

TASMANIA
LAW REFORM
INSTITUTE

**Racial Vilification and
Racially Motivated Offences**

ISSUES PAPER NO 16

JUNE 2010

CONTENTS

List of Questions	IV
PART 1: INTRODUCTION	1
1.1 Background.....	1
PART 2: CURRENT LAW IN TASMANIA.....	3
2.2 Civil Provisions	3
2.3 Criminal Provisions	4
2.4 Commonwealth Racial Vilification Provisions	6
Civil Provisions.....	6
Criminal Provisions.....	8
2.5 International Conventions.....	9
2.6 The Right to Freedom of Speech in Australia	10
PART 3: RACIAL VILIFICATION PROVISIONS IN OTHER JURISDICTIONS.....	11
3.2 Anti-Discrimination Act Provisions	11
3.3 Criminal Code Provisions.....	13
3.4 Sentence Enhancement Provisions	14
3.5 Penalty Enhancement Provisions.....	15
PART 4: NEED FOR REFORM	17
4.1 Changing Demographic of Australia and Tasmania.....	17
4.2 Extent of Racism in Australia and Tasmania	18
4.3 Number of Attacks on Foreigners.....	19
4.4 Psychological and Physiological Characteristics of Racist Attacks	21
4.5 Symbolic Function of Criminal Law	22
PART 5: OPTIONS FOR REFORM	23
5.2 Option 1 – No Change	23
5.3 Option 2 – Extend Anti-Discrimination Provisions to Introduce a New Criminal Offence	24
5.4 Option 3 – Introduce New Criminal Provisions	26
5.5 Option 4 – Sentence Enhancement Provisions	27
5.6 Option 5 – Penalty Enhancement Provisions.....	28
APPENDIX A	30

About this Issues Paper

This Issues Paper examines the capacity of Tasmanian laws to address serious racial vilification and racially motivated offences. It reviews the current Tasmanian and Commonwealth civil racial vilification provisions and includes a brief consideration of the relevant international conventions and declarations and their application to Australian domestic law. The Paper includes a survey of the relevant civil and criminal provisions introduced in other Australian states and territories and various international common law jurisdictions to address the problems of racial vilification and racially motivated offences. The Board of the Tasmania Law Reform Institute approved the project in August 2009. The reference for this paper was made by the Vice-Chancellor of the University of Tasmania.

How to respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the Paper. The questions are intended as a guide only – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by Friday 16th July 2010.

If possible, responses should be sent by email to: law.reform@utas.edu.au

Alternately, responses may be sent to the Institute by mail or fax:

address: Tasmania Law Reform Institute
Private Bag 89,
Hobart, TAS 7001
fax: (03) 6226 7623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquires should be directed to Esther Newitt, on the above contacts, or by telephoning (03) 6226 2069.

This Issues Paper is also available on the Institute's web page at: www.law.utas.edu.au/reform

or can be sent to you by mail or email.

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 Otlowski (Dean of the Faculty of Law at the University of Tasmania), The Honourable Justice AM 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 Issues Paper 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. The Institute would also like to thank Mr Bruce Newey for his editorial work.

List of Questions

- Question 1:** Have ethnic minorities been specifically targeted in recent attacks or are they simply the victims of random or opportunistic attacks?
- Question 2:** Is the symbolic function of a law a sufficient justification for its introduction?
- Question 3:** Are the current laws in Tasmania sufficient to address the issue of racial vilification and racially motivated crimes?
- Question 4:** Should Tasmania introduce a criminal racial vilification provision in Tasmania's Anti-Discrimination Legislation?
- Question 5:** If so, what changes would need to be made to the existing models, such as the New South Wales legislation, to make it a more effective provision?
- Question 6:** Should Tasmania enact criminal racial vilification provisions in the *Criminal Code* and/or the *Police Offences Act 1935*?
- Question 7:** If racial vilification provisions are introduced as a new section of the *Criminal Code*, which part should they be located in; Part II (Crimes Against Public Order) or Part V (Crimes Against the Person)?
- Question 8:** Should specific sentence enhancement provisions be enacted in Tasmania (i.e. providing racial motivation as an express aggravating factor in the *Sentencing Act 1997*)?
- Question 9:** Should penalty enhancement provisions for racially motivated offences be incorporated into the *Police Offences Act 1935* (i.e. increased maximum penalties for racially motivated offences)?
- Question 10:** Should penalty enhancement provisions apply only to offenders who are motivated by hatred for or prejudice against a group of people with which the victim was associated, or to all offenders who select victims because of their race?

