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Hate crime laws in Australia: Are they achieving their goals?

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*A number of common-law countries have introduced legislation designed to respond to the problem of prejudice-related crime, commonly referred to as “hate crime”. This article examines recent developments in hate crime law in Australia; it outlines the general purpose of these laws and provides an overview of three different models: the penalty enhancement model, the sentence aggravation model, and the substantive offence model. Against this background, the article analyses several reported decisions under the sentence aggravation provisions that have operated in New South Wales since 2003. Four issues of significance emerge: whether the provisions apply to individual forms of hatred; whether intra-group conflict is covered; whether criminal conduct influenced by racial stereotypes comes within the ambit of the applicable-motive test; and the question of which groups should be protected under the legislation. In terms of the last issue, the article argues that the recent decision of the New South Wales Court of Criminal Appeal in *Dunn v. The Queen* to include paedophiles as a protected group under s21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999 (NSW) does little to further the social justice goals of hate-crime laws.*

INTRODUCTION

Since the 1980s, many criminological commentators have identified a shift in punishment philosophy and policy across western nations including Australia, New Zealand, Great Britain, Canada and the United States. The key features of this shift are (a) the move away from the goals of rehabilitation, welfare and humanitarianism; and (b) the move towards retribution, punitiveness and an insistence on “law and order”.¹ This “tough on crime” approach is said to be beholden to a new public mood that demands victim-centred laws and policies in conjunction with greater responsibility from individual offenders.² In this climate of “new punitiveness”,³ we have witnessed a range of legislative and policy interventions designed to increase the public’s perceptions of safety about crime (and decrease a supposed concomitant sense of anxiety), particularly in terms of the introduction of harsher penalties and the

*The author would like to thank Joel Gilbourn for research assistance in the preparation of this article.

¹Garland D, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2000): Pratt J, “Penal Populism and the Contemporary Role of Punishment” in Anthony T and Cunneen C (eds), *The Critical Criminology Companion* (Hawkins Press, 2008): Hogg R and Brown D, *Rethinking Law and Order* (Pluto Press, Annandale, 1998)

²Pratt, n 1, p 268

³Pratt J et al (eds), *The New Punitiveness* (Willan Publishing, 2005) p xv

use of actuarial models of risk assessment. Penal developments characterised as the product of new punitivism include “truth in sentencing”, mandatory sentencing, preventative detention for serious sex offenders, and supermax prisons etc.⁴

Although rarely identified as such, the rise of legislation designed to specifically address the problem of prejudice-related crime can also be understood as a part of this broader trend towards the imposition of punitive forms of punishment.⁵ These laws are a specific response to the demands of an influential convergence of new social movements and crime victim advocates for a policy-oriented solution to the problem of prejudice-related crime, otherwise known as “hate crime”. Although beset by definitional problems, “hate crime” can be broadly defined as crime wholly or partly motivated by, grounded in, or aggravated by, bias or prejudice towards particular groups of people.⁶ The key element is prejudice towards the group affiliation of the victim. In other words, the victim is targeted on the basis of his/her presumed membership of that group. In Australia, a series of victimisation studies and government inquiries over the last 20 years have carefully documented the characteristics and prevalence of hate crime, which ranges from intimidation, vandalism and graffiti to homicide or assault.⁷ This research also suggests that the primary targets of hate crime in Australia are members, both individuals and organisations, of minority groups including the Jewish, Muslim, Arab, Asian, Aboriginal, gay/lesbian, transgender and disabled communities. Thus typical examples of hate crime include the tire-bombing of a synagogue or the physical assault of a gay man on Oxford Street in Sydney.

The current wave of hate crime laws were first introduced in the United States in the early 1980s.⁸ Since then they have spread to numerous common-law countries including Canada, Great Britain and New Zealand. Australia has also witnessed the gradual introduction of hate crime laws. In contrast to jurisdictions such as the United States and the United Kingdom, Australian laws have arrived with a minimum of fanfare and appear to have been taken up with far less enthusiasm by police and

⁴Brown D et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 2006) p 1266

⁵An exception is Iganski P, *Hate Crime and the City* (The Policy Press, 2008) p 73

⁶Although neat distinctions are not possible, hate crime is often distinguished from hate speech on the grounds that it involves conduct that is criminal irrespective of the expression of prejudice. Detailed analyses of hate speech and vilification laws in Australia can be found in Gelber K and Stone A, *Hate Speech and Freedom of Speech in Australia* (Federation Press 2007).

⁷Human Rights and Equal Opportunity Commission, “Racist Violence: Report of the National Inquiry into Racist Violence in Australia” (1991); Attorney-General’s Department of New South Wales; *You Shouldn’t Have to Hide to Be Safe: A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in NSW* (2003); Cunneen C, Fraser D and Tomsen S (eds), *Faces of Hate: Hate Crime in Australia* (Hawkins Press 1997); Mason G and Tomsen S (eds), *Homophobic Violence* (Hawkins Press 1997); Tomsen S, *Hatred, Murder and Male Honour: Anti-homosexual Homicides in NSW, 1980-2000*, Australian Institute of Criminology (2002); Moran L and Sharpe S “Violence, Identity and Policing: The Case of Violence Against Transgender People” (2004) 4 *Current Issues in Criminal Justice* 395

⁸During the 1940s and 1950s, in an attempt to address anti-Semitism and other forms of racial tension post-World War II a number of European countries, including Germany, Austria and Great Britain, introduced legislation that could be categorised as hate crime or hate speech law. Although these laws are very different in origin from those that have flowed from the more recent American approach to hate crime legislation, some of them, such as the incitement to racial hatred provisions in Great Britain, are used (even if sparingly) in the same ways as contemporary hate crime or hate speech laws.

prosecutors.⁹ Although there is great variation between the legislative models enacted across international jurisdictions, there are two common threads that link them all: (a) they aim to specifically and publically target crime that is motivated by, grounded in or aggravated by prejudice: and (b) they largely seek to do this by imposing heavier penalties than those applicable to parallel crimes.

This article aims to examine the significance of developments in Australian hate-crime law. It will begin by outlining the general purpose of hate crime laws in Part A. Part B will provide a broad overview of models of hate crime legislation that have been introduced in common-law countries, enabling Australian laws to be understood within this international context. Three models are advanced: the penalty enhancement model; the sentence aggravation model: and the substantive offence model.¹⁰ Within these three models are a variety of tests used to prove the hatred or prejudice element of the offence. The article will categorise these as “motive”, “group selection” and “demonstration” tests.

In 2003, New South Wales introduced hate crime provisions via the sentence aggravation model under s21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The courts have now had the opportunity to interpret and apply these provisions in several cases, giving New South Wales the largest body of case law on hate crime provisions in Australia. Part C will examine these decisions in terms of four issues of significance: whether the provisions apply to individual forms of hatred; whether intra-group conflict is covered; whether criminal conduct influenced by racial stereotypes comes within the ambit of the applicable-motive test; and the question of which groups should be protected under the legislation. It is this last question that has proven to be the most controversial and the decision of the New South Wales Court of Criminal Appeal in *Dunn v. The Queen*¹¹ to extend s21A(2)(h) to include paedophiles as a group will be critically examined in detail. When considered in terms of the purpose for which hate crime laws have ostensibly been introduced, the results of this analysis provide little comfort for those who advocate such laws on the grounds that they have the potential to challenge subtle and ingrained attitudes towards traditionally underprivileged groups.

