Section 9A of the Race Relations Act 1971 — The "Tigger" of New Zealand's Race Relations Legislation

by

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Introduction

> The mountains have apparently laboured and brought forth — well, not a mouse, though it amounts to very little; nor an elephant, though it is very short sighted; nor a donkey, though it make more noise than sense; nor a worm, though it appears not to know which direction it is going; nor a cat, though it will not take advice; nor a parrot, though it speaks of things which it does not understand; nor a hippopotamus, though it excites mirth.
>
> What the mountains have brought forth is a Tigger, which was given, as I recall, to pulling the tablecloth to the ground, wrapping itself up in it amid the broken crockery, rolling about the room and going "worra-worra-worra", and finally sticking its head out and asking "Have I won?"[1]

Far from it. By section 9A of the Race Relations Act 1971, the Legislature has enacted one of the most problematic, futile and time-consuming (for the Race Relations Conciliator and staff) provisions in New Zealand's race relations legislation. The workload to the Race Relations Conciliator's office has become disproportionately over-burdened by complaints laid under section 9A — from 37 of 150 complaints or 24.7% of all complaints in 1979[2], rising more or less steadily to 141 of 185 complaints or 76.2% of all complaints in 1985.[3] The section fails to fulfil its statutory aim; it is legally questionable whether, in the context of the Act as a whole, sections 9A and 25 fulfil New Zealand's international legal obligations under the International Convention on the

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[1] Levin, "Damn Braces — Pornography: The Longford Report" *The Observer* 24 September 1972; reproduced in Levin, *Taking Sides: A First Selection of His Journalism* (Jonathon Cape, London, 1979) 195.

[2] [1979] *Report of the Race Relations Conciliator,* 3.

[3] [1985] *Report of the Race Relations Conciliator,* 67.

Elimination of All Forms of Racial Discrimination;[4] it has become a tool in political point scoring battles against Maori nationalism; and, perhaps worst of all, has more retarded than advanced the cause of race relations in New Zealand.

II. The History of Section 9A

Section 9A, inserted in the Race Relations Act 1971 by section 86 of the Human Rights Commission Act 1977, appears under the heading "Racial Disharmony"[5] and makes it:

> (1) . . . unlawful for any person —
> (a) To publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting; or
> (b) To use any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or in any meeting to which the public are invited to have access, words which are threatening, abusive, or insulting, —
> being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

For all intents and purposes it is identical to section 25 of the same Act[6] except that section 9A has no requirement of specific intent — it is sufficient that the words or actions are likely to excite racial disharmony — a modification of "undoubted utility"[7] to at least one commentator and certainly also to the Race Relations Conciliator at whose behest a provision allowing for the conciliation of a section 25-type disputes was included in the Act. The Conciliator's concern was spurred by the large number of complaints received by the Office which were classified (by the Office) under that provision. Although few would be able to support a successful section 25 prosecution, each clearly was in regard of an incident which, to the complainant, involved elements of "racial disharmony". Prior to the Human Rights Commission Act 1977 amendment of the Race Relations Act 1971, however, the Conciliator had no jurisdiction at all as regards section 25. The functions attended upon the Office were set out in section 13 of the Act and limited the functions to investigating acts or omissions breaching sections 3 to 7 of the Act, conciliating in relation to same, and taking further action "as contemplated by this Act".

The public, though, was clearly of the impression that inciting racial disharmony was exactly the problem with which the Race Relations Con-

[4] (1969) 660 UNTS 195, 212.

[5] The offence is known as "exciting racial disharmony" — "exciting" is a verb and not an adjective.

[6] Section 25 makes liable to a maximum of 3 months' imprisonment or $1,000 fine anyone whose words or actions are likely to excite racial disharmony and who intends to so excite.