Part 1

Introduction

1.1 Background

1.1.1 In 2009 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 have caused considerable concern both for the safety of minority groups in Australia and for 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 Issues Paper, 'racial vilification' is intended to cover all possible acts that may fall under any of these terms.

1.1.4 This paper 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 paper 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 options for reform are summarised and arguments both for and against the various possibilities are presented.

1.1.5 One of the major issues raised in this Paper is whether Tasmania should make racial vilification a criminal offence, and if so whether it should introduce new provisions in the existing

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 may not involve racial hatred or racist motivation.

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

⁴ *Ibid.*

Anti-Discrimination Act 1998 (Tas), the *Criminal Code* or the *Sentencing Act 1997* (Tas). In considering this issue, a number of key questions will be asked. These are listed on page iv. While these questions form the basis of the inquiry, they are not intended to confine the contributions that may be made to the consultation process. The Tasmania Law Reform Institute wishes to learn the community's views on these issues and any other matter considered relevant to the topic of racial vilification.

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.⁵ Some examples of conduct prohibited in Tasmania and other Australian states include: shouting racial and religious slurs at a taxi driver in the car-park of a hotel,⁶ publically blaming criminal activity on particular ethnic groups,⁷ displaying racist signs,⁸ and distributing racist propaganda.⁹ 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.¹⁰ 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*¹¹ the Tribunal found that ‘an apology (to the victim) is meaningless unless genuine and

⁵ See Appendix A.

⁶ *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.’

⁷ *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.’

⁸ *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.

⁹ *Jones v Scully* (2002) FCA 1080 – the respondent distributed pamphlets that denied the Holocaust and contained other anti-Semitic statements.

¹⁰ See Appendix A.

¹¹ [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.¹² 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*.¹³ 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;
- Jews control pornography in Russia and America;
- Jews are anti-democratic, anti-freedom and pro-tyranny;
- Jews and the world Jewry are seeking to control the world and have already gained large parts of it;
- Jews have the intent of destroying white Christian civilisation; and
- Jews in powerful positions are lying frauds trying to force the white race to mongrelise.¹⁴

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.¹⁵ 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.¹⁶ 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

¹² *Cosmos* [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.

¹³ [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.

¹⁴ *Jones v Scully* [2002] FCA 1080, [44].

¹⁵ *Ibid*, [183].

¹⁶ *Ibid*, [245].

violence towards a person or property do fall within the current criminal laws, but racist motivation is not an element of any criminal offence in Tasmania.¹⁷

2.3.2 There also are no express or specific sentence 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.¹⁸ This reflects the common law position.

2.3.3 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.’¹⁹ Aggravating factors include:

- that the victim was particularly vulnerable;²⁰
- that the effect on the victim was particularly severe;²¹
- that the offences were committed to intimidate the victims;²² and
- that the offender was motivated by revenge.

2.3.4 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*,²³ 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.²⁴

2.3.5 Similarly, victims of racially motivated offences could be viewed by the court as more vulnerable because of their minority status. That is, their membership of racial or ethnic minority groups makes them more vulnerable to being the victim of a crime. Their apparent vulnerability could also be seen as an aggravating factor at sentencing.

¹⁷ *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.

¹⁸ See Appendix A.

¹⁹ *Prokopiec v R* [1982] TasR 170, 174.

²⁰ *Smith v Tasmania* [2008] TASSC 30.

²¹ *Ibid*; *Parker v Tasmania* [2007] TASSC 39; *Woods v R* [1998] TasCCA – the complainant suffered from Post Traumatic Stress Disorder (PTSD) as a result of the attack.

²² *Reynolds v Keygan* [1998] TASSC 81.

²³ [1996] Supreme Court of Victoria, Court of Appeal (Unreported, Winneke ACJ, Charles and Callaway JJA, 13 September 1996).

²⁴ *Ibid*, 11.

2.3.6 Recognising racial hatred as an aggravating factor of sentencing is constrained by a number of factors. First, any aggravating factor must be established beyond reasonable doubt. In *R v Olbrich*²⁵ 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 or not initially accepted by the judge.²⁶ Therefore, to show that an offender was motivated by racial hatred there would either need to be a direct confession from the accused or some other evidence of their racial hatred. For example, in *R v Palmer* (noted above), the court heard evidence from a member of the group which the accused belonged to, that the accused held hostilities towards persons of Maori descent,²⁷ 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.²⁸ Without this kind of evidence it is reasonable to presume that it would be very difficult for the prosecution to establish the racial motivation of the offender beyond reasonable doubt.