PART A: THE PURPOSE OF HATE CRIME LAWS

Over the last 25 years, a combination of quite specific forces has produced a climate conducive to the enactment of laws designed to address problems of prejudice-related crime and violence. These forces include: the growing influence of social movements relating to promote equality for marginalised groups; the rise of victims’ rights groups; and a

⁹For example, sentencing aggravation provisions for hate crime were introduced into the Northern Territory in 2006 under s6 of the *Justice legislation (Group Criminal Activities) Act 2006* (NT). Parliamentary *Hansard* reveals no discussion of s6, focusing instead on the larger body of amendments relating to group criminal activities: Northern Territory, Legislative Assembly, *Justice Legislation Amendment (Group Criminal Activities) Bill* (Serial 65) Presentation and Second Reading Speech (24 August 2006); Second Reading Speech in continuation, Third Reading Speech (17 October 2006). See also Northern Territory, legislative Assembly, *Criminal Reform Amendment Bill* (Serial 61). Second Reading Speech in continuation. Third Reading Speech (22 August 2006).

¹⁰This model is different from that proposed by Walters M, “Hate Crimes in Australia: Introducing Punishment Enhancers” (2005) 29 Crim LJ 201.

¹¹*Dunn v. The Queen* [2007] NSWCCA 312

number of globally publicised and extreme acts of prejudice-related violence.¹² Although the traditional criminal law provides remedies for many violent and threatening forms of conduct, the harsher penalties imposed by hate crime laws are said to be justified through principles of proportionality that tie the severity of punishment to the gravity of the offence, whether gravity is understood as a question of harm (hate crimes inflict greater harm than parallel crimes) or culpability (the biased motive of the offender renders him/her more culpable).¹³ The clear intention of those who advocate on behalf of hate crime laws is to place “discriminatory violence on the public agenda”¹⁴ as a “recognizable social problem”.¹⁵ This intention is apparent in the fact that the kinds of group differences covered under hate crime laws mimic well recognised “social fissure lines”: race, religion, ethnicity, colour, sexuality, physical and mental ability etc.¹⁶ Indeed, some early hate crime laws covered minority groups only (e.g. homosexuality was protected but not heterosexuality).¹⁷ Although most laws now define protected groups in terms of group categories that are applicable to both minority and majority groups (e.g. sexuality is protected, not just homosexuality), such neutral definitions are open to criticism on the grounds that they undermine the real purpose of hate crime laws which is to protect subjugated groups in the face of long-standing and disproportionate problems of prejudice-related crime and violence.

Whilst the heavier penalties imposed by hate crime laws (discussed further below) are designed to denounce, and thereby deter, prejudice-related violence, it is apparent that these laws are meant to do more than punish and deter. They aim to condemn, not just criminal conduct per se, but also racism, homophobia, religious intolerance and the like. In this way they seek to make a broad moral claim that “prejudice is wrong”¹⁸ and to thereby “reinforce prosocial values of tolerance and respect”¹⁹ for marginalised and disadvantaged groups. Ultimately, advocates of hate crime laws hope to exploit the wider ideological function of the criminal law by using such laws to “unearth and de-normalise subtle and ingrained attitudes towards traditionally underprivileged groups”.²⁰

Opponents of hate crime laws make a number of counter-arguments. Such laws are said to erode fundamental rights, such as freedom of expression, by penalising

¹²Jenness V and Grattet R, *Making Hate a Crime: From Social Movement to Law Enforcement* (Russell Sage, 2001); Hall N, *Hate Crime* (Willan Publishing, 2005). The murder of Matthew Shepherd in Wyoming in 1998 and the nail-bombing attacks upon London’s black, Bangladeshi and gay communities by David Copeland in 1999 are two examples of prejudice-related cases that drew, and continue to draw, international attention.

¹³Lawrence F, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) p 63

¹⁴Jenness and Grattet, n 12, p 18

¹⁵Jenness V and Broad K, *Hate Crimes: New Social Movements and the Politics of Violence* (Aldine Transaction, 1997) p 106

¹⁶Lawrence, n 13, p 13

¹⁷For example, when the offence of serious vilification was introduced into the Anti-Discrimination Act 1977 (NSW) it applied, like other discrimination provisions, to homosexuality but not heterosexuality (ss 49ZF-49ZG). It continues to do so today.

¹⁸Jacobs JB and Potter K, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998) pp 66, 144

¹⁹Jenness and Grattet, n 12, p 179

²⁰Brown C, “Legislating Against Hate Crime in New Zealand: The Need to Recognise Gender-based Violence” (2004) 35 VUWL Rev 591 at 595. See also Walters, n 10 at 206.

offenders more harshly for their bad thoughts, values or motives.²¹ These laws are also said to jeopardise the principle of equality before the law by singling out particular groups for protection and thus failing to treat all victims the same.²² For instance, the group category of race is covered under all hate crime laws whilst categories such as sexual preference and disability are not included in many statutes. Some opponents refuse to accept the claim that hate crimes necessarily inflict greater harm than parallel crimes²³ or that there is sufficient evidence to demonstrate that the heightened penalties imposed for such crimes are actually capable of deterrence.²⁴ Thus, it has been suggested that hate crime laws are superfluous, given the extensive prosecutorial options available under the traditional criminal law.²⁵ Moreover, critics of hate crime laws argue that in seeking to exploit the expressive function of the criminal law to the extent that they do, such laws effectively operate as a form of “affirmative action”²⁶ that attempts to “extend the civil-rights paradigm into the world of crime and criminal law”.²⁷ They have been characterised as a quick-fix political solution, fuelled by a sense of resentment on the part of minority groups, that runs the risk of further balkanising destructive divisions between identity groups instead of tackling the problem at its source.²⁸

PART B: MODELS OF HATE CRIME LAW

Although it is difficult to accurately categorise the diverse and sometimes idiosyncratic legislative provisions that have been introduced under the umbrella of hate crime, it is possible to map three very broad models that are useful for capturing the key features of both Australian and comparable international legislative interventions in this field (United States, Great Britain, Canada and New Zealand).

Penalty enhancement model

This is the most common model of hate crime legislation. It imposes an additional maximum or minimum penalty on specified pre-existing offences if the conduct is motivated or aggravated by racial, religious or other forms of prejudice or hostility. For example, the maximum term of imprisonment for an offence of common assault in Western Australia is 18 months, while the maximum penalty for the same offence committed in circumstances of racial aggravation is three years imprisonment.²⁹ Western Australia is the only Australian jurisdiction to have enacted penalty enhancement provisions. These were introduced in 2004, in response to a spate of racist graffiti and vandalism in Perth.³⁰ The only ground covered is race.