[7] Arnold, *Discord in Godzone: A Study of New Zealand's Race Relations Legislation* (Thesis, Auckland, 1981) 212.

hind the development of the Race Relations Act 1971. It is hard to establish that there was, in fact, any other factor which led the Legislature to a belief in the need for such an Act. There was little or no vocal mandate from New Zealanders for such an Act and, rather, the suggestion of such legislation gave rise to considerable opposition — both generally, since there was no need for anti-discrimination legislation in a country unsullied by any form of discrimination:[19]

> We are fortunate that the particular problems of race we have in New Zealand are not wholly comparable to the problems that occur in other countries . . . The pakeha have to admit to a considerable amount of land grabbing and insensitive dealing in the past, but running through the whole of our relations there has been a spirit of mutual respect, sometimes innately expressed, but always deeply felt. Perhaps this is what some people mean when they speak of the spirit of Waitangi.

and specifically, since the Race Relations Bill was, at best, a calculated and cynical piece of deception:[20]

> The legislative policy of the Government of New Zealand in the field of race relations has, with the Race Relations Bill 1971, reached a new low. As an exercise in indifference, ignorance, stupidity, and governmental irresponsibility the Bill is difficult to surpass. At its best the Bill in its present form is sheer tokenism, a pusillanimous gesture in an area where bold and intelligent government is long overdue. At its worst it is a cheap and dirty insult both to the United Nations and the Maori people of New Zealand; a pandering to an international reputation in the field of race relations which widely departs from domestic realities.

However, over the past few years there had been growing pressure on New Zealand, beginning with a stated intention of the New Zealand Government during the International Human Rights Year to review its attitude to the human rights conventions as yet unratified[21] or unsigned[22]:

> If we fail to accept these conventions on the ground that our legislation does not comply we are open to accusation — perhaps specious but nonetheless often sincere — that we are really practising discrimination after all, and that our claims to virtue are hypocritical.

Thus, when 1971 was declared the International Year for Action to Combat Racism and Racial Discrimination, the Government seized upon the chance to ratify the Convention in the right place at the right time. Interestingly, the *other* purpose in enacting the Bill — the reaffirmation of racial equality — was hardly mentioned at all beyond the very introduction of the Bill to the point that the Acting Minister of Justice, David Thomson, was moved to say that:[23]

> . . . but for the desirability of implementing the international convention and (sic) the elimination of all forms of racial discrimination the Government would not have brought down this legislation, and it cannot be regarded domestically as essential.

[19] Sir Guy Powles, quoted by Dr Finlay, 377 NZPD 5310 (15 Dec 1971).
[20] Nga Tamatoa Council, quoted by Dr Finlay, ibid 5308.
[21] Of 23 human rights conventions, NZ had ratified eight and signed only another two.
[22] Hanan, "Human Rights: The Prospect", in Keith (ed.) *Essays on Human Rights,* (1968) 188.
[23] 377 NZPD 5305 (15 Dec 1971).

and the Prime Minister, Sir Keith Holyoake, dismissed criticism as to the non-comprehensivity of the Bill by saying that:[24]

> All [the Bill] does is to close those few loopholes to . . . enable us to ratify the United Nations convention.

III The International Convention On The Elimination Of All Forms Of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination, however, establishes concepts barely capable of such casual adoption as that purported by the Legislature in 1971. The Race Relations Act 1971 leaves the potential of these concepts unrealised and unexpressed and exhibits no evidence of any appraisal of the New Zealand situation as would effectively provide for the implementation of the Convention in New Zealand or for satisfaction of the obligations it imposes.[25] Indeed, the concepts proffered by the Convention have been termed "essentially revolutionary"[26] and it is difficult in the extreme to contemplate that concepts of that nature were already in force, operative and adhered to in New Zealand in 1971. The philosophies underlying the substance of the Convention are expressed in its Preamble. Implicit is the conviction that racial discrimination exists not as an issue to be resolved in isolation but as part of a series of worldwide phenomena of oppression. Thus the Convention rests upon the basis of the United Nations Charter — the principles of the dignity and equality inherent in all human beings — and condemns the denial of these principles reaffirming that one of the basic preconditions of peace is an elimination of racial conflict achievable only within an order in which individual and group autonomy are not only recognised but also observed and protected.[27]

> Recent history has emphasised that no nation, no region, no city can flourish, perhaps even survive, unless it fashions an equitable solution to racial conflict and, more generally, to discrimination. . . . Discrimination is a matter of international concern; its elimination is intertwined with the prospects of international survival.