2.3.7 Other factors that can be taken into consideration by the sentencing judge include whether the act was premeditated and whether the consequence of the act was intended.²⁹ This enables the court to draw a distinction between conduct that is planned and acts that are committed on the spur of the moment.

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.³⁰ 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.³¹

²⁵ (1999) 166 ALR 330.

²⁶ Kate Warner, *Sentencing in Tasmania*, (2nd ed, 2002) 34.

²⁷ The accused had erroneously believed that the victim was Maori.

²⁸ *R v Palmer* [1996] Supreme Court of Victoria, Court of Appeal (Unreported, Winneke ACJ, Charles and Callaway JJA, 13 September 1996) 2-3.

²⁹ Culpability is in part determined by the consequences of an offence and whether the offender intended or foresaw those consequences. The court also draws a distinction between an act committed on the spur of the moment and one which is premeditated. Warner, above n 26, 80-82.

³⁰ Luke McNamara and Tamsin Solomon, ‘The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?’ (1996) 18 *Adelaide Law Review* 259, 260.

³¹ *Ibid.*

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 such conduct unlawful.³² This led the Commonwealth Parliament to introduce laws that prohibited racial vilification in 1995.³³ These provisions were aimed at protecting groups and individuals from abuse, threats of violence and the incitement of racial hatred.³⁴ 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).³⁵

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.³⁶ 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.³⁷ 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.³⁸ Remedies handed down by the Commission for breaches of s 18C include:

- compensation orders;³⁹
- order for an apology;⁴⁰
- order to complete cultural awareness training;⁴¹ and
- order to publish a retraction.⁴²

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*,⁴³ 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. The 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*.⁴⁴

³² 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).

³³ 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.

³⁴ Ibid.

³⁵ McNamara and Solomon, above n 30, 259. HREOC is now called the 'Australian Human Rights Commission' (AHRC).

³⁶ See Appendix A.

³⁷ Section 18B of the *Racial Discrimination Act 1975* (Cth). See Appendix A.

³⁸ 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.

³⁹ *Feghaly v Oldfield* (2000) EOC 93-090; *Jacobs v Fardig* (1999) HREOCA 9.

⁴⁰ *Warner v Kucera* (2001) EOC 93-137.

⁴¹ *Jacobs v Fardig* (1999) HREOCA 9.

⁴² *Feghaly v Oldfield* (2000) EOC 93-090.

⁴³ (1998) HREOCA 26.

⁴⁴ (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,⁴⁵ these were strongly opposed by opposition political parties who feared the laws would unduly restrict free speech.⁴⁶ 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.⁴⁷ 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.⁴⁸

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).⁴⁹ 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.⁵⁰ 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.⁵¹

2.4.8 A further inadequacy of using the sedition laws as a means of addressing racial vilification (rather than 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,⁵² if the Department of Public Prosecutions is already reluctant to pursue prosecution under state criminal racial vilification provisions because of the difficulty associated with establishing the motive of the offender,⁵³ there is a

⁴⁵ McNamara and Solomon, above n 30, 264.

⁴⁶ 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.

⁴⁷ Ibid, 271-272.

⁴⁸ Western Australian Greens Senator Christobel Charmarette cited in McNamara and Solomon, above n 30, 276.

⁴⁹ Dan Meagher, ‘Inciting Racial Violence as Sedition: A Problem of Definition?’ (2006) 30 *Criminal Law Journal* 289, 289.

⁵⁰ See Appendix A.

⁵¹ B Saul cited in Meagher, above n 49, 296.

⁵² Mark Walters ‘The Cronulla riots: Exposing the problem with Australia’s Anti-vilification laws’ (2006-2007) 18 *Current Issues in Criminal Justice* 165.

⁵³ 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.⁵⁴

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).⁵⁵

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.'⁵⁶ 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 to 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.⁵⁷

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.'⁵⁸

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.⁵⁹ 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'.⁶⁰ In Tasmania, the provisions prohibiting racial discrimination and vilification in the *Anti-Discrimination Act 1998* reflects the state's commitment to such conventions.

⁵⁴ Walters, above n 52.

⁵⁵ Equal Opportunity Commission, Western Australia, *Racial and Religious Vilification Consultation Paper* (2004) 19.

⁵⁶ *Universal Declaration of Human Rights*, art 19.

⁵⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, art 4.

