

TASMANIA
LAW REFORM
INSTITUTE

**Racial Vilification and
Racially Motivated Offences**

FINAL REPORT No 14

APRIL 2011

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About this Final Report

This Report makes recommendations in relation to the introduction of provisions that address criminal racial vilification and racially motivated offences. The project was referred from the Vice-Chancellor of the University of Tasmania in July 2009. The Board of the Tasmania Law Reform Institute accepted the reference in August 2009. The publication of this Report is made following the release of an Issues Paper in June 2010 and subsequent consultations. The Issues Paper considered the extent of racism and racist behaviour in Tasmania and Australia and asked whether reforms were needed to address this behaviour. It discussed several options for reform, including:

- The introduction of a criminal provision for serious racial vilification in the *Anti-Discrimination Act 1998* (Tas);
- The introduction of new criminal provisions in either the *Criminal Code* or the *Police Offences Act 1935* (Tas);
- The introduction of penalty enhancement provisions; and
- The introduction of a sentence aggravation provision.

Responses to the Issues Paper were received from:

1. Mr T J Ellis SC, Director of Public Prosecutions (Tas);
2. Professor G Mason, Director of the Sydney Institute of Criminology;
3. Office of the Anti-Discrimination Commissioner (Tas);
4. Tasmanian Institute of Law Enforcement Studies;
5. Ms R G Pybus, Newly Arrived Youth Support Service, Colony 47 (Tas);
6. The Hobart Community Legal Service;
7. Migrant Education, Tasmanian Polytechnic;
8. Tasmanian Gay and Lesbian Rights Group;
9. Hobart Hebrew Congregation Inc.;
10. Mr E H Lipsett;
11. Mr G Prior;
12. Ms S L Neighbour, Culturally and Linguistically Diverse (CALD) Social Worker (Tas);
13. Ms A Hines
14. Mr P Crane;
15. Students Against Racism, Hobart College (oral submission);
16. Mr O Daiso (oral submission);
17. Anonymous (phone interview – oral submission);
18. Anonymous, UTAS Student
19. Anonymous, UTAS student

In the preparation of this Report, detailed consideration has been given to all responses. The Institute thanks these people for taking the time and effort to respond.

Information on the Tasmania Law Reform Institute

The Tasmania Law Reform Institute was established on 23 July 2001 by agreement between the Government of the State of Tasmania, the University of Tasmania and the Law Society of Tasmania. The creation of the Institute was part of a Partnership Agreement between the University and the State Government signed in 2000.

The Institute is based at the Sandy Bay campus of the University of Tasmania within the Faculty of Law. The Institute undertakes law reform work and research on topics proposed by the Government, the community, the University and the Institute itself.

The Institute's Director is Professor Kate Warner of the University of Tasmania. The members of the Board of the Institute are Professor Kate Warner (Chair), Professor Margaret Otowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice A M Blow OAM (appointed by the Honourable Chief Justice of Tasmania), Ms Lisa Hutton (appointed by the Attorney-General), Mr Philip Jackson (appointed by the Law Society), Ms Terese Henning (appointed by the Council of the University), and Mr Craig Mackie (nominated by the Tasmanian Bar Association) and Ms Ann Hughes (community representative).

Acknowledgments

The Final Report was prepared by Ms Esther Newitt.

The Institute would like to acknowledge the Vice-Chancellor of the University of Tasmania for his reference and for granting the TLRI \$15,000 for the project.

The Institute would like to thank the Office of the Anti-Discrimination Commissioner for allowing the researcher access to the de-identified data from the 2008 Racism Survey and the online incident reporting system, launched in 2010. The Institute would also like to thank Mr Bruce Newey for his editorial work.

List of Recommendations

Recommendation 1:

That the status quo is an inadequate response to incidents of racial vilification and racially motivated offences.

Recommendation 2:

That a serious racial vilification criminal provision not be introduced in the *Anti-Discrimination Act 1998* (Tas).

Recommendation 3:

That no criminal racial vilification or racially motivated offence be introduced in either the *Police Offences Act 1935* (Tas) or the *Criminal Code* (Tas).

Recommendation 4:

That penalty enhancement provisions not be introduced in Tasmania.

Recommendation 5:

That a sentence aggravation provision be introduced in Tasmania.

Recommendation 6:

That the Tasmanian sentence aggravation provision be modelled on the Victorian *Sentencing Act 1991* s 5(2)(daaa) but extended to cover all situations of racist aggravation, including where the victim was selected because of their presumed membership of a particular group or where the offender demonstrated hostility at the time of, or immediately before or after, the offence.

Recommendation 7:

That quantifying the sentence aggravation not be mandatory but left to the judge's discretion to stipulate when considered appropriate.

Part 1

Introduction

1.1 Background

1.1.1 In 2009 and 2010 there was an apparent increase in the number of racially motivated attacks on immigrants and international students in Australia. Whether these incidents were in fact racially motivated or merely opportunistic attacks on those who were vulnerable by reason of shift/late night work and dependence on public transport is a matter of continuing debate.¹ What is clear, however, is that these attacks raised considerable safety concerns among minority groups in Australia and damaged Australia's reputation as a tolerant multi-cultural society and a safe destination for international students and immigrants from diverse ethnic backgrounds.

1.1.2 Against this background, the death of an Asian student studying at the University of Tasmania prompted the Vice-Chancellor of the University to ask the Tasmania Law Reform Institute to undertake a project examining the capacity of Tasmanian laws to address racial vilification and racially motivated offences.² In particular, the Vice-Chancellor asked whether there was a need to make changes to the criminal law, such as the enactment of criminal racial vilification offences. At about the same time, the Tasmanian Greens Party wrote to the Attorney-General of Tasmania requesting that the Institute be provided with a reference in relation to extending Tasmania's anti-discrimination laws to ensure that racial vilification constitutes a criminal offence. The Board of the Institute accepted the Vice-Chancellor's reference in August 2009.

1.1.3 Racial vilification is a broad term that involves more than simply judging others as inferior because of their perceived race or ethnicity, or discriminating against them on such grounds. The term 'racial vilification' is generally used to refer to offensive and abusive comments or acts which either express, demonstrate or incite hatred and contempt for individuals on the grounds of their race or ethnicity.³ Other terms, such as 'racial hatred', 'hate propaganda' and 'hate speech' may be used to describe such behaviour.⁴ In this Report, 'racial vilification' is intended to cover all possible acts that may fall under any of these terms.

1.1.4 This Report reviews the current Tasmanian laws that are relevant to the issues of racial vilification and racially motivated offences, describes the applicable Commonwealth laws and includes a consideration of International Conventions and Declarations and their application to Australian domestic law. The Report also includes a brief survey of the legal changes in other jurisdictions that have been introduced to address the problem of racial vilification and racially motivated offences. The need for reform is then considered and finally the Report recommends which

¹ For a discussion on this matter, see Senate Standing Committee on Education, Employment and Workplace Relations, Parliament of Australia, *Welfare of International Students*, (2009). See also Cameron Stewart, 'Victoria in a State of Denial' *The Australian* (Sydney) 13 February 2010 <<http://www.theaustralian.com.au/politics/state-politics/victoria-in-a-state-of-denial/story-e6frczx-1225829870696>> at 14 February 2010.

² The Institute acknowledges that this murder did not involve racial hatred or racist motivation. In his sentencing remarks, Porter J described the killings as a 'thrill' murder that was committed for the sheer sake of doing it. His Honour noted that the offender was motivated by the gender of the victim but not her race. He also commented, however, that the murder '...caused much anxiety in the population of overseas students studying in Tasmania' – Comments on Passing Sentence, *State of Tasmania v Stavros Papadopoulos & Daniel Jo Williams* 30 June 2010.

³ Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975: Background Paper No. 1* (2008) 49.

⁴ Ibid.

reform options are seen as the most effective and appropriate for Tasmania. In making these recommendations, the Institute has given detailed consideration to all responses to the Issues Paper⁵ it received.

1.1.5 One of the major issues raised in the Issues Paper was whether Tasmania should make racial vilification a criminal offence, and if so, whether it should introduce new provisions in the existing *Anti-Discrimination Act 1998* (Tas), the *Police Offences Act 1935* or the *Criminal Code*. In considering this issue, a number of key questions were asked. These questions formed the basis of the majority of responses received by the Institute.

1.2 Submissions

1.2.1 The TLRI received a total of 19 submissions to its Racial Vilification Issues Paper. Fifteen of these were written submissions, one was a written response submitted after a consultation with staff at Migrant Education, two were interviews and one was a consultation with a group of students conducted at Hobart College. The TLRI also held a consultation/information session at the Law Faculty at the University of Tasmania. Despite advertising the session and inviting all Culturally and Linguistically Diverse (CALD) and International students to attend, only the University CALD officer and a representative from Student Services attended. The UTAS CALD officer also encouraged students to respond by email and the TLRI received two submissions.

1.2.2 There was notable divergence in opinion amongst the responses received by the Institute. Some respondents believed that there is a high level of racism in Tasmania and that legislative amendments are necessary to address this problem.⁶ Others questioned the true extent of racism and warned against being overly or unduly influenced by media reports.⁷ One respondent strongly doubted the existence of any form of racism or racial prejudice in Australia.⁸

1.2.3 There was also considerable difference in opinion in what was seen by respondents as being the most appropriate reform option for dealing with racial vilification and racially motivated offences in Tasmania. One respondent believed that the current laws are sufficient to deal with these types of offences and therefore recommended that no changes be made.⁹ Others supported legislative change, with two respondents¹⁰ supporting the introduction of serious racial vilification provisions in the *Anti-Discrimination Act 1998* (Tas), six¹¹ supporting the introduction of a racial vilification provision in the *Criminal Code* or *Police Offence Act 1935* (Tas) and eight¹² supporting either penalty or sentence enhancement provisions.¹³

1.2.4 A number of submissions also recommended that strategic cultural and operational changes need to be made in order to address racial prejudice within the Tasmanian community. Five¹⁴ respondents recommended that the introduction of any new provision or legislative change be accompanied by educational programs that would explain the purpose of the new laws, with the aim of reducing peoples' apparent prejudice towards persons of different ethnic or cultural backgrounds.

⁵ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Issues Paper no. 16, June 2010.

⁶ Respondents no. 3, 5, 7, 12, 15 and 17.

⁷ Respondents no. 4 and 6.

⁸ Respondent no. 11.

⁹ Respondent no. 1.

¹⁰ Respondents no. 4 and 8.

¹¹ Respondents no. 3, 4, 6, 8, 9 and 17.

¹² Respondents no. 2, 3, 4, 6, 7 and 8.

¹³ Some submissions recommended more than one legislative change.

¹⁴ Respondents no. 4, 5, 7, 15 and 16.

Professor Gail Mason, Director of the Sydney Institute of Criminology, also recommended that the purpose of any new law be expressly stipulated by Parliament to help ensure that the new laws are interpreted and applied correctly.

1.2.5 Two respondents¹⁵ also recommended that those responsible for the application of any new laws, in particular the police, be provided with specific training in cultural awareness.

1.2.6 Some respondents were concerned about the impact any new provision would have on individuals' right to freedom of speech and expression. These respondents urged that the maintenance of this right should be a priority when considering the introduction of any law reform option.¹⁶

1.2.7 A number of respondents also questioned why the Issues Paper only looked at offences motivated by racial hatred or prejudice. They argued that all attribute-related prejudices, including sexuality and sexual orientation, disability and gender, should have been considered in the Paper. The TLRI was confined in the scope of its investigation by the reference it received from the Vice-Chancellor of the University of Tasmania. That is, the Institute was specifically asked to look at the adequacy of Tasmanian laws in relation to racial vilification and racially motivated offences. The Institute acknowledges that victims of attribute-motivated hatred, prejudice and offences may be selected for a variety of reasons, including their gender, sexual orientation or physical ability. The TLRI believes that the Report provides a model for dealing with all forms of attribute-motivated offences.

¹⁵ Respondents no. 2 and 17.

¹⁶ Respondents no. 6, 10 and 11.

Part 2

Current Law in Tasmania

2.1.1 There are at present no laws in Tasmania that make racial vilification a criminal offence. A person who believes they have been the subject of racial vilification may pursue a civil action under s 19(a) of the *Anti-Discrimination Act 1998* (Tas) or at a federal level under s 18C of the *Racial Discrimination Act 1975* (Cth). In criminal cases, the racist motivation of an attack or other offence may be considered by the court as an aggravating factor at sentencing, however there is no provision under the *Sentencing Act 1997* (Tas) that expressly states that an offence motivated by racial hatred is to carry a heavier penalty than one that is not.

2.2 Civil Provisions

2.2.1 The *Anti-Discrimination Act 1998* (Tas) s 19(a) states that a person, by a public act, must not 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 any member of the group.¹⁷ Some examples of conduct caught by the civil anti-vilification provisions in Tasmania and other states include: shouting racial and religious slurs at a taxi driver in the car-park of a hotel,¹⁸ publicly blaming criminal activity on particular ethnic groups,¹⁹ displaying racist signs,²⁰ and distributing racist propaganda.²¹ Section 89 of the *Anti-Discrimination Act 1998* (Tas) lists the orders the Anti-Discrimination Tribunal may make if a claim of inciting racial hatred is found to be substantiated.²² These include an order that:

- the prohibited conduct not be repeated or continued;
- any loss, injury or humiliation suffered by the complainant and caused by the prohibited conduct be redressed by the respondent;
- the respondent pay to the complainant compensation for any loss or injury suffered by the complainant; or
- any other order that the Tribunal thinks appropriate.

2.2.2 Under s 92, the Tribunal can also order the respondent to apologise to the complainant and make any retractions the Tribunal considers necessary and appropriate. However, in *Cosmos v Dunlop*²³ the Tribunal found that ‘an apology [to the victim] is meaningless unless genuine and

¹⁷ See Appendix A.

¹⁸ *A v G* [2005] TASADT 16 – the respondent was found to have racially vilified the claimant by calling him a ‘fucking idiot Muslim’ and telling others that he ‘(did) not know what (the complainant) is doing here in Australia.’

¹⁹ *Feghaly v Oldfield* (2000) EOC 93-090 – a senior officer of the One Nation political party told a newspaper journalist that ‘home invasions are ethnically based; Lebanese or Iranian, not Australian.’

²⁰ *Warner v Kucera* (2001) EOC 93-137 – a diner owner displayed signs vilifying Aboriginal persons that read ‘not open due to destructive Aborigines’ and did not remove racist graffiti after his premises had been vandalised.

²¹ *Jones v Scully* (2002) FCA 1080 – the respondent distributed pamphlets that denied the Holocaust and contained other anti-Semitic statements.

²² See Appendix A.

²³ [2003] TASADT 6 – this case involved a taxi driver who had refused to take a group of intellectually disabled passengers on the basis that he had had an earlier negative experience with a similar passenger. He was found to have unjustifiably stereotyped intellectually disabled persons and his conduct was found to be discriminatory.

sincere.²⁴ Chairperson Wood also noted that an order requiring a person to participate in training or to cease the offending behaviour is unlikely to be successful and may even be counter-productive if the person is an unwilling participant. For these reasons an order for an apology or a retraction is seldom made. The most common orders made by anti-discrimination tribunals are for compensation or fines.

2.2.3 The *Anti-Discrimination Act 1998* (Tas) s 55 provides that the provisions of s 19 do not apply if the respondent's conduct is a fair report of a public act; a communication or dissemination of a matter that is subject to a defence of absolute privilege in defamation proceedings; or a public act done in good faith for academic, artistic, scientific, research or public interest purposes. These exemptions are identical in nature to the ones available under the federal *Racial Discrimination Act 1975* (Cth). The extent of these exceptions was considered in *Jones v Scully*.²⁵ In this case it was alleged that the respondent had breached s 18C of the *Racial Discrimination Act 1975* (Cth) and racially vilified people of the Jewish faith by distributing anti-Semitic literature in letter boxes in Launceston and selling or offering to sell such literature at a public market in Launceston. The literature stated, amongst other claims, that the Holocaust was a myth perpetuated by the Jewish people for their own political purposes.²⁶

2.2.4 The respondent attempted to argue the 'truth' of her claims and that the production of the pamphlets and books was for a genuine academic purpose.²⁷ The court, however, rejected both these arguments. Justice Hely noted that the emphasis of the proceedings was not on the truth or otherwise of the offending material, which was something that was better left to historians to debate, but on whether the material was reasonably likely to offend.²⁸ His Honour also noted that the respondent had not acted reasonably or in good faith, nor could the published material be described as legitimate criticism as it was more analogous to prejudicial vilification.

2.3 Criminal Provisions

2.3.1 As mentioned above, Tasmania does not currently have criminal racial vilification provisions. This means that acts of racial vilification are not specific criminal offences. Acts of violence towards a person or property do fall within the current criminal laws, but racist motivation is not a specific element of any criminal offence in Tasmania.²⁹

2.3.2 It is possible for courts to address some incidents of race hate or like acts where a victim has taken out a restraint order against a defendant and the defendant breaches the terms of such an order. Applications for restraint orders are made under s106B of the *Justices Act 1959* (Tas) and may state, for example, that a person is not to 'threaten, harass, abuse or assault' another.³⁰ This prohibited conduct could include racial abuse or harassment. Restraint orders can only be made where the victim

²⁴ *Cosmos v Dunlop* [2003] TASADT 6, 38 – the Tribunal did urge the respondent to voluntarily participate in training and sincerely apologise to the individuals involved in the case – cited in *A v G* [2005] TASADT 16.

²⁵ [2002] FCA 1080 – the complainant, Jeremy Jones, was the president of the Executive Council of Australian Jewry. He brought an action against the respondent, Olga Scully, under ss 18B and 18C of the *Racial Discrimination Act 1975* (Cth). The matter was initially heard before the Human Rights and Equal Opportunity Commission (HEROC), where it was held by the Commissioner that Ms Scully had breached s 18C of the *Racial Discrimination Act 1975* (Cth) and that none of the exemptions in s 18D were made out. Mr Jones then brought an action before the Federal Court of Australia to enforce the determination of the Commission. The matter was heard *de novo* (as new) and all relevant evidence and witnesses were called before the court.

²⁶ *Jones v Scully* [2002] FCA 1080, [44].

²⁷ *Ibid*, [183].

²⁸ *Ibid*, [245].

²⁹ *Criminal Code* (Tas) – see Part V *Crimes Against the Person*, Chapter XVII, ss 156, 158, 159 and 172; Chapter XIX, ss 183-184A and Part VI *Crimes Relating to Property*, Chapter XXXI, ss 267-268. Also see *Police Offences Act 1935* (Tas), Part III *Injuries to the Person*, s 35 and Part IV *Injuries to Property*, s 37.

³⁰ Such as in *Allen v Tasmania Police* [2004] TASSC 30; *Dennison v White* [2003] TASSC 121.

knows (or at least can identify) the offender. For this reason, they are generally used where there is a pre-existing relationship between the parties, such as neighbours.

2.3.3 There also are no express or specific sentence aggravation provisions, or penalty enhancement provisions, that deem racial vilification to be a factor aggravating the sentence in Tasmania. An aggravating factor is a specific fact or circumstance related to the case that the sentencing judge can take into account after the accused has been found guilty of an offence. If the judge accepts the presence of the aggravating factor, he or she may choose to impose a greater penalty than would have been the case if the factor was not proven. While there is no statutory provision that specifies racial hatred as an aggravating factor, there are certain provisions in Tasmanian sentencing legislation that allow the court to consider such an element of a case when passing sentence. The *Sentencing Act 1997* (Tas) s 80(2)(a) provides that before a court passes sentence on an offender found guilty of an offence, the prosecution may draw the attention of the court to any aggravating factors, or the presence or absence of any extenuating circumstances, in relation to the offence.³¹ This provision reflects the common law position.