These substantive provisions of the Convention are contained in Part I. Article 1 defines racial discrimination and the subsequent six articles clearly define the obligations of the States Parties. Kelsey extracts four basic undertakings from these articles:[28]

[24] 377 NZPD 5365 (16 Dec 1971).

[25] This article does not pretend to discuss the Convention and its obligations in any depth. However, the writer's interpretation of the Convention was drawn directly from Kelsey, "A Radical Approach to the Elimination of Racial Discrimination" (1975) 1 UNSWLJ 56.

[26] Ibid, 57.

[27] Kelsey, supra at note 25 at 58 citing Reisman, "Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination" (1971) 1 Den J Int'l L & Pol 29, 63.

[28] Kelsey, supra at note 25, at 58.

(a) The elimination of all forms of racial discrimination by governments and public authorities, and by organisations and individuals within the State — Articles 2.1 (a) and (b), 3, and 4 (c).
(b) The amendment of domestic laws to eliminate racial discrimination and hatred and to secure equality before the law — Articles 2.1 (c) and (d), 4 (a) and (b), and 5.
(c) The provision of effective protection and remedies against acts of racial discrimination — Article 6.
(d) The undertaking of social, cultural and educational development — Articles 1.4, 2.1 (e), 2.2 and 7.

The serious fulfillment of these obligations requires both an intense analysis of the underlying causes of racial discrimination and a willingness to question the basic tenets of the social framework in which it is manifested. Furthermore, new legal tools are required for the resolution of racial conflicts since the existing machinery frequently preserves the established inequalities and patterns of discrimination. "Mere tinkering" with the existing machinery will not suffice and trivialises the principle to which the Convention commits New Zealand. Insofar as the Convention applies to this article, the above discussion serves to put section 9A of the Race Relations Act 1971 in its context. The reform of section 9A in the manner the writer suggests is hugely inadequate without an overhaul of the Act as a whole. Nonetheless, given the vast amount of time taken by the Race Relations Office on section 9A complaints, such reform has merit so long as it is understood that the reform needs to be applied to the Race Relations Act 1971 as a whole and not just to section 9A.

As discussed earlier, section 9A of the Race relations Act 1971 is a virtual copy of section 25 of the same Act for the purposes of conciliation and "civil law". The requirements of Article 4 of the Convention help to explain, at least in part, the presence of section 25 (and thus section 9A) in the Act. In Article 4:

> States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights . . ., *inter alia:*
> (a) Shall declare an offence punishable by law all dissemination of ideas based in racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against another race or group of persons or another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
> (b) Shall declare illegal and prohibit organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination, and shall recognise participation in such organisations or activities as an offence punishable by law;
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

The Minister of Justice, D.J. Riddiford, in introducing the Race Relations Bill 1971, said that:[29]

[29] 373 NZPD 1701 (9 July 1971).

> Clause 25 makes it an offence to incite racial disharmony by insult, abuse, or threat. To a considerable extent this overlaps the general law, but the creation of a special offence is required by article 4 of the Convention.

