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Prohibition of Incitement to Hatred Act 1989: A Review

**Submission by the National Consultative
Committee on Racism and Interculturalism**

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Preface

The National Consultative Committee on Racism and Interculturalism (NCCRI) welcomes the decision by John O Donoghue, TD, Minister for Justice, Equality and Law Reform to review the Prohibition of Incitement to Hatred Act (1989). This submission is based on research and advice from the members of the Board of the NCCRI and the Irish Centre for Human Rights, NUI Galway¹.

Introduction

When passing the International Convention for the Elimination of Racial Discrimination (ICERD) in 1969² the UN declared racism an abhorrent practice. Framed in part as a direct response to Apartheid, the ICERD sought to protect the human rights and dignity of peoples of different races. The main thrust for this movement can be described as being contained in the sentiment expressed a decade later at the UNESCO Conference:

Any theory which involves the claim that racial or ethnic groups are inherently superior or inferior, thus implying that some would be entitled to dominate or eliminate others, presumed to be inferior, or which bases value judgements on racial differentiation, has no scientific foundation and is contrary to the moral and ethical principles of humanity.

UNESCO - General Conference 27 November 1978.

Ireland signed the ICERD in 1968 and it was ratified in January 2001, following the enactment of the Employment Equality Act 1998 and the Equal Status Act 2000. One of the legal obligations created by this document and monitored by the Committee for the Elimination of Racial Discrimination³ is contained in article 4(a) of the document. This article requires states, amongst other actions, to:

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

Having thus signed and ratified ICERD, Ireland is under a legal obligation to ensure that the above conditions are met.

¹ This submission to the review has been prepared by the NCCRI. The NCCRI wishes to acknowledge the research of Joshua Castellino from the Irish Centre for Human Rights, NUI Galway and Cahir O'Higgins in the preparation of this submission, and to the contributions of Board members of the NCCRI which discussed the review at its meeting in May 2001,¹

² Henceforth referred to as ICERD

³ Henceforth referred to as CERD

Report Format

This report is divided into five main sections and contains four annexes.

Section 1

Background

This section contains a brief summary of the events in Ireland that have contributed to the review of the legislation.

Section 2

Analysis of Current Act

This section contains a clause-by-clause analysis of the current Act.

Section 3

Hate Law Legislation: A Comparison

This section is essentially comparative. The systems in operation in Australia, Canada, Germany, the UK & the US are highlighted.

Section 4

International & European Regimes

This section overviews the discussion about freedom of expression and its relationship with incitement to racial hatred. In addition it also attempts to provide an overview of the international regime with regard to this issue.

Section 5

Recommendations & Analysis

In addition the report also contains four annexes. These are, as follows:

Annex One: Summaries of ECHR Cases.

Annex Two: List of Relevant Cases.

Annex Three: NCCRI Report on Racism on the Internet

Section Four: Select Bibliography

Section 1: Background

In announcing the Review of the Prohibition of Incitement to Hatred Act at the national preparatory conference for the World Conference on Racism, John O Donoghue, TD, Minister for Justice, Equality and Law Reform stated`:

Ireland has legislation in place for the past ten years prohibiting incitement to hatred. The Prohibition of Incitement to Hatred Act, 1989 makes it an offence to incite hatred against any group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, or membership of the Traveller community. I am aware that there has been some criticism of the effectiveness of this Act and I understand that since it was enacted only one case involving an alleged breach of the Act was referred to the Director of Public Prosecutions. That case was subsequently dismissed in the District Court. At my request officials have commenced a review of this legislation and I would welcome any suggestions which may lead to an improvement to the existing provisions of the Incitement to Hatred Act.⁴

There are a number of events in Ireland that have helped identify weaknesses in the present legislation. These include:

- The comments made by a columnist with the Sunday Independent in regard to Travellers in January 1996 under the heading of 'Time to get tough on Tinker Terror 'Culture'. Subsequent offensive comments were made by the same columnist in regard to people with disabilities and their participation in the Olympics. After consideration by the Gardai and the DPP, action was not proceeded with. Following the decision not to proceed there were calls for a review of the legislation.
- The comments made by a Councillor in Co. Mayo, a member of the Western Health Board, in relation to the Traveller Community. This case resulted in a failed prosecution attempt, with the judge concluding that the councillor's words were likely to cause offence but did not constitute incitement. Following the judgement there were renewed calls for a review of legislation.
- The conviction of a Dublin Bus driver in district court under the 1989 Act, who was fined £450 and a further £450 for an assault that took place during the same incident. The conviction was subsequently quashed in circuit court. There were calls for a review of the act, including calls from the NCCRI, when the conviction was quashed in the circuit court.
- The attack and stabbing of David Richardson and the alleged the use of racist epithets. Six men were subsequently charged. Case pending.

⁴ NCCRI (1990) Report of the National Preparatory Conference for the World Conference on Racism. www.nccri.com

Section 2: Analysis of Prohibition to Incitement of Hatred Act, 1989

2.1 Interpretation

This section contains a clause-by-clause description and analysis of the current Prohibition to Incitement of Hatred Act 1989.

Broadcast – transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

Distribute - to the public or a section of the public

Hatred - means hatred against a group of persons in the State or elsewhere on account of their race, colour, nationality, religion, ethnic or national origins, membership of the travelling community or sexual orientation;

Publish - to the public or a section of the public;

Recording – includes visual images or sounds, which may be reproduced (by any means). It also includes references to the distribution, showing or playing of such recordings to the public or sections of the public;

Written material - includes any sign or other visual representation.

Comment:

Whilst this section is concerned with definitions and interpretations it fails to address the issue of exactly what constitutes ‘incitement’. This would appear to be a lacuna owing to the ambiguous nature of incitement. Elsewhere incitement has been defined as ‘a conscious and motivated act’ which requires the subjective judgement of the Court.⁵

2.2 Actions Likely To Stir Up Hatred

Offences: Publish/distribute written material/use words/behave/display written material/show/play, or distribute recordings of images or sounds, where it may be threatening, abusive or insulting and is intended to stir up hatred or likely to stir up hatred.

Defences: No intention to stir up hatred/Lack of awareness of the content of the offensive material/ No reason to suspect material was threatening, abusive or insulting.

⁵ Section 60 Racial Hatred Bill 1994 (Australia). Similar definitions can also be found in Canadian and New Zealand legislation.

