PREJUDICE AND PAEDOPHILIA IN HATE CRIME LAWS: *Dunn v R*

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Hate crime laws are designed to target crime that is motivated or aggravated by prejudice. Largely, they do this by imposing heavier penalties than those applicable to parallel crimes. Hate crime laws are distinguished by the fact that they require an element of prejudice or bias on the part of the offender towards the victim's presumed group affiliation. Group categories most commonly covered under these laws include race, ethnicity, religion, colour, nationality, sexuality and disability (gender has proven much more controversial).

Although the current wave of hate crime legislation has its roots in identity politics of the 1980s, these kinds of laws have a much longer trajectory. Designed to deal with intimidation and large scale racial violence, civil rights statutes in the United States represent an important precursor to the proliferation of hate crime laws in that nation over the last twenty-five years. In the 1940s and 1950s, a number of European countries, including Germany, Austria and Great Britain enacted laws to address specific problems of anti-Semitism and/or other forms of racial conflict. Many of these laws remain in force today and, indeed, have been 'updated' in the post-September 11 2001 climate. For example, despite sparse use over the last forty years, Great Britain's incitement to racial hatred laws were expanded in 2006 to include a new offence — incitement to religious hatred.[1]

Australia has several different types of hate crime laws. Although there are strong similarities between these laws and those that have been enacted in other common law countries — particularly Great Britain, Canada, New Zealand and the United States — the socio-legal features of Australia have produced a distinct, yet predictable, body of laws. Western Australia has the largest regime of hate crime laws in the nation (first introduced in 1990 and amended in 2004). Both substantive hate crime offences and mandatory penalty enhancement provisions operate in that state, albeit for race-related offences only. The former criminalise both conduct and the possession of material that constitutes racial harassment and incitement to racial harassment or animosity.[2] The latter impose an additional mandatory penalty on specified pre-existing offences that are racially aggravated.[3]

In 2003 New South Wales opted for a model that retains greater judicial discretion.[4] The Northern Territory followed suit in 2006.[5] These provisions take the prejudicial motive or aggravation into account at sentencing (and can be classified as a sentence aggravation model). Under the NSW version it will be an aggravating factor at sentencing if an offence is '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)'.[6] Although the sentencing court must take such an aggravating factor into account, it is not mandatory that the sentence be increased (unlike the penalty enhancement model in Western Australia).[7]

Additionally, under discrimination law, the civil wrong of vilification can be elevated to the criminal offence of serious vilification in NSW, Victoria, Queensland, South Australia and the Australian Capital Territory.[8] In New South Wales, for example, 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.[9] The group categories covered vary and race is the only ground covered in all jurisdictions. While the offence of serious vilification does provide a criminal avenue of redress for narrowly defined conduct, the fact that there has never been a prosecution since the provisions were first introduced twenty years ago makes them largely redundant.

Indeed, there is very little case law under these different models of hate crime legislation. In Western Australia, the original 1990 racial hatred laws were successfully invoked only once before being reformed in 2004 and the first prosecution under the new provisions was dismissed as a 'petty' use of the law.[10] To date, there are no reported decisions under the sentencing provisions in the Northern Territory. In contrast, the New South Wales sentence aggravation provisions — contained in s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* — have now been the subject of judicial interpretation in several reported decisions.[11] Of particular concern is the Court of Criminal Appeal decision in *Dunn v R* where the court held that s 21A(2)(h) applied to paedophiles as a group.[12] Clearly, vigilantism against paedophiles is unacceptable — as the recent hysteria surrounding the Dennis Ferguson case demonstrates — and the court's attempt to reinforce this in *Dunn* is to be welcomed. The purpose of this article, however, is to examine this controversial decision in the context of the wider purpose of hate crime laws. It asks: to what extent does *Dunn* undermine the capacity of hate crime laws to address crime and violence against marginalised communities

REFERENCES

1. *Public Order Act 1986* (UK) ss 17-23 and 29A-29N.

2. *Criminal Code Amendment (Racial Vilification) Act 2004* (WA) ss 78-80D.

3. *Criminal Code Act Compilation Act 1913* (WA), Schedule ss 313, 317, 317A, 338B, 444.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

5. *Sentencing Act 2002* (NT) s9(1)(h).

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h).

7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5).

8. *Anti-Discrimination Act 1977* (NSW) ss 20D, 38T, 49ZTA, 49ZXC; *Racial Vilification Act 1996* (SA) s 4; *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act* 1991 (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 24, 25.

9. *Anti-Discrimination Act 1977* (NSW) s 20D.