2.3.4 It has long been established that in imposing sentence, the court is bound to take into account ‘all the proved circumstances that surround the crime which affects its gravity.’³² Aggravating factors relevant in the context of offences with a racial element include:

- a motive of hatred or prejudice;
- psychological and physical harm to the victim;
- harm to society; and
- the vulnerability of the victim.

Motive

2.3.5 Just as a motive of revenge may be an aggravating factor, if an offender’s actions were motivated by hatred for the victim on the grounds of their race, origin, or national or ethnic identity, this could also be an aggravating factor. In the Victorian case of *R v Palmer*,³³ the Court of Appeal found that the murder of a Samoan man had been racially motivated and that the offender’s sentence had been appropriately and proportionately increased because of this aggravating factor. Justice Callaway noted that:

racial violence, of which this was an example, is a serious threat to the maintenance of a safe and decent society. It matters not from which ethnic group it proceeds. Like armed robbery and drug trafficking, it will often call for condign punishment.³⁴

2.3.6 In *DPP v Caratozzolo*³⁵, the defendant pleaded guilty to one count of murder and two counts of robbery. The defendant was part of a gang which had set out with the intention of mugging persons of Asian descent and ‘hassling a curry’ (ie robbing a person of Indian descent). During these attacks, the accused and other members of the gang killed one victim and caused serious harm to another. In sentencing Caratozzolo, Harper J made the following observation:

³¹ See Appendix A.

³² *Prokopiec v R* [1982] TasR 170, 174.

³³ [1996] Supreme Court of Victoria, Court of Appeal (Unreported, Winneke ACJ, Charles and Callaway JJA, 13 September 1996).

³⁴ *Ibid*, 11.

³⁵ [2009]VSC 305.

It has been submitted to me on your plea that, although you spoke of seeking out an Indian as your victim, there was nothing racist in this. Rather, you targeted Indians because you thought Indian students study hard, get good jobs and have the funds to purchase good phones. I was first inclined to accept that submission. Now I am satisfied beyond reasonable doubt that an element of racism was involved.³⁶

According to his Honour, the accused's intention of causing physical injury to his victims and the fact that he had learnt to say abusive and insulting phrases in Hindi were indicative of his racist motivation. Harper J went on to acknowledge the greater harm that is caused when an offender intentionally selects a victim based on prejudice towards the victim's identity. He noted that these types of attacks have an effect on the victim, members of the targeted group and other minority groups in the community.³⁷

2.3.7 Despite specifying the racist and aggravating elements of the accused's conduct and noting that it would be taken into account when deciding the appropriate sentence, Harper J proceeded to say that he did 'not want to make more of this point than is warranted' and that he accepted that 'since (the defendant's) incarceration (he had) shown no signs of racist attitudes'.³⁸ His Honour also noted that the defendant's group on the night of the attack comprised several nationalities. He concluded that 'it seems to me that the racism you exhibited that night was the product of youthful stupidity rather than a reflection of considered attitudes'.³⁹

2.3.8 Some Victorian cases have been cautious about finding that an offence was racially motivated, even where there has been a demonstration of racism either at the time of, or just before or after, the commission of an offence. In *R v Rintoull & Sabatino*,⁴⁰ two white offenders attacked and killed a young Sudanese man. There was evidence that the accused had vandalised a property on the night of the attack and spray-painted 'fuck da niggas' on the walls. One of the offenders was also heard to say that he was going to 'take his anger out on some niggers'. However, in sentencing, the judge did not find that this amounted to evidence of a racist motivation. Her Honour said the fact that the accused had tried to provide food to a homeless Sudanese youth a day or so before the attack was evidence that the two accused did not have any racial prejudice or motivation:

[Your] actions on the previous Sunday when you had twice taken food to the homeless African boy living in the abandoned house is not consistent with your actions on this night being racially motivated, and in these circumstances I am not satisfied beyond reasonable doubt that your actions were so racially motivated and that racism per se was a motive for the attack.⁴¹

2.3.9 In May 2010 the Tasmanian Supreme Court also expressly recognised the racist motivation of two offenders as an aggravating factor.⁴² In this case, two brothers were accused of assaulting a taxi-driver from Sierra Leone and a University student of Asian appearance. During both the attacks, the brother racially abused their victims, calling one a 'black dog' and the other a 'fucking Asian' and a 'chink'.⁴³

2.3.10 In sentencing the older brother, Evans J rejected the suggestion that the assaults were not racist in nature. He noted the racist abuse prior to the attacks, as well as the racist slogans and images

³⁶ Ibid [14].

³⁷ Ibid [15].

³⁸ Ibid [16].

³⁹ Ibid.

⁴⁰ [2009]VSC 617.

⁴¹ *R v Rintoull & Sabatino* [2009] VSC 617, [108].

⁴² *Tasmania v Bigwood* (unreported, Supreme Court of Tasmania, Evans J, 31 May 2010).

⁴³ Ibid.

that were displayed on the defendant's MySpace page as evidence of his racist motivation.⁴⁴ His Honour also noted that 'where racism is an aspect of the motivation for a crime, there is good reason for a sentencing court to place particular significance on the needs for general and personal deterrence.'⁴⁵ This case demonstrates that it is possible for the Court to consider the racist motivation of an accused as an aggravating factor in sentencing in Tasmania. It is not clear from the sentencing remarks of Evans J, however, how much the sentence was increased by this aggravating factor.

2.3.11 Recognising racial hatred as an aggravating factor in imposing sentence is constrained by a number of factors. First, any aggravating factor must be established beyond reasonable doubt. In *R v Olbrich*⁴⁶ the High Court held that a sentencing judge may not take any fact into account in a way that is adverse to the interests of the offender unless it has been established by the prosecution beyond reasonable doubt. That is, while the prosecution is not required to prove beyond a reasonable doubt every fact upon which the sentence is based, it is the requisite standard for any adverse facts not admitted by the offender.⁴⁷ Therefore, to show that an offender was motivated by racial hatred there would either need to be an admission from the defendant of such a motive or some other evidence of their racial hatred. For example, in *R v Palmer*, the court heard evidence from a member of the group to which the accused belonged that the accused had hostile views about persons of Maori descent,⁴⁸ that someone in the group had shouted 'let's go get the black niggers' just prior to the attack and that the accused had participated in hurling a torrent of racial abuse at two Samoan teenagers on the same night.⁴⁹ In *Tasmania v Bigwood*, the racist images and slogans displayed on the defendant's MySpace page, as well as the racist slurs uttered before and during both attacks, were considered by the sentencing judge to be evidence of the racist motivation of the offenders. Without this kind of evidence it is reasonable to presume that it would be difficult for the prosecution to establish the racial motivation of the offender beyond reasonable doubt.

Harm and Vulnerability

2.3.12 The consequences of an offence are also relevant to the sentence. Where the harm is at least foreseeable this is an aggravating factor. It follows that the degree of harm, physical and psychological, caused to the victim is a matter which should be taken into account in the imposition of sentence. Harm to society is also a matter which can be aggravating. Both forms of harm were taken into account in *Tasmania v Woolley*. The defendant had pleaded guilty to assaulting a Singaporean student in the course of an attempt to steal his car, and to assaulting a female Chinese student who came to his aid. Two other young men joined in the attack. In imposing sentence Blow J stated:

This was a cowardly attack on two defenceless young people. It was distressing for them. They were hurt. They were concerned for their safety. Ms Xiang has left the country. Crimes like this affect Australia's international reputation, although there is no suggestion that this was motivated by racism.

2.3.13 Any particular vulnerability of the victim is regarded as an aggravating factor.⁵⁰ In the case of attacks on minority groups this can be particularly relevant because of the effect on the particular victim and the fear it engenders in other members of the victim's racial group. This can make the

⁴⁴ Ibid – the images on the MySpace page included the words 'Fuck off. We're Full' printed on a map of Australia and another image of a white fist around which the words '100% white, 100% proud' were printed.

⁴⁵ Ibid.

⁴⁶ (1999) 166 ALR 330.

⁴⁷ Kate Warner, *Sentencing in Tasmania*, (2nd ed, 2002) 34.

⁴⁸ The accused had erroneously believed that the victim was Maori.

⁴⁹ *R v Palmer* [1996] Supreme Court of Victoria, Court of Appeal (Unreported, Winneke ACJ, Charles and Callaway JJA, 13 September 1996) 2-3.

⁵⁰ Richard Fox and Arie Freiberg, *Sentencing: State and Federal laws in Victoria* (2nd ed, 1999) para 3.624; Warner, above n 47, para 3.417.

racial element of an attack aggravating even if a motive of racial hatred cannot be established. In *DPP v Broadby, Cockshutt and Woolley*,⁵¹ the offenders robbed a young female Chinese university student by grabbing her bag from her, dragging her along the street and then assaulting her friend. The sentencing judge imposed wholly suspended sentences of eight months imprisonment on each of the offenders. She noted that at the time of the robbery they had not been convicted and sentenced for the previous offences⁵² and that the attacks were opportunistic and not racially motivated. The Director of Public Prosecutions appealed. The Court of Criminal Appeal allowed the appeals on the grounds that the suspension of the sentences rendered them manifestly inadequate and they failed to give sufficient weight to general deterrence, punishment and denunciation.⁵³ The court did not specifically find that the fact that the victims were Chinese students aggravated the crime or that any racial element was an aggravating factor. However, rather than characterising the attack as opportunistic and unplanned, the court stated that on a Friday evening in winter, the men travelled across the city to the vicinity of the university with trouble in mind and chose the two victims who were walking along the suburban street because of their vulnerability. It would have been apparent to them that they were Asian. Evans J, who delivered the judgment with which Porter and Wood JJ agreed, said, ‘This is the sort of crime that causes substantial concern in the community at large and to the vulnerable in particular.’ The fact that the victims were particularly vulnerable because they were young, female and Asian, together with the fact that Cockshutt and Woolley were on bail for a similar offence at the time of the robbery, were significant matters in the determination that the needs of deterrence, punishment and denunciation outweighed the consideration of rehabilitation due to the youth of the offenders.

2.4 Commonwealth Racial Vilification Provisions

2.4.1 Racial vilification is currently recognised at a federal level under the *Racial Discrimination Act 1975* (Cth). Sections 18B-18F of this Act allow for civil actions to be initiated by residents of all states and territories of Australia. While there is no specific criminal provision against racial vilification in any federal legislation, there are provisions in the *Criminal Code* (Cth) that could potentially be used to impose criminal sanctions for racial vilification. However, to date, they have not been tested.

Civil Provisions

2.4.2 The issue of racial vilification and the need for federal provisions prohibiting such conduct was considered several times by Federal Parliament before being officially enacted in 1995. In the 1970s, the early drafts of the *Racial Discrimination Act 1975* (Cth) contained provisions relating to racial hatred, although they were ultimately excluded from the final Act.⁵⁴ Unsuccessful proposals to add provisions to the *Racial Discrimination Act 1975* (Cth) with respect to incitement to racial hatred were again considered in the early 1980s.⁵⁵

2.4.3 In the early 1990s, a number of reports were released that documented the extent of racial vilification in Australia and identified it as a sufficiently serious problem to warrant the making of

⁵¹ [2010] TASSCA 13.

⁵² Two of the offenders, Woolley and Cockshutt, were involved in the attempted stealing of a car and attack on two international students – see 2.3.12.

⁵³ *DPP v Broadby, Cockshutt and Woolley* [2010] TASSCA 13, [5].

⁵⁴ Luke McNamara and Tamsin Solomon, ‘The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?’ (1996) 18 *Adelaide Law Review* 259, 260.

⁵⁵ *Ibid.*

such conduct unlawful.⁵⁶ This led the Commonwealth Parliament to introduce laws that prohibited racial vilification in 1995.⁵⁷ These provisions were aimed at protecting groups and individuals from abuse, threats of violence and the incitement of racial hatred.⁵⁸ They offered all Australian citizens civil redress for certain types of racist conduct, irrespective of their state or territory of residence, by allowing all victims to lodge complaints with the Human Rights and Equal Opportunity Commission (HREOC).⁵⁹

2.4.4 Sections 18B-F of the *Racial Discrimination Act 1975* (Cth) prohibit a person from doing any act, other than in private, that is reasonably likely in all circumstances to offend, insult, humiliate or intimidate another.⁶⁰ Such prohibited conduct must be associated with the person's race, colour or national or ethnic origins, however this does not have to be the sole reason for the offending behaviour.⁶¹ Section 18D lists the exceptions that apply to this Part of the *Racial Discrimination Act 1975* (Cth). These include that the conduct was done reasonably and in good faith; in the performance of an artistic work; for a genuine purpose in the public interest (such as political or academic debate); or publishing a fair and accurate report of a matter in the public interest. During the Second Reading of the *Racial Hatred Bill 1994*, then Federal Attorney-General Michael Lavarch noted that the bill was not intended to limit free speech and that the broad exemptions found in s 18D were included to help ensure this did not occur.⁶² Remedies handed down by the Commission for breaches of s 18C include:

- compensation orders;⁶³
- order for an apology;⁶⁴
- order to complete cultural awareness training;⁶⁵ and
- order to publish a retraction.⁶⁶

2.4.5 A number of cases have considered what is meant by the term 'reasonably likely to offend' in these provisions. In *De La Mare v Special Broadcasting Services*,⁶⁷ it was found that the term referred to an objective test. The Commission noted that the relevant question is not whether the complainant was offended, insulted, humiliated or intimidated by the relevant act, but whether a reasonable person in all the circumstances would have been offended. This case also considered the meaning and operation of the phrase 'in all circumstances' and decided that this further underlined the objective criteria that must be applied. This position was confirmed in the case of *McLeod v Power*.⁶⁸

⁵⁶ Ibid, 262. These reports included HREOC's *National Inquiry into Racist Violence* (1991); Royal Commission into Aboriginal Deaths in Custody *Final Report* (1991); and The Australian Law Reform Commission reference on *Multiculturalism and the Law* (1992).

⁵⁷ Brad Jessup, 'Five Years On: A Critical Evaluation of the *Racial Hatred Act 1995*' (2001) 6(1) *Deakin Law Review* 91, 91. Section 3 of *Racial Hatred Act 1995* (Cth) inserted Part IIA (ss18B-E) 'Prohibition of Offensive Behaviour Based on Racial Hatred' into the *Racial Discrimination Act 1975* (Cth). See Appendix A.

⁵⁸ Ibid.

⁵⁹ McNamara and Solomon, above n 54, 259. HREOC is now called the Australian Human Rights Commission (AHRC).

⁶⁰ See Appendix A.

⁶¹ Section 18B of the *Racial Discrimination Act 1975* (Cth). See Appendix A.

⁶² Judith Bannister, 'It's Not What You Say but the Way That You Say It: Australian Hate Speech Laws and the Exemption of "Reasonable Expression"' (2008) 36 *Florida State University Law Review* 23, 27.

⁶³ *Feghaly v Oldfield* (2000) EOC 93-090; *Jacobs v Fardig* (1999) HREOCA 9.

⁶⁴ *Warner v Kucera* (2001) EOC 93-137.

⁶⁵ *Jacobs v Fardig* (1999) HREOCA 9.

⁶⁶ *Feghaly v Oldfield* (2000) EOC 93-090.

⁶⁷ (1998) HREOCA 26.

⁶⁸ (2003) FMCA 2.

Criminal Provisions

2.4.6 There is no specific federal criminal racial vilification legislation. While the original *Racial Hatred Bill 1994* contained three proposed new criminal offences relating to racial vilification,⁶⁹ these were strongly opposed by opposition political parties who feared the laws would unduly restrict free speech.⁷⁰ In opposing these provisions, some politicians referred to the need to ‘resist government thought police’ and ‘the forces of political correctness’ and for Australian society to be more ‘tolerant’ of divergent opinions.⁷¹ Others, including the Western Australian Greens Senator, Christobel Charmarette, believed that the criminal provisions should not be included in the final Act as they would not achieve the intended result.

If this legislation is passed it will create a crime of words. ... I do not believe that we will become a less racist, more tolerant society by passing a law that imitates exactly the type of intolerance we are trying to readdress – that is, intolerance of people expressing racial sentiments. We would be guilty of doing just what we are accusing racists of doing – singling out groups of people by labelling them unacceptable.⁷²

2.4.7 Although there is no criminal offence of racial vilification under the *Racial Discrimination Act 1975* (Cth), there is other legislation that could potentially be used to prosecute an offender for racially vilifying another. In 2005, the Commonwealth government introduced the *Anti-Terrorism Act (No 2) 2005*. This Act repealed the sedition provisions in the *Crimes Act 1914* (Cth) and incorporated five new sedition offences into the *Criminal Code* (Cth).⁷³ Sedition is defined as words or actions that incite rebellion or insurgency against the ruling government of a country. The new offences in the *Criminal Code* include s 80.2(5), which makes it unlawful to urge violence within the community by exhibiting behaviour or speech that threatens the peace, order and good government of the Commonwealth.⁷⁴ While it was initially touted by some to be a substitute for a criminal racial vilification offence, other commentators have argued that it will not operate effectively as a general racial vilification provision.

Characterising incitement to group violence as sedition is an error of classification. The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. ... The appropriate place for such an offence is within the framework of anti-vilification.⁷⁵

2.4.8 A further inadequacy of using the sedition laws as a means of addressing racial vilification (rather than enacting express criminal racial vilification provisions) is that it adds yet another element to the offence that the prosecution must establish before a defendant could be found guilty. That is, in addition to proving the offender racially vilified the victim, the prosecution must also prove that the offending behaviour threatened the peace, order and good government of the country. As Walters points out in his paper about the 2005 Cronulla riots in New South Wales,⁷⁶ if the Department of Public Prosecutions is already reluctant to pursue prosecutions under state criminal racial vilification provisions because of the difficulty associated with establishing the motive of the offender,⁷⁷ there is a

⁶⁹ McNamara and Solomon, above n 54, 264.

⁷⁰ Ibid. The *Racial Hatred Bill 1994* (Cth) was supported by the ALP and the Democrats. It was opposed in its entirety by the Liberal/National Coalition. The WA Greens refused to support the criminal provisions.

⁷¹ Ibid, 271-272.

⁷² Western Australian Greens Senator Christobel Charmarette cited in McNamara and Solomon, above n 54, 276.

⁷³ Dan Meagher, ‘Inciting Racial Violence as Sedition: A Problem of Definition?’ (2006) 30 *Criminal Law Journal* 289, 289.

⁷⁴ See Appendix A.

⁷⁵ B Saul cited in Meagher, above n 73, 296.

⁷⁶ Mark Walters ‘The Cronulla Riots: Exposing the Problem with Australia’s Anti-vilification Laws’ (2006-2007) 18 *Current Issues in Criminal Justice* 165.

⁷⁷ This is explained in detail below at 5.3.6.

real possibility they would never seek a conviction under sedition laws which have the added burden of proving the offending behaviour threatened the peace, order and good government of the country attached to them.⁷⁸

2.5 International Conventions

2.5.1 Legislation in Tasmania (as with other Australian states) and at the federal level reflects Australia's obligations under international conventions. Since the end of World War II, the Australian Government has ratified a number of international declarations and conventions that aim to protect and promote the fundamental human rights of all citizens. These instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (DEIDRB).⁷⁹

2.5.2 Article 19 of the UDHR is concerned with the right to freedom of opinion and expression. It states that everyone has the right to 'hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers.'⁸⁰ These principles are also largely reflected in Article 19 of the ICCPR and Article 5 of the ICERD. This right is most commonly referred to as the right to 'Freedom of Speech'.