²¹Hurd M, “Why Liberals Should Hate ‘Hate Crime Legislation’” (2001) 20 L & Phil 215 at 221

²²Morgan J, US Hate Crime Legislation: A Legal Model to Avoid in Australia” (2002) 38 Journal of Sociology 25 at 33

²³Hurd, n 21 at 215

²⁴Dixon B and Gadd D, “Getting the Message? ‘New’ Labour and the Criminalization of ‘Hate’” (2006) 6 Criminology and Criminal Justice 309 at 286

²⁵Jacobs and Potter, n 18, p 5

²⁶McLaughlin E, “Rocks and Hard Places: The Politics of Hate Crime” (2002) 6 Theoretical Criminology 493 at 495

²⁷Jacobs and Potter, n 18, p 27

²⁸Jacobs and Potter, n 18, p 131. See also Goodall K, “Incitement to Religious Hatred: All Talk and No Substance?” (2007) 70 MLR 89.

²⁹*Criminal Code* 1913 (WA) s313

³⁰*Criminal Code* 1913 (WA) ss 313, 317-317 A, 338B, 444; Geoff Gallop, Premier of Western Australia, Racial Vilification: Framework for Reform, Media Release (5 August 2004).

Internationally, penalty enhancement provisions operate in Great Britain³¹ and in the vast majority of jurisdictions in the United States.³² Race and religion are the most common but far from only grounds covered.

Sentence aggravation model

Under this second model, the aggravation or prejudicial motive is taken into account at sentencing, thus allowing more judicial discretion than the penalty enhancement model discussed above. Sentence aggravation provisions of this kind have been in force in New South Wales since 2003 and the Northern Territory since 2006.³³ For example, in New South Wales it is an aggravating factor at sentencing if:

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability).³⁴

The power conferred on the sentencing court is discretionary and although such an aggravating factor must be taken into account, the court is not required to increase the sentence if such a motive is established (unlike the penalty enhancement model).³⁵ Recent judicial interpretations of the New South Wales provisions are discussed in the following section. Sentence enhancement provisions for hate crime also operate in New Zealand, Canada and Great Britain.³⁶

Substantive offence model

This model includes a diverse body of provisions that criminalise conduct that promotes, incites or is motivated by prejudice or group hate. In Australia, offences of serious vilification – found in discrimination statutes in New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory – are examples of

<http://www.mediastatements.wa.gov.au/ArchivedStatements/Pages/GallopLaborGovernmentSearch.aspx?ItemId=121309&minister=Gallop&admin=Gallop&page=2> [viewed 20 January 2010]

³¹*Crime and Disorder Act 1988* (UK), ss 28-32

³²For example, California Penal Code, ss 422.7, 422.75, 1170.75; *New York Hate Crimes Act 2000*, Arts 485.05, 485.10.

³³*Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(2)(h); *Sentencing Act 1995* (NT), s6A as amended by s6 of the *Justice Legislation (Group Criminal Activities) Act 2006* (NT). In June 2009, the Victorian Attorney-General referred the issue of crime motivated by prejudice or hatred to the Victorian Sentencing Advisory Council. The Council recommended that if a convicted offender has been motivated (wholly or partly) by hatred or prejudice against a group of people with common characteristics, then this should be specified in legislation as an aggravating factor to be taken into account by a judge when sentencing the offender: Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (2009) p 22. The *Sentencing Amendment Bill 2009* (Vic), introduced into the Victorian parliament on 15 September 2009, will amend s5(2) of the *Sentencing Act 1991* (Vic) to put this recommendation into effect.

³⁴*Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(2)(h)

³⁵*Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(5)

³⁶See *Sentencing Act 2002* (NZ), s9(1)(h); *Criminal Code*, s718.2(a)(i); and *Criminal Justice Act 2003* (UK) ss 82, 146, respectively. Canada also has limited incitement to hatred and promotion of hatred provisions, as well as laws against advocating genocide: *Canadian Criminal Code*, ss 318-319. See also *Criminal Justice Act 2003* (UK), Sch 21; and *Football (Offences) Act 1991* (UK), s3.

substantive hate-crime offences.³⁷ Under these provisions, the civil wrong of vilification can be elevated to a criminal offence in certain circumstances. For example, in New South Wales, the first State to introduce such provisions in 1989, serious vilification occurs if an offender incites hatred, serious contempt or severe ridicule towards a specified group by threatening physical harm or inciting others to do so. The grounds covered vary between jurisdictions but in New South Wales include race, homosexuality, transgender and HIV/AIDS.³⁸

Race/ethnicity is the only ground covered in all Australian jurisdictions where such laws have been introduced. Emerging prior to the influence of the hate crime movement in Australia, serious vilification was not initially conceptualised as a form of hate crime but nowadays is commonly understood in this way.³⁹ Such a classification is not unwarranted, given that the offence has the potential to offer redress for conduct that incites hatred in a physically threatening manner or that incites others to such behaviour. At first blush, this is wholly consistent with the kinds of substantive hate-crime offences that have been introduced internationally (discussed below). The reality, however, has proven very different. Situated as it is within discrimination law, serious vilification has a cumbersome prosecution process. For example, in New South Wales, the police play no formal role in investigating serious vilification: rather, the legislation contemplates that a referral for prosecution will be made to the Office of the Director of Public Prosecutions via the President of the Anti-Discrimination Board.⁴⁰ The decision to situate the offence in discrimination law has been characterised by Meagher as a “mistake” that has prevented it from “taking root in the existing criminal law” and which thereby sends a “mixed and diluted message” regarding the seriousness of the offence.⁴¹ The effect is apparent. There has never been a conviction for serious vilification in Australia and, indeed, no prosecutions.

Western Australia has a unique set of substantive hate-crime offences which cover race only (these provisions are colloquially referred to as “racial vilification” offences, yet are quite different in substance and process from the serious-vilification provisions under discrimination law discussed above). In 1990, the *Western Australian Criminal Code* was first amended to create, inter alia, the offence of incitement to racial hatred.⁴² These provisions were repealed in 2004 and replaced with a more expansive body of offences. In both instances, the legislature acted in direct response to highly publicised acts of racial violence and intimidation connected to the Australian Nationalist Movement. In their current form, these provisions criminalise conduct that: (a) is intended or is likely to racially harass others⁴³ or incite racial animosity or

³⁷For example, *Anti-Discrimination Act 1977* (NSW), s20D; *Racial Vilification Act 1996* (SA), s4; *Discrimination Act 1991* (ACT), s67; *Anti-Discrimination Act 1991* (Qld) s131A; *Racial and Religious Tolerance Act 2001* (Vic), ss 24-25.

³⁸*Anti-Discrimination Act 1977* (NSW), ss 20D, 38T, 49ZTA, 49ZXC

³⁹For example, the South Australian Attorney-General’s office refers to the *Racial Vilification Act 1996* (SA) as “the only State legislation that specifically deals with hate crime”: personal correspondence between the author and the Attorney-General’s office (13 August 2008). For a detailed discussion of racial vilification laws in Australia, see McNamara L, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology Monograph Series, 2002).

