O'CONNELL -v- THE STATE OF WESTERN AUSTRALIA [2012] WASCA 96 (4 May 2012)

Last Updated: 4 May 2012

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : O'CONNELL -v- THE STATE OF WESTERN AUSTRALIA [2012] WASCA 96

CORAM : MARTIN CJ

BUSS JA

MAZZA JA

HEARD : 13 DECEMBER 2011

DELIVERED : 4 MAY 2012

FILE NO/S : CACR 27 of 2011

CACR 28 of 2011

BETWEEN : BRENDON LEE O'CONNELL

Appellant

AND

THE STATE OF WESTERN AUSTRALIA

Respondent

ON APPEAL FROM:

Jurisdiction : DISTRICT COURT OF WESTERN AUSTRALIA

Coram : WISBEY DCJ

File No : IND 1767 of 2009

Catchwords:
Criminal law - Application for leave to appeal against conviction and sentence - Conduct intended to incite racial animosity or racial hatred - Conduct likely to racially harass - Whether trial judge erred by failing to adjourn - Whether self-represented litigant denied procedural fairness - Whether there should have been separate trials - Whether individual sentences manifestly excessive - Whether total effective sentence offended the first limb of the totality principle

Legislation:
Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA)
Australian Constitution
Criminal Appeals Act 2004 (WA), s 30(3)(c), s 31(4)(a)
Criminal Code (WA), s 77, s 80B
Criminal Procedure Act 2004 (WA), s 98(2)(a), s 17(3)
District Court Act 1969 (WA)
Evidence Act 1906 (WA), s 31A, s 97
Judiciary Act 1903 (Cth), s 78B(1), s 78B(2)
Oaths, Affidavits and Statutory Declarations Act 2005 (WA), s 4, s 5
Sentencing Act 1995 (WA), s 20(1), s 21(3)

Result:
Appeal dismissed

Category: A

Representation:

Counsel:

Appellant : Dr John Walsh of Brannagh

Respondent : Mr J McGrath SC & Ms S H Linton

Solicitors:

Appellant : Nelson Lawyers

Respondent : Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Billing v The State of Western Australia (No 2) [2008] WASCA 11

Dair v The State of Western Australia [2008] WASCA 72; (2008) 36 WAR 413

Dietrich v The Queen [1992] HCA 57; (1992) 177 CLR 292

Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289

Glew v Shire of Greenough [2007] HCATrans 520

Glew v The Shire of Greenough [2006] WASCA 260

House v The King [1936] HCA 40; (1936) 55 CLR 499

Love v The Queen (1983) 9 A Crim R 1

MacPherson v The Queen [1981] HCA 46; (1981) 147 CLR 512

Michael v The State of Western Australia [2007] WASCA 100

Nikolic v MGICA Ltd [1999] FCA 849

Preston v The State of Western Australia [2012] WASCA 64

R v Abu Hamza [2006] EWCA Crim 2918; [2007] 3 All ER 451

R v Sheppard [2010] EWCA Crim 65; [2010] 2 All ER 850

Re F; Litigants in Person Guidelines [2001] FAMCA 348; (2001) 27 Fam LR 517

Roffey v The State of Western Australia [2007] WASCA 246

Shaw v Jim McGinty in his capacity as Attorney General [2006] WASCA 231

State Bank of New South Wales v Commonwealth Savings Bank of Australia (1986) 66 ALR 129

Thompson v The Queen (1992) 8 WAR 387

Toben v Jones [2003] FCAFC 137; (2003) 129 FCR 515

Tomasevic v Travaglini [2007] VSC 337; (2007) 17 VR 100

Van Tongeren & Van Blitterswyk v The Queen (Unreported, WASC, Library No 920221, 16 April 1992)

Williamson v Hodgson [2010] WASC 95

Wilson v The State of Western Australia [2010] WASCA 82

1 **MARTIN CJ**: The application for leave to appeal against conviction, and the appeal against conviction should be dismissed for the reasons given by Mazza JA with which I agree. Leave to appeal against sentence should be granted, but the appeal dismissed, for the reasons given by Mazza JA with which I agree.

2 **BUSS JA**: I agree with Mazza JA.

3 **MAZZA JA**: Before the court are the appellant's applications for leave to appeal against conviction and sentence.

4 By an indictment dated 21 February 2010, the appellant was charged as follows:

(1) On 2 May 2009 at South Perth Brendon Lee O'Connell, engaged in conduct, otherwise than in private, that was likely to harass Stanley Elliot Keyser as a member of a racial group namely pursuing Stanley Elliot Keyser and making a series of statements to Stanley Elliot Keyser.

(2) On a date unknown between 2 May 2009 and 11 May 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely publishing on the internet a series of statements concerning the Jewish people.

(3) On a date unknown between 2 May 2009 and 11 May 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely publishing on the internet a series of statements concerning the Jewish people.

(4) On or about 25 October 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely publishing on the internet a series of statements concerning the Jewish people.

(5) On or about 29 October 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely publishing on the internet a series of statements concerning the Jewish people.

(6) On or about 7 November 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely

publishing on the intemet a series of statements concerning the Jewish people.

(7) On or about 11 November 2009 at Maylands, Brendon Lee O'Connell, with intent to create or promote animosity towards a racial group engaged in conduct, otherwise than in private, namely publishing on the internet a series of statements concerning the Jewish people.

Count 1 is an offence contrary to s 80B of the *Criminal CodeI* (WA). Counts 2 to 7 are offences contrary to s 77 of the *Criminal Code*.

5 On 28 January 2011, after a trial spanning eight sitting days, before Wisbey DCJ and a jury in which the appellant acted on his own behalf, the appellant was acquitted of count 4, but convicted of all the other charges: ts 738 - 739. On 31 January 2011, he was sentenced to a total effective term of 3 years' imprisonment with eligibility for parole.

The offences

6 Sections 77 and 80B appear in ch 11 of the *Criminal Code* which is entitled 'Racist harassment and incitement to racial hatred'.

7 Section 77 provides:

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.

8 Section 80B provides:

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.

9 Section 76 is the definitional section applicable to ss 77 and 80B. Relevantly, it states:

animosity towards means hatred of or serious contempt for;

harass includes to threaten, seriously and substantially abuse or severely ridicule;

racial group means any group of persons defined by reference to race, colour or ethnic or national origins;

10 It can be seen that in order for the appellant to be convicted of any of the charges brought against him, it was necessary for the State to prove beyond reasonable doubt that Jewish people are a racial group as defined. The primary difference (although not the only difference) between s 77 and s 80B is that s 77 requires proof of a specific intention , where s 80B does not.

11 Both offences concern conduct engaged in 'otherwise than in private'. For the purposes of each offence, s 80E(2) specifies that conduct is taken not to occur in private if it:

(a) consists of any form of communication with the public or a section of the public; or

(b) occurs in a public place or in the sight or hearing of people who are in a public place.

12 The defences available to an accused charged with an offence against s 80B (but not s 77) are set out in s 80G. Relevantly, that section provides:

(1) It is a defence to a charge under section 78 or 80B to prove that the accused person's conduct was engaged in reasonably and in good faith -

...

(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for -

(i) any genuine academic, artistic, religious or scientific purpose; or

(ii) any purpose that is in the public interest;

The State's case

13 On the morning of 2 May 2009, Stanley Keyser, who is Jewish and was at the time the president of the WA branch of the Australasian Union of Jewish Students, attended an IGA store in South Perth, where he had heard that a group called the Friends of Palestine were going to protest against the sale of Israeli produced Jaffa oranges at the shop. Mr Keyser attended the store in the company of a fellow Jewish student, Timothy Peach, with the plan to counter the protest by providing some literature that presented a contrary view to the Friends of Palestine. Mr Keyser took a photograph of the protest group when they arrived. After leaving the store, the appellant, who was present to observe and record the protest, approached Mr Keyser and Mr Peach. The events that followed were captured on video footage shot by the appellant at the scene. The appellant and Mr Keyser became engaged in a public and heated confrontation. The appellant made statements to Mr Keyser such as, 'You are a racist homicidal maniac,' 'You are a racist Jew,' 'You belong to a racist homicidal organisation' 'You are anti-goy ... it is in your religion and race' and 'You kill little Palestinian children and you support it' (count 1). The State alleged that the appellant's statements seriously or substantially abused or severely intimidated Mr Keyser as a member of a racial group.

14 After this incident, the appellant caught a ferry from South Perth and went to the Belltower on The Esplanade in Perth. There, in a piece to camera, he described the confrontation with Mr Keyser and made statements of a general and specific nature on the subject of the Jewish people. He accused Jews of 'continuing to kill today ... You did it in Russia, you did it to Germany, you do it to anyone who stands up to you.' He continued,

'We've had enough of you and those bells toll for you. Your days are numbered.' At one point he threatened to put Jews who do not 'speak the truth' or 'sincerely change' 'in camps' because 'we've had enough'. In the concluding section of the video he questioned what he described as 'holocaustianity' and asserted the right to question history, 'especially the received truths received by these vampires [Jews]'.