Such a simplistic review of section 25 and Article 4 cannot be realistically upheld. It is difficult in the extreme to see how section 25 does fulfil New Zealand's obligations under the Convention and that fulfillment comes no closer by the insertion of section 9A. Indeed, New Zealand's failure to effectively implement the requirements of Article 4 has been discussed by the United Nations Committee on the Elimination of Racial Discrimination.[30] In fact, section 25 was substantially modelled on section 6 of the Race Relations Act 1965 (UK)[31] which was not drafted in response to the obligations ensuing from the Convention but which came into force before the text of the Convention had even been adopted by the General Assembly and which was designed to deal specifically with the activities of the National Socialists and other extremist groups active in the United Kingdom at this time. Unsurprisingly, therefore, section 6 was itself modelled on section 5 of the Public Order Act 1936 (UK) which throws interesting light on the strong public order flavour of sections 9A and 25 of the New Zealand Race Relations Act 1971 — echoing as they do similar wording in sections 3 and 4 of the Summary Offences Act 1981, New Zealand's basic public order provisions. More interesting yet is the distinct aversion to reenacting foreign race relations legislation for use in New Zealand displayed in the Parliamentary debate accompanying the introduction of the Race Relations Bill 1971. The Minister of Justice, D.J. Riddiford, in introducing the Bill pointed out that since:[32]

> the Bill seeks to apply the Convention in the light of circumstances in New Zealand. For these reasons, its provisions do not closely follow legislation in other countries which have different problems . . .

to which Dr Finlay replied:[33]

> . . . I take it that it is a matter of considered policy . . . not to follow the pattern of similar legislation overseas. The most familiar overseas legislation, of course, is the Act which set up the Race Relations Board in Britain.

and drew attention to the difference in emphasis between the UK and New Zealand Acts. The Minister of Justice responded guardedly that:[34]

> The member for Henderson [Dr Finlay], rightly I think, considered that there were certain parallels between the role of the conciliator [in NZ] and the function of the conciliation board in Great Britain, but I am sure he will appreciate that those who have caused serious riots and racial disharmony in Britain are very different in character from our Maoris. The relationship here is entirely different, as indeed it is with the islanders, and also, I might add, with the Chinese.

30 [1976] *Report of the Race Relations Conciliator,* 15-16,
31 See, generally, Arnold, supra, n 7, 170-185.
32 373 NZPD 1700 (9 July 1971).
33 Ibid, 1701.
34 Ibid, 1706.

At least Mrs Tirikatene-Sullivan was able to separate the rhetoric of autochthony from the reality of the Bill's langauge:[35]

> . . . I do not consider that this Bill is entirely appropriate to the unique racial community we have in New Zealand. It is better suited to the conditions currently prevailing in the United Kingdom; indeed, it appears to me to be framed along lines similar to the Race Relations Act of the United Kingdom.

as, of course, it was. If fact, the one substantive difference between section 25 of the New Zealand Act and section 6 of the UK Act was that the effectiveness of section 6 was severely limited by the requirement that an accused have the specific intention of "stirring up" racial hatred whereas section 25, as introduced, had no such requirement. Yet, on the commital of the Bill, the Acting Minister of Justice, David Thomson, made mention of an amendment to clause 25.[36]

> Nearly all the witnesses before the [Statutes Revision] committee thought that this clause was too broadly drafted and placed undesirable curbs in the principle of free speech. They pointed out that as the clause was drafted it could apply where incitement was likely but where there was no intention of inciting racial disharmony. The committee has therefore introduced the requirement of intent into this clause, thus bringing the offence into line with most other criminal offences.

Section 25 was thus pruned of what effectiveness it might realistically once have had. Although the intent requirement will enable the full force and censure of the law — all three months imprisonment or $1000 fine of it — to be brought down upon the intransigent offender, its inclusion does little to further the elimination of racial discrimination. Where, by section 9A, the intent requirement was omitted so too was any ability of the Race Relations Conciliator to do other than agree that the offender's complained of actions or words were in fact likely to excite racial disharmony. Section 6 of the UK Act, incidentally, has since been repealed and replaced by section 70 of the Race Relations Act 1976 (UK). That provision, although similar in concept to section 6 does not have a requirement that the offender intend to stir up hatred. It is sufficient in section 70 that such actions are likely to have this effect. Furthermore, by changing section 25 so that it better accommodates the principle of free speech, the Legislature abdicates responsibility towards the Convention which requires States Parties to:[37]

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, [and] incitement of racial discrimination . . .