⁴⁰McNamara, n 39, pp 140-141

⁴¹Meagher D, “So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia” (2006) 17 PLR 213

⁴²*Criminal Code 1913* (WA), ss 77-80

⁴³*Criminal Code Amendment (Racial Vilification) Act 2004* (WA), ss 80A-80B

harassment towards others;⁴⁴ or (b) involves possession of threatening or abusive material for display that is intended or likely to racially harass,⁴⁵ or involves possession of threatening or abusive material for publication, distribution or display that is intended or likely to incite racial animosity or harassment.⁴⁶ Western Australia has seen very few prosecutions under these laws because crimes involving racism appear to be more commonly prosecuted as ordinary criminal offences.⁴⁷ It was not until July 2004, 14 years after their introduction, that the 1990 provisions were first used to charge and convict Damon Blaxall for racist graffiti attacks and possession of material likely or intended to promote racial hatred.⁴⁸ In 2006, a 16-year old Aboriginal girl was the first person to be charged under the 2004 version of the provisions. The girl was charged both with assault and with engaging in conduct “intended to racially harass”. The facts of the case involved a physical attack upon a 19-year old woman during which the victim was called a “white slut” by the accused. Upon receiving a plea of guilty to the assault charge, the Kalgoorlie Children’s Court dismissed the racial charges saying that the racial vilification laws “were intended to deal with severe abuse, and not petty name-calling”.⁴⁹

In the international area, incitement to racial hatred provisions have been in force in Great Britain since the 1950s and incitement to religious hatred since 2006.⁵⁰ In the United States, states such as California and Massachusetts have separate substantive offences that aim to criminalise certain forms of conduct motivated by prejudice or bias,⁵¹ as does Canada.⁵²

Within these models of hate crime law there is little consistency as to the evidence needed to prove the “aggravation” or “hatred” component of the offence. Several tests are currently in use and these cut across the three models presented above. The most common distinction drawn is between the “motive” or “group selection” tests. In general, the motive (or “animus”) test requires evidence that the offender was motivated by group hostility, hatred or prejudice. For example, sentence aggravation provisions in New South Wales apply to an offender who is “motivated by hatred for

⁴⁴*Criminal Code Amendment (Racial Vilification) Act 2004 (WA)*, ss 77-78

⁴⁵*Criminal Code Amendment (Racial Vilification) Act 2004 (WA)*, ss 80C-80D

⁴⁶*Criminal Code Amendment (Racial Vilification) Act 2004 (WA)*, ss 79-80

⁴⁷Western Australia Equal Opportunity Commission, *Racial and Religious Vilification: Consultation Paper* (2004) p 35

⁴⁸Blaxall was convicted in late 2005 under the now repealed offence of racial vilification for offences that took place in July 2004 (before the law was amended to its present form). The incidents involved the expression of anti-Semitic, anti-African and anti-Asian sentiment. Clifford G APM, Police Charge Two Over Racist Graffiti Attacks. A/Insp 3782, Police Media (20 July 2004); King D and Taylor P, “Extremely Vulnerable”, *The Australian* (24 December 2005) p 20; Rasdien P, “Green Plea Fails to Save Graffiti Racist”, *The West Australian* (21 December 2005) p 41. Four other men were charged in relation to these same incidents but none were charged under these race-related provisions, instead being charged with offences such as criminal damage: see Pitsis S, “5th Man Charged Over Race Graffiti”, *The Australian* (29 July 2004) p 4.

⁴⁹See *Western Australia Legislative Assembly, Criminal Law and Evidence Amendment Bill 2006*, Hansard. Second Reading Speech, RF Johnson (28 September 2006) p 6939 where *Police v. A Child* (unreported, magistrate Auty, 14 September 2006) is discussed. See also Weber D, WA Court Dismisses Charges Over Racial Insult, Transcript for ABC Local Radio program AM (15 September 2006), <http://www.abc.net.au/am/content/2006/s1741596.htm> [visited 20 January 2010].

⁵⁰*Public Order Act 1986 (UK)*, ss 17-23, 29A-29N

⁵¹*California Penal Code*, ss 422.6, 190.03; *Mass Gen Laws*, Ch 265, ss 37, 39

⁵²*Criminal Code (CAN)*, ss 318-320

or prejudice against” the specified victim groups.⁵³ In Western Australia, the second arm of the penalty enhancement provisions specify that an offence will be racially aggravated if “the offence is motivated, in whole or part, by hostility towards persons as members of a racial group”.⁵⁴ Great Britain’s sentence enhancement provisions include a comparable test to Western Australia.⁵⁵ This concern with why the offender acted has been criticised on the grounds that it runs counter to criminal law’s general disinterest in the question of motive as opposed to intent.⁵⁶

In contrast, under the group selection test, it is not necessary to establish motive, only that the offender intentionally selected the victim on the basis of his/her membership of a group protected under the legislation. Although Wisconsin is the only United States jurisdiction to adopt an explicit group-selection test, many United States statutes employ language such as “because of” or “by reason of” (e.g. Maine and Iowa) that is said to amount to a group selection test in practice.⁵⁷ The level of proof required to satisfy the group selection test is less onerous than it is for the motive test and the standard set by the latter is unlikely to be met in circumstances where the conduct is motivated by mild bias only, rather than overt hatred or prejudice.⁵⁸ Under the group selection test it is not necessary to prove that the accused’s emotional state motivated him/her to commit the act, only that he/she selected the victim(s) on the basis of their perceived membership of a particular group. The group selection test thus has the potential to apply to a wider body of circumstances. For example, if A mugs B because he/she believes that B is Jewish and that Jewish people are wealthy, this conduct may well be caught by the group selection test but not the motive test. It is important to note, however, that these two tests are not mutually exclusive. The motive test implicitly encompasses the group selection test: if an offender is motivated by prejudice towards a particular group, then it follows that this is the reason why he/she selected the victim (if not the only reason, it will be a significant one). The group selection test is thus a means of constructing motive without requiring direct proof of it. It has been criticised for failing to place an onus on the prosecution to establish the existence of overt prejudice or group hatred and thereby capturing offenders who may merely be influenced by mild bias or stereotypes.⁵⁹ The test adopted by each model has a significant impact on the application of the relevant provision.

A third and less commonly identified test is the “demonstration of hostility” test. This test operates both in Western Australia and Great Britain as an alternative to the motive test under the first arm of their penalty enhancement provisions.⁶⁰ Under the United Kingdom’s version of this test, a base offence will be elevated to a racially or religiously aggravated offence, and thereby attract a higher penalty, if “at the time of committing the offence, or immediately before or after doing so, the offender

⁵³*Crimes (Sentencing Procedure) Act 1999* (NSW), s21A(2)(h). The Northern Territory provisions use similar wording.

⁵⁴*Criminal Code Act 1913* (WA), s801(b)

⁵⁵*Crime and Disorder Act 1998* (UK), s28(1)(b)

⁵⁶Hurd, n 21 at 217

⁵⁷Lawrence, n 13, p 36. Although Lawrence points out that when “maliciousness” is combined with “because of” this comes closer to an animus- or motive test (p 37).

