legislation, there is something to be said for a return to the full British legislation.

The British provisions enact offences in broad terms but, because they are so broad and all encompassing, the British Parliament has written in certain specific defences to give a system of checks and balances.

Hon PETER FOSS: Are those defences "onus of proof" defences or "exceptions provable by"?

Mr SYROTA: A combination of both, but in non–lawyer's terms I refer to them as offences. There may be an onus of proof in relation to some and, in relation to others, exceptions. However, they have taken the British offences and stripped away the defences in that broad sense in a way that leaves the Bill unbalanced.

The CHAIRMAN: Are you referring to page 64?

Mr SYROTA: I am talking about what are the defences. I did not sign the Law Reform Commission's majority report. I am totally in agreement with what it tried to do. However, towards the end of the commission's majority report, it produced what is effectively a draft Bill. That draft Bill was lifted by the Parliamentary Draftsman, turned into the Government's original Bill, and put before the Legislative Assembly.

My reason for not signing the report is that in my view the Bill does not do what the majority report says it will do. It is wider in some respects and I think it should be narrowed down so that the intentions and the actual Bill become one and the same thing. When this gets to court at the end of the day the judges will not look at the Law Reform Commission's report, but they will look at the clear words of the Statute and that will govern their decisions. Therefore, it is most important that the Bill be tinkered with a little so that it will reflect their true intentions.

I intend to go through the relevant provisions of the English Act; I refer to the Public Order Act 1986 and the principal section, section 5(1), which states that a person is guilty of an offence if he –

> (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting,
>
> within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.

That section has been the basis of clauses 79 and 80 of the Western Australian Bill. The word "serious" has been added to qualify harassment. It is pretty well the same except that section 5(1) deals only with the display of material. I do not have the present Bill in front of me, but I am aware that clause 79 contains a possession offence. The commission's notion is that if the offence is confined to displaying this material it would not be possible to catch anyone committing an offence. I agree that there should be a possession offence so that it is possible to go into people's houses and find the posters. I agree with the commission that there should be an offence of possession with a view to display.

Hon PETER FOSS: What is wrong with "possession in a public place" as suggested by the Law Society?

Mr SYROTA: I think that the places where racists are most likely to have their posters in volume before they actually display them are in their homes. Of course, I have no proof of that and it is an assumption. If it is necessary to wait until a person takes them out of his home, and there is no way of knowing when that will be done, it will be difficult to catch the persons committing an offence.

Hon PETER FOSS: The material could be found in the boot of a person's car when he is returning with a pot of glue.

Mr SYROTA: That makes it more chancy. If the notion is for the offence to be possession with a view to displaying the posters in a public place, it does not make much odds whether the person is caught in possession of the material in his car or in his home.

Hon PETER FOSS: The difference is that it would justify search warrants and would authorise people to walk into people's homes and to look for the material. That is the objection.

MR SYROTA: It would certainly increase that. If the legislation dealing with this is to be enacted, I do not see that level of intrusion as going over the top. It is assumed that the person must have a view to displaying the posters in a public place, and they must be threatening, abusive or insulting. I believe there should also be an intention to cause serious harassment. That is not in the present Bill but I would have it redrawn and cut down. I would not be troubled about the place in which a person is caught.

I move now to the British defences and, although I do not suggest that these are all perfect, if the Committee intends to recommend some amendments to the Bill, these may provide a starting point. The first is the defence of the accused to prove he had no reason to believe that there was any person within hearing or sight who was likely to be caused harassment,

alarm or distress. That is aimed, among other things, at the sort of situation where someone has a racist poster in his living room and someone else sees it from outside the house. Under the provisions of the Western Australian Bill that person will have committed an offence on the basis that the poster is likely to cause serious alarm. Under English law it is a defence to say that the person displaying the poster did not think others could see it through the net curtains. It is a small point but it is a possible defence.

A more substantial defence is contained in subsection (3)(c) of the Public Order Act which provides for the accused to prove that his conduct was reasonable. That may refer to the display of a poster, book or pamphlet in a bookshop. It allows a quite wide-ranging defence, but it may be felt by some to be too open-ended. Also, who will judge what is "reasonable"? Of course, at the end of the day the jury will make that decision.

Finally, subsection (4) states that a person is guilty of an offence under section 5 only if he intends the writing, sign or other visible representation to be threatening, abusive or insulting or is aware that it may be such. There is an element of mens rea, a mental element of intention which is not present in the Western Australian legislation. Those are some of the safeguards considered by the Law Reform Commission but which were tossed aside. That may be a starting point for the Committee if it decided to recommend some defences.

I refer now to section 19 of the Act. The relevant clauses in the Western Australian Bill based on this section are clauses 77 and 78 relating to stirring up racial hatred. This section of the British Act states that a person who publishes or distributes written material which is threatening, abusive or insulting is guilty of an offence if he intends thereby to stir up racial hatred. Prior to 1986 in England the offence was limited to such intent but it was found difficult to operate in practice. It was broadened in 1986 to include provision for the likelihood of stirring up racial hatred. I query what is the point of including clauses 77 and 78 in the present Bill which are limited to intent, when a corresponding jurisdiction in England with worse racial problems than in Western Australia, found them to be ineffective. Why put on the Statute book provisions that are likely to be a dead letter in this State also? There is something to be said for widening those clauses to include the likelihood of stirring up racial hatred. However, if that is done, the defences which follow must be incorporated. I refer to just three of them.

Section 19(2) states that 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 material and did not suspect, and had no reason to suspect, that it was threatening, abusive or insulting. That is a defence for the owner of the radical bookshop who stocks books of one type or another which may contain racist passages. He cannot be expected to read every page of every book. If he can prove what is laid down in this Act he is off the hook. The legislation in this State should be reworded along similar lines for the alarm and harassment defence.

Section 26(1) states that nothing in this part applies to a fair and accurate report of proceedings in Parliament. That was introduced because there was a fear that without that clause it would not be possible for the Press to report something like Enoch Powell's rivers of blood speech in which he spoke about the dangers of immigration. It was suggested that Enoch Powell should be prosecuted for making that speech but, quite rightly, he was not because the Attorney General would not give his fiat. Of course, Enoch Powell put the political noose around his neck and thereafter he was not such a powerful figure in the Conservative Party. He received his punishment.

Unless a clause such as this is included, if a speech along similar lines were made in this Chamber or in the Legislative Assembly the people at *The West Australian* might be worried about reporting it. They could say that a dreadful speech was made last night and it was terribly racist, but could they report the actual words? There may be argument about this matter. They could probably report the speech even under the existing legislation because as long as the paper did not give the speech its imprimatur and did not appear to

approve of the remarks, it would be off the hook. However, there are other opinions on this matter. This provision has been added to make it crystal clear that the words can be reported verbatim without any such danger. Likewise, section 26(2) refers to reports of court proceedings. If the Press were covering trials of people accused of racist offences and during the course of that trial racist remarks were made by those people, there would be no query about whether those remarks could be reported verbatim.

Finally, because this is a sensitive issue, the Committee should start with a clause similar to section 27(1) in the English Act – that no proceedings for an offence under this part may be instituted except by or with the consent of the Attorney General. That applies only to part 111 offences, not to section 5 offences. These defences may not be ideal but we considered them and they were reflected by the majority report, and I think that was the wrong thing.

I turn now to the Salman Rushdie prosecution. I have given you an extract from the *New Law Journal* report of that case. That was a private prosecution under section 4 of the Public Order Act, and the Attorney General's fiat was not required. The message from this case is twofold. First, I did say in my dissenting report that Salman Rushdie's book might fall within the scope of the Government's Bill, to which I think some people thought I was scaremongering and was trying to suggest wrongly that there would be prosecutions of people when really that will not be so. I bring this case to your intention because it shows that there are people out there who will try to stifle books such as that, which I believe is the wrong thing to do.

The prosecution failed in England because under section 4 you have to show that the display of the book in the shop is likely to cause immediate violence. I think that is what the section says, but you will have to check the provisions. So because no such evidence was adduced the magistrate chucked out the case, and the Queen's Bench division confirmed the magistrate's decision. There is no requirement in the Western Australian Bill that there be a threat to cause immediate violence or turmoil in the streets. The WA Bill is very much wider and there is no guarantee that merely because the prosecution failed in England it would also fail under the WA Bill.

The CHAIRMAN: Does the English Bill require that posters cause immediate threat of violence and mayhem or does it apply just to books?

Mr SYROTA: I did not bring section 4 with me, and it may be wise to look at the Statute afterwards. I do not think it is limited to books. Like all of these things, it tends to be aimed at written material generally, of which posters would be an example, and also books, so it would apply to the two but you would have to check that.

The CHAIRMAN: You are probably aware of the submission from the Australian Press Council.

Mr SYROTA: Only in general terms.

The CHAIRMAN: Its submission was to adopt the words used in the New South Wales Anti-Discrimination (Racial Vilification) Amendment Act 1989, which says that newspapers can give a fair report of an incident or a story even though it may have racist content, and that will be a defence.

Mr SYROTA: That goes wider than the English law because the English law talks about Parliaments and courts, which definitely do need protection because if people make absurd speeches here or in the courts, why should not that be reported? It goes much wider to say in respect of a report of any incident, there should be a defence. I would favour a defence along those wider lines.

The CHAIRMAN: In their report?

Mr SYROTA: Yes. It is true that if you give an editor judgment and freedom he will sometimes exercise that judgment poorly and will make a poor fist of it, but is that really a reason for putting him in gaol or subjecting him to criminal sanctions? There is the Press Council, people can write in and complain, he can be lambasted or removed as editor, but the threat of the criminal law is a bit over the top and is such a savage way of dealing with things that it will have a cooling effect on Press freedom which will go way beyond the content of this Bill because the editor will think, "Do I want to spend a few days in gaol, along the lines of Tony Barrass, or would I rather go home tonight? I would rather go home tonight, so I will err on the side of safety."

Hon PETER FOSS: Or face prosecution, in which he succeeds. You have to bear in mind that the reason we have free speech in Parliament is not to enable us to say things wrongfully but to free us of the concern that we will be prosecuted or sued for what we say. Pre–censorship or self–censorship is what you have got to watch out for, where people err on the side of caution so as not to run the risk of even being prosecuted, let alone convicted.

Mr SYROTA: I agree with that but I would add that in a sense, if you take the British view, it is providing a bit of a dispensation to Parliament. The work of Parliament is so important that we will give it a dispensation, and also the work of the courts, but why are not newspapers allowed the same dispensation? If the newspapers, through their editorials, stir up hatred against a particular community, they should fall within the scope of the law?

The CHAIRMAN: That is a horse of another colour.

Mr SYROTA: Yes, but if they are reporting what somebody else does in the usual way, that is just part of the free flow of information.

The CHAIRMAN: The defence in the New South Wales Act provides in section 20C that racial vilification is unlawful. Subsection (2) then provides that nothing in the section renders unlawful –

> a. A fair report of a public act referred to in subsection (1) or
>
> b. a communication or the distribution or the dissemination of any matter comprising a publication referred to in Division 3 of the part 3 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 reasonably well and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Mr SYROTA: I do not know that I can comment on the detail of that.

The CHAIRMAN: The defence is fairly wide.

Mr SYROTA: It is, and much wider than the corresponding British defence. The WA Law Reform Commission has gone the whole hog and cut out defences altogether, and to some extent you need to go back either along the British lines or, further, to encompass the sorts of defences there. I did not come along with a detailed submission on the New South Wales Act.

Hon PETER FOSS: One of the things that astounded me about that report from the Law Reform Commission is that I have never seen a Law Reform Commission report which does not contain any law.

The CHAIRMAN: Is that a value judgment?

Hon PETER FOSS: It is. The report has a beginning and an end but it does not appear to have a middle. I was looking for the middle and did not find it. There was a little bit of comment on some of the words that were used but it was a summary of legislation in other jurisdictions – New South Wales, England, and wherever else there happens to be case law on that – and the results of it and how it has worked. It seems to me that a fundamental middle point between stating the problem and stating the solution is to show the workings as to how you got to the solution, and it appeared to me that there is no middle point in this report. That disturbed me. We are now getting a bit of that from the last witnesses and we are getting some from you, but these issues that are being canvassed today do not appear to have been properly canvassed in the report.

Mr SYROTA: I differ with my colleagues on their result. I do not know that I could go along with the view that they had not done it in a professional manner. The report has to be considered in conjunction with the discussion paper which was produced some six months earlier, and we would have different views on this but I think that does deal with the law quite effectively. It has also been my feeling that particularly with the sorts of issues we are getting recently – racial hatred, the right to die – which are very social issues, that people want to read about them. If we lard it with too much law it excludes the community, so I have tended to push for a fairly straightforward, intelligent, layman's guide to the problem so that we can involve the community. So although I appreciate your concerns, I am more at one with you on your concerns about the Bill than the mode in which the report is actually written, but it is a difference of opinion.

Hon PETER FOSS: The concern I have is that we have ended up with a Bill, and somehow you got to that Bill, and you must have had to consider overseas experiences. You say it is in the discussion paper, which unfortunately I have not read, but the report is what finally goes forward and what Parliament normally works on. The concern I have is that it is a Law Reform Commission, yet most of what was in its report were social issues. I do not deny they should be covered and are useful, but the Law Reform Commission exists to put forward legal solutions to a social problem and those must, to some large extent, depend upon how other people have solved the problem. I am sure the commission does not work on the basis of sitting down and thinking, "How will we deal with it without looking at other legislation?" We have missed out on this report saying those things.

Mr SYROTA: Yes, and the answer to that is that we must make it more clear in future reports that parliamentarians like yourself are really to consider them in light of what we have previously said in the discussion paper. Obviously that point has not come through clearly; but I do think they did the rounds fairly thoroughly.

If I can make one general comment about the reference, the Law Reform Commission, as you know, was originally within a Government department but in 1972 it was set up by independent Statute. It is staffed by a very independent–minded group of commissioners. On this occasion we were given the reference by the Attorney. It was made a top priority reference, and it is his right to do that, but I thought the amount of time we were given to deal with it was too short. I thought the report would unravel when it got into the public eye, although I do not wish to say, "I told you so". The commission has two full–time commissioners – Charles Ogilvie, whom you just met, and Moira Rayner, who has now left – and three part–timers. We meet once a week and policy is driven from there. Given that the part–time commissioners all have other work – I am a law lecturer, as you know; Rene Le Miere is in full–time practice; and Jim Thomson works in the Attorney General's office – we can only devote so much time to these issues. It may be a failing of mine, but it takes me some time to get my mind around these issues, and the Government was saying, "Are we going to get this legislation in place before Christmas?" If the Law Reform Commission had not tried to get its report out in time we would have got pushed aside, more or less; but if more time had been allowed we would not have been where we are now.

Hon PETER FOSS: More haste, less speed.

