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# CHANGING THE CRIMINAL LAW TO COMBAT RACIALLY MOTIVATED VIOLENCE

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## I. Introduction

Recently, I wrote an article in a state newspaper calling for the introduction of hate crime legislation in the wake of the Cronulla riots late last year. In response, I received many emails, letters and phone calls from disgruntled members of the community wishing to convey their utter dismay at what they saw as my pugnaciousness against White Australians. However, my real fame came when my name was posted on a white nationalist website calling upon members of the community to contact me. Some accused me of attempting to dismantle White Australian society as we know it, while others said I had written a hate filled article that was yet another fierce attack on Australians of European descent. Moreover, what was consistent throughout all who contacted me was their willingness to vocalise their animosity towards Muslim and/or Lebanese Australians.

The acrimonious response I received from the public demonstrates the difficulty currently facing Australian society in regards to race relations. This will surprise few people, especially since the events of 10 December 2005 have been so widely publicised. Further many other racially motivated violent acts have occurred in Australia both before and after the Cronulla riots.<sup>1</sup>

Crimes committed by an offender because of the victim's race or ethnicity are called "hate crimes".<sup>2</sup> The phenomenon of racially motivated crime is by no means new to Australia.<sup>3</sup> For many years Aborigines through-

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1 See Scott Poynting and Greg Noble, "Living with Racism: The Experience and Reporting by Arab and Arab Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001" (2004) <[http://www.hreoc.gov.au/racial\\_discrimination/isma/research/UWSReport.pdf](http://www.hreoc.gov.au/racial_discrimination/isma/research/UWSReport.pdf)> at 5 October 2006; Tanja Dreher, "'Targeted' Experiences of Racism in New South Wales after September 11, 2001" (2005) <<http://www.shopfront.uts.edu.au/news/2005-10.html>> at 5 October 2006.

2 They are sometimes referred to as bias crimes. Hate crime is an umbrella term for all crimes which are committed by reason of some characteristic held by the victim. For example, A assaults B because B is (or is perceived to be) either Muslim, black, disabled or gay etc.

3 See Judy Atkinson, "Violence against Aboriginal Women: Reconstitution of Community Law—The Way Forward" (2001) *Indigenous Law Bulletin* 62; Chris Cunneen, "Hate and Hysteria: The Vilification of Aboriginal and Torres Strait Islander People" in Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate, Hate Crime in*

out Australia have suffered from widespread vilification.<sup>4</sup> Yet, unlike many other Western countries such as the US and the UK, Australia does not recognise racially motivated violence as an offence under the criminal law.

In 1998, the UK introduced a new crime of “racially aggravated assault”.<sup>5</sup> This created, for the first time, an offence which was characterised by racial motivation. The UK Government expressed the need for such a crime as being essential to combating racially motivated violence and protecting ethnic minorities from intimidation.<sup>6</sup> The new laws are not just variations of standard crimes but they represent a distinct classification of criminal conduct. Perhaps the biggest justification behind the criminalisation of such conduct is the fact that the gravity of harm created by racial violence is higher than other parallel offences.<sup>7</sup> Specifically, the aftermath of racial violence can be far reaching. It can lead to prolonged periods of depression, serious anxiety, and social phobias amongst its victims.<sup>8</sup> Not only has research shown that the psychological harms incurred are increased in cases involving hate motivation, but the physical violence accompanying hate crimes is also frequently more brutal.<sup>9</sup> This often leads to higher hospitalisation rates when compared with other assaults not motivated by prejudice.<sup>10</sup>

The harm created by racial attacks such as those witnessed in Cronulla have a contagion effect reaching all racial minority communities in Australia. In the aftermath of these riots and other unprovoked attacks, Muslim and Middle Eastern communities have become fearful that they will also be attacked.<sup>11</sup>

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*Australia* (1997) 137; Irene Moss, “The National Inquiry into Racist Violence” (1990) 1 *Without Prejudice* 7; David Greason, “Australia’s Racist Far-Right” in Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate, Hate Crime in Australia* (1997) 188.

4 Ibid.

5 *Crime and Disorder Act 1998* (UK) ss 28–32 and 96.

6 See Maleiha Malik, “‘Racist Crime’: Racially Aggravated Offences in the Crime and Disorder Act 1998 Part II” (1999) 62 *Modern Law Review* 409.

7 See Ivan Hare, “Legislating against Hate—The Legal Response to Bias Crimes” (1997) 17 *Oxford Journal of Legal Studies* 415.

8 See Wesley Skogan, “The Fear of Crime and Its Behavioral Implications” in Ezzat Fattah (ed), *From Crime Policy to Victim Policy: Reorienting the Justice System* (1986) 167; G M Herek, J C Cogan and J R Gillis, “The Impact of Hate Crime Victimization” (Paper presented at the congressional briefing co-sponsored by the American Psychological Association and the Society for the Psychological Study of Social Issues, Washington DC, November 1997); see <<http://www.apa.org/ppo/issues/pherek.html>> at 2 July 2006 for a summary of the findings; Mark Walters, “Hate Crimes in Australia: Introducing Punishment Enhancers” (2005) 29(4) *Criminal Law Journal* 201, 209–10.

9 See Brian Levin, “Bias Crimes: A Theoretical and Practical Overview” (1992–1993) 4 *Stanford Law and Policy Review* 165; Jack Levin and Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Blood Shed* (1993); see also Krishten Kuehnle and Anne Sullivan, “Patterns of Anti-Gay Violence: An Analysis of Incident Characteristics and Victim Reporting” (2001) 16(9) *Journal of Interpersonal Violence* 928, who found that 88.8% of anti-gay offences reported to the police by gay men were personal in nature; fifty per cent had been of serious personal nature including murder, robbery, sexual assault and assault with or without a weapon. See generally Walters, above n 8, 208–09.

10 Brian Levin, “Hate Crime: Worse by Definition” (1999) 15(1) *Journal of Contemporary Justice* 6, 15.

11 See Walters, above n 8, 210.

This fear is further compounded through the willingness of people to voice their dislike for individuals of Muslim or Middle Eastern appearance. This has been bolstered by a general acceptance of racist or xenophobic attitudes found within many Australian communities.<sup>12</sup> It is this acceptance which is the key to the perpetuation of high levels of racial violence throughout Australia.

This article will examine the potential impact that hate crime legislation could have on victims, offenders and the community.