2.5.3 These principles, however, cannot be read in isolation and the rights they purport to confer cannot be considered absolute. All the conventions and declarations mentioned above contain limitations on the right to freedom of speech. For example, Article 4 of ICERD obliges State Parties to,

declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.⁸¹

2.5.4 Article 19 of ICCPR expressly states that the right to freedom of expression carries with it special duties and responsibilities and is therefore subject to certain restrictions. Article 20(2) of the same instrument provides that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.'⁸²

2.5.5 While the federal government is a signatory to these international instruments, under Australian constitutional law ratification of international conventions and declarations does not automatically mean that they are enforceable in domestic law.⁸³ In order for these instruments (or the principles contained in them) to become part of Australian law, they must be enacted into federal law by the Commonwealth Parliament. Alternatively, states and territories may 'observe and advance the principles enunciated in (international conventions) by enacting their own legislation'.⁸⁴ In Tasmania, the provisions prohibiting racial discrimination and vilification in the *Anti-Discrimination Act 1998* reflects the state's commitment to such conventions.

⁷⁸ Walters, above n 76.

⁷⁹ Equal Opportunity Commission, Western Australia, *Racial and Religious Vilification Consultation Paper* (2004) 19.

⁸⁰ *Universal Declaration of Human Rights*, art 19.

⁸¹ *International Convention on the Elimination of All Forms of Racial Discrimination*, art 4.

⁸² *International Covenant on Civil and Political Rights*, art 20(2).

⁸³ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (3rd ed, 2010) 122.

⁸⁴ Equal Opportunity Commission, above n 79, 22.

2.6 The Right to Freedom of Speech in Australia

2.6.1 As noted in the various international conventions, including ICERD and ICCPR, there is the possibility that the right to freedom of speech and the right to freedom from racial discrimination and vilification can at times be incompatible. If citizens are afforded an unfettered right to freedom of speech, this would presumably include a right to express all opinions, including those of a racist nature. However, unlike the American Bill of Rights, the Australian Constitution does not expressly grant any specific right to freedom of speech to the citizens of Australia. The High Court has, however, recognised an implied right to free political speech in a number of decisions including: *Australian Capital Television Pty Ltd v Commonwealth*,⁸⁵ *Nation Wide News Pty Ltd v Wills*,⁸⁶ *Cunliffe v Commonwealth*,⁸⁷ and *Theophanous v Herald & Weekly Times*.⁸⁸ Despite this recognition, it has also been noted in a number of decisions that this right is restricted to ‘the dissemination of information or opinion that is of public interest in relation to governmental or political matters’,⁸⁹ and should not be considered an unfettered privilege. In the case of *Wagga Wagga Aboriginal Action Group & Ors v Eldridge*,⁹⁰ the NSW Equal Opportunity Tribunal observed that the right to freedom of expression has never been regarded as ‘absolute and unequivocal’.⁹¹ The Tribunal also held that the right to freedom of speech cannot be used as a defence to a complaint of racial vilification.⁹² Thus, it appears the express right to freedom from racial vilification, as contained in the various pieces of state and Commonwealth legislation, including the *Anti-Discrimination Act 1998* (Tas) and the *Racial Discrimination Act 1975* (Cth), has greater weight than the implied right to freedom of speech in Australia.

2.6.2 The Victorian *Charter of Human Rights and Responsibilities Act 2006* states that every person ‘has the right to hold an opinion without interference’ (s 15 (1)) and ‘has the right to freedom of expression’ (s 15(2)). However, the Charter also notes that these rights have ‘special duties and responsibilities’ attached to them and are subject to restrictions ‘to respect the rights and reputations of other people’ (s 15(2)).

⁸⁵ (1992) 177 CLR 106.

⁸⁶ (1992) 177 CLR 1.

⁸⁷ (1994) 182 CLR 272.

⁸⁸ (1994) 182 CLR 104. In this case it was noted that the scope of the implied freedom of political speech had been expressed in a variety of ways in earlier decisions. These included as ‘freedom of communication, at least in relation to public affairs and political discussion’, ‘freedom...to discuss governments and political matters’ and ‘freedom of participation, association and communication in relation to federal elections’ (Mason CJ, Toohey and Gaudron JJ) 121.

⁸⁹ Equal Opportunity Commission, above n 79, 23.

⁹⁰ (1995) EOC 92-701.

⁹¹ Equal Opportunity Commission, above n 79, 24.

⁹² Ibid.

Part 3

Racial Vilification Provisions in Other Jurisdictions

3.1.1 To date, all Australian states and territories (except Western Australia and the Northern Territory) have enacted civil complaints-based processes in tribunals and commissions that prohibit racial vilification or hatred. Furthermore, racial vilification is covered by criminal law provisions in many Australian states. In other common law countries, including the United Kingdom, the United States, Canada and New Zealand, various civil and criminal racial vilification provisions have been enacted. These include provisions that increase an offender's sentence if the offence was found to have been motivated because of racial hatred and specific criminal offences for racial vilification.

3.2 Anti-Discrimination Act Provisions

3.2.1 In Australia, six states and territories, including Tasmania, have enacted civil racial vilification provisions. Of these six, all but Tasmania have also amended their relevant acts to include criminal sanctions for acts of serious racial vilification.⁹³ The severity of these sanctions varies between jurisdictions.

3.2.2 New South Wales, for example, has a civil racial vilification provision under s 20C of the *Anti-Discrimination Act 1977* (NSW). This provision makes it unlawful for a person, by a public act, to 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 the members of the group.⁹⁴ Section 20D of the *Anti-Discrimination Act 1977* (NSW) creates the criminal offence of serious racial vilification. It reads:

- (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.⁹⁵

⁹³ The five Australian states to have civil and criminal racial vilification provisions are New South Wales, Queensland, Victoria, South Australia and the ACT.

⁹⁴ *Anti-Discrimination Act 1977* (NSW) s 20C. See Appendix A.

⁹⁵ *Anti-Discrimination Act 1977* (NSW) s 20D. See Appendix A.

3.2.3 As Meagher notes, the format of the New South Wales legislation reflects the government's desire to protect, or at least minimally impact upon, the implied right to freedom of speech.

Criminal liability is attracted only with the presence of an aggravating factor – the threat to do violence to person or property or inciting another to do so. The idea or the viewpoint per se contained in the speech is of no material concern to this criminal offence. And the need to prove the *mens rea* of intent in order to establish the incitement requirement in s 20D(1) ensures that even speech that negligently or recklessly causes the relevant – very serious – harm will not attract criminal sanctions.⁹⁶

3.2.4 That is, under the New South Wales legislation, it is not necessarily the view point of the offender that creates a criminal offence, but whether what the offender said *incited* or *caused* others to commit or threaten acts of violence against the victim and that the offender *intended* this to be the outcome.

3.2.5 The South Australian *Racial Vilification Act 1996* contains an offence identical to s 20D of the New South Wales Act.⁹⁷ Section 131A of the *Anti-Discrimination Act 1991* (Qld) and s 67 of the *Discrimination Act 1991* (ACT) create similar offences, although under these provisions an element of knowledge or recklessness is required to be established in the incitement of hatred. The Victorian criminal racial vilification provision is also similar to the New South Wales provision, although it extends to situations where the offender intentionally engages in conduct that they know is likely to incite serious contempt, revulsion or severe ridicule without the requirement of the threat of violence.⁹⁸

3.2.6 The following table details the relevant civil and criminal provisions and penalties in the Australian states that have introduced criminal offences alongside existing civil provisions.

State	Civil Provision	Criminal Provision	Criminal Penalty (Individual)	Criminal Penalty (Body Corporate)
Tasmania	<i>Anti-Discrimination Act 1998</i> – s 19			
New South Wales	<i>Anti-Discrimination Act 1977</i> – s 20C	<i>Anti-Discrimination Act 1977</i> – s 20D	50 penalty units, 6 months imprisonment, or both	100 penalty units
Queensland	<i>Anti-Discrimination Act 1991</i> – s 124A	<i>Anti-Discrimination Act 1991</i> – s 131A	70 penalty units or 6 months imprisonment	350 penalty units
Victoria	<i>Racial and Religious Tolerance Act 2001</i> – ss 7-8	<i>Racial and Religious Tolerance Act 2001</i> – ss 24-25	6 months imprisonment, 60 penalty units, or both	300 penalty units
South Australia	<i>Civil Liabilities Act 1996</i> – s 73	<i>Racial Vilification Act 1996</i>	\$5,000 fine, 3 years imprisonment or both	\$25,000 fine
ACT	<i>Discrimination Act 1991</i> – s 66	<i>Discrimination Act 1991</i> – s 67	50 penalty units	

⁹⁶ Dan Meagher, 'So far no good: The regulatory failure of criminal racial vilification laws in Australia' (2006) 17 *Public Law Review* 209, 212.

⁹⁷ *Racial Vilification Act 1996* (SA) s 4. However, s 5 of the South Australian legislation requires the DPP's written consent, not the Attorney-General's, before prosecution can commence.

⁹⁸ *Racial and Religious Tolerance Act 2001* (Vic) ss 24-25.

3.3 Criminal Code Provisions

3.3.1 Western Australia, in contrast, does not have any civil provisions prohibiting racial vilification. Instead, the Western Australian government has twice introduced criminal racial vilification provisions into the *Criminal Code* (WA). The first set of provisions, introduced in 1990, was specifically drafted to address the activities of the Australian Nationalist Movement (ANM), a neo-Nazi organisation led by Jack Van Tongeren.⁹⁹ During the 1980s, the ANM was responsible for a number of fire-bombings of Asian restaurants. They also defaced Jewish Synagogues and businesses owned by Jews and produced posters that racially vilified Jewish and Asian Australians and called for their expulsion from Australia.¹⁰⁰ Because of the typical activities of the ANM, which included the production of anti-Semitic and anti-Asian posters and other forms of graffiti, the legislation only targeted written or pictorial racist communication. Despite being drafted to counter the activities of this particular group, only one member of the ANM was convicted under these provisions.¹⁰¹

3.3.2 In 2004, the second set of racial vilification provisions was introduced. This legislation repealed the 1990 provisions and replaced them with new provisions that significantly expanded the conduct that is considered criminal.¹⁰² This Act also amended the *Criminal Code* (WA) crimes of assault, common assault occasioning bodily harm, assault with intent, threats and criminal damage to provide for enhanced penalties when racial aggravation is a contributing factor.¹⁰³

3.3.3 Western Australian legislators included a number of crimes of strict liability in the 2004 amendments to counter any potential criticism that the laws were too restrictive or had too high a burden of proof to enable prosecutions or convictions.¹⁰⁴ Strict liability offences differ from traditional criminal offences in that the prosecution is not required to prove a guilty mind. Under s 78 of the *Criminal Code* (WA) it is an offence for any person to engage in conduct that is likely to incite racial animosity or racial harassment. The offence does not require the prosecution to prove that the offender intended to incite such racial animosity or racial harassment. Similarly, s 80B makes it an offence to engage in conduct, other than in private, which is likely to racially harass a racial group or a person as a member of such group. Section 80 prohibits the possession of material for dissemination if the material is likely to incite racial animosity or racial hatred, while s 80D prohibits the possession of such material for display. None of these offences require the prosecution to prove beyond a reasonable doubt that the accused intended to incite racial animosity or racially harass the complainant. The Western Australian Government also introduced new free speech and public interest defences to avoid any public concerns that these strict liability offences would infringe upon free speech rights.

⁹⁹ Meagher above n 96, 218.

¹⁰⁰ Australian Screen *Nazi Supergrass* (1993) <<http://www.aso.gov.au/titles/documentaries/nazi-supergrass/>> at 15 January 2010.

¹⁰¹ Meagher above n 96, 229. In 2004, Damon Blaxall was charged with four counts of criminal damage and one count of possessing material with the intention to create, promote or increase racial hatred through its publication, distribution or display. In December 2005, after having his application for legal aid refused, Blaxall plead guilty to the charges in the Perth Magistrates Court and was sentenced to 12 months imprisonment. In 2006 a 16-year-old Aboriginal girl attacked a 19-year-old and called her a 'white slut'. She was charged with assault and engaging in conduct intended to racially harass under the new provisions, however the racial charges were dismissed. The court noted that the laws were intended to counter severe abuse and not petty name calling. See also Gail Mason 'The Penal Politics of Hatred' (2009) 42(3) *The Australian and New Zealand Journal of Criminology* 275, 279.

¹⁰² Meagher above n 96, 219. See Appendix A for a complete list of all relevant provisions.

¹⁰³ See ss 313, 317, 317A, 338B and 444 of the *Criminal Code* (WA) – discussed below.

¹⁰⁴ *Criminal Code* (WA) ss 78, 80, 80B and 80D.

3.4 Sentence Aggravation Provisions

3.4.1 New South Wales, the Northern Territory¹⁰⁵ and most recently Victoria,¹⁰⁶ have introduced specific sentence aggravation provisions for any offence that is motivated by racial hatred. The New South Wales *Crimes (Sentencing Procedure) Act 1997* s 21A(2)(h) reads:

(2) The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

...

(h) 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)...

This provision expressly recognises the power of the judge to impose a more severe punishment than if there was no aggravating motivation for the offence. It was applied in the New South Wales District Court case of *R v Amir El Mostafa*.¹⁰⁷ This case involved an organised confrontation between members of the Sunni and Shiite Muslim communities in suburban Sydney. The defendant was accused of instigating the attack and found guilty of riot,¹⁰⁸ assault occasioning actual bodily harm,¹⁰⁹ and maliciously inflicting grievous bodily harm.¹¹⁰ In sentencing, Judge Cogswell noted the specific aggravating nature of the offence.

In my opinion the nature of the attack by the rioters, in this case on the innocent and defenceless Shiite Muslims, demonstrated that the strong differences of opinion had moved sufficiently to be described as hatred by the attackers against those whom they attacked. ... I regard that as an aggravating factor of this offence and I will take that into account.¹¹¹

3.4.2 The *Sentencing Act 1991* (Vic) s 5(2)(daaa) provides that:

(2) In sentencing an offender a court must have regard to-

...

(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated...

3.4.3 This section was applied shortly after it came into force in December 2009 in *R v Gouros*,¹¹² where the deliberate and intentional selection of a victim because of their race by the offender was held to be a form of racist motivation. Gouros pleaded guilty to a number of offences, including five counts of armed robbery, attempted armed robbery and robbery. All of the robbery victims were of Indian, Pakistani or Nepalese background. Gouros had also committed three previous robbery

¹⁰⁵ Section 5(2) of the *Sentencing Act 1995* (NT) provides that the presence of any aggravating or mitigating factor concerning the offender may be taken into account at sentencing. Section 6A of the Act lists some of the specific circumstances that may be regarded as aggravating, including the fact that the offence was motivated by hate against a group of people.

¹⁰⁶ In December 2009, the *Sentencing Amendment Bill 2009* (Vic) was adopted. This bill amended the Victorian *Sentencing Act 1991*, which now expressly recognises a motivation of hatred and prejudice against a group of persons with a common characteristic as an aggravating factor – see s 5(2)(daaa).

¹⁰⁷ [2007] NSWDC 219.

¹⁰⁸ Contrary to s 93B(1) of the *Crimes Act 1900* (NSW).

¹⁰⁹ Contrary to s 59(2) of the *Crimes Act 1900* (NSW).

¹¹⁰ Contrary to s 35(2) of the *Crimes Act 1900* (NSW).

¹¹¹ *R v Amir El Mostafa* [2007] NSWDC 219.

¹¹² [2009] VCC 1731.

offences against persons of ‘Indian appearance’. He argued that s 5(2)(daaa) did not apply because his co-offenders had selected the victims and he bore no hatred or prejudice towards people of Indian appearance. Judge Cohen held the provision applied to the motivation of the offence as a whole rather than to each individual offender’s motivation – the latter being a factor when assessing individual culpability. Her Honour also held that s 5(2)(daaa) envisages ‘multifactorial’ motivation and therefore if any aspect of the motivation exhibits hatred or prejudice, the aggravating factor applied. Judge Cohen held that because the previous armed robberies were committed against people of a similar race or ethnic appearance, she was satisfied beyond a reasonable doubt that the choice of victim was at least partly based on their race or ethnic origin.¹¹³

3.4.4 Both Warner and Mason¹¹⁴ have suggested that this case could be seen as a misapplication of the new Victorian provision. They noted the decision appears to equate deliberate choice of victim on the basis of race or ethnic origin with a motivation of hatred or prejudice. This is arguably beyond the scope envisaged by the Sentencing Advisory Council when recommending the introduction of a hate crime sentence aggravation provision and goes further than any of the examples contained in the Council’s report.¹¹⁵

3.4.5 New South Wales courts take a different, arguably stricter, approach to their sentence enhancement provisions. In *Aslett v R*¹¹⁶ the Court rejected the argument that the deliberate selection of Asian victims, who the offenders presumed would be richer and more likely to have cash, jewellery and other valuables in their home, was a racial motivation. The Court held this was ‘quite a different motivation from crimes committed out of race hatred or prejudice’¹¹⁷ and that it was better seen as a deliberate targeting that did not involve prejudice.

3.4.6 The Northern Territory *Sentencing Act (1995)* s 5(2)(f) directs the court to consider any aggravating or mitigating factor in sentencing an offender. Section 6A(e) reads:

6A Without limiting section 5(2)(f), any of the following circumstances in relation to the commission of an offence may be regarded as an aggravating factor for that section:

...

(e) the offence was motivated by hate against a group of people;

3.4.7 In 2010, five men were charged with the manslaughter of an Aboriginal man in Alice Springs.¹¹⁸ The Supreme Court of the Northern Territory heard evidence that, before the attack on the victim, the group had deliberately driven their car towards two groups of Aboriginal persons camped in a dry riverbed, at one point discharging an imitation pistol in the direction of the campers. The judge held that these events displayed ‘a negative attitude towards, and a complete lack of respect for, those camped in the riverbed’. He went on to note that he doubted the group would have behaved in the same manner if the campers were white. His Honour further found that:

¹¹³ Ibid, [30].

¹¹⁴ Kate Warner, ‘Sentencing Review 2009-2010’ (2010) 34 *Criminal Law Journal* 385, 388-389; Gail Mason, ‘R v Gouros: Interpreting Motivation Under Victoria’s New Hate Crime Laws’ (2010) 34 *Criminal Law Journal* 323, 325-326.

¹¹⁵ Sentencing Advisory Council, Victoria, *Sentencing for offences motivated by hatred or prejudice* (2009) – the report did contain some examples where the crimes were only partially motivated by race, however these examples still appeared to contain elements of hate, prejudice or at least negative stereotypes that point to prejudice.

¹¹⁶ [2006] NSWCCA 49.

¹¹⁷ Ibid, 124.

¹¹⁸ *R v Doody, Hird, Kloeden, Spears and Swain* (unreported, NTSC, Martin CJ, 23 April 2010).

From this combination of facts, and having regard to the events that followed, I am satisfied that as the Hilux crossed the causeway, within the vehicle there was a negative attitude towards, and an atmosphere of antagonism towards, Aboriginal people... It is relevant that it was an Aboriginal person who threw the bottle which smashed against the side of the vehicle.