⁵⁸Jenness and Grattet, n 12, pp 87-90

⁵⁹Lawrence, n 13, pp 8, 30; Jenness and Grattet, n 12, pp 87-90

⁶⁰*Criminal Code Act 1913* (WA) s801(a); *Crime and Disorder Act 1998* (UK), s28(1)(a). To date, there is no reported case law in Western Australia relying on this arm of the test.

demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership)" of a racial or religious group.⁶¹ It is not necessary to establish that the offender was motivated by prejudice or that he/she intentionally selected the victim on the basis of the latter's group membership. Spoken and written racial or religious insults during the commission of an offence have been held to be sufficient evidence of the demonstration of such hostility. For example, in *R v. Londesbrough*,⁶² it was held that statements including "fucking Paki ... fuck off out of our country ... I will fucking shoot you, paki bastard, go home" made by the accused during an assault arising out of a dispute over a parking space, came within the provision. Similarly, an accused who referred to the victim as a "fucking baboon" and "fucking refugee" who should "go back to [his] own country" during an assault occasioning actual bodily harm was also held to have committed a racially aggravated offence for the purposes of the legislation.⁶³ The demonstration test gives Britain's penalty enhancement provisions far-reaching application and this arm of the test is relied upon more heavily in prosecutions than the motive test. It can be criticised on the basis that it imposes a heavier penalty for offenders who use hate speech during the commission of an offence, yet have not been motivated by prejudice nor intentionally selected their victims on the basis of their membership of any particular racial or religious group. It sets the lowest threshold of the three tests.

Despite their diversity, all of these models are linked by a common purpose: to specifically and publicly target crime that is motivated or otherwise shaped by prejudice and to do this largely by imposing more severe penalties than those applicable to parallel crimes. In retributivist terms, hate crime statutes punish offenders more severely for conduct that is said to involve a greater degree of culpability on the basis that it inflicts greater harm and/or is the product of a more blameworthy state of mind. In utilitarian terms, the heightened penalties imposed by these laws aims to achieve both specific and general deterrence. Over and above these instrumental objectives, hate crime laws also serve a symbolic function which can be crystallised as a "moral claim" that "prejudice is wrong".⁶⁴

The extent to which these broad rationales are reflected in the application of individual models of hate crime law in practice is, however, another question. The following section considers how the New South Wales courts have interpreted the sentence aggravation provisions that have been in force in that State since 2003.

PART C: DEVELOPMENTS IN SENTENCE AGGRAVATION IN NEW SOUTH WALES

In mid-2002, the New South Wales Opposition Leader, John Brogden, announced that, if elected, a coalition government would mandatorily increase the penalty for certain crimes by 25% if they were proven to be motivated by hate.⁶⁵ Mr Brogden stated that the proposal was "sparked by the recent spate of court cases involving young Lebanese Muslims raping Caucasian girls and women".⁶⁶ At the time, the New

⁶¹ *Crime and Disorder Act 1998* (UK), s28(1)(a)

⁶² *R v. Londesbrough* [2005] EWCA Crim 151

⁶³ *R v. Alexander* [2004] EWCA Crim 3398

⁶⁴ Jacobs and Potter, n 18, p 144

⁶⁵ Gibbs S, "Move to Add Penalties for Hate Crimes 'Dangerous'", Sydney Morning Herald (19 July 2002) p 8

⁶⁶ Gibbs, n 65, p 8

South Wales Attorney-General, Bob Debus, called the proposed reform a “cynical stunt”, stating: “Is the leader of the Opposition seriously saying that there are rape cases where ‘hate’ is not an issue?”⁶⁷

Later in 2002, the government instead chose to introduce discretionary sentence aggravation provisions for hate crime as a part of a suite of changes within the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW). Although parliamentary debate on the amending legislation was extensive, it is noteworthy that virtually none of this included the hate crime provisions. Indeed, only one explicit reference was made throughout the entire debate when Helen Sham-Ho spoke in favour of hate as an aggravating factor on the basis that it increases the “moral culpability of an offender ... [and is a] ... further affront to the community’s sense of decency and stability”.⁶⁸ The sentence aggravation provisions came into operation in February 2003 under s21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Bronitt and Stellios suggest that although they appear to be “a progressive development from an anti-discrimination policy perspective”, they are nonetheless the product of “political pressure” stemming from “the moral panic about the rise of ‘ethnically’ motivated Lebanese gang rape in Sydney”.⁶⁹

There are now several reported decisions where the New South Wales Supreme and District Courts have had occasion to interpret s21A(2)(h), giving New South Wales the most extensive body of hate crime jurisprudence in the country. The significance of these cases can be understood through four key issues regarding the scope and application of the subsection: whether s21A(2)(h) covers individual hatred; application of the provision to intra-group and political prejudice; whether the subsection requires a motive or group selection test; and which groups are protected under the subsection. Each of these issues will be discussed in turn. It is, however, the last issue and the decision by the Court of Criminal Appeal to include paedophiles as a protected group under s21A(2)(h) that is the most contentious and warrants the most consideration.

Group hatred not individual hatred

Section 21A(2)(h) applies only to offences motivated by hatred for a group of people to which the victim was believed to belong. In *R v. MAH*,⁷⁰ the New South Wales Supreme Court held that the subsection did not apply in circumstances where the offender had murdered the victim out of jealousy over the latter’s relationship with the offender’s girlfriend. The court rejected the prosecution’s submission that one of the aggravating factors to be taken into account at sentencing was evidence that the offender was motivated by hatred for the victim.⁷¹ In accordance with the plain and ordinary meaning of the phrase “group of people” in s21A(2)(h), the court confirmed that the purpose of the subsection is to punish group hatred or prejudice rather than hatred towards an individual. This decision is wholly consistent with the rationale

⁶⁷Lipari K, “Hate Crime ‘Deserves More Jail Time’”, Daily Telegraph (19 July 2002) p 20

⁶⁸NSW Legislative Council, *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002*, *Hansard*, Helen Sham-Ho MLC (19 November 2002) p 6954

⁶⁹Bronitt and Stellios J, “Sedition, Security and Human Rights: ‘Unbalanced’ Law Reform in the ‘War on Terror’” (2006) 30 MULR 948

⁷⁰*R v. MAH* [2005] NSWSC 871 at [32]

⁷¹*R v. MAH* [2005] NSWSC 871 at [32]

behind hate crime laws, as discussed above, to achieve both instrumental and symbolic goals in the particular interests of disadvantaged groups.

Intra-group hatred: religion and political views

The New South Wales District Court has held that s21A(2)(h) applies in circumstances of intra-group religious conflict. In *R v. El Mostafa*,⁷² the accused, a Sunni Muslim man, was convicted of participating in a riot directed towards a group of Shiite Muslims. The sentencing judge was satisfied that the defendant “held strong feelings against Shiite Muslims”, having referred to them as “sons of bitches and dogs”.⁷³ His Honour stated:

[T]he nature of the attack by the rioters, in this case on the innocent and defenceless Shiite Muslims, demonstrated that the strong difference of opinion had moved sufficiently to be described as hatred by the attackers against those whom they attacked. That hatred was certainly related to religious opinions but also in this case to political views. I regard that as an aggravating factor of this offence and I will take that into account.⁷⁴

The political difference to which the judge referred was a disagreement over whether Iraqi nationals living in Australia should have voted in the 2005 Iraq elections.⁷⁵

The significance of the decision in *El Mostafa* is twofold. First, although hatred based on religion falls clearly within the scope of the subsection, whether or not hatred based on political opinions is covered is less apparent. Nonetheless, the court did not take the opportunity to exclude such an interpretation and, indeed, implied that both religious and political hatred are covered.

