Submission
No 41

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: NSW Society of Labor Lawyers

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Submission to the Inquiry Into Racial Vilification Law in New South Wales

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Edited by Hannah Quadrio.

Submission to the New South Wales Parliament's Legislative Council Standing Committee on Law and Justice for the *Inquiry into Racial Vilification Law in New South Wales*.

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The New South Wales Society of Labor Lawyers aims, through scholarship and advocacy, to effect positive and equitable change in the substantive and procedural law, the administration of justice, the legal profession, the provision of legal services and legal aid, and legal education.

This submission was approved by the New South Wales Society of Labor Lawyers' Executive. It is in line with the Society's principles, objectives and values.

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I INTRODUCTION

1. We at the NSW Society of Labor Lawyers (the "**Society**") write to you regarding the *Inquiry into Racial Vilification Law in New South Wales*. We welcome the inquiry and the consideration of the effectiveness of Section 20D of the *Anti-Discrimination Act 1977* (NSW) (the "**ADA**") within the current framework of racial vilification laws in New South Wales, as well as legislative changes to procedural steps. We acknowledge the Terms of Reference of the current inquiry. A copy of the Terms of Reference and Section 20D is set out in Appendix A.

2. We submit that:

   2.1 Section 20D is consistent with Australia's international obligations to eliminate racial discrimination and compatible with freedom of speech and political communication;

   2.2 Section 20D is effective as a symbolic and educative provision;

   2.3 notwithstanding the absence of prosecution made under Section 20D, it should not be abolished or be re-enacted within existing criminal legislation;

   2.4 the procedural requirements for Section 20D ought to be reviewed and amended, in particular extending the current 28-day limit in sub-s. 91(3) of the ADA for the referral of a possible Section 20D matter to the Attorney–General or to the Office of the Director of Public Prosecutions;

   2.5 the term "serious" should be removed from the heading of Section 20D;

   2.6 the effectiveness of Section 20D should be considered in the broader framework of New South Wales and Commonwealth laws, particularly in respect of New South Wales anti-discrimination legislation and case law and provisions within the *Crimes Act 1900* (NSW) and the exercise of judicial discretion in the sentencing of offences that contain an element of aggravation on the basis of racial vilification; and

   2.7 funding of the Anti-Discrimination Board of New South Wales must be at a level that allows for Section 20D and other provisions of the ADA to operate effectively, for appropriate research to be undertaken and sufficient funding to handle complaints and administer the ADA in a just and timely manner.

3 We make the following recommendations to the Inquiry, set out more fully below:

Recommendation 1: The word 'serious' should be removed from the heading of Section 20D of the ADA.

Recommendation 2: The 28-day limit imposed in sub-s 91(3) of the ADA should be abolished, or able to be extended from time to time as required.

Recommendation 3: The Committee should examine the impact of Section 20D within the overall anti racial discrimination and criminal law framework. The current penalties for any breach of Section 20D should be comparable to those imposed under sentencing provisions in the criminal law.

Recommendation 4: The definition of racial vilification under Section 20D should not be amended, other than to delete the word "serious" form the heading of Section 20D.

Recommendation 5: The funding and support given to the Anti-Discrimination Board ought to be sufficient in order to ensure the complaints are handled in a timely and just manner and appropriate levels of research can be undertaken.

II HISTORICAL BACKGROUND

4. New South Wales is the first Australian jurisdiction to have an anti-discrimination (racial vilification) law. This law was introduced as a response to unfortunate historical events. As Associate Professor McNamara recounted, incidents such as firebombing of shops owned by ethnic Australians and a number of racially motivated assaults and threats were cited as catalysts for the law's introduction.[1]

5. In 1995, the Parliament made the only amendment to date to Section 20D, with the maximum fine which can be imposed increased to 50 penalty units for an individual and 100 penalty units for a corporation.[2] We submit that these maximum penalties should be reviewed and even increased, so that they become a more effective general and specific deterrent and comparable to sentencing provisions for similar criminal offences.

[1] Luke McNamara, *Regulating Racism* (Institute of Criminology, 2002) pp. 121-122.
[2] *Anti-Discrimination (Amendment) Act 1994* (NSW) s 3.