In particular this article examines:

- (1) The problem of rising racial violence as a serious threat to the safety of minority racial groups.
- (2) The harms caused to victims and minority communities.
- (3) The need for the State to send a strong message to Australian society proscribing racial violence.
- (4) A potential criminal law model to follow.
- (5) Why anti-vilification and sentencing provisions currently in place in New South Wales are insufficient.
- (6) Why potential problems with hate crime legislation should not prevent its introduction.

## **II. The Rise and Rise of Racial Violence: Race, Ethnicity and the “Arab Other”**

Racial tensions within Australian communities have greatly intensified since 11 September 2001.<sup>13</sup> The result has been an explosion of racially motivated violence particularly against those of Middle Eastern appearance.<sup>14</sup> A similar situation was experienced during the Gulf War of 1991 when racially motivated crime increased throughout Australia due to a propensity for many people to see anyone of Middle Eastern appearance as the enemy.<sup>15</sup> The gradual decrease in these attacks some years after the precipitating events has unfortunately been short lived. Since the terrorist attacks in New York and the ensuing war on terror thereafter, the interaction between White Australians and Australians of Middle Eastern appearance has been somewhat strained. This has led to a dramatic increase in racially motivated violence not just against Muslims, Lebanese and Middle Eastern people but various other residents and citizens who resemble them.<sup>16</sup>

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12 See Poynting, above n 1; and Dreher, above n 1. See also the following articles for a discussion on the relationship between racist attitudes and racially motivated violence: Larry Ray, David Smith and Liz Wastell, “Shame, Rage and Racist Violence” (2004) 44 *British Journal of Criminology* 350; Rae Sibbit, “Home Office Research Study 176”, *The Perpetrators of Racial Harassment and Racial Violence* (1997).

13 See Poynting, above n 1; and Dreher, above n 1.

14 Ibid.

15 Poynting, above n 1.

16 Ibid. Poynting found that events in 1991 (Gulf war) 2001 (World Trade Centre attacks) and 2002 (Bali bombings) have had the biggest impact on the increase of racial violence: Scott Poynting, “Bin Laden in the Suburbs’: Attacks on Arab and Muslim

In relation to the analysis of whether racially motivated violence should become an offence itself, one obvious difficulty is the distinction between race and/or ethnicity and religion. In this regard it is important to understand whether offenders are preoccupied with their victim's religious beliefs or ethnic background. If the offender is preoccupied *only* with the victim's religion, racially motivated assault as a crime is inapplicable.<sup>17</sup> The difficulty, however, is race and religion are not always mutually exclusive. Being Middle Eastern (race or ethnicity) has been equated by many with that person also being Muslim (religion).<sup>18</sup> In this sense, race and religion are almost synonymous in terms of the offender's perceptions.

For many offenders, whether a "Middle Eastern" Australian is Muslim, Hindu, Buddhist, Christian or Atheist appears to make no difference as long as their perception of 'Middle Eastern' remains. It is therefore a perception based not simply on religious beliefs but on race, religion and ethnicity combined.

Therefore, "Middle Eastern" people (rather than just Muslims) have come to represent the depraved. They are perceived by many to be a community who should be feared and mistrusted. This fear is propelled by a belief that all Muslims/Middle Eastern people are potential terrorists, driven by a religion that compels them to destroy Western culture. As such, we have now seen the emergence of what Scott Poynting describes as the "Arab other"<sup>19</sup>, the black sheep of society who threatens our existence as a cohesive democratic society. Those who are of Middle Eastern or "Arab" appearance (whether they are or not) have therefore become an ethnic group ostracised from the rest of society.<sup>20</sup>

In fact, research by the Human Rights and Equal Opportunity Commission (HREOC) into racial violence in 1991 found that there were various reports of racially motivated violence against people of Middle Eastern appearance who were neither Arab nor Muslim.<sup>21</sup>

More recently in 2004, Poynting produced a report to HREOC into the extent of violence, abuse and discrimination against Arabs and Muslims in Sydney and Melbourne.<sup>22</sup> Respondents were asked to answer questions

Australians Before and After 11 September" (2002) 14 (1) *Current Issues in Criminal Justice* or the hijab. See also P Newell, *Migrant Experience of Racist Violence: A Study of Households in Campbelltown and Marrickville*. Sydney, Human Rights and Equal Opportunities Commission (1990).

17 While it is the author's belief that hate crimes should cover a range of different minority groups including religion, this article will concentrate on racial violence. For a general discussion of hate crime offending see Walters, above n 8.

18 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 362; Ahmed Muneer, "A Rage Shared by Law: Post-September 11, Racial Violence as Crimes of Passion" (2004) 92 *California Law Review* 1259.

19 Poynting, above n 1.

20 The construction of "Muslim-looking" people is also discussed in Muneer, above n 18, 1295.

21 Human Rights and Equal Opportunity Commission, above n 18.

22 Poynting, above n 1.

relating to their experiences since 11 September 2001. Two thirds of respondents had personally experienced an increase in racism since this date.<sup>23</sup> Further, 27 per cent of Muslims experienced racism on a weekly basis.<sup>24</sup> Significantly, 71 per cent of those who had experienced racist abuse or violence identified the perpetrator as being White Australian.<sup>25</sup>

As a secondary part to his investigation, Poynting used face to face interviews in order to determine the experiences of the respondents. A story is told of several women who had suffered racial attacks. One woman, a young second generation Lebanese, had experienced several incidents of violence including being struck on more than one occasion and the stabbing of a young male of Middle Eastern appearance who had tried to defend her.<sup>26</sup>

After 11 September the Community Relations Commission for a Multicultural NSW (CRC) set up a hotline to receive calls relating to racially motivated attacks. Research into these calls by Tanja Dreher found that in the two months after the attack 248 reports were made to the hotline.<sup>27</sup> Out of the 248 reports, 320 incidents had occurred and forty two of these (13.2 per cent) involved a physical assault, with thirty of these occurring in a public space.<sup>28</sup>

Poynting's and Dreher's research in 2004 and 2005 painted a disturbing picture of racial violence throughout Australia. One year later that picture was put on national display when 5000 White Australians clashed with those of Middle Eastern appearance in the Sydney beach town of Cronulla.<sup>29</sup> Within hours, the violence spread and the towns of Maroubra and Rockdale were vandalised.<sup>30</sup> Several instances of property damage at the Rockdale railway station were reported and one man was stabbed in the back when assaulted by a gang of ten men of Middle Eastern appearance, apparently as a reprisal for an earlier incident.<sup>31</sup> Reports of violence were also made in Brighton Le Sands,<sup>32</sup> Ashfield in Sydney's Inner West, as well as Bankstown and Punchbowl.<sup>33</sup>

23 Ibid, 6.

24 Ibid, 7.

25 Or some similar identification including: "Aussie", "Anglo", "Anglo-Australian". Ibid, 6. Only six and a half per cent of these reported the abuse/attack to the police.