Secondly, both the defendant and the victims followed the Muslim faith but held differing views as to how that faith should be expressed, i.e. as Sunni or Shiite Muslims. Nevertheless, the court held that hatred relating to this form of “religious opinion” fell within the meaning of the term “religion” in s21A(2)(h).⁷⁶ This decision has parallels in international jurisdictions. For example, in Great Britain it has been held that being of the same racial group as the victim does not preclude the offender from being convicted of a racially aggravated offence and thus attracting an enhanced penalty.⁷⁷ This interpretation, which relies upon a formal understanding of equality before the law, has been criticised on the basis that penalty enhancement provisions were introduced into Great Britain with the purpose of penalising racist crime by members of majority groups against members of vulnerable minority groups: *inter-racial* hostility rather than *intra-racial* hostility.⁷⁸ Indeed, concern has been expressed about the specific possibility that Britain’s hate crime laws might be used to re-label conflicts between Shiite and Sunni Muslims as religious conflict: “[T]he worry is that

⁷²*R v. El Mostafa* [2007] NSWDC 219

⁷³*R v. El Mostafa* [2007] NSWDC 219 at [16]

⁷⁴*R v. El Mostafa* [2007] NSWDC 219 at [16]

⁷⁵*R v. El Mostafa* [2007] NSWDC 219 at [16]

⁷⁶*R v. El Mostafa* [2007] NSWDC 219 at [16]

⁷⁷See *R v. White* [2001] 1 WLR 1352 where a West Indian man, who identified as African, called a bus conductor from Sierra Leone an “African bitch”, “stupid bitch” and “stupid fool”. He unsuccessfully appealed his conviction for a racially aggravated offence under s31 of the *Public Order Act 1988* (UK).

⁷⁸Brennan F, “Punishing Islamophobic Hostility: Are Any Lessons to be Learned From Racially Hostile Crimes?” (2003) 8 *Journal of Civil Liberties* 28 at 32-33

as the courts try to get to grips with these complex provisions the confused messages sent out to the victims of Islamophobia may not convince them that racial and religiously motivated crimes is being taken seriously.”⁷⁹ Given that this is precisely what took place in *El Mostafa*, we must ask ourselves whether we should have a similar concern in New South Wales.

Motive v. group selection test (or hatred v. stereotypes)

In *Aslett v. The Queen*, the New South Wales Court of Criminal Appeal rejected the argument that s21A(2)(h) applied in circumstances where the victims of a home invasion had been selected by the perpetrators on the basis they were “Asian” and the perpetrators’ belief that “Asians tended to keep money and jewellery in their homes”.⁸⁰ The court held that the motive in this case was different from crimes committed out of race hatred or prejudice:

[A] better analysis is that the appellant approved the attack on Mr and Mrs A’s home not because Mr and Mrs A were Asian but because he believed that as Asians they fell into a category of people whose homes might contain valuables suitable for stealing. There was no evidence that the appellant hated Asians. There was no evidence that he was prejudiced against Asians.⁸¹

Although not expressly discussed by the court, this decision boils down to the position that criminal conduct founded on a racial stereotype will not be sufficient to attract s21A(2)(h) unless it is accompanied by evidence that the crime was specifically motivated by prejudice or group hatred. In contrast, had s21A(2)(h) contained a group selection test, it is likely that this would have been satisfied by evidence that the victims in *Aslett* were selected “because of” their race. By implication, s21A(2)(h) is unlikely to apply to a situation where the victim of a mugging is selected because he/she is Jewish and the offender believes that Jewish people are all wealthy, nor to a situation where the victim is selected because he is gay and the offender believes that gay men are effeminate and will not fight back. Although such stereotypes are generally accepted to lie at the heart of prejudice and group hatred,⁸² the New South Wales Court of Criminal Appeal’s strict interpretation of the motive test in s21A(2)(h) sets a standard that will not likely be met without clear proof of actual ill will or hatred by the perpetrator towards the victim.

Protected groups: Paedophiles

Although aspects of the above decisions are divisive, they are largely consistent with international interpretations of hate crime legislation. The same cannot be said of *Dunn v. The Queen*.⁸³ Between August and October 2005, Mr Dunn twice set fire to his neighbour’s unit. The second fire completely burnt out the unit and caused so much damage that the entire block of five units, owned by the New South Wales Department of Housing, was deemed uninhabitable. Dunn was found guilty of

⁷⁹Brennan, n 78 at 34

⁸⁰*Aslett v. The Queen* [2006] NSWCCA 49 at [124]. In addition to home invasion, this case also involved multiple aggravated sexual assaults by three of the perpetrators against a 16-year old girl who was home with her parents at the time.

⁸¹*Aslett v. The Queen* [2006] NSWCCA 49 at [124]

⁸²Allport G, *The Nature of Prejudice* (Addison-Wesley, 1954) pp 20-25

⁸³*Dunn v. The Queen* [2007] NSWCCA 312

malicious damage by fire to property and malicious destruction to property.⁸⁴ Despite some conflicting evidence, the sentencing judge, Judge Marien, concluded that the crimes were motivated by Dunn's feelings of antipathy towards the victim because the former believed (incorrectly) that the victim was a paedophile:

I am satisfied beyond reasonable doubt on all the evidence before me that a significant factor in the offender's motivation to commit these offences was his feelings of antipathy towards his neighbour Mr Arja who he believed, without any justification at all, was a paedophile.⁸⁵

Judge Marien concluded that this was a significant aggravating factor for the purposes of s21A(2)(h).⁸⁶ Dunn was sentenced to imprisonment for a combined period of six years with a balance term of 18 months.⁸⁷ He appealed this sentence. One ground of appeal was that his actions in lighting the fires were directed towards the victim personally and not towards any particular group. As s21A(2)(h) was "directed at offences against persons who were motivated by hatred or prejudice against a group to which it was believed those persons belonged", it had no application where there was "particular dislike or animosity between two individuals".⁸⁸ In contrast to *R v. MAH*, the New-South Wales Court of Criminal Appeal rejected this challenge:

A significant factor in the applicant's motivation was his feelings of antipathy towards Mr Arja because he believed him to be a paedophile ... [T]he motivation was described by the applicant ... as a "scare tactic" and there was no evidence of any other basis for ill-will between Mr Arja and the applicant. On the contrary Mr Arja believed that they got on well together.⁸⁹

The court further held that:

Applying s21A(2)(h) it is clear that the offences come fairly and squarely within it. The offence was motivated by a hatred or prejudice against Mr Arja solely because the applicant believed him to be a member of a particular group, i.e. paedophiles. The examples given in parentheses are merely that, i.e. examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.⁹⁰

This is a provocative and unique decision. Paedophiles have never been recognised as a protected category under hate crime laws. New South Wales appears to be the only jurisdiction in the world to do so. As discussed above, hate crime laws are designed to punish and denounce violence that is grounded in prejudice towards communities who are the historical objects of oppression: racial, religious, ethnic, gay/lesbian minorities etc. Prejudice by its very definition denotes an irrational or unjustified

⁸⁴*Dunn v. The Queen* [2007] NSWCCA 312 at [4]

⁸⁵*Dunn v. The Queen* [2007] NSWCCA 312 at [171]

⁸⁶*Dunn v. The Queen* [2007] NSWCCA 312 at [17]

⁸⁷*Dunn v. The Queen* [2007] NSWCCA 312 at [5]

⁸⁸*Dunn v. The Queen* [2007] NSWCCA 312 at [29]. It is interesting to note that submissions on behalf of the applicant, Mr Dunn, did not argue that paedophiles were not a group intended to be protected under the subsection, as argued below.