Mr SYROTA: That was my feeling, because essentially we are a bunch of lawyers – we are all legally trained. I am new to Perth and have spent only four years here. How do I know how to solve the problems of racial hatred? The Law Reform Commission was set up 20 years ago to deal with technical, black–letter law – we are great at that. We have been so good at it that the Government has said, "Oh well, let us give the commission these tougher issues"; but the make–up of the commission has not changed. It is still composed of black–letter lawyers, if I can put it like that, yet we are expected to get to grips with the right to die – one of the commissioners is in charge of that at the moment – and report about confidentiality of medical records. We have a lot of work in the medico–legal field, plus this issue, but the composition has not changed. I thought the Government was not sufficiently sensitive to how the commission worked. That was my personal view; I do not know whether the other commissioners would share it. Possibly they would not.

Hon PETER FOSS: That was my impression from reading the report – that there was no black letter law in it. I have always looked to Law Reform Commission reports because they are principally black–letter law and therefore one can treat them as being non–polemic and non–contentious in many ways; yet I did not find that in the report and of course I was looking for it. I think it has been very helpful to have had your advice today because it is the black–letter law approach which is useful for us in making up our minds.

Mr SYROTA: I would like now to take five minutes to speak about a letter which I have circulated to the Committee. The letter was sent to Mr Cronin, Editor in Chief of *The West Australian* newspaper, in preparation for a meeting that he had with the editors of the *Sunday Times* and the *Daily News*, Carmen Lawrence, Moira Rayner and various other dignitaries. I was not invited but I thought, "Don't be backward in coming forward", so I sent this letter and apparently it was quoted by the newspaper editors to Carmen Lawrence in the course of discussions. It relates to the impact of the Bill on Press freedom generally but in particular on one story. I do not know whether the Committee members have copies of it but it appeared in *The West Australian* on 28 February under the banner headline "Aboriginal gangs terrorise suburbs". I understand that has been the subject of a complaint to the Press Council and when the Press Council organised a discussion on this Bill some weeks ago at the University of Western Australia, which unfortunately I could not attend, there was a question mark as to whether that headline might fall foul of the new Bill. I believe, although I have not seen the original headline, that the first editions ran "Black gangs terrorise suburbs", then it was changed to "Aboriginal gangs terrorise suburbs". Moira Rayner told me that was the case, but I do not think I ever saw it.

The story itself is about Aboriginal children in the Maylands and Bayswater area breaking into hotels there. It concerned a group of about 30 of them. There is a straight, factual report and there is no doubt in my view that under the new legislation that would not be penalised. The difficulty is with the headline, because on one reading it seems to suggest a kind of widespread lawlessness by Aborigines running throughout the whole of the metropolitan area, and to that extent they could take offence. I would like to take five minutes to go through my letter because the question it deals with is how the Bill impacts on this headline in particular and on Press freedom generally. I will comment on one or two paragraphs, beginning at the bottom of the first page –

> In my view, there is really no likelihood that the story itself would be caught by clause 79 or 80 of the Bill. It is a straightforward factual report of incidents of violence in the Maylands area. Assuming the report is accurate, it could not possibly be regarded as "threatening, insulting or abusive" to Aborigines, as required by clauses 79 and 80.
>
> The difficulty lies with the *headline* ("Black gangs terrorise suburbs") which arguably carries with it an imputation of widespread lawlessness by Aborigines throughout the whole of the metropolitan area (whereas the story itself merely refers to some 30 or so Black vandals operating in the adjacent suburbs of Maylands and Bayswater).

> Although the headline would not be prohibited by any existing criminal law, it would very likely be caught by clauses 79 and 80, which prohibit the possession and display of written material which is "insulting" and –

And this was in the original Bill –

> "likely to cause serious distress to an identifiable group".

I think the next case is important, and it bears out what Hon Peter Foss was saying a moment ago; that is, you should get your law in the report. Masterson *v* Holden was mentioned in an initial draft of the report, but I do not think it is in the final version. This is an English case which held that conduct would be "insulting" if it insults just one person who sees it. My letter to Mr Cronin continued –

> This suggests that under clause 79 or 80 the prosecution would merely have to show that at least one Aborigine felt genuinely "insulted" and "seriously distressed" by the headline: it would not be necessary to prove that a majority or sizeable proportion of Aborigines was insulted.
>
> Of course, the WA courts would not be bound to follow the English precedent in *Masterson*; but if they did so . . . then the stage would be set for a very major incursion into press freedom.

If I may make the suggestion, Mr Chairman, what needs to be looked at is the reference in all of these offences to an identifiable group. Let us take clause 80, which refers to the display of material which is likely to cause serious harassment to any identifiable group. What is the identifiable group in this headline, assuming it is distressing? Is it Aborigines throughout Australia, Aborigines in Western Australia, or Aborigines in the metropolitan area? If it is Aborigines in the metropolitan area, is it a majority of them, all of them, one or two of them? What is the identifiable group?

Hon PETER FOSS: It is Aborigines in Maylands.

Mr SYROTA: In Maylands? The lawyers will make an absolute fortune out of this in the courts, by asking who is the identifiable group, and the judge will be just wishing it would go away. That needs to be sorted out.

Hon PETER FOSS: On this question, it does not require the group to be within our community. It could relate, for instance, to the writing of a pamphlet denigrating the Russian Government for not allowing Jews to emigrate.

Hon DERRICK TOMLINSON: Even the Minister's second reading speech countenances that, with its reference to the offence that was taken in Singapore and Malaysia to the activities of the Australian Nationalist Movement. While it is drawing a long bow, it does embrace the point Hon Peter Foss has made.

Mr SYROTA: I might be arguing against myself here, but I think there must be a likelihood in the original Bill of serious fear, harassment and distress in WA. The question is whether the Kremlin is really quaking in its boots when it reads an article written about it in *The West Australian.*

Hon PETER FOSS: What about Russians?

Mr SYROTA: In this community?

Hon PETER FOSS: It might be about Russians overseas or Jews overseas. If people here take it as being alarming or fearing, even people overseas can take it as alarming or fearing. What about the remarks made by the Return Services League about the Japanese and that

they would never forgive them for what they did during the war? What about the latest picture "Blood Oath" – that is a pictorial representation and could possibly be seen to cause fear to Japanese? Mainly it is directed toward the Japanese during the Second World War but local Japanese could be upset.

Mr SYROTA: Even the Law Reform Commission majority report and the original Bill suggest it needs to do more than disturb people. It has to be serious distress.

Hon PETER FOSS: Sections 79 and 80 talk about serious harassment, alarm or fear. I do not know if "serious" governs alarm or fear.

Mr SYROTA: Probably all of that. One could nit–pick away all day but broadly my suggestion is to cut it down to serious harassment. I could not conceive a woollier phrase than "serious distress".

Hon PETER FOSS: Harassment is a good word because it shows that you are actually getting someone and there is a connection between what you do and what a person feels.

Hon DERRICK TOMLINSON: That is not necessarily covering deliberate intention. There is a distinction between a deliberate intent, in some aspects, and likely to cause. A person could engage in activities which other people find alarming or which create fear or harass someone – but that person may not have a deliberate intent. There is an attempt to give a person a defence in the legislation.

Mr SYROTA: As I said earlier when I referred to the English defence. My minority report came up with a slicker solution. I suggested a narrowing down to keep the Bill plausible; that is, in sections 79 and 80 to strike out "likely" and leave it at intent. The argument is if you have to prove intent to cause harassment you could render the legislation unworkable.

To answer the question, we do not know. It is true in the English legislation prior to 1986 in the offence of intentionally stirring up racial hatred it was difficult to secure a conviction. So it has been widened to include the likelihood of stirring up racial hatred. The wider offence in sections 79 and 80 to be put on the books now is untested. All you would have to show with my proposal is the intent to cause harassment and alarm.

The CHAIRMAN: What if the defendant says he did not intend to do that? Then you have no case.

Mr SYROTA: That is the common layman's misconception. The evidence will speak for itself. If you catch red–handed a member of the ANM putting up vicious posters and he says that he did not mean any harassment, he can be asked, "What did you mean?" That is the issue.

The CHAIRMAN: You are making it harder to get a conviction by deleting the word "likely".

Mr SYROTA: Yes, but at the same time you are not really confronting the matter. The freedom of speech is correspondingly reduced, and given that it is a sort of balancing act the harder you go into racists the more you encompass everyone and his dog. It is a matter of trading off one thing against another. If you put a stringent law on the books, the history of criminal law shows you can never draw that back. They are left on the Statute books for years on end. If you move cautiously now and review the provisions – and I believe this legislation should be reviewed annually or biennially for the first 10 years – it could then be broadened. My approach is prudent; you should start cautiously and move with small steps.

The CHAIRMAN: You made a point about an identifiable group and that lawyers would have a field day. What remedy do you have for an identifiable group?

Mr SYROTA: I did a quick think about that point this morning. I do not have the perfect solution. Perhaps you should keep in the likelihood. Why do you not say that the article or poster in question has to be likely to harass, cause fear or alarm to a majority or substantial proportion of those people likely to see it? It has to be the people who see it. I am sure that is not the perfect solution. Really I am criticising the terms of the present Bill and saying how you should redefine it. If you limit this to an intent possibly the problem goes away. If it is something intentionally against Aborigines, for instance, perhaps the problem is exacerbated if the word "likely" is used.

The CHAIRMAN: How is it handled in the Public Order Act?

Mr SYROTA: The fear and harassment offences under section 5(1) are not racial so the problem does not really arise.

The CHAIRMAN: What about the racial hatred provision?

Mr SYROTA: I am not sure how that is handled; it would have to be looked into.

The CHAIRMAN: Could we not refer to racial hatred; then race could be defined?

Hon PETER FOSS: You would have enormous problems as to what race means and it would leave out ethnicity. What if you say "Chinese" and not "Asians"; Chinese are not a racial group, they are an ethnic group.

The CHAIRMAN: We could say "or racial or ethnic group".

Hon DERRICK TOMLINSON: We would run into a serious problem with defining race. I notice the Law Reform Commission declined to define race. The legislation refers to any identifiable group which means any group of persons identifiable by race, colour, ethnic or national origin or nationality. In your evidence, you made a distinction between harassment and racial harassment. Race has a meaning which is constantly being avoided. Should we not attempt, or is it wise to continue to avoid a definition of race?

Mr SYROTA: To put it in concrete form, if you consider Salman Rushdie's book that is aimed at religious rather than racial things. In my dissenting report I said they are often intertwined. When one refers to "Jewish" people, is it race or is it religion? I do not know.

Hon PETER FOSS: Is it a nation?

Mr SYROTA: Yes. If you wish to toss out Rushdie's book I would ask something of the identifiable group which excludes people tied together exclusively by religion. That may not be the ideal formulation but to answer the point I made earlier, my feeling as the commission came to the report stage was that we have left a lot of loose ends and someone would pick up on them.

The CHAIRMAN: An identifiable group is a broad description. We talk about racial hatred and ethnicity, and you have mentioned religion. Perhaps we should use "harassment or fear to any identifiable racial or ethnic or religious group"?

Mr SYROTA: Religion broadens it because religion is not clearly brought in by the definition of identifiable group.

The CHAIRMAN: We would have to redefine it.

Mr SYROTA: If you add "religious group" it would mean that the comments by, say, Anglicans against Catholics –

The CHAIRMAN: Not comments, we are talking about posters.

Mr SYROTA: The poster may refer to blacks or whatever.

Hon PETER FOSS: That creates other problems.

Hon DERRICK TOMLINSON: Stating that the Pope is not a Catholic!

The CHAIRMAN: If we leave out religion, a person may be identifiable as part of an ethnic group.

Hon PETER FOSS: One further problem is that the Bill does not make it clear when one is referring not to the whole group but referring to part of that group.

The CHAIRMAN: What I have suggested does not change that.

Hon PETER FOSS: That is one of the problems.

Mr SYROTA: That is a separate problem.

Hon PETER FOSS: What George was saying was that if the group means Aborigines in Maylands, the mere fact that one refers to the race of the group in a particular suburb could be enough to bring one within the terms of the Bill. Also, one may not have to mention such a feature of a group being of a particular ethnic background, and one could still have serious problems. One example given was the suggestion about marijuana growers in Griffiths in that they happened to be Italians. That could be presented in a racist manner, but it could be sufficient to state that they are all Italians and they are all growing marijuana and this stirs up dislike against the group, and one could offend the Bill.

Mr SYROTA: I will not go through all of my letter as it is self-explanatory. However, I draw attention to the elements which are most likely to cause problems: These are inaccurate reporting and editorials or feature articles critical of ethnic minorities. In the second case I refer to an article which appeared on the front page of the Big Weekend supplement to *The West Australian* that was titled "Men of dishonour", and this drew a very harsh reply from the Italians. The punch-line to this response came from Mr Tudori, of the Italian Anti-Defamation Association, who stated that all politicians, particularly ones with ethnic backgrounds, should change the law to stop this ethnic insulting which the media seems to think it has a right to do with impunity. He stated that a couple of $200 000 fines would stop the practice. I thought the article to which he referred was long on innuendo and short on fact – it was an editorial mistake. However, I do not agree that it should be subject to that sort of fine. The community must determine whether it wants that sort of article in the newspapers.

Finally, I refer to something which I heard Hon Peter Foss discussing earlier and I quote from my letter –

> However, at the eleventh hour, and possibly because the Commission had finally woken up to the awesome breadth of its proposed new offences, –

I should not talk about my colleagues in that fashion. However, the letter continues –

> – it did decide to recommend a novel (and in my view unsatisfactory) "safeguard" applicable to clauses 79 & 80. This would confine those offences to cases racially inflammatory material is printed on the <u>front cover</u> of a newspaper or periodical – but would allow the same material to be printed with impunity <u>inside</u> the publication.
>
> The effect would be that, whereas, the headline "Black gangs terrorise suburbs" could not be printed safely on page 1 of <u>The West</u> after enactment of the Bill, it could be printed on page 2 or elsewhere inside the newspaper. The intellectual

justification for this proposal is obscure.

A further difficulty with the proposal is that, although it is referred to briefly in the Commission's majority report and also in the Minister's 2nd reading speech –

I refer to Mr Gordon Hill; the letter continues –

– it is nowhere reflected in the Government's Bill. On the contrary, a fair reading of clauses 79 & 80 clearly suggests that these offences apply to "racist" headlines and stories regardless of whether they are printed on the front cover or inside a newspaper.

This discrepancy between the actual provisions of the Bill, and the interpretation placed upon them by the Minister in his 2nd reading speech, has the potential to cause enormous confusion in practice. If the Government seriously intends to confine clauses 79 & 80 to the front covers of publications, it should amend the Bill so as to spell out this limitation clearly.

The cover/content distinction is hopeless and should be abandoned. If this was applied in the context of the article "Men of Dishonour" which was on the front cover of the pull–out supplement to *The West Australian*, but not the cover of the newspaper, it would cause problems – I would love to deal with this in court as the judge would be sweating! There is no justification for this provision and the position is not clear in the Bill. My colleague, Charles Ogilvie, said that he believed the covers were displayed and not the content, but if this matter could be sorted out now one way or another it would be to great advantage.