Comment:

This section seeks to be inclusive with regards to the kinds of actions liable to being offences. On the other hand, rather than relying on actual harm, it uses the language of 'intention' thereby allowing, as a defence, lack of intention to stir up hatred in conjunction with other defences. One of the considerations here is including tests such as the potential harm test.⁶ In addition the Act only covers actions in public places. Thus, it is a legitimate defence, in deference to the rights to privacy, to prove that the defendant was inside a private residence at the time and had no reason to believe the offensive material would be heard or seen outside the residence.

2.3 Broadcasts likely to stir up hatred**Offence:**

The person providing the broadcasting service, the producer, the director, any person whose words or behaviour is threatening, abusive or insulting can be culpable under the Act. If the item is intended to stir up hatred or is, with regard to all circumstances, likely to do so.

Defence:

Lack of awareness of involvement of offensive material/ Not reasonably practicable to secure removal of material/ Not knowing the item, or an item involving the use of material to which the offence relates, would be broadcast/ Circumstances not be likely to stir up hatred/ No reason to suspect that the item was threatening, abusive or insulting

Comment:

Although the definition seems to suggest that websites would come under the auspices of this particular article, this perhaps needs to be made more explicit in light of the current debate internationally on the issue.⁷ (See annex three for NCCRI report on racism on the Internet in Ireland).

⁶ Grant Ian & Dean Geoff 'Regulating Hate Speech: A Proposal for Criminal Law Reform' in (1999) NLR 6

⁷ See for instance 'Stockholm International Forum: Combating Intolerance 29th –30th January 2001. A significant component to the Conference discussed the role of the Internet within this debate.

3. Preparation And Possession Of Material Likely To Stir Up Hatred

Offence:

Preparation or possession of material which is threatening, abusive or insulting and is intended or is likely to stir up hatred.

Defence:

If reasonable to assume that material is not for personal use, it is necessary for defendants to prove that they are not in possession of the material contrary to subsection 1 of Art 4.

Comment:

Possession of offensive material with a view to distribution is clearly an offence. However once again, the lack of a proper clarification of what is offensive material remains.

4. Reports Of Proceeding in Oireachtas /Judicial Proceedings

Fair and accurate reporting of proceedings in the Oireachtas is permitted by the Act, as soon as publication is reasonably practicable and lawful.

Comment:

This clause is by way of a saving clause to prevent the honest reporting of events in the Oireachtas or judicial proceedings from coming under the scope of this Act. The rationale for this is that there will be from time to time, discussions and cases that relate to these matters and if in the reporting of these, the media is castigated for the offences it will stymie discussion and prevent public awareness.⁸ However the Act itself has far fewer restrictions than other acts of a similar nature, which make other exceptions.⁹ Restrictions are essentially useful if they clarify the precise nature of actions covered as offences under the Act.

⁸ See the ECHR judgement in *Jersild v Denmark* – as discussed in section 4

⁹ See Section 3 on Australia

5. Penalties

Summary conviction: fine up to £1,000 or imprisonment up to six months or both
Conviction on indictment: fine up to £10,000 or imprisonment up to 2 years or both.

Comment:

These penalties are similar to those contained in other jurisdictions with the exception of Germany where penalties are likely to be stiffer.

6. Offences by Bodies Corporate

Where an offence is committed by a body corporate with the consent, connivance or neglect of a director, manager, secretary or similar position, the person and body corporate are culpable and can be proceeded against.

Comment:

This section seeks to bring corporate bodies that are the perpetrators of such offences under the scope of this Act.

7. Proceedings brought by The DPP

Further action in cases where the Act has been invoked can only be taken by or with the consent of the Director of Public Prosecutions

Comment:

This is a standard provision of hate laws to restrict their use to appropriate situations. The reasons for this are many and are discussed in Section 4. One advantage of the role ascribed to the DPP rather than the Attorney General is that since the former is non-political it removes some of the political overtones that colour actions instigated by Attorney Generals in other jurisdictions.

7. Search and seizure

8. Powers of arrest

9. Forfeiture

10. Short title and commencement

Section 3: Hate Law Legislation in other Jurisdictions

3.1. Australia

The discussion in Australia with regard to racism has similar undertones to that in Ireland. Whilst racist sentiment has been expressed against the Aborigines for a while, the inflow of immigrants and asylum seekers has re-opened this particular debate. Legislation with regard to racial vilification is widespread at national and provincial level.

National level:

Racial Hatred Act 1995 – introduced section 18C(1) – into the Racial Discrimination Act 1975:

*Makes unlawful, public acts which are reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or a group of people where the act is done because of race, colour, or national or ethnic origin of the other person or group members.*¹⁰

Incitement is defined as ‘.. A conscious and motivated act’ which requires subjective judgement on the part of the Court.

Limitations:

Nothing said or done ‘in reasonably good faith in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose, or any other purpose in the public interest’ will be prohibited (section 60).

Complaint mechanism: Human Rights and Equal Opportunities Commission, which can be individually activated.

Provincial Level:

New South Wales

Anti-Discrimination Act 1977

Section 20C (1) – unlawful (not criminal) incitement

Section 20D – criminal offence¹¹ – physical threat/incitement to physical threat

Exceptions: fair reporting, absolute privilege, good faith, public interest

Regulation: Anti-Discrimination Board (NSW)

Wagga Wagga Aboriginal Action Group v Eldridge 1995 (EOC 92-701); Patten v State of NSW 1995 EOT 91/92 21 January 1997

Western Australia

Criminal Code 1913 – amended in 1989 – regulate acts of racial hatred in response to poster campaigns

Crime: possession of material/threatening/abusive – with intent to publish/distribute/display for racial hatred to be created/promoted/increased

¹⁰ Unlawful behaviour includes: writing racist graffiti in public places/ wearing Nazi insignia in a public place/ making racist speeches at a rally/ placing racist posters or stickers in a public place/ Racist abuse in public places such as shops, workplaces, parks, public transport/ Offensive racist comment in a publication

¹¹ Fine Australian Dollar 10,000 / 6 months imprisonment – individual; 100,000 – corporation. Attorney General must consent – 4 cases – prosecution never recommended

Penalty: summary offence \$2000 and/or 6 months imprisonment; indictable offence – 2 years imprisonment. No prosecutions

Queensland

Section 126 Anti-Discrimination Act 1991

Person must not, by advocating racial or religious hatred or hostility, incite unlawful discrimination of another contravention of the act.