10. Western Australia Assembly Hansard, *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).

11. *R v MAH* [2005] NSWSC 871; *R v Amir Ibrahim El Mostafa* [2007] NSWDC 219; *R v Aslett* [2006] NSWCCA 49. For further discussion see Gail Mason, 'Hate Crime Laws in Australia: Are they achieving their goals?' (2009) 33 CrimLJ 1.

12. *Dunn v R* [2007] NSWCCA 312.

who are the unjustified targets of prejudice and discrimination?

Dunn v R

Between August and October 2005, Mr Dunn lived in a block of units owned by the New South Wales Department of Housing. Mr Arja lived in the adjoining unit. In August 2005, Dunn lit a fire on the front porch of Arja's unit. Arja was overseas at the time but the fire caused damage to the porch, front window and lounge room of his unit. Two months later, Dunn lit another fire at Arja's unit. Fortunately, the latter was not home at the time but the fire completely burnt out the unit and caused so much damage to the entire building of five units that the Department of Housing deemed it to be uninhabitable. In December 2006, Dunn was found guilty in the District Court of one count of malicious damage by fire to property for the incident in August 2005 and one count of malicious destruction to property for the incident in October 2005.

Although Dunn did not give evidence at trial, the sentencing judge, Marien DCJ, sought to establish motive. Evidence from a police informer and a sentencing report by psychiatrist Dr Richard Furst suggested two possible motives for the offences. First was Dunn's desire to be relocated by the Department of Housing to the Sutherland Shire where he believed he would be more successful with women. Second was Dunn's belief that Arja was a paedophile (the court accepted that this was a false claim about Arja). Dr Furst's report stated: 'He told me that both fires were meant to be a "scare tactic" as he was convinced ... [Arja] was a "rock spider" ... a child molester. ... He further explained that the intention of the fires was to get either himself or his neighbour moved by the Department of Housing because he could not bear to live next to a rock spider.'[13] Dunn stated that he was intoxicated with both alcohol and cannabis at the time of the offences. A second report by Professor Reid stated that Dunn became 'very upset and started drinking' when he heard that Arja was a paedophile.[14] Although Professor Reid accepted a claim by Dunn that he had been sexually abused as a child, and that this caused him to become angry, this was at odds with an earlier Parole Board report by Dr Andrew Walker where Dunn expressly denied any childhood sexual abuse. Although Marien DCJ accepted that Dunn did not intend to harm Arja personally, his Honour concluded that his conduct, which was 'recklessness of a very high order',[15] was motivated by his feelings of antipathy towards Arja:

> 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.[16]

The sentencing judge thus concluded that this antipathy towards paedophiles was a significant aggravating factor for the purposes of s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*. Dunn was assessed by Professor Reid as being of borderline intellectual ability with an anti-social personality disorder (or, alternatively, by Dr Furst as suffering from post-traumatic stress disorder triggered by his childhood sexual abuse), as well as being alcohol dependent and a user of heroin. He was sentenced to imprisonment for a combined period of six years with a balance term of 18 months.

Dunn appealed against his sentence. One ground of appeal was that the sentencing judge had erred in his application s 21A(2)(h). It was submitted that Dunn's 'actions in lighting the fires were directed at Mr Arja personally and were not directed at any particular group' and that as s 21A(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.'[17] The Court of Criminal Appeal rejected these arguments:

> 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 to Dr Furst 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.[18]

The court justified the application of s 21A(2)(h) to the facts of the case in the following way:

> Applying s 21A(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, ie paedophiles. The examples given in parentheses are merely that, ie examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.[19]

This decision appears to be a world first. The protection offered by hate crime laws has never before been extended to paedophiles as a group.

Prejudice and paedophilia

Hate crime laws are designed to place 'discriminatory violence on the public agenda'[20] as a 'recognizable social problem'.[21] Advocates justify the harsher penalties imposed by such laws via principles of proportionality that tie the severity of the punishment to the gravity of the offence. They argue that hate crimes are more serious because they inflict greater harm than parallel crimes and/or that the biased motive of the offender renders him/her more culpable.[22] The imposition of heavier penalties is also intended to denounce, and thereby deter, prejudice-related violence. Yet, hate crime 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'[23] and thereby 'reinforce prosocial values of tolerance and respect' for marginalised and disadvantaged groups.[24] Ultimately, advocates of hate crime laws hope to exploit the wider expressive function of the criminal law by using these laws to 'unearth and de-normalise subtle and ingrained attitudes towards traditionally underprivileged groups.'[25] For this reason, the group categories covered under hate crime laws have tended to mimic the kinds of

13. Ibid [12].
14. Ibid [15].
15. Ibid [18].
16. Ibid [17].
17. Ibid [29].
18. Ibid [31].
19. Ibid [32].
20. Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (2001) 18.
21. Valerie Jenness and Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (1997) 106.
22. Frederick Lawrence, *Punishing Hate: Bias Crimes under American Law* (1999) 63.
23. James B Jacobs and Kimberley Potter, *Hate Crimes: Criminal Law and Identity Politics* (1998) 66, 144.
24. Jenness and Grattet, above n 20, 179.
25. Charlotte Brown, 'Legislating Against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence' (2004) 35 *Victoria University of Wellington Law Review* 591, 595. See also Mark Walters, 'Hate Crimes in Australia: Introducing Punishment Enhancers' (2005) 29 *Criminal Law Journal 201*, 206.