15 The video footage shot by the appellant at the IGA store and the Belltower, along with commentary and captions which he added later, were posted by him on an internet website (exhibit 1).

16 One caption referred to Mr Keyser as 'The "Perfumed Prince" of Club Death Judaica ... '. When, as recorded in the video, Mr Keyser told the appellant he went to a Jewish day school the caption is 'jewish [sic] day school where little judaicas learn how to be racist, homicidal maniacs'. At the conclusion of the video is written 'Time to get out there' and 'Time to get angry'.

17 The posting of the video footage recorded at the IGA store formed the basis of count 2, while the posting of the video footage in front of the Belltower was the basis of count 3.

18 There is no need to describe the facts with respect to count 4, as he was acquitted of that count.

19 Counts 5, 6 and 7 concern internet blogs which were written by the appellant and uploaded by him onto a website. Each was written after the appellant had been charged with offences arising out of the incident with Mr Keyser and the posting of the video material associated with that incident.

20 The blogs were shown to the jury, and a hard copy of them was tendered as one exhibit: exhibit 3. It is unnecessary to set out the blogs in full. What follows is a description of certain parts of each blog.

21 Count 5 concerns a blog dated 29 October 2009 in which the appellant wrote:

They [Jews] hate Christ and Christians. They just need our money and our support until the time is right and they then can stop pretending: exhibit 3, p 81.

22 The appellant spoke of 'the modus operandi of Jewish cryptocracies ... since the days of Queen Elizabeth [Queen Elizabeth I] using deception, blasphemy, bribery and homicide': exhibit 3, p 91. He asserted that 'the Jew runs, owns and dominates the internet': exhibit 3, p 102.

23 Later in the blog he argues that 'the "Jew" community could have at least made their lies and slander half believable, but I guess after years of inventive over-the-top "holocaust" memoirs they have gotten lazy': exhibit 3, p 118.

24 Count 6 concerns a blog dated 7 November 2009. The blog was written a day or so after a shooting by a lone gunman, who was a US Army major and not a Jew, at a US Army base at Fort Hood, Texas, in which many people were killed and wounded.

25 In this blog, the appellant alleged that 'Israeli Jews From Fanatical Orthodox Yeshiva Academy in Israel Kill US Soldiers at Texas base': exhibit 3, p 70.

26 He accused Israeli Jews of 'dancing on car roofs when the towers fell [a reference to the infamous events of 11 September 2001] ... blowing up US ships...demolishing hotels full of British soldiers...They [Jews] supply hi-tech triggering devices to the "Iraqi Insurgency", and they hand over triggering devices for nuclear bombs to Pakistan ...': exhibit 3, p 71.

27 The blog the subject of count 7 is dated 11 November 2009. Ostensibly, it is about the charges arising out of the confrontation with Mr Keyser and the video he subsequently made and uploaded to the internet. In this blog he states: '[The] essence of so-called Judaism [is to] crush destroy, maim and slaughter all who get in you're [sic] way': exhibit 3, p 37. He asserts that Jews wish to 'dominate the planet and rule over the goy': exhibit 3, p 43. He states Jews are unable to deny that 'they are a religion, culture and tradition of racism, hate, homicide and ethnic cleansing': exhibit 3, p 43.

28 The appellant further states, 'I am vehemently ANTI-XEWISH [sic]' and 'I am most definitely anti-israel [sic] (may it be wiped from the face of the earth)': exhibit 3, p 60.

29 The prosecution case in respect of counts 2, 3, 5, 6 and 7 was that the material the subject of each charge and published by the appellant was conduct intended to create, promote or increase hatred of, or serious contempt towards, Jews as a racial group.

30 The State called a number of witnesses in support of its case.

31 Detective Sergeant Constable Timothy Paini was the principal investigating police officer. He downloaded from the internet the video made by the appellant and posted by him, relevant to counts 1 to 3: exhibit 1. Later, he downloaded the blogs.

32 Both Mr Keyser and Mr Peach gave evidence about the incident on 2 May 2009. Their evidence was largely consistent with what was shown of the incident in exhibit 1.

33 The State also called expert evidence from Professor Andrew Markus and Rabbi David Freilich about whether Jews in Australia were a racial group, that is, whether they were a group of persons defined by reference to race or ethnic origins.

34 The expertise of Professor Markus was not disputed. He has been the Professor of Jewish Civilisations at Monash University since 2001 and he has researched ethnic groups and race relations in Australia since 1971. He testified that in 2008, a comprehensive cross-national survey was undertaken in Australia of persons aged 18 and above who saw themselves as, in any way at all, Jewish. The questionnaire which was completed by 5,100 respondents was, in his opinion, representative of the Jewish community in Australia. He testified that, having regard to what he described as elements of commonality, being:

a. knowledge of the Holocaust;
b. fear or experience of anti-Semitism;

i. bat/bar-mitzvah;

a. the Passover Seder;

b. family connectiveness;
c. Jewish identity;
d. friendship patterns; and
e. concern for Israel: exhibit 4, p 1 - 11,

his opinion was that Jews in Australia, whether secular or religious, could be better understood in terms of ethnicity rather than as a religious group or race: ts 453

35 Rabbi Freilich, Chief Rabbi of the Perth Hebrew congregation, testified that, from a religious perspective, Jews believe that they descended from Abraham and in this sense they were a race. He acknowledged, however, that the Jewish people are not a biological race, but have, whether religious or secular, a common culture, language, tradition and history: ts 485.

The defence case

36 The appellant gave evidence in his defence and was cross-examined. He was unambiguous in his views about Judaism, Jews and the nation of Israel.

37 He testified that some time after he had given up working as a nurse, in about 2005, he began reading online political forums. He said that he 'was reading all this Jewish issue stuff': ts 535. He agreed that he had done a great deal of research in this area and had accessed a very large amount of material via the internet: ts 646. He said that he became convinced of his views as a result of his reading: ts 535.

38 The appellant was severely critical of the State of Israel and of Judaism.

39 He said the events of 9/11 were 'run by Israel for the benefit of Israel'. He was particularly critical of the State of Israel for its treatment of Palestinians in the Gaza Strip: ts 537.

40 He said that Israel does not have 'the slightest respect for human life, decency or the rule of law': ts 551. Later, he said Israel 'has no right to exist whatever. None': ts 568.

41 He described Israel and Judaism as 'sick': ts 548. He said that he considered Jews or Judaism 'generally speaking, as more an organised crime outfit than even a religion ...': ts 557.

42 He asserted 'they [Jews] were running the Anglo establishment of America through Freemasonry of which this court is a part of': ts 646. He also said that 'they [Jews] literally run the planet': ts 569; and that 'Jews have a desire for world domination': ts 651.

43 He questioned the existence and use of gas chambers in the Holocaust: ts 586.

44 The appellant plainly sees himself and other like-minded people as engaged in a struggle against Jews, Judaism and Israel, a struggle in which he 'will never surrender': ts 659 - 660.

45 The appellant alleged that he and others were being watched and vilified and were the subject of harassment by Israel: ts 548, ts 591.

46 His attitudes are exemplified by the following exchange which took place in cross-examination:

EYERS, MR: And as a result of the Internet and – and other research resources, you formed an opinion that we've heard about. And would it be fair to characterise it in this way: you feel a tremendous animosity towards Jews?---Absolutely. Until – till otherwise they – Normal Finkelstein, Max Blumenthal, Paul Eisen - - -

Yes. Well, don't just - - -?--- - - - Israel Shahak. Not them, because they've come out and spoken out. I know who they are.

But would I be fair in characterising it – and of course it's your – it's your evidence now, and the – I'd like the jury to understand your position?---Sure.

As a result of this research using open-source information and other information, you've reached the position, and you reached the position as at sort of May onwards 2009, in which you felt a tremendous animosity - - -?---Perhaps hatred even. Absolute hatred after what they did to me, my friend in America. Ripped all her floor tiles off and stacked them on a roof, ran her out of Chicago. Unbelievable what they do to people.

Okay. Now - - -?---Unbelievable. You should read in there. ADL [Anti-Defamation League].

Give – given then that that – and you make no bones about it, an absolute hatred of Jews - - - ?---Absolute – no though – absolute – until otherwise: ts 647 - 648.

47 Relevantly to all counts, the appellant disputed the proposition that Jews could be considered a racial group, describing that proposition as 'garbage': ts 577.

48 With respect to count 1, the appellant denied what he said amounted to abusing or ridiculing Mr Keyser. His case was that what occurred was a vigorous street debate.

49 The appellant did not deny or resile from the statements he made to Mr Keyser during the confrontation. The appellant said, in cross-examination, that Mr Keyser was 'defending and supporting the ethnic cleansing of the Palestinian people'. He then continued, 'So I'm going to call him a racist homicidal maniac ... you bet I am and I'll say it a hundred times more': ts 607.

50 The appellant asserted that the conduct the subject of count 1 was engaged in reasonably and in good faith in the course of a statement, discussion or debate made or held in the public interest.