26 Poynting, above n 1, 10. Other stories are documented at 10-11.

27 Dreher, above n 1.

28 The others happened at the shops (4), in the resident's neighbourhood (5) and at school (3). Ibid, 11.

29 11 December 2005.

30 ABC News Online, *Violence Moves to Maroubra* (11 December 2005) <<http://www.abc.net.au/news/newsitems/200512/s1528611.htm>> at 4 July 2006.

31 National Nine News, *Man Refused Bail over Cronulla Attack* (29 June 2006) <<http://news.ninemsn.com.au/article.aspx?id=109337>> at 4 July 2006.

32 ABC News Online, *Violence Spreads to a Third Sydney Suburb* (12 December 2005) <<http://www.abc.net.au/news/newsitems/200512/s1528619.htm>> at 4 July 2006.

33 Sydney Morning Herald News Report, *Sydney's Racial Tension Spreads* (11 December 2005) <<http://www.smh.com.au/news/national/sydneys-racial-tension-spreads/2005/12/11/1134235950547.html>> at 4 July 2006. For a full report on all the events surrounding the Cronulla riots see Wikipedia, *Cronulla Riots 2005* <[http://en.wikipedia.org/wiki/2005\\_Cronulla\\_riots#endnote\\_abc5](http://en.wikipedia.org/wiki/2005_Cronulla_riots#endnote_abc5)> at 4 July 2006.

Since the riots, New South Wales police have made over eighty five arrests and laid over 230 charges.<sup>34</sup> The most common charges laid for violent offenders have been affray (thirty one per cent) and riot (twenty seven per cent).<sup>35</sup> Other charges include assaulting police, threatening violence, malicious damage and resisting arrest. One man has been charged with affray and maliciously inflicting grievous bodily harm with intent.<sup>36</sup>

So far, nineteen people have been prosecuted for a criminal offence with fourteen of those resulting in a conviction.<sup>37</sup> Just four people have been jailed, with the longest sentence being nine months. Four people have received community service orders, three people have been fined, two have been given a bond and one person has received a suspended sentence.<sup>38</sup>

This means that with over 5,000 people, hundreds of violent incidents, extensive video coverage and police presence, only fourteen people have been convicted of an offence. Important to this discussion is that no single offender will face charges for racially aggravated offending.

### III. Do we Need an Offence of Racially Aggravated Assault?

The fact that in New South Wales (or any other State) none of the criminal offences of assault, grievous bodily harm, wounding, affray or riot contain a motivation component means that the criminal law almost completely ignores an offender's racial motivation.

Opponents of hate crime legislation often argue that the introduction of a motivation based on prejudice is not needed because standard criminal laws already punish offenders fairly.<sup>39</sup> That is, an assault is an assault regardless of why the offender committed the offence. The main argument is that all offenders should be treated the same in the pursuance of an objective, fair and consistent criminal justice system. Traditionally the criminal law is not normally concerned with why an offender committed an offence, but only that he intended to do it.<sup>40</sup>

However, racially motivated crime is much more complicated than this. This is because violent crime that has been motivated by prejudice against someone's race has far reaching impacts on both the victim, the minority community they come from and wider society.

34 Information obtained through Wendy Valois, Media Liaison Officer New South Wales Police. Email from Wendy Valois to Mark Walters, 16 May 2006.

35 Ibid.

36 Yahya Jamal Serhan will appear in Bankstown Central Local Court via video link on 27 July 2006.

37 Valois, above n 34.

38 Ibid.

39 See for example, James Jacobs and Kimberly Potter, *Hate Crimes* (1998).

40 See Walters, above n 8, 211–12.

## A. The Individual Impacts of Racial Violence

The severity of harm created by racial violence is highly supportive of an argument in favour of creating a separate offence for racially aggravated assault. Research conducted in the United States suggests that bias violence is more brutal and causes more harm to the victim than other victims in general. For example, Brian Levin notes that not only are hate crime attacks more likely to involve physical harm but that the harm is also likely to be of greater severity.<sup>41</sup> Indeed, hate crimes are twice as likely to cause personal injury as parallel offences not motivated by hate.<sup>42</sup> That would mean that a victim who is perceived to be Lebanese or Middle Eastern is twice as likely to suffer injury when attacked because of his ethnicity. Racial violence is therefore likely to carry a higher level of brutality when compared with other violent altercations. This assertion is supported by research which shows that victims of bias attacks are also four times more likely to be hospitalised.<sup>43</sup>

Research conducted by Brian Levin and Jack McDevitt also supports the contention that hate crimes are often more severe than other crimes.<sup>44</sup> They examined the “Boston Project”, which looked at hate crimes between 1983 and 1987, finding that seventy five per cent of assault victims had suffered physical injury. In comparison, the national average indicated that only thirty per cent of assault victims suffered physical injury.<sup>45</sup>

Beyond typically causing greater physical harm, the psychological harm caused by an act of racial violence is frequently more severe compared with other acts of violence. Research shows that the impact a crime has on a victim may differ depending on the circumstances of the individual.<sup>46</sup> Key factors in this determination are “vulnerability”, “resources”, “isolation” and “previous experiences”.<sup>47</sup> Linked to these factors are the differential impacts that hate crimes have on individuals from minority groups compared with similar violent crimes that are not motivated by racism.

Levin notes that research by the National Institute Against Prejudice and Violence<sup>48</sup> found that victims of hate related criminal and non-criminal attacks experienced twenty one per cent *more* adverse psychological and physiological symptoms than those who had suffered similar attacks that were not hate related. Although not victims of racial violence, Herek et al reported that “Lesbian and gay survivors of hate crimes showed significantly more signs of psychological distress—including depression, stress, and anger

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41 Levin, above n 9.

42 That is, physical attacks.

43 Levin, above n 10, 15.

44 Levin and McDevitt, above n 9.

45 See also Kuehnle and Sullivan, above n 9.

46 See Skogan, above n 8.

47 Ibid.

48 Baltimore MD, National Institute Against Prejudice and Violence, *The Ethnoviolence Project*, Institute Report No 1 (1986), cited by Levin, above n 9, 17.

—than did lesbian and gay survivors of comparable non-bias-motivated crimes.”<sup>49</sup> Distress of victims was “heightened” due to “personal danger” and “vulnerability” associated with them belonging to the gay and lesbian community.<sup>50</sup> This vulnerability is equally shared with victims of racial violence who also fear victimisation because of how they look.