6. From time to time some review of Section 20D has been undertaken, including the 2007-2008 inter-agency working party of the New South Wales' Attorney-General's Department.[3]

III AUSTRALIA'S INTERNATIONAL OBLIGATION AND FREEDOM OF SPEECH ISSUE

A *International Obligations*

7. Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) provides that

> 6.1 [*State parties*] *shall declare an offence punishable by all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of person of another colour or ethnic origin…*[4]

8. Since Australia is a party to the ICERD, enacting a criminal offence provision against racial vilification is consistent with Australia's international obligation.

B *Freedom of Speech and Anti-Vilification Laws*

9. On the Commonwealth level, it has long been resolved that anti-racial vilification law (the federal model) does not breach the implied constitutional freedom of communication about government or political matters set out in the *Lange v ABC* case.[5]

10. In a recent decision concerning the anti-sexual vilification law in NSW, the Court of Appeal found that anti-vilification laws as adopted in NSW is not incompatible with the implied freedom of communication about governmental or political matters.[6]

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[3] As noted in the 2007-2008 Annual Report of the New South Wales' Office of the Director of Public Prosecution, at page 81, in which it was expected the working party would finalise a Discussion Paper for consideration by Cabinet.

[4] *International Convention on the Elimination of All Forms of Racial Discrimination,* open for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art4.

[5] See, *Toben v Jones* [2002] FCA 1150; *Jones v Scully* [2002] FCA 1080 [240].

[6] *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) [46]-[53].

IV EFFECTIVENESS OF SECTION 20D

11. In assessing the effectiveness of Section 20D, the following factors should be taken into account:

(a) its importance as a symbolic and educative legislative provision;[7]

(b) the absence of any prosecutions; and

(c) investigations and referrals for prosecution under Section 20D.

A *Section 20D as a Symbolic and Educative Provision*

12. At the time of enactment, Section 20D was intended to be a standard of lawfulness and an educative provision. In the Second Reading Speech to the 1989 amendment Bill, the Attorney-General John Dowd described the Bill as "…a clear statement by the Government that racial vilification has no place in our community…" and said the emphasis of the new racial vilification provisions was on 'conciliation and education'.[8]

13. It is not uncommon, particularly in the field of human rights and anti-discrimination laws, for provisions to be introduced with a view to educate the public.[9] This function must be properly valued and recognised[10].

14. Due to definitional and practical factors affecting its operation (discussed in more detail below), Section 20D has been described as a 'symbolic' provision.[11] Arguably, criminal sanctions such as Section 20D have stronger "symbolic and educative effects…in providing a clear statement of unacceptability of racist behaviour…"[12] than civil remedies alone. We submit that the symbolic effect of Section 20D remains notwithstanding the absence of prosecutions. Full consideration of the symbolic and educative effects of Section 20D must involve consideration of Section 20D within the framework of the ADA, whereby complaints

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[7] See, Luke McNamara, Above n 1, 305; JB Jacobs and K Potter, 'Hate Crimes: Criminal Law and Identity Politics' (Oxford University Press,1998), p.144.

[8] New South Wales, *Parliamentary Debates*, Legislative Assembly, 4 May 1989, 7488-7489 (John Dowd)

[9] See, eg Victoria, *Parliamentary Debate*, Legislative Assembly, 4 May 2006,1290 (Rob Hulls).

[10] Ibid.

[11] Luke McNamara, above n1, p. 305; JB Jacobs and K Potter, above n 7, p.144.

[12] Sally Frances Reid and Russell G. Smith, *Regulating Racial Hatred*, Australian Institute of Criminology Report No 79 (1998) 6

are determined in accordance with the civil provisions in ss. 20 B and 20C as well as the related provisions set out in Section 20D.