Hon PETER FOSS: What would be the situation with racist books where fairly warped racist people buy them; should these people be allowed to buy them?

Mr SYROTA: This situation would not be covered by the present provision because it relates to a person who displays or distributes such books and who is caught.

Hon PETER FOSS: It could apply to publishers. Should we stop people from buying these books? Effectively these books would not be available to those people who wanted to buy them.

Mr SYROTA: In my respectful submission, I doubt whether this Bill will make much difference when it is enacted. A lot is at stake with this legislation but racism will still occur when the Act is in place. The long term solution is to argue rationally against racism. I do not know how much this Bill will add to the equation, but if it is not put in place the ethnic community will feel that the Government is not standing behind it; therefore, the legislation should be put in place. Those people with high hopes for the legislation may have their hopes dashed.

Hon DERRICK TOMLINSON: While it may be true that racist attitudes will prevail in our community, is it not proper for certain behaviour of individuals which is offensive to be curtailed by law?

Mr SYROTA: If one takes an article such as "Men of Dishonour", this was a misjudgment in being published. I thought that the reply from Mr Tudori was the appropriate manner in which to handle such issues as I am reluctant to bring in criminal sanctions, as opposed to other forms of sanction, other than in clear cases. That is why clauses 77 and 78 should be widened to include "likelihood", and why clauses 79 and 80 should be limited to cases of intent to cause harassment. If a person intends to harass Jews or blacks, I have no problem with fining such a person; if that person persists he should be sent to gaol. However, if you widen the provision to include "likelihood", too many people may come into the categories.

Hon PETER FOSS: Harassment is the important part of the present Bill. If a public library

displays a copy of *Mein Kampf* that could arguably be caught within the Bill.

Mr SYROTA: I did say that originally, but now I am not so sure.

Hon PETER FOSS: I think it could because the book intends to spread racial hatred and is likely to cause fear and harassment to people in seeing the book displayed in a public library.

Mr SYROTA: It must be seen in context. I am sure we have copies at the university library and many Asians and Jewish people study at the university; however, I wonder how many such students are scared by this book. If the university somehow gave the book its imprimatur, the case would be different.

Hon PETER FOSS: It does not say that in the Bill.

The CHAIRMAN: If we could move on, the next witness is waiting.

Mr SYROTA: People would become afraid if the university was setting its imprimatur to the book; without that people will not be alarmed. The fact that the book is on the shelf would not alarm people.

Hon PETER FOSS: You have said that if any one person is alarmed, the provision will apply. Charles Perkins made certain statements about Aboriginal rights; what would happen if people wishing to gain redress did something which was likely to cause fear in an identifiable group? In the case to which I refer this would involve white settlers to Australia and the people causing the distress would be the Aboriginals. They would say that we should look at the terrible, wrong and hateful things done to Aboriginals over a long time by white settlers. They could state that the behaviour of the settlers was outrageous and that Aboriginals should be entitled to redress under law. If they cannot achieve that lawfully they may have to take that redress. Charles Perkins made statements early in his career in which he urged people to take action rather than following the normal procedures. If some person did that for legitimate political reasons in seeking redress for racial wrongs and in seeking that redress said something nasty about somebody else, would that situation not apply with this Bill?

Mr SYROTA: I will send to Mr Foss, and perhaps he could pass it on to the rest of the Committee, a book by McDonald which is a discussion of the English provisions. It is some years out of date, but it indicates that the example just given is less than fanciful. The English legislation, which was first put into place 20 years ago, was initially used to prosecute members of the ethnic minorities who said that they were having a hard time. That does not happen any longer. It was a bit of a farce in England when it was first introduced as it was used against blacks and ethnics. That is another reason for the Committee to move cautiously. I will fax that down and it can be distributed.

Hon PETER FOSS: This is where the English "or is reasonable" may come in. You could say it is reasonable because it is part of a complaint to the public of the treatment that they have received.

Mr SYROTA: It would be most unfortunate if, when this legislation is finally put into place, the first prosecutions were of people in the ethnic community. That would make the whole thing seem like a farce; so tread warily.

The CHAIRMAN: Thank you for your contribution; you have been most helpful.

[The witness retired]

TAN, MR ERIC G.C.

Surgeon,
Public Member Australian Press Council,
Past President, The Chung Wah Association,
44 Parliament Place,
West Perth, examined:

The CHAIRMAN: Welcome to the Committee. Have you read the notice to witnesses?

Mr TAN: Yes, thank you.

The CHAIRMAN: You may like to make an opening statement and then members of the Committee will proceed to ask some questions.

Mr TAN: I have written a letter to the Committee and my feelings are contained in that. During my trip here I was reflecting on this meeting. It occurred to me that in the last decade of the 20th century we are living in a civilised country and we have seen a lot of spectacular technological advances. It is sad to be talking about a Bill such as this. I thought we would never see the need for such a Bill. However, there is no doubt in my mind that I have lived through a period which has been very difficult for community relations. It has been a period in which people's pride in their identity as Australians and in their interpersonal relationships with other people has been very seriously damaged. It is with a degree of sadness that I come today to talk to the Committee.

I have done some work in relation to this Bill. Right from the beginning I have talked with various people pointing out the damage that has been caused and which needs to be arrested. We are not talking about a hypothetical situation. We are not talking about intended or likely to cause or various possibilities; we are talking about a set of situations in which people have been damaged, reputations have been ruined and the standing of this community has been affected, not just in Australia but also overseas. I come here to urge your good work and to try to bring this legislation to fruition. I am quite happy to answer questions on specific items, but my feelings are set down in my submission.

The CHAIRMAN: Have you any comments to make on the Press Council submission to be incorporated in the Bill so that journalists will not be caught? The Press Council feels that journalists will be caught if they give a fair report of any activity or incident which might be caught under the provisions of the Act. For example, if they display a headline.

Mr TAN: I understand the Press Council will be represented by another person. There is a fear in the Press that by reporting something which they conceive and perceive as being of public interest and service they may land themselves in litigation. In answering that question at a public meeting Moira Rayner had some illuminating points to make. I will leave you with a copy. She remarked that because of the nature of the report in relation to the black gang terror incident, it was unlikely to be covered under this proposed legislation. She said that there were certain barriers to the success of the prosecution. She said in response to a question from Mr Chris Smyth –

> Alright. There are two offences. One requires proof of intention to incite racial hatred, the other only that harassment, fear, alarm or distress is a likely or intended result. For the first offence is the inciting race hatred offence. If written material is intended to incite racial hatred and is threatening, abusive or insulting, then it ought to be got. The second racist display offence is the one that relates to incitement to racial hatred. I don't think there is any question that that front page was not

intended to incite racial hatred. So the only offence which could possibly apply would be the display offence, that is, the actual display of threatening, abusive or insulting material which is intended or likely to cause serious harassment, alarm, fear or distress. There are two major elements, of course, to this offence. The first is the nature of the material must be such that the use of those terms usually implies that there is a risk of the breach of the peace if they are used. And the second relates to whether it's likely to have the effect which follows, that is serious harassment, alarm, fear or distress. And there are two major hurdles. They are indictable offences, as the Bill presently stands, so there will have to be a decision made to take a prosecution proceeding – it wouldn't be an ordinary police decision in the usual circumstances. And a jury would ultimately have to be satisfied that those two hurdles had been reached. These would be decisions to be taken by a judge, in the particular circumstances, if the police or other prosecuting authority decided to charge. I couldn't possibly predict whether the decision to prosecute would be made or whether a conviction would follow. It is not likely that the sort of public comment in a newspaper which is bona fide, not intended to incite racial hatred and of a nature which is said to be based on fact, it would be highly likely to fall under the second heading.

The CHAIRMAN: That might be the legal situation –

Hon PETER FOSS: She is wrong actually.

The CHAIRMAN: If she is correct and the Press think there is an impediment, they will err on the side of caution. That is the problem they see.

Mr TAN: I have had discussions in the Press Council. There are two submissions. A submission from the Press Council asks for a defence clause on fair reporting to be inserted. That is a fair thing to do. I have supported that position.

The CHAIRMAN: Are you on the Press Council?

Mr TAN: Yes.

Hon PETER FOSS: Moira Rayner has suggested that these words lead to a breach of the peace. I had discussions with her in relation to the 1989 Bill. She cited a whole lot of cases from the Police Act which I did not believe were a correct statement to law. The context in which the words were used was that it was an offence relating to breaches of the peace. Of course those words were taken as likely to lead to a breach of the peace. I do not think that is derivable from this defence because the second part is the discretion "likely to cause" and we have debated that at length. I think Mr Tan supports that. "Likely to cause" is a worrying part for me.

Most of the submissions that we received acknowledge the problem to which you have referred. The Committee accepts that there is a problem and that something needs to be done about it. There is a concern that the remedy as proposed may allow for a possibility of catching people it is not intended to catch. The reason for that is that people who are guilty of the acts to which you referred are already committing offences. However, it is difficult to catch them. Therefore, some of these things are intended to throw the net a little wider so that we can catch the people we really want to catch. However, by throwing the net wider we take more people into the possibility of being prosecuted. I am not happy with Moira Rayner's suggestion that we can get over that by the Attorney General's not agreeing to an indictment. He may agree if the possibility is there. Have you lived in Malaysia?

Mr TAN: I lived there for 18 years.

Hon PETER FOSS: Have you heard of the Internal Security Act?

Mr TAN: Yes.

Hon PETER FOSS: The Internal Security Act contains a similar provision which, in some ways, is a less draconian provision than this one. Section 22 of the Internal Security Act is headed "Special powers relating to subversive publications". That section has been used by the Malaysian Government to prevent ethnic Chinese from complaining about the preferential treatment given to ethnic Malays under the laws which allows preference being given in a number of areas.

Mr TAN: The bumi putra idea.

Hon PETER FOSS: Yes. That law has been the subject of severe criticism by the International Commission of Jurists. Its report in 1988 contains a preface by Mr Justice Marcus Einfield, the President of the Australian Human Rights and Equal Opportunity Commission. Mr Syrota told the Committee that, under the equivalent English legislation, most of the early prosecutions were against ethnic minorities complaining about the treatment they received. To what extent are you prepared to rely on the good nature of the Government not to prosecute ethnic communities complaining about their treatment? To what extent do you want to see that preserved in the legislation? Would you be concerned if an unfriendly Government to ethnic minorities used the section in the same way that the Malaysian Government used its legislation?

Mr TAN: I think the situation is different in Malaysia. What happened here is quite different, so the problem does not apply. We do not condone what happens in Malaysia. Many people who now live here chose not to live in Malaysia for those reasons. It is a different set of circumstances. The risk of the Government using this legislation to attack a minority group is very small.

Hon PETER FOSS: The legislation at present allows anybody to prosecute. It is not wide enough to prevent ethnic minorities complaining in a particularly loud way about their treatment. An individual who is offended by it – perhaps a racist individual, a person who objects to the complaints – could commence prosecution. There is the protection that the Attorney General may not issue an indictment. However, generally, he is obliged to issue an indictment if an offence is disclosed. It is not a matter of his saying that he will not enforce the law because he does not like to enforce it against ethnic minorities. He has to enforce the law as it is written. Would you not be concerned if a group opposed to ethnic minorities commenced a prosecution?

Mr TAN: Commencing a prosecution is one thing; whether that prosecution would hold water is another. There is that safeguard. I understand that the prosecution under the proposed Bill is to be initiated by the police.

Hon PETER FOSS: No, I have not seen anything about that.

Mr TAN: Is this not a civil action case?

Hon PETER FOSS: No. Anybody can commence a prosecution under the Criminal Code. You can commence a prosecution.

Mr TAN: It seems that the legislation focuses very strongly on a fairly narrow range of activities relating to the possession or the display of material intended for incitement of race hatred. This legislation is not intended to fight racism. I think better methods such as community education should be used. I do not think we can stop people from being racists. I listened to your previous witness. We cannot stop people from having racist views. We can tell them that society does not stop them having racist views in private, but if they intend to disrupt society through their activities, they will be prosecuted. At some point we have to draw a line and say that it is wrong and the Bill attempts to do that. I am not a lawyer so I do not know the intricacies of the various terms in the Bill. I can only listen to

the debate by various people including the Law Reform Commission and others, and also take on board the comments of Sir Ronald Wilson who thought that the Bill had some rather imaginative elements in it which make it likely to be more successful than other Bills.

He also thought that the Bill was too narrow. There are arguments both ways; some people whose views must be respected say that on balance it is a reasonably good attempt to solve the problem. I understand there are also plans to review the operation of the Bill and if it is found that there are shortcomings we shall be in a position to change them. There are enough mechanisms built into the legislation and, unless there are very strong reasons to do otherwise, people should make compromises just as we have made significant compromises in this regard.

Hon PETER FOSS: I agree in some ways that the Bill with regard to incitement to racial hatred probably is too narrow, but it is not confined to that. Most of the criticism has not been of clauses 77 and 78, but of clauses 79 and 80. I agree with what you and Sir Ronald Wilson say with regard to clauses 77 and 78; there seems to be no logical reason to limit it to the written word. However, the criticism has not been of that but of clauses 79 and 80 where the combination of the words, especially the use of the words "is likely to" and the way in which an identifiable group is defined, is such that if a person says something or writes something which causes offence to a member of a racial group, and not necessarily a minority group, he may be prosecuted because somebody has taken offence whether or not that was the intention. The intention is that if a person puts things in a threatening or abusive manner which can be seen as directed towards a racial group, and somebody in that group takes offence and it is likely that they will take offence, that person will be prosecuted. The concern is not at what you are trying to achieve but whether this legislation does that.

Mr TAN: I understand those concerns, but how does one deal with people who deliberately display posters in the streets of Perth and who say they have no intention of causing offence?

Hon PETER FOSS: You do not believe them. The law has never had a problem disbelieving people who say they did not intend to do something. Would you believe somebody who put up an ANM poster if he said he did not intend to incite racial hatred? I would not and I do not believe a jury would either.

Mr TAN: If somebody declared that he had no intention of inciting racial hatred, how would it be dealt with?

Hon PETER FOSS: The jury could decide not to believe him.

Mr TAN: Could the jury do the opposite and say that it did not believe the prosecution?

Hon PETER FOSS: Yes, but that is always on trial in an action – whether the jury believes or does not believe a defendant. It is not a problem to say that intent must be proved notwithstanding what a person says. Most criminal offences require some element of intent but, for example, very few people who are convicted of wilful murder say that they intended to murder the victim.

Mr TAN: I understand that the phrase is to give a mechanism for the application of an effective test of intent.

Hon PETER FOSS: It goes further and will allow people to be convicted even if they had no intent.

Mr TAN: That is assuming that the judge, jury and prosecution are easily swayed on these matters.