This suggests that in addition to the sense of vulnerability many victims of crime suffer, victims of racially motivated violence suffer further psychological damage because their ethnicity and race is an important part of who they are. As a result, they become isolated from the general public. Herek et al also note that the duration of psychological harm can last longer for victims of bias abuse. They found that victims of hate crime suffered from prolonged periods of “depression, stress and anger for as long as 5 years after their victimisation occurred”.<sup>51</sup> In contrast, the psychological harm suffered by other non-hate related victims showed vast improvements within two years.<sup>52</sup>

Like all crimes, we must distinguish between the severity of each offence by looking at the culpability of the defendant and the harm he has caused. Evidence which shows that racial violence creates greater harm to the victim requires that a harsher penalty is imposed. This contention is made more compelling when the harm suffered by the community is also examined.

## B. Community Impacts

Many Middle Eastern communities throughout Australia have been feeling the heat since 11 September 2001.<sup>53</sup> Violent attacks act not only to seriously injure the primary victim but create further fear and isolation amongst other community members who bare the same characteristics. These people become secondary victims of a violent crime aimed not just at a single individual but at a whole group of people hated for what they look like.<sup>54</sup>

Documentation of attacks through the local and national media and through word of mouth spreads a harrowing message to other minority communities that they could be next.<sup>55</sup>

Dreher’s research using the findings from the CRC hotline found that the most common impact that 11 September had on individuals of Middle Eastern decent was “fear coupled with feelings of insecurity and isolation.”<sup>56</sup> Callers expressed fear for themselves and other family members who were afraid to leave the house.<sup>57</sup> The research also found

49 Herek et al, above n 8.

50 Ibid.

51 Ibid.

52 Ibid

53 See Part I.

54 And/or what they are perceived to represent.

55 Concerns that the media has been supportive of racial attacks were voiced by callers in Dreher’s study of the CRC hotline: Dreher, above n 1, 23.

56 Dreher, above n 1, 19.

57 Ibid, 19 and 20.



that overwhelming feelings of fear meant that many victims did not want to report incidents to the police through a fear of potential repercussions. This was consistent amongst most callers, demonstrating that they had a total lack of confidence in the State to help or protect them.<sup>58</sup>

Thus, the wider consequence of racial violence is to actively oppress the rest of the racial/ethnic group (and other like groups). This creates immense feelings of fear for individual safety, vulnerability and persecution. Primary and secondary victims are left feeling helpless as they perceive the State does not sympathise with their situation.

There will be others in society who sympathise with the minority group being targeted but fail to speak up in its defence for the reason that they do not want to subvert the majority attitude and become unpopular themselves. Even worse, they may also fear that they too would become a target of the violence.<sup>59</sup>

This ultimately leads to a state of social unrest whereby members of a racial group feel completely helpless and ostracised from the rest of society.<sup>60</sup> The unsympathetic approach traditionally taken by the police towards racial minorities acts only to create further isolation.<sup>61</sup>

The overall impact that racial violence has on minority communities is further justification for the introduction of legislation proscribing hate crime offences. It is important to a community that it has confidence in the criminal justice system. The reluctance of the government to introduce hate crime laws means that the criminal justice system is currently failing to protect minority racial groups adequately. The protection of minority groups by the state is axiomatic in creating a more harmonious society. For if minority groups do not feel a sense of protection by the state they will be less inclined to feel a part of the wider community. Worse still is the potential problem that failing to give specific legal protection to ethnic minorities (from racially motivated attacks) will lead to minority communities resenting the State and the majority race. In this case, the situation worsens, as instead of the integration of ethnic minority communities becoming stronger, the ostracising of minority groups ensures that they are further segregated from the rest of society.<sup>62</sup> As this

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58 Ibid.

59 See Frederick M Lawrence, *Punishing Hate* (1999) 43, 44.

60 In fact, Dreher notes that many of the callers in her study did not feel that they belonged to Australian society. Many of them referred to Australians as white or Anglo. Victims had been told to “go home” to learn English or that they were not wanted in Australia. This was even though many were born in Australia and had Australian citizenship: Dreher, above n 1.

61 See Janet Chan, “Police Racism: Experiences and Reforms” in Stephen Castles and Ellie Vasta (eds), *The Teeth are Smiling: The Persistence of Racism in Multicultural Australia* (1996) 160–72. Robert White, “Racism, Policing and Ethnic Youth Gangs” (1996) 7(3) *Current Issues in Criminal Justice*, 302; Scott Poynting, “Accounting for Cultural Diversity?: The Recent Record of the New South Wales Police Service” (2000) 12(2) *Current Issues in Criminal Justice* 223.

62 Dreher notes that many of the callers felt they were “under siege” or “under attack” from the rest of society: Dreher, above n 1, 23.

occurs, the relationship between minority and majority racial groups deteriorates and the frequency of racially motivated violence will ultimately increase.

#### IV. Legislation's Symbolic Power: A Strong Message of Express Denunciation

Rae Sibbit suggests that rather than perpetrators of racial violence being miscreants of society, they are in fact acting in concert with the general attitudes of the community in which they live. This is reinforced by regular expressions between each other and verbal abuse towards those of ethnic minorities.<sup>63</sup>

Gail Mason's research into homophobic and racial harassment in the UK, points to the fact that much of this type of abuse is carried out in groups, indicating that encouragement by peers is integral to the carrying out of racially motivated crime.<sup>64</sup> The relationship between the perpetrator and the community in which they live is therefore intrinsic to their willingness to act violently.

Some academics have argued that the criminal law is a useless tool in combating hate crimes.<sup>65</sup> This is because racism runs too deeply for laws to prevent those from acting out their hatred. There is some cogency in this argument and the author certainly does not intend to purport that the criminal law will miraculously cure racism. Yet, this should not deter us from attempting to use the criminal law as a way of reducing racially motivated violence.<sup>66</sup>

Traditionally, the criminal law has been used, amongst other purposes, to denunciate the actions of criminal offenders.<sup>67</sup> However, this purpose becomes difficult to achieve where mainstream social attitudes support the racist views of the offenders. A stronger message is therefore needed to combat racist norms.