51 With respect to each of counts 2, 3, 5, 6 and 7, the appellant, in effect, stood by his statements. The appellant's case was that on each charge what he said or wrote was not intended to create, promote or increase animosity towards, or harassment of, Jewish people.

52 He rejected the expert evidence, calling Rabbi Freilich, amongst other things, 'a compulsive liar': ts 654.

53 The appellant did not dispute that his conduct was otherwise than in private.

The proposed grounds of appeal

54 In this appeal, the appellant has been represented by solicitors and counsel who have acted on a pro bono basis. The court is grateful for their assistance.

55 The proposed grounds of appeal against conviction set out in the appellant's case are as follows:

1. The trial should have been adjourned in line with s 78B Judiciary Act 1903

The learned trial Judge erred by refusing and failing to adjourn proceedings as per the requirements of s 78B Judiciary Act 1903.

1. The Appellant Was Not Afforded Procedural Fairness

The learned trial Judge erred in not assisting the appellant in accordance with the guidelines which created procedural unfairness throughout the trial.

1. Count 1 should have been severed from Counts 2 - 7

The learned trial Judge erred in not ordering that there be a separate trial of count 1 from counts 2 - 7 pursuant to each limb of cl 7(3) of schedule 1 of the Criminal Procedure Act 2004.

56 The proposed grounds of appeal against sentence were, as originally framed, not as concise. After a directions hearing where the question of leave to appeal was referred to the hearing of the appeal, the appellant's counsel accepted that the proposed grounds of appeal were to be taken as follows:

1. The learned sentencing judge erred in law by failing to accord the appellant procedural fairness in the sentencing proceedings.
2. The individual sentences were manifestly excessive in that his Honour should have imposed a suspended imprisonment order.
3. The total overall sentence of 3 years' imprisonment, infringed the first limb of the totality principle.

57 It was these grounds of appeal against sentence that were argued at the hearing on 13 December 2011.

58 After the hearing of the appeals was completed, an affidavit sworn by the appellant, dated 7 December 2012, arrived in the Court of Appeal office. Then the appellant sent directly to the court, without notice to his solicitors or counsel and the respondent, three lengthy letters. The first two were dated 30 December 2011 and 5 January 2012, respectively. The further undated letter which appears to have been typed on 23 January 2012, was delivered to the court.

59 These documents, most notably the letters, raised further arguments in support of the appellant's appeals and sought to rely upon material which was not before the court below. No application to reopen the appeals, adduce other evidence or add to the grounds of appeal was made.

60 The court wrote to the appellant's solicitor and counsel, giving the appellant until 21 February 2012 to file any application, failing which they were put on notice that the appeals would be decided only on the material that was before the court at the hearing on 13 December 2011. No application was filed. Therefore these applications for leave to appeal will be decided on the proposed grounds of appeal which were before the court on 13 December 2011 and on the material and evidence in the court below: s 39(1) *Criminal Appeals Act 2004* (WA).

61 Leave to appeal is required in respect of each of the grounds of appeal. Leave cannot be granted unless the ground has a reasonable prospect of succeeding. If no ground reaches this threshold, the appeal is taken to be dismissed: ss 27(2) and (3) *Criminal Appeals Act*.

The application for leave to appeal against conviction

62 Before analysing the proposed grounds, it is necessary to say something about how the appellant came to represent himself at trial and the course of the trial itself.

63 On 28 June 2010, Mr Bougher, an experienced criminal lawyer, first appeared for the appellant at a directions hearing before a District Court judge. Prior to that, two other counsel had, on occasions, appeared for the appellant, but he had largely acted on his own. On that occasion, Mr Bougher confirmed that he was representing the appellant and that he would be ready for a trial which, by then, had been set down to commence on 16 August 2010: ts 148. That trial was subsequently adjourned for reasons which are, for present purposes, irrelevant.

64 On 27 August 2010, the trial was relisted to commence on 17 January 2011. Mr Bougher sought a directions hearing to deal with certain legal issues. On 19 November 2010, a directions hearing took place before McCann DCJ. Mr Bougher submitted that the appellant had no case to answer in respect of all the charges, pursuant to s 98(2)(a) of the *Criminal Procedure Act 2004* (WA). His Honour rejected this submission: ts 209.

65 On 11 January 2011, Mr Bougher appeared before Martino CJDC and sought leave to cease acting for the appellant. Mr Bougher told his Honour that there was no acrimony between him and the appellant, but 'Mr O'Connell's just made a decision that he believes that he can best serve his own interests without legal representation': ts 220. Amongst the reasons given by Mr Bougher in support of his application were that the appellant had not given him instructions as to the witnesses he wished to call at trial, and the appellant's failure to meet Mr Bougher for appointments. The appellant said that he wished to act for himself because Mr Bougher 'could not possibly match my 10 years of research in this subject': ts 221.

66 Before his Honour were emails sent by the appellant to both Mr Bougher and the District Court. It was apparent from those emails that the appellant wished to adjourn the trial.

67 The appellant explained that he wanted an adjournment because he questioned whether the District Court was a court under Ch III of the *Australian Constitution* and because a pyramidal symbol at the front of the District Court building indicated that the District Court 'came under Corporate Jewish Masonic control'. He stated that he refused to be judged in such a court: ts 220.

68 Martino CJDC refused Mr Bougher's application to withdraw, in the hope the appellant would change his mind about acting for himself. His Honour also dismissed the application for the adjournment.

69 On 14 January 2011, the appellant filed in the District Court a document, dated 13 January 2011, entitled 'Applicant's notice of constitution matter under s 78B of the Judiciary Act 1903 (Cth)' (the s 78B notice). In that document, the appellant purported to give notice to the Attorneys-General of the States and Territories of matters 'arising under the Constitution of the Commonwealth of Australia or involving its interpretation'. I will refer later in these reasons to the matters said to arise under the Constitution or involve its interpretation. It is sufficient to say at this point that the matters raised in the notice were completely devoid of merit.

70 On 17 January 2011, prior to the empanelment of the jury, Mr Bougher again sought leave to withdraw. Mr Bougher confirmed that the appellant had instructed him that he wished to act on his own behalf. Mr Bougher advised his Honour that if the appellant wished to seek advice from him, before or after court, he was available for that purpose. Mr Bougher said that he had explained to the appellant in detail the procedure in a criminal trial and his rights in relation to jury challenge, cross-examination of prosecution witnesses and to give evidence himself. Mr Bougher said:

[I have] basically gone through the entire trial procedure with him and I think he understands all those things: ts 233.

71 After the appellant confirmed to the trial judge that he did not wish Mr Bougher to represent him, counsel was given leave to withdraw: ts 234. At no stage did the appellant voice any disagreement with anything Mr Bougher had said.

72 The appellant then referred to the s 78B notice and sought an adjournment of the trial to await any response from the Attorneys-General.

73 His Honour said that he did not propose to adjourn the trial because there was no legal merit in the submissions contained in the notice: ts 235.

74 The appellant did not accept his Honour's ruling. Instead, he accused his Honour of committing treason. His Honour ignored this and asked the appellant whether he understood his right of jury challenge. He replied, 'Your Honour, could we just get your neck size for the treason charges?': ts 236.

75 From then on and throughout the trial, the appellant treated his Honour and the trial process with complete disrespect.

76 There are many examples of the appellant's disrespectful and insulting behaviour towards his Honour and the court during trial. The flavour of his behaviour can be gauged from the following examples:

1. He said to his Honour, 'I wish to get your neck size so we can go straight to the gallows for treason': ts 280.

2. When referring to his Honour, the appellant often called him 'adjudicator'. On other occasions, the appellant referred to his Honour as 'Captain Pugwash': ts 682, 'De Fuhrer' and 'Comrade Stalin'.
3. He referred to the court as 'a kangaroo court': ts 261. To emphasise the point, he sang the theme song to the well-known children's television program 'Skippy': ts 662, and made references to Skippy, at other times during the trial.
4. He insulted his Honour, saying, at one point, 'Shut up, you old fool': ts 683; and at another point, 'Were you paid or do they have something on you?': ts 733.

77 Throughout the trial, the appellant refused to accept or acknowledge the authority of the court. At various times in the trial, when he was addressed by his Honour he made a speech in similar terms to the following:

Just to clarify the jury - for the jury, my name is Brendon Lee - Brendon Lee of the family O'Connell. I am a sovereign subject of Queen Elizabeth II, her heirs and successors. I'm a free man. This court does not sit under Ch 3 of the Australian Constitution - if you're that bored you can leave - sit under Ch 3 of the Australian Constitution, nor does it sit under 1903 Judiciary Act. This whole court is a farce. It's an insult to Skippy. But I'll continue on with this farce, this comedy. Absolute comedy. Here under duress: ts 321.

See also ts 384, ts 424, ts 515, ts 530, ts 636, ts 642, ts 666 and ts 707.

78 The appellant used his opening address to the jury to claim that his Honour, and the District Court generally, had no jurisdiction to try the case under the Constitution. When asked by his Honour if he would state his defence, the appellant replied:

I don't have to give you a defence, adjudicator, because you can't sit. You're in a kangaroo court: ts 264.