If a drunk white man had done likewise, I am satisfied that as a group, the offenders would have reacted angrily and sought to confront him. However, it is difficult to avoid the conclusion that the nature and the rapidity of the reaction...were influenced, at least to some degree, by the fact that the deceased was an Aboriginal person.¹¹⁹

3.4.8 While acknowledging that there were ‘racial elements in the earlier events’ and that a ‘tone or atmosphere was set of antagonism towards and harassment of Aboriginal persons’ that was ‘likely to have influenced the later conduct of all offenders’,¹²⁰ his Honour did not specify the degree of aggravation these factors had on the sentences of the offenders or whether it increased any of the sentences.¹²¹

3.4.9 Sentence aggravation provisions also operate in New Zealand, Canada and the United Kingdom.¹²² In the UK, the *Criminal Justice Act 2003* provides for increases in sentences for offences aggravated by hatred on the part of the offender for the race and/or religion of the victim.¹²³ Similar provisions exist in the *Sentencing Act 2002* (NZ)¹²⁴ and the *Criminal Code* (Canada).¹²⁵

3.4.10 In Tasmania there are already a small number of specific sentence aggravation provisions in operation. For example, the *Family Violence Act 2004* (Tas) s 13(a) states that when determining the sentence for a family violence offence, a judge can consider the presence of a child at the time of the offence, or that the victim was pregnant, as an aggravating factor.¹²⁶

3.5 Penalty Enhancement Provisions

3.5.1 According to Mason, penalty enhancement provisions are the most common model of hate crime legislation.¹²⁷ Penalty enhancement provisions impose an additional maximum or minimum penalty on specified pre-existing offences if the conduct is motivated by racial hatred or hostility.¹²⁸ As mentioned above, Western Australia introduced penalty enhancement provisions for racially motivated offences in 2005. The enhanced penalties in this state range from an increase of two years from the original period of imprisonment,¹²⁹ to an increase of double the maximum term of

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid – It is interesting to note that the judge did specify the amount each sentence was reduced by the offenders pleas of guilty and, in some circumstances, other mitigating factors such as good character and lesser moral culpability.

¹²² Gail Mason ‘The Penal Politics of Hatred’ (2009) 42(3) *The Australian and New Zealand Journal of Criminology* 275, 278.

¹²³ Mark Walters, ‘Hate crimes in Australia: Introducing punishment enhancers’ (2005) 29 *Criminal Law Journal* 201, 204. See Appendix A.

¹²⁴ Section 9(1). See Appendix A.

¹²⁵ Part XXIII Sentencing, s 718.2. See Appendix A. The Canadian *Criminal Code* also contains offences that deal with hate propaganda – s 319(2). Furthermore, a number of Canadian provinces, including Ontario and British Columbia, have introduced separate hate propaganda legislation – see also Luke McNamara ‘Criminalising Racial Hatred: Learning from the Canadian Experience’ (1994) *Australian Journal of Human Rights* 3.

¹²⁶ See Appendix A.

¹²⁷ Mason, above n 122, 278.

¹²⁸ Ibid.

¹²⁹ For example, under ss 317 Assault Occasioning Bodily Harm and 317A Assault with Intent, the penalty is increased by two years to seven years imprisonment when the offence is committed in circumstances of racial aggravation.

imprisonment and/or double the fine.¹³⁰ This model is largely reflective of the penalty enhancement provisions that have been introduced in the majority of states in the United States.

3.5.2 In the UK, as well as having sentence aggravation provisions, s 28 of the *Crime and Disorder Act 1998*¹³¹ prescribes that certain offences will be aggravated if the offender demonstrates towards the victim (either at the time of the offence or immediately before or after) hostility based on the victim's membership, or presumed membership, of a racial or religious group. This section also provides that it is immaterial if the offender was also motivated by some other factor. Sections 29–32 set out the crimes that this provision applies to and the enhanced penalties they incur.¹³² They include:

- racially-aggravated assaults (s 29);
- racially-aggravated criminal damage (s 30);
- racially-aggravated public order offences (s 31); and
- racially-aggravated harassment (s 32).

3.5.3 The *Police Offences Act 1935* (Tas) contains a penalty enhancement provision. Under s 35 of the Act, the court may increase the sentence of an offender from 20 penalty units or 12 months imprisonment to 50 penalty units or two years imprisonment if it considers the assault to be of an aggravated nature.¹³³ Furthermore, if the offender acts with 'indecent intent', the maximum penalty is similarly increased. This provision shows that penalty enhancement provisions can and do exist under some Tasmanian laws. However, unlike the Western Australian *Criminal Code*, the Tasmanian *Criminal Code* could not be amended to provide for penalty enhancement provisions because the Tasmanian Code does not generally stipulate separate maximum penalties for specific offences. That is, the maximum sentence for all crimes contained in the *Criminal Code*, excluding murder and treason,¹³⁴ is 21 years imprisonment.¹³⁵

3.5.4 The advantages and disadvantages of introducing each of these legislative changes, as well as the opinions of the respondents to the Issues Paper are discussed in greater detail in Part 5 of this Final Report.

¹³⁰ For example, under s 313 Common Assault, if the offence is committed in circumstances of racial aggravation, the term of imprisonment is doubled from 18 months to three years and the fine from \$18,000 to \$36,000. Under s 338B Threats, the penalty for the offence of making a threat to kill is doubled from seven years imprisonment to 14 years when committed in circumstances of racial aggravation. Similarly, the penalty for any other threat made in such circumstances is doubled to six years imprisonment.

¹³¹ See Appendix A.

¹³² Mark Walters 'Changing the Criminal Law to Combat Racially Motivated Violence' (2006) 8 *University of Technology Sydney Law Review* 66, 77.

¹³³ See Appendix A. Section 35(2) was amended in November 2009. The provision used to read 'where any person is charged with having unlawfully assaulted any child who, in the opinion of the court, is under 14 years, or any female, the court, if it considers the assault is of an aggravated nature, may sentence the offender to pay a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years'.

¹³⁴ Murder and treason attract a maximum penalty of life in prison – see ss 158 and 56 of the *Criminal Code* (Tas).

¹³⁵ See s 389 (3) of the *Criminal Code* (Tas).

Part 4

Need for Reform

4.1 Changing Demographics of Australia and Tasmania

4.1.1 As a society becomes more multicultural and the range of ethnic and national origins of citizens more diverse, there is the possibility of greater tensions between the various groups and communities. It is also possible that these tensions will be exacerbated by, and eventually manifest in, some form of anti-social behaviour, including acts of racial hatred and vilification.

4.1.2 Australia's population has comprised a variety of cultural, linguistic and historical backgrounds since the start of European settlement. When the 'White Australia' immigration policy¹³⁶ was rescinded by the Whitlam Government in the early 1970s,¹³⁷ immigration from a larger number of countries was permitted and Australia's population became more diverse. The 2006 national census showed that 27% of the Australian population were born overseas and just over 2% are Indigenous.¹³⁸ The 2006 census also indicated that around 135 religions are practised by the Australian population.¹³⁹ In Tasmania, 16% of the population were born overseas.¹⁴⁰

4.1.3 While Tasmania's population is less ethnically diverse than Australia's as a whole, over the past decade immigration, and in particular the number of humanitarian entrants who have settled in the state, has increased. According to the Department of Immigration and Citizenship (DIAC), from 2003 to 2008 there were 6,689 new 'permanent additions' to the state.¹⁴¹ While the majority of these immigrants were from countries where English is the main language,¹⁴² a significant proportion came from non-English speaking countries, including Bhutan¹⁴³ and Sudan.¹⁴⁴

4.2 Extent of Racism in Australia and Tasmania

4.2.1 Despite the governments of Australia, both at the state and federal levels, embracing and promoting notions of tolerance and cultural pluralism,¹⁴⁵ racism exists in all facets of Australian

¹³⁶ The *Immigration Restriction Act* of 1901, commonly known as the 'White Australia' immigration policy, was introduced at Federation. It aimed to control Australia's immigration intake by restricting immigration to settlers from the 'home country'. In the early 1970s, the Whitlam Government introduced a non-discriminatory policy of immigration and ethnic pluralism. This was the beginning of the development of the notion of multiculturalism in Australia. See above n 79, 11-12.

¹³⁷ Above n 79, 12.

¹³⁸ The term Indigenous is used in reference to people who are Aboriginal Australian and/or from the Torres Strait Islands.

¹³⁹ Australian Bureau of Statistics, '2006 Census Tables: Australia' <<http://www.abs.gov.au/AUSSTATS>> at 10 December 2009.

¹⁴⁰ Ibid.

¹⁴¹ These numbers comprise on-shore and off-shore additions. They do not include grants of temporary protection visas or temporary humanitarian visas. Department of Immigration and Citizenship, <<http://www.immi.gov.au/media/publications/statistics/>> at 10 December 2009.

¹⁴² In particular, the United Kingdom and New Zealand.

¹⁴³ Between 2007-2008, 10.7% of immigrants to Tasmania were from Bhutan.

¹⁴⁴ Between 2005-2006, 9.3% of immigrants to Tasmania were from Sudan.

¹⁴⁵ The acceptance of cultural pluralism as a notion means that all people within a democracy are free to be who they are and who they want to be within the confines of the law, without fear, harassment or degradation. See above n 79, 7.

society. While there is a tendency for racism and racist behaviours to be attributed to extremists or uneducated ‘rednecks’, ‘thugs’ and ‘bogans’,¹⁴⁶ a number of reports have suggested that many people in Australia today live with prejudice and intolerance.¹⁴⁷ One respondent to the Issues Paper described how he had witnessed on a number of separate occasions apparently middle-class people racially abusing African migrants. The respondent noted these incidents highlight that ‘there isn’t necessarily a typical perpetrator of racial abuse’.¹⁴⁸

4.2.2 The Australian Human Rights Commission (AHRC) has conducted a number of consultations that have found that racism is evident in all sections of Australian society and that Indigenous people continue to be the primary victims of racism and racist discrimination in Australia.¹⁴⁹ Other reports¹⁵⁰ have found that, as well as Aboriginal people, minority groups such as the Jewish, Muslim, Arab and Asian communities are often the victims of racist behaviour and hate crimes. Since the events of 11 September 2001 and the Bali bombings of 12 October 2002, the number of incidents of racial vilification against members of the Muslim and Arab communities has increased.¹⁵¹ There has also been a significant increase in the number of anti-Semitic attacks in Australia since these events.¹⁵² The results of an Australian-wide survey conducted by the University of Western Sydney released in February 2011 indicate that around half of the Australian population harbours anti-Muslim sentiments and a quarter are anti-Semitic.¹⁵³ The project surveyed 12,512 people and aimed to ‘provide a clear picture of the perspectives of everyday Australians on the issues of racism, ethnic-relations and cultural diversity’.¹⁵⁴

4.2.3 There is also evidence that neo-Nazi and white supremacist groups exist in Australia. In April 2010, the Southern Cross Hammer Skinheads, a local arm of the international white pride network Hammerskins Nation, held a white supremacist music festival on the Gold Coast, Queensland. The festival was co-sponsored by race-hate groups Crew 38 and Blood and Honour, which was banned in Germany in 2000 for spreading Nazi ideology.¹⁵⁵ Billed by organisers as ‘one hell of a week! Sun, surf and racialist music’, police and the local council reported that because the festival was held on private property, they were powerless to prevent it.¹⁵⁶

4.2.4 Although there have not been any studies conducted to date that look specifically at the number of racist attacks in Tasmania, it is reasonable to assume that Tasmania is not immune from the trends experienced in other states. The University of Western Sydney project surveyed a total of 352 Tasmanians about their attitudes to racism and multi-culturalism. It found that 41.1% had negative

¹⁴⁶ For example, the majority of comments made by members of the public in the online forums for stories relating to violence towards minority groups on *The Mercury* website attributed the acts to ‘bogans’ and ‘racist thugs’ <<http://www.themercury.news.com.au>> at 9 October 2009.

¹⁴⁷ Above n 79, 13.

¹⁴⁸ Respondent no. 17.

¹⁴⁹ A long history of systemic discrimination and institutional racism against the Aboriginal population has led to a range of societal issues and problems, including reduced life expectancy, limited access to education and greater unemployment. Indigenous people continue to be over-represented in official records of poverty, homelessness, imprisonment and child protection. See above n 79, 13.

¹⁵⁰ NSW Attorney-General’s Department, ‘You shouldn’t have to hide to be safe: A report on the homophobic hostilities and violence against gay men and lesbians in NSW’ (2003); Cunneen, Fraser and Tomsen, *Faces of hate: Hate crime in Australia* (1997); Mason and Tomsen, *Homophobic Violence* (1997) cited in Mason, above n 122, 277. See also Tamsin Solomon, ‘Problems in Drafting Legislation Against Racist Activities’ (1994) *Australian Journal of Human Rights* 7.

¹⁵¹ Walters above n 132, 68-69. See also above n 79, 14.

¹⁵² Above n 79, 15. Between 1988 and 2000 there was an average of 242 incidents of anti-Semitism reported each year across Australia. Between 2001 and 2004, the number of incidents each year doubled.

¹⁵³ Evonne Barry, ‘Australia a land of racists says survey’ *The Mercury* (Hobart), February 23 2011.

¹⁵⁴ University of Western Sydney, *Challenging Racism: The Anti-Racism Research Project*, National Level Findings <www.uws.edu.au/_data/assets/pdf_file/0007/173635/NationalLevelFindingsV1.pdf> at 23 February 2011.

¹⁵⁵ Jared Owens ‘Warning on racist gig’, *The Australian*, (Sydney), 17 April 2010 <<http://www.theaustralian.com.au/news/warning-on-racist-gig/story-e6frg6n6-1225854720864>> at 21 April 2010.

¹⁵⁶ Ibid.

views about Muslims, 17.8% about Jews and 18.4% about black Africans.¹⁵⁷ The survey also found that 9% of respondents admitted they were prejudiced against other cultures. On average, the results for racism and racial prejudice for Tasmania were slightly lower than the national average.¹⁵⁸ In late 2008, the Office of the Anti-Discrimination Commissioner (OADC) Tasmania conducted a survey that aimed to capture anecdotal reports of racial discrimination, abuse and attacks in the Tasmanian community against humanitarian entrants, international students and migrants.¹⁵⁹ The survey also examined the proportion of alleged racist attacks which were reported to the relevant authorities. It aimed to understand the reasons victims had for non-reporting and to develop strategies on how to support and assist victims of racist attacks.¹⁶⁰ The OADC received a total of 92 completed surveys. The results indicated that there is a significant under-reporting of racist behaviour to both the police and the OADC. The reasons for this vary, but include:

- language difficulties;
- considering the attack to be too minor to report;
- fear that reporting will affect visa status;
- fear of reprisal from attackers; and
- cultural barriers such as not understanding how the justice system works in Tasmania.¹⁶¹

4.2.5 Similar reasons were also reported during consultations and interviews held by the TLRI. Students from Hobart College said they felt that police often lacked the necessary resources to investigate their claims of racial abuse or (minor) assaults. Students also felt that they would not be able to identify the perpetrators of such acts, especially if they were committed from moving vehicles, and therefore there was no point in reporting such incidents to the police. An African student at the University of Tasmania commented that many victims of racial abuse or attacks do not wish to pursue claims either because they do not understand how the Tasmanian justice system works or they do not want to go through the courts. He also suggested that violence and violent incidents may be more ‘normalised’ for humanitarian entrants than other community members and they may not think these attacks or incidents of abuse are worth reporting.

4.2.6 The results of the OADC survey also suggested that there is a lack of legal advocacy available to ethnic minorities in Tasmania and that a more co-ordinated approach is required to ensure that the legal rights of all Tasmanian communities are protected.¹⁶²

4.2.7 To help address these issues identified, the OADC, in consultation with the DIAC, developed a new incident reporting form.¹⁶³ Launched at the end of May 2010, this new mechanism for reporting incidents of racism and other forms of discrimination or harassment can be used anonymously and is available on-line.¹⁶⁴ Reports can be made by the victim or by persons who were not directly involved in the incident, including friends, family members and community workers. The OADC hopes that these features will help encourage victims to report more incidents, even when they feel they do not have sufficient evidence to make a formal complaint to police. The OADC anticipates

¹⁵⁷ University of Western Sydney, *Challenging Racism: The Anti-Racism Research Project*, Findings by region (Tasmania) <www.uws.edu.au/social_sciences/soass/research/challenging_racism/findings_by_region> at 23 February 2011.

¹⁵⁸ Ibid.

¹⁵⁹ Office of the Anti-Discrimination Commissioner, Tasmania, *Annual Report 2008-2009* (2009) 37.

¹⁶⁰ Ibid.

¹⁶¹ Ibid 39.

¹⁶² Ibid 41.

¹⁶³ The new incident report form is not a formal complaint form.

¹⁶⁴ <http://www.antidiscrimination.tas.gov.au/forms/Incident_form> at 15 February 2011.

that information from these reports can be used ‘to undertake a range of targeted strategies, such as community education, to address unlawful discriminatory behaviours in (the) community’.¹⁶⁵

4.2.8 The OADC received 19 responses to its new incident report form in the first five months since its introduction.¹⁶⁶ Of these, 13 were reported by the victim and six by a relative, support person or other concerned party. From the data, it appears that seven incidents were racist in nature. A further eight were potentially racially motivated, although the reports of the incidents did not include conclusive evidence of racism or prejudice. Four of the incidents reported were not racist in nature.¹⁶⁷ Over half of all the incidents reported involved verbal abuse or harassment. There were six reports of physical assault to the person and three of damage to property. Four of the incidents were reported to the police and two resulted in formal complaints being lodged with the OADC. The majority of incidents were determined not to require further action or the person reporting the incident chose not to include their contact details.¹⁶⁸

4.3 Number of Attacks on Foreigners

4.3.1 In 2009, there was reportedly an increase in the number of allegedly racially motivated attacks in Australia.¹⁶⁹ Many of the victims of these attacks were Indian students,¹⁷⁰ who claimed they were specifically being targeted because of their race. These incidents had a negative impact on Australia’s reputation as a tolerant society and as a safe destination for international students.¹⁷¹

4.3.2 Although there is a perception by the victims, the press and some facets of the wider community that a number of assaults in Victoria were racially motivated, a report on the welfare of international students by the Senate Standing Committee on Education, Employment and Workplace Relations in Victoria,¹⁷² published in 2009, found that there was little evidence to indicate this was the case. The Report found that ‘[the] majority of evidence given to the committee indicated that the incidents were more likely to be opportunistic robberies, with the attackers targeting owners of laptop computers who did not have an appropriate level of personal safety awareness’.¹⁷³ The Report cited a

¹⁶⁵ Catherine Edwards ‘Online TAS Reporting tool turns table on discrimination’ (Press Release, 31 May 2010) <www.newsroom.immi.gov.au/media_release/809> at 15 February 2011.

¹⁶⁶ The OADC supplied the TLRI with a copy of the de-identified data.

¹⁶⁷ In these incidents, the discrimination alleged was either based on gender or physical ability.

¹⁶⁸ People using the online incident reporting form are not required to provide any personal details. However, if the complainants’ personal contact details are not supplied, the complainant cannot be contacted by the OADC and the incident cannot be investigated further – see <<http://www.antidiscrimination.tas.gov.au/forms>>.