The criminal law can play a useful role in attempting to change the general attitudes of people towards those of different races. Introducing hate crime legislation will ultimately provide a strong message to communities that racist violence is utterly condemnable. The message does not necessarily act to deter potential offenders straight away,<sup>68</sup> but instead, the effect is more subtle. The use of hate crime legislation progressively

63 Sibbit, above n 12.

64 Gail Mason, "Hate Crime and the Image of the Stranger" (2005) 45 *British Journal of Criminology* 837.

65 See for example, Jacobs and Potter, above n 39.

66 It should also be borne in mind that the hate crime laws are not just about deterring offenders but also fairly reflect the seriousness of the crime. That is, the offender should be punished in proportion to the harm caused to the victim and the community.

67 See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

68 Indeed some academics believe that hate crime legislation will have no deterrent effect because they do not pay attention to what the criminal law states at all: see Jacobs and Potter, above n 39, 66.

creates awareness about hate crime offending. The use of media coverage in relation to hate crime offending and prosecutions under the new offences helps to provide a basis from which racially motivated crime slowly becomes socially unacceptable.

In turn, the criminal law (amongst many other social, economic and political forces) can help to change community attitudes towards racist offending. Potential perpetrators will fail to obtain the support and encouragement that allows them to use violence in a way which has previously empowered them.<sup>69</sup> As community support wanes, the willingness of those to assault others for the single reason that their victim is from a different race should decrease. This is not necessarily because they no longer hold hatred for Middle Eastern people, but because they lack the support they need to carry out the offence.

This does not mean that all racist violence will become obsolete. There will always be those with extreme views who have a propensity to act violently.<sup>70</sup> Instead, hate crime legislation will have a long term effect.<sup>71</sup> In this sense it will potentially reduce the likelihood of incidents such as the Cronulla riots, i.e. incidents which arise from a general attitude of racism fuelled by a perceived grievance towards a particular racial community. Racist attitudes are not necessarily considered “extreme” amongst community members. It is the attempt to dismantle the acceptance of violence as a response to these attitudes which is the key to the effectiveness of hate crime legislation. Thus the interconnection between community attitudes and racial violence demonstrates the need for an appropriate legal response that targets community ideology.

This theory of hate crime law is not without criticism. There are other influences shaping racism such as religion, socio-economics and political forces which may outweigh the potential impact of the criminal law. In fact, the extent to which the criminal law can successfully challenge people’s ideologies about crime may very well also depend on the extent to which changes are made in other areas of life. This may include structural and policy changes in policing, government social policy, education, parenting as well as the media and television programming. However, without attempting to change the criminal law in support of proscribing racially motivated violence we are doing nothing at all to challenge the way in which people perceive racially motivated crime.

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69 The media coverage of hate crime offences which will accompany new laws will convey the serious consequences that racially motivated violence can have. This will support a preferred attitude against racist crime: see Craig L Uhrich, “Hate Crime Legislation: A Policy Analysis” (1999) 36 *Houston Law Review* 1467, 1497ff.

70 Many offenders believe in the absolute right of their actions: see Uhrich, above n 69.

71 The effect may be undermined if other areas are not aligned to combat racism, such as education, social policy, the media and policing.

## V. A Model from the UK

Much of the USA,<sup>72</sup> Europe<sup>73</sup> and now the UK<sup>74</sup> have implemented hate crime legislation in an attempt to recognize the seriousness of racially<sup>75</sup> motivated crime.

In the UK, racially aggravated offences were introduced under the *Crime and Disorder Act 1998*. Sections 29-32 lay out several different standard crimes which become aggravated crimes if a racial or religious motivation can be proven. Section 28 prescribes that:

(1) An offence is racially or religiously aggravated for the purposes of sections 29 to 32 below if—

(a) at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial or religious group; or

(b) the offence is motivated (wholly or partly) by hostility towards members of a racial or religious group based on their membership of that group.<sup>76</sup>

Section 28(3) adds that it is immaterial if the offender was also motivated by some other factor as well. It is therefore clear that racially aggravated assault can occur where the motivation for the attack is not solely based on race.<sup>77</sup>

It is important that the word “presumed” is also contained in any legislation proscribing prejudiced motivation. Presumed should mean presumed by the offender, i.e., the offender presumed or perceived the victim to belong to a certain racial or ethnic group.

Under the UK Act the term “racial group” is defined as a group of persons in reference to race, colour, nationality (including citizenship) or ethnic or national origin.<sup>78</sup> Both of these provisions would be extremely important in scenarios such as those which occurred in Cronulla. Many of those attacked in Cronulla were victims who had been perceived to be of Lebanese or Middle Eastern origin. Many of the victims were Australian citizens whose ethnic origins are found in the Middle East.

Therefore as previously discussed, the fact that much of the racial violence since 2001 has been characterised by both race, ethnicity and

72 See Lawrence, above n 59, for a full description of every state's legislation.

73 See broadly, Margaret Shaw, *Preventing Hate Crimes: International Strategies and Practice* (2002,) International Centre for the Prevention of Crime, <[http://www.crime-prevention-intl.org/publications/pub\\_3\\_1.pdf](http://www.crime-prevention-intl.org/publications/pub_3_1.pdf)>.

74 See Malik, above n 6.

75 And other prejudices towards religion, sexual orientation and disability.

76 Section 82 then provides for increasing the sentence of each offence. The *Criminal Justice Act 2003* (UK) now provides for new aggravating factors at sentencing only including crimes that were motivated by the defendant's prejudice towards the race, religion, disability and sexual orientation of the victim: ss 145, 146.

77 However the racial motivation should be the main motivation. This means that the courts should ask themselves the following question: can it be said that if it had not been for the victim's ethnicity or race the attack would not have taken place? If the answer is yes, the assault should be characterised as a hate crime.

78 Section 28(4).

religion a section such as 28 would allow offenders to fall under the terms of the Act as having partly been motivated by the ethnicity of the victim. That is, they would not have attacked their victims had it not been for their appearance of being Lebanese/Middle Eastern.

The new legislation represented a major change in the UK's response to racially motivated violence. The previous approach, which adopted the view that racially motivated crime could be sufficiently dealt with by standard criminal laws, was rejected when the new Labour party came into power in 1997. This position should now be taken up by the New South Wales and Commonwealth Governments.<sup>79</sup> The offences of racially aggravated assault should cover all offences contained in Divisions 6 and 8 of the *Crimes Act 1900* (NSW) such as 35,<sup>80</sup> 35A,<sup>81</sup> 56-59A<sup>82</sup> and 61.<sup>83</sup>

For example, the UK Act reads:

29. (1) A person is guilty of an offence under this section if he commits-
- (a) an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm);
  - (b) an offence under section 47 of that Act (actual bodily harm); or
  - (c) common assault, which is racially or religiously aggravated for the purposes of this section.