Hon PETER FOSS: No, it is assuming that they apply the law. The problem I have with this legislation is that in order to make it administratively easier to prove the offence it can pick up people who did not intend to cause racial harassment because it is not necessary to prove that they intended it. It does not give an objective standard of intent; it says that intent is one way of proving the offence and likelihood is another, and it becomes irrelevant for a person to say they did not intend to cause racial harassment.

The CHAIRMAN: Are you, Mr Tan, aware of the amendments in the redrafting of the Bill?

Mr TAN: There was one defence.

The CHAIRMAN: Bob Cronin said that the proposed inclusion in the Bill of a defence that the person publishing or displaying the material did not know that it would cause alarm, fear or distress appears to be totally unsatisfactory. For the editor or publisher of a newspaper that defence appears to amount to a plea of incompetence. Do you have any comment on that? I know that you support the fair report concept. Are you familiar with the provision that if the editor of *The West Australian*, for example, said that he did not know something would cause alarm, fear or distress and if he could sustain that he would be home free?

Mr TAN: That is precisely the argument I am putting forward. If somebody were to seek a defence on the ground that he had no intention, this Bill might be rendered inoperative. That defence should be subject to an objective test, and the clause referred to provides that mechanism. I agree with the concept of fair reporting, with the reservation that there is nothing to stop the ANM from starting a newspaper and writing articles purporting to report statements.

The CHAIRMAN: It must be a fair report.

Hon PETER FOSS: It would be a fair report if somebody made a speech which was blatantly racial and the newspaper reported it word for word. That is a valid concern. Can you think of a way around that problem?

Mr TAN: No I cannot. I hope the provisions of this Bill will never be used but they may need to be fine tuned. That is why I welcome this interview.

The CHAIRMAN: The English Public Order Act limits the reporting to reports of the proceedings of Parliament and the courts.

Mr TAN: In some courts in Australia reporting is banned; for example, the Family Court. There are many restrictions on reporting in this country, both in the Press and in the electronic media. A number of restraints have been placed on members of the media. So long as they do their job properly, I do not think they are dragged into the courts too often. If they deliberately go against the spirit of things and in fact engage in incitement to racial discrimination they should not be above the law.

The CHAIRMAN: That is quite different. As I said, that is a horse of another colour, and that would be caught by the Act.

Hon PETER FOSS: That is caught. Your point about the ANM using its own newspaper as a means of getting around it is very valid, and we would have to look at that if we were prepared to put in a general "fair report" exemption because your concern is perfectly justifiable.

Hon DERRICK TOMLINSON: We are concerned that the evidence we have looked at this morning has focused almost continuously on protecting the freedom of the Press, whereas the principles of the Bill are about the display and publication of material. I go back to

your opening comments because I want to make it clear in my mind and in the evidence before this Committee that your reference to your having lived through a period which you found very distressing and which other Australian found distressing was, I assume, a direct reference to the activities during the past decade of the group known as the ANM?

Mr TAN: The poster campaign has certainly inflamed the situation. What is not known is that there was a plan to bomb 30 Chinese restaurants simultaneously in one night, and if that had happened you can imagine the sort of headlines that would have gone around the world. We may say that a poster on a lamp post is nothing, but the cumulative effect is horrendous.

Hon DERRICK TOMLINSON: I want to move a bit further than that because while I believe most fair minded Australians would find the activities of the ANM offensive – and they do not have to be the targets of the racial hatred contained in the ANM campaign to find it offensive – this legislation is not about the ANM but about any person who engages in such activities. I want that to be quite clear in my understanding of your evidence as well.

Mr TAN: I am very clear on that. I had hoped this legislation would prevent the recurrence of what has happened in the last few years.

Hon PETER FOSS: It may prevent more than that, you realise. I do not think you have any doubts that we all support the prevention of that. We obviously cannot address the bombing of Chinese restaurants but there are other more serious offences which address that. We as legislators have to look after your right as a citizen of Western Australia to be protected from legislation which, while trying to catch the ANM, may instead catch you. If you have got documents in your house, for example, which attack the Malaysian Government for what it has done in Malaysia, and if you possess those documents with the intention of showing them to other members of the Chung Wah Association, that could be an offence under the terms of the Bill. I know you may say that will never happen but –

Hon DERRICK TOMLINSON: The legislation is about things which might happen.

Hon PETER FOSS: Yes. When we write legislation we have got to take into account what it says, not what we in good faith hope will happen. Things can change in our society.

Mr TAN: Let us not use the Malaysian situation because there are international implications, but there are situations in Western Australia where groups are not as amicable to each other as they could be, and where from time to time they have made disparaging remarks about each other. I would like to think that those activities will also be discouraged. It does not do us much good to import foreign disputes and wars into this community, and if as a side benefit of this Bill we could get people to temper their criticisms of other people and have a more Australian focus in their attitudes that would be desirable. We do not engage in that sort of activity but those are the sorts of concerns that you are talking about.

Hon PETER FOSS: What about the complaint by Aboriginals about the racist treatment they have received over the years?

Mr TAN: They are not inciting hatred of other people.

Hon PETER FOSS: They might be.

Mr TAN: They are complaining about their victimisation as a race.

Hon PETER FOSS: You are always going back to sections 77 and 78, but sections 79 and 80 do not talk about incitement to racial hatred. If you were to write a pamphlet which caused fear in the mind of somebody that Aboriginal activists might want to do something

more active to get land rights, that could offend the Act even if you did not intend to cause racial hatred. You keep coming to the words of sections 77 and 78. I do not disagree with you. Sections 77 and 78 are fairly good because they talk specifically about inciting racial hatred, and I do not think anybody should say that people should be entitled to incite racial hatred, but sections 79 and 80 do not talk about incitement to racial hatred, and that is the problem.

Mr TAN: It talks about serious harassment to a group.

Hon PETER FOSS: It talks about serious harassment, alarm or fear. Mr Syrota said that if any one person in that group felt alarm or fear then you might satisfy the terms of the section. So if a member of the Australian community felt alarm or fear about a statement made by an Aboriginal activist regarding land rights, and if that was written in a threatening or abusive tone – and it is not terribly difficult to find in all sorts of political pamphlets that they are threatening and abusive – then whether he intends to cause it or not, if it is likely to cause it, and it may be caught. You are saying to me that that is a long shot but I do not think sections 79 and 80 are a long shot. That is just the sort of thing that groups who are intolerant will seize upon in order to silence minorities. It is the wording that we are worried about. George Syrota suggested the English wording was a bit better because it talks about harassment – and I think harassment is a pretty difficult word to get around – rather than fear or alarm. People can often feel fear or alarm but I am a lot more comfortable with the word harassment.

Mr TAN: I was given to understand – again as a non–lawyer – that the combination of the words fear, alarm, abusive and threatening etc are conventional word phrases used in legal terms.

Hon PETER FOSS: Moira Rayner said that, and I think she is wrong.

Hon DERRICK TOMLINSON: There is a difference between sections 77 and 78, and sections 79 and 80. The first deals with the intention to do something to an identifiable group of individuals. The second deals with an offence against an identifiable group of individuals.

Hon PETER FOSS: The result.

Hon DERRICK TOMLINSON: Yes, the result; but the result is in the individual. It is whether he or she – to use nonsexist language – feels harassed, fearful or abused by it. It think that is particularly important if we are going to be talking about legislation which avoids the sorts of feelings Mr Tan expressed right at the beginning of his remarks.

The CHAIRMAN: Have you any comment to make on that, Mr Tan?

Mr TAN: No, I cannot offer a comment to that on the spot. I can understand the intent of the legislation, I understand that the Committee is trying to improve on the wording, and I am sure that there is a final decision that the Council wants to make. So long as the intent of the application of the Bill is there, I am quite comfortable.

The CHAIRMAN: You will receive a copy of the transcript. If after reading and correcting it there is any further point you want to make to the Committee, please feel free to make contact with us again.

Mr TAN: Thank you.

[The witness retired]

OGILVIE, MR CHARLES WILLIAM

Lawyer,
residing at 22 Hewitt Way,
Booragoon, re–examined:

HANDFORD, DR PETER ROBERT

Legal Officer,
Kingswood College, Hampden Road,
Nedlands, re–examined:

Hon PETER FOSS: One of the concerns which has come to me relates to sections 79 and 80 which look to the consequences of what is done, whereas sections 77 and 78 look more to the characterising of the activity. Many of the submissions to date and evidence has been more directed towards the section 77 and 78 type of thing – people incited to racial hatred, and where most of the criticism of the Bill has come relates to sections 79 and 80. Have you read the Law Society submission?

Mr OGILVIE: It came to me in an informal way. At the time Moira Rayner looked at it; she studied it in more detail than I.

Hon PETER FOSS: The society thinks a distinction between the two would be unworkable; I am not sure I agree with that. Page 3 of the Law Society's report on the Criminal Code Amendment (Incitement to Racial Hatred) Bill 1989 at paragraph 10 states –

> You should take out or that would be liable to cause –

They do not like that phrase. I have some sympathy with them on that.

> The amendments suggested in the previous paragraph which is necessary to prevent unintended consequences have the effect of further blurring the distinction between the offences contained in sections 77 and 78 compared with the offences in sections 79 and 80. This demonstrates the Bill is unwieldy and in practice almost unworkable.

Later on –

> If it is suggested that the distinction is to look at whether the material concerned was directed to affecting the minds of members of the public who were not in the group being attacked, alternatively affecting the minds of those included in that group, the distinction is unworkable.

They say what is the difference between creating hatred and serious harassment; it could be argued it has directed the minds of people who would turn around and direct hatred to the individuals being spoken about, whereas causing serious harassment, alarm, fear and distress is related to the recipient of it.

It would seem that the point raised is that if you talk about causing that alarm it may be sufficient to say that one particular person has had serious alarm caused. George Syrota quoted a case – Masterson *v* Holden, 1986, 3 All England Reports 39. The English court held that conduct would be insulting if it insults any person who sees it. This suggests that under sections 79 or 80 the prosecution could merely have to show that at least one Aborigine felt genuinely insulted and seriously distressed by a headline. It would not be

necessary to prove that a majority or sizeable proportion of Aborigines were insulted.

If you are to leave in "or is likely to" it must seriously increase the possibility of an unintended breach of sections 79 and 80.

Mr OGILVIE: Is that what you bring out of paragraph 10 of the Law Society's submission?

Hon PETER FOSS: No. In paragraph 9 the society has suggested that "or is likely to" should be taken out. I was using paragraph 10 to say why it is another reason to leave out "or is likely to".

Mr OGILVIE: It seems to be going further than suggesting that you take out "or is likely to". I understand you are saying you might as well take out sections 79 and 80.

Hon PETER FOSS: Do you agree? Is there a role for sections 79 and 80 if you take out those words?

Mr OGILVIE: It hinges on intention. If you take them out it says it is intended to cause serious harassment and so on.

Hon PETER FOSS: I think you have picked up the point. If we are to leave out "or is likely to", the strong chance is that we will pick up unintended breaches of the Act. If we take it out, the Law Society then asks what is the difference between sections 79 and 80 and sections 77 and 78. It must be in the people whom you are affecting – in the case of sections 77 and 78 it is the minds of the haters; in sections 79 and 80 it is the minds of the hatees being affected.

Mr OGILVIE: So there would still be a role for sections 79 and 80 even if you took out those words?

Hon PETER FOSS: I think there is. The Law Society says there is not. It says it would be in practice unworkable and that the distinction is unworkable.

Mr OGILVIE: I do not understand that because in the first type of offence – intending to incite racial hatred – a person can intend to create in the minds of those whom he thought an ally something less than hatred, contempt for the type of group, so if you intend to create contempt – and some of the ANM posters would engender contempt rather than hatred because the caricatures are so grotesque – you would have a poster and a posterer who does not intend hatred and intends something less than that. So, he could not be caught under the first type of offence because he had not intended hatred as he had intended contempt. He could also be likely to engender fear in the target group; therefore, one could have both. I believe both types of offences would have a place.

Hon PETER FOSS: It is possible to have two different intentions in two different publications. On page 3, paragraph 9, you state that the provision relates to any display in a newspaper or a poster or on the dust jacket on a book in the window of a store. The commission states that that is not the intention of the legislation, and it would seem that you would not agree with that. You stated that that is where you started out and you finished with the view that you were looking at something wider than just the poster campaign.

Mr OGILVIE: Yes.

Hon PETER FOSS: Do you believe it would cover the "Jap go home" or the "Italian in Northbridge" campaigns?

Mr OGILVIE: It would have to be tested against the words of the clause in that it would have to be threatening or abusive. Who would it be abusing? It would not seem to be

threatening anyone.

Hon PETER FOSS: The Italians in Northbridge campaign could be seen as abusive to Italians, although I do not believe so either. However, what about the "Italian thugs in Northbridge" campaign?

Dr HANDFORD: Are you suggesting that it might be abusive to Italians generally?

Hon PETER FOSS: It refers back to the point raised by Hon Derrick Tomlinson and George Syrota regarding the problem of identifiable group. The definition of "identifiable group" as it exists in the Bill seems to include identifiable groups of any size. So, the Italians in Northbridge is an identifiable group.

Mr OGILVIE: It could be Aborigines in the Kimberleys.

Hon PETER FOSS: Or Aborigines in Maylands.

The CHAIRMAN: Those examples could be valid; there could be Italian thugs in Northbridge.

Mr OGILVIE: It has to be threatening.

Hon PETER FOSS: Or abusive.

Mr OGILVIE: To say that Italian thugs are in Northbridge could not be seen as such.

Hon PETER FOSS: What about that statement by the Commissioner of Police that Maori bikie gangs should be deported to New Zealand? That group is identifiable by its nationality and its race; its members are Maoris and are from New Zealand. The statement is threatening in that it states that the group should be deported to New Zealand.

Mr OGILVIE: Another barrier exists – this is the point I was trying to make this morning – in that it must be displayed.

Hon PETER FOSS: That can be done – we can write that in. The commissioner could send out a Press release which is reported in the newspaper.

Mr OGILVIE: The Bill refers to "serious alarm or distress". I suppose that deporting to New Zealand could –

Hon PETER FOSS: Cause serious alarm.

Mr OGILVIE: The Bill refers to harassment, alarm and fear; they would not apply.

Hon PETER FOSS: Why not?

Mr OGILVIE: They would not be fearful.

The CHAIRMAN: Of their personal safety?

Mr OGILVIE: They would not be frightened.

Hon PETER FOSS: What about alarmed?

Mr OGILVIE: I do not know. Under the provisions the persons would have to be likely to be alarmed.

Hon PETER FOSS: Do you not show that by proving that somebody was alarmed?

Mr OGILVIE: I do not think so. It has to be an ordinarily robust member of that group.

Hon PETER FOSS: What about the suggestion that the Chinese students should be sent back to China, which caused serious alarm in the Chinese community? It was suggested that the mainland Chinese students should be sent back to China when their visas had expired. The cause of that alarm may have been attributed to what had happened in China, but the statement caused serious alarm. It probably would not cause such serious alarm to the Mongrel Mob if it was deported.