79 The appellant refused to question the first prosecution witness, Detective Senior Constable Paini. During the detective's evidence, when his Honour asked the appellant if he had been given a particular part of the prosecution brief, the appellant replied:

I'm sorry, adjudicator, I'm still waiting for the court to sit under common law under section - chapter III of the Australian Constitution and the Judiciary Act of 1903. When that happens - - -

WISBEY DCJ: The jury - - -

THE APPELLANT: When that happens, we can talk business. Till then, I'm just staring at the ceiling: ts 271.

80 Apart from Detective Senior Constable Paini, the appellant cross-examined, at some length, the witnesses called by the prosecution. The appellant was frequently argumentative with, and insulting to, witnesses. On occasions, he used cross-examination as an opportunity to make speeches and, from time to time, sought to embark upon irrelevant religious and political discourse.

81 The appellant disrupted the prosecutor's closing address to the jury and his Honour's summing up, to the point where he had to be removed from the courtroom and placed in a remote courtroom from where he could see and hear the proceedings: ts 684, ts 712.

82 It is no exaggeration to characterise the appellant's behaviour as seriously defiant, disrespectful and, on many occasions, contemptuous.

Ground 1: The s 78B notice

83 Sections 78B(1) and (2) of the *Judiciary Act 1903* (Cth) provide:

(1) Where a cause pending in a federal court including the High Court or in a court of a State or Territory involves a matter arising under the Constitution or involving its interpretation, it is the duty of the court not to proceed in the cause unless and until the court is satisfied that notice of the cause, specifying the nature of the matter has been given to the Attorneys-General of the Commonwealth and of the States, and a reasonable time has elapsed since the giving of the notice for consideration by the Attorneys-General, of the question of intervention in the proceedings or removal of the cause to the High Court.

(2) For the purposes of subsection (1), a court in which a cause referred to in that subsection is pending:

(a) may adjourn the proceedings in the cause for such time as it thinks necessary and may make such order as to costs in relation to such an adjournment as it thinks fit;

(b) may direct a party to give notice in accordance with that subsection; and

(c) may continue to hear evidence and argument concerning matters severable from any matter arising under the Constitution or involving its interpretation.

84 There is no point in setting out the full terms of the appellant's s 78B notice. It is confused, contradictory and largely incomprehensible. It does not clearly identify any relevant matter arising under the Constitution or involving its interpretion.

85 The appellant's written submissions, apart from making a bare assertion that the s 78B notice raised a constitutional issue, were silent as to the identity of that issue.

86 In his oral submissions, the appellant's counsel identified two issues.

87 The first is that the passage of the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) (which, in broad terms, changed references to the Crown or her Majesty in a large number of statutes, including the *District Court Act 1969* (WA), to the Governor or the State) 'purported to dissolve the indissoluble Federal Commonwealth under the Crown of the United Kingdom by removing the Sovereign': appeal ts 16.

88 The second issue is that the appellant asserts that, as the Department of the Attorney General has an Australian Business Number (ABN), the courts in this State have effectively become corporations. Thus, it is said the judiciary is no longer a separate and independent arm of government: appeal ts 18, 19.

89 The appellant's counsel submitted, in effect, that no matter what the trial judge's view was of the merit of the matters contained in the s 78B notice, he was obliged to adjourn the proceedings to give the Attorneys-General the opportunity to intervene, if they so wished.

90 The purpose of a s 78B notice is to give Attorneys-General an opportunity to intervene in proceedings and, if desired, to seek removal of the cause, or part of the cause, into the High Court: ***Nikolic v MGICA Ltd*** [1999] FCA 849 [7]. To invoke the application of s 78B, it is necessary to show that there is some matter arising under the Constitution or involving its interpretation. A matter which is trivial, unarguable, frivolous or vexatious is not a matter arising under the Constitution or involving its interpretation: ***State Bank of New South Wales v Commonwealth Savings Bank of Australia*** (1986) 66 ALR 129, 130; ***Nikolic v MJICA Ltd*** [8], [11]. As Wheeler JA put it in ***Shaw v Jim McGinty in his capacity as Attorney General*** [2006] WASCA 231 [42]:

If the alleged 'constitutional issue' is unarguable or vexatious, then there is in truth no constitutional issue at all;

91 The first issue identified by the appellant's counsel is totally devoid of merit. The identical argument has been decided in this court in a number of cases including ***Glew v The Shire of Greenough*** [2006] WASCA 260; and ***Glew Technologies Pty Ltd v Department of Planning and Infrastructure*** [2007] WASCA 289. An application to the High Court for special leave to appeal against the first of those decisions was refused: ***Glew v Shire of Greenough*** [2007] HCATrans 520 (6 September 2007).

92 As these cases make clear, the *Acts Amendment and Repeal (Courts and Legal Practice) Act* did no more than change the terminology used in many statutes and did not alter the relationship between the Crown and the various bodies contained within the Acts it amended. The Act does not have, and could not have, the constitutional effects asserted by the appellant. The submission is frivolous and vexatious.

93 The submission concerning the ABN can be similarly described. An ABN is required for any organisation or individual who carries on an enterprise with a GST turnover over a certain sum. Further, anyone who wishes to claim GST credits or fuel tax credits needs an ABN. An ABN holder may be an individual, a corporation, a partnership or government entity. A person or entity does not become a corporation simply because that person or entity has an ABN: ***Williamson v Hodgson*** [2010] WASC 95 [44] - [45].

94 Assuming that the Department of the Attorney General has an ABN, this does not:

(i) change the character of any court in this State;

(ii) affect the independence of the courts and the judiciary; or

(iii) offend the doctrine of the separation of powers.

95 Finally, for the sake of completeness, the appellant, on many occasions during the trial, asserted that the District Court was not a court constituted under Ch III of the Constitution. This argument is completely misconceived. The offences for which the appellant was tried are State offences, not Commonwealth offences. Chapter III of the Constitution was never engaged. The case fell to be determined solely by the laws of Western Australia.

96 None of the matters raised by the appellant in the s 78B notice are in truth matters arising under the Constitution or involving its interpretation. His Honour was entirely correct in refusing to adjourn the proceedings. Ground 1 is hopeless and has no reasonable prospect of succeeding.

Ground 2: Did his Honour fail to accord the appellant procedural fairness?

97 The appellant's written submissions assert that, as a self-represented litigant, the appellant was denied procedural fairness by his Honour. The submissions further assert that this procedural unfairness was exacerbated by the conduct of the prosecutor.

98 The written submissions state:

The learned trial judge erred in not assisting the appellant in accordance with the guidelines which created procedural unfairness throughout the trial: white AB 11.

99 The guidelines referred to in this submission are the guidelines set by the Family Court of Australia in ***Re F; Litigants in Person Guidelines*** [2001] FAMCA 348; (2001) 27 Fam LR 517.

100 The written submissions do not state how, assuming that these guidelines apply to a criminal trial, they were breached in this case. Nor do the written submissions say how the prosecutor 'exacerbated' any procedural unfairness caused by his Honour.

101 What emerged in the appellant's counsel's oral submission were a number of complaints about his Honour's conduct of the trial that allegedly gave rise to an unfair trial and a miscarriage of justice. Dr Walsh drew this court's attention to some remarks made by his Honour in the course of the trial and alleged that his Honour acted like a prosecutor rather than as an impartial judge. Dr Walsh did not go so far as to allege actual or ostensible bias on his Honour's part. He also submitted that his Honour should have advised the appellant to take an oath rather than an affirmation before he testified in his own defence. Counsel further submitted that the appellant was not given the opportunity to present his case. Counsel put this last point in this way:

The essence is that Mr O'Connell did not have the opportunity to present, as he would wish, the full evidence that would go to his state of mind: appeal ts 31.

102 In order to deal with these submissions, it is necessary to say something about the nature of a trial judge's obligation to ensure a fair trial and then to examine the specific instances which the appellant submits gives rise to the conclusion that his trial was unfair.

103 It is trite to say that a fundamental obligation of a trial judge is to ensure a fair trial according to law. The concept of a fair trial means fairness to the accused and to the prosecution. It is the duty of a trial judge to conduct the trial in accordance with due process, fairly and impartially: ***Michael v The State of Western Australia*** [2007] WASCA 100 [69] (Steytler P).

104 It is necessary that a trial judge control the proceedings. For example, a trial judge may intervene in order to prevent irrelevant matters being raised and pursued, and any unnecessary delays or disruptions. A trial judge should protect witnesses from being required

to answer irrelevant, embarrassing and scandalous questions and to prevent questions becoming speeches or statements to the jury: ***Michael v The State of Western Australia*** [65] and [68], s 26 *Evidence Act 1906* (WA). It is also the trial judge's duty to ensure that the court's processes are not abused. A trial should not be allowed to be used as a soapbox for some irrelevant social, religious or political cause.

105 Generally, if not almost always, an accused person who is unrepresented will be at a disadvantage when compared with someone who is represented by counsel. As Wickham J pointed out in ***Love v The Queen*** (1983) 9 A Crim R 1, 3:

... trial by jury is a sophisticated process involving the application of rules of procedure and of evidence highly honed over the centuries for the purpose of reducing to a minimum the chance of error. It also requires a grasp of legal logic and of law beyond the usual capacities of a lay [person].