This incorporates all criminal violent acts under one section allowing for the offence to be imposed regardless of what type of assault was committed. It allows for an easier injection of hate crime provisions into the criminal law without creating new substantive crimes for each different type of assault.

While assault is perhaps the most important type of crime in a discussion of racial violence, hate crime legislation should also encompass criminal damage to property<sup>84</sup> and public order and harassment offences.<sup>85</sup>

## VI. Current Anti-discrimination Laws in New South Wales

In regards to public order and harassment, Australian law is not completely silent on the issue of racially motivated conduct. Under section 18C of the *Racial Discrimination Act 1975* (Cth) it is unlawful to do an act which is reasonably likely to humiliate or intimidate that person/s and the conduct was done because of the race of that person/s. However the Act does not make it an offence to do this and it is therefore not a behaviour which is punishable by the criminal law. State legislatures have also enacted laws

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79 See Malik, above n 6, 409.

80 Malicious wounding or infliction of grievous bodily harm.

81 Maliciously cause dog to inflict grievous bodily harm or actual bodily harm.

82 Assaults.

83 Common assaults. This list is by no means exhaustive.

84 Found in s 30 of the *Crime and Disorder Act 1998* (UK); see *Crimes Act 1900* (NSW) 195-98.

85 Found in ss 31-33 of the *Crime and Disorder Act 1998* (UK). See discussion under anti-violification provisions below.

which protect individuals from discrimination based on race.<sup>86</sup> These laws prescribe that discriminating against a person on the grounds of his/her race/ethnicity is unlawful. However, they are only applicable in certain areas of life, for example, “education” or “employment in the workplace”.

More important to the discussion of hate crime offending are acts which specify *vilification* as criminal. These acts are not limited to specific areas of life. Instead, they include acts that occur in the public domain.

For example, under section 20D *Anti-Discrimination Act 1977* (NSW) it is an offence, as a public act, to incite hatred towards a person or group by threatening physical harm towards him/her or inciting others to threaten physical harm.<sup>87</sup> The maximum penalty for this is six months imprisonment. Other states have included similar provisions.<sup>88</sup>

Strangely no one identified in the Cronulla riots has been charged with the offence of inciting racial violence. In fact, since the legislation became active seventeen years ago no offender has been prosecuted under the Act.<sup>89</sup>

One problem with prosecuting offenders under the legislation is that the police do not investigate offences of incitement of physical harm on the ground of race. Victims must contact the Anti-Discrimination Board (ABD) who will investigate the complaint. Unlike the police, the Board does not have the resources to carry out extensive investigations. This means that fewer cases are investigated and no official record of racial vilification complaints exist.<sup>90</sup>

Moreover, it is the wording of the Act which has largely reduced its

86 See *Anti-Discrimination Act 1992* (NT); *Equal Opportunity Act 1984* (WA); *Equal Opportunity Act 1995* (Vic); *Anti-Discrimination Act 1977* (NSW); *Discrimination Act 1991* (ACT); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Anti-Discrimination Act 1991* (Qld).

87 Section 20D, “Offence of serious racial vilification” provides that:

(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or  
 (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty:

In the case of an individual—50 penalty units or imprisonment for 6 months, or both.

In the case of a corporation—100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

88 Similar provisions from other jurisdictions include: *Discrimination Act 1991* (ACT) ss 66, 67; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19 (“inciting hatred”). The Commonwealth, Victoria, South Australia and Western Australia are yet to enact legislation on public acts of vilification on the grounds of sexuality but some do have statutes prohibiting racial vilification. Acts which prohibit vilification include: *Racial Hatred Act 1995* (Cth), *Racial Vilification Act 1996* (SA), *Racial and Religious Tolerance Act 2001* (Vic), *Equal Opportunity Act 1984* (WA).

89 See Mark Walters, “The Cronulla Riots: Exposing the Problem with Australia’s Anti-vilification Laws” (2006) 18(1) *Current Issues in Criminal Justice*.

90 A Working Party has produced a report reviewing the racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW) but this has yet to be tabled in Parliament.

effect.<sup>91</sup> Under the Act the burden of proof is too high for the prosecution to prove and therefore the Department of Public Prosecutions are unlikely to take potential cases to court. The prosecution must prove beyond reasonable doubt that the defendant incited hatred towards the victim on the grounds of race. The words “likely to cause incitement to hatred” are not incorporated, making the burden difficult to prove. Further, the Act does not mention that the defendant may have presumed the victim was from a particular race whether he is or not. Together the wording of the Act has made any attempt to prosecute offenders almost impossible. Until the language of the Act is reconstructed it will remain useless in the fight against racial abuse.<sup>92</sup>

### A. The Inadequacies of Sentencing Provisions

Under sentencing legislation in New South Wales a judge may take into account aggravating and mitigating factors when sentencing.<sup>93</sup> One aggravating factor that can be taken into account is that the offender was motivated by the race of the victim. Section 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) states that:

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).

The provision means that the court may pay regard to violent acts motivated by some forms of hatred when deciding upon a sentence.<sup>94</sup> The provision is recognition that racially motivated crime is more serious and therefore the offender deserves to be punished more severely. However, it does not set racial violence apart from other violent acts due the fact that the offender will still be convicted of a standard criminal offence.<sup>95</sup>

The fact that the crime remains the same therefore fails to adequately

91 Some have argued that the Government has rectified the uselessness of the anti-violification laws by creating new laws of sedition. The provisions were passed late in 2005 under *Anti-Terrorism Act (No.2) 2005* (Cth) (commencing in December). The Act amended *Criminal Code Act 1995* (Cth) to create the offence of urging one racial, religious, national or political group to commit violence against another. That is because the offender’s actions must also threaten “peace, order and good government of the Commonwealth”: Schedule 7, Part 5.1 (12), adding 80.2 to the end of Division 80 of the *Criminal Code Act 1995*.

92 On 5 December 2005, Nicola Roxon of the Labor Party introduced a private members’ bill called the *Crimes Act Amendment (Incitement to Violence) Bill 2005* (Cth). The Bill would have a wider application than the current New South Wales provisions on incitement to racial violence. The burden of proof under the new Bill is much lower, incorporating the words “reasonably likely”. This would only require the prosecution to prove that the act was reasonably likely to incite violence, rather than proving beyond reasonable doubt that it actually did. It is unlikely, however, that the Bill will pass when viewed against the traditional resistance for the controlling Liberals to pass similar bills in the past: see Walters, above n 89.