B *Prosecution under S*ection *20D*

15. We note that no prosecution has been made under Section 20D to date.[13]

16. The absence of prosecutions under Section 20D is within the context of a number of formal complaints received by the Anti-Discrimination Board. For instance:

    (a) in the period between 1989 and 1997, the Anti-Discrimination Board received 642 racial vilification complaints;

    (b) in the same period, it received 2236 enquiries about racial vilification;

    (c) nonetheless, in that period 1989-1997 only four matters were referred to the Attorney-General as suitable for prosecution and none were recommended for prosecution;[14]

    (d) until 2008, only 16 matters have been referred to the DPP by the Attorney-General following complaints received by the President of the ADB, again with no prosecution made;[15] and

    (e) the ADB made no referral to the Attorney-General in the period between 2010 and 2012.[16]

17. There are a variety of possible reasons for the absence of prosecutions under Section 20D.

18. First, the absence of prosecutions may be attributable to difficulties in applying the test for serious racial vilification in Section 20D. In a paper delivered by the former Director of Public Prosecution, Mr Cowdery QC, to the 2009 roundtable on *Hate*

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[13] The most recent information being the 2011-2012 Annual Report of the New South Wales Anti-Discrimination Board.

[14] Reid and. Smith, n. 12 at pp. 2—3.

[15] Peter Wertheim, 'Hate Crime And Vilification Law: Developments And Directions' (speech delivered at the Roundtable on Hate Crime and Vilification Law: Directions and Developments, University of Sydney, 28 August, 2009.

[16] Anti-Discrimination Board, *Annual Report 2010-11*, the one referral in 2010-2011 to the DPP being for serious homosexual vilification and not serious racial vilification and the Anti-Discrimination Board, *Annual Report 2011-12* which records that one matter was again referred to the Attorney- General / DPP (also for serious homosexual vilification and not serious racial vilification). The 2011-2012 Annual Report further notes that there were 31 enquires received on the grounds of racial vilification, with 15 complaints received on the grounds of racial vilification, and 214 complaints on the grounds of race discrimination. Race vilification complaints "decreased this year to 15 complaints (1.2%) which is less than the last two years…" (at p. 14.).

Crime and Vilification Law: Developments and Directions, Mr Cowdery highlighted that:

(a) the NSW racial vilification law concerns the effect of the alleged conduct on the public as whole, which is to be contrasted with the Commonwealth provision in s. 18C of the *Racial Discrimination Act* 1975 , which only concerns the person or group of people who were targets of the conduct;

(b) the Federal law does not require the proof of 'incitement';

(c) it is difficult for the DPP to adduce sufficient evidence to prove either incitement or incitement by specific means described in the offence provisions; and

(d) the requirement to prove incitement in Section 20D means that no matter how offensive the expression of hatred is it will not lead to prosecution under Section 20D unless the expression of hatred includes a threat of physical harm or damage to personal property.[17]

19. Mr Cowdery also opined that the term 'serious vilification' gives rise to concern, as it may suggest that some vilification is not 'serious'. He further suggested that the legislative provisions should distinguish between 'vilification' and 'vilification involving threats of violence to persons and/or property'.[18]

20. The limited time period (28 days) in which the President of the ADB may refer matters to the Attorney-General for prosecution may also operate to curtail the number of matters considered for prosecution.

21. We support Mr Cowdery's assessment of Section 20D and suggest that there is probably a causal link between the characteristics of Section 20D identified by him and the lack of prosecutions under Section 20D.

22. We submit, as recommended by Mr Cowdery, that the word "serious" be deleted from the heading "serious vilification" in Section 20D.

23. However, we do not view the perceived evidentiary requirements of Section 20D as a reason for it to be amended.

[17] Nicolas Cowdery, 'Review of Law of Vilification: Criminal Aspect' (Paper presented at Roundtable on Hate Crime and Vilification Law: Developments and Directions, University of Sydney, 28 August 2009), p. 4.

[18] Id, at p. 6

24. Other extraneous factors may also contribute to the absence of prosecutions under section 20D. As Reid and Smith[19] have noted, racism has become more 'moderate' since the introduction of anti-racism laws, and has adopted a more 'persuasive tone'. These characteristics make it difficult to bring racism within the scope of criminal offence provisions.

25. Reid and Smith suggest that the lack of prosecutions may also be reflective of a concern that prosecuting extremist individuals or groups under section 20D or its equivalent may bring unintended and undesirable repercussion, such as giving the extremists a forum in which to express their views.[20]

26. Reid and Smith also note that the absence of criminal prosecutions is not limited to Australia – it also occurs internationally[21].