⁵⁸ *International Covenant on Civil and Political Rights*, art 20(2).

⁵⁹ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (3rd ed, 2010) 122.

⁶⁰ Equal Opportunity Commission, above n 55, 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 racial 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*,⁶¹ *Nation Wide News Pty Ltd v Wills*,⁶² *Cunliffe v Commonwealth*,⁶³ and *Theophanous v Herald & Weekly Times*.⁶⁴ 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’,⁶⁵ and should not be considered an unfettered privilege. In the case of *Wagga Wagga Aboriginal Action Group & Ors v Eldridge*,⁶⁶ the NSW Equal Opportunity Tribunal observed that the right to freedom of expression has never been regarded as ‘absolute and unequivocal’.⁶⁷ The Tribunal also held that the right to freedom of speech cannot be used as a defence to a complaint of racial vilification.⁶⁸ 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.

⁶¹ (1992) 177 CLR 106.

⁶² (1992) 177 CLR 1.

⁶³ (1994) 182 CLR 272.

⁶⁴ (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.

⁶⁵ Equal Opportunity Commission, above n 55, 23.

⁶⁶ (1995) EOC 92-701.

⁶⁷ Equal Opportunity Commission, above n 55, 24.

⁶⁸ *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 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.⁶⁹ 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.⁷⁰ 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.⁷¹

⁶⁹ The five Australian states to have civil and criminal racial vilification provisions are New South Wales, Queensland, Victoria, South Australia and the ACT.

⁷⁰ *Anti-Discrimination Act 1977* (NSW) s 20C. See Appendix A.

⁷¹ *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.⁷²

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.⁷³ 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.⁷⁴

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	

⁷² Dan Meagher, 'So far no good: The regulatory failure of criminal racial vilification laws in Australia' (2006) 17 *Public Law Review* 209, 212.

⁷³ *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.

⁷⁴ *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 Nationalists Movement (ANM), a neo-Nazi organisation led by Jack Van Tongeren.⁷⁵ 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.⁷⁶ 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.⁷⁷

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.⁷⁸ 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.⁷⁹

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 a too high burden of proof to enable prosecutions or convictions.⁸⁰ 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.

⁷⁵ Meagher above n 72, 218.

⁷⁶ Australian Screen *Nazi Supergrass* (1993) <<http://www.aso.gov.au/titles/documentaries/nazi-supergrass/>> at 15 January 2010.

⁷⁷ Meagher above n 72, 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, 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.

⁷⁸ Meagher above n 72, 219. See Appendix A for a complete list of all relevant provisions.

⁷⁹ See ss 313, 317, 317A, 338B and 444 of the *Criminal Code* (WA) – discussed below.

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

3.4 Sentence Enhancement Provisions

3.4.1 New South Wales, along with the Northern Territory and most recently Victoria,⁸¹ has introduced specific sentence enhancement provisions for any offence that is motivated by racial hatred. Under the *Crimes (Sentencing Procedure) Act 1997* (NSW), a judge may take the racial motivation of the offender into consideration as an aggravating factor when sentencing.⁸² This expressly recognises the power of the judge to impose a more severe punishment than if there was no aggravating motivation for the offence. This provision was applied in the New South Wales District Court case of *R v Amir El Mostafa*.⁸³ 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,⁸⁴ assault occasioning actual bodily harm,⁸⁵ and maliciously inflicting grievous bodily harm.⁸⁶ 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.⁸⁷

3.4.2 Sentence enhancement or aggravation provisions also operate in New Zealand, Canada and the United Kingdom.⁸⁸ 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.⁸⁹ Similar provisions exist in the *Sentencing Act 2002* (NZ)⁹⁰ and the *Criminal Code* (Canada).⁹¹

3.4.3 In Tasmania there are already a small number of specific sentence enhancement 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.⁹²

⁸¹ 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 6 of the Act lists some of the specific circumstances that may be regarded as aggravating, including the fact the offence was motivated by hate against a group of people. In December 2009, the *Sentencing Amendment Bill 2009* (Vic) was adopted.

⁸² *Crimes (Sentencing Procedure) Act 1997* (NSW) s 21(2)(h). See Appendix A.

⁸³ [2007] NSWDC 219.

⁸⁴ Contrary to s 93B(1) of the *Crimes Act 1900* (NSW).

⁸⁵ Contrary to s 59(2) of the *Crimes Act 1900* (NSW).

⁸⁶ Contrary to s 35(2) of the *Crimes Act 1900* (NSW).