¹⁶⁹ Victorian Chief Commissioner Simon Overland, publicly announced in January 2010 that Indian nationals are over-represented in robbery statistics in Victoria and that there is a racist element to some of these attacks. See ‘We’ve known for two years about Indian attacks: Overland’, *The Age*, (Victoria), 20 January 2010 <<http://www.theage.com.au/national/weve-known-for-two-years-about-indian-attacks-overland-20100120-mk8o.html>> at 12 February 2010.

¹⁷⁰ Indian students were the predominant victims in Melbourne and Sydney. Students of other nationalities also reported being attacked in these and other cities, including Hobart.

¹⁷¹ Senate Standing Committee on Education, Employment and Workplace Relations, above n 1, 25. The apparent racist attacks on Indian students in Victoria lead to a number of Indian newspapers and news agencies to publish stories criticising the Victorian police force and the Australian Government for failing to ensure the safety and protection of Indian nationals living and studying in Australia. Examples included the *Delhi Mail Today* newspaper, which published a cartoon that depicted a Victorian police officers as a Klu Klux Klan member. In order to improve relations between the nations, Deputy Prime Minister Julia Gillard and later Victorian Premier John Brumby have each travelled to India to hold discussions with Indian government officials.

¹⁷² Senate Standing Committee on Education, Employment and Workplace Relations, above n 1.

¹⁷³ *Ibid* 25-26.

number of submissions that supported this assertion and highlighted the lack of awareness of safety and security issues by new arrivals in Australia.¹⁷⁴

4.3.3 In Tasmania, international students (predominantly from Asian countries¹⁷⁵), migrants and people of non-Anglo ancestry have reported being the victims of racist attacks. The nature of these attacks varied from having eggs and other projectiles thrown at them from moving vehicles to being physically assaulted.¹⁷⁶ In April and May 2010 three assaults against international students from the University of Tasmania were reported to Tasmania Police. All three assaults occurred at night in the vicinity of the University. Both the Tasmania Police and the Tasmania University Union considered the attacks to be opportunistic and not racially motivated. A rally was held at the University in response to the attacks and to encourage all students to be aware of their personal safety.¹⁷⁷

4.3.4 During consultations, a number of respondents reported either being the victim of racist attacks in Tasmania or witnessing racist attacks. The majority of students from the Hobart College group, Students Against Racism, reported experiencing such attacks. Although many of these were described by the students as being relatively minor in nature (ie racial slurs being shouted and projectiles being thrown from passing cars), there were a few more serious incidents and assaults reported. The students also stated that some of the incidents could perhaps be explained as drunken behaviour and not necessarily racist in nature.

4.3.5 Staff at Migrant Education and others who work with new arrivals reported receiving or witnessing high numbers of incidents of racially motivated harassment or attacks. Many involve incidents of property damage (such as car tyres being slashed or windows broken). One respondent told how he had witnessed someone deliberately drive a car at an African man for no apparent reason. Another reported how a client had been hit on the head with an empty wine bottle as the perpetrators called out 'Black nigger, get off the street'.

4.3.6 The OADC 2008 racial discrimination survey showed that the majority of respondents reported incidents of verbal abuse or intimidation (43.5%).¹⁷⁸ However, 29.3% of respondents reported that they had been the victim of a physical assault that they believed was racially motivated. In one incident, a taxi driver described being hit over the head with a bottle after asking his attackers to pay their fare. The attackers reportedly told the taxi driver that they could 'kill him and nothing would happen because he was black'. Another victim reported being punched in the mouth and told to 'go home'. He lost two teeth as a result of the attack.¹⁷⁹

4.3.7 Anecdotal examples of other apparent racial attacks were reported by members of the public on the Mercury newspaper website's online public discussion forums:¹⁸⁰

¹⁷⁴ Ibid 26. Submissions from President of ISANA, President of Curtin University Student Guild and the International Students Committee and International Students Online can be viewed at <http://www.aph.gov.au/senate/committee/eet_ctte/international_students/submissions.htm>.

¹⁷⁵ In 2009, the University of Tasmania had a total student population of over 19,000. Of these, there were approximately 2,000 international students from over 70 countries studying at UTAS. There are also a number of international students studying at various high schools and colleges around the state.

¹⁷⁶ Incidents of these kinds were reported in both the OADC online reporting forms and to the researcher in a number of consultations.

¹⁷⁷ Tasmania Police, 'Planned Protest' (Press Release, 11 May 2010).

¹⁷⁸ 20.7% of respondents reported incidents of discrimination and 6.5% did not specify what had occurred.

¹⁷⁹ The details of the attacks are not published in the Office of the Anti-Discrimination Commissioner, Tasmania, *Annual Report 2008-2009* (2009). Instead, the Acting Commissioner kindly agreed to allow the TLRI to have access to their de-identified data from the study. The TLRI thanks the Officer of the Anti-Discrimination Commissioner for their assistance.

¹⁸⁰ *The Mercury* <<http://www.themercury.com.au>> at 10 October 2009.

While at Uni, my closest friend from Hong Kong moved to Melbourne to get away from (racist attacks)' – Sos of Sandy Bay – 2:29pm Sunday 19 July 2009.

I find it funny to see how 'white' Tasmanians always refuse to acknowledge that racism is prevalent in Tasmania. Having been here in Hobart for 3 yrs, I have been thrown lots of stuff at [sic], including eggs, mustard sauce, water bottles. 90% of my 'non-white' friends also have the same experience. Verbal abuse was without doubt far more common than that. If you are a 'non-white' person, you know what I mean. Therefore, I have been sharing my experience with 'non-white' students who might come to study in Tasmania in order to avoid disappointment and waste of time and money' – Jimmy of Hobart – 10:58am Sunday 19 July 2009.

My wife is Asian and she and her friends have suffered taunts, though thankfully no assaults, on the streets of Hobart. There's racist thuggery on the rise in our city...' – John of Hobart – Monday 2:55pm Monday 5 October 2009.

4.3.8 International student support groups also claim that there are many more victims of this type of behaviour but these victims are reluctant to report the incidents to police. According to the UTAS International Services director, the reasons for this reluctance to report include the problem of cultural barriers and a fear of retribution from offenders:

Many of our (international students) come from countries in which there is a fear of authority, and there may be a consequent reluctance to report incidents (of racial attacks) to police... A further complication is that when charges are laid sentences appear to be very light and students are concerned there may be repercussions from the same offender.¹⁸¹

Submissions

4.3.9 The majority of submissions received by the TLRI addressed the issue of whether racism exists in Tasmania and whether ethnic minorities are specifically targeted. Some respondents recounted personal experiences of being the victim of racist attacks and abuse. Others reported witnessing such incidents or being told about them by the victim after they had occurred. For these respondents, particularly those who work with the Culturally and Linguistically Diverse (CALD) community, there is no doubt that ethnic minorities are specifically targeted in these attacks. The fact that physical attacks are often accompanied by racial abuse evidences the racial motivation.

Students regularly report incidents where they have been personally targeted, or where they have witnessed verbal or physical attacks on other members of their community... Some would argue they are a daily occurrence.¹⁸²

Through my experience working with Culturally and Linguistically Diverse (CALD) communities, I have become aware...that these communities, the individuals within them, have to contend with racist actions towards them on an ongoing and often daily basis. Such actions range from verbal insults, the threat of violence or actual violence.¹⁸³

4.3.10 One respondent suggested that the attacks could be seen as simultaneously opportunistic and specially targeted.

I am aware as a member of the Hobart community that some individuals from [disadvantaged] communities seek out targets for violent attacks; these actions are often in connection to the use of drugs and alcohol in the evening on a weekend. As a new arrival to the Tasmanian community, it is likely that there would not be a comprehensive awareness of this occurrence and thus protective measures, such as not being alone after

¹⁸¹ Paul Rigby, Director International Services, University of Tasmania, quoted in Danielle McKay, 'Soft target fears on foreign students', *Sunday Tasmania* (Tasmania), 19 July 2009, 2.

¹⁸² Respondent no. 7.

¹⁸³ Respondent no. 5.

dark in certain areas, would not be taken. In the seeking out of an attack it could be deducted that the most vulnerable of persons with the most obvious identifiable points of difference that connect to pre-established racist idea would become the easiest target for an attack.¹⁸⁴

4.3.11 Students from Hobart College, who themselves may have been a victim of an attack, sometimes attribute the incident to the offender being intoxicated and not necessarily racist. One student explained that the perpetrators of these offences can often end up being quite friendly once they get to know their victims.

4.3.12 Other respondents questioned the extent of racism in Tasmania. While acknowledging that there is a perception among certain members of the community that recent attacks have been racially motivated, they argue that there is a lack of any scientific or statistically significant evidence to support these claims. According to the Hobart Community Legal Service (HCLS), '(there) appears to be no compelling evidence to support the argument that there have been a recent spate of physical attacks (that) have been racially motivated... (There) is little evidence to suggest that there is organised, or racially motivated violence in Tasmania'.

4.3.13 The Tasmanian Institute of Law Enforcement Studies (TILES) also argued that there is a lack of evidence to support a claim of racially motivated attacks occurring in Tasmania or the need for the introduction of racially motivated offences:

This proposal for legislative change came to the fore in a heavily charged political context, regularly inflamed by (sometimes unfounded) anecdotal evidence featured by a wide range of media outlets ... Legislative change should relate to strength in evidence and certainty of facts as opposed to unfounded representations fuelled by misguided interpretation of second hand hear-say ... It is also our opinion that insufficient research and forensic/police evidence have been garnered to ascertain the foundations of these offences.

TILES also submitted that it is important to recognise that some attacks on ethnic minorities are going to be opportunistic in nature and should be labelled as such. Professor Gail Mason, Director of the Sydney Institute of Criminology, also noted that there is a lack of Australian research on racial vilification:

Australian data in this area is flimsy. Victimisation surveys are largely ad hoc and methodologically restricted by limited funding. We have virtually no evidence on perpetrators. While some jurisdictions allow police to collect data on prejudice related crime (eg NSW, QLD) this facility is vastly under-utilised by investigating officers. We have no systematic data on prosecutions and no court or sentencing data. In comparison to the UK and the US, we know very little about the extent and patterns of racial crime in Australia.

4.3.14 An interviewee¹⁸⁵ told how he does not believe that there is much organised or overt racism in Tasmania. He felt that it is important to look at the reasons why some members of the Tasmanian community might hold racist beliefs. He believed that in most situations it could be explained by the fact that Tasmania used to be a very homogenous society and it is only in last few years that the population has started to become more diverse. The advent of new cultures will inevitably cause some tension. He also felt that international students studying at UTAS, as opposed to other ethnic minority groups and communities such as humanitarian entrants, may be more vulnerable to racist attacks because they tend not to have the same level of community involvement or networks.

4.3.15 One respondent submitted that there is no evidence of racism in Tasmania or Australia. He argued that the majority of recent attacks in other states that have been labelled 'racially motivated' have been carried out by other ethnic minority groups and therefore were not 'racist' in nature.

¹⁸⁴ Respondent no. 5.

¹⁸⁵ Respondent no. 16.

Institute's View

4.3.16 The TLRI acknowledges that there is currently a lack of hard data on the extent of racism and racially motivated offences in Tasmania and Australia. However, the numerous reports of racial abuse and apparent racially motivated attacks that were detailed in some of the submissions received by the Institute indicate that racism is experienced by racial minorities in Tasmania and that they are likely to be specifically targeted in some attacks.

4.4 Psychological and Physiological Characteristics of Racist Attacks

4.4.1 One of the major arguments for the introduction of criminal racial vilification offences or sentencing provisions is that general criminal laws do not sufficiently deal with assaults or other offences that are committed with a racial motivation.

4.4.2 It is well documented that hate-related attacks are, in general, more violent, brutal and vicious and have a deeper psychological effect on the victim and the community to which the victim is a member when compared with other assaults not motivated by prejudice.¹⁸⁶ An American study by the National Institute Against Prejudice and Violence¹⁸⁷ found that victims of criminal and non-criminal racist attacks experienced 21% more adverse physiological and psychological symptoms than those who had suffered similar attacks that were not race related. Other studies indicated that hospitalisation rates for victims of hate crimes are considerably higher.¹⁸⁸

4.4.3 From a psychological perspective, perpetrators of hate crimes, including racial vilification, often see themselves as sending a message to the victim and those like them that they are not welcome in, and will not be tolerated by, the general community. The victim is usually aware of this message and this can cause them and other members of similar minority groups to feel especially isolated and vulnerable.¹⁸⁹ Victims can also suffer from prolonged periods of depression and anxiety after an attack.¹⁹⁰

4.4.4 It is these characteristics of racially motivated crimes that lead proponents to call for the introduction of racial vilification laws. They claim that general criminal provisions against, and sentences for, the destruction of property, assault, wounding or murder, even when aggravated by the severity of the violence or the circumstances of the attack, do not adequately condemn the behaviour. Proponents argue that behaviour which is motivated by hatred or prejudice is qualitatively different from other criminal behaviour and therefore specific legislation is required to address it.

4.4.5 A number of submissions received by the TLRI documented the psychological strain a racially motivated attack can have on a victim. Respondents who work with migrant communities noted that many migrants, especially those who have entered the country as refugees, have often been through severe trauma and have lasting mental health issues as a result. Therefore, these kinds of attacks can have a greater impact on new arrivals than on locals.

¹⁸⁶ Walters, above n 132, 67; Walters, above n 123, 209; Craig L Uhrich, 'Hate Crime Legislation: A Policy Analysis' (1999) 36 *Houston Law Review* 1467, 1497.

¹⁸⁷ (1986) cited in Walters, above n 123, 209.

¹⁸⁸ Hospitalisation rates for racially motive assaults are up to four times higher than assaults not aggravated by prejudice – see Walters, above n 132, 67, 72.

¹⁸⁹ Uhrich, 'Hate Crime Legislation: A Policy Analysis', above n 186, 1506.

¹⁹⁰ Walters, above n 76, 165.

Staff have ... witnessed the ongoing consequences of insidious behaviour against individuals, such as incidents that retraumatise clients from refugee backgrounds and trigger Post Traumatic Stress Disorder symptoms.¹⁹¹

Need to remember that [members of] refugee communities come with trauma issues and are often hyper-vigilant. Any kind of incident basically retriggers their trauma responses. They often have PTSD, so incidents have a very large negative impact on their emotional well-being.¹⁹²

4.4.6 A UTAS student also highlighted the feeling of isolation that new arrivals can experience if they are subjected to racial abuse or racially motivated attacks.

I think this kind of crime has a bigger impact on new arrivals than on locals. If you get abused or assaulted when new in the country, particularly people who have been through trauma this can make a truly terrible feeling and really shut them off from trusting the society and cause a lot of loneliness and mental health issues.¹⁹³

4.4.7 Others talked about the financial costs victims can incur if they break rental leases to escape abusive situations. One respondent noted that racial vilification can make settlement outcomes much more problematic for migrants. In some circumstances the victims are unable to settle or are forced to move to other towns or states. Others may not successfully integrate into the wider community.

It is very sad to see people who have come [to Tasmania] with the promise of a new life and a lot to offer the community be treated in a manner that causes them to retreat into their shells and does not allow them to engage with their new life in Australia.¹⁹⁴

4.5 Symbolic Function of Criminal Law

4.5.1 Proponents of racial vilification laws also believe that the symbolic nature of separate racial vilification laws is an important argument in support of their introduction. While the offending behaviour may be proscribed by other provisions, the creation of a separate offence expressly acknowledges the additional, more obnoxious, element of the crime.¹⁹⁵ They argue that these laws can act as a way of educating the public about what behaviour is and is not acceptable in the community.

The existence of a law is an educative thing in itself, because it shows that the community does not approve of certain behaviour. Even though (Canadian) laws have not been used much, the fact that they are there is an expression of the community's conviction...It has been recognised...that the legislation goes hand in glove with education and all the countries that have chosen this option have been aware of the significance of the law in that respect, of the fundamental and vital importance of education.¹⁹⁶

¹⁹¹ Respondent no. 7.

¹⁹² Respondent no. 17.

¹⁹³ Respondent no. 19.

¹⁹⁴ Respondent no. 17.

¹⁹⁵ Meagher, above n 96, 214.

¹⁹⁶ The Hon. A J Grassby cited in Human Rights Commission (Australia), *Words that Wound: Proceedings of the Conference on Freedom of Expression and Racist Propaganda*, Occasional Paper No. 3 (1983) 57-58. Senator Alan Missen (Victoria) expressed similar sentiments at 41, '[There are people] who said we do not need legislation (against racial incitement) at all as (legislative reforms) do not change society's behaviour. I have never believed that. I think it is pretty clear over the years that you can, by legislation, change people's activities and a lot of people do change and improve over a period where the society says this is the law we are going to insist upon and we are going to enforce.'

4.5.2 Other commentators, however, disagree with these assertions. They claim that the criminal law is not an appropriate mechanism to combat racial vilification because racism and racial prejudices ‘run too deeply’ to be changed by legislation.¹⁹⁷

Submissions

4.5.3 The TLRI received six submissions that addressed the question of whether the symbolic function of a law is a sufficient justification for its introduction.

4.5.4 Of the six responses, two were strongly in favour of a law being introduced to serve a symbolic function. The OADC submitted that creating a criminal offence of racial vilification would send a strong public statement of society’s condemnation of racism. The OADC noted that ‘[both] criminal and civil laws can be employed towards the goal of educating the community about non-discrimination and human rights’. Similarly, the submission from Colony 47 stated that the symbolic function of a law is ‘absolutely and without question sufficient justification for its introduction’ as such laws ‘can have a profound influence towards the positive challenging and changing of ingrained racisms that are evident in the communities of Tasmania.’

4.5.5 This submission also noted that the influence of such laws would be dependent on the way in which they are communicated to the public. Such laws would need to be accompanied by large-scale consciousness-raising.

4.5.6 TILES recognised the need to accompany the introduction of a new racial vilification law with highly visible awareness and education campaigns as well. TILES contended that the symbolic function alone is not sufficient justification for the introduction of a law. While not expressly addressing the issue of the function of a law, a number of other submissions also recommended the introduction of some form of community education program or public advertising campaign about diversity, migrant communities and what constitutes racism and racist behaviour.

4.5.7 According to Professor Mason, the symbolic function of any law must be accompanied by an operative function in order for any law to be of actual use and value. Professor Mason noted that while the symbolic function of a law is important because it shows that concerns about racist violence and crime are taken seriously, these laws need to be able to be used in order to be effective:

Purpose built hate crime laws allow the legislature to explicitly denounce the racist or prejudicial element of an offence ... [However] a law that is never used to prosecute eventually becomes redundant with little denunciative or symbolic capacity.

4.5.8 Two submissions argued that the symbolic function of a law is not a sufficient justification for its introduction. Mr Tim Ellis, Director of Public Prosecutions (DPP), noted that he believes there is no benefit in a law with only a symbolic function:

[I] don’t believe it is a useful or necessary exercise of Parliament’s power over citizens to enact criminal laws to serve a “symbolic function”.

Similarly, Edward Lipsett found that the symbolic function is not an adequate justification for a new law:

It must be remembered that legislation and legal sanctions have very real practical impact [sic] on individual and society. For any additional restrictions on individual and collective freedom to be justified, their actual rather than their emotive, speculative or “symbolic” benefits must be demonstrated.

¹⁹⁷ Walters, above n 132, 75.

Institute's Views

4.5.9 The TLRI believes that a symbolic function is an important aspect of some laws. A law can operate to demonstrate to the community what is and is not acceptable behaviour. This function is particularly important when social and demographic changes in a population mean that new problems or hostilities emerge that need to be addressed. However, the TLRI also agrees that laws that only have a symbolic function are likely to lose their effectiveness if they are seldom or never used to prosecute an offender. The symbolic function of such laws is also likely to be meaningless if the wider community, beyond those engaged in the legal profession, are unaware of their existence or purpose.