Penalty: \$3500 (individual) 17,000 (corporation)

Australian Capital Territories

Sections 65 – 67 Discrimination Act 1991 – mirror closely the NSW Act

South Australia

Racial Vilification Act 1996

Penalties: \$5000 (individual) 25000 (corporation)

Attorney General must consent

General Comments

Effectiveness of Legislation

- Criminal Law model or human rights model – vital to define conduct to be regulated with precision
- Threshold needs to be clearly identified so as not to erode freedom of expression
- Clarity vital to prevent excessive number of complaints

Criminal Sanction

- Lack of criminal prosecutions visible
- Difficulties – onerous requirements (Attorney General)/fear of political or social repercussions/ fear of providing racists with a platform/proving allegations

Civil Remedies

- Advantages – ease of operation/conciliation/prevention of martyr syndrome
- Difficulty – lack of publicity/Instigated by complainant who is aware of procedure/no social change factor/inadequate deterrent

3.2. Canada

Canada regularly sees relevant cases in this area. The following is a summary of legislation and a few notable cases.

National Level

Criminal Code, 1985, Section 319(2):

Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of:

(a) An indictable offence and is liable to imprisonment for two years; or

(b) An offence punishable on summary conviction.

Defences: freedom of expression including truth, religious opinion in good faith, public interest. Consent of Attorney General required for prosecution.

Human Rights Act, 1977, Section 13:

Discriminatory practice: Repeated communication by telephone of 'hate messages' i.e. 'any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of prohibited ground of discrimination. (Taylor Case)

Provincial level

Saskatchewan Human Rights Code

Ontario Human Rights Code

*British Columbia Human Rights Amendment Act, 1993*¹²

Cases

R v Keegstra

R. v Zundel (1992) 16 C.R. (4th);

Taylor v Canadian Human Rights Commission (1990)

R v Keegstra: dismissed as high school teacher in Alberta for communicating racist statements to his students. Convicted in 1985, fined \$5,000 sentenced to 5 months. Appeal successful on the basis of freedom of expression and presumption of innocence (Canadian Charter of Rights and Freedoms). Canadian Supreme Court overturned the appeal on the basis of limitation to rights.

Judge Dickson CJC: 'Few concerns can be as central to the concept of a free and democratic society as the dissipation of racism, and the especially strong value which Canadian society attaches to this goal must never be forgotten in assessing the effects of an impugned legislative measure.' He acknowledged the limitation of criminal legislation as a mechanism for 'advancing the goals of equality and multicultural tolerance in Canada. He also suggested that the enactment of anti-hate laws was of such magnitude as to support even the severe response of criminal prohibition.

The decision of the Supreme Court of Canada can be considered to have effected a subtle change in the terms of the debate about the role of statutory regulation as an instrument of anti-racism. However it was struck down on a technicality and comes before the court once again – where Keegstra has asked for a reconsideration of the constitutional validity of section 319(2). This is especially valid in light of the Zundel decision where the freedom of expression was deemed to have over-ruled the incitement to racial hatred.

Also: Criminal Code – rarely invoked.

¹² This is the broadest racial vilification provision and reads as follows:

(1) No person shall publish, issue or display or cause to be published, issued or displayed any statement, publication, notice, sign, symbol, emblem or other representation that:

(a) Indicates discrimination or an intention to discriminate against a person or a group or class of persons (b) is likely to expose a person or a group or class of persons to hatred or contempt because of the race, colour, ancestry, place or origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or that group or class of persons

(2) Subsection (1) does not apply to a private communication or to a communication intended to be private.

3.3. Germany

The discussion with regards to incitement to racial hatred in Germany is perhaps the most advanced, due to historical reasons. Incitement to racial hatred was included in 1973 as a criminal offence. Between 1992 and 1999 1000 extreme right wing organisations were banned with individual neo-Nazis being convicted with heavy sentences. Amongst famous cases was that of an Australian (Director of the Adelaide Institute) and US citizen Gary Lauck who was sentenced to 4 years imprisonment in 1996. The relevant provisions of the German Criminal Code are as follows:

Section 130 (3):

Any person who publicly denies the historicity, expresses approval or plays down the importance of the racial murder committed under the national Socialist regime in a manner calculated to disturb the public peace is liable to a prison sentence of up to 5 years or a fine.

Section 130(4) in conjunction with (2):

Any person distributing or rendering accessible written material whose contents correspond to the definitions in section 130(3) of the Criminal Code under the conditions therein set out, or undertaking preparations to these ends, is liable to a prison sentence of up to three years or a fine.

These provisions do not conflict with the constitutional right to freedom of expression under article 5 of the Basic Law. Under Article 5(2) of the Basic Law, the right to freedom of speech is subject to restrictions arising out of statute in general and statutory provisions for the protection of young people and personal honour in particular. Also relevant is Article I (I) Basic Law which protects human dignity and honour.

Incitement to Racial Hatred – peace does not actually have to be disturbed – ‘abstract endangerment offence’ – an offence which represents a risk.

3.4 United Kingdom

One of the earliest recorded cases concerning incitement to hate took place in 1732 where newspaper material was ruled to be seditious for allegations against Portuguese Jews that led to violence and disorder.¹³

The first substantive criminal civil rights sanctions – section 6 of the Race Relations Act 1965. ‘Crime to publish or distribute written matter or to use words in a public place or at a public meeting which are threatening abusive or insulting if done ‘with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race, ethnic or national origins.’¹⁴ Replaced by Section 70 – creation of the crime of Incitement to Racial Hatred based on the principle of *mens rea*.

¹³ R. v Osborne (1732) 2 Swnast.503

¹⁴ Lawrence, Frederick M. ‘Bias Crime in a Multi-Cultural Society’ Working Paper Series, Public Law & Legal Theory Working Paper No.00-01 Boston University School of Law. Available at www.bu.edu/law/faculty/papers

Current Regime

Sections 17,18,19,23 Public Order Act 1986

S.17 'Racial Hatred' is 'hatred against a group of persons in Great Britain defined by reference to colour, race, nationality (including citizenship) or ethnic or national origins.'