⁸⁷ *R v Amir El Mostafa* [2007] NSWDC 219.

⁸⁸ Gail Mason 'The Penal Politics of Hatred' (2009) 42(3) *The Australian and New Zealand Journal of Criminology* 275, 278.

⁸⁹ Mark Walters, 'Hate crimes in Australia: Introducing punishment enhancers' (2005) 29 *Criminal Law Journal* 201, 204. See Appendix A.

⁹⁰ Section 9(1). See Appendix A.

⁹¹ 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.

⁹² See Appendix A.

3.5 Penalty Enhancement Provisions

3.5.1 According to Mason, penalty enhancement provisions are the most common model of hate crime legislation.⁹³ 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.⁹⁴ 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,⁹⁵ to an increase of double the maximum term of imprisonment and/or double the fine.⁹⁶ 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 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.⁹⁷ Furthermore, if the offender acts with ‘indecent intent’, the maximum penalty is similarly increased.

3.5.3 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,⁹⁸ is 21 years imprisonment.⁹⁹

3.5.4 In the UK, as well as having sentence enhancement provisions, s 28 of the *Crime and Disorder Act 1998*¹⁰⁰ 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.¹⁰¹ 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).

⁹³ Mason above n 88, 278.

⁹⁴ Ibid.

⁹⁵ 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.

⁹⁶ 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.

⁹⁷ 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, may sentence the offender to 50 penalty units or to imprisonment for a term not exceeding 2 years’.

⁹⁸ Murder and treason attract a maximum penalty of life in prison – see ss 158 and 56 of the *Criminal Code* (Tas).

⁹⁹ See s 389 (3) of the *Criminal Code* (Tas).

¹⁰⁰ See Appendix A.

¹⁰¹ Mark Walters ‘Changing the Criminal Law to Combat Racially Motivated Violence’ (2006) 8 *University of Technology Sydney Law Review* 66, 77.

3.5.5 The advantages and disadvantages of introducing additional anti-discrimination provisions, new criminal provisions, sentence enhancement and penalty enhancement provisions are discussed in greater detail in Part 5 of this Issues Paper.

Part 4

Need for Reform

4.1 Changing Demographics of Australia and Tasmania

4.1.1 As a society becomes more multi-cultural 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 and eventually manifest in some form of anti-social behaviour, including acts of racial hatred and vilification. These kinds of changes in the demographic make-up of a community form the basis of the justification for the introduction of racial vilification laws.

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 policy¹⁰² was rescinded by the Whitlam Government in the early 1970s,¹⁰³ 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.¹⁰⁴ The 2006 census also indicated that around 135 religions are practised by the Australian population.¹⁰⁵ In Tasmania, 16% of the population were born overseas.¹⁰⁶

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.¹⁰⁷ While the majority of these immigrants were from countries where English is the main language,¹⁰⁸ a significant proportion came from non-English speaking countries, including Bhutan¹⁰⁹ and Sudan.¹¹⁰

¹⁰² 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 55, 11-12.

¹⁰³ Above n 55, 12.

¹⁰⁴ The term Indigenous is used in reference to people who are Aboriginal Australian and/or from the Torres Strait Islands.

¹⁰⁵ Australian Bureau of Statistics, '2006 Census Tables: Australia' <<http://www.abs.gov.au/AUSSTATS>> at 10 December 2009.

¹⁰⁶ Ibid.

¹⁰⁷ 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.

¹⁰⁸ In particular, the United Kingdom and New Zealand.

¹⁰⁹ Between 2007-2008, 10.7% of immigrants to Tasmania were from Bhutan.

¹¹⁰ Between 2005-2006, 9.3% of immigrants to Tasmania were from Sudan.

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,¹¹¹ racism exists in all facets of Australian society. While there is a tendency for racism and racist behaviours to be attributed to extremists or uneducated ‘rednecks’, ‘thugs’ and ‘bogans’,¹¹² a number of reports have suggested that many people in Australia today live with prejudice and intolerance.¹¹³ 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.¹¹⁴ Other reports¹¹⁵ have found that, as well as Aboriginal people, minority groups such as the Jewish, Muslim, Arab and Asian communities are the primary 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.¹¹⁶ There has also been a significant increase in the number of anti-Semitic attacks in Australia since these events.¹¹⁷

4.2.2 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.¹¹⁸ Billed by organisers as ‘one hell of a week! Sun, surf and racialist music’, police and local council reported that because the festival was held on private property, they were powerless to prevent it.¹¹⁹

4.2.3 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. In late 2008, the Office of the Anti-Discrimination Commissioner, 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.¹²⁰ 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.¹²¹ The Office received a total

¹¹¹ 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 55, 7.