Section 25 only makes "punishable by law" those disseminations of ideas made with the intention of inciting racial disharmony — not "all disseminations of ideas" as the Convention requires. And when, by section 9A, all such disseminations are declared to be offences, they are not "punishable by law".

The legislation thus upholds what has been described as the "classic

[35] 377 NZPD 5330 (15 Dec 1971).
[36] Ibid, 5308.
[37] Article 4(a).

objection"[38] to governmental attempts to control incitement to racial disharmony — the defence of freedom of expression. Proponents of such a defence that freedom of expression is a value which cannot be placed under "undesirable curbs" sacrifice the rights of those impinged upon until curbing the "right" of freedom of expression becomes desirable and unreasonably simplify the matter into one of support or denial of the right to freedom of expression without confronting the two opposing values that naturally arise — those of free speech and of public order. Yet if the basis of public order is examined, it becomes apparent that the real challenge is that of establishing an order of social cohesion wherein an elimination of incitement to racial disharmony — far from undermining the freedom of speech — allows for the growth of freedom of opportunity of which freedom of expression is a part. Civil libertarians would not deny such but find it, instead, less preferable than reliance on the good judgment of the majority to reach the same state of affairs — eventually — even if it means "a bit of pain and discomfort and even disorder"[39] to those who are not the ones exercising their "right" of free speech; are not the ones who will, in power terms, benefit from the upholding of the "right" of free speech; and who are, in fact, the ones whose rights are being trampled into non-existence by the fearless defence of the "right" to freedom of expression by the civil libertarian. In the end, though, the civil libertarian cannot uphold the principle of freedom of speech as benefitting society generally since:[40]

> . . . priority [will have to be given] to the procedural, perhaps negative, aspects of civil liberties, leaving improvements in social welfare to the advocacy of other groups in society.

The issue of eliminating incitement to racial disharmony is not simply one of civil disorder as opposed to individual freedom. It involves the choice between the value of individual freedom of expression and the regulation of the:[41]

> dignity and worth of each person to live without discrimination. . . . the inherent right every citizen has of equal opportunity . . . to grow up and live in a climate of understanding and mutual respect.

The Canadian Special Committee on Hate Propaganda perhaps put the dilemma and its resolution best:[42]

> While holding that over the long run the human mind is repelled by blatent falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason

[38] [Australian] Human Rights Commission, *Incitement to Racial Hatred: Issues and Analysis* (Australian Government Publishing Service, Canberra, 1982), 5.

[39] Hodge W C, letter to Secretary of Justice, 11 September 1985, 2.

[40] Hodge, "Civil Liberties in New Zealand: Defending Our Enemies" (1980) 4 Otago LR 457, 468.

[41] McAlpine, "Report Arising out of the Activities of the Ku Klux Klan in British Columbia" (1981), quoted in [Australian] Human Rights Commission, *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation, 9.*

[42] *Report of the Special Committee on Hate Propaganda in Canada,* (Ottawa, 1966), 8-9.

> and individuals perversely reject the demonstrations of truth put before them and forsake the good they know . . . Those who urged a century ago that men should be allowed to express themselves with utter freedom even though the heavens fall did so with great confidence that they would not fall. That degree of confidence is not open to us today. . . . However small the actors may be in number, the individuals and groups promoting hate . . . constitute a 'clear and present danger' to the functioning of a democratic society.

The Legislature, in subverting the cause of section 25 of the Race Relations Act 1971, also failed to consider the proper place of the principle of freedom of speech. The Article 4 obligations incumbent upon States Parties to the Convention on the Elimination of All Forms of Racial Discrimination are to be adopted

> with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5.

The phrase was specifically introduced with the intention of meeting the objections of those who maintained that Article 4 would violate the principles of freedom of speech and association. Essentially, when due regard is had, it will be discovered that the right of freedom of expansion goes untrammelled except that its exercise carries with it concomitant duties and responsibilities. Article 19 (3) of the International Covenant on Civil and Political Rights therefore recognises certain restrictions on the right of freedom of expression, so long as they are

> . . . provided by law and are necessary
> (a) for respect of the rights or reputations of others, and
> (b) for the protection of national security or of public order (ordre public), or of public health or morals.