Crime & Disorder Act 1998

Racially motivated crimes under sections 28-32

Football (Offences) Act 1991 – Section 3 – 'chanting of an indecent or racist nature'

Problems

- a) Definitional difficulties with 'hatred' 'insulting' 'abusive' 'likely to stir up racial hatred'
- b) Differentiation between religion and race, extent of 'racial groups'
- c) Politicisation of Attorney General's involvement.¹⁵

Cases:

R v Britton [1967] 2 QB 51 – first prosecution later quashed

R v Osborne [1732]

Jordan v Burgoyne [1963] 2QB 744

Cozens v Brutus [1973] AC 854

R v Read The Times 7th January 1978

R v Sawh, The Times, 20-30 November 1967

R v Malik (1968) 1 WLR 353

Also relevant: Prosecution under the *Prevention of (Northern Ireland) Incitement to Hatred Act 1970*

Re: Publication of *Orange Loyalist Songs 1971*

3.5. United States of America

The US presents an example of a state in which the freedom of expression as protected by the First Amendment renders the action of incitement to racial hatred protection-less.

As stated in the Special Rapporteur's report on the USA:

'There is no legislation to prohibit incitement to racial hatred and the activities of racist organisations because of the sacrosanct nature of the First Amendment to the Constitution, which guarantees total freedom of expression and association, regardless of the ideas expressed and aims pursued by an association. This explains the reservations expressed by the United States Government with regards to article 4 of the ICERD and article 20 of the ICCPR. The Special Rapporteur is concerned about the influence exerted through the media by activities of racist organisations, which freely broadcast their propaganda over the radio and participate in numerous television talk shows... He wonders whether racist arguments which threaten the very foundations of democracy should benefit from human rights safeguards.'

¹⁵ Twomey A., 'Laws Against Incitement to Racial Hatred in the United Kingdom' in *Australian Journal of Human Rights* (1994) Vol.1

The Special Rapporteur also expressed anxiousness by the way the US Supreme Court is moving in its decisions on freedom of expression. In its decision *R.A.V. v/s City of St. Paul Minnesota*,¹⁶ the Supreme Court found that burning of crosses – a form of intimidation commonly employed by members of the Ku Klux Klan to terrorise African Americans – was a freedom of expression protected by the Constitution.¹⁷ The older case of *Village of Skokie* had already tilted this discussion in favour of the freedom of expression.¹⁸

¹⁶ *R.A.V. v/s City of St. Paul Minnesota* 60 U.S.L. 4667 (22nd June 1992)

¹⁷ *Report of the Special Rapporteur on Racism & Racial Discrimination* E/CN.4/1995/78/Add.1

¹⁸ *Village of Skokie v National Socialist Part of America* (1978) where the Federal Court quashed an injunction to prevent the Chicago Nazi Party from demonstrating in the village of Skokie as a violation of the First Amendment.

Section 4: International Standards

4.1. European Convention On Human Rights (ECHR): Salient Cases

The importance of the media's capacity to report freely on issues of public interest was established in *Handyside v. UK*,¹⁹ even where this concerns the dissemination of unfavourable or offensive ideas. However this right, as is evident from the phrase, 'subject to paragraph 2 of article 10'²⁰, is not an absolute one. The right often impacts on other rights, as a result the ECHR has sought to balance the right to freedom of expression with the state's legitimate need to limit it in certain circumstances, (e.g. morality, person's reputation, prejudice to a fair trial, incitement to hatred, public order).

Freedom of Expression

A variety of categories of expression have emerged through ECHR case law including political expression, artistic expression and commercial expression.

Political Expression

In *Lingens*²¹ the court in a similar vein to the US Supreme Court opined that politicians must tolerate greater scrutiny and criticism than ordinary citizens.²²

Not confined to factual or verifiable data

As per *Lingens* and subsequently in *Oberschlick v. Austria*²³, it was accepted that proving the truthfulness of opinions or interpretations about politicians was not a necessary requirement to come under the protection of article 10.

¹⁹ *Handyside v. United Kingdom*, European Court of Human Rights, Judgement of 7 December 1976, Series A, No.24; 1 European Human Rights Record (EHRR) 737 (1979 – 80).

Handyside publisher of *The little Red Schoolbook* convicted on obscenity charges, the English courts found the book was likely to deprave and corrupt a proportion of children likely to read it. Even though the book had been widely published in many member states and was available in other parts of the UK, the European Court ruled that there had been no violation of Article 10 on the grounds that the state had a legitimate reason, in the context of local circumstances, to protect morals. It attached importance to the intended readership. Despite the point that the book contained mainly factual material, it also contained, "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences" (para.52).

²⁰ Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.

²¹ *Lingens v. Austria*, Judgement of 8 July 1986, Series A, No.103; 8 EHHR 103 (1986). Lingens, published two articles critical of the Austrian Chancellor, Bruno Kreisky, accusing him of protecting and supporting former members of the Nazi SS. The Chancellor brought a private action for criminal defamation. Lingens was convicted, fined, and his magazine was confiscated. He complained to the Commission that his rights under Article 10 had been violated. The Court agreed.

²² 'More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual.' 8 EHHR 103, p.419.

²³ *Oberschlick v. Austria*, Judgement of 23 May 1991, Series A, No.204. Publication of a criminal summons laid against the Secretary-General of the Austrian Liberal Party regarding remarks he had

Hate Speech

The fine balance between freedom of the press and the rights of others was considered by the Court in *Jersild v. Denmark*²⁴ (1994). The Court accepted that the racist comments for which a group of youths called the Greenjackets were convicted 'were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10'²⁵ and that the Government had moved to safeguard its minorities against racial discrimination. The judgement underscored the possible impact of the medium, since '...it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media'.²⁶ However, the Court opined that the penalties imposed on the media in these circumstances were not required in a democratic society for the protection of the rights of others:

*The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.*²⁷

Thus in the *Jersild* case, the Court was cognisant of the target audience of the program in ascertaining whether the state's interference was legitimate. In contrast to the *Handyside* case, in which the content of *The Little Red Schoolbook* was meant principally for children, the Greenjackets item was an element of a serious news programme targeting a well-informed audience, who necessitated less protection. With the exception of the *Otto-Preminger*²⁸ case, the courts have been reluctant to allow interferences with the communication of ideas and information to consenting adult consumers.

made during an election campaign. The applicant was convicted of defamation. The Court upheld his complaint of a violation of Article 10.

²⁴ *Jersild v. Denmark*, Judgement of 23 September 1994, Series A, No.298; 19 EHRR 1 (1995). Jersild was a Danish journalist working for a television news programme. He reported on a group of extremist youths -the Greenjackets - who made racially prejudiced observations regarding black people and immigrants in Denmark. The youths, the journalist and the news chief were prosecuted and convicted under section 266 of the Danish Penal Code. The ECHR ruled that the penalties imposed on the media were in violation of Article 10, as the news item was not intended to engender racist views, but to inquire into a subject that was already of substantial public concern.