... hate crime 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.

'social fissure lines' also protected under discrimination law: race, religion, ethnicity, colour, age, sexuality, physical and mental ability and so on.[26]

The Court of Criminal Appeal made no reference in *Dunn* to the purpose of s 21A(2)(h) or hate crime laws as a whole. Admittedly, they had limited extrinsic aids available to establish this purpose (as opposed to a wealth of secondary sources). Section 21A(2)(h) was introduced — some might say camouflaged — within a much larger body of reforms pertaining to the establishment of standard non-parole periods. Parliamentary debate on the amending legislation was dominated by discussion of the latter and only one explicit reference was made to the subsection, when the Hon Helen Sham-Ho, member of the New South Wales Legislative Council, spoke in favour of it on the basis that hate increases the 'moral culpability of an offender' and is a 'further affront to the community's sense of decency and stability.'[27] In interpreting s 21A(2)(h) the court instead chose to rely upon the plain and ordinary meaning of the phrase 'group of people' and interpreted the list of social groups in brackets as examples only, not intended to limit the ambit of the section.

The difficulty with this construction is that hate crime laws, as indicated above, are designed to punish and denounce violence that is grounded in prejudice. Prejudice by very definition denotes an irrational or unjustifiable negative attitude towards members of a particular group.[28] It is the *unjustifiable* nature of the attitude that distinguishes groups conventionally protected under hate crime law from paedophiles as a group. Adults who engage in sex with children inflict a clear and identifiable harm upon others, namely children. Condemnation of such behaviour is neither unwarranted nor unjustified. Indeed, many would argue we have a moral imperative to denounce exploitative conduct of this nature. Such condemnation cannot be equated with intolerance and bias that is directed towards, for example, members of Jewish, Asian, disabled, gay or lesbian communities. In short, holding or expressing negative attitudes towards adults who sexually abuse children does not fit within contemporary understandings of prejudice. This is not to say, of course, that vigilantism against paedophiles is warranted.

A preferable reading of the s 21A(2)(h) would be to interpret the phrase 'group of people' as informed by the list of social categories that appear in brackets (religion, race, ethnic origin, language, sexual orientation, age and disability) rather than the other way around. It is arguable that the phrase 'such as' in *its* plain and ordinary meaning functions to constrain the phrase 'group of people' to groups that are the historical objects of unjustified prejudice and its violent manifestations. This interpretation would be more in keeping with the ideals of those who advocate for hate crime laws on the grounds that they are capable of making a positive contribution to the promotion of tolerance and respect for such groups.

Furthermore, and irrespective of whether we support the 'affirmative action' goals of hate crime laws, it makes little practical sense to extend coverage of s 21A(2)(h) to paedophiles as a group. In refusing to acknowledge that the examples in brackets have anything in common that limits the application of the provision to groups that are the objects of unjustifiable or irrational prejudice, which would arguably exclude paedophiles, the Court of Criminal Appeal may have left the door open for s 21A(2)(h) to apply to *any* group (lawyers, politicians, teachers, greenies, rapists perhaps?). There is simply no guidance in *Dunn* as to how or, indeed, *if* a line should be drawn. This was probably not the court's intention. Nevertheless, there seem to be only two ways of avoiding such an interpretation. The first is to accept that paedophiles *do* have something in common with the other group categories listed. The second is to accept that paedophiles fall within one of the categories specified within the subsection, the most likely option being 'sexual orientation'. Both propositions are problematic.

The first proposition requires us to accept that paedophiles are no different from the kinds of minority groups signaled by the categories listed in the subsection: any prejudicial attitude held by the wider population towards paedophiles is thus unjustified and unacceptable. This is hardly a satisfying outcome. The implications of including paedophilia within the term 'sexual orientation' are equally troubling. Although it is arguable that a predilection for sex with children is technically a form of sexual 'orientation', such an interpretation would be at odds with the dominant understanding of the concept as it has emerged from the sexual politics of the 1980's. Like 'sexuality' and 'sexual preference', the concept of 'sexual orientation' has been popularised as a central organising principle in the struggle of gay men, lesbians and bisexuals to achieve equality with heterosexual men and women. Although not without controversy, the term has come to signify sexual conduct, lifestyle and identity between consenting adults along a spectrum of homosexuality,