The burden on a trial judge to ensure a fair trial is almost always heavier when an accused is unrepresented. The absence of representation can also cause difficulties for the prosecutor: ***Love v The Queen*** (3), (4). A difficult task is made even harder when, as in the present case, an unrepresented accused deliberately adopts a defiant and uncooperative stance.

106 A criminal trial is an adversarial process. It is not the role of the trial judge, when faced with an unrepresented accused, to play the part of his or her advocate and give the advice, guidance and representation which counsel would have provided: ***Dietrich v The Queen*** [1992] HCA 57; (1992) 177 CLR 292, 334 - 335 (Deane J). However, consistent with a trial judge's duty to ensure a fair trial, he or she is under an obligation to give an unrepresented accused such information and advice as is necessary to ensure that he or she has a fair trial: ***MacPherson v The Queen*** [1981] HCA 46; (1981) 147 CLR 512, 534 (Mason J). There is no limited category of matters of which a judge must advise an unrepresented accused: ***MacPherson v The Queen***, (524) (Gibbs CJ and Wilson J). The scope of the assistance to be given depends on the particular litigant and the nature of the case. The touchstones are fairness and balance: ***Tomasevic v Travaglini*** [2007] VSC 337; (2007) 17 VR 100 [14] (Bell J).

107 A prosecutor is bound to act fairly towards the accused, but cannot tell the accused how to conduct his or her defence: ***Dietrich v The Queen*** (354) (Toohey J).

108 The DPP's Statement of Prosecution Policy and Guidelines 2005 provides, at par 119:

Particular care must be exercised by a prosecutor in dealing with an accused person without legal representation. The basic requirement, while complying in all other respects with these guidelines, is to ensure that the accused person is properly informed of the prosecution case so as to be equipped to respond to it, while the prosecutor maintains an appropriate detachment from the accused's person's interest.

109 An unrepresented accused cannot deliberately take advantage of this position to conduct him or herself in a way that would not be acceptable from defence counsel. Being unrepresented is not a free pass to misbehave, flout the legal or procedural rules, ignore the law of evidence or to treat the trial judge and witnesses with disrespect or contempt. Where an unrepresented accused acts or attempts to act in any of these ways, a trial judge must fairly and, if necessary, firmly deal with such behaviour. The extent to which a trial is regarded as

fair will be examined in the light of the accused's own conduct: Hon Justice Dean Mildren, 'Don't give me any LIP' (1999) 19 Aust Bar Rev 30.

110 The guidelines set by the Family Court in ***Re F; Litigants in Person Guidelines*** were intended to apply to in litigants in person appearing in trials before the Family Court. They were never intended to be guidelines for criminal trials and should not be applied by analogy to criminal trials. In the context of a criminal trial, it is appropriate to have regard to what was said by the High Court in ***MacPherson v The Queen*** and ***Dietrich v The Queen***.

111 The appellant's counsel identified four occasions in the trial where it was said that the trial judge took on the role of a prosecutor.

112 The first impugned passage came during the appellant's cross-examination of Mr Keyser at ts 397 and ts 398:

ACCUSED: Mr Keyser, I put to you you just deliberately set me up to get me charged under racial vilification?--- Okay. If that's what you think.

Thanks. I know.

WISBEY DCJ: Well, just respond “yes” or “no”?---No, it was definitely not. I just got abused and I just felt very threatened when someone told me my religion was racist, so I thought it was the right thing to get your name so, yes, when I go home I can go to the police.

ACCUSED: Yeah. And I gave you my name straight up, didn't I? Stand by everything I say?---If I was on a soccer field and someone told me to go back – go back to the gas chambers - - -

WISBEY DCJ: No, don't worry about - - -

THE WITNESS: - - - I would go to the police.

ACCUSED: Please?---It's the exact same thing.

Please, Mr Keyser. *You defame the dead with that throwaway line.*

WISBEY DCJ: But - - -

ACCUSED: Legitimate suffering of Jews - - -

WISBEY DCJ: - - - comments like that are *not only inappropriate, they're pathetic, Mr O'Connell*. Please - - -

ACCUSED: Pathetic? I say throwing - - -

WISBEY DCJ: Please – please - - -

ACCUSED: - - - a “gas chamber” line - - -

WISBEY DCJ: Please – please - - -

ACCUSED: - - - out to the audience is pathetic.

WISBEY DCJ: Please desist from them.

ACCUSED: That was low. Legitimate suffering of Jews. A toss-away line. (emphasis added)

113 The second part of the trial record that the appellant's counsel drew to the court's attention was during the appellant's cross-examination of Rabbi Freilich at ts 495:

ACCUSED: Could you give me a clarifying quote, if it's - if I can ask this - would you consider Judaism, as you practise, a religion of peace and tolerance to all people including non-Jews?---Could I ask you what the relevance of this is to the expert evidence?

WISBEY DCJ: What - - -

ACCUSED: Can I ask you would - is my statement that Judaism is a religion of peace and tolerance to all people including non-Jews? Would that be an accurate statement?

WISBEY DCJ: I think what - what the witness is saying and perhaps he - I should say, beforehand - - -

ACCUSED: Excuse me, but shouldn't the - *shouldn't counsel be providing the - providing the objection, not yourself? You're an adjudicator of the law, you shouldn't be providing objections?* Surely the counsel - - -

WISBEY DCJ: Well, that's very kind of you to tell me that but the position is that it is not relevant.

ACCUSED: Excuse me - - - (emphasis added)

114 The next part of the trial record that the appellant's counsel drew to our attention was during the appellant's cross-examination of Rabbi Freilich at ts 507.

ACCUSED: And seeing as no one could possibly ever know their true origin so far back or even back several hundred years is extremely difficult. But what I'm stating is you would have to take, as a matter of faith, as a matter - even if you were descended from a Jewish mother, you can't go that far back, you would have to take, as a matter of faith, that you were a descendant of Abraham, Isaac and so on and so forth. Is that not so?---Certainly spiritually, but I - I - I will - I will say this to you. That 4,000 or 4,500 years ago is not so far back. We - we have ancient history regarding the Egyptians. Now - now, we accept Egyptian culture and history as it's handed down and that is only - you know, we're talking about a few thousand years ago now. Judaism as 4,500 years ago, that is not so far back to actually to determine and - and to - to - to actually feel that some - some authenticity on - on what has - what has been handed down during that time.

Are you saying there's - - -?---It isn't that far back.

- - - a stone tablet somewhere in ancient Judea or Samaria with your ancestor's name on it?

WISBEY DCJ: No, he's not saying that and it's - - -

ACCUSED: Well, what relevance does that have to your descent?

WISBEY DCJ: - - - *pathetic to put the proposition to him*. (emphasis added)

115 The fourth instance that the appellant's counsel drew to the court's attention was also during the appellant's cross-examination of Rabbi Freilich at ts 510:

ACCUSED: I'll clarify that on Monday, thanks. Moving right along, if I was to say, "I am a proud white European, and I would like to marry within my race," would that be something that would be well received in Perth, do you think?

WISBEY DCJ: Well, whether it would or whether it wouldn't is not relevant to the matter that the jury have to determine.

ACCUSED: *Rabbi, in your opinion do only Jews have the right to marry amongst their own to preserve their culture, their race and their heritage, or can others also be proud of their race, their culture and their heritage and wish to marry amongst their own?*

WISBEY DCJ: *And don't bother to answer that, thank you, rabbi.* (emphasis added)

116 In each of the four examples relied upon by the appellant's counsel, his Honour's intervention was justified.

117 In the appellant's cross-examination of Mr Keyser, the comment, 'You defame the dead ...', made by the appellant in response to Mr Keyser's answer was inappropriate. The position is the same with the appellant's question of Rabbi Freilich, at ts 507, 'Are you saying there's a stone tablet somewhere in ancient Judea or Samaria with your ancestor's name on it?' His Honour did not 'object' as counsel would have it at ts 495. He intervened to prevent the introduction of irrelevant evidence. The question put by the appellant to Rabbi Freilich, at ts 510, raised matters which were entirely irrelevant.

118 His Honour's characterisation of the appellant's comments at ts 397 and the question at ts 507 as 'pathetic', although strongly worded, did not indicate that his Honour had taken on a role as prosecutor.

119 There is no merit to the submission made on behalf of the appellant that his Honour should have advised the appellant 'that it's far better to take an oath than an affirmation, particularly if you're proceeding from a religious perspective': appeal ts 25.

120 There is no factual basis upon which it may be concluded that a jury will look more favourably upon evidence given on oath than on affirmation. The appellant chose to affirm. That was his choice. It could not conceivably give rise to any miscarriage of justice.

121 His Honour correctly told the appellant that if he chose to testify he was required to make an oath or an affirmation: s 97 of the *Evidence Act 1906* (WA), read with ss 4 and 5 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA): ts 524. It was not his Honour's duty to advise the appellant whether to take an oath or affirmation.