²⁵ *Ibid.* p.28

²⁶ p.27

²⁷ p.28

²⁸ *Otto-Preminger Institute v. Austria*, Judgement of 20 Sept. 1994, Series A, No.295-A; 19 EHRR 34 (1995). The Austrian authorities seized an allegedly blasphemous film from a private organization on the basis that it was offensive to Christians. The Commission on Human Rights found a violation of Article 10, but the Court ruled there had not been a violation of Article 10. At issue was whether the action was proportionate to the justifiable aim sought, and as a corollary of this 'necessary in a democratic society'. The reasoning behind the Court's conclusion was that a significant section of the population living in the region were Roman Catholic and the state had acted to protect their rights and prevent disorder, and thus this scenario was balanced in favour of the state's need to interfere with freedom of speech in the context of Article 10.

Right to Freedom of Expression v the Administration of Justice

This matter has been considered in a number of cases. In the *Sunday Times*²⁹ case the Court emphasised the importance of media reporting on issues of public interest.

*The thalidomide disaster was a matter of undisputed public concern... Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed... The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest... The facts of the case...did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion.*³⁰

Restrictions prescribed by law

The *Sunday Times* case was also important for its deliberation on the concept that a restriction was 'prescribed by law'. In the UK, contempt of court is a common law notion, which aims to protect the administration of justice. The *Sunday Times* argued that the law of contempt was intrinsically uncertain. The Court determined that the vital aspect was not whether the law was written or unwritten but whether it was clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. It found that the British law on contempt of court met that standard. However, 'the *Sunday Times* test' does not only ask whether a law exists in the state concerned, but whether it complies with the requirements of Article 10(2).

Conclusion³¹

The position under the ECHR can thus be summarised under the following points:

- a) The discussion with regards to regulation of hate speech comes within the discussion on the freedom of expression.
- b) There has been a well-developed notion of limitation to rights in various cases before the Court.
- c) Freedom of expression has expressly been established under case law as being fundamental but non- absolute.

²⁹ *Sunday Times v. United Kingdom*, Judgement of 26 April 1979, Series A, No.30; 2 EHHR 245 (1979-80). The Court found that an injunction prohibiting the *Sunday Times* newspaper from publishing an item concerning 'thalidomide children' (children who were born deformed as a consequence of thalidomide being used as a tranquilliser during pregnancy) was in violation of Article 10. The initial ruling in the English courts had been made on the basis that the piece might prejudice court proceedings then pending against the company, which had manufactured the drug. However, the court case had been in a "legal cocoon" for several years, and it was uncertain that the parents' action was ever going to come to trial.

³⁰ *Ibid.* p.277

³¹ See Jacobs & White *The European Convention on Human Rights* Oxford: Clarendon Press 1996 pp.222-236 & pp.284-309. Also see generally, Janis M., Kay, R. & Bradley A. *European Human Rights Law* 2nd edition, O.U.P. 2000

4.2. International Standards

As mentioned earlier the legal regime on racism at an international level is based on the ICERD. Recently ratified by Ireland, it calls in article 4(a) for states to:

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

The monitoring committee of the ICERD thus examines each state report submitted under article 9 with regard to its legislation. In addition it would also examine how often the legislation is used and to what extent it achieves its aims. At the moment the report on Ireland would suggest that although this Act has been in place since 1989 it has failed to result in direct prosecutions. However the record also shows that there is a degree of inherent racism present in Ireland. Thus vis-à-vis this standard a couple of avenues need to be explored:

- 1) **Modify existing legislation:** The aim of such action would be to address the issue of clarity and enable appropriate use. In addition this route could address issues as to what extent the Equal Status Act 2000 could overlap with issues of incitement to racial hatred.
- 2) **Create preconditions for better usage of current legislation:** There are a variety of means that could be pursued, including the setting up of an intermediary body that makes the Act more accessible to those likely to be in need of it. These kinds of bodies do exist in other jurisdictions and could be looked at as models.

In addition the international standards also suggest that the incitement to racial hatred is a symptom of a problem that needs to be addressed. Thus whilst legislation addressing racial vilification can be improved and tightened it needs to go hand-in-hand with other measures in civil society such as education and public awareness campaigns to diffuse the harm that racist attitudes can cause in society.³²

³² See Article 7 of the ICERD: State Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

4.3 Other Relevant Documents At International Level

United Nations

Preamble, Article 7, *Universal Declaration of Human Rights 1948*

Article 20 (2), *International Covenant for Civil and Political Rights, 1966*

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities 1993

Council of Europe

Vienna Declaration, 1993

Appendix III, Vienna Declaration: Declaration & Plan of Action on Combating Racism, Xenophobia, Anti-Semitism & Intolerance, 1993

Framework Convention for the Protection of National Minorities 1995

Protocol 12, European Convention for Human Rights, [2000]

Section 5: Analysis and Recommendations

5.1 Overall Comment on Current Act

The act as it stands appears reasonable in itself. However the low degree of usage since it came into force suggests that it does essentially fail to address the issues it is targeted at. Thus whilst the option of revising the Act does need to be explored, the means of enforcement and regulation also need to be examined in tandem. The Act does not adequately address the issue of what constitutes incitement to racial hatred. Whilst legislators in other jurisdictions have attempted (not always successfully) to grapple with this question, the current Act does not seek to grapple with the issue in any depth. This is perhaps one amongst a host of other reasons why the Act, as a piece of legislation that can regulate incitement to racial hatred has not proved useful. As can be seen in Section 1, and NCCRI Reports³³, racism is present in Ireland, and therefore, if it is to be a useful piece of legislation the Act would need to tackle the issues more assertively.

5.2 Comparative Aspect: Lessons To Be Learnt

One of the key lessons from other jurisdictions is the need to define the issue of racial vilification. The Australian examples bear special examination. The debate in Australia has been extremely focussed in the last few years with consideration of freedom of expression and its counter-balances. The British example does provide some indicators as to the direction of change, although it is mainly shrouded under the Public Order Act, and whilst the maintenance of order is central to the prohibition of incitement to racial hatred, it cannot be the only deciding element. The other countries examined also provide an understanding of how different countries deal with this issue and are worth analysing in more detail.