Mr OGILVIE: It is not threatening or abusive. The Minister did not abuse the people in question.

Hon DERRICK TOMLINSON: Let us take another case: During a visit of the American fleet to Fremantle a group of demonstrators positioned at the North Mole held up placards stating, "Yankee go home" and alongside the placards were others containing a caricature of Uncle Sam with a bomb in one hand and something offensive in the other. Would those people be caught under the provisions of this Bill?

Mr OGILVIE: I do not think so.

Hon DERRICK TOMLINSON: Why not?

Mr OGILVIE: I hope you do not think you are taking your example too narrowly but a "Yankee go home" does not refer to a single person; it is referring to the military establishment.

Hon DERRICK TOMLINSON: That is an identifiable group.

Mr OGILVIE: Identifiable by what?

Hon DERRICK TOMLINSON: "Yankee" has ethnic associations; the term is identified as a group representing the American military forces.

Hon PETER FOSS: Who are present in Western Australia and whom these people want to be sent home.

Rather than dealing with that and giving instances why it is not covered by the Bill, can you give examples of how you would improve the example so that it is covered? For example, if one had a placard stating, "Yankee warmongers go home" which contained a picture of Uncle Sam dangling by a noose – a standard abusive slogan – would that be caught?

Mr OGILVIE: I do not know whether it would be taken seriously as such. You asked for an example of what was likely to be covered.

Hon PETER FOSS: In the circumstances in which a Maori thug was told that he was not wanted in our society and that such people should not come here and become involved in gang wars, and when the Minister for Immigration was told to immediately repatriate these people – I cannot remember the terms of the statement – this example seems to have all the required ingredients. What more does it need?

Mr OGILVIE: My objection is that it is not likely to cause alarm or fear.

Hon PETER FOSS: To be repatriated?

Mr OGILVIE: In the relevant sense. Anybody would realise it has to be done through legal constitutional processes.

Hon PETER FOSS: What about, "Asians go home"? What if one says Australia should

have a white Australia policy? That must be caught. The fact that it has to be done through legal processes does not seem to be caught, does it? What if one were to say there should be no more Asian immigration? That must be done through legitimate legal processes, but it is still not acceptable, is it?

The CHAIRMAN: That would not be caught by the Bill. It is open for one to say that, surely?

Hon PETER FOSS: One might get caught by proposed sections 77 or 78 on that one.

The CHAIRMAN: Referring to sections 79 and 80 –

> It is a defence to a charge of the offence defined in this section to prove that the accused person did not know that the material was threatening or abusive.

In his letter dated 20 July, Bob Cronin of *The West Australian* states –

> The proposed inclusion in the Bill of a defence that the person publishing or displaying material did not know that it would cause alarm, fear or distress, appears to us totally unsatisfactory. For the editor or publisher of a newspaper, that defence appears to amount to a plea of incompetence.

I know that was not the commission's amendment. Do you have any comments on that?

Mr OGILVIE: I did not hear you fully, could I have a look at what you are reading?

The CHAIRMAN: The defence is in the Bill.

Mr OGILVIE: I have the defence. That amounts to confining it to, "knowingly causes", not "intentionally causes." If you had this defence, apart from the onus of proof switch, you would really be saying a person would only be caught by the provision if the material were threatening or abusive and he knowingly caused fear, alarm or distress. You would be saying he would only be caught if he knowingly or intended causing fear, alarm or distress.

The CHAIRMAN: *The West Australian* is saying that if an editor says after it has been published that he did not know it would cause fear, alarm or distress that amounts to saying the editor is incompetent. In other words, if he did not know he should have known. No editor would use that material.

Dr HANDFORD: The legislation is really intended to deal with other kinds of situations. There may be other situations where people might justifiably say they did not know this sign or symbol has an effect.

Hon PETER FOSS: It is more a book seller offence.

Dr HANDFORD: As I understand it, this defence is based on something which appears in the English legislation where it appears to be a defence which more or less duplicates elements stated in other sections of the legislation.

Hon PETER FOSS: I refer to section 79. Had I a copy of *Mein Kampf* – let us assume it has threatening or abusive language in it of a written or pictorial nature – and I intended to bring it into Parliament for reference purposes and to display it in some way to members of Parliament and that display would be likely to cause serious harassment, alarm or fear to an identifiable group, have I committed an offence?

Mr OGILVIE: Would you have the book under your arm and then put it in a prominent position on your desk?

Hon PETER FOSS: I will not say that I have it in Parliament. I would have it at home and intended bringing it into Parliament and will display it because I will quote from it.

Mr OGILVIE: This relates to my old distinction that it has to be the cover of the book, *Mein Kampf.*

Hon PETER FOSS: We have a problem with this legislation, that is I do not think that is what it says. Let us assume it does not have the cover. I do not think the legislation says that.

MR OGILVIE: That is what the commission intended; the legislation refers to the cover. It is the visible part and you would intend to put that on your desk in the Legislative Council. What is on the cover could be threatening or abusive but merely the title *Mein Kampf* is not. It must be likely to cause harassment, alarm or fear. I do not see how that situation could possibly qualify.

Hon PETER FOSS: Do you not think people could be frightened by its contents? I do not think members of this Committee are keen to restrict the legislation to covers of books, although I am not certain about that. There seems to be an inconsistency in limiting it to covers.

Mr OGILVIE: If you do not limit it to covers, you must be pretty careful as to what you then include and you could be including the contents of *Mein Kampf* under the "likely to cause" serious fear, alarm or distress which is undesirable.

Hon PETER FOSS: I am assuming that to be the case. Let us assume the legislation is unchanged and the interpretation is that it includes the contents.

Mr OGILVIE: If there were any doubt about it, I think the Bill should be amended to confine the offence to the display of the cover of a book.

Dr HANDFORD: It is certainly clear that it was never the commission's intention that the legislation cover the contents of a book.

Hon PETER FOSS: I refer to page five of the report of the Criminal Law Association. It proposes that the offence be couched in the terms in respect to displaying and possessing; that it be in a public place because the difference is more to be found in possession rather than in a place. The association says that will at least enable the police to catch the person found with 300 leaflets in his hand or in the boot of his car especially if he has a glue pot, even though it cannot be shown he has displayed any posters at all. The advantage of making possession in public is that you do not then open the police powers to search and seizure in your own home.

Mr OGILVIE: The case put to us by the police was that these people – I will not say who they are because of legal constraints – run their business from their premises. That is where they store their thousands and thousands of leaflets and pamphlets. They also run a small printing press. If it is confined to the people in the street, they can only be searched in the street. It would not be very effective in the case of a paramilitary–type of activity. It may be able to be done with the odd, enthusiastic, amateur posterer, but those people are professionals.

Hon PETER FOSS: The police have suggested that if they put the resources into it they could catch these people, but because the offence as presently stated is not seen by Parliament as being a very serious offence, they are not prepared to put the resources into it. They said that if Parliament were to declare it a more serious offence, they would put the resources into it.

Mr OGILVIE: But have no extra powers. Is that the situation?

Hon PETER FOSS: If we increased the penalties of the current offences and made it an indictable offence with several years' gaol, the police would put the resources into it. However, they could not justify the resources for a stake–out in order to catch somebody for committing what is virtually a littering offence. I can understand the police attitude that, if Parliament is not prepared to make it a serious offence, they will not put the resources into it.

Mr OGILVIE: That is probably so. However, we had discussions with the police and they said that they wanted to strike at the financial resources of these people. That meant an intensive criminal intelligence campaign and they needed powers to divest these people of their – excuse me, I am sorry, but I wonder whether this is sub judice. I am terribly anxious not to –

The CHAIRMAN: It has been mentioned a few times.

Hon PETER FOSS: I do not think they are being charged with that at the moment. We have mentioned who they are.

Mr OGILVIE: I do not think that concludes the matter.

Hon PETER FOSS: I do not think that is what they are presently in gaol for; that is not what is sub judice.

The CHAIRMAN: Do not mention their names and keep going on the point you are trying to make.

Mr OGILVIE: All right. The police indicated they wanted powers to search and seize which is in the possession offence; it was not just a case of someone happening to have a leaflet in his pocket. It was a massive campaign and this would help the police in respect of that.

Hon DERRICK TOMLINSON: While a particular group and a particular campaign were the motivation of the initial report, that particular group and particular campaign is not the only target of this Bill, is it?

Mr OGILVIE: No, indeed not.

Hon DERRICK TOMLINSON: Who is the target of the Bill?

Mr OGILVIE: That group that you are talking about and any other like–minded person. It would cover also the enthusiastic, amateur, obsessed person who had a bundle of anti–Semitic leaflets in his pocket.

Hon DERRICK TOMLINSON: In the process of developing the legislation from the initial reference to the Law Reform Commission to the Bill that is before this Committee, we have moved from a particular instance to the general principle of incitement to racial hatred. In that process it seems that we have also moved from the particular groups identified by that group as the targets of racial hatred to applying the general principle almost universally to any identifiable group. My fear is that we have moved well and truly away from the notion of racial hatred to incitement to racial hatred or engendering fear in any identifiable group in our community.

Mr OGILVIE: The group has got to be "any group of persons identifiable by race, colour, ethnic or national origin".

Hon PETER FOSS: You can always identify them by those groups. They are a mixture of Italians, French, Australians and Maltese. Would that be a group identifiable by race? You can always identify people by race.

Hon DERRICK TOMLINSON: Or all of the Australian members of the Liberal Party.

Mr OGILVIE: I do not think it would cover them.

Hon PETER FOSS: Or Anglo–Saxon origin members of the Liberal Party.

The CHAIRMAN: I think we are beginning to split hairs. We can always play with semantics.

Hon DERRICK TOMLINSON: The splitting of hairs and the semantics are essential to the understanding of this Bill because the long title refers to "incitement to racial hatred and for connected purposes". There was an avoidance of defining race in the Law Reform Commission's report and, nowhere in the Bill other than in the title and in the reference to race in the definition of "identifiable group" is there any reference to the racial focus of the title. I feel that that splitting of hairs and the semantics is essential to the future interpretation of this Bill. As we were told by one of the witnesses this morning – I took note of what he said – the Bill has layers of uncertainty which will have to be fixed by the courts. The courts will be interpreting those fine distinctions of semantics.

The CHAIRMAN: I would not have thought that racial hatred was one of those fine distinctions.

Hon PETER FOSS: I think that references to anything else other than race are contrary to the long title of the Bill and not allowed.

The CHAIRMAN: It says "connected purposes".

Hon PETER FOSS: That is not a connected purpose. Connected purposes are all the other things you do with regard to it. It is not a connected purpose, it is a new origin. I think there has also been a suggestion that "race" includes more than one race. I think the Law Society said that.

Dr HANDFORD: These points are reflected in exactly the same way no matter what the definition is. Under the Public Order Act racial hatred is defined as hatred against a group of persons in Great Britain defined by reference to colour, race, nationality, including citizenship, or ethnic or national origins.

Hon PETER FOSS: They must be in Great Britain? That is an interesting point. Under the present legislation this can apply even when the people talked about are not in Western Australia or even in Australia. There is nothing to limit it to this State.

The CHAIRMAN: I assume that those definitions are essentially the same as those in the original Bill introduced last year. Why was "racial hatred" not defined in the suggestion from the Law Reform Commission in line with the English Act with the appropriate modifications to suit Western Australia?

Dr HANDFORD: I suppose it is arguable that it would refer to a person in Western Australia or anywhere else, but there is no other change.

The CHAIRMAN: But it is not included.

Dr HANDFORD: There is a definition of identifiable groups.

The CHAIRMAN: I agree, but it is not related to racial hatred.

Hon PETER FOSS: I think the Interpretation Act states that if reference is made to a race, it refers to more than one race. So this could be read to refer to races or nationalities. It could be said when talking about a group that it is necessary only to identify them and not

to define them. We could say that this group of people in the Chamber is an identifiable group by race, no matter what the combination of races is present.

Mr OGILVIE: It must be identified by race.

Hon PETER FOSS: It is always possible to identify people by race. It does not say identifiable in the abuse. It says identifiable in some way. We could be identified as Caucasians and our national origin as Australian. We are identifiable. It does not say "identified".

Mr OGILVIE: I do not believe it is identifiable. You have already identified it by reference to people sitting around a table. It adds nothing to say that those people are Caucasian or Australian. It must be by reference only to race.

Hon PETER FOSS: Does it say that?

Mr OGILVIE: No, but it would not make sense otherwise. The people around this table are identified by saying that these are the people around the table, and it adds nothing further to the identification of that group by saying that they are Caucasian.

Hon PETER FOSS: What about the suggestion of Aborigines in Maylands?

Mr OGILVIE: That would be all right. A person who is not familiar with the situation has sufficient instructions to go to Maylands and then from all the Maylands people he identifies the Aborigines.

The CHAIRMAN: I want to take up the point raised earlier about restricting the possession of these matters in public places. Part of the concerns held by some people with regard to the possession of material on private property relates to the fact that a search warrant must be obtained to enter those premises, and sometimes search warrants can be too easily obtained by the police without sufficient quality control. Under the Telecommunications (Interception) (Western Australia) Bill it is necessary for a judge to sign the warrant for the intercept; is there any benefit in requiring a higher standard of warrant in the cases under discussion?

Mr OGILVIE: It is difficult to justify singling out this category for a higher standard of warrant. There is possibly an argument for a higher standard of warrant issuing generally and I think in some other Australian jurisdictions a signature is required from a magistrate rather than a justice of the peace. However, those jurisdictions have different systems of justices of the peace. If this legislation is to go ahead, I think this is a price we must pay.

Hon PETER FOSS: I know that you do not believe this is included in the legislation but, if the interior contents of a book were included, do you still think it would be all right to go into a person's home?

Mr OGILVIE: No. There must be the intention to create or to stir up racial hatred, and then theoretically the police can go in on a search warrant.

Hon PETER FOSS: We have had less trouble with proposed sections 77 and 78.

Mr OGILVIE: You are interested only in proposed sections 79 and 80? It is a difficult question to answer. I do not think "display" means what you suggest it means. Covers of books and not books? One could not authorise the police to enter premises and to search through a library.

Hon PETER FOSS: Would you have serious concerns about that?

Mr OGILVIE: If it were confined to intention to incite racial hatred, I would not have the

same problem.

Hon PETER FOSS: I do not have a problem with it either. I do not agree with your definition of "display" and neither does the Law Society nor, I think, George Syrota. Let us assume that the legislation includes the contents. The Committee has submissions before it suggesting that the contents should be included. If we were minded to make it quite clear that it included not only the exterior of pieces of paper but also the internal parts of a book, and proposed sections 79 and 80 were retained so that it also included possession in a private home, that would mean the police could search a person's library. Would you be concerned about that?

Mr OGILVIE: The contents then must be threatening and abusive. The person must intend to display that book in a public place.

Hon PETER FOSS: What about a copy of *Mein Kampf* in a public library?