¹¹² 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 Newspaper website attributed the acts to ‘bogans’ and ‘racist thugs’ <<http://www.themercury.news.com.au>> at 9 October 2009.

¹¹³ Above n 55, 13.

¹¹⁴ 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 55, 13.

¹¹⁵ 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 88, 277. See also Tamsin Solomon, ‘Problems in Drafting Legislation Against Racist Activities’ (1994) *Australian Journal of Human Rights* 7.

¹¹⁶ Walters above n 101, 68-69. See also above n 55, 14.

¹¹⁷ Above n 55, 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.

¹¹⁸ 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.

¹¹⁹ Ibid.

¹²⁰ Office of the Anti-Discrimination Commissioner, Tasmania, *Annual Report 2008-2009* (2009) 37.

¹²¹ Ibid.

of 92 completed surveys. The results indicated that there is a significant under-reporting of racist behaviour to both the police and the Office of the Anti-Discrimination Commissioner. 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.¹²²

4.2.4 The results of the 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.¹²³

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.¹²⁴ Many of the victims of these attacks were Indian students,¹²⁵ 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.¹²⁶

4.3.2 Although there is a perception by the victims, the press and some facets of the wider community that the recent assaults in Victoria were racially motivated, a recently published report on the welfare of international students by the Senate Standing Committee on Education, Employment and Workplace Relations in Victoria¹²⁷ 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...'¹²⁸ The Report cited a number of submissions that supported this assertion and highlighted the lack of awareness of safety and security issues by new arrivals in Australia.¹²⁹

¹²² Ibid 39.

¹²³ Ibid 41.

¹²⁴ Victorian Chief Commissioner Simon Overland, publically 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.

¹²⁵ 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.

¹²⁶ 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 made trips to India to hold discussions with Indian government officials.

¹²⁷ Senate Standing Committee on Education, Employment and Workplace Relations, above n 1.

¹²⁸ Ibid 25-26.

¹²⁹ 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.apf.gov.au/senate/committee/eet_ctte/international_students/submissions.htm>

4.3.3 In Tasmania, both international students, predominantly from Asian countries,¹³⁰ 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. 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 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.¹³¹

4.3.4 As mentioned above, the Office of the Anti-Discrimination Commissioner conducted a survey in 2008 that looked at racial discrimination and vilification in Tasmania. The majority of respondents to the survey reported incidents of verbal abuse or intimidation (43.5%).¹³² 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.¹³³

4.3.5 Anecdotal examples of other apparent racial attacks were reported by members of the public on the Mercury newspaper website's online public discussion forums:¹³⁴

'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.

4.3.6 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.'¹³⁵

¹³⁰ 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.

¹³¹ Tasmania Police, 'Planned Protest' (Press Release, 11 May 2010).

¹³² 20.7% of respondents reported incidents of discrimination and 6.5% did not specify what had occurred.

¹³³ 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.

¹³⁴ *The Mercury* <<http://www.themercury.com.au>> at 10 October 2009.

¹³⁵ 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.

4.3.7 The UTAS International Services director highlighted the case of a 15-year-old Asian student who was attacked in the Elizabeth Street bus mall. The victim was stabbed in the arm with a pair of scissors, robbed of his mobile phone and told to 'go back to his own country'. His 18-year-old attacker received a suspended sentence.¹³⁶

Question 1: Have ethnic minorities been specifically targeted in recent attacks or are they simply the victims of random or opportunistic 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 provisions or sentence enhancement provisions is that general criminal laws do not sufficiently deal with assaults that are committed with a racial motivation.

4.4.2 It is well documented that racial 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.¹³⁷ An American study by the National Institute Against Prejudice and Violence¹³⁸ 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.¹³⁹

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.¹⁴⁰ Victims can also suffer from prolonged periods of depression and anxiety after an attack.¹⁴¹

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.

¹³⁶ The TLRI does not suggest that this is an unusually light sentence for this type of offence. This example is used to demonstrate that victims may perceive the penalties imposed by the courts as being too lenient and therefore may be reluctant to report offences.

¹³⁷ Walters, above n 101, 67; Walters, above n 89, 209; Craig L Uhrich, 'Hate Crime Legislation: A Policy Analysis' (1999) 36 *Houston Law Review* 1467, 1497.