5.3 International Standards

The international standards on the issue of prohibition of racial discrimination are very clear. According to Article 4(a) of the ICERD a country that is party to the treaty is required to enact legislation and other measures that prevent incitement to racial hatred. The discussion at an international human rights level recognises clearly that human rights like the right to freedom of expression have to have limits, so as not to impinge on other rights. Thus, this concept is not considered to have been eroded by such legislation. At the level of the ECHR, too, there is provision to understand that the rights discourse cannot be absolute. Thus with regards to international standards on the issue it can be said that incitement to racial hatred laws in principle are a justifiable restriction on the freedom of expression.

5.4 Debates To Be Taken Into Account

Any discussion about racial hatred laws have to take into account the extent to which a state sees fit to regulate freedom of expression. Different states draw the line between the two rights at different points based on their independent histories. As a state in which the Traveller Community in particular have faced discrimination for a considerable period of time, this line perhaps needs to be drawn more in favour of protection against incitement. In addition the changing nature of Irish society dictates that to set in place the building blocks for an inclusive society such legislation is strongly required. However the legislation needs to be unambiguous in what it seeks

³³ See www.nccri.com

to achieve and needs to be accessible to those likely to need protection under it. Alternatively a role for an intermediary body could be examined which can address issues of accessibility of the legislation.

5.5. Internet

What was once proscribed and prosecuted is now available on the Internet. Annex three of this report outlines the emergence of 'Irish' racist websites as a cheap means of spreading hate and racist propaganda. The report highlights the problems of tackling racism in the Internet but contends they are not insurmountable. The new legislation should specifically cover racism on the Internet.

Annex One: Summaries of ECHR Case Law

1. *Handyside v. UK*

European Court of Human Rights, Judgement of 7 December 1976, Series A, No.24; 1 European Human Rights Record (EHRR) 737 (1979 – 80)

The importance of the media's capacity to report freely on issues of public interest was established in *Handyside v. UK*, even where this concerns the dissemination of unfavourable or offensive ideas. However this right, as is evident from the phrase, 'subject to paragraph 2 of article 10,' in the below quote, is not an absolute one. The right often impacts on other rights, as a result the ECHR have sought to balance the right to freedom of expression with the state's legitimate need to limit it in certain circumstances, (e.g. morality, person's reputation, prejudice to a fair trial, incitement to hatred, public order).

'Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'

Handyside publisher of *The little Red Schoolbook* was convicted on obscenity charges and the English courts found the book was likely to deprave and corrupt a proportion of children likely to read it. Even though the book had been widely published in many member states and was available in other parts of the UK, the European Court ruled that there had been no violation of Article 10 on the grounds that the state had a legitimate reason, in the context of local circumstances, to protect morals. It attached importance to the intended readership. Despite the point that the book contained mainly factual material, it also contained, "sentences or paragraphs that young people at a critical stage of their development could have interpreted as an encouragement to indulge in precocious activities harmful for them or even to commit certain criminal offences" (para.52).

2. *Lingens v. Austria*

Judgement of 8 July 1986, Series A, No.103; 8 EHHR 103 (1986)

Lingens, published two articles critical of the Austrian Chancellor, Bruno Kreisky, accusing him of protecting and supporting former members of the Nazi SS. The Chancellor brought a private action for criminal defamation. Lingens was convicted, fined, and his magazine was confiscated. He complained to the Commission that his rights under Article 10 had been violated. The Court agreed. The court in a similar vein to the US Supreme Court opined that politicians must tolerate greater scrutiny and criticism than ordinary citizens.

"More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual." 8 EHHR 103, p.419.

3. Oberschlick v. Austria

Judgement of 23 May 1991, Series A, No.204

As per *Lingens* and subsequently in *Oberschlick v. Austria*, it was accepted that proving the truthfulness of opinions or interpretations about politicians was not a necessary requirement to come under the protection of article 10. This case concerned the publication of a criminal summons laid against the Secretary-General of the Austrian Liberal Party regarding remarks he had made during an election campaign. The applicant was convicted of defamation. The Court upheld his complaint of a violation of Article 10.

4. Jersild v. Denmark

Judgement of 23 September 1994, Series A, No.298; 19 EHRR 1 (1995)

Jersild was a Danish journalist working for a television news programme. He reported on a group of extremist youths -the Greenjackets - who made racially prejudiced observations regarding black people and immigrants in Denmark. The youths, the journalist and the news chief were prosecuted and convicted under section 266 of the Danish Penal Code. The ECHR ruled that the penalties imposed on the media were in violation of Article 10, as the news item was not intended to engender racist views, but to inquire into a subject that was already of substantial public concern.

The ECHR accepted that the racist comments for which the Greenjackets were convicted “were more than insulting to members of the targeted groups and did not enjoy the protection of Article 10” (p28), and that the Government had moved to safeguard its minorities against racial discrimination. The ECHR underscored the possible impact of the medium, since “it is commonly acknowledged that the audio-visual media have often a much more immediate and powerful effect than the print media” (p27). However, the Court opined that the penalties imposed on the media in these circumstances were not required in a democratic society for the protection of the rights of others:

“The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.” (p26 & 28).

In the *Jersild* case, the ECHR were cognisant of the target audience of the program in ascertaining whether the state’s interference was legitimate. In contrast to the *Handyside* case, in which the content of *The Little Red Schoolbook* were meant principally for children, the Greenjackets item was an element of a serious news programme targeting a well-informed audience, who necessitated less protection. With the exception of the *Otto-Preminger* case, the ECHR have been reluctant to allow interferences with the communication of ideas and information to consenting adult consumers.

5. *Otto-Preminger Institute v. Austria*

Judgement of 20 Sept. 1994, Series A, No.295-A; 19 EHRR 34 (1995)

The Austrian authorities seized an allegedly blasphemous film from a private organization on the basis that it was offensive to Christians. The Commission on Human Rights found a violation of Article 10, but the Court ruled there had not been a violation of Article 10. At issue was whether the action was proportionate to the justifiable aim sought, and as a corollary of this 'necessary in a democratic society'. The reasoning behind the Court's conclusion was that a significant section of the population living in the region were Roman Catholic and the state had acted to protect their rights and prevent disorder, and thus this scenario was balanced in favour of the state's need to interfere with freedom of speech in the context of Article 10.

6. *Sunday Times v. UK*

Judgement of 26 April 1979, Series A, No.30; 2 EHRR 245 (1979-80)

This matter has been considered in a number of cases. In the *Sunday Times* case, the ECHR emphasised the importance of the media reporting on issues of public interest.