122 The submission that the appellant did not have the opportunity to present, as he would wish, the full evidence that would go to his state of mind is without merit.

123 The last prosecution witness was Rabbi Freilich. Towards the end of his cross-examination, the appellant said:

On Monday I'll be presenting a vast amount of material on orthodox Judaism, on the ultra orthodox sects of the Kahunas, Chabad-Lubavitch, various kinds. I'll be producing perhaps hundreds of statements made by rabbis within the [Israeli Defence Force] within Israel itself. This will be presented to the jury on Monday: ts 495.

124 This was the first clear indication from the appellant that he intended to give evidence in his defence. It was also the first indication of the material he would seek to adduce in his defence.

125 After the State closed its case, but before the appellant gave evidence, there was a discussion, in the absence of the jury, between his Honour, the appellant and the prosecutor on a number of matters. These included whether or not the appellant should give evidence and, if he gave evidence would he have to take an oath and, if so, what was the form of the oath, and what evidence could he adduce: ts 515 - 526.

126 In the course of this discussion, his Honour explained to the appellant that he could give or adduce evidence in his defence. He told the appellant that if he gave evidence he would be subject to cross-examination.

127 The appellant said that he was not familiar with the rules of evidence, but that he had 'made a package up for the jury': ts 515.

128 The appellant told his Honour that he wished to present material to the jury 'to back up my sincere beliefs'. He asserted that the material was relevant to whether what he said to Mr Keyser was in the public interest and whether he intended to create, promote or increase animosity towards, or harassment of, Jewish people.

129 The prosecutor said that he would object to the appellant reading passages from material written by persons who were not being called as witnesses. He asserted that such material would be hearsay.

130 His Honour said:

Well, you can say as a result of your readings, you believe the following to be the position. But you can't say what various authors - what views various authors have expressed without calling those people. The same way that Mr Eyers could not - was required to produce the professor and the rabbi to give their views so that they were subject to cross-examination: ts 522.

131 The appellant gave lengthy evidence-in-chief, covering some 65 pages of transcript. He was hardly interrupted, either by his Honour or by prosecuting counsel. Despite the indications given by his Honour to the contrary, the appellant gave evidence of the opinions of apparently like-minded others. He referred to articles and books which, he asserted,

supported his views about Judaism, Jews and the nation of Israel. On occasions he quoted, from memory or paraphrased, statements from those sources.

132 He explained, in considerable detail, exhibit 1.

133 At various places in his evidence-in-chief, the appellant indicated to the jury that he had wanted to show them some material, but he was not permitted to do so. For example, he told the jury that he wanted to show them television reports of an operation apparently conducted by Israel called Operation Cast Lead which depicted 'the piles of children being just thrown in piles, two bullets in the chest close by, boom, boom, up close': ts 536.

134 At another point in his evidence, the appellant said to the jury that he wanted to show material which supported his assertion that some ultra orthodox Jews were 'positively mentally diagnosable': ts 540.

135 Having read the appellant's testimony, it is impossible to avoid the conclusion that the appellant said all that he could say in his defence. He was given very considerable latitude to do so.

136 The appellant's counsel did not, in his written and oral submissions, point to any particular document which the appellant was prevented from referring to or from adducing by his Honour. Counsel instead made broad assertions that the appellant 'wanted to put forward writings from learned academics, statements from members of Congress of the United States, what members of the United Nations have said': appeal ts 30; without identifying, with precision, those writings and statements. The appellant did not take up the opportunity given to him by the court after the hearing of the appeal to make any application that he saw fit to adduce further evidence. It is impossible, in these circumstances, to conclude that there is any sound basis for the assertion that the appellant was prevented from adducing evidence that was relevant to his defence.

137 There is nothing to the submission that the conduct of the prosecutor somehow gave rise to or contributed to a miscarriage of justice. The transcript reveals a number of instances where the prosecutor acted to assist the appellant to fairly present his case.

138 For these reasons, there is no merit in ground 2.

Ground 3: Should a separate trial have been ordered with respect to count 1?

139 In its form, this proposed ground of appeal cannot succeed. No application was made to the trial judge (or beforehand) for a separate trial in respect of any of the counts in the indictment. Accordingly, his Honour made no error of law as alleged. If the issue of separate trials has any merit, it can only be on the basis that there was a miscarriage of justice: s 30(3)(c) of the *Criminal Appeals Act*.

140 Clause 7 of the first schedule of the *Criminal Procedure Act* concerns, amongst other things, when multiple charges can be brought against an accused in the one indictment. Clause 7(3) provides that an indictment may charge an accused with two or more offences if the offences:

(a) form or are a part of a series of offences of the same or a similar character;

(b) are alleged to arise substantially out of the same or closely related acts or omissions; or

(c) are alleged to arise from a series of acts or omissions done or omitted to be done in the prosecution of a single purpose.

141 Section 133(3) of the *Criminal Procedure Act* states:

If a court is satisfied that an accused is likely to be prejudiced in the trial of a prosecution notice or indictment because it contains 2 or more charges, the court may order -

(a) that the accused be tried separately on one or more of the charges; and

(b) the prosecutor to tell the court the order in which the charges will be tried.

142 The appellant submitted that count 1 should have been severed from the rest of the counts in the indictment. It was said that count 1 was not related to the other counts and was not related in type or method of offending. The appellant's counsel also asserted that another reason for severance was that there were too many counts in the indictment which gave rise to unfair prejudice to the appellant because 'a lay jury facing seven charges could quite naturally [reason] that [the appellant] must have done something': appeal ts 37.

143 These submissions have no merit. The offences were properly joined pursuant to cl 7(3). They are all patently a series of cases that are of the same or similar character involving an allegation of harassment of a racial group or a person who is a member of a racial group. Moreover, counts 1, 2 and 3 arise substantially out of the same or closely related acts. They have in common the confrontation at the IGA store in South Perth.

144 The number of charges in this indictment, when compared to other indictments seen in this and other courts, is relatively modest. There is no reasonable prospect that a jury would have reasoned in the way alleged by the appellant's counsel.

145 The written submissions in support of this proposed ground also assert that the evidence relevant to count 1 was inadmissible propensity evidence in respect of the other counts in the indictment and did not comply with the requirements of s 31A of the *Evidence Act*.

146 This submission is curious. The State case at trial was not run on the basis that the evidence in support of count 1 was admissible in respect of the other counts in the indictment. His Honour gave orthodox and unchallenged directions to the jury, instructing them that each count must be decided separately on the evidence that related to that count: ts 721.

147 In any event, the evidence relevant to count 1 was admissible in respect of the other counts in the indictment.

148 Section 31A of the *Evidence Act* provides:

(1) In this section -

propensity evidence means -

(a) similar fact evidence or other evidence of the conduct of the accused person; or

(b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

relationship evidence means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers -

(a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and

(b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

(3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

149 Recently, in ***Preston v The State of Western Australia*** [2012] WASCA 64, I noted that the history and proper interpretation of s 31A has been dealt with in this court in a substantial number of cases. The cases are set out at [33] of my reasons in ***Preston*** and do not require repetition here.

150 Evidence will be admissible under s 31A if:

(a) it comes within either or both of the definitions of propensity evidence and relationship evidence;

(b) it is considered that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value. In assessing whether the evidence in question has significant probative value, the court is not permitted to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion; and

(c) the probative value of the evidence compared to the degree of risk of an unfair trial is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

151 The appellant's behaviour at the IGA store was propensity evidence, being 'evidence of the conduct of the accused person'. It was also relationship evidence because it showed the appellant's antipathy towards a class of persons, namely, Jews.

152 It is accepted by the appellant that the evidence had probative value, but it was contended that it did not have significant probative value. In its statutory context, 'significant' means 'important' or 'of consequence': ***Dair v The State of Western Australia*** [2008] WASCA 72; (2008) 36 WAR 413 [61]. Contrary to the appellant's submission, the evidence had significant probative value. It showed in graphic terms just how entrenched and strong the appellant's views were and his preparedness to act on his views. These were matters which

were relevant to the question of the appellant's intention when he recorded the video footage seen in exhibit 1, and the blogs which were the subject of the other counts.

153 Finally, in my opinion, fair-minded people would think that the interests of justice require the admission of the evidence despite its risks. I have already explained why the evidence had significant probative value. Any risk of an unfair trial would have been neutralised by his Honour's concise and pointed direction to the jury to be objective and analytical, and not to base any verdict on prejudice or sympathy: ts 730.

154 For these reasons, there was no miscarriage of justice caused by the joinder of the counts in the indictment. Ground 3 has no merit.

Conclusion with respect to the appeal against conviction

155 In my opinion, none of the proposed grounds of appeal have reasonable prospects of succeeding. Leave to appeal in relation to each proposed ground is refused. Accordingly, the appeal against conviction must be dismissed.

The appeal against sentence

156 The jury delivered its verdicts on the afternoon of 28 January 2011. The prosecutor informed his Honour of the maximum penalties for the offences. The prosecutor noted that the offences created by s 77 and s 80B of the *Criminal Code* (WA) were relatively recent enactments and that no sentence appeal had been decided by this court concerning those sections which may have been of assistance to the court.