¹³⁸ (1986) cited in Walters, above n 89, 209.

¹³⁹ Hospitalisation rates for racially motive assaults is up to four times higher than assaults not aggravated by prejudice - see Walters, above n 101, 67, 72.

¹⁴⁰ Uhrich, 'Hate Crime Legislation: A Policy Analysis', above n 137, 1506.

¹⁴¹ Walters, above n 52, 165.

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.¹⁴² 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.¹⁴³

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.¹⁴⁴

4.5.3 In summary, it is argued that the changing demographics of many societies, including Australia and Tasmania, have made racism more apparent and the need to address it more pressing. The appropriate way to achieve this includes using the law and introducing provisions that expressly prohibit acts of racial hatred and racial vilification.

Question 2: Is the symbolic function of a law a sufficient justification for its introduction?

¹⁴² Meagher, above n 72, 214.

¹⁴³ 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.'

¹⁴⁴ Walters, above n 101, 75.

Part 5

Options for Reform

5.1.1 As mentioned above, 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 reconsider these options, indicate the benefits and disadvantages of each option and consider which would be the most appropriate and effective provision to introduce in Tasmania.

5.2 Option 1 – No Change

5.2.1 The first option available is 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 (i.e. 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. As mentioned above at 2.3.4, Victorian courts have already recognised racism as an aggravating factor in sentencing at common law.

5.2.2 There are arguably a number of advantages of not introducing criminal provisions and simply retaining the current laws in Tasmania. For example, 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.¹⁴⁵

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.

Question 3: Are the current laws in Tasmania sufficient to address the issue of racial vilification and racially motivated crimes?

¹⁴⁵ Above n 55, 35.

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

5.3.1 Option two is 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,¹⁴⁶ has been charged with criminal racial vilification in New South Wales.¹⁴⁷ 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, who 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.¹⁴⁸ 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.¹⁴⁹

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.

¹⁴⁶ 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 101, 70-71.

¹⁴⁷ There have also not been any criminal convictions under racial vilification provisions in Queensland, ACT, South Australia or Victoria.

¹⁴⁸ Walters, above n 101, 79.

¹⁴⁹ Meagher, above n 72, 215.

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.¹⁵⁰

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.¹⁵¹ 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.’¹⁵² 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.¹⁵³

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.’¹⁵⁴ 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 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.¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷

¹⁵⁰ 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.

¹⁵¹ Walters, above n 101, 80.

¹⁵² Meagher, above n 72, 217.

¹⁵³ Nancy Hennessy and Paula Smith, ‘Have We Got it Right? NSW Racial Vilification Laws Five Years On’ (1994) *Australian Journal of Human Rights* 6.

¹⁵⁴ *Ibid.* See also Meagher, above n 72, 213.

¹⁵⁵ Meagher, above n 72, 213.

¹⁵⁶ 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.

¹⁵⁷ Meagher, above n 72, 215.

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.

Question 4: Should Tasmania introduce a criminal racial vilification provision in Tasmania's Anti-Discrimination Legislation?

Question 5: If so, what changes would need to be made to existing models, such as the New South Wales provisions, to make it a more effective provision?

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,¹⁵⁸ and possess material for dissemination or display with the intent of inciting racial animosity or hatred.¹⁵⁹

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'.¹⁶⁰ That is, in most states, strict liability provisions are reserved for offences such as speeding and some other traffic offences.¹⁶¹ 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'.¹⁶² 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 (i.e. the courtroom) from which to assert their opinions.¹⁶³

¹⁵⁸ Section 77. See Appendix A.

¹⁵⁹ Sections 79 and 80. See Appendix A.

¹⁶⁰ Meagher, above n 72, 227.

¹⁶¹ John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (2006) 87.

¹⁶² Meagher, above n 72, 227.

¹⁶³ This criticism is equally applicable to criminal racial vilification provisions contained in anti-discrimination legislation.

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.¹⁶⁴

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

5.4.5 The issue of where to locate any new racial vilification provision in an existing Criminal Code can also be problematic for the government. Under the Western Australian legislation, racial vilification provisions are located in Part II, Division XI of the *Criminal Code* (WA). This Part deals with offences against public order and includes crimes such as sedition and unlawful assembly. It could be argued that this is not an appropriate location for racial vilification laws as the other offences in this Part are concerned with conduct that damages the peace, order and good government of the country and not complaints from individuals or small groups of persons being allegedly vilified. However, as Meagher points out, the intention of the Western Australian Parliament was to highlight that these new laws are aimed at proscribing behaviour that deprives citizens of their ‘ability to enjoy and exercise their political rights and liberties’, and therefore this section was deemed an appropriate location by the government.¹⁶⁵

5.4.6 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.