Mr OGILVIE: If there were any doubts as to the extent of the word "display" then the Bill should be amended so that it is expressly limited to what is visible and excludes the contents.

Hon PETER FOSS: My concern is what if we do not accept that?

Mr OGILVIE: If it includes content, I think one would have to think twice about it.

Hon DERRICK TOMLINSON: The definition of race in section 4 of the Equal Opportunity Act 1984 includes colour, descent, ethnic or national origin or nationality, and the fact that a race might comprise two or more distinct races does not prevent it from being a race for the purposes of this Act. That is very similar to the definition of identifiable groups in this Bill. Would there be an effect on the Bill before us if we changed identifiable group to racial group and defined racial group along the lines of the definition of race in the Equal Opportunity Act, so that every time we referred to intense hatred of any identifiable group we made it intense hatred of any racial group?

Mr OGILVIE: I would have to look at that in more detail. There could be fish hooks embedded there somewhere. Just off the cuff it seems unexceptionable.

Hon DERRICK TOMLINSON: It seems to me that fish hooks are also embedded in the words "any identifiable group".

Mr OGILVIE: Yes.

[The witnesses retired]

SMYTH, MR CHRIS

Secretary, Australian Journalists Association,
residing at 45 Grosvenor Road,
Bayswater, examined:

Mr SMYTH: The position of the Australian Journalists Association is outlined in the document that has been handed to you. I sent a letter to the Premier, with this document attached, to make it clear to her what the AJA's position was in respect of the proposed amendments to this Bill. I have had discussions with the publishers of newspapers in this town, and we share similar concerns about the proposal. I have not had the opportunity of looking at the detail of the subsequent suggested amendment which would give a defence –

The CHAIRMAN: The amendment from the Press Council or the one in the Bill?

Mr SMYTH: I understand there was a further amendment which would make it a defence if a defendant did not knowingly believe that he would offend.

The CHAIRMAN: That is in the Bill that is now before the House.

Mr SMYTH: I have not sought advice, nor do I have advice, that that would give a watertight defence for the concern that we have for the possession of material for display on the front page of a newspaper or on a banner for a newspaper or a magazine that is displayed in the street. Our concern is quite specific. We are obviously not concerned about the Bill's reaching into the content of a publication. It is clear that the only areas by which our industry could be caught would be material which appears on the outside of a publication which could be seen on a rack or even on the street, or on a banner that was on the street, and which was material which would fall within the description.

Hon PETER FOSS: I do not think that is in the Bill at the moment. The Bill as presently written covers both the exterior and the interior parts of a newspaper, so perhaps you should make a submission about whether you agree with that. In looking at paragraph 5 of your statement, I do not agree that what Ms Rayner has said is correct. I believe it is incorrect and that you should give the words their ordinary meaning. What is your attitude to those two points?

Mr SMYTH: I will take the second one first. That attitude worried us. We were not assured by it.

Hon PETER FOSS: With good reason.

Mr SMYTH: After some thought about it we determined that was not a satisfactory position to take. We are saying that any content – front or middle – of a newspaper, magazine or publication that is compiled by our members as news and current affairs in the public interest should not fall within the scope of the amendments.

Hon PETER FOSS: So you think a fair report on a matter of public interest should be excluded no matter what it happens to contain?

Mr SMYTH: Absolutely.

Hon PETER FOSS: What would happen if a racist group decided to publish an entirely racist newspaper? It has been put to us that is what might happen.

Mr SMYTH: I can speak only on behalf of my organisation, which deals with players in the media in the area of news, current affairs and comment on current events, and we would not have a problem with rags that come out, just as we would not have any truck with the sorts of publications that defame people or spread lies. We do not deal with that kind of thing.

The CHAIRMAN: How would you differentiate in legislative terms between the two types of Press? How would you distinguish between the established Press and a newspaper that was set up for a particular purpose?

Mr SMYTH: I would hate to see a situation where it was left to legislation to say yes or no to particular classes or licences of publication. There are obviously common law remedies for material that is defamatory or offensive in terms of other Statutes, or which may transgress, for example, the national interest or security.

Hon PETER FOSS: You would not like to leave it to any registration or governmental intervention to decide who may or may not publish these things?

Mr SMYTH: That is certainly the case – make sure that goes on the record!

Hon PETER FOSS: What about a definition such as this: "A fair report in a newspaper, the principal content of which newspaper is not racial matters"? In other words, we define it by saying it is not a racial newspaper but just happens to be a newspaper which is concerned with all sorts of matters.

Mr SMYTH: I disagree with that, because I have members employed – not in this State but in other States – with what could quite easily be construed as racial newspapers. For instance, we have an award for Jewish newspapers in Australia. There are racial magazines and they are often printed in the language of the people involved.

The CHAIRMAN: Would you define a newspaper in terms of its circulation?

Mr SMYTH: No; indeed, I would not define a newspaper.

Hon PETER FOSS: You raise a valid point and I think those newspapers might have problems now.

The CHAIRMAN: Not unless they are threatening or abusive.

Hon PETER FOSS: But that is the problem we have. I think Mr Smyth is trying to deal with that. One may inadvertently use something that is abusive. It was argued that the headline referring to black gangs – which I think is possibly abusive – does inadvertently offend this legislation, and we may very well get, say, a Serbian newspaper saying some very abusive things about a Croatian group. Dr Tan said he thought that sort of thing probably should be restricted, and that it is not good for the community to have those divisions, where overseas prejudices are imported into our community and fester here in newspapers such as that. I think in all of those newspapers we may very well get threatening or abusive matters about the other racial group. The question is whether it causes fear or alarm, and there is always the possibility it might do so.

The CHAIRMAN: On page 4 of the Bill the defence referred to earlier is printed in two places – at the end of proposed sections 79 and 80. It reads –

> It is a defence to a charge of the offence defined in this section to prove that the accused person did not know that the material was threatening or abusive.

That defence has been inserted into the Bill by an amendment. *The West Australian* says it is no good for an editor to use that defence because it would amount to a plea of

incompetence on the part of the editor to use it. Could you comment on that?

Mr SMYTH: I would like to know how on earth this could defend a journalist. We put things in newspapers which we mean to put in.

The CHAIRMAN: The Committee reached the conclusion when talking to the last witnesses that that defence really applied to booksellers rather than to newspaper publishers.

Mr SMYTH: Even with booksellers left out of it, it still leaves the author.

Hon PETER FOSS: To give an example, if you wish to report Enoch Powell's rivers of blood speech and comment on it, even in a disapproving manner, you could not plead this defence because it is threatening or abusive and you know it is likely to cause fear. You could not report a racist speech and criticise it because you know that it is likely to prove that you knew the speech was threatening or abusive and that is why you published it – you published it to say that this particular public personage made a disgraceful speech which was threatening and abusive to a racial group, and that this person is not fit to be in public office. So you knew very well from the beginning that it was threatening and abusive and that you would not be able to report it, and that would not be a defence.

Mr SMYTH: I agree with that. In fact, in discussions with editors it even came to a point where we may put headlines into newspapers that are intended to be alarming, for instance. If there were Indonesian gunboats off Rottnest, for example, we would intend to write a headline reporting that, which hopefully would alarm the Australian population to the fact that we were entering into a war. Indonesians may clearly be termed as an identifiable group, and in fact we would endeavour to identify them in the public interest.

Hon PETER FOSS: "Indonesian fishermen threaten West Australian coral reef" is something we have had in the newspaper recently. That was probably intended to alarm people to say that something must be done about this because our coral reef is being threatened.

Mr SMYTH: I would say it would be not particularly professional to write headlines that alarm people unnecessarily. They would have to be very important issues where action needs to be taken quickly for anything to be alarming. On a very rare occasion we would put material into a newspaper that was alarming, and certainly a responsible editor and journalist would not put into a newspaper any material that is intended to distress somebody or to cause them to be in real fear, or which would seriously harass somebody, or a group. However, we could and we did foresee material that could possibly alarm.

Hon PETER FOSS: The English Act talks mainly of harassment. I must say that if section 79(b) were restricted to harassment I would feel much easier with many other parts of the section, because harassment is a far more active noun, whereas fear and alarm are things which almost are engendered in the recipient.

The CHAIRMAN: Are you saying harassment is more objective?

Hon PETER FOSS: I think harassment is much more an active noun. Harassment is externally imposed, whereas fear or alarm can be something which you generate without there necessarily being the intentional link between the two. I can sit quite easily with the word harassment because although I do not really like the phrase "likely to be" it is easier with harassment than with fear or alarm. If we have "fear and alarm" with "likely to be", and we take into account that if one person feels it, it is probably enough, that is pretty alarming.

The CHAIRMAN: That is if the English case holds.

Hon PETER FOSS: Yes. With harassment there is much more of a connection between the harasser and the person being harassed, whereas fear and alarm could be provenly unintended consequences.

Mr SMYTH: One's cognitive response to the action, which is harassment.

Hon DERRICK TOMLINSON: It is a question of cause and effect. The biggest fear is that the cause will act in particular ways. I could not intend to cause, and yet still engender fear and/or alarm. It is reasonable, when they are talking about things such as racial hatred, to consider the effect upon the person who feels those things, as it is upon the deliberate intention of some members of the community.

The CHAIRMAN: Do you have a comment about that?

Mr SMYTH: We do not and have not said in our position whether or not there should be this type of legislation. We are neither fundamentally opposed to nor in support of legislation dealing with these matters, unlike some parties that may have made submissions and public comments. Our main fears are for restrictions on legitimate work that we do in the media. I would like to see any legislation ensure that no restrictions are placed on the range of media and public expression on these matters or any matter because I believe that the range of publications and discussion that we currently have in Australia is regrettably narrow, and that particularly the range of publications available to the public and interest groups are very stereotyped. I would not like to see any legislation restricting the natural development of the range of public expression in this country because it is far too narrow as it is.

The CHAIRMAN: The Press Council has suggested that the Act in New South Wales relating to anti–discrimination should provide for a fair report. Have you seen that?

Mr SMYTH: Yes, I have seen parts of it in that council's publication. There is, as I understand it, express exemption from the Act. That Act is far more wide–ranging. It has great scope and involves uniforms and insignias.

Hon PETER FOSS: This Bill is restricted to racially visible propaganda. I refer you to the second last page of the submission made by the Press Council.

Mr SMYTH: That appears suitably wide–ranging enough to offer exclusion of my members' work. I do not exactly know what is Division 3, Part III of the Act in New South Wales. I assume that a public act is something you do in the street. We would fall under "other purposes in the public interest", and that is wide enough to include journalists. Our work would not be termed scientific –

Hon PETER FOSS: Are you happy to have a public interest qualification in the legislation, or provision for a fair report in the public interest?

Mr SMYTH: We could defend cases in that case with a wide description such as that. I presume in normal practice we would not have to mount a defence because the prosecution would be responsible enough to see that a newspaper is exempted in its normal practice. If someone goes off the beam, that is different.

Hon PETER FOSS: You are alerted to my point that you do not want also to be in a position of having continually to defend yourselves even if the result of that is that you win. You must be in a position to be able to act genuinely and honestly in the public interest with the confidence that you would not normally be subjected to prosecution, not that you are regularly being subjected to prosecution and if by fighting hard enough you get off.

Mr SMYTH: That is to be emphasised. If a law is to be made we would want to see that we do not face prosecutions; in fact under current law in Australia we spend enough

winning cases of defamation and in other areas but particularly in defamation cases where it costs publishers a fortune to defend the truth. We do not want another Statute where publishers will have to continue to spend a fortune in defending cases that they ultimately win.

Hon PETER FOSS: You do not want to end up being harassed.

Mr SMYTH: Yes. It is easy to say that. I think the media can stand up to scrutiny. It does not stand up anywhere near enough to scrutiny from the public but on the other hand it needs to have these freedoms to exercise responsibility.

Hon PETER FOSS: You realise the point of this Committee is to enable people to give direct input and that is an important democratic right that people should have. It is useful for the Committee to get that information directly. For instance, your response on the question of my proposed limitation on newspaper freedom to limiting those of a racial basis was very useful to deal with immediately; you were able to put me right instantly from the point of view of your members. From the point of view of this Committee, the process is a valuable one and one which in many ways is better served than merely a written submission. It gives us the opportunity to make certain points and for you to give your instant reaction. Hopefully we end up with a better piece of legislation. I found your contribution very useful.

[The witness retired]

UR, MR DORON

Hon President, Council of WA Jewry,
residing at 8 Malton Court,
Dianella, examined:

The CHAIRMAN: Welcome to the Committee. Please make your comments and then we will ask some questions.

Mr UR: Whenever we look at legislation we must bear in mind its spirit. I have detected from the tenor of most questions and answers I have observed today that many people are bogged down in technicalities and are forgetting the spirit of the Bill. The essence of this Bill is to deal with the problem of the incitement of racism. For instance, when we are talking about an identifiable group, that is defined on page 2, within clause 3, of the Bill; that definition is the only identifiable group involved in this Bill.

Why is this legislation so necessary? If it was up to me, we would have a Bill to sentence all people who incite racial hatred to death. However, we do not have the death sentence in this State so that could not be done. However, if such people were sitting in the places of the members of this Committee today, they would sentence me to death as they have sentenced to death most of my family in the past. I am an Australian and very objective. As a matter of interest, when a member of the Australian Nationalist Movement came up for bail at the Police Court, at which I am a justice of the peace on a voluntary basis, I disqualified myself from dealing with that matter. People laughed and asked why I did that, but I would have had to approve surety and if I had not done so I may have prejudiced the entire case. So, we must deal with the spirit of the law and deal with freedom and not just freedom of speech. The freedom to live in freedom is comprehensive and contains the freedom to speech ideal. If we do not live in freedom we do not have freedom of speech.

I have pointed out to members of Parliament, friends and people in the know that the Criminal (Western Australia) Code contains restrictions on freedom of speech. For example, it restricts people from certain activities; for instance, one may not injure the person of her Majesty the Queen or speak against her Majesty the Queen. Also, one may not speak ill of a foreign head of State – that is a ridiculous situation. I can say that all the Patagonians stink, but I cannot say that Ceausescu, Stalin or Hitler stank – that is absurd. That is why it is ridiculous that the Press is afraid of this Bill. What is there to be afraid of? If the Press is reporting something accurately, it has nothing to fear. I have heard instances today in which the fear was expressed, yet why should anybody take the Press to court if it has stated the truth?

The CHAIRMAN: The Press believe that someone will do that.

Mr UR: Nobody did that when it spoke against religions. Commonwealth legislation exists which restricts speaking against the Christian churches.

Hon PETER FOSS: The example we gave was that if Enoch Powell made his rivers of blood speech in Western Australia, and if *The West Australian* reported that speech in the context that it was a disgraceful thing to happen in Western Australia, and if it stated that it believed the Government should act to prevent it happening again, that would probably offend proposed section 80 of the Bill. I would have thought that that is the kind of thing that should be reported in order to prevent the spread of racial hatred.

Mr UR: Do you believe that *The West Australian* would display the material to cause, or be likely to cause, serious harassment and fear?