157 His Honour then asked the appellant if he wished to make any submissions. In answer, the appellant said:

Yes, I choose to stand. One day Benjamin Netanyahu and the Jewish warmongers from Chicago, Miami and New York, they will stand in the dock and they will (indistinct) - - -: ts 740.

158 His Honour interrupted the appellant, saying:

Listen, do you want to - do you wish to say anything in respect of sentence?

159 To which the appellant replied:

Yes. Free Palestine and Iraq and bring to justice the murderers of millions. Indeed.

160 His Honour then said to the appellant:

I take it that you don't wish to say anything.

161 The appellant's response was to say:

And [I] hope your career goes well, Detective Paini, because it ain't going nowhere: ts 741.

162 His Honour decided to remand the appellant for sentence to the following Monday, 31 January 2011. He remanded the appellant in custody, saying that:

A disposition that I will have to seriously consider is one of immediate imprisonment: ts 745.

He did not call for pre-sentence, psychological or psychiatric reports. His Honour had heard the appellant's evidence to the jury about his background and had a copy of his criminal record. The only matter of any significance was a conviction in 2003 for cultivation of cannabis with intent to sell or supply to another, for which he was given a suspended imprisonment order.

163 On 31 January 2011, immediately after the appellant was put up and identified, his Honour proceeded to make relatively brief sentencing remarks, at the conclusion of which he sentenced the appellant to 1 year immediate imprisonment on count 1 and 2 years' imprisonment on counts 2, 3, 5, 6 and 7. His Honour ordered that the terms imposed on counts 2, 3, 5, 6 and 7 be concurrent with each other, but cumulative on the term imposed on count 1. Thus, the total effective sentence imposed upon the appellant was 3 years' immediate imprisonment. The appellant was made eligible for parole and the sentences were backdated to commence on 24 January 2011: ts 746 - 747.

His Honour's sentencing remarks

164 None of his Honour's findings on sentence are challenged.

165 His Honour found, with respect to the material that was published on the internet, that the appellant intended to encourage the wider community, both in Australia and internationally, to share his 'unbridled hatred of Judaism'. His Honour further found that the appellant regarded it as his 'right and obligation to engender ill will towards Jews': ts 745.

166 His Honour observed that the appellant's behaviour during the course of the trial 'was that of a bully, contemptuous of anyone or anything who, or that, stands in the way of that which you seek to achieve': ts 745.

167 His Honour said that although some aspects of the appellant's behaviour in court constituted contempt, that was not an aggravating factor, but it was eloquent of the appellant's complete lack of remorse and his intention to maintain his aberrant position.

168 His Honour noted the statutory maximum penalties for the offences which he said marked the seriousness of the type of conduct proscribed by those sections.

169 With respect to the appellant's personal circumstances, his Honour noted that the only material available to him on that topic was revealed during the trial. His Honour observed that the appellant was 40 years of age, well-educated and apparently held nursing qualifications. His Honour was satisfied that the appellant was an intelligent man with an irrational hatred of Jewish people.

170 His Honour expressly acknowledged that he could not impose a term of immediate imprisonment unless the seriousness of the offending demanded it. He said that he had 'no doubt' that terms of immediate imprisonment were 'the necessary sentencing disposition' in order to provide personal and general deterrence. His Honour described the behaviour

engaged in by the appellant as 'not only highly offensive to that section of the community to which it is directed, but has the potential to be catalytic of civil unrest. It must be demonstrated clearly that it will not be tolerated': ts 746

Ground 1: Were the sentencing proceedings procedurally unfair to the appellant?

171 I have, in the context of deciding ground 2 of the appellant's appeal against conviction, referred to the trial judge's obligation to ensure a fair trial where an accused is not represented by legal counsel. Analogous considerations apply to sentencing proceedings. A sentencing judge is under an obligation to provide an unrepresented offender with such information and advice as is necessary to ensure that he or she is sentenced fairly. The matters about which a judge must advise an offender should not be confined because of the infinitely varying circumstances that may arise. But it may be accepted that procedural fairness in sentencing proceedings requires at least that an offender be given an opportunity to be heard, to advance arguments as to relevant factors in mitigation, as well as to answer any aggravating factors alleged by the prosecution. However, once a sentencing judge has done what he or she is required to do, there can be no procedural unfairness to the offender if he or she refuses to cooperate in the process.

172 Here, the trial judge asked the appellant three times, in effect, whether he wished to say anything. It would have been abundantly clear to the appellant, an intelligent man who had just been convicted of six offences, that he was being asked whether he wished to make submissions on sentence. His Honour's second question, in which he asked the appellant whether he wished to say anything in respect of sentence, made this explicit.

173 There can be no doubt that the appellant knew that if he was convicted he was in jeopardy of immediate imprisonment. At various stages in the trial he mentioned that he thought that he would be imprisoned for 4 years if he was convicted: ts 369, 394, 401, 577, 610 and 613.

174 In light of these factors he must have known the jeopardy he was in once convicted and that he was being given the opportunity to address the court with a view to persuading his Honour to impose the most lenient sentence possible.

175 It was argued on behalf of the appellant that his Honour should have advised him about the importance of a plea in mitigation and that the appellant should have been given more time to prepare a plea and put before the court materials such as character references or to brief counsel. These arguments must be rejected.

176 The appellant declined the offers to address the court on sentence made to him by the trial judge. He chose instead to use the opportunities given to him to make irrelevant statements consistent with some of the beliefs that he professed during the trial, and to make offensive remarks to one of the investigating officers.

177 It is clear that the appellant did not ever intend to make a bona fide plea in mitigation and that he intended to use the sentencing proceedings to voice his aberrant views. Further explanation by his Honour, given the defiant and intransigent attitude he had adopted throughout the proceedings, would not have realistically brought about a change of heart. His Honour had an obligation not to allow the court's processes to be abused by the appellant.

178 The appellant had voluntarily dispensed with the services of competent and experienced counsel. It is not reasonably likely that he would have taken up any opportunity given to him to brief counsel. Certainly he did not seek to do so.

179 The appellant's counsel submitted that his Honour should have ordered pre-sentence, psychological and psychiatric reports.

180 The power to order such reports is found in s 20(1) when read with s 21(3) of the *Sentencing Act*. A sentencer may order a report if he or she considers they would be assisted in the sentencing by such a report.

181 The power to order a report is discretionary. The person in the best position to decide whether they would be assisted by a report will usually be the sentencing judge. A failure to order a report cannot, of itself, be a ground of appeal, but it might reinforce a contention that a judge's sentencing discretion miscarried because he or she was not sufficiently advised of the facts: ***Thompson v The Queen*** (1992) 8 WAR 387, 397. In this case, it has not been said that his Honour was not sufficiently advised of the facts.

182 For these reasons, the ground of appeal has not been made out. Although I would grant leave to appeal, the ground must be dismissed.

Ground 2: Were the individual sentences manifestly excessive?

183 An appellate court will not interfere with a sentence simply because the members of the court might have imposed a different sentence had they been sentencing the offender at the original hearing. This court is only entitled to intervene if the appellant demonstrates that the sentencing judge erred in the exercise of his or her sentencing discretion. This may occur if the judge acted on a wrong principle, for example, by mistaking the law, mistaking the facts, taking into account an irrelevant matter or failing to take into account a relevant consideration. The court may intervene where, although it is not possible to discover the exact nature of the error, the end result is so unreasonable or unjust that the court must conclude that a substantial wrong has occurred: ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499 and ***Wilson v The State of Western Australia*** [2010] WASCA 82 [2]. Even if error is demonstrated, this court can intervene only if it is satisfied that a different sentence should have been imposed: s 31(4)(a) of the *Criminal Appeals Act*.

184 Ground 2 is an allegation of implied error, thus the appellant must demonstrate that the challenged individual sentences were manifestly unreasonable or unjust.

185 To determine whether or not a sentence is manifestly excessive, it is necessary to view it in light of:

(a) the maximum sentence prescribed by law;

(b) the standards of sentencing customarily observed with respect to the offence;

(c) the place which the criminal conduct occupies on a scale of seriousness of offences of that type; and

(d) the personal circumstances of the offender.

186 The maximum penalty for the offence the subject of count 1 is 3 years' imprisonment. The maximum penalty for each of the other offences is 14 years' imprisonment.

187 As the appellant is the first known person to be convicted of an offence pursuant to s 77 and s 80B of the *Criminal Code*, there are no appellate decisions which would suggest a range of sentences customarily observed. In cases such as ***Van Tongeren & Van Blitterswyk v The Queen*** (Unreported, WASC, Library No 920221, 16 April 1992); and ***Billing v The State of Western Australia*** (No 2) [2008] WASCA 11, the appellants were not charged with offences like the ones committed by the appellant. Rather, each appellant committed other offences involved in the bombing of Chinese restaurants, or a conspiracy to bomb Chinese restaurants, which were racially motivated. These cases are plainly different in nature to the present case and are of no assistance, despite their racial overtones.