Thus legislation prohibiting the incitement of racial disharmony — far from needing to be limited in order to preserve the right of freedom of expression — provides one of the clearest examples of legislation "necessary for the respect and reputations of others". Any limitations to rights will occur to the right of freedom of expression as a small part of that greater right given life, at least in part, by legislation prohibiting racial disharmony — the right of freedom of opportunity.[43]

IV The Reform

To properly get to the heart of what is required by the Convention on the Elimination of All Forms of Racial Discrimination in terms of prohibiting incitements to racial disharmony it is necessary to identify the true nature of the issue with which the Convention is concerned. The Convention is far wider than the Race Relations Act 1971 appears to recognise. It attacks racism and the practice thereof and not merely, as the 1971 Act addresses the problem, specific acts of racial discrimination. The demise of racism as countenanced by the Convention will ensure the disappearance of instances of racial discrimination. The pro-

[43] See *Glimmerveen and Hagenbeek v The Netherlands* (1979) 4 E.H.R.R. 260.

hibition, on the other hand, of acts of racial discrimination, as the 1971 Act purports to do, runs the very real risk of providing cosmetic cover to the running sore of racism and thus explains the futility of sections 9A and 25 as demonstrated by the steadily increasing numbers of complaints received by the Race Relations Conciliator under, first section 25 and, after its insertion into the Act, section 9A. By confining itself to regulating individual acts of racial discrimination instead of tending to the root cause of such discrimination, the Race Relations Act 1971 perpetuates situations of inequality between a paternalistic majority and an enslaved inferior minority and institutionalises racial attitudes of inequality of power, segregation and racial heterogeneity among others. Although these are recognised as coming out of the enforcement of the Race Relations Act as it presently stands, there seems to be little attempt to establish the remedies necessary to deal with them. One reason for the lack of such remedies is that the dissolution of existing patterns of discrimination must involve discrimination in favour of presently discriminated against groups. Affirmative action thus presupposes an unacceptable degree of discrimination which will not be remedied simply by prohibiting such discrimination or providing ostensibly equal treatment and accepts that action must be taken to redress the balance, deriving justification from the pursuit of equality and equal opportunity:[44]

> There is no reason for supposing that benign discrimination is somehow incompatible with the concept of equality.

Furthermore, under Article 5 of the Convention, New Zealand undertakes to

> guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of

the political, civil, economic, social and cultural rights listed in the Article. If this undertaking is to be honoured it requires more than a declaration of equal opportunity or the removal of specific barriers based upon race. It requires a realistic breaking of the attitudes which give rise to racial discrimination, a positive war against racism itself. Equality will only be achieved when those discriminated against are enabled to participate in New Zealand society on their own terms and only then will the "essentially revolutionary" nature of the Convention be satisfied.

> If New Zealand has a destiny as a separate nation . . . it will be principally because these islands were a meeting place of two great races, and because — even in the worst times — their dealings with each other never lacked a certain grandeur. It is, of course a flawed record; but the word has no better record and can ill afford to lose this one. In return, the theory and practice of the modern international law of human rights can reinforce our resolution to do whatever may be needed to reduce, and finally to eliminate, margins of disadvantage suffered by the Maori and islands people. . . . The characteristic New Zealand demand, now taken up by the Maori, was always for fairness and equality of opportunity — an affirmation of the intrinsic worth of every human being, found also in the Universal Declaration of Human Rights.[45]

[4] Evans, "Benign Discrimination and the Right to Equality" (1974) 6 Fed LR 26, 79.
[5] Quentin-Baxter, "Themes of Constitutional Development: The need for a favourable climate of discussion" [1984] NZLJ 203, 207 and 208.

To return to the issue, raised by the Convention, not of racial discrimination but of racism, it is clear that at the centre of racism are three beliefs:[46]

(a) that one's own culture is superior to others;
(b) that perceived physical or cultural differences between groups are evidence of group inferiority; and
(c) that these two factors provide a legitimate basis for discriminatory treatment of those groups or, more importantly, a rationalisation for their dispossession, subjugation or oppression.