93 Section 21A *Crimes (Sentencing Procedure) Act 1999* (NSW).

94 Similar to ss 145 and 146 of the *Criminal Justice Act 2003* (UK); no other Australian state has such a sentencing provision.

95 See further Walters, above n 8, 209.

denunciate offenders.<sup>96</sup> For example, in the UK case of *Canvey and Corbett*<sup>97</sup> the court refused to give detailed guidance on the actual extent to which racial motivation aggravated the offence.<sup>98</sup> This meant that the law was not being used to its full potential in regards to expressly denouncing the racial motivation of the accused. This same predicament is occurring in New South Wales.

Earlier this year the following defendants were sentenced by Sutherland Local Court for the offences of affray and riot: Mitchell John Newby was sentenced to a minimum three months jail for riot on 10 April 2006. His appeal to the District Court was dismissed on 15 June; Danny Glen Shanahan was sentenced to a three month jail sentence after pleading guilty to riot on 5 April; and Geoffrey John Atkinson was sentenced to a nine month jail term with a non-parole period that expired on the day he was sentenced on 9 February. All of these defendants were involved in the Cronulla riots and were motivated by the race of their victims. As these cases were heard in the Local Court the full transcript of what the Magistrate said in relation to racial motivation was too difficult to obtain. However, it is noted that in each case section 21A(2)(h) was considered but the Magistrate cannot recall whether it was referred to or not.<sup>99</sup> In any case, I was told by the Magistrate that it was not appropriate to tell the public the reasons behind the sentences.<sup>100</sup>

However, if it is not appropriate to tell the public the reasons behind the sentence, surely the court fails to send a message of denunciation to the community in relation to this type of offending. Furthermore, the Magistrate's explanation seemed nonsensical, not least because most court cases are available either online in databases such as Austlii or via transcripts from the court itself.<sup>101</sup> If the Courts did not intend to express their reasons for sentencing to the public they would not write them in judgments and have them published in Law Reports or in online databases. Further, section 3A of the *Crimes (Sentencing) Procedure Act 1999* states that two of the purposes of sentencing are to "prevent crime by deterring the offender and other persons from committing similar offences", and "to denounce the conduct of the offender". These purposes would be extremely difficult to fulfil if judges did not express their reasons behind sentences to others outside of the case.

Although it is important for judges to explain the reasoning behind

96 See Hare, above n 7.

97 (1996) 2 Cr App R(S) 336, cited by Hare, above n 7.

98 This case was before the *Crime and Disorder Act 1998* (UK) incorporated the offence of Racially Aggravated Assault. The court could still take such motivation into account as a matter of discretion: *R v Ribban, R v Duggan, R v Ridley* (1995) Cr App R (S) 698.

99 Email from Magistrate Brydon to Mark Walters, 30 June 2006.

100 Ibid.

101 Although the latter is time consuming and at a high financial cost; the three transcripts for the above cases from Sutherland Court were quoted at costing over \$1,000 and would take several weeks to deliver: email from Sutherland Court Administration to Mark Walters, 26 June 2006.



why they have handed down a certain sentence, sentencing provisions themselves still do not have the same expressive impact that an actual criminal offence will have in its own right. The fact that the sentencing stage of proceedings becomes highly discretionary means that magistrates or judges do not have to impose aggravating factors such as those prescribed under section 21A(2)(h) at all. The express denunciation needed to combat the seriousness of racially motivated violence is therefore either ignored or inadequately fulfilled. This can only be successfully achieved via a separate offence of racially aggravated assault.

## VII. Arguments Against an Offence of Racially Aggravated Assault

### A. FREEDOM OF EXPRESSION

Some academics have argued that hate crime laws are unfair because they punish an offender's thoughts.<sup>102</sup> The argument is that although racist attitudes might very well be repugnant to a cohesive and integrated society, a person's freedom of expression is paramount to his liberty.<sup>103</sup>

However, hate crime laws are not aimed at punishing an opinion itself. It is the perpetration of violent actions because of an opinion that gives rise to culpability. There is a marked difference between merely expressing an opinion and that opinion motivating you to carry out violence.

Moreover, it is not the opinion that is punished but the *consequences* of the violence that is punished. The punishment reflects the impact that the offence has on the victim and the community. Hate crime laws are not aimed at restricting freedom of expression but instead reflect the severity of the consequences of racially motivated violence. These consequences have been explained above and include heightened levels of physical and psychological harm and serious emotional and oppressive impacts on the wider minority community. The law is also used to send a message of denunciation in relation to racist violence. This message does not prohibit racist thought but like many other messages sent from the government, encourages citizens to act cohesively and constructively by prohibiting racist crime.<sup>104</sup>

It is therefore the consequences of racially motivated violence which becomes paramount. Ignoring the impact of these crimes ignores the onus on the State to protect minority rights, such as freedom from vilification and abuse. It ignores the principle that punishment should be proportionate

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102 Susan B Gellman and Frederick M Lawrence, "Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground" (2004) 41(2) *Harvard Journal on Legislation* 421, 425.

103 See also Mark Stromer, "Combating Hate Crimes against Sikhs: A Multi-tentacled Approach" (2006) 9(3) *Journal of Gender, Race and Justice* 739.

104 For example, the Government advertises strong messages against smoking and prohibits it in certain areas on the basis of the public interest in health, however the right to smoke in one's home is still protected.

to the offence carried out, and it ignores the obligation on the State to promote a society free from racist violence.

Indeed, the affording of civil rights must have a limit where the harm created by that protection outweighs the need for the freedom. This is no groundbreaking theory of human rights. It makes up much of the basis of the criminal law. We are all free to do as we please without restriction unless it encroaches on other peoples' freedoms. I am free to go wherever I please unless it is into someone's private dwelling. I am free to drive my car into town as long as I do not break the speed limits or consume too much alcohol beforehand. Therefore, we are free to express racist thoughts unless we use these thoughts as a basis for physically assaulting someone.<sup>105</sup>

## B. FREEDOM OF ASSOCIATION

Evidence that the defendant belonged to or actively partook in a particular association may be used to prove that the defendant held a racist motivation. It has been argued that such evidence to prove animus is a breach of a defendant's freedom of association as it may later be used against the defendant in a court of law.<sup>106</sup> However, a person's freedom of association is not infringed because that person's membership in an association is neither being punished or prohibited. Rather, the membership is merely evidence to show that the person has a racist motivation. This works the same for most circumstantial evidence at trial. For example, witness evidence that a defendant was in the vicinity of a crime does not infringe on that person's freedom of movement. It is circumstantial evidence to prove that the defendant was at the scene of the crime.