Hon PETER FOSS: That is the problem; we are worried about it being likely to cause such an effect. It could very well be likely to cause fear even if it is not intended to do so.

Mr UR: The Bill contains a defence clause.

Hon PETER FOSS: That is not a defence; the only defence is that a person did not know that it was threatening or abusive. However, the Press would know that such comments would be threatening or abusive because that is why it would report the statements in the first place. My concern is that as a result of this manner of ridding Western Australia of racism it will also hold up to ridicule and public contempt the people who are not guilty of racism. If a Bill was considered in which nobody could discuss race or racial hatred, you could not come along and tell us how bad racism is. The newspaper airs such statements and stories as a matter of public interest.

Mr UR: I do not see the point; if *The West Australian* was reporting that Enoch Powell made statements with which we do not agree, it is a statement of fact – I do not see the problem.

Hon PETER FOSS: It is not *The West Australian's* opinion. It is the effect of the words, "or would be likely to cause", not what was intended by them. That is the problem that arises in this legislation.

Mr UR: To take "or would be likely to cause" out of this would be to emasculate the Bill. The posters of the Australian Nationalist Movement were likely to cause a lot of aggravation. People complain that those posters are likely to encourage a lot of other people to perpetuate and repeat what Hitler had done because of *Mein Kampf*.

Hon PETER FOSS: If anyone were to say in court that they did not intend to cause harassment by those posters I would say that that is nonsense.

Mr UR: I have tremendous faith in our jurors and judges. If one were to say that he did not intend to cause fear, alarm or distress, it would be very easy to detect whether he intended that or not. If the ANM said it did not intend to cause any offence, it would be ridiculous.

Hon PETER FOSS: If the ANM came to you and said it did not intend to cause distress, a jury would say that that is nonsense. One cannot publish something like that and expect a jury to seriously believe there was no intention to cause distress.

Mr UR: Perhaps one or two or three or four –

Hon PETER FOSS: You could not believe them.

Mr UR: A prosecutor could then say one's defence was full of holes.

Hon PETER FOSS: Even without the words, "or would be likely to cause", those poster people could be convicted because no-one would believe it was not their intention to cause harassment. We do not need those words.

Mr UR: I think we do, but not necessarily for that reason. I might say to you I do not like people with yellow ties, or with braces because they are the new yuppies or whatever.

Hon DERRICK TOMLINSON: That is an identifiable group.

Mr UR: In saying that I did not intend to cause you harm, but said it as a humorous aside. However, it did cause you distress – I was likely to – so I would apologise and say that I did not mean it in that sense.

Hon PETER FOSS: I do not think you should be sent to gaol for it.

Mr UR: I would not be sent to gaol because I would either apologise or it would be proven by jury that it was not intended to cause distress. That would be up to the court. Everybody goes to court and is proven innocent or guilty.

Hon DERRICK TOMLINSON: Suppose the people who wear yellow ties persist with the charge that you offended them or caused them some alarm and take you to court. Could you not then be found guilty under clause 80 of the Bill?

Mr UR: Would you find me guilty?

Hon DERRICK TOMLINSON: I would not, because I have a fondness for yellow braces.

Hon PETER FOSS: The example you have given does not contain any of the relevant elements. In my example of the newspaper, the defence is that one does not know that it was threatening or abusive. Plainly that defence would not be available to a newspaper because they know it is threatening or abusive. The newspaper published the article because it was threatening or abusive and it was likely to cause alarm but it was not intended to cause alarm. The publishing of it was intended to alert the people of Western Australia to a danger in their midst.

Mr UR: Precisely, the newspaper alerted the public that that man is likely to cause alarm.

Hon PETER FOSS: But publishing that article is an offence under section 80 of the Criminal Code.

Mr UR: No, it is not an offence because the newspaper did not intend to do that and it is not likely that what the newspaper writes will cause alarm.

Hon PETER FOSS: I agree with what you are saying, but that is not what section 80 says. It says that if the material is published, whether it is your material or somebody else's material, it is an offence. That is the point. If the legislation meant what you thought it meant, I would agree entirely with your conclusion. I do not believe that is what the legislation says. I sympathise with your position on the matter but I do not agree that that is what the words say.

Mr UR: In that case, should we not take out of the Criminal Code the part about the Queen in relation to piracy? The intent must be proven.

The CHAIRMAN: I refer to the question about fair reporting by the Press. In New South Wales last year the Government amended the Anti–Discrimination (Racial Vilification) Act. That Act has a broader thrust than what is intended by this Bill. The Australian Press Council Submission says –

> Section 20C provides that racial vilification is unlawful. Ss (2) then provides that nothing in the section renders unlawful:–
>
> a. A fair report of a public act referred to in subsection (1) or
>
> b. a communication or the distribution or the dissemination of any matter comprising a publication referred to in Division 3 of the part 3 of the Defamation Act 1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation; or

The Press Council wishes to see this written into the Western Australian legislation. The defence in the New South Wales Act says that it is a fair report if a publication referred to in subsection 1 and also something under the Defamation Act in New South Wales which is not relevant here, or

c. a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate and expositions of any act or matter.

If anything is published on that basis the newspaper cannot be caught under the provisions of the New South Wales Act. In its submission to this Committee, the Press Council suggested that a similar provision be written into the Bill.

Mr UR: The problem with that would be that publications like the ANM's publication called *The Nationalist* which is available at the public library would be covered by this Act and would always have recourse to this act, because the ANM could say it is just reporting something that has happened while in fact it is publishing material which incites racial hatred.

Hon PETER FOSS: I raised that problem with the person from the journalists' association. If the principle content of a newspaper were racist, you do not get the protection. He said that the problem with that was many newspapers are racially based. He mentioned a Jewish newspaper. Were a Jewish newspaper to enter into a debate about the intafada, it would be arguable that, if it said things which were at all unkind or abusive of Arabs in that publication, the article would be offensive. Someone has been sending me a Jewish newspaper.

Mr UR: I have sent it.

Hon PETER FOSS: The last one had some pieces in it about misleading information about the situation.

Mr UR: Were the Arabs in Australia provoking racial hatred? Was it about Arabs in Australia or was it about Arabs in Israel? What was it about?

Hon PETER FOSS: The articles contained references to the number of Arabs in Israel and that for every Israeli who settles there means one fewer Palestinian. Do you remember the last article?

Mr UR: I do not remember that one, but it does not matter. I remember the tenor of it.

Hon PETER FOSS: It said that pro-Arab propagandists had been saying false things and that, for 130 years, the Jews had been in a majority in Jerusalem and that, therefore, Arab propaganda was wrong. It might be said that it was abusive of the Arabs.

Mr UR: It was not and I can prove it. I was talking about Arab propaganda. They are not conducting that propaganda here.

Hon PETER FOSS: It does not have to be here.

Mr UR: Many of the submissions that you received came from Muslims and Arabs in this State who go along with me.

Hon PETER FOSS: Do you understand my point? It does not talk about groups in Australia. The British Act refers to identifiable groups in the United Kingdom. This legislation does not talk about identifiable groups in Western Australia; it talks about identifiable groups which could include groups overseas – in Israel for instance.

Mr UR: Mr Foss, do you legislate for identifiable groups in Israel?

Hon PETER FOSS: That is the problem, we can.

Mr UR: Do you? You legislate for this State.

Hon PETER FOSS: I think this legislation does. Obviously, the publication and possession of material in Israel would not be covered by the Criminal Code. We are legislating for publication in Western Australia so that if the publication is in Western Australia it is caught even if the identifiable group is not in Western Australia. The question is whether the people will be alarmed or have fear as a result of it. Interestingly, the legislation does not talk about the alarm or fear being created in the identifiable group.

Mr UR: What we legislate for, we do for the people in this State. I do not know who brought it up, but someone referred to signs being held at the American fleet, "Yanks go home".

Hon DERRICK TOMLINSON: I did.

Mr UR: It is not important. However, it is important that the American fleet is not an American racial group. It cannot even be placed under this legislation. It is a foreign military entity. The same thing would apply to the Indonesian Navy if it stood off Rottnest. It would be there illegally for a start.

Hon PETER FOSS: It would still be caught.

Mr UR: No, I am sorry. It would not enjoy the protection of the laws of Western Australia or Australia. It would be outside the ambit of all of our laws; it is our enemy.

Hon PETER FOSS: Let us take the example of the American fleet because it comes here by invitation of the Australian Government. "Identifiable group" means "any group of persons identifiable by . . . national origin".

Mr UR: Do you know that on American warships there are many non–Americans such as Filipinos and people of other nationalities?

Hon DERRICK TOMLINSON: They are still identifiable.

Mr UR: But they are part of a foreign military force, not a racial group.

Hon PETER FOSS: They are under the definition in the legislation.

The CHAIRMAN: Surely, if somebody held up a sign on the Fremantle wharf stating "Yanks, go home" to a flotilla of military vessels, it would not cause alarm or fear to anyone anywhere.

Hon PETER FOSS: I do not know about that.

The CHAIRMAN: It would not cause alarm or fear among those on the ships, that is for sure.

Hon PETER FOSS: That is interesting.

Mr UR: I agree that it may cause alarm or fear among the Americans sailors, but they are part of a foreign military group. We are talking about residents of Australia being intimidated by posters claiming "Racial invasion means revolution". That is incitement to rebellion.

Hon DERRICK TOMLINSON: Let us use as an example a group of Americans resident in Australia who may not have taken out Australian citizenship but are identifiable by their national origin as Americans. They may be standing on the opposite side of the harbour and see that sign, "Yank, go home" which is directed at the American fleet which you say is not an identifiable group under this legislation. What about the people standing on the other side of the harbour who are alarmed by it?

Mr UR: If I, as the editor of the community paper of the Jewish community, said something against the Arabs which was taken as offensive, they would be entitled under this Bill to take me to court as would American citizens of Australia be entitled to take me to court. Let us not shy away from the fact that this Bill will cover every Western Australian.

Hon PETER FOSS: It will cover "Yanks, go home".

Mr UR: Not the navy. It is very important to tell all Western Australians that nobody is exempt from the law.

Hon PETER FOSS: If we decided that your proposition in relation to a newspaper report is not what the Bill says, would the news report make the Bill say that?

Mr UR: I would have to give that a lot of thought. However, I do not think I would agree for the simple reason small magazines and papers would seek refuge under the new provisions in the Bill.

Hon PETER FOSS: I am worried by that but I do not know what is the answer.

Mr UR: I am worried for another reason. I said earlier that in the Criminal Code there are so many clauses under which newspapers could have been sued a long time ago, but were not sued.

Hon PETER FOSS: This is a different situation. The English legislation now does not allow the commencement of prosecution proceedings without the consent of the Attorney General. That stops racial groups using the legislation against each other, which is a bit of a problem. What about the example of something racist being mentioned, and another group seeing it as in its interest to further its cause by bringing prosecution? In terms of saying something against foreign dignitaries, you do not have the same motivation against people in the community, but you do have it where there are racial difficulties and people will possibly use the legislation as a way of harassing somebody else.

Mr UR: Thank God we have a jury and judge system.

Hon PETER FOSS: It is not much of a consolation for a person who has to go through an entire court case knowing that, theoretically, he is guilty but, due to the good sense of a jury, he will get off. It is a little worrying.

Mr UR: There are courts of appeal.

Hon DERRICK TOMLINSON: But the whole process of having to go through legal proceedings is harassing so the law becomes harassing.

Mr UR: I would rather prosecute offenders than defend their victims. Do you know what racism can cause in Australia? Already some murders have been committed. In the 1930s there was something happening in the Goldfields, and we all remember that.

Hon PETER FOSS: We have not had any problems with proposed sections 77 and 78. But sections 79 and 80 which relate to possession of material are causing distress. It is not related to the intent behind the document but to the way people react to it.

Mr UR: Let us refer to section 80 in toto and not to just part of it –

> If –
>
> (a) any person displays written or pictorial material that is threatening or abusive; and

(b) the display of the material is intended by that person to cause, or is likely to cause, serious harassment, alarm or fear to any identifiable group,

that person is guilty of a crime.

We are talking of a joint sentence and concerns; we are not talking about (a) as separate from (b). All of these must be the intent.

Hon PETER FOSS: That is exactly my point; the words "or is likely to cause" remove the necessity for intent.

Hon DERRICK TOMLINSON: It must be read that the display of the material is likely to cause etc.

Mr UR: And the display of the material is intended by the person to cause etc.

Hon PETER FOSS: We have no problem with that. The problem is with the words "or is likely to cause". This is an offence with which a person may be charged. If a person displayed written material that was likely to cause serious alarm to an identifiable group, he would be committing an offence. I have no problem with the provision relating to persons who display written material that is threatening, and the display of which was intended to cause serious harassment.

Mr UR: Your difficulty lies with the words "or is likely to cause"?

Hon PETER FOSS: Yes, because it does not go to the intent of the person doing it. It merely goes to the result on the recipient.

Mr UR: I would invoke the provision on lines 8 to 10 of page 4.

Hon PETER FOSS: That relates only to material that is threatening or abusive.

Mr UR: We must also consider the character and spirit of the Bill. What was the intent of Parliament when it enacted this Bill? It was to punish those people who were willingly, wittingly, and wilfully attempting to harm the people.

Hon PETER FOSS: I agree entirely with that and that is why I would remove the words "or is likely to cause".

Mr UR: That aspect would be raised in any court.

Hon DERRICK TOMLINSON: I assume that the Minister's second reading speech would be regarded as the clearest indication of the Government's intention and that it would have more importance in interpreting intention in a court of law. The Minister's second reading speech focuses attention on a single group and the actions of a single group. However, the legislation is much more comprehensive in embracing harmony or the prevention of disharmony within our community.

Mr UR: The Minister's speech intended to make an example at the time of a certain group, but the character of the Bill was never directed towards one objective, nor was it enacted for just one objective.

The subject of *Mein Kampf* has been raised a number of times, and this arose because I mentioned it months ago, especially to the Leader of the Opposition.

Hon PETER FOSS: I have quoted *Mein Kampf* in this Chamber.

Mr UR: You may do so because you are under parliamentary privilege. You may also

display the book in this Chamber under parliamentary privilege.

Hon PETER FOSS: But if I possessed it at home intending it to bring it into this Chamber I might be committing an offence.

Mr UR: No, because you would be bringing it to this Chamber in order to do something profitable for the community and you did not intend to do any harm. On the other hand *Mein Kampf* should not be available in your home for distribution. How would one prove that it was in your home for distribution? Because you would possess more than one copy. I believe, for instance, that *Mein Kampf* should be available at university libraries although I would be inclined to burn all copies. It is a manual for genocide, but we have freedom of speech and we do not want to censor anything.

Hon PETER FOSS: If you destroyed all copies of *Mein Kampf* how could people be convinced of the evils of Nazism?

Mr UR: With the graves and the ashes.

Hon DERRICK TOMLINSON: Some people say that they do not exist.