In order to visualise a truly non-racist society it is necessary to invert these beliefs. We then arrive at the following:
(a) one's own culture is equal to and co-ordinate with every other;
(b) physical and cultural differences are evidence of the diversity and richness of the human condition, so that other cultures provide the opportunityfor exploration of those facets of human experience in which one's own culture is deficient; and
(c) that these two factors provide a legitimate basis for a society in which no group is "treated" by another but accepted as a participant in a common endeavour towards the full enjoyment and experience of their common humanity.

To protect against discrimination, therefore, an order is required which will deal with the issue of racism itself and not merely the symptoms. It must do more than proscribe specific acts. It must work by positive encouragement and not by coercion. Thus there must first be a legitimation of the position held by minority groups in New Zealand — so that there can be true equality without debasement — by legislation ratifying the Convention. Secondly, recognition must be given to that legitimate position in the furtherance of such legislation. In reality, the latter will bring about the former but it must still start from the assumption that a legitimate position is held by minority groups in New Zealand. Furtherance of the Convention-ratifying legislation must reflect and make tangible aspirations towards a new form of equality in society.

When consideration is given to the legitimation and recognition which needs to be accorded the tangata whenua and minority groups in New Zealand, it is apparent that the legitimation and recognition of Maori rights go beyond what might otherwise be readily deemed acceptable in furtherance of the Convention. These rights derive from Maori status as tangata whenua o Aotearoa and could well be accorded by recognising and realising the Maori right to self-determination — the right to exist as Maori. In terms of te Tiriti o Waitangi such a right is one guaranteed by te Tiriti in the Crown's obligation under Article 2 to take active steps to ensure that the Maori have and retain full, exclusive and undisturbed possession of "o ratou taonga katoa".[47] It is inconceivable that "all their valued customs and possessions" does not include the very basis of taha Maori — the possession of dignity and respect as tangata whenua o Aotearoa.

Under both the Convention and te Tiriti o Waitangi, the Legislature

[46] Kelsey, supra, at note 25, at 92-93.
[47] Waitangi Tribunal, *Finding of the Waitangi Tribunal Relating to Te Reo Maori*, (1986) para 4.2.3-4.2.8.

has an obligation to protect the Taonga which would be greatly fulfilled by a dedicated reconsideration of the Race Relations Act 1971. The Act as it exists at present trivialises the obligations imposed by the Convention and by te Tiriti o Waitangi. By reducing, in sections 9A and 25, the Convention's anti-racial discrimination propaganda obligations to incitements of racial disharmony the Act fails to take into account the pervading issue of the Convention — that of the elimination of racism and not of the proscription of individual acts of racial discrimination. By disallowing any matter or words likely to excite racial disharmony without differentiation, the Act perpetuates a system founded upon a racial premise and allows no way of overcoming entrenched racist concepts, patterns and institutions. The Act ought be the beginning of a new order which will achieve the aims of the Convention and indeed may well be the best way to begin such a radical step.

> It is ironic that the only countries which have built conceptions of race into all the structural components of their culture have been Nazi Germany and South Africa. It does not seem to have occurred to other countries that if a state can be organised on a theory of race which expresses inequality and pathological ethnocentrism that leads to a theoretical and actual segregation, it might be equally possible to structure a system founded on concepts of race which express a true cultural pluralism and equality leading to a theoretical and actual conviviality.[48]

V Section 9A Of The Race Relations Act 1971

It is abundantly clear that reform of the entire Race Relations Act 1971 is long overdue and much warranted. The reform solely of section 9A will do little or nothing for the Act as a whole in its implementation of the Convention on the Elimination of All Forms of Racial Discrimination. Nonetheless, examples need be given and the opposition to a complete overhaul of the Act in the manner this opinion suggests may be so strong as to render impossible such extensive reform in the immediate future. Section 9A, therefore, is a perfect candidate for piecemeal reform (if piecemeal reform is the only option open) since it is a controversial part of the Act and the overwhelming percentage of complaints made to the Conciliator under it allow the section to be a perfect vehicle for testing the precepts and principles of the more extensive reform.