'The thalidomide disaster was a matter of undisputed public concern... Article 10 guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed... The question of where responsibility for a tragedy of this kind actually lies is also a matter of public interest... The facts of the case...did not cease to be a matter of public interest merely because they formed the background to pending litigation. By bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion. (p. 277-282)'.

The Court found that an injunction prohibiting the *Sunday Times* newspaper from publishing an item concerning 'thalidomide children' (children who were born deformed as a consequence of thalidomide being used as a tranquilliser during pregnancy) was in violation of Article 10. The initial ruling in the English courts had been made on the basis that the piece might prejudice court proceedings then pending against the company, which had manufactured the drug. However, the court case had been in a "legal cocoon" for several years, and it was uncertain that the parents' action was ever going to come to trial.

The *Sunday Times* case was also important for its deliberation on the concept that a restriction was "prescribed by law". In the UK, contempt of court is a common law notion, which aims to protect the administration of justice. The *Sunday Times* argued that the law of contempt was intrinsically uncertain. The Court determined that the vital aspect was not whether the law was written or unwritten but whether it was clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. It found that the British law on contempt of court met that standard. However, 'the *Sunday Times* test' does not only ask whether a law exists in the state concerned, but whether it complies with the requirements of Article 10(2).

7. Goodwin v. UK

Judgement of 27 March 1996, Series A, No.17488/90; 22 EHHR 123 (1996)

The Court decided that Goodwin, a journalist, had the right not to divulge the identity of a source who had given him confidential information about a company that, if published, might have caused the company fiscal damage and redundancies. The High Court had ordered Goodwin and his publishers to disclose the source and held them in contempt when they refused. In considering the case, the European Court considered whether the disclosure order was proportional to the aim of protecting the company's interests. It determined that the balance between free speech and the rights of others should weigh in favour of the public interest, not commercial interests.

8. Observer & Guardian v. UK,

Judgement of 26 November 1991, Series A, No.216; 14 EHHR 153 (1992); and *Sunday Times v. UK (No.2)*, Judgement of 26 November 1991, Series A, No.217; 14 EHHR 229 (1992)

The press involved had complained of a violation of Article 10 arising from an action by the Attorney-General in bringing breach of confidence actions and seeking injunctions restraining publication of extracts of Peter Wright's book, *Spycatcher*, which detailed his experiences in the British secret service. In 1985, the *Observer* and the *Guardian* had printed short articles on legal proceedings in Australia to prevent its publication there, and reporting some of the book's contents. The UK Government lost its case in Australia that the book breached Peter Wright's agreement to preserve confidentiality about his employment in the secret service. In April 1987, the *Independent* newspaper printed an extensive synopsis of the book's allegations and the Court of Appeal ruled that the injunctions were binding on all British media - any publication or broadcast of *Spycatcher* content would constitute contempt of court. The *Sunday Times* began a serialisation of the book to correspond with its publication in the US in July 1986, and was charged with contempt of court. Despite the book's unobstructed importation into the UK, the injunctions were maintained until October 1988.

The *Spycatcher* case was important in establishing that neither maintaining the authority of the judiciary, nor national security could justify measures to suppress material in the book once it was published in the US. It was the first time that the Court had rejected a government's claim that an interference in a fundamental freedom was necessary to protect national security.

Annex Two

List Of Relevant Cases

United Nations

D.F. et al v Sweden, Communication No. 183/1984 (26th March 1985) UN Doc. CCPR/C/OP/1 at 55 (1984)

L.K. v The Netherlands, C.E.R.D. Communication No.4/1991 UN Doc A/48/18 at 131 (1993)

C.P. & his son M.P. v Denmark, Communication No. 5/1994 UN Doc CERD/C/46/D/5/1994 (1995)

Narrainen v Norway, C.E.R.D. No.3/1991 UN Doc A/49/18 at 129 (1994)

ECHR

Handyside v. United Kingdom, 1 European Human Rights Record (EHRR) 737 (1979 – 80)

Lingens v. Austria, Judgement of 8 July 1986, Series A, No.103; 8 EHHR 103 (1986)

Oberschlick v. Austria, Judgement of 23 May 1991, Series A, No.204

Jersild v. Denmark, Judgement of 23 September 1994, Series A, No.298; 19 EHRR 1 (1995)

Otto-Preminger Institute v. Austria, 19 EHRR 34 (1995)

Sunday Times v. United Kingdom, Judgement of 26 April 1979, 2 EHHR 245 (1979-80)

Goodwin v. United Kingdom, Judgement of 27 March 1996, 22 EHHR 123 (1996)

Observer and Guardian v. UK, Judgement of 26 November 1991, 14 EHHR 153 (1992); and *Sunday Times v. UK (No.2)*, Judgement of 26 November 1991, 14 EHHR 229 (1992)

Müller v. Switzerland, Judgement of 24 May. 1988, 13 EHRR 212

Hadjianastassion v. Greece, Judgement of 16 Dec. 1992, 16 EHRR 219

Barford v. Denmark, Judgement of 22 Feb. 1989, 13 EHRR 493

Kosiek v. Germany, Judgement of 28 Aug. 1986, 9 EHRR 328

Lehideux and Isnori v. France, Judgement of 23 Sep. 1998, Reports 1998 - VII

Other Cases of Note:

Australia

Wagga Wagga Aboriginal Action Group v Eldridge 1995 (EOC 92-701)

Patten v State of NSW 1995 EOT 91/92 21 January 1997

Harou-Sourdon v TCN Channel 9 Pty Ltd (1994) EOC 92-604 (New South Wales)

Buttle [1984] Tasmania Review 209 at 218

United States

R.A.V. v/s City of St. Paul Minnesota 60 U.S.L. 4667 (22nd June 1992)

Village of Skokie v National Socialist Party of America (1978)

Canada

Neally v Johnston (1989) 10 CHRR 435 (Canada)

R. v Zundel (1992) 16 Canadian Review (4th)

R v Keegstra

Taylor v Canadian Human Rights Commission (1990)

United Kingdom

R v Britton [1967] 2 QB 51 – first prosecution later quashed

R v Osborne [1732]

R v Horseferry Road Magistrate ex parte Siadatan [1991] 1QB 260

Jordan v Burgoyne [1963] 2QB 744

Cozens v Brutus [1973] AC 854

R v Read *The Times* 7th January 1978

R v Sawh, *The Times*, 20-30 November 1967

R v Malik (1968) 1 WLR 353

Annex Three Racism on the Internet

Interim report on racism on the Internet

The National Consultative Committee on Racism and Interculturalism (NCCRI) established a monitoring system for racist incidents in June 2001 (www.nccri.com). Since this system was established three racist websites with a specific focus on Ireland have been drawn to our attention, purporting to represent the Irish National Front, the Irish Fascist Party and the NSRUS (National Socialists R Us). The emergence of sites and their flouting of existing legislation is a new and disturbing development in Ireland, even if only a small number of people are involved in publishing such sites.