Question 6: Should Tasmania enact racial vilification legislation in the *Criminal Code* and/or the *Police Offences Act 1936*?

Question 7: If racial vilification provisions are introduced as a new section of *Criminal Code*, which part should they be located in; Part II (Crimes Against Public Order) or Part V (Crimes Against the Person)?

5.5 Option 4 - Sentence Enhancement Provisions

5.5.1 A fourth option is to introduce specific sentence enhancement provisions. Sentence enhancement provisions are usually found in the sentencing legislation of the state and specify 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 alongside general provisions in the Criminal Code, and provide for an increased maximum penalty where racial prejudice or motivation is a proven part of the offence.

5.5.2 Sentence enhancement provisions can play a strong symbolic function, showing the community that racial hatred and racially motivated offences are not tolerated by society. They can also have the benefit of providing specific and general deterrence to offenders who act under racial prejudice or motivation, or who may be inclined to do so.¹⁶⁶

¹⁶⁴ Above n 55, 35.

¹⁶⁵ Meagher, above n 72, 225.

¹⁶⁶ Sentencing Advisory Council, Victoria, *Sentencing for offences motivated by hatred or prejudice* (2009) 18.

5.5.3 Some critics argue, however, that sentence enhancement 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.¹⁶⁷ 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. The New Zealand legislation includes these situations. The Victorian Sentencing Advisory Council noted in their report that this broader approach is more effective and recommended it be incorporated into the Victorian legislation.¹⁶⁸

5.5.4 While sentence enhancement provisions are subject to some criticism, many legal commentators see them as a relatively effective way of acknowledging and addressing the prejudicial motivation of the offender and the effect this can have on the severity of the harm caused to the victim. 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.¹⁶⁹

5.5.5 As mentioned above, Tasmanian sentencing legislation already has some scope for the court to include the racist motivation of the offender at sentencing, however there are currently no specific provisions relating to racism or racial hatred. As has been noted throughout this issues paper, including provisions that specifically target particular behaviour can send a stronger message to the community that this behaviour is considered abhorrent and will not be tolerated.

Question 8: Should specific sentence enhancement provisions be enacted in Tasmania (i.e. providing racial motivation as an express aggravating factor in the *Sentencing Act 1997*)?

5.6 Option 5 – Penalty Enhancement Provisions

5.6.1 As mentioned above, 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,¹⁷⁰ assault occasioning bodily harm,¹⁷¹ assault with intent,¹⁷² threats¹⁷³ and criminal damage¹⁷⁴ when undertaken in circumstances of racial aggravation.¹⁷⁵ 'Circumstances of racial aggravation' is defined in s 80I of the *Criminal Code* (WA) as meaning

¹⁶⁷ Walters, above n 101, 80.

¹⁶⁸ See above n 166, 11 and 22; see also Appendix A. The difficulty of establishing motive as an element of an offence is discussed above at 5.3.6. As Walters notes, taking motive into consideration at the sentencing stage is generally less problematic for the court as courts will often pay regard to the motivation of the crime at sentencing. See above n 89, 211-212.

¹⁶⁹ Evidence to Senate Legal and Constitutional Legislation Committee – Racial Hatred Bill 1994, Parliament of Australia, Canberra, March 2005, 14 (Victorian Council of Civil Liberties).

¹⁷⁰ Section 313.

¹⁷¹ Section 317.

¹⁷² Section 317A.

¹⁷³ Section 338B.

¹⁷⁴ Section 444.

¹⁷⁵ Meahger, above n 72, 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.

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.

5.6.2 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.¹⁷⁶

5.6.3 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.¹⁷⁷ 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.

5.6.4 As mentioned 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,¹⁷⁸ 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).

Question 9: Should penalty enhancement provisions for racially motivated offences be incorporated into the *Police Offences Act 1935* (i.e. increased maximum penalties for racially motivated offences)?

Question 10: Should penalty enhancement provisions only apply to offenders who are motivated by hatred for or prejudice against a group of people with which the victim was associated, or to all offenders who select victims because of their race?

¹⁷⁶ Walters, above n 101, 78.

¹⁷⁷ Meagher, above n 72, 231.

¹⁷⁸ These offences attract a maximum penalty of life imprisonment.

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 (New Zealand)

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,