27. It is also of relevance that, as required by sub-s 91(3) of the *ADA*, the President of ADB only has 28 days to decide whether referrals should be made to the Attorney-General for consideration of a possible prosecution under Section 20D. As Mr Cowdery has argued, this time limit may be unrealistic in some circumstances and may be hindering investigations.[22]

Recommendation 1: The word 'serious' should be removed from the heading of Section 20D of the ADA.

Recommendation 2: The 28-day limit imposed in sub-s 91(3) of the ADA should be abolished, or able to be extended from time to time as required.

V *SECTION 20D AS A COMPLIMENT TO OTHER MECHANISMS ADDRESSING RACIAL VILIFICATION*

28. We acknowledge that having a dedicated racial vilification provision is not the only mechanism for addressing racial hatred, and racially motivated violence and threats.

[19] Reid and. Smith, n. 12 at p. 5.
[20] Ibid..
[21] Ibid.
[22] Nicolas Cowdery, above n 17, at p. 7.

29. For example, some conduct captured in sub-sections 20D (1) (a) and (b) is also prohibited by the NSW *Crimes Act* 1900. See for example: s. 31 ('Document Containing Threats'), sub-s 33B(1)(b) (threatens injury to person or property with intent to commit an indictable offence or resist arrests), and s 545B ('Intimidation or Annoyance by Violence or Otherwise').[23]

30. Racially-motivated acts may also be taken into account as an aggravating factor in sentencing procedures. Currently, sub-s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the '**Sentencing Aggravation Provision**'), stipulates that where an offence is motivated by hatred or prejudice (including racial hatred or prejudice), that will be considered as an aggravating factor in sentencing.

31. The Sentencing Aggravation Provision has been considered and utilised in a number of cases, which are extracted in Appendix B for further reference.

32. Although the Sentencing Aggravation Provision is arguably a less conspicuous mechanism to address racial vilification, its significance should not be understated and it ought to be treated as an integral part of our anti-discrimination framework. As Associate Professor Gail Mason wrote, the Sentencing Aggravation Provision aims to achieve general and specific deterrence by enhancing penalties, and 'serve[s] a symbolic function which can be crystallised as a "moral claim" that "prejudice" is wrong"'.[24]

33. Section 20D complements these other methods of addressing racial violence.

34. Additionally we submit that Section 20D goes further than the other legislative provisions - signalling that it is also unlawful to *incite* hatred, contempt or ridicule on the basis of race through speech or conduct – and in this respect, it plays a unique role.

Recommendation 3: The Committee should examine the impact of Section 20D within the overall anti racial discrimination and criminal law framework. The current penalties for any breach of Section 20D should be comparable to those imposed under sentencing provisions in the criminal law.

[23] Ibid 3

[24] JB Jacobs and K Potter, above n6, 144.

VI *REALISTIC TEST IN LINE WITH COMMUNITY EXPECTATIONS*

A *What are the community's expectations?*

35. As the former Federal Race Discrimination Commissioner Irene Moss put it, '…racist violence represents the antithesis of everything our society values, everything Australians have worked for, everything we have achieved…'[25]

36. While Ms Moss' statement still holds true today, we accept that it is difficult to identify 'community expectations' with a good degree of specificity, given the diversity and dynamics of our society. Additional research could be undertaken (for example by the Anti-Discrimination Board) to enhance understanding of community expectations in relation to race discrimination and specific information on matters of racial vilification.

37. Existing research on aspects of race discrimination may be indicative of community expectations. The number of complaints to the New South Wales Anti-Discrimination Board in 2011-2012 decreased from the previous two years, with fifteen complaints being lodged[26]. Through a review of relevant literature, in June 2001 Dr Lorana Bartel[27] identified:

    (a) the available evidence seems to suggest that overall, migrants have the lowest rates of criminality in Australia; and

    (b) for Cultural and Linguistically Diverse communities key criminal justice issues include racially motivated attacks, predominantly from strangers (particularly in the context of so-called 'hate crime') and disproportionately high rates of fear of crime (again, often in the context of hate crime).