188 In its written submissions, the respondent referred to legislation in other jurisdictions within Australia which deal with racial or religious discrimination and vilification. The respondent referred to the *Racial Discrimination Act 1975* (Cth), the *Anti-Discrimination Act 1977* (NSW), the *Anti-Discrimination Act 1991* (Qld), the *Racial Vilification Act 1996* (SA), the *Anti-Discrimination Act 1998* (Tas), the *Racial and Religious Tolerance Act 2001* (Vic), the *Discrimination Act 1991* (ACT) and the *Anti-Discrimination 1992* (NT). Not all jurisdictions have criminalised breaches of the relevant legislation. Of those that have (NSW, Qld, SA and Victoria), none of them have maximum penalties which remotely compare in severity to s 77 of the Code.

189 The respondent did not refer to any sentencing decisions from those jurisdictions which have criminal sanctions. In any event, any such decisions would afford little assistance in light of the different maximum penalties.

190 The respondent referred in its written submissions to the decision of the Federal Court in ***Toben v Jones*** [2003] FCAFC 137; (2003) 129 FCR 515 and to two English cases, being ***R v Abu Hamza*** [2006] EWCA Crim 2918; [2007] 3 All ER 451 and ***R v Sheppard*** [2010] EWCA Crim 65; [2010] 2 All ER 850. There is no need to analyse these cases. It is sufficient to say that none of them are relevant to the issues of whether the sentences are manifestly excessive.

191 Section 77 and s 80B appear in ch 11 of the *Criminal Code*. Chapter 11 is a relatively recent inclusion in the Code. The impetus for its introduction was the publication of a report by the Law Reform Commission of Western Australia entitled Incitement to Racial Hatred (Project No. 86). That report was prompted by the activities of the Australian Nationalists Movement of which Van Tongeren, Van Blitterswyk and Billing were members.

192 In 2004, amendments were made to ch 11. The amendments included the introduction of s 77 and s 80B. These sections came into effect on 8 December 2004. The object of the 2004 amendments was described by the then Premier, the Hon Dr G I Gallop in his second reading speech, as follows:

Racial vilification is an insidious crime. It is a most serious offence that can and does cause great harm and damage - physical, psychological and emotional - to members of our diverse community and consequently, to our society as a whole. It is intended to incite, or has the effect of inciting, hatred and similar emotions by one group against another - usually the

dominant against one or more minorities - and affects community relations generally. It causes or is intended to cause fear in those who are targets.

193 Dr Gallop continued:

The desire to allow people the right to express themselves freely must be balanced with the recognition that racism can destroy people's sense of safety and wellbeing and their ability to participate in community life. This can marginalise them from the community, thereby damaging the quality of our democratic society and our ability to live together peacefully, respecting our differences. Every person has the right to a dignified and peaceful existence, free from racial vilification and harassment: Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 5158c - 5160a (Dr G I Gallop, Premier)

194 Parliament substantially increased the maximum penalties for offences under ch 11. The maximum penalty for an offence under s 77 is, as I have already observed, 14 years' imprisonment. This reflects the seriousness with which Parliament regards the offence.

195 In light of the insidious nature of the offence and the potential to undermine community safety and wellbeing, personal and general deterrence must be the primary sentencing objective. To accommodate this, matters personal to the offender, while not to be ignored, must be accorded less weight.

196 In relation to count 1, the jury rejected the appellant's claim that he was engaging in a vigorous street debate on political matters.

197 The video recording of what occurred amply illustrated that the appellant went well beyond any legitimate political discourse about Israel and its relationship with Palestinians in the Gaza Strip. Rather, the appellant deliberately and persistently used highly offensive racial language and substantially abused and ridiculed Mr Keyser personally, simply because he was Jewish. Mr Keyser was visibly offended and upset by what the appellant said.

198 Mr Keyser's humiliation was not over when the confrontation concluded. Having recorded the incident, the appellant uploaded it into the internet for others to view into the future. Thus, Mr Keyser's humiliation potentially continues.

199 With respect to counts 2, 3, 5, 6 and 7, the jury found that the appellant's intention was to create, promote or increase hatred of, or serious contempt towards, Jews.

200 In respect of counts 2 and 3, the statements made by the appellant at the Belltower contained thinly-veiled threats of harm to Jews by use of the words, 'We've had enough of you ... those bells toll for you. Your days are numbered.' The references to putting those Jews who do not change their ways 'in camps' and his reference to 'Holocaustianity' are deeply insulting and offensive. The captions he used, such as 'Time to get out there', and 'Time to get angry', in context may well be interpreted as a call to violence towards Jewish people.

201 The offences relating to the blogs, counts 5, 6 and 7, are all aggravated by being committed on bail. They show the appellant's deep hatred towards Judaism, Jews and the nation of Israel and are intended to imbue others, again via the internet, with that hatred. This hatred has the potential to provoke violence and promote disharmony towards Jewish people and their property in this State and elsewhere.

202 The videos and blogs were carefully and, in many ways, skilfully produced. The appellant sought to exploit the virtually uncontrolled environment of the internet to convey and promote to others his seriously aberrant views.

203 At no time has the appellant shown any regard or sensitivity to the rights of Jewish people to live a dignified and peaceful existence free from racial vilification and harassment.

204 The appellant is completely without remorse. His testimony at trial shows that he is proud of what he has done and regards it as his duty to speak and act out in the manner that he has. There is no indication that the appellant has any insight into his views and behaviour. His recalcitrant stance indicates that he poses a risk of further such offending in the future.

205 Each offence was a serious instance of its kind. Any sentence needed to send a clear message of denunciation and serve as a strong personal and general deterrent.

206 The appellant's personal circumstances, while relatively good, could only carry limited mitigatory weight.

207 The sentence on count 1 is one-third of the statutory maximum applicable to that offence. The sentences on each of counts 2, 3, 5, 6 and 7 were one-seventh of the statutory maximum. Ultimately, the appellant must demonstrate that each sentence was not a proper exercise of his Honour's sentencing discretion because it was unjust or unreasonable. In light of all of the circumstances of the case, I am unable to conclude that the individual sentences were unjust or unreasonable.

208 Although I would grant leave to appeal in respect of ground 2, I would dismiss the ground.

Ground 3: Did the total effective sentence offend the first limb of the totality principle?

209 A complaint that the first limb of the totality principle has been infringed is a complaint of inferred error. The terms of the totality principle are well known. In this jurisdiction, an accepted statement of the principle was made by McLure P in ***Roffey v The State of Western Australia*** [2007] WASCA 246 [24] - [26]:

The appellant relies on the totality principle which comprises two limbs. The first limb is that the total effective sentence must bear a proper relationship to the overall criminality involved in all the offences, viewed in their entirety and having regard to the circumstances of the case, including those referable to the offender personally: ***Woods v The Queen*** (1994) 14 WAR 341.

The second limb is that the court should not impose a 'crushing' sentence. The word crushing in this context connotes the destruction of any reasonable expectation of a useful life after release: ***Martino v The State of Western Australia*** [2006] WASCA 78 [16]. An aggregate sentence may be inappropriately long under the first limb even if it cannot be described as crushing: ***Jarvis v The Queen*** (1998) 20 WAR 201, 216 (Anderson J).

The practical effect of the totality principle is ordinarily to arrive at an aggregate sentence that is less than that which would be arrived at by simply adding up all the terms appropriate for the individual offences: ***R v Holder*** [1983] 3 NSWLR 245, 260 (Street CJ). A rationale

for the totality principle is that there is assumed rehabilitation and reduced demand for retribution after the initial sentences have been served. Where the principle of totality comes into effect, it is of little importance how the ultimate aggregate is made up: ***R v Holder*** (260).

210 There is no need to repeat what I have already said about the seriousness of the individual counts on the indictment. It is sufficient for me to observe that when one views those offences in their entirety, it is clear that the appellant's overall criminality was high. The appellant's personal circumstances provide only limited mitigation. In my opinion, there needed to be some cumulation of the sentences imposed by his Honour to reflect the fact that counts 5, 6 and 7 were committed separately in time and in their method to counts 1, 2 and 3.

211 The appellant's counsel submitted that, in effect, the time served by the appellant up to the hearing of the appeal, approximately 11 months, was enough.

212 I accept that the total effective sentence imposed upon the appellant of 3 years was high. However, I do not think it was so high as to be unjust or unreasonable. Having regard to all of the circumstances of the case, including those referable to the appellant personally, the total effective sentence bore a proper relationship to his overall criminality.

213 While I would grant leave to appeal, I would dismiss ground 3.

Conclusion on the appeal against sentence

214 Although I would give leave to appeal in respect of each proposed ground, none of those grounds have been made out. The appeal must be dismissed.

Orders on the appeal

215 With respect to the appeal against conviction, CACR 27 of 2011:

1. Leave to appeal is refused on each ground.
2. The appeal is dismissed.

216 With respect to the appeal against sentence, CACR 28 of 2011:

1. Leave to appeal is granted on each ground.
2. The appeal is dismissed.