⁸⁹*Dunn v. The Queen* [2007] NSWCCA 312 at [31]

⁹⁰*Dunn v. The Queen* [2007] NSWCCA 312 at [32]

negative attitude towards members of these communities.⁹¹ Paedophiles can be distinguished from groups conventionally protected under hate crime law on the basis that moral condemnation of their conduct is far from unjustified; their sexual conduct inflicts a clear and identifiable harm upon others (children) whilst the conduct of these other minority groups does not. Thus, negative attitudes towards adults who sexually abuse children do not fit easily within contemporary understandings of prejudice. This is not, of course, to say that vigilantism against paedophiles is warranted.

It is clear that a construction of s21A(2)(h) that promotes the purpose or object of the legislation is to be preferred to one that does not.⁹² Yet, the New South Wales Court of Criminal Appeal made no reference to the purpose of s21A(2)(h) in *Dunn v. The Queen*. This may be because the extrinsic materials available to the court offer very little guidance on this matter.⁹³ Neither the Attorney-General's Second Reading Speech nor the explanatory notes for the amending legislation discuss s21A(2)(h) specifically, focusing instead on the aim of the Bill as a whole in promoting consistency and transparency in sentencing.⁹⁴ There is nothing to suggest that applying an aggravated sentence in the case of an offender who engaged in a vigilante-style attack on a person he presumed to be a paedophile undermines this purpose; yet, nor can we say that it promotes it. Although it is arguable that s21A(2)(h) has a more specific purpose than the whole of the Act as outlined by the Attorney-General, this is difficult to infer from the relevant extrinsic materials. As noted above, s21A(2)(h) received almost no mention in the parliamentary debate leading up to the enactment of the amending Act, nor was the section enacted pursuant to any specific report or recommendation by a law reform body.

In *R v. Dunn*, the New South Wales Court of Criminal Appeal approached s21A(2)(h) through a syntactical construction instead. Their interpretation appears to rely upon a presumption towards giving the language of s21A(2)(h) its plain and ordinary meaning.⁹⁵ The subsection refers to "a group of people to which the offender believed the victim belonged". The court held that suspected paedophiles do indeed form a "group of people" in the plain and ordinary meaning of that term and the examples given in parentheses ("such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability") do not change this. The court appeared to be of the opinion that the listing of various social groups in this section is merely to ensure that these groups will be caught by the ambit of the section and not to exclude other groups. In other words, the court accepted that the latter segment of s21A(2)(h) was not intended to limit the plain meaning of the phrase "group of people".

The difficulty with this construction of s21A(2)(h) is that the principles that favour a plain and ordinary meaning of statutory language only create a rebuttable

⁹¹Allport, n 82, pp 22-24. See also Young-Bruehl E, *The Anatomies of Prejudices* (Harvard University Press, 1996).

⁹²*Interpretation Act 1933* (NSW), s33

⁹³*Interpretation Act 1987* (NSW), s34

⁹⁴*Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Bill 2002* (NSW), Explanatory Notes

⁹⁵Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 2006) p 44; *Bowtell v. Goldsbrough, Mort & Co Ltd* (1906) 3 CLR 444

presumption. Such an interpretation is justified unless the contrary is not shown.⁹⁶ It is arguable that the contrary is indeed shown in s21A(2)(h), which should be read as a whole such that the meaning of the phrase “group of people” is informed by the list of social groups that appears in parentheses (rather than the other way around). Instead of isolating the general term “group of people” in its literal meaning and then adapting the rest of the section to this meaning – and thereby subjecting the specific to the general – the New South Wales Court of Criminal Appeal could have read the term “group of people” as subject to the rest of the language in the subsection, thereby accommodating⁹⁷ and limiting a phrase with potentially wide connotation (“group of people”) to the context in which it appears.⁹⁸ Thus it is arguable that the phrase “such as” in its plain and ordinary meaning functions to have a constraining effect on the phrase “group of people”. Moreover, if we take “such as” to mean “akin to” or “having the same quality as”, then s21A(2)(h) will only apply to a group of people that is akin to people of a particular religion, racial or ethnic origin etc.⁹⁹

As indicated above, the examples in parentheses *do* have something in common that could be said to constrain the general term “group of people”. The categories of religion, race, ethnicity, language, sexual orientation, age and disability represent “social fissure lines” that have led to unjustified prejudice and discrimination.¹⁰⁰ For this reason, the goal of hate crime legislation has traditionally been to protect minority members of these categories. Further, the need to legislate against the inequality experienced by many of these groups has been recognised in discrimination law since the 1980s.¹⁰¹ In asserting that paedophiles come “fairly and squarely” within s21A(2)(h), the court has refused to draw a distinction between paedophiles and these minority groups. This in turn denies that the latter constitutes any kind of meaningful “genus”.¹⁰² In the absence of the court’s preparedness to recognise that such a “genus” is implied in s21A(2)(h), the provision has the potential to be applied to convictions for offences motivated by hatred or prejudice towards any identifiable group of people, e.g. politicians, lawyers, judges, cyclists, academics, rapists, environmentalists, four-wheel-drive owners, and chocolate-lovers. Even if the court’s construction of s21A(2)(h) is read more narrowly to implicitly confine its application

⁹⁶*Cody v. JH Nelson Pty Ltd* (1947) 74 CLR 629 at 645 (Dixon J); *Maunsell v. Olins* [1975] AC 373 at 382 (Lord Reid). While courts may be hesitant to impute a technical meaning on ordinary words, there may well be circumstances where it is the technical meaning of a word that is genuinely more consistent with the intentions of parliament than its ordinary meaning: *Barren v. Thurling* [1984] 2 NSWLR 683.

⁹⁷*Taylor v. Public Service Board (NSW)* (1976) 137 CLR 208 at 213 (Barwick CJ)

⁹⁸*Prior v. Sherwood* (1906) 3 CLR 1054; *R v. Refshauge* (1976) 11 ALR 471 at 475; *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 376 (Toohey and Gaudron JJ)

⁹⁹This interpretation is strengthened by the fact that in other sections of the *Crimes (Sentencing Procedure) Act 1999* (NSW) where the legislature intended to denote an open-ended list rather than a limited set. The term “included” is used, thereby suggesting that the use of the phrase “such as” is intended to have a limiting effect.

¹⁰⁰Lawrence, n 13, p 13

¹⁰¹Thornton M, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990). Gender is the main exception here. It is protected under discrimination law in all Australian jurisdictions but not under s21A(2)(h). For a discussion of the issues around, including gender, in hate crime laws see Gelber K, “Hate Crimes: Public Policy Implications of the Inclusion of Gender” (2000) 35(2) *Australian Journal of Political Science* 275.

¹⁰²Although the somewhat problematic *ejusdem generis* principle may not be directly relevant, given the wording of s21A(2)(h), which does not feature a list of things followed by the expression “or any other”, it is helpful to draw an analogy.

to groups that tend to attract animosity or hatred, it has the potential to catch these same examples (perhaps with the exception of chocolate-lovers).