38. Meeting the community's expectations in relation to racial vilification may not be limited to criminalising extreme racist behaviours. A series of high-profile racial vilification cases, such as Eatock v Bolt (No. 2)[28] and Trad v Jones (No. 4),[29] highlight the need to address more subtle forms of racial vilification. That some of the legal arguments in recent cases also include issues of "freedom of speech" and/or the

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[25] Australian Institute of Criminology, *Violence Today* Newsletter No. 8 (1989).

[26] See n. 16 above.

[27] See Australian Institute of Criminology website for summary and link to report (downloaded 4 March 2013) at http://www.aic.gov.au/publications/current%20series/rip/1-10/18.html.

[28] [2011] FCA 1103.

[29] [2012] NSWADT 265

implied freedom of communication on government and political matters[30] demonstrates the complexity in addressing community expectations and legal issues.

39. We submit Section 20D is in line with community expectations that government will address racial violence, and incitements to racial violence, and encourage tolerance and multiculturalism within Australian society.

B *Applying a Realistic Test*

40. When considering a realistic test for racial vilification, we would like to point to two issues.

41. First, although similar in wording, the current civil and criminal racial vilification provisions have been held to have different applications.[31] While s 20C (civil provision) does not require proof that the offender had the intent to incite hatred (thus an objective test), Section 20D (criminal provision) does require proof of that intent.

42. It should also be noted that, compared to the Commonwealth racial vilification laws, Section 20D contains a far higher 'harm threshold'.[32] While s 18C of the *Racial Discrimination Act* (Cth) requires only 'offend, insult, humiliate, or intimidate' a victim, the harm threshold in NSW is inciting hatred, serious contempt or sever ridicule *and* by means of threat of violence to a person or their property.

43. In spite of these issues concerning Section 20D, we do not believe the current test should be changed to lower the harm threshold or otherwise should be amended.

44. This is because, as noted above, criminalising racial vilification has inherent procedural limitations. We regard the proper functioning of a democratic system of government and a robust public sphere as a more productive way to eliminate racial discrimination.

45. This would include retaining Section 20D in its present wording, other than to delete the word "serious" from the heading and make provision for any restriction arising from the 28 day period in sub-s. 91(3) of the ADA to be addressed and/or removed.

[30] See Eatock v. Bolt, n. 29 and recent cases on the same implied freedom such as Monis v. Queen [2013] HCA 4 (27 February 2013) concerning criminal provisions in sending communications by postal service and Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3 (27 February 2013) concerning local government by-laws prohibited preaching and distributing printed matter on any road.

[31] *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 [6].

[32] Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Texts, Cases, and Materials* (The Federation Press, Leichhardt) 579-582.

We submit this will retain the strong symbolic and educational value of Section 20D, while likely increasing its effectiveness.

46. This should also include priority given to address racial vilification through research, public debate and ongoing review of Section 20D within the overall framework of anti-discrimination and criminal law.

47. This should also include ensuring the relevant government bodies, such as the Anti-Discrimination Board, are receiving sufficient level of support and funding.

Recommendation 4: The definition of racial vilification under Section 20D should not be amended, other than to delete the word "serious" form the heading of Section 20D.

Recommendation 5: The funding and support given to the Anti-Discrimination Board ought to be sufficient in order to ensure the complaints are handled in a timely and just manner and appropriate levels of research can be undertaken.

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Appendix A - Terms of Reference and Section 20D

The Inquiry is being undertaken by the New South Wales Parliament's Legislative Council Standing Committee on Law and Justice (the "**Standing Committee**"). The terms of reference of the Inquiry are the following:

> "…That the Committee inquire into and report on racial vilification law in NSW, in particular:
>
> 1. the effectiveness of section 20D of the *Anti-Discrimination Act 1977* which creates the offence of serious racial vilification;
> 2. whether section 20D establishes a realistic test for the offence of racial vilification in line with community expectations; and
> 3. any improvements that could be made to section 20D, having regard to the continued importance of freedom of speech…"

Anti-Discrimination Act 1977 No 48

"….

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.

…."

Appendix B – Application of Sentencing Aggravation Provisions

R v M.A.H. [2005] NSWSC 871 (30 August 2005) (per Hislop J.) in which his Honour made the following finding (at para. 32):

> "…(iv) Section 21A(2)(h) is concerned with an offence motivated by hatred for a group of people to which the victim was believed to belong. That is not this case…".

Regina v Amir Ibrahim El Mostafa [2007] NSWDC 219 (24 August 2007) (per Cogswell DCJ) in which his Honour made the following findings (at paras. 16 and 17):

> "…16 However, the one exception is contained in s 21A(2)(h). That provides that it is an aggravating factor where 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. 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. That hatred was certainly related to religious opinions but also in this case to political views. I regard that as an aggravating factor of this offence and I will take that into account.
>
> 17 Hence I regard Mr El Mostafa's culpability to be in the middle of the range of objective seriousness for these offences. I regard him as being in the middle of the range rather than the top of the range because he did not personally inflict any violence. However, I regard him as being firmly towards the upper end of the middle of the range because of his organisational role and because of the motivation provided by s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act*. .."

R v Lee [2010] NSWSC 632 (18 June 2010) (per Price J.) in which his Honour made the following findings (at paras. 20 and 22):

> "…20. Another matter which assumed significance during the sentencing hearing was that of the factors of aggravation which are to be taken into account in determining the appropriate sentence: s 21A(2) *Crimes (Sentencing Procedure) Act*. The Crown invited me to find that the murder was motivated by the offender's prejudice against the race of the three Korean men: s 21A(2)(h)*Crimes (Sentencing Procedure) Act*. The onus is on the Crown to prove each of the factors of aggravation that it asserts beyond reasonable doubt. The Crown submitted that the offender's enquiry of Mr Song "Are you Korean?" was the trigger of the whole incident.
>
> 21 The offender denied that he was racially motivated and said that he has many Korean friends. His testimony was supported by a letter of reference from Jinman Kim. Mr Kim, who is of Korean descent, referred to the offender having many Korean friends during high school and expressed his strong belief that the offender "does not discriminate to one particular race."
>
> 22 I do not consider that there is any evidence that the offender disliked or was prejudiced against Koreans. The question posed by the offender does not support such a finding. The offending conduct, in my view, was motivated by the offender's support for the co-offender's anger arising from his perception that Mr Song had stared at him. This factor of aggravation has not been established…"

R. v. Winefield [2011] NSWSC 337 (20 April 2011) per Fullerton J. in which her Honour found (at para. 28):

"…I am satisfied that the knife was in the offender's possession, being one of a collection of knives in his home, and that he flicked it open as he got out of his car to remonstrate with the boy who had hit his car and shouted at him…Although I cannot be satisfied that this conduct was racially motivated (since I cannot be satisfied on the evidence that he knew Caleb was Aboriginal when he almost collided with him), I am satisfied that as he approached he was aware of Caleb's racial identity and that he was a teenager despite his height and size. Because I am left in doubt as to whether the use of the knife thereafter was racially motivated, despite some suspicions I have that it might be the case, the aggravating factor in s. 21A(2)(h) of the *Crimes (Sentencing Procedure) Act* 1999 ("the Sentencing Act") is not enlivened. The Crown did not submit otherwise…".

R v James DEAN-WILLCOCKS [2012] NSWSC 107 (24 February 2012) (per Garling J.) at paras. 71 and 73:

"…

71. Although the offence was committed whilst Mr Dean-Willcocks was heavily intoxicated, I am satisfied that the motivation for this otherwise senseless attack is to be found in what he called out from time to time whilst he was assaulting, scuffling with, chasing and tackling Mr Alvarado. Mr Dean-Willcocks obviously formed the opinion that Mr Alvarado was a Japanese or Asian man. His racial abuse of Mr Alvarado, yelling out that he ought to go back to Japan and leave Australia, as well as his justification to Mr Doyle namely, " *you don't understand, he's Japanese* ", leave me in no doubt that this was an offence motivated by prejudice against people from Japan or perhaps more generally from Asia. This is an aggravating feature of the conduct that I will take into account.
….

73. Whilst I accept that Mr Dean-Willcocks was not a person who acted or spoke contrary to the interests of any racial group, that does not tell against, on this occasion, his being motivated by hatred or prejudice against a specific racial group. The persistent use by him of racially directed comments whilst assaulting Mr Alvarado leaves no real room for debate that what he was doing was racially motivated…"

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