26. Lawrence, above n 22, 13.

27. New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 November 2002, 6954, (Helen Sham-Ho, MLC).

28. Gordon Allport, *The Nature of Prejudice* (1954) 22–24. See also Elizabeth Young-Bruehl, *The Anatomies of Prejudices* (1996).

bisexuality, transsexuality and heterosexuality (transgender tends to be understood as a question of gender identity rather than sexual identity). It is this understanding of the term that has been relied upon in much international hate crime legislation.[29] It is also this interpretation of the term that has been taken up in comparable Australian legislation, such as discrimination law. For example, the Tasmanian Office of the Anti-Discrimination Commissioner defines sexual orientation as 'heterosexuality, bisexuality, homosexuality or transsexuality'.[30] Notably, some Australian jurisdictions have sought to avoid any suggestion that anti-discrimination legislation could be applied to adults who engage in sexual conduct with children by employing the phrase 'lawful sexual activity' which specifically excludes discrimination on this basis.[31]

There is another potential reading of the decision in *Dunn* which would offer even less comfort. If the court was aware that the phrase 'sexual orientation' is commonly used to signify homosexuality, as explained above, is it possible that it has failed to appreciate the difference between homosexuality and paedophilia? Gay men are only too familiar with the ease with which adult homosexual conduct is confused with paedophilia. Whilst there is reason to be hopeful that such slippage is less common today, it would be an outrage if the court in *Dunn* had lapsed into this kind of homophobic presumption. Fortunately, there is no evidence that the court in *Dunn* did conflate homosexuality with paedophilia in this way.

Conclusion

The decision in *Dunn* does nothing to advance the fight against ingrained and unjustified manifestations of prejudice. It provides no encouragement to those who see hate crime laws as an important tool in this struggle. On the contrary, it lends support to opponents of hate crime law who argue that there is no sound basis upon which to draw a coherent line between those groups that should be protected and those that should not. It is difficult to defend a law that imposes a heavier penalty for crimes motivated by hatred towards paedophiles yet ignores crimes motivated by gender bias. Whilst it is possible that the Court of Criminal Appeal's interpretation of s 21A(2)(h) can be traced to the vague terminology of the provision, an alternate and arguably more logical interpretation was open to the court on the face of the wording as it stands. Moreover, the court's failure to consider the provision in the context of its likely objectives — there is ample secondary literature on the purpose of hate crime legislation and comparable international sentence aggravation provisions — has produced a technically artificial construction far removed from the social problem of prejudice-related crime and violence.

Yet perhaps it is overly optimistic to think that the court would have found appropriate guidance had it turned its attention to the purpose of the provision. It is probably no coincidence that the New South Wales government chose to introduce s 21A(2)(h) in the midst of the furore over supposed 'ethnic gang rapes' in Sydney in 2002. It is a reform that has been described as less of a progressive expansion of anti-discrimination policy into the criminal arena and more of a politicised response to a 'moral panic about the rise of "ethnically" motivated Lebanese gang rape in Sydney.'[32] Such quick fix political solutions rarely offer a satisfying touchstone for determining careful and constructive responses to real social problems.

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29. Jenness and Grattet, above n 20, 54–62. Although the possibility that term sexual orientation could be misinterpreted to include 'child molestation' has led to the use of alternative phrases, such as 'homosexuality and heterosexuality' in some US legislation: ibid, 60.

30. Government of Tasmania (Office of the Anti-discrimination Commissioner), *Sexual Orientation and Lawful Sexual Activity: Discrimination* (available at <antidiscrimination.tas.gov.au/__data/assets/pdf_file/0003/108831/adc_sexualorientation.pdf> at 28 October 2009. The *Anti-discrimination Act 1977* (NSW) gives no guidance here as the relevant ground is narrowly defined as 'homosexuality': s 49ZG.

31. *Equal Opportunity Act 1995* (Vic) s 6(l); Government of Victoria (Victorian Equal Opportunity and Human Rights Commission), *Sexual Orientation and Lawful Sexual Activity* (2004) <humanrightscommission.vic.gov.au/types%20of%20discrimination/sexual%20orientation/default.asp>, at 28 October 2009. Ironically, the use of the phrase 'lawful sexual activity' may not provide such a safeguard if the legislation also covers 'sexual orientation' or 'sexuality' and these terms were to be interpreted to include paedophilia. See, for example: *Equal Opportunity Act 1995* (Vic) s 6(d); *Anti-Discrimination Act 1991* (Qld), ss 7(l),(n).

32. Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the "War on Terror" ' (2007) 30 *Melbourne University Law Review* 923 at 948.