Although the court made no reference to it, an alternate interpretation of the decision in *Dunn* is that the court read the phrase “sexual orientation” as encompassing paedophilia. On the face of things, it is arguable that a predilection for sex with children is a form of sexual orientation. However, such an interpretation would be completely out of sync with contemporary usage of the term – as well as interpretations of the term in hate crime law in other jurisdictions – which predominantly signifies homosexual, heterosexual and bisexual preferences.¹⁰³ Further, it would be deeply troubling if the court’s interpretation of s21A(2)(h) in *R v. Dunn* were to be seen to suggest that protection should be extended to paedophiles as a group on the grounds that homosexuality is clearly a form of sexual orientation and thus comes within the ambit of the section. Any such interpretation would involve unacceptable slippage between notions of homosexuality and paedophilia. Whilst such slippage was alarmingly common in the past, and has been extensively used to tarnish gay male sexuality,¹⁰⁴ it would be cause for considerable concern if the same mistakes were being made by our courts today.

Vigilantism against adults who sexually abuse children is unacceptable. However, as indicated above, the heavier penalties that hate crime laws impose are defended by advocates on the grounds of both proportionality and public policy. Hate crime is said to inflict greater harm than other crimes because it represents an attack upon the victim’s core identity which, in turn, produces a sense of vulnerability amongst his/her wider community.

Ultimately, hate crime is said to undermine multiculturalism itself. Hate crime laws can thus be understood as an extension of anti-discrimination and equal opportunity principles into the criminal domain. Whether or not we agree with these ambitious social objectives, we need to recognise that by imposing harsher penalties such laws send the message that crimes motivated by prejudice are worse than crimes that are not accompanied by such feelings. In applying s21A(2)(h) to paedophiles as a group, *R v. Dunn* sends the message that crimes motivated by hatred of paedophiles are worse than crimes that are not motivated by anti-paedophilia sentiment.

The significance of *R v. Dunn* does not just lie in the preparedness of the Court of Criminal Appeal to extend s21A(2)(h) to a controversial group which was most likely not envisaged by the legislature nor protected under hate crime laws in other jurisdictions. The court’s willingness to include paedophiles as a “group of people” confirms the fears of critics of hate crime laws who argue that there is no firm basis upon which to draw a coherent line between those groups that should be protected and

¹⁰³For example, the Office of the Anti-Discrimination Commissioner, Tasmania, defines sexual orientation as “heterosexuality, bisexuality, homosexuality or transsexuality”. http://www.antidiscrimination.tas.gov.au/data/assets/pdf_file/0003/108831/adc_sexualorientation.pdf [viewed 21 January 2010]. The *Equal Opportunity Act* 1995 (Vic) applies both to “sexual orientation” and “lawful sexual activity” (ss 6(d),6(l)). The latter phrase specifically excludes discrimination on the basis of unlawful sexual activity such as sex between adults and children, <http://www.humanrightscommission.vic.gov.au/types%20of%20discrimination/sexual%20orientation/default.asp> [viewed 21 January 2010].

¹⁰⁴Weeks J, *Against Nature: Essays on History, Sexuality and Identity* (Rivers Oram Press, 1991)

those groups that do not need or warrant such protection.¹⁰⁵ More than this, the court's preparedness to include paedophiles as just one among many potential groups rests upon its failure to acknowledge that the examples of groups in parentheses have anything in common or represent any kind of genus. In this seemingly "neutral" interpretation of s21A(2)(h), the court has refused to contribute to the wider expressive function of hate crime laws to address discriminatory violence against groups that are traditionally recognised as marginalised and underprivileged and, more fundamentally, to challenge the ingrained and unjustified prejudices that facilitate this animosity in the first place.

CONCLUSION

There is little case law on the recent hate crime provisions that have been introduced in Western Australia, the Northern Territory and New South Wales. Apart from the *Blaxall* case in Western Australia, the facts giving rise to the cases that have emerged do not revolve around typical scenarios of hate crime where members of "minority" groups are abused or attacked by members of "majority" groups. The New South Wales Court of Criminal Appeal has had the opportunity to interpret the scope and application of s21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in several cases now. The decisions in *MAH* and *Aslett* are consistent with both the purpose and scope of sentence aggravation provisions that adopt a motive test: i.e. such laws are designed to address criminal manifestations of group hate and, as such, require convincing evidence of prejudice as a motivating factor in the offence. This is not to say that prejudice must be the only motive. In *Dunn*, the court accepted that the offender's primary reason for lighting the fire was his hatred of paedophiles. However, there was also evidence from a police informant that, in lighting the fire, Dunn also sought to prompt the New South Wales Department of Housing to move him to a different area of the city where he believed he would be more successful in attracting women partners.¹⁰⁶ Although the Court of Criminal Appeal made no direct comment on whether prejudice must be the only motive its agreement with judge Marien's decision, that s21A(2)(h) did apply on the facts because the offender's hatred towards paedophiles was a significant factor, suggests that it is not necessary for prejudice to be the *only* motive.¹⁰⁷ Whilst this is consistent with international case law, the Court of Criminal Appeal provided little guidance as to how significant the prejudiced motive must be.

In *El Mostafa* and *Dunn*, the New South Wales District Court and Court of Criminal Appeal respectively have taken a broad interpretation of the groups to be protected under s21A(2)(h). Whilst the decision to apply the subsection to intra-group hatred in *El Mostafa* did not turn on the offender's hatred towards the victim's political affiliations but rather on his religious convictions, the court still suggested that the subsection may well extend to political beliefs. There is precedent in both domestic discrimination law and international hate-crime law for such recognition.¹⁰⁸ The same

¹⁰⁵Hurd H and Moore M, "Punishing Hatred and Prejudice" (2004) 56 Stanford Law Review 1081

¹⁰⁶*Dunn v. The Queen* [2007] NSWCCA 312 at [11]

¹⁰⁷Although it is also possible that judge Marien put greater weight on the psychiatric evidence that pointed to the offender's hatred of paedophiles as the motive than on the evidence of the police informer.

¹⁰⁸For example, "political belief or activity" is covered under Victoria's *Equal Opportunity Act 1995* (Vic), s6. In the United States, some hate crime statutes cover political affiliation and involvement in civil or human rights activities: see Jenness and Grattet, n 12, p 96.

cannot be said of the decision in *Dunn* to extend protection to paedophiles, or child sexual abusers, as a group. Certainly, the law needs to deal with individuals who take it upon themselves to attack or “punish” others because they believe them to be paedophiles. Whether it is helpful to define such conduct as a hate crime is another matter. Such a decision undermines the capacity of s21A(2)(h) to place unjustified prejudice-related crime on the public agenda as a serious social problem. It is questionable whether the expressive function of s21A(2)(h) – to tackle prejudice, discrimination and violence against subjugated groups – is usefully served by extending the scope of the provision to this particular victim group. What s21A(2)(h) does achieve, however, is the imposition of a heavier sentence upon those offenders to whom it is applied. The fundamental dilemma this raises is that the harsher penalties facilitated by s21A(2)(h) may simply become another example of punitive punishment that, in light of the inability of the provision to achieve its intended goals, is unjustifiable.