Mr UR: I have heard that. I am willing to believe it did not happen so long as those people who say it are prepared to produce those members of my family who perished.

Hon PETER FOSS: We would not seriously take note of those people. I think you understand our point. One of the things Hitler did was to burn all the books he believed were wrong. I would hate to adopt anything Hitler did as a model for a way of stopping the people thinking the way one does not want them to think. Therefore, to me burning books equals in many ways another of Hitler's methods.

Mr UR: Let us say that it should not be displayed or distributed but if people want to study it they may. However, I do not know what there is to study, and I cannot envisage a thesis being written on it.

Another matter raised in discussion was Salman Rushdie's *The Satanic Verses*. That indicates that most people talking about him have never read the book. It is not a racist book; not even Muslims say that it is racist although it is offensive to the Muslim religion. I condemn it for that but, on the other hand, it would not fall within the ambit of the legislation.

Hon PETER FOSS: If it had been written about the Jewish religion it probably would fall within the ambit of the legislation.

Mr UR: Why?

Hon PETER FOSS: Because the Jewishness and the Jewish religion are so closely bound that it is hard to insult the Jewish religion without insulting the Jewish people.

Mr UR: It has been done. I could show the Committee many articles that have been published in Australia and all we do is write letters to the editors. We have a situation with the pamphlet referred to. I suggest that any person could buy the pamphlet called "Your Rights 1990" in any bookshop or newsagents. It has 20 pages of defamation and untruths, and the same applies to all publications of the League of Rights. I have transmitted copies to one or two members of the Committee of the context of the Legal Rights magazine of 6 July which is obviously crude anti–Semitism.

I have another shock for the Committee. I have a questionnaire from an English course in one of the TAFE colleges in Western Australia. I will not mention the name of the school for publication by the Press but I will put it into the record at a later stage. The

questionnaire asked students to reply to the 20 offensive pages of the publication "Your Rights 1990". I am asking Committee members what that represents. Is it an innocent prank? I have a copy of this publication and the Committee will understand what I am saying.

Hon PETER FOSS: We all have the appropriate pages of this publication which was sent to us. We have the offensive part. We do not have the whole thing. My copy starts at page 74, chapter 13.

Mr UR: That is one of them. Why is it necessary for this to be used on this TAFE college campus in a class of advanced English? What is the sense of that?

Hon DERRICK TOMLINSON: The argument would be that that is training students in literary discrimination.

Mr UR: This was given to me by, of all things, a Peruvian Jew who is a recent immigrant, and he came to me with tears in his eyes.

Hon PETER FOSS: Could it not be justified on the ground that you wish people to read it to pick up the subtle influence of this type of material in that while pretending to be non-discriminatory it is in fact putting over a racist message?

Mr UR: This is putting over a racist message.

Hon PETER FOSS: It is trying to alert people to the danger of reading something that is apparently factual.

Mr UR: There is no need for that. It is the same as if I were to cite to you, in the record of this Committee, which is publicly available, text from *Mein Kampf*.

Hon PETER FOSS: I have not had any problems with what you have stated as the principles to be applied. I agree with them entirely. My concern is that I do not believe sections 79 and 80 say what you say they do. We appear to agree on what we believe to be the correct result of this legislation. We differ on whether sections 79 and 80 bring about the result that you confidently believe they do.

Mr UR: They do because we are in Australia. If we were in Bucharest I would not believe that. I was born there.

Hon PETER FOSS: It is a concern of mine that what you rely upon I do not rely upon quite as confidently, but I do not have a problem with the principles you enunciate.

Hon DERRICK TOMLINSON: You have been present and you have heard the discussion about the definition of "identifiable group" and you understand that "race" is capable of a narrow interpretation. The Bill quite deliberately avoids a narrow interpretation or definition and enables a very broad definition and interpretation of identifiable group. How do you respond to a suggestion that it might be preferable to define race and make it capable of a narrower application than the broad words identifiable group?

Mr UR: You cannot do that.

Hon PETER FOSS: Why?

Mr UR: Because you have got such races as the Semites. The Arabs, the Ethiopians and the Jews are Semites because we are talking here – as opposed to what the majority of people believe – not about a race but about a family of languages. How would you apply this to the Armenians? What race are they? This ethnic group has three religions, they speak one language, and they have three kinds of traditions. Armenia is divided between

Turkey, the Soviet Union and Iran. We have Muslim Armenians, Catholic Armenians – but of a different Catholic type to the Roman Catholic Church – and Orthodox Armenians.

So this definition, which is loose, is healthier than a very narrow one. The Jews, for example, are an ethnic group. Very few people know that they have got three languages: Hebrew, Yiddish and Lungdino, which is an ancient Spanish language which was used by Jews who were exiled from Spain in the 1400s. They have common traditions, which are not necessarily religious traditions. I have a little anecdote about that. I lived in Tel Aviv in Israel for a while and I had a friend who was an atheist, and on the Day of Atonement, which is a big day when all the Jews go to the synagogue to pray and fast, I saw this atheist going to the synagogue. I asked him why was he going to the synagogue. He said because it is a tradition in his family. So this make the Jews an ethnic group. They are also Semites, but then the Arabs are also Semites. That is why the term anti–semitism is misunderstood. That term was invented at the time of Bismarck during the last century. They did not even know that the Arabs existed, let alone that they were Semites. They thought that there were no Arabs. The only people they knew about were the Jews. The *Oxford Dictionary* defines anti–semitism as anti–Jewish. So this loose verbiage is more appropriate, and please stick to it.

Hon DERRICK TOMLINSON: Should we delete "racial" from the title of the Bill? Should we talk about incitement to racial hatred when in fact we are talking about incitement to group hatred, group harassment and group fear?

Mr UR: No. The spirit of it is that we are talking about ethnic, racial and religious. A group could also include the Carlton Football Club.

Hon PETER FOSS: Or members of the Legislative Council.

Mr UR: Yes, or Liberals in the Legislative Council. I think the title is correct. The whole Bill is correct, and please enact it, and then if we find something is wrong with it we can change it.

Hon DERRICK TOMLINSON: Do you promise not to blame us for passing it?

Mr UR: No; I will praise you.

[The witness retired]

CRONIN, MR ROBERT EDWARD

Editor in Chief, *The West Australian*,
residing at 113 Corinthian Road West,
Shelley, examined:

O'SULLIVAN, MR DAN

Member, Australian Press Council,
residing at 8 Eileen Street,
Cottesloe, examined:

The CHAIRMAN: Mr Cronin, you represent *The West Australian*, and you both represent the Australian Press Council.

Mr CRONIN: Can I say on behalf of Dan and myself, and also on behalf of the Press Council, that we have no argument with the stated aims of this legislation. What does concern us, however, is that in its application as set out in the Bill, and including the latest amendments to the Bill, we believe it will have effects that are not intended and which would be very detrimental to the operation of the free Press.

We are perhaps even more concerned that in the early stages of this legislation we were led to believe that there was no way that a newspaper properly fulfilling its function could be caught up in this legislation. It then emerged at a public meeting, which was organised in Perth in March this year by the Press Council, that a front page of *The West Australian* published on 28 February this year would in fact have been caught up in the legislation and that *The West Australian* could have been prosecuted over that story. That rang alarm bells quite loudly for us. We then went back and re-examined the Bill and had further discussions about it with Moira Rayner. We also approached the Premier about it and had a discussion with her, and we are still not satisfied that the legislation poses no threat. Indeed, it has been suggested to us on a couple of occasions, both by the Government and by Moira Rayner, that we should not worry about the legislation and should rely on the good graces of both the Attorney General and the public prosecutor that even though newspapers might be technically guilty of this offence they would not be prosecuted. We draw no comfort at all from that suggestion.

So, as I have said in my submission, it is only sections 79 and 80 with which we have any problems, essentially the phrase "or would be likely to cause", which we believe could involve the newspaper in endless legal battles to establish whether or not it was likely to cause. We have enough problems already in fighting legal battles for our right to publish and to see off people who take us to task under a variety of legislation. I do not wish to add to the cost of that sort of legislation and we believe the Bill as it stands would inevitably involve the newspaper in constant legal actions seeking to determine whether or not material published would be likely to cause offence. For that reason we hope that the Bill in its final form will be varied in such a way as to remove that threat to us. Finally, I must say that the latest proposed defence, to my mind, amounts to almost a defence of incompetence on the part of a newspaper.

The CHAIRMAN: I have been quoting you for most of the day on that.

Mr CRONIN: That is basically all I have to say about it.

Mr O'SULLIVAN: I would say on behalf of the Australian Press Council that legislation of this kind, setting out to cure a major public ill, has, of course, the capacity to be so

dangerous as to present greater problems than it seeks to cure. It would seem that quite revolutionary legislation of this kind can succeed only if it has community support, otherwise one will find that the law and the community are in substantial conflict and it will be the law itself – this legislation – which will earn public disrepute on the basis of community willingness to support legislation. It is quite obviously important that the media should be supportive, because that is the conduit to the public and from the public, and it seems an extraordinary thing that legislation can be prepared in such a way as almost to ensure universal media hostility, which is the surest way of endangering the purposes of the legislation.

The Australian Press Council, as you have heard, has not only examined the legislation but also has called a public seminar in which it was substantially aired. Following that, the Press Council has taken the rather unusual step of generally endorsing the legislation, with some qualifications. I say "unusual" because the Press Council is a vigorous opponent of all forms of legislation which would attempt to limit free speech. To the Press Council there seemed to be sufficient grounds for setting aside that general objection to inhibitions on free speech because of the need, as seen, to attack the particular problem of racism and racial hatred encouragement within the community of Western Australia. However, as you have seen, that support is qualified by the requirement that there be some form of protection for the media, not only so that it can do its job properly in the community's best interests, but so that we do not finish up with the media and all journalists working within it in a state of antagonism towards the legislation and its purposes. The New South Wales authorities, faced with a similar situation, found no trouble, it seemed, in preparing adequate bases for omitting the media from the legal duress.

The CHAIRMAN: Are you talking about the anti–vilification Act? We have discussed that several times today, but the question has arisen that if we give the Press that defence, how do we legislate to get around a racist group setting up a newspaper, quoting its members, and saying it is a fair report?

Mr O'SULLIVAN: That certainly does provide difficulty but I think – and this is not only my personal view but also the Press Council's submission – that the legislation as it now exists will cause far more trouble than it will solve in this community.

Hon PETER FOSS: I understand that, and my concern is also directed towards sections 79 and 80, and towards the same parts of those sections about which you have expressed concern, particularly the words "will be likely to cause", which I do not like at all. I must say that I am also leaning towards leaving out the words "alarm or fear" because I think the words "serious harassment" have a meaning which newspapers would find rather hard to run foul of. However, I am very concerned about this question of reporting a "Rivers of Blood" type of speech with the intent of drawing to the attention of the public that there is racism in the community, and with the intent of raising public awareness of it and public revulsion to it. The problem is that with the way sections 79 and 80 are presently written, certainly with "likely to cause" left in, the legislation will catch newspapers. They would not be able to report the text of racist statements because they would have satisfied all the requirements of section 80. That worries me enormously but I am still worried about the question of a racist group starting its own newspaper. We must address that problem. If we purely write in a total exception for newspapers and fair reports in newspapers, every racist group could immediately start up a newspaper. In fact, some of them apparently have newspapers which have dreadful things published in them.

Perhaps a further point is that it is also in the public interest that it be published. You have those in a number of things you do. Fair reports and excuse in defamation matters also have a public interest qualification on it. That may be one way to allow the opportunity to show it is in the public interest.

Mr CRONIN: One thing that concerns me about that proposition, and about the proposition in general, is that currently at *The West Australian* we have a problem with a number of

different people who make up a particular group about our reporting of race related matters. We are very firmly of the view that we are not a racist organisation; we are an anti-racist organisation. We are pursuing an objective of racial harmony in a very responsible way. A number of people disagree about that for perhaps, in some cases, good reasons. I would suggest they disagree, in some cases, for not such good reasons.

I can see our spending a lot of time and money in the courts arguing about whether something that we have published is in the public interest or not. I will give examples of the sorts of things we run up against. You may recall that we published on the front page of *The West Australian* some time ago a picture of a man named Brian Yorkshire who was convicted of a series of horrific rapes. A number of people accused us of racism in the publication of the picture because the man was an Aborigine and was clearly identifiable as such from his picture. Those people overlooked that it is common practice for the newspaper to publish on the front page pictures of people convicted of major crimes such as rape and murder. We did not single out the man by any means. Even more important about the story is that I believe Yorkshire's race was a very relevant and vital part of his crime. I have a theory that in fact those rapes were not sex offences at all; they were a reaction to racial mistreatment of a young man throughout his entire life. The Human Rights Commission declared from Sydney that race was totally irrelevant in the case. Irene Moss said that from Sydney without knowing any more about the case except that he had been convicted and we published his picture. Many people thought that the young man's race was relevant to the whole situation.

Nothing in the way of the advancement of the human race, by legislation or other means, has ever been achieved by hiding the facts. We are in danger of having a situation where people, perhaps for the best motivations, could produce a completely contrary result by the misguided notion that some of these things should be prevented. That is slightly different from perhaps where we started but it is worth taking into account.

Mr O'SULLIVAN: At the seminar which the Press Council organised, Moira Rayner said that it had not been the intention of the legislation as drafted to catch up the general news media in carrying out its current and normal functions. One would take it from that, if it is not the intention to do that, one should specifically ensure that it does not do that. Otherwise, since the media is so visible in what it does it may well be that the first, second or third prosecutions will be of newspapers, television channels or whatever because they are the easiest to catch. We could have the reporting of a racist campaign when people who established the campaign have not been detected or there is no real evidence against them, so the newspaper stands in the dock. It seems to me this would do total harm to any likelihood that this legislation will work inside this community.

Hon PETER FOSS: If you took a picture of one of these posters and published it in the newspaper, in terms of the Act if it is likely to cause alarm or fear to a person reading the newspaper you have satisfied section 80.

Mr O'SULLIVAN: We would think so.

Hon PETER FOSS: You have done nothing different from what those people have done except you did not intend it. If intention is not an element you have done everything that those people have done. You have disseminated further. You may be seen to have done worse because they only put up one poster and you have put out thousands of newspapers. Arguably, you would get caught as the law is in the Bill.

Mr CRONIN: With the posters, another matter relates to reporting. *The West Australian* reported extensively the statements by certain members of the ANM. We were taken to task by some people, again for the purest of motives, along the lines of, "Why are you giving publicity to such outrageous statements by such terrible people?" If the media had not publicised the remarks made by these people the police would never have been motivated to undertake the investigations which led to those arrests. Again, I make the

point that if you limit the media in an attempt to stop something you may well achieve a counter result.

Hon PETER FOSS: It is like the writing of Dickens in the nineteenth century which uncovered the nastiness of Victorian life. As a result people were revolted by it and did something about it.

[The witnesses retired]

THE COMMITTEE ADJOURNED