4.5.10 The TLRI recognises that if any new racial vilification law or is introduced, it needs to be accompanied by a highly visible awareness and education campaign. This campaign should include information about the operation of any new laws as well as what constitutes racism, why such behaviour is considered abhorrent and what avenues are available to address such behaviour. As recommended by TILES, it is 'important to have a holistic, highly visible approach to the problem. The holistic approach should encompass education, media, non-government and government agency training and (internal) policy making.' The Institute agrees with this statement. If changes to the law are warranted, these need to be accompanied by other measures.

Part 5

Options for Reform

5.1.1 Almost all states and territories in Australia have introduced laws that not only prohibit racial vilification but make serious racial vilification a criminal offence. This section will summarise these options, indicate the benefits and disadvantages of each option and make recommendations as to what would be the most appropriate and effective provision to introduce in Tasmania.

5.2 Option 1 – No Change

5.2.1 The first option raised by the Issues Paper was to make no changes to the current laws that operate in Tasmania. Under this option, Tasmanian citizens would have access to two options for civil redress for racial vilification (ie under the state's *Anti-Discrimination Act 1998* (Tas) and the Commonwealth *Racial Discrimination Act 1975*) and the possibility of seeking a criminal conviction for serious racial vilification under the new Commonwealth sedition laws that are found in the *Criminal Code*. Under the existing sentencing provisions, the sentence imposed on an offender convicted of a criminal act, such as assault, could be increased if the court was satisfied beyond reasonable doubt that the crime was aggravated by racial hatred. A racial element can also aggravate the offence for the reasons explained above at 2.3.4 and Victorian and Tasmanian courts have already recognised racism as an aggravating factor in sentencing at common law.

5.2.2 In favour of not introducing new criminal provisions and simply retaining the current laws in Tasmania, it could be argued that introducing new criminal laws or criminal law provisions will merely add to the complexity of the legal system without protecting victims or encouraging racial tolerance. The criminal law is a blunt instrument to use for the task of educating prejudiced members of the community. There are already a number of remedies available to the courts under anti-discrimination legislation, including the imposition of a fine, the order for an apology or that the offending behaviour cease. It has been shown that it is these forms of civil redress that many victims of racial vilification wish to receive.¹⁹⁸

5.2.3 There are also arguably a number of disadvantages of not introducing any new criminal racial vilification provisions in Tasmania. These include a failure by the legislature and the government to acknowledge that racism does exist in our society and that it can be a key motivation for often brutal attacks. It also represents a failure by these institutions to expressly condemn this kind of behaviour and promote tolerance and multiculturalism. Furthermore, by not introducing any form of criminal racial vilification laws, Tasmania and Tasmanian laws could be seen as not keeping pace with the changing demographics of our state and not affording adequate protection to ethnic minorities in the community.

Submissions

5.2.4 The DPP submitted that the current laws in Tasmania appear to be sufficient to address the issue of racial vilification and racially motivated offences. The DPP noted that, following the decision in *Bigwood*,¹⁹⁹ the approach of the Tasmanian Supreme Court will be the same as that of the Victorian

¹⁹⁸ Above n 79, 35.

¹⁹⁹ See 2.3.9 – 2.3.10 above.

Court of Appeal in *Palmer* and therefore there may be no need for the introduction of sentence aggravation provisions. He also wrote that there ‘seems to be little demonstrated need for the creation of a crime or offence of racial vilification, or other statutory provision canvassed in the [Issues] Paper. The lack of use of such provisions in other jurisdictions tends to demonstrate this.’

5.2.5 The OADC, on the other hand, submitted that there is a need for the introduction of new criminal or other provisions in Tasmania to address racial vilification and racially motivated offences. While the OADC supported the retention of the provisions in the *Anti-Discrimination Act 1998* (Tas), it felt that stronger penalties are needed for acts of serious vilification.

It could be said that Tasmania, at least on the issue of racially motivated offences, has not kept pace with developments in other states that have criminalised serious racial vilification... There is an argument that conciliation based resolution is not strong enough and criminal penalties should apply for serious acts of vilification on the basis of race.

5.2.6 The Hobart Hebrew Congregation also argued that civil remedies are not sufficient for acts of serious racial vilification.

Experience has shown that there are some who engage in racial vilification who are not deterred by civil process.

5.2.7 The Congregation further argued that the *Anti-Discrimination Act 1998* (Tas) is ineffective in addressing racial vilification and that s 19(a), inciting hatred on the grounds of race, should be abolished.

With over a decade of operation, the Tasmania *Anti-Discrimination Act 1998* has proved ineffective in controlling racial vilification... It has also been seen that many victims of racial vilification are from vulnerable communities, who [do] not know and/or understand the process for seeking redress through the civil processes and/or are too scared to undertake such processes.

5.2.8 Professor Mason acknowledged that, for some, making no changes to the current laws in Tasmania is the most attractive option because ‘strictly speaking, racially motivated crime, including offensive (ie racist) language and behaviour can be prosecuted under existing criminal law.’ However, Professor Mason also noted that this approach fails to pay attention to the symbolic function of the criminal law and may result in Tasmania being seen as not taking the problem of racism and racist violence seriously.

Institute’s Views

5.2.9 The TLRI agrees with both Professor Mason and the OADC that Tasmania ought to introduce some form of new provision to explicitly address acts of serious racial vilification or racially motivated offences. The Institute acknowledges that, as demonstrated by the *Bigwood* case, Tasmanian courts are currently able to take the racist motivation of offenders into consideration when passing sentence,²⁰⁰ however, this alone does not necessarily have the same symbolic value or denunciative effect that a specific provision would.

5.2.10 The TLRI also believes that the provisions contained in the *Anti-Discrimination Act 1998* (Tas) should be retained as they serve an important function. People may experience incidents of racial hatred or vilification such as those described at 2.2.1 that are appropriately addressed in the Anti-Discrimination tribunal. There may also be situations where the victim of racial hatred seeks a civil, rather than a criminal, remedy for the offending conduct, such as a retraction or apology. If s 19(a) of the *Anti-Discrimination Act 1998* (Tas) was revoked, these types of remedies would no longer be available for incidents of racial hatred.²⁰¹

²⁰⁰ Tasmanian courts can do this by using s 80(2)(a) of the *Sentencing Act 1997* – see 2.3.3 above for further discussion on the operation of this section.

²⁰¹ See 5.4.3 below for further discussion.

Recommendation 1:

That the status quo is an inadequate response to incidents of racial vilification and racially motivated offences.

5.3 Option 2 – Extend Anti-Discrimination Provisions to Introduce a New Criminal Offence

5.3.1 The second option canvassed in the Issues Paper was to introduce a criminal provision for serious racial vilification alongside the current civil provision that is contained in s 19(a) of the *Anti-Discrimination Act 1998* (Tas). This is the model that exists in most Australian states, however, it attracts a number of criticisms from legal commentators.

5.3.2 One of the major criticisms levelled against this kind of provision, in particular the New South Wales criminal racial vilification provision s 20D of the *Anti-Discrimination Act 1977*, is that it is ineffective and never used by the prosecution. Despite having been in force for 20 years, no offender, including those identified as taking part in the 2005 Cronulla Riots,²⁰² has been charged with criminal racial vilification in New South Wales.²⁰³ Several legal commentators have identified what they believe to be the deficiencies of the legislation. For example, according to Walters, one problem with prosecuting offenders under the New South Wales legislation is that the police do not investigate the offence of incitement of physical harm on the grounds of race. Victims of racial vilification must contact the Anti-Discrimination Board, which then decides whether to investigate the complaint. Walters points out that, unlike the police, the Board does not have sufficient resources to carry out extensive investigations and therefore many matters may not be investigated.²⁰⁴ The Board must also refer the matter to the Department of Public Prosecution within 28 days of receiving the complaint, which is arguably a relatively short time frame.

5.3.3 Almost all racial vilification laws contained in Anti-Discrimination legislation require the consent of the Attorney-General before any prosecution can proceed. This requirement has been criticised because it puts the Attorney-General, and ultimately the government, in a difficult position where they are open to accusations of acting as ‘thought police’ or for giving preferential treatment for particular groups in society.

The discretionary power (of whether to pursue prosecution or not) places the Attorney-General in an invidious position. For a decision to prosecute, however appropriate and considered, will inevitably give rise to claims that the government is engaged in political censorship. And even when a decision is made not to prosecute in circumstances when parts of the community consider it appropriate, the Attorney-General will be accused of favouring certain political viewpoints over others.²⁰⁵

²⁰² The Cronulla Riots involved a clash between approximately 5000 white Australians and a large number of persons of Middle Eastern appearance at the Sydney beachside suburb of Cronulla. The violence soon spread to neighbouring suburbs, including Maroubra and Rockdale and the inner west suburbs of Ashfield, Bankstown and Punchbowl. There were several incidents of property damage and assault. In the end, police arrested 85 people and laid over 230 charges, including affray, riot, threatening violence and malicious damage. Despite the extensive video coverage of the incident and the strong police presence, only 14 people were convicted and no offender was charged with a racially aggravated offence. According to Walters, this is exactly the kind of behaviour that ought to have been covered by the racial vilification provisions of the NSW *Anti-Discrimination Act 1977*. See Walters, above n 132, 70-71.

²⁰³ There have also not been any criminal convictions under racial vilification provisions in Queensland, ACT, South Australia or Victoria.

²⁰⁴ Walters, above n 132, 79.

²⁰⁵ Meagher, above n 96, 215.

5.3.4 It should be noted that this issue is problematic in other common law jurisdictions that have introduced racial vilification and other racial hatred laws.

In most common law countries the Attorney General or the Director of Public Prosecutions must authorise each such prosecution. He is reluctant to do so, in part because authorisation in these circumstances implies a particular official approval of the prosecution. Debates over failure to give approval then tend to move the entire matter into the political arena.²⁰⁶

5.3.5 A possible solution to this problem is to require the consent of the DPP rather than the Attorney-General before prosecution can proceed. This would arguably retain the benefit of having a ‘filter’ to help avoid vexatious charges or prosecutions, while not involving the same degree of apparent political censorship and therefore would not warrant the same level of criticism.

5.3.6 A further inadequacy of this model is that the prosecution must prove the motive of the offender beyond reasonable doubt. Walters argues that this requirement restricts prosecutions.²⁰⁷ Under s 20D of the *Anti-Discrimination Act 1977* (NSW), the prosecution is required to prove beyond a reasonable doubt that the defendant intended to incite hatred towards the victim on the grounds of race. That is, the reason for their actions was to encourage others to feel hatred towards or serious contempt for the victim and/or other persons on the grounds of their race. This additional *mens rea*, according to Walters, essentially equates to a requirement to prove the motive of the accused, which is virtually impossible without a confession from the offender. As Meagher points out, ‘it is one thing for motive to be relevant in attributing intention to an accused, it is something altogether different to require a prosecutor to in effect prove the motive of a crime beyond reasonable doubt.’²⁰⁸ For these reasons, it has been argued that most vigilant prosecutors would seek prosecution under a more general provision as contained in the relevant Criminal Code for any apparent racially motive offence involving actual violence.²⁰⁹

5.3.7 Other legal commentators have suggested that locating criminal racial vilification provisions within general anti-discrimination legislation may have the appearance of lessening or diminishing the seriousness of the offence. They argue that making serious racial vilification part of a state’s criminal code would ‘put it on the same footing as other criminal acts.’²¹⁰ Meagher notes that this criticism of placing the New South Wales racial vilification laws in separate legislation was first highlighted not long after its introduction in a report by James Samios MLC in 1992 (the Samios Report). The Samios Report recommended relocating the provisions to the *Summary Offences Act 1988* (NSW). A similar recommendation was made in 1999 when the New South Wales Law Reform Commission found that it was more appropriate for the offences to be contained in the *Crimes Act 1900* (NSW). However, on both occasions the recommendation was not adopted by the New South Wales government.²¹¹

²⁰⁶ Human Rights Commission (Australia), *Proposal for Amendments to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation*, Report No 7 (1984) 18.

²⁰⁷ Walters, above n 132, 80.

²⁰⁸ Meagher, above n 96, 217.

²⁰⁹ Nancy Hennessy and Paula Smith, ‘Have We Got it Right? NSW Racial Vilification Laws Five Years On’ (1994) *Australian Journal of Human Rights* 6.

²¹⁰ *Ibid.* See also Meagher, above n 96, 213.

²¹¹ Meagher, above n 96, 213.

5.3.8 Section 20D is further criticised for having a relatively modest punishment attached to it in comparison to more general offences of a similar nature.²¹² Not only does this contradict the apparent aggravated nature of the offence of racial vilification, it also acts as another disincentive for the prosecution to pursue an offender under this provision.²¹³

5.3.9 One advantage of introducing a criminal offence for racial vilification alongside an existing civil provision is that it avoids the need to introduce an entirely new offence into the state's Criminal Code, which can be problematic. For example, the issue of in which part of the Code to situate the new offence can present problems for the legislature.

Submissions

5.3.10 Seven of the submissions received addressed the questions of whether Tasmania should introduce a serious racial vilification criminal provision in the *Anti-Discrimination Act 1998* (Tas), and if so, what changes would need to be made to the existing models in other Australian jurisdictions to make it more effective. Of these, four were opposed to the idea of introducing such a provision, one noted it was not the preferred reform option but was better than no reform, while two supported the proposal, albeit with significant changes to provisions that currently operate in other jurisdictions.

5.3.11 TILES and the Tasmanian Gay and Lesbian Rights Group (TGLRG) supported the introduction of a criminal racial vilification provision in Tasmania's Anti-Discrimination legislation. The TGLRG submitted that the introduction of a criminal provision into the *Anti-Discrimination Act 1998* (Tas) would 'enhance the status of the [Act] as an effective instrument against unfair and detrimental treatment of disadvantaged minorities.' However, both argued that such a provision should be 'all encompassing' and apply to all grounds of attribute-motivated vilification, including sexual orientation, religion, physical ability and all other attributes as listed under ss 16 and 19 of the *Anti-Discrimination Act 1998* (Tas). TILES also argued that any new provision would need to be specifically tailored to Tasmania's situation and address the problems that are experienced here. They claimed the legislature would need to ensure that

any reform that would apply to the Tasmanian case is not a cut and paste of other jurisdiction provisions. New provisions will have to be representative of local conditions.

5.3.12 The OADC submitted that it was not entirely opposed to the introduction of a new provision in the *Anti-Discrimination Act 1998* (Tas), however it noted that this was not the Office's preferred reform option. The OADC suggested that if such a new provision was enacted, specific review requirements could also be included. These would require an assessment of the implementation and effectiveness of any new provision after a set period of time. The OADC also noted a number of changes that would need to be made to the New South Wales provision if it was to be used as a template for Tasmania. These included removing the requirement to seek the Attorney-General's consent before pursuing a prosecution. The OADC felt this requirement 'interferes with the prosecutorial discretion as to whether proceedings should be instituted' and would result in 'different treatment to other criminal offences'.

5.3.13 The second change was ensuring that the police, and not the OADC, be responsible for the investigation of claims of serious racial vilification. The OADC noted that the *Anti-Discrimination Act 1998* (Tas) presently contains two offences; s 105 (providing false and misleading statements) and s 106 (hindering process). The OAC explained that the Anti-Discrimination Tribunal has held that 'the correct method [of dealing with an offence under the *Anti-Discrimination Act*] is for the

²¹² As mentioned above, the maximum penalty for s 20D is \$5500, six months imprisonment or both. Under the *Crimes Act 1900* (NSW), the maximum penalty for assault is two years, while affray and threatening to destroy or damage property attract five years imprisonment.

²¹³ Meagher, above n 96, 215.

complaint to be referred to the Police. The OADC has no role in relation to the police. The OADC is an independent statutory office and not a prosecutorial body’.

5.3.14 Three respondents opposed the introduction of any form of new provision, regardless of what act it is located in. As mentioned above, the DPP submitted that the current laws in Tasmania are sufficient. Two respondents expressed particular concern about the risk to freedom of speech. Edward Lipsett commented that ‘any legislation prohibiting “racial vilification” or “hate speech”...which target the impugned ideas alone could unduly imperil freedom of expression’. Similarly, Geoff Price submitted that ‘to allow additional penalties against perpetrators for “hate speech” or “hate crime” etc is nothing more than thought crime. To make it a crime to think in a certain way...’ He also argued that ‘the minute any group or ideology in society is above being scrutinised or [criticised], this allows damaging effect occur [sic] without any recourse available. This threatens our freedom and it threatens our democracy.’

5.3.15 Professor Mason opposed the introduction of a serious racial vilification provision in the *Anti-Discrimination Act 1998* (Tas). Her arguments were based on the apparent ineffectiveness of similar provisions in other jurisdictions.²¹⁴ Professor Mason notes that there has never been a successful prosecution for the criminal offence of serious racial vilification in any of the five jurisdictions where the offence is in operation. She submits that ‘serious vilification laws in the [five] jurisdictions should be completely overhauled or repealed.’

Institute’s Views

5.3.16 The TLRI does not believe that introducing some form of race hate crime legislation will negatively affect people’s ‘right’ to freedom of speech, or be a quasi ‘thought crime’ as suggested by some respondents. As discussed above at 2.6.1, the right to freedom of speech should not be seen as absolute or unfettered. It is subject to restrictions, including the right of others not to be vilified or unduly harassed. Any legitimate speech or communication that might be accused of being vilifying could be protected by a list of exceptions as listed in s 55 of the *Anti-Discrimination Act 1998* (Tas). The introduction of provisions for serious racial vilification and racially motivated offences should not be seen as an attempt at controlling ‘thoughts’ or creating a ‘crime of words’. Instead, it is concerned with protecting some of the most vulnerable members of society.

5.3.17 The TLRI does not recommend that a new serious racial vilification provision be introduced in the *Anti-Discrimination Act 1998* (Tas). As indicated by the lack of a successful prosecution in any other Australian jurisdiction with similar offences, such provisions cannot be regarded as an effective means to address racist behaviour.

5.3.18 The TLRI does not believe that any procedural changes to the current models in any of the jurisdictions where serious racial vilification provisions exist will be sufficient to make this form of provision effective. The TLRI is also concerned that introducing a serious racial vilification in the *Anti-Discrimination Act 1998* (Tas) could be a ‘wasted’ opportunity for law reform as the provisions would not have the same symbolic function or potential as other reform options. That is, the risk of the provision not being used could detrimentally affect the way it is seen by both perpetrators and victims.

Recommendation 2:

That a serious racial vilification criminal provision not be introduced in the *Anti-Discrimination Act 1998* (Tas).