The emergence and growth of racist sites

There has been a significant growth in racist websites at a global level in recent years. According to the Simon Wiesenthal Centre, based in Vienna, there was just one explicitly racist website in 1995, but by 1999 this figure had risen to over 2 100.

While much of the content of these sites are patently absurd and bizarre, and constitute a very small proportion of the number of websites on the internet, there are a number of concerns arising out of their existence and of proliferation, including:

- They provide a mechanism to bring together extremist groups and individuals who may have been isolated and declining in influence.
- They constitute a permanent incitement to hatred and provide a cheap opportunity for individuals and groups to spread racist propaganda.
- It is difficult to track down many sites because extremists who publish such sites can operate with impunity in certain countries, in particular the United States.
- Allowing racist websites to exist and proliferate over a period of time may result in racism being considered less as a crime as more as an acceptable point of view.
- It provides a potential means of recruitment to racist organisations, with many sites focussing in on young people through 'clubs' and 'chat rooms'.

What was proscribed and liable to prosecution in the past is now accessible on the Internet. Many of these websites demonstrate a knowledge and contempt for the relevant legislation in individual countries, for example, one of the sites reported to the NCCRI draws attention to the Incitement to Hatred Act (1989) and the Public Order Act (1996).

The role of Internet providers/portals, particularly those operating out of the United States is of particular concern. It has been estimated by the Wiesenthal centre that 90% of racist sites are made accessible by American service providers. European web publishers use American Internet providers to host their sites because of the guarantee of anonymity. Under American law, as currently protected by their Constitution, American providers cannot be compelled to reveal the identity of the person responsible for publishing a racist site. These internet providers are not only prepared

to host racist websites, but to make them easily more accessible through registering them on 'search engines' or to categorising sites under 'clubs' or 'chat rooms'.

Tackling Racism on the Internet

Tackling racism on the Internet may be difficult but not insurmountable. Laws, commercial rules and guidelines apply to the Internet and many states lay down criteria making its legislation applicable to on-line activity or content. The recent successful action taken by the French government in respect of Nazi memorabilia being sold on an American internet provider with a French subsidiary demonstrates that there may be further potential for national governments in tackling racism on the internet through legal action.³⁴

The Irish Government are currently revising the Incitement to Hatred legislation (1989) and the NCCRI will be advising on the specific inclusion of the internet within the terms of the revised legislation.

Irish service providers and the Irish domain registration company may have an important role in developing promoting anti racism policies and codes of conduct.

At an international level bodies such as the United Nations and the European Monitoring Centre on Racism are actively looking at measures to address the problem of racism on the internet. The United Nation's concern about use of the Internet as a tool for racism emerges in a number of preparatory texts and studies drafted in the run-up to the World Conference on Racism, which will take place in South Africa in September 2001. The draft programme of action identifies a number of steps that States and private and other institutions can seek to tackle racism on the Internet, including the introduction of codes of conduct.

³⁴ A French court ruled that Internet provider 'Yahoo' should block access to auction sales of Nazi memorabilia to all French web servers, as such activities were contrary to French law. Yahoo is appealing the ruling through the French Courts.

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- Courtney N., 'British & US Hate Speech Legislation: A Comparison' in *Brooklyn Journal of International Law* March 1993 Vol.19 No.2 pp.727-769
- Jureidini R., 'Origins and Initial Outcomes of the Racial Hatred Act 1995' in *People and Place*
<http://www.elecpress.monash.edu.au/pnp/pnpv5n1/jureidin.html>
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- Jones M 'The Legal Response: Dealing with Hatred' in Cunneen C., Fraser D., & Tomsen S. (eds.) *Faces of Hate: Hate Crime on Australia* (Sydney: Hawkins Press, 1997) pp.215-241 at 216
- McNamara L., 'Criminalizing Racial Hatred: Learning from the Canadian Experience' in *Australian Journal of Human Rights Vol.1 (1994)*
- Twomey A., 'Laws Against Incitement to Racial Hatred in the United Kingdom' in *Australian Journal of Human Rights (1994) Vol.1*

Reports Linking Hate Speech To Violence

National Inquiry into Racist Violence (HREOC 1991)

Australia Law Reform Commission's Report 'Multiculturalism and the Law (ALRC 1992)

National Report on the Royal Commission of Aboriginal Deaths in Custody (RCADC 1991)

International Bodies

ECRI General Policy Recommendation No. 6, December 15th 2000

HRC General Comment 18, Non-discrimination

HRI\GEN\1\Rev.1 at 26 (1994)

HRI\GEN\1\Rev.1 at 64 (1994) CERD on the Roma – UN Doc A/55/18 Annex V
CERD General Recommendation VII – article 4 32nd session, 1985)
CERD, General Recommendation XV on Article 4 of the Convention (42nd session,
1993)
Political Platforms and Doctrines of Racial Superiority UN DOCUMENT
A/RES/55/82
WCAR – Preparatory Committee First session 1-5 May 2000, Geneva
A/CONF.189/PC.1/5
Report of the Special Rapporteur on Racism & Racial Discrimination
E/CN.4/1995/78/Add.1
Concluding Observations CERD (18th August 1997) CERD/C/304/Add.36

Some Relevant web Sites

<http://www.homeoffice.gov.uk/raceact/part9.html>
www.racialharassment.org.uk/legal.html
www.racismnoway.com.au/library/legislation/index-State.html
www.gu.edu.au/school/art/AMMSite/07.html
www.atsic.gov.au/issues/international/un/4_11
www.austlii.edu.au/special/rsjproject/rsjlibrary/rciadic/regional/wa_underlying
<http://www.germany-info.org/newcontent/np/news/BGHPRESS.html>
www.hri.ca/fortherecord2000/vol11/racism.html
<http://www1.umn.edu/humanrts/gencomm/genrxv.htm>