Although it is section 9A which has brought the author's attention with an eye to reform, it is not so much the section which needs reform as the mischief the section attempts to redress — that of racial disharmony. Reform cannot be adequately executed without considering both racial disharmony sections — sections 9A and 25.

Both sections 9A and 25 ought be repealed. In their place ought be enacted a new section, conceivably in place of section 25, which reads:

> *25. Promoting racial discrimination* — (1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding [ ] years or a fine not exceeding $[ ] who —

[48] Kelsey, supra at note 25, at 83-84.

(a) promotes or incites or organises any form of racial discrimination against any person, persons, group or race of people; or
(b) uses or disseminates, or allows or causes to be disseminated, material which is likely to promote or incite or organise any form of racial discrimination against any person, persons, group or race of people; or
(c) conveys or transmits or displays or in any way makes known concepts of racial superiority or hatred in a manner likely to promote or incite or organise any form of racial discrimination against any person, persons, group or race of people.

(2) For the purposes of this section, "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

(3) Nothing in this section will delimit the right guaranteed by Article II of *te Tiriti o Waitangi* to the *tangata whenua o Aotearoa* to the maintenance and protection of *o ratou wenua o ratou kainga me o ratou taonga katoa.*

(4) Any justification to a charge under this section arising under subsection (3) will be referred to the Waitangi Tribunal for a binding decision on the application of such a justification to the charge.

(5) Nothing in this section will delimit the powers of the Race Relations Conciliator under sections 13 and 14 of the Race Relations Act 1971 provided always that no report or publication of the Conciliator's action is made while the matter to which such report or publication would refer is *sub judice.*

Incidental amendment is also required to section 13(1) (a) of the 1971 Act to give the Conciliator jurisdiction over the revised section 25.

It would be optimistic in the extreme to imagine that reform of the existing sections 9A and 25 as mooted by this article would be sufficient to implement the Convention on the Elimination of All Forms of Racial Discrimination in New Zealand. Sheer logic would dictate that the revised section 25 take its proper place within sections 3-7 (or sections 3-8 as they would then be) of the Act — preferably as the new section 3. The revised secition 25 (3) and (4) would best find their place in the present section 9 "Measures to ensure equality". Sections 3 and 24 ought be amalgamated and brought also under the first part of the Act — "Unfair discrimination". Section 26 ought be repealed. But further to this, in reality, the entire Race Relations Act 1971 is in dire need of reform and reform in the nature and sentiment expressed by the proposed section 25 in this article. Furthermore, greater attention must be paid to the obligations incumbent upon New Zealand under the convention — particularly those under Article 7 (educative measures to combat prejudices leading to racial discrimination) and by Article 2(2) (the adoption of affirmative action measures for the development and protection of certain groups of individuals belonging to them). The same attention must be paid to te Tiriti o Waitangi and the obligations therein imposed because if there is an autochthonous race relations instrument in New Zealand then te Tiriti o Waitangi is it and provides the basis for a realistic implementation of the Convention. This article has not discussed te Tiriti in any depth but such an omission is not made in the belief that te Tiriti has nothing to proffer. Conversely, it must be the very beginning of any legislation which purports to affect any aspect of taha Maori. That its promises and guarantees have been omit-

ted from the Race Relations Act 1971 is an inexcusable oversight and one which must be corrected urgently by the complete reform of the legislation. The first step in this process would be the commissioning of a group similar to the Maori Perspective Advisory Committe, which so recently completed a report for the Minister of Social Welfare,[49] with the investigation of the 1971 Act with reference to both te Tiriti o Waitangi and the International Convention on All Forms of Racial Discrimination.

Puao-te-Ata-tu (Day Break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare (Wellington, 1986).