²¹⁴ See 3.2.6 for a table of criminal and civil provisions and penalties in other Australian jurisdictions

5.4 Option 3 – Introduce New Criminal Provisions

5.4.1 Another reform option is to introduce a new offence in the *Criminal Code* (Tas) and/or the *Police Offences Act 1935* (Tas). This is the option that Western Australia has adopted. As discussed above at 3.3.1 – 3.3.3. Western Australia now has criminal racial vilification provisions that make it an offence to, amongst other things, engage in conduct that incites racial animosity or hatred,²¹⁵ and possess material for dissemination or display with the intent of inciting racial animosity or hatred.²¹⁶

5.4.2 Despite the measures taken by the Western Australian government to ensure the provisions were not too burdensome for the prosecution and at the same time not too intrusive on the right to free speech, the provisions – in particular the strict liability provisions – have attracted criticism from some legal commentators. As noted above, under the four strict liability offences found in the Western Australian *Criminal Code*, the prosecution is not required to prove that the accused *intended* their conduct or actions to incite racial hatred or animosity. Meagher points out that strict liability offences in other jurisdictions are usually ‘summary offences of a petty character, conviction in respect of which does not impute very much, if any, social stigma’.²¹⁷ That is, in most states strict liability provisions are reserved for offences such as speeding and some other traffic offences.²¹⁸ However, the Western Australian strict liability racial vilification offences are very serious crimes, conviction for which carries ‘significant moral stigma and in some circumstances, serious punishment’.²¹⁹ Therefore, opponents argue that where an offence attracts a considerable punishment, it is inappropriate for the prosecution not to have to prove beyond a reasonable doubt that the offender intended the result of his or her actions.

5.4.3 Other critics have noted that only having criminal sanctions means victims of racial vilification cannot always be provided with adequate remedies or redress. Often victims desire an apology or a public retraction of the offending comments or behaviour by the perpetrator. By only having criminal provisions, the option of making an order for either of these remedies is not available to the court. It also means that, in some circumstances, perpetrators of racist behaviour are inadvertently given a relatively public platform (ie the courtroom) from which to assert their opinions.²²⁰

The civil process adopted in other jurisdictions recognises the value, both socially and economically of the option of resolving complaints by conciliation. It is a relatively inexpensive, flexible, quick and confidential process, making it more attractive to applicants and less likely to draw attention to those who would seek to publicise their views.²²¹

5.4.4 However, as there are already civil racial vilification provisions in the *Anti-Discrimination Act 1998* (Tas), and the TLRI does not recommend repealing these, this criticism is not relevant in Tasmania.

5.4.5 An advantage of creating a new criminal provision of racial vilification within the Criminal Code is the strong symbolic nature of such a law. Situating it in pre-existing criminal legislation sends a message to potential perpetrators, and to society as a whole, that the parliament and the community believe that this behaviour is not acceptable and will not be tolerated. However, if such criminal provisions are not utilised, as has been the case with the Western Australian laws, there is a risk that the symbolic nature of such a law is lost.

²¹⁵ Section 77. See Appendix A.

²¹⁶ Sections 79 and 80. See Appendix A.

²¹⁷ Meagher, above n 96, 227.

²¹⁸ John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (2006) 87.

²¹⁹ Meagher, above n 96, 227.

²²⁰ This criticism is equally applicable to criminal racial vilification provisions contained in anti-discrimination legislation.

²²¹ Above n 79, 35.

Submissions

5.4.6 The TLRI received nine submissions that directly addressed whether a racial vilification provision should be included in either the *Criminal Code* or the *Police Offences Act 1935*. Two thirds of the respondents were in favour of introducing a provision. Two of the respondents qualified their answers with significant amendments to the current models that exist in other jurisdictions. One respondent opposed the reform option.

5.4.7 Of those who supported introducing a racial vilification provision in the *Criminal Code* or *Police Offences Act 1935*, the majority submitted that it would help to send out a strong message about the seriousness of the offence. The TGLRG, OADC and a number of other responses cited the symbolic nature of including a racial vilification provision in the *Criminal Code* as opposed to the *Anti-Discrimination Act 1998*. They felt that it was important to ensure it was on the ‘same footing’ as other crimes and had the weight of the criminal law behind it.

5.4.8 The Hobart Hebrew Congregation submitted that the Western Australian provisions provided a good model and should be emulated in Tasmania. Professor Mason, on the other hand, noted that these provisions have not been extensively used and may not be effective in addressing the intended behaviour.

5.4.9 The HCLS warned that laws against racial vilification are often unsuccessful because they ‘fall firmly in the chasm between liberty and equality’. The HCLS noted that:

[in] assessing the desirability of anti-vilification laws, particular regard should be had for the equality which they are curbing: that of freedom of speech... (The) best model is one which focuses not on vilification but on threats and incitement. Laws which focus on threats of criminal acts or incitement of threats target “hate speech” without creating the potential to infringe on all-important civil liberties.

The HCLS suggested that the best way to ensure freedom of speech was not unduly infringed was to introduce a provision similar to s 20D of the New South Wales *Anti-Discrimination Act*²²² in the Tasmanian *Criminal Code*.

5.4.10 The DPP, while opposed to any legislative changes, recommended that if a new racial vilification provision is to be introduced, it should be included in the *Police Offences Act 1935* only.

The only justification for enacting substantive racial vilification provisions in the Criminal Code rather than as a summary offence would be if it were thought that there will be examples of the to-be criminalised behaviour which would not be adequately met by the maximum penalties usually entrusted to magistrates. Given the rarity of utilisation of such provisions where they have already been enacted, it is difficult to argue that the risk of such examples justifies the creation of crimes in the Criminal Code.

The DPP also expressed concern that criminalisation of racial vilification would ‘add allure for some’ to engage in such behaviour.

5.4.11 TILES recommended that new offences be located in both the *Police Offences Act 1935* and the *Criminal Code*. However, TILES submitted that these new offences be specific, aggravated version of existing offences rather than separate racial vilification offences. That is, the provision would provide that an existing offence, such as assault or rape, would be aggravated if the race, or other attribute, of the victim, was a specific motivation for the offence.

5.4.12 Two respondents also made reference to in which Part of the *Criminal Code* any new provision should be located. The HCLS argued that the offence should be located in Part II of the Code, Crimes Against Public Order, as racial vilification is an offence against a class, or group, of

²²² See 3.2.2 above. See also Appendix A.

persons. The OADC, in contrast, wrote that a criminal racial vilification offence should be located in Part V (Crimes Against the Person).

[Racial vilification] laws should be introduced because it is a human rights issue and racial attacks cause serious harm and damage to vulnerable groups and people experiencing discrimination. Accordingly as a classification issue, the OADC considers the racial vilification laws ought to be included in Part V of the Act dealing with offences against the person.

Institute's Views

5.4.13 The TLRI is of the view that racial vilification and racially motivated offences should not be introduced in either the *Police Offences Act 1935* (Tas) or the *Criminal Code*. While there is some merit in this law reform option as indicated by the submissions received in support of their introduction, the TLRI does not believe that criminal racial vilification provisions are practically the most effective method of addressing racist behaviour. The lack of use of such provisions in other jurisdictions, including strict liability provisions, indicates that these are not a not an effective law reform option and provides a strong argument against their introduction.

Recommendation 3:

That no criminal racial vilification or racially motivated offence be introduced in either the *Police Offences Act 1935* (Tas) or the *Criminal Code* (Tas).

5.5 Option 4 – Penalty Enhancement Provisions

5.5.1 A fourth reform option is to introduce penalty enhancement provisions. Western Australia amended its *Criminal Code* in 2005, with the introduction of penalty enhancement provisions for certain offences. The amendments provide for enhanced penalties for the offences of assault,²²³ assault occasioning bodily harm,²²⁴ assault with intent,²²⁵ threats²²⁶ and criminal damage²²⁷ when undertaken in circumstances of racial aggravation.²²⁸ ‘Circumstances of racial aggravation’ is defined in s 80I of the *Criminal Code* (WA) as meaning circumstances in which immediately before, during, or immediately after the commission of the offence, the offender demonstrated hostility towards the victim based, in whole or in part, on the victim being a member of a racial group. It also includes circumstances in which the offence is motivated, in whole or in part, by hostility towards persons as members of a racial group.

5.5.2 Legal commentators tend to be generally positive about penalty enhancement provisions. They believe that they provide an express denunciation of racially motivated crimes by increasing the penalties for such offences without needing to draft entire new laws or provisions. One criticism of the Western Australian penalty enhancement provisions, however, is that they are not applied to enough offences and should be included in crimes involving public order and harassment type offences.²²⁹

²²³ Section 313.

²²⁴ Section 317.

²²⁵ Section 317A.

²²⁶ Section 338B.

²²⁷ Section 444.

²²⁸ Meahger, above n 96, 220-221. The enhanced penalties range from an increase of two years from the original period of imprisonment, to an increase of double the imprisonment time – See also Appendix A.

²²⁹ Walters, above n 132, 78.

5.5.3 Some legal analysts believe that penalty enhancement provision should be extended and apply to situations where the victim is selected by the offender simply because of their race and not because the offender necessarily ‘hates’ members of that racial group. It is suggested that this may make it considerably easier for the prosecution to establish the requisite motivation element and are therefore likely to be used more often.²³⁰ For example, these broader provisions could be used where the offender chooses their victim because they believe the victim to be Jewish and believes that all Jewish people are wealthy, or where they believe the victim to be an Indian student and that all Indian students carry laptops and other expensive electronics. In these circumstances, the prosecution would not need to prove the offender hated such racial groups, just that they targeted the victim because of their race. This is referred to as the ‘group selection’ model.

5.5.4 As discussed above at 3.5.3, the structure of the Tasmanian *Criminal Code* does not permit the inclusion of penalty enhancement provisions, as it does not specify maximum or minimum punishments for individual offences. Instead, under the Tasmanian Code, sentencing is at the discretion of the judge or court and the maximum penalty for all offences, except murder and treason,²³¹ is 21 years imprisonment. It would, however, be possible for penalty enhancement provisions to be incorporated into the *Police Offences Act 1935* (Tas) as this piece of legislation does stipulate maximum sentences for offences, such as assault (s 35) and offences relating to property (s 37) and offences relating to prohibited language and behaviour (s 12).

Submissions

5.5.5 Three submissions supported the introduction of some form of penalty enhancement provisions in the *Police Offences Act 1935*. TILES, the HCLS and TGLRG all argued that a number of offences, including s 35 aggravated assault, should be amended to include a specified increased maximum penalty where the offence was motivated by racial hatred or prejudice. TILES and TGLRG also argued that these increases should be extended to all attribute-motivated offences.

5.5.6 The OADC submitted that the introduction of penalty enhancement provisions is not its preferred option for law reform but should be considered if serious racial vilification is not criminalised. Professor Mason was generally opposed to the introduction of penalty enhancement provisions. She noted that provisions of this type tend to be ‘punitive and fairly rigid’ and ‘mandate the imposition of harsher penalties for racial crimes with little judicial discretion’.

Institute’s Views

5.5.7 The Institute is of the view that penalty enhancement provisions should not be introduced in Tasmania to address incidents of racial vilification or racially motivated offences. The Institute believes that other reform options, such as sentence aggravation provisions, are to be preferred as they allow for greater flexibility and judicial discretion. Penalty enhancement provisions are also likely to be limited in their use as they can only be applied to offences contained in the *Police Offences Act 1935*, and not the *Criminal Code*. The institute believes that it is preferable to adopt an approach that covers both summary and indictable offences.

Recommendation 4:

That penalty enhancement provisions not be introduced in Tasmania.

²³⁰ Meagher, above n 96, 231.

²³¹ These offences attract a maximum penalty of life imprisonment.

5.6 Option 5 – Sentence Aggravation Provisions

5.6.1 A fifth option suggested is to introduce specific sentence aggravation provisions.²³² Sentence aggravation provisions are common in sentencing legislation, usually providing that the racial motivation of the offender is to be taken into consideration as an aggravating factor by the sentencing judge. They differ from penalty enhancement provisions, which are usually located in offence provisions and provide for an increased maximum penalty where racial prejudice or motivation is a proven element of the offence.

5.6.2 Sentence aggravation provisions can play a strong symbolic function, showing the community that racial hatred and racially targeted offences are not tolerated by society. It has been claimed they have the benefit of providing specific deterrence to offenders whose offences have a racial element and a general deterrence to those who may be inclined to offend in a like manner.²³³

5.6.3 Some critics argue, however, that sentence aggravation provisions still fail to adequately distinguish racially motivated crimes and denounce the racist behaviour, as the offender is still convicted of a standard criminal offence.²³⁴ It has also been noted that it may be very difficult for the prosecution to prove that the primary motivation for an offence was racial hatred or prejudice, even where there is sufficient evidence to show that it formed part of the offender's motivation. However, this concern can be addressed by ensuring that the provision allows the aggravating factor to be applied where the offence is committed *wholly or partly* because of the offender's hostility as is done by New Zealand and Victorian legislation.

5.6.4 While sentence aggravation provisions are subject to some criticism, many legal commentators see them as a relatively effective way of acknowledging and addressing the enhanced culpability of the offender and the effect severity of the harm caused by offences with a racial element. According to a submission from the Victorian Council of Civil Liberties made to the Senate Legal and Constitutional Legislation Committee in 1995, creating separate racial vilification or racial hatred provisions risks making martyrs out of offenders. The Council recommended ensuring racists were treated as 'ordinary criminals' and that racial motivation only be considered at the sentencing stage, rather than as an element of the offence, to avoid making heroes of racists.²³⁵

5.6.5 As mentioned above, Tasmanian law already has some scope for the court to include the racist motivation of the offender at sentencing, and has been used on two recent occasions in the Tasmania Supreme Court.²³⁶ However, there are currently no specific provisions relating to racism or racial hatred. As has been noted throughout this Report, an important function of these types of provisions is the community being aware that this behaviour is considered abhorrent and will not be tolerated.

Submissions

5.6.6 Of the five respondents who addressed the question of whether specific sentence aggravation provisions should be enacted in Tasmania, all were in favour of their introduction. These respondents saw this option as the most effective method of addressing racially motivated behaviour.

5.6.7 Staff at Migrant Education submitted that sentence aggravation provisions could have a symbolic function for both perpetrators and victims of racially motivated offences. They wrote that

²³² This was reform option number four in the Issues Paper.

²³³ Sentencing Advisory Council, above n 115, 18.

²³⁴ Walters, above n 132, 80.

²³⁵ Evidence to Senate Legal and Constitutional Legislation Committee – Racial Hatred Bill 1994, Parliament of Australia, Canberra, March 2005, 14 (Victorian Council of Civil Liberties).

²³⁶ See 2.3.9 – 2.3.10 and 2.3.13 above.

such provisions would send a strong message to the community that such behaviour is not tolerated. At the same time, the introduction of these kinds of provisions may encourage victims to report these types of incidents as they may feel that the police and the courts will take these kinds of attacks more seriously.

5.6.8 TILES and the OADC were also in favour of the introduction of sentence aggravation provisions. TILES called for such a provision to be extended to all forms of attribute-motivated offences including where the victim is selected because of their apparent age, gender, occupation, religion or disability.

5.6.9 The HCLS submitted that it saw sentence aggravation provisions as the most effective option as it ‘...provided a straightforward way to punish crimes of a racial nature without the need to create new offences or overhaul existing ones’. According to the HCLS, sentence enhancement provisions would ‘provide a good method of punishing a broad range of crimes...without changing the elements of the offence, but increasing the penalty’. The HCLS also saw it as having less ‘impact on judicial discretion’ and therefore ‘leaving judges and magistrates free to consider sentences on their merits’.

5.6.10 Similarly, Professor Mason wrote that sentence aggravation provisions are ‘probably the most practical and useful option [for reform] for Tasmania’. Professor Mason did urge, however, that consideration be given to the wording of any such provision and its intended scope and operation. In particular, she highlighted the need to consider whether the provision:

- will refer to just hatred or hatred and prejudice as an aggravating factor;
- will cover situations where the offender believed the victim belonged to a particular group but was in fact mistaken;
- will cover to situations where a victim is associated with a group (but not necessarily a member of that group);
- will list the groups that the provision applies to or contain a general statement such as ‘groups of people with common characteristics’;
- will have an explanatory memorandum or other aid to help in its interpretation and application;
- will apply to situations where the offender was wholly or partially motivated by hatred.

5.6.11 Three responses to the Issues Paper also addressed the question of whether such provisions should apply only to offenders who are motivated by hatred or prejudice, or to any offender who selects their victim because of their race. The HCLS submitted that there is currently insufficient information and understanding about the nature of ‘opportunistic’ offences and therefore it is ‘not desirable to formulate specific legislation against such crimes at this stage’.

5.6.12 The OACD and TGLRG, on the other hand, supported the inclusion of ‘group selection’ offences in any sentence aggravation or penalty enhancement legislation. The OACD wrote that specific targeting:

involves a deliberate action on the part of the offender... Such targeting is inherently racist in nature and exposes vulnerable groups to attack and harm.

5.6.13 The TGLRG wrote that it:

strongly (supports) broader provisions which apply to offenders who (intentionally) select victims... as well as those who are motivated by prejudice. This is because victims may be selected because they are perceived as weak, vulnerable, socially-marginalised or socially-expendable.

Institute's Views

5.6.14 The Institute believes that the introduction of an express sentencing aggravation provision is the most appropriate method of addressing the problem of racial vilification and racially motivated offences. By singling out this factor as a statutory aggravating factor, Parliament is sending a strong message that reaffirms social values of tolerance and respect for racial minorities. Moreover, it recognises the humiliating and harmful effect that racist conduct has on victims.²³⁷ As the experience of other jurisdictions demonstrates, its purpose is not purely symbolic. It is a provision that can readily be used by the courts. Giving statutory recognition to this factor ensures that when imposing sentence, judicial officers draw attention to this aspect of the offence and use the opportunity to strongly condemn racist violence and other forms of hate crime. Moreover, it will help ensure that police look for and record evidence of racial aggravation so that the information is available to the prosecution and the courts and the full impact and circumstances of the offence are known.

Which model?

5.6.15 The Institute has identified three possible models for a statutory sentence aggravation provision:

- the motive model;
- the group selection model;
- the demonstration of hostility model.

5.6.16 Each of these models can be justified on fundamental sentencing principles.²³⁸ That is, under each model the offence is more serious on a basis of an assessment of harm and/or culpability. Each model also allows for denunciation and deterrence of racist behaviour.

5.6.17 A motive of racial hatred or prejudice increases offence seriousness on the grounds of both culpability and harm. As discussed in detail in Part 4.4 of this Report, offences motivated by racial hatred or prejudice often involve a greater level of harm for both the victim and the group of persons to which the victim belongs. They can have a strong psychological and emotional impact on victims as they know they were selected because of their membership of the targeted group. This can also cause harm for the other members of the targeted group who may fear future victimisation. Members of some racial minorities, especially those from refugee communities, may also be more susceptible to psychological harm, including experiencing episodes of PTSD, because racial attacks invoke memories of their past traumatic experiences. Further, racially motivated offences harm society in general because they 'negate fundamental values of tolerance, respect and equality which a multicultural society such as Australia aims to foster'.²³⁹

5.6.18 Culpability is likewise increased when an offence is motivated by racial hatred or prejudice. Racism and racial hatred is generally considered obnoxious and is not tolerated by the wider community. For these reasons, an offence motivated by racial hatred or prejudice can be seen as more culpable and therefore more serious and deserving of an increased penalty.²⁴⁰

5.6.19 The group selection model, where the offender is found to have deliberately selected their victim because of their apparent membership of a particular group, and not necessarily because of any hatred or prejudice towards this group, also satisfies the fundamental principles of sentencing. As with the racial hatred/prejudice model, the deliberate selection of a victim can have an increased psychological and emotional effect on both the victim and other members of the 'selected' group.

²³⁷ Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed.) (2010) 160.

²³⁸ Warner, above n 114, 391.

²³⁹ *Ibid*, 389.

²⁴⁰ *Ibid*, 391.