The issue should not be whether evidence of belonging to the association is a breach of the defendant's human rights but whether it is *relevant* to proving his motivation. The fact that an offender is involved in the activity of a racist organisation may be probative evidence that the offender may have held racist motivations. This is for the judge to determine. Further a defendant's association only comes into question if the defendant is prosecuted for a racially aggravated offence and therefore one is free to belong to any lawful association that one pleases without restriction.

## C. TRADITIONAL CONCEPTIONS OF MOTIVE AND THE DIFFICULTY IN ADDING MOTIVATION

The intention to carry out a hate crime is different from many other intentions found within the criminal law. This is because the motivation is integral in determining whether the hate offence has been committed.

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<sup>105</sup> A similar situation comes to mind when thinking of the punishment of thought; the failure of a defendant to show remorse for his crime is often taken into consideration when the judge determines sentence. Does this mean that thoughts of defiance are punishable?

<sup>106</sup> See Malik, above n 6, 431–33. Freedom of Association is protected under Article 22 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 and 1057 UNTS 407 (entered into force 23 March 1976). See also Article 20 of the *Universal Declaration of Human Rights*, opened for signature 10 December 1948.

Traditionally, the intention of an accused does not encompass the accused's motive due to the difficulties and time consumption of making such a determination.<sup>107</sup> A defendant's motive relates to reasons why the defendant committed the offence. It is therefore to be distinguished from intention which simply refers to whether a defendant intended the actions to occur. Those who argue against the use of motivation point to the fact that the consideration of motive would require a much higher level of investigation into the reasons behind why the offender committed the offence.

However, in regard to hate crime offending the motivation of the offender is interlinked with the offender's intention i.e., the offender intends to hurt someone of a particular race or ethnicity. A does not simply intend to assault B, the fact that B belongs to a certain race/ethnicity is intrinsic to A's intention. This is a specific intent much like many other crimes which carry two components to the intention. They are crimes in which a specific result is intended. For example, under section 198 of the *Crimes Act 1900* (NSW), it is an offence to maliciously destroy or damage property with the intention of endangering life. The intention is to destroy or damage property. The offender's motivation is to endanger someone's life. Although the offender's motivation is not directly referred to in the Act, the specific intent requires the offender's motivation to be taken into account in determining whether the offender is guilty of the offence.<sup>108</sup>

The addition of having to prove motivation has been argued by many to make it too difficult to prove the offence.<sup>109</sup> The danger is that if the racial motivation cannot be proven beyond reasonable doubt the offence cannot be made out and the offender might go free.

However, this does not necessarily have to be the case. The prosecution could always charge both the racially aggravated offence and the primary offence. Therefore, if the racial motivation can not be proven beyond reasonable doubt but the act and the intention can, the defendant will still be convicted of the standard crime. This is a fair way of dealing with the offence. As Ivan Hare rightly asserts, the racially motivated offence will carry a tougher sentence and therefore should be harder to prove.<sup>110</sup>

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107 For arguments against the use of motive in the criminal law see Uhrich, above n 69, 1512–19 and James Morsch, "The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation" (1992) 82 *Journal of Criminal Law and Criminology* 659.

108 See Andrew E Taslitz, "Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong" (1999) 40(3) *Boston College Law Review* 739. Furthermore, evidence of motive has been admissible and relevant to proving intention in court: *R v Clarke* (1927) 40 CLR 227, 232 per Isaacs ACJ (motive was strong evidence of state of mind); *R v Neilan* (1991) 52 A Crim R 303, 322; *Meissner v R* (1995) 184 CLR 132, 144 per Brennan, Toohey and McHugh JJ; *De Gruchy v R* (2002) 190 ALR 441, 446; per Gaudron, McHugh and Hayne JJ.

109 See Uhrich, above n 69, 1513.

110 Hare, above n 7. For further analysis on the issue of motive and hate crimes see Walters, above n 8, 211–12.

## D. HATE INFORMING HATE?

Leslie Moran and Beverley Skeggs argue that hate crime law may give shape to emotions such as hate itself, albeit a different kind.<sup>111</sup> They pose the question, “Is the demand for the violence of the law informed by the very emotions that it seeks to condemn?”<sup>112</sup> They wish to add a new dimension to the debate of hate crime law by suggesting that such legislation can be viewed as a paradoxical contradiction in itself i.e., the call for harsher punishments is a form of legal hatred based on retribution and revenge.<sup>113</sup> The politics of hate crime legislation is thus purported to be based on a desire to harm offenders.

However, this is somewhat assuming and fails to appreciate the multitude of reasons behind why hate crime legislation should be introduced (discussed in detail above). We do not need to hate or use hate to enact legislation. In fact this assertion only really acts to confuse the debate. The clear aims of introducing hate crime legislation are to protect minorities, recognise the seriousness of an offence and to deter future offending. A crime that has a greater consequence must be punished with a greater penalty. This is simply logical, not vengeful. For example, the fact that drug trafficking now carries the highest possible punishment reflects the serious consequences that this crime can have on a community. The will to combat racial violence is not based on a politics of violence, but through a desire to deter people from committing racially motivated crime. This does not mean that advocates of hate crime legislation harness desires of hatred and revenge in wanting to create this general deterrence but instead a strong desire to prevent it.

## Conclusion

The impact that racially motivated violence has on Australian society must not be ignored by the criminal law. The events in Cronulla late last year should act as a wake up call to legislatures who have traditionally resisted calls to introduce hate crime laws.

The documentation of widespread racially motivated abuse across the country demonstrates the need for the criminal justice system to rethink the law in this area. Current criminal laws are failing to protect victims and fairly punish perpetrators of this highly consequential crime. Thus, if minority communities are to gain confidence in the criminal justice system the criminal law must be changed to protect them.

There are many social, economic and political forces which must also be changed if the law is to have its greatest success. For each discipline must play its part in reducing racism whilst working towards a more integrated society. The law itself can not do it alone nor can the media, parenting, or education.

<sup>111</sup> Leslie Moran and Beverley Skeggs, *Sexuality and the Politics of Violence and Safety* (2003).

<sup>112</sup> Ibid 29. This is in respect to homophobic violence.

<sup>113</sup> Ibid 29–43.

However, the influence of the criminal law should not be underestimated. It can be utilised as an effective tool to combat racially motivated crime. An offence of racially aggravated assault similar to that introduced in the UK will clearly denounce racially motivated offenders while sending a strong message to the rest of society that racist violence will not be tolerated. This will act, not just as an important symbolic gesture, but as a justified and important response to the seriousness of racial violence.