Victims may still feel singled out and vulnerable to further attacks.²⁴¹ Culpability is also arguably increased as group selection involves a level of planning and premeditation that is relevant to culpability. As Warner notes, ‘a planned crime is (arguably) more seriously regarded than one committed on the spur of the moment, (and) any planned element of a crime which involves selection of particular racial group adds something to culpability’.²⁴²

5.6.20 The group selection model or ‘discriminatory selection test’ exists under Wisconsin law.²⁴³ Following the decision in *Gouros*, it can be argued that the group selection test is covered by s 5(2)(daaa) of the *Sentencing Act 1991* (Vic).

5.6.21 The demonstration of hostility model is used in Western Australia and the UK in penalty enhancement provisions. This model requires that the offender demonstrated hatred, hostility or prejudice towards the victim either at the time of committing the offence or immediately before or after it. As with the motivation of hatred or prejudice model, a demonstration of hostility both increases the harm and culpability of an offence as ‘it exacerbates the impact of the crime on the victim’ and ‘evidences a malicious state of mind accompanying the offence even if racial hostility was not the (only) motive’.²⁴⁴

5.6.22 All three models of sentence aggravation can also be justified on the basis of the sentencing goals of denunciation and deterrence. As well as potentially deterring offenders,²⁴⁵ sentence aggravation provisions can denounce and condemn racism. They can ‘legitimately seek to send the message that prejudice is wrong and attempt to reinforce pro-social values of tolerance and respect.’²⁴⁶

5.6.23 New South Wales, the Northern Territory and Victoria have all opted for the motive model of sentence aggravation provisions. Victoria has attempted to address the difficulty in proving that the offender was motivated by hatred or prejudice by expressly providing that a partial motive is sufficient. But the decision in *Gouros* demonstrates that even in cases where the offender’s victims were of one racial appearance in almost all the offences committed, it can be plausibly argued that it has not been proved beyond reasonable doubt that the reason for selection was hatred or prejudice towards a particular race. This suggests that ‘racially aggravated’ should be defined to cover each of the tests: that the offence was motivated (wholly or partly) by racial (or group) hatred, hostility or prejudice; or that the offender selected the victim because of his or her membership of a racial (or other) group; or, at the time of committing the offence or immediately before or after it, the offender demonstrated towards the victim such hatred, hostility or prejudice. Including all three tests has the advantage of avoiding problems of proof entailed in a purely motive formulation of sentence aggravation.

²⁴¹ This was seen in the case of *Tasmania v Woolley* (unreported, Supreme Court of Tasmania, Blow J, 23 February 2010), where the female victim of a ‘group selection’ type attack was so upset and frightened that she could not give evidence, even by video link, and soon returned to China.

²⁴² Warner, above n 114, 391.

²⁴³ Mason, above n 114, 324 – citing F Lawrence, *Punishing Hate: Bias Crimes Under American Law* (1999) 36 – see also 2010 Wisconsin Code, Chapter 939, Crimes – general provisions:
939.645(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub.(2):

(a) commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor’s belief or perception is correct.

²⁴⁴ Warner, above n 114, 391.

²⁴⁵ It should be recognised that sentence aggravation provisions may not be entirely effective in deterring offences that have a racial element as many are committed when the offender is intoxicated and therefore not considering the aggravated penalty. In addition, according to Warner, empirical evidence suggests that there is very little support for the hypothesis that increasing the severity of sentences is effective in reducing crime – above n 114, 392.

²⁴⁶ Warner, above n 114, 392.

5.6.24 The Institute also considered whether it would be beneficial for the court to quantify the effect of the racial aggravation. This approach was recommended by the English Sentencing Advisory Panel in its advice for the Court of Appeal on racially aggravated offences.²⁴⁷ The Panel noted that this approach sends a much clearer message to the offender, the victim and the public that racism and racist crime is not tolerated. However, the majority of the TLRI Board decided that the introduction of a mandatory quantification requirement for racial aggravation was not appropriate in Tasmania as this is not required for other aggravating factors. Judges may choose to indicate in their sentencing remarks the additional sentence imposed on an offender where an offence has been racially motivated but it is not recommended that this be mandated.

Recommendation 5:

That a sentence aggravation provision be introduced in Tasmania.

Recommendation 6:

That the Tasmanian sentence aggravation provision be modelled on the Victorian *Sentencing Act 1991* s 5(2)(daaa) but extended to cover all situations of racist aggravation, including where the victim was selected because of their presumed membership of a particular group or where the offender demonstrated hostility at the time of, or immediately before or after, the offence.

Recommendation 7:

That quantifying the sentence aggravation not be mandatory but left to the judge's discretion to stipulate when considered appropriate.

²⁴⁷ Sentencing Advisory Panel, *Racially Aggravated Offences: Advice to the Court of Appeal* (July 2000) 6-8.

Appendix A

Anti-Discrimination Act 1998 (Tas)

19. Inciting hatred

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

- (a) the race of the person or any member of the group; or
- (b) any disability of the person or any member of the group; or
- (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or
- (d) the religious belief or affiliation or religious activity of the person or any member of the group.

55. Public purpose

The provisions of section 19 do not apply if the person's conduct is –

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
 - (i) academic, artistic, scientific or research purposes; or
 - (ii) any purpose in the public interest.

89. Orders

- (1) If the Tribunal finds after an inquiry that a complaint is substantiated, it may make one or more of the following orders:
- (a) an order that the respondent must not repeat or continue the discrimination or prohibited conduct;
 - (b) an order that the respondent must redress any loss, injury or humiliation suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
 - (c) an order that the respondent must re-employ the complainant;
 - (d) an order that the respondent must pay to the complainant, within a specified period, an amount the Tribunal thinks appropriate as compensation for any loss or injury suffered by the complainant and caused by the respondent's discrimination or prohibited conduct;
 - (e) an order that the respondent must pay a specified fine not exceeding 20 penalty units;
 - (f) an order that a contract or agreement is to be varied or declared void in whole or in part;
 - (g) an order that it is inappropriate for any further action to be taken in the matter;
 - (h) any other order it thinks appropriate.

Sentencing Act 1997 (Tas)

80. Parties may address court on sentence

...

- (2) Without limiting the generality of subsection (1), in an address pursuant to that subsection the prosecutor may do all or any of the following:
- (a) draw the attention of the court to any aggravating circumstances or the presence or absence of any extenuating circumstances in relation to the offence;

Family Violence Act 2004 (Tas)

13. Sentencing factors

When determining the sentence for a family violence offence, a court or a judge –

- (a) may consider to be an aggravating factor the fact that the offender knew, or was reckless as to whether, a child was present or on the premises at the time of the offence, or knew that the affected person was pregnant;

Police Offences Act 1935 (Tas)

35. Common assault and aggravated assault

...

- (2) Where any person is charged with having unlawfully assaulted any other person, the court, if it considers the assault is of an aggravated nature, may sentence the offender to pay a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 2 years.

Racial Discrimination Act 1975 (Cth)

Part IIA—Prohibition of offensive behaviour based on racial hatred

18B Reason for doing an act

If:

- (a) an act is done for 2 or more reasons; and
- (b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

18C Offensive behaviour because of race, colour or national or ethnic origin

- (1) It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Note: Subsection (1) makes certain acts unlawful. Section 46P of the *Australian Human Rights Commission Act 1986* allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

public place includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
 - (i) a fair and accurate report of any event or matter of public interest; or
 - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

18E Vicarious liability

(1) Subject to subsection (2), if:

- (a) an employee or agent of a person does an act in connection with his or her duties as an employee or agent; and
- (b) the act would be unlawful under this Part if it were done by the person;

this Act applies in relation to the person as if the person had also done the act.

(2) Subsection (1) does not apply to an act done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing the act.

18F State and Territory laws not affected

This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

Criminal Code Act 1995 (Cth)

80.2 Sedition

Urging violence within the community

(5) A person commits an offence if:

- (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
- (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Anti-Discrimination Act 1977 (NSW)

Division 3A – Racial vilification

20C Racial vilification unlawful

- (1) It is unlawful for a person, by a public act, to 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.
- (2) Nothing in this section renders unlawful:
 - (a) a fair report of a public act referred to in subsection (1), or
 - (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or
 - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

20D Offence of serious racial vilification

(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.

Crimes (Sentencing Procedure) Act 1999 (NSW)

21A Aggravating, mitigating and other factors in sentencing

...

(2) Aggravating factors: The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

...

- (h) 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),

Sentencing Act 1991 (Vic)

5. Sentencing guidelines

...

(2) In sentencing an offender a court must have regard to-

...

- (daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated;

Criminal Code (WA)

Chapter XI — Racist harassment and incitement to racial hatred

77. Conduct intended to incite racial animosity or racist harassment

Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offence: s. 78, 80A or 80B.

78. Conduct likely to incite racial animosity or racist harassment

Any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years.

Alternative offence: s. 80A or 80B.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

79. Possession of material for dissemination with intent to incite racial animosity or racist harassment

Any person who —

- (a) possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
- (b) intends the publication, distribution or display of the material to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

is guilty of a crime and is liable to imprisonment for 14 years.

Alternative offence: s. 80, 80C or 80D.

80. Possession of material for dissemination if material likely to incite racial animosity or racist harassment

If —

- (a) any person possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
- (b) the publication, distribution or display of the material would be likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

the person possessing the material is guilty of a crime and is liable to imprisonment for 5 years.

Alternative offence: s. 80C or 80D.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

80A. Conduct intended to racially harass

Any person who engages in any conduct, otherwise than in private, by which the person intends to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years.

Alternative offence: s. 78 or 80B.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

80B. Conduct likely to racially harass

Any person who engages in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

80C. Possession of material for display with intent to racially harass

Any person who —

- (a) possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and

- (b) intends the display of the material to harass a racial group, or a person as a member of a racial group,

is guilty of a crime and is liable to imprisonment for 5 years.

Alternative offence: s. 80 or 80D.

Summary conviction penalty: imprisonment for 2 years and a fine of \$24 000.

80D. Possession of material for display if material likely to racially harass

If —

- (a) any person possesses written or pictorial material that is threatening or abusive intending the material to be displayed whether by that person or another person; and
- (b) the display of the material would be likely to harass a racial group, or a person as a member of a racial group,

the person possessing the material is guilty of a crime and is liable to imprisonment for 3 years.

Summary conviction penalty: imprisonment for 12 months and a fine of \$12 000.

313. Common assaults

(1) Any person who unlawfully assaults another is guilty of a simple offence and is liable —

- (a) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 3 years and a fine of \$36 000; or
- (b) in any other case, to imprisonment for 18 months and a fine of \$18 000.

(2) A prosecution for an offence under subsection (1) may be commenced at any time.

317. Assaults occasioning bodily harm

(1) Any person who unlawfully assaults another and thereby does that other person bodily harm is guilty of a crime, and is liable —

- (a) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 7 years; or
- (b) in any other case, to imprisonment for 5 years.

Alternative offence: s. 313.

Summary conviction penalty:

- (a) in a case to which paragraph (a) above applies: imprisonment for 3 years and a fine of \$36 000; or
- (b) in a case to which paragraph (b) above applies: imprisonment for 2 years and a fine of \$24 000.

317A. Assaults with intent

Any person who —

- (a) assaults another with intent to commit or facilitate the commission of a crime;
- (b) assaults another with intent to do grievous bodily harm to any person; or
- (c) assaults another with intent to resist or prevent the lawful arrest or detention of any person,

is guilty of a crime, and is liable —

- (d) if the offence is committed in circumstances of aggravation or in circumstances of racial aggravation, to imprisonment for 7 years; or
- (e) in any other case, to imprisonment for 5 years.

Alternative offence: s. 313 or 317.

Summary conviction penalty:

- (a) in a case to which paragraph (d) above applies: imprisonment for 3 years and a fine of \$36 000; or
- (b) in a case to which paragraph (e) above applies: imprisonment for 2 years and a fine of \$24 000.

338B. Threats

Any person who makes a threat to unlawfully do anything mentioned in section 338(a), (b), (c) or (d) is guilty of a crime and is liable —

- (a) where the threat is to kill a person, to imprisonment for 7 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years;
- (b) in the case of any other threat, to imprisonment for 3 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 6 years.

Summary conviction penalty in a case to which paragraph (b) applies: imprisonment for 18 months and a fine of \$18 000.

444. Criminal damage

(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of a crime and is liable —

- (a) if the property is destroyed or damaged by fire, to life imprisonment; or
- (b) if the property is not destroyed or damaged by fire, to imprisonment for 10 years or, if the offence is committed in circumstances of racial aggravation, to imprisonment for 14 years.

Alternative offence: s. 445.

Summary conviction penalty: for an offence where —

- (a) the property is not destroyed or damaged by fire; and
- (b) the amount of the injury done does not exceed \$25 000,

imprisonment for 3 years and a fine of \$36 000.

(2) Property that is capable of being destroyed or damaged by fire includes vegetation.

Criminal Justice Act 2003 (UK)

145 Increase in sentences for racial or religious aggravation

- (1) This section applies where a court is considering the seriousness of an offence other than one under sections 29 to 32 of the Crime and Disorder Act 1998 (c. 37) (racially or religiously aggravated assaults, criminal damage, public order offences and harassment etc).
- (2) If the offence was racially or religiously aggravated, the court—
 - (a) must treat that fact as an aggravating factor, and
 - (b) must state in open court that the offence was so aggravated.
- (3) Section 28 of the Crime and Disorder Act 1998 (meaning of “racially or religiously aggravated”) applies for the purposes of this section as it applies for the purposes of sections 29 to 32 of that Act.

Crime and Disorder Act 1998 (UK)

Part II Criminal Law

Racially-aggravated offences: England and Wales

28 Meaning of "racially aggravated"

- (1) An offence is racially 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 group; or
 - (b) the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.
- (2) In subsection (1)(a) above—

"membership", in relation to a racial group, includes association with members of that group;

"presumed" means presumed by the offender.
- (3) It is immaterial for the purposes of paragraph (a) or (b) of subsection (1) above whether or not the offender’s hostility is also based, to any extent, on—
 - (a) the fact or presumption that any person or group of persons belongs to any religious group; or
 - (b) any other factor not mentioned in that paragraph.
- (4) In this section "racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins.

29 Racially-aggravated assaults

- (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 [1861 c. 100.] 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 aggravated for the purposes of this section.

- (2) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.
- (3) A person guilty of an offence falling within subsection (1)(c) above shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.

30 Racially-aggravated criminal damage

- (1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the [1971 c. 48.] Criminal Damage Act 1971 (destroying or damaging property belonging to another) which is racially aggravated for the purposes of this section.
- (2) A person guilty of an offence under this section shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine, or to both.
- (3) For the purposes of this section, section 28(1)(a) above shall have effect as if the person to whom the property belongs or is treated as belonging for the purposes of that Act were the victim of the offence.

31 Racially-aggravated public order offences

- (1) A person is guilty of an offence under this section if he commits—
 - (a) an offence under section 4 of the [1986 c. 64.] Public Order Act 1986 (fear or provocation of violence);
 - (b) an offence under section 4A of that Act (intentional harassment, alarm or distress); or
 - (c) an offence under section 5 of that Act (harassment, alarm or distress),

which is racially aggravated for the purposes of this section.

- (2) A constable may arrest without warrant anyone whom he reasonably suspects to be committing an offence falling within subsection (1)(a) or (b) above.
- (3) A constable may arrest a person without warrant if—
 - (a) he engages in conduct which a constable reasonably suspects to constitute an offence falling within subsection (1)(c) above;

- (b) he is warned by that constable to stop; and
- (c) he engages in further such conduct immediately or shortly after the warning.

The conduct mentioned in paragraph (a) above and the further conduct need not be of the same nature.

- (4) A person guilty of an offence falling within subsection (1)(a) or (b) above shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- (5) A person guilty of an offence falling within subsection (1)(c) above shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale.
- (6) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(a) or (b) above, the jury find him not guilty of the offence charged, they may find him guilty of the basic offence mentioned in that provision.
- (7) For the purposes of subsection (1)(c) above, section 28(1)(a) above shall have effect as if the person likely to be caused harassment, alarm or distress were the victim of the offence.

32 Racially-aggravated harassment etc

- (1) A person is guilty of an offence under this section if he commits—
 - (a) an offence under section 2 of the [1997 c. 40.] Protection from Harassment Act 1997 (offence of harassment); or
 - (b) an offence under section 4 of that Act (putting people in fear of violence),

which is racially aggravated for the purposes of this section.

- (2) In section 24(2) of the 1984 Act (arrestable offences), after paragraph (o) there shall be inserted—

"(p) an offence falling within section 32(1)(a) of the Crime and Disorder Act 1998 (racially-aggravated harassment);".
- (3) A person guilty of an offence falling within subsection (1)(a) above shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both.
- (4) A person guilty of an offence falling within subsection (1)(b) above shall be liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine, or to both.
- (5) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(a) above, the jury find him not guilty of the offence charged, they may find him guilty of the basic offence mentioned in that provision.

- (6) If, on the trial on indictment of a person charged with an offence falling within subsection (1)(b) above, the jury find him not guilty of the offence charged, they may find him guilty of an offence falling within subsection (1)(a) above.
- (7) Section 5 of the [1997 c. 40.] Protection from Harassment Act 1997 (restraining orders) shall have effect in relation to a person convicted of an offence under this section as if the reference in subsection (1) of that section to an offence under section 2 or 4 included a reference to an offence under this section.

Racially-aggravated offences: Scotland

33 Racially-aggravated offences

After section 50 of the [1995 c. 39.] Criminal Law (Consolidation) (Scotland) Act 1995 there shall be inserted the following section—

Racially-aggravated harassment

50 A Racially-aggravated harassment

- (1) A person is guilty of an offence under this section if he—
 - (a) pursues a racially-aggravated course of conduct which amounts to harassment of a person and—
 - (i) is intended to amount to harassment of that person; or
 - (ii) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person; or
 - (b) acts in a manner which is racially aggravated and which causes, or is intended to cause, a person alarm or distress.
- (2) For the purposes of this section a course of conduct or an action is racially aggravated if—
 - (a) immediately before, during or immediately after carrying out the course of conduct or action the offender evinces towards the person affected malice and ill-will based on that person's membership (or presumed membership) of a racial group; or
 - (b) the course of conduct or action is motivated (wholly or partly) by malice and ill-will towards members of a racial group based on their membership of that group.
- (3) In subsection (2)(a) above—

"membership", in relation to a racial group, includes association with members of that group;

"presumed" means presumed by the offender.
- (4) It is immaterial for the purposes of paragraph (a) or (b) of subsection (2) above whether or not the offender's malice and ill-will is also based, to any extent, on—
 - (a) the fact or presumption that any person or group of persons belongs to any religious group; or
 - (b) any other factor not mentioned in that paragraph.
- (5) A person who is guilty of an offence under this section shall—
 - (a) on summary conviction, be liable to a fine not exceeding the statutory maximum, or imprisonment for a period not exceeding six months, or both such fine and such imprisonment; and

- (b) on conviction on indictment, be liable to a fine or to imprisonment for a period not exceeding seven years, or both such fine and such imprisonment.

- (6) In this section–

"conduct" includes speech;

"harassment" of a person includes causing the person alarm or distress;

"racial group" means a group of persons defined by reference to race, colour, nationality (including citizenship) or ethnic or national origins,

and a course of conduct must involve conduct on at least two occasions."

Sentencing Act 2002 (NZ)

9 Aggravating and mitigating factors

- (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

...

- (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
 - (i) the hostility is because of the common characteristic; and
 - (ii) the offender believed that the victim has that characteristic:

Criminal Code 1985 (Canada)

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor