Submission No 26

INQUIRY INTO RACIAL VILIFICATION LAW IN NSW

Organisation: Department of Attorney General and Justice

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The Director
Standing Committee on Law and Justice
Parliament House
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8 MAR 2013

Dear Director

Submission to the Legislative Council Standing Committee on Law and Justice inquiry into racial vilification law in NSW

Thank you for the opportunity to provide a submission to the Legislative Council Standing Committee on Law and Justice inquiry into racial vilification law in NSW (**Inquiry**).

Please find enclosed the Department of Attorney General and Justice's submission to the Inquiry.

Should you wish to discuss this matter, the relevant contact in my division is Phillipa Hetherton, Policy Manager who may be contacted on or at

Yours faithfully

Kathrina Lo
Director
Legislation, Policy and Criminal Law Review Division

Inquiry into racial vilification law in NSW

Department of Attorney General and Justice submission

March 2013

Introduction

Section 20D of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) is a criminal sanction on serious racial vilification. It applies to race hate crimes of a specific kind – where a person, by a public act, incites others to racial hatred through means of violence.

The Inquiry is charged with investigating both the effectiveness of this law and its appropriateness. The terms of reference require that the impact of the law and/or any suggested changes to the law be evaluated against their impact on freedom of speech.

Vilification laws must strike a balance between addressing the harms caused by vilification and limiting the impact of the law on free and open discussion. Judgements must be made about where to draw the line in determining what kind of conduct is so serious that it should be unlawful and conduct that, while potentially offensive or harmful, should not be proscribed by legislation.

Evaluation of s 20D should consider the purpose of the law, and evidence about the problem the law is intended to address. It should consider other legal and non-legal measures available to address the problem. In NSW, these include the wider legislative scheme regulating racial vilification in NSW, which includes a civil prohibition on racial vilification and a process by which complaints may resolved by conciliation by the Anti-Discrimination Board (**ADB**) or determined by the Administrative Decisions Tribunal (**ADT**). It also includes other criminal laws by which racially motivated crimes may be prosecuted and punished.

The offence created by s 20D of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) has been on the statute book for over 20 years but has not been prosecuted, although at least 11 serious racial vilification complaints have been referred by the President of the Anti-Discrimination Board (**ADB**) to the Director of Public Prosecutions (**DPP**).[1] Similarly, none of the other serious vilification offences in the ADA modeled on s 20D have been prosecuted in NSW, although since 1998 at least 27 referrals have been made[2].

The absence of prosecution does not, in itself, indicate that provision does not strike an appropriate balance between protecting freedom of speech and proscribing the most serious forms of harmful vilification. Although it may suggest that the provision is not a significant aid in addressing vilification.

This submission:

- considers the nature and purpose of existing racial vilification laws in NSW and the wider context in which they operate, and
- considers alternative approaches, including approaches adopted in other jurisdictions, to addressing the harms caused by racial vilification

[1] As advised by the Office of the DPP

[2] This figure includes all serious vilification offences, including race [s 20D], homosexuality [s 49ZTA], HIV/AIDS [s 49ZXC], transgender [s 38T].

NSW vilification laws

Sections 20B, 20C and 20D were inserted into the new Division 3A of Part 2 of the ADA by the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (**RVAA**). The RVAA was the first legislative prohibition on racial vilification in Australia.

The RVAA established both a civil prohibition on racial vilification [s 20C] and criminal sanctions for serious racial vilification [s 20D].[3] Both s 20C and s 20D prohibited 'public acts' that 'incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons' on the ground of race.[4] It was not intended that the law prohibit conduct of a 'trivial nature'.[5]

The level of conduct subject to criminal sanctions in NSW is defined as the same kind of conduct, but with the aggravating feature that the incitement by public act includes threatening or inciting others to threaten physical harm towards people or property. In the second reading speech for the RVAA the then Attorney General stated that the prosecution of offences would be 'limited to very serious conduct',[6] but did not give specific examples. Some examples given in the second reading speech debates introducing the equivalent provision concerning serious homosexual vilification may be illustrative:

> The legislation is aimed at bumper stickers with slogans which read 'Stop AIDS: Shoot Poofters'…The legislation aims to stop people such as Mr Hetherington from Bega who advertised…for 40 'decent men' to help him run gay men and lesbians out of town, for which he offered to pay them $100 each…[7]

The RVAA established a complaints-based process for the initiation of all racial vilification matters. Civil matters were to be dealt with through conciliation by the President of the ADB or, failing that, determined by the Equal Opportunity Tribunal (now by the Administrative Decisions Tribunal). Matters that could potentially breach the criminal offence were to be identified by the President of the ADB and referred to the Attorney General for consent to prosecute.

These elements of the racial vilification laws established by the RVAA remain in place today. Although a number of reviews of the law have made recommendations for changes.

The first review into the operation of the new racial vilification laws was conducted in 1991 and 1992 by the Hon James Samios MBE MLC (**Samios Report**). The Samios Report endorsed the new laws, but identified a number of issues with their operation and made recommendations to amend the laws. Some of the recommendations were subsequently implemented, including recommendations that the definition of 'race' should be expanded to include 'ethno religious' and that the penalties for the criminal offence should be increased.[8] Other recommendations, such as suggested changes to the elements of the offence itself, were not implemented.

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[3] Division 3A.
[4] Sections 20B-20D *Anti-Discrimination Act 1077*
[5] Hansard, Legislative Assembly, 4 May 1989, p7489
[6] Hansard, Legislative Assembly, 4 May 1989, p 7489
[7] Clover Moore MP, Hansard, Assembly 11 March 1993, p 658
[8] *Anti-Discrimination (Amendment) Act 1994*

Subsequently, other amendments to the ADA were made, including by introducing new offences of serious vilification on the grounds of homosexuality, HIV/AIDS and transgender status.

A comprehensive review of the ADA was undertaken by the NSW Law Reform Commission (**LRC**), which reported in 1999. The LRC Report considered vilification laws as part of its general review and made a number of recommendations for change, although these have not been implemented.

In the years since the enactment of the NSW racial vilification laws, Queensland, South Australia, Victoria and the Australian Capital Territory (**ACT**) have each enacted similar racial vilification offences. At least some of these were modelled on the NSW law. In each case, the criminal provisions are complemented by a civil prohibition on racial vilification, as in NSW.

Role of racial vilification laws

The justification for racial vilification laws is that they protect the rights of all persons to 'a dignified and peaceful existence free from racist harassment and vilification'.[9] Such laws reflect the view that speech promoting prejudice and hatred can cause significant psychological and social harm to individuals from targeted groups.[10]

More generally, the justification for racial vilification laws is that, left unchecked, racist propaganda can 'subtly gain credence in society at large', and so create an environment in which more serious acts (including discrimination and/or violence) against targeted groups is more tolerated and therefore more likely.[11] As stated by the LRC, 'one of the aims of vilification legislation is to reduce the threats to social cohesion, and reduce public disorder, by encouraging and preserving tolerance.'[12]

The potential effect of vilification laws may be both practical and symbolic. When utilised, vilification laws may resolve conflicts created by hate speech and provide a measure of redress to individuals or groups harmed.

The mere existence of vilification laws may also serve an educative and symbolic function. It has been argued that legislation that clearly articulates that certain kinds of behaviours are not tolerated has a normative power that can positively influence behaviour.[13] For example, the Samios Report noted that several bodies which made submissions stated that their efforts to combat racism had been 'enhanced considerably by their ability to point to the law, in setting both a legal and a community standard.'[14] Of course, any symbolic value of criminal laws may wane if they are not prosecuted.

Lastly, where criminal sanctions are deployed, vilification laws have the potential to serve the aims of criminal law more generally, including punishment of individual

[9] Attorney General, Mr Dowd MLC, 2nd Reading Speech, Hansard, Legislative Assembly 4 May 1989, p7488
[10] Parliament of New South Wales Legislative Council, *Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of New South* Wales, August 1992, (herein '**Samios Report**') p 11
[11] NSW Law reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92, November 1999, paragraph 7.66 (herein '**LRC Report**'); Samios Report, note 10 above, p 11
[12] LRC Report, note 11 above, paragraph 7.66
[13] LRC Report, note 11 above, paragraph 7.67
[14] Samios Report, note 10 above, p12

offenders, as well as denouncing and deterring the prejudice that underlies prejudice-related-crime in the community at large. [15]

The arguments for limiting the scope of vilification laws are primarily based on the fact that such laws place restrictions on free speech. Freedom of speech is an important civil right because repression of dissenting views can erode democracy and lead to the abuse of other human rights.[16]

The implied constitutional freedom of communication about government or political matters established by *Lange v Australian Broadcasting Commission*[17] is also relevant to the appropriate reach of vilification laws. The test of whether a law infringes the constitutionally protected freedom depends on two matters: firstly, whether the law effectively burdens freedom of communication about government or political matters, and secondly, whether the law is reasonably appropriate and adopted to serve a legitimate end in a manner that is compatible with the maintenance of representative and responsible government.[18] The implied freedom has been considered recently in relation to civil prohibitions on vilification in both NSW and Queensland. In each case, the vilification laws were held to be constitutionally valid.[19]

Vilification laws are characterised by the attempt to find a balance between addressing the harms caused by vilification and permitting free and open discussion. In the second reading speech for the RVAA, then Attorney General, Mr Dowd MLC stated that the new law was intended to strike a balance between the 'right to free speech and the right to a dignified and peaceful existence free from racist harassment and vilification'.[20]

A major issue that legislatures have had to confront in determining the appropriate balance between free speech and regulating racist vilification is defining the kind of conduct that should be prohibited and, where criminal offences are created, the level of conduct that is so serious it should be subject to criminal penalties.

Choices about where to draw the line between distasteful but not unlawful conduct, and between civil and criminally proscribed conduct, are based on specific judgments about the appropriate level of culpability for different kinds of conduct. To date, in NSW the line between civil and criminally proscribed conduct has been set at the point where incitement involves a threat of violence. Public acts inciting hatred are not criminalised

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[15] Although, Marsden suggests that while such laws are intended to denounce and deter, the shift to more punitive penalties can also be understood as part of a broader trend towards the imposition of more punitive forms of punishment, and away from goals of rehabilitation: Marsden, G, *Hate Crime Laws In Australia: Are they Achieving their Goals?*, Paper presented to *Roundtable on Hate Crime and Vilification Law: Developments and Directions*, Institute of Criminology, Faculty of Law, University of Sydney, 28 August 2009

[16] LRC Report, note 11 above, paragraph 7.65

[17] 145 ALR 96 at 106

[18] *Sunol v Colllier (No 2)* [2012] NSWCA 44

[19] In *Sunol v Collier (No 2)*, the New South Wales Court of Appeal considered whether section 49ZT of the ADA, the civil prohibition on homosexual vilification, infringed the implied constitutional freedom. The majority (Bathurst CK and Allsop P, Basten JA dissenting) held that the prohibition on homosexual vilification was a burden on the freedom of communication about governmental or political matters. However the law was found to be 'reasonably appropriate and adapted'. Justice Allsop stated that

> 'A diverse society that seeks to maintain respectful and harmonious relations between racial and religious groups and that seeks to minimise violence and contemptuous behaviour directed towards minorities, including those based on sexual orientation, is entitled to require civility or reason and good faith in the discussion of certain topics.' (at paragraph 73):

In *Owen v Menzies* (2012) 293 ALR 571 the Queensland Court of Appeal held that the equivalent law in Queensland was reasonably appropriate and adapted as it promoted equality of opportunity by prohibiting objectionable conduct (see paragraphs 2-4 and 70 - 72).

[20] Hansard, Legislative Assembly, 4 May 1989, p7488

where there is no threat of violence. The line has been drawn differently in other jurisdictions, as is considered further below.

Another important feature of vilification laws is that they do not target all racist conduct, nor do they target all criminal conduct involving an element of racism. They are targeted at communications that display a high level of animosity on the basis of race and which may have an effect on the attitudes or conduct of third parties. In NSW at least, the effect that the conduct may have on third parties has been central to the concept of vilification. A private threat of violence against another individual, even where based on racial hatred, does not fall within the definition of the criminal offence of serious racial vilification.

Vilification laws are thus significantly narrower than some other kinds of laws that have been enacted to address the racist aspects of criminal conduct more generally, such as sentence aggravation provisions (which provide that racist motivations for crimes are an aggravating matter that can be considered in sentencing) or penalty enhancement provisions (which provide for a higher maximum penalty for the same substantive offence where motivated or affected by racial (or other) prejudice). These kinds of laws typically apply to a wide range of criminal conduct.

Vilification laws are characterised by the attempt to find a balance between addressing the harms caused by vilification and permitting free and open discussion.

Racial vilification in NSW

The limitations on free speech created by racial vilification laws are justifiable only insofar as they are necessary to prevent the harms caused by racial vilification. A preliminary question in examining the effectiveness of racial vilification laws in NSW could therefore be the extent to which these harms occur or are at risk of occurring in NSW.

Research on racism in Australia suggests that racism is prevalent in Australia. Between 2001 and 2008 the Challenging Racism Project, based at the University of Western Sydney, collected the first comprehensive national picture of racial attitudes in Australia.[21] A nationwide survey conducted in 2006 looked at four different kinds of racism experienced.[22] The results of the survey indicated that 19% of respondents had experienced racist talk, 11% had experienced racist exclusion, 7% had experienced unfair treatment and almost 6% had experienced racist attack (described as including 'physically attacking, abusing or threatening you or your property').[23]

Other research supports these findings. For example, another report detailed that the Muslim and Arab Australians interviewed 'indicated that some forms of incivility of vilification, based on ethnicity or faith, were a regular part of their daily life in contemporary Australia.'[24]

[21] <http://www.uws.edu.au/ssap/school_of_social_sciences_and_psychology/research/challenging_racism/introduction>

[22] Nelson, J, Dunn KM & Paradies, Y 2011 *Australian Racism and Anti-Racism: Links to Morbidity and Belonging*, in Mansouri, F and Lobo, M (eds) *Migration, Intercultural Relations and Social Inclusion*, (Ashgate Publishing, Surrey), Chapter 11, 159-175, at pp165-166
< http://www.uws.edu.au/__data/assets/pdf_file/0004/381676/024_Chapter_11_Mansouri.pdf>

[23] Ibid.

[24] Nelson et. al., note 22 above, p161

Recommendation:

The Inquiry should consider what harms are caused by racial vilification and the extent to which these harms occur or are at risk of occurring in NSW.

Responses to racial vilification in NSW

A further consideration in examining the effectiveness of racial vilification laws in NSW could be the extent to which existing measures are needed and/or effective to prevent the harms caused by racial vilification.

Other criminal law provisions

There are numerous existing criminal law provisions in NSW that may address some aspects of the conduct that may otherwise constitute racial vilification. Examples include threatening to destroy or damage property [s 199 *Crimes Act 1900*]; sending a document containing threats [s 31 *Crimes Act*]; affray [s 93C *Crimes Act*]; assault [s 61 *Crimes Act*]; intimidation or annoyance by violence or otherwise [s 545B *Crimes Act*]; stalking or intimidation with intent to cause fear of harm [s 13 *Crimes (Domestic and Personal Violence) Act 2007*]; contravening an apprehended violence order [s 14 *Crimes (Domestic and Personal Violence) Act*]; or counselling or procuring any such offence [ss 351 and 546 *Crimes Act*].

These criminal offences differ from serious racial vilification, as currently defined by s 20D, as typically these offences address circumstances where the threat or incitement is directed towards a specific individual or individuals. They also do not explicitly prohibit any racial denigration that forms part of the conduct.

The specific utility of the NSW criminal prohibition on serious racial vilification, in this context, appears to be that s 20D is the only criminal offence in NSW that specifically targets incitement of racial hatred by means of threatened violence, where the threat or incitement need not be directed towards a specific individual. That is, where the offender's conduct is aimed at influencing third parties, and the victim or victims of the crime may not be specifically targeted in their individual capacity, or as a member of a specific group, but because they are part of a broader social group who, as a whole, may be damaged by the vilifying conduct. To the extent that inciting racial violence promotes social discord, the victim of the vilification offence can be thought of even more broadly.

Sentence aggravation

Where offences are motivated by hatred or prejudice against a group of people to which an offender believes a victim belongs, then that can be considered an aggravating factor in sentencing, pursuant to s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1999*. Sentencing aggravation factors expressly recognise the ability of the judge to impose a more severe punishment where a crime is motivated by hatred or prejudice towards a particular group based on race. The court is required to take sentencing aggravation factors into account in sentencing, although how that factor is taken into account by the court is discretionary. Both NSW and Victoria have sentencing aggravation factors.

No statistics are available as to the circumstances in which, or the extent to which, s21A(2)(h) has been applied in sentencing. However, in the NSW Court of Appeal decision of *Holloway v R* [2011] NSWCCA 23 the court accepted the application by the sentencing judge of s21A(2)(h) to assaults that were racially motivated. Hall J said at [32]:

> In any multi-cultural society, criminal acts involving racial violence ought to be strongly deterred and this fact taken into account in a case such as the present when sentencing an offender in respect of such conduct: *Crimes (Sentencing Procedure) Act*1999, s.21A(2)(h).[25]

Victoria, Canada, NZ and the UK have similar provisions.[26] The Northern Territory also has sentencing aggravation factors (but does not have civil or criminal prohibitions on racial vilification).[27]

Complaint resolution

As noted earlier in this submission, s 20C of the ADA creates a civil prohibition on racial vilification. A victim of racial vilification can make a complaint to the ADB, provided they have the characteristic that is the ground for the complaint.[28] The ADB is then responsible for investigating the complaint and, if appropriate, may then try to conciliate the complaint. If it is not possible to resolve the complaint, the complaint can be referred to the Equal Opportunity Division of the Administrative Decisions Tribunal for a decision.

McNamara has suggested that the complaint-driven, conciliation-based approach for dealing with s 20C racial vilification matters has some limitations.[29] He suggests that while conciliation may be appropriate to the resolution of discrimination complaints, it is less suitable for the resolution of vilification complaints.[30] While vilification concerns public acts of incitement, the private nature of conciliation may inhibit any educational impact of the process on the broader community.[31] Further, requiring parties to a complaint to negotiate treats the matter as a matter to be resolved rather than a breach of a legislative standard. This may limit the capacity of the laws to set clear community standards on acceptable conduct.[32] There is also a concern that complainants may be disadvantaged and relatively powerless in this context.

McNamara's analysis, is based on 1991 data, which found that the successful conciliation of racial vilification complaints was substantially less than for discrimination complaints.[33] More recent statistics as to the proportion of conciliated racial vilification complaints that are successful are not available. However, it is notable that the rate of enquiries to the ADB about racial vilification is significantly higher than the rate of

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[25] see also: Judicial Commission, Sentencing Bench Book [11-130]

[26] Victoria: s 5(2)(daaa) *Sentencing Act 1991* (Vic); Canada: s 718.2 *Criminal Code 1985* (Can); New Zealand: s 9 *Sentencing Act 2000* (NZ); United Kingdom: s 145 *Criminal Justice Act 2003* (UK).

[27] s 6A of the Sentencing Act (NT)

[28] s 88 of the *Anti-Discrimination Act 1977* (NSW)

[29] McNamara, L, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology Monograph Series No 16, The Institute of Criminology, University of Sydney Faculty of Law, Sydney 2002, p163

[30] McNamara, note 29 above, p163

[31] McNamara, note 29 above, p58

[32] McNamara, note 29 above, p58

[33] Only 10% of racial vilification complaints were settled (compared to 18% of all complaints), while 38% were declined (compared to 28% of all complaints) and 45% dropped out of the process (compared to 38% of all complaints).

complaints made, as seen in the table below.[34] The number of racial vilification complaints heard by the Administrative Decisions Tribunal is very low.

Year	Enquiries received by ADB	Complaints received by ADB	Complaints referred to Administrative Decisions Tribunal
2010-2011	59	21	3
2009-2010	73	22	2
2008-2009	47	14	3
2007-2008	96	16	

There is also a civil prohibition on racial vilification at a federal level under the *Racial Discrimination Act 1975* (Cth).

In this context, the criminal prohibition is part of a continuum of measures to resolve complaints of alleged racial vilification, where the criminal prohibition is 'limited to very serious conduct',[35] while other less serious complaints of racial vilification can be addressed through the ADB's investigation and conciliation processes or referral to the Administrative Decisions Tribunal.

Principles of Multiculturalism

The *Community Relations Commission and Principles of Multiculturalism Act 2000* (NSW) recognises and values the different linguistic, religious, racial and ethnic backgrounds of residents of NSW, and promotes equal rights and responsibilities for all residents of NSW. The Community Relations Commission, which is established under the Act, undertakes a range of projects and activities to promote community harmony and participation and access to services. These activities help ensure that the contribution of cultural diversity to NSW is celebrated and recognised.

Recommendation:

The Inquiry should consider the extent to which current responses to racial vilification are effective.

Alternative approaches to responding to racial vilification

A review of the arrangements for combating racial vilification in other Australian and common law jurisdictions identified some alternative approaches to responding to racial vilification. These are considered in turn below.

Penalty enhancement provisions

Penalty enhancement provisions are another legislative mechanism used to combat racially motivated crime. They impose 'an additional maximum or minimum penalty on

[34] Information in the table is drawn from annual reports of the ADB and the ADT.
[35] Hansard, Legislative Assembly, 4 May 1989, p 7489

specified pre-existing offences if the conduct is motivated or aggravated by racial, religious or other forms of prejudice or hostility'.[36]

The *Crime and Disorder Act 1998* (UK) contains offences of racially aggravated assault, criminal damage, public order and harassment.[37] These provisions are extensions of existing offences that provide that where the underlying offence is 'racially aggravated', higher maximum penalties apply. Western Australia also has aggravated offences where an offence of assault, threat or criminal damage occurs is in 'circumstances of racial motivation'.[38]

The Tasmania Law Reform Institute (**TRLI**) evaluated penalty enhancement provisions as an option. It concluded that, while not suitable for Tasmania's legislative scheme, legal commentators tended to be 'generally positive' about penalty enhancement provisions on the basis that 'they provide an express denunciation of racially motivated crimes by increasing the penalties for such offences without needing to draft entirely new laws.[39] On the other hand, such laws tend to be punitive and mandate the imposition of harsher penalties with little judicial discretion.[40]

Amending the elements of the offence

The elements of s 20D that must be established to prosecute the offence are that there be:

1. a public act (as defined in s 20B)
2. which incites
3. hatred towards, serious contempt for or severe ridicule of
4. a person or group of persons on the ground of their race
5. by means which include threatened violence or inciting of others to threaten violence

The ODPP has advised that the requirement to establish each of these elements to a criminal standard (beyond reasonable doubt) has been a significant barrier to prosecutions under s 20D. In a review of the decisions not to prosecute in the 11 s 20D matters referred to the DPP, the ODPP noted that the most common reason for deciding not to prosecute was that the available admissible evidence was not sufficient to establish the elements of the offence (specifically the elements of incitement and threatened violence).[41] The ODPP's summary of reasons for decisions in these 11 matters indicates that:

- a lack of evidence regarding threatened violence may have been an issue in 5 of the 11 matters,
- a lack of evidence of incitement may have been an issue in 9 of the 11 matters, and
- a lack of evidence establishing that the incitement was by a public act was a factor in possibly 6 of the 11 matters.

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[36] Mason, Gail, 'Hate Crime Laws in Australia: Are they Achieving their Goals?' (2009) 33(6) *Criminal Law Journal* 326
[37] ss 28-32
[38] ss 313, 317, 317A, 338B and 444 *Criminal Code Act Compilation Act 1913* (WA)
[39] Tasmania Law Reform Institute (herein '**TLRI**'), *Racial Vilification and Racially Motivated Offences*, Final Report No 14, April 2011, pp58-60
[40] TLRI, note 39 above, p60
[41] Letter from the Solicitor for Public Prosecutions to the Legislation, Policy and Criminal Law Review Division, Department of Attorney General and Justice, 21 January 2013

While removing or relaxing particular elements of s 20D may make the offence easier to prove, it would also potentially expand the degree to which the offence limits freedom of speech. Any expansion of the scope of the offence so as to further limit freedom of speech can only be justified where it is necessary to address harms resulting from racial vilification.[42]

For example, the inclusion of the element of threatened violence in the NSW serious vilification offence is based on a judgment about the level of conduct that should be subject to criminal sanctions. If the Inquiry were to consider changes to this element of the existing offence, it should consider whether the proscribed conduct (taking into account the other elements of the offence) would still be sufficiently serious to warrant criminal sanction.

While modification of some elements of the existing offence might facilitate prosecution, any suggested changes should be measured against the underlying purpose of the offence. Queensland, South Australia, Victoria, the ACT and NZ each have racial vilification offences that are similar to the NSW offence (although modifications have been made in some jurisdictions to some elements of the offence). The Commonwealth, the UK, Canada and Western Australia also have stand-alone offences that criminalise conduct that 'promotes, incites or is motivated by prejudice or group hate'[43]. The model for these offences differs from that in NSW. The arrangements in each jurisdiction are summarised at **Appendix A**.

It is notable that, with some minor exceptions, the racial vilification offences in other jurisdictions are rarely used.[44] There have been some prosecutions in Western Australia and Canada. However, it appears that (at least to 2010) there had never been a successful prosecution of any of the racial vilification offences introduced in NSW, Victoria, Queensland, South Australia or the ACT.[45]

This suggests that adoption of one of the other models adopted in other jurisdictions may be unlikely of itself to improve the effectiveness of the offence. This view is supported by a 2011 inquiry undertaken by the TLRI. After considering the models in other Australian jurisdictions, the TLRI recommended against introducing racial vilification offences given the lack of successful prosecutions in other Australian jurisdiction with similar offences.[46]

Recommendation:

The Inquiry should consider whether s 20D is effective in capturing 'very serious conduct'.

Investigation and enforcement

The effectiveness of racial vilification provisions also depends in part on the degree to which they are enforced, including arrangements for reporting of alleged offences.

[42] See for example the discussion at note 19 above.
[43] Mason, *Hate crime laws in Australia: Are they achieving their goals?*, Paper presented to Sentencing Conference 2010, Canberra 6 & 7 February 2010 <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/Mason.pdf>
[44] No data could be sourced in relation to United Kingdom.
[45] TLRI, note 39 above, p49. See also submission by Gail Mason to the TLRI, 12 August 2010.
[46] TLRI, note 39 above, p40

In NSW the ADA establishes a single entry point for enforcement of both the civil prohibition and the criminal offence of racial vilification. All racial vilification complaints are made to the President of the ADB.[47] The ADB website sets out the process for how to make a complaint of racial vilification.[48]

On receiving a complaint, the President then has 28 days to investigate the complaint and consider whether an offence under s 20D may have been committed.[49] If the President so considers he refers the matter to the Attorney General/DPP.[50] The Attorney General's consent is required before a prosecution may be commenced, although, in practice the power to consent to prosecutions for serious vilification has been delegated to the DPP since 1990.[51]

Prosecution of summary offences (including s 20D) must be commenced within 6 months from the date the offence is alleged to have been committed.[52] However, there are a number of delays built into the prosecution of potential s 20D matters. Firstly, complainants may not lodge complaints promptly after an alleged offence occurs. Secondly, there is a further delay in the period prescribed for the President of the ADB to investigate a vilification complaint and determine whether it should be referred to the DPP (28 days). As a consequence, the DPP may be referred potential serious vilification matters at a point where there may be little time available to prosecute.

Further, the limited time frame for investigation of vilification complaints by the President of the ADB means that such matters may be referred to the ODPP on the basis of relatively limited evidence. Such evidence may be sufficient to determine that a serious vilification offence is likely to have occurred, but may not be a sufficient basis on which the DPP could decide to prosecute.[53] In such circumstances the DPP can request the Police to carry out further investigation.[54] The DPP advises that on at least two occasions matters that indicated the possibility of an offence under s 20D have been referred to the Police for further investigation (but did not produce evidence warranting prosecution under s 20D). Nevertheless, the tight time frames for the prosecution of the offence have the potential to frustrate this potential course of action.

Recommendation:

The Inquiry should consider the effectiveness of current arrangements for investigating and referring potential s 20D matters for prosecution.

Investigation of offence initiated by complaints

The prescribed statutory process relies on potential cases of serious racial vilification being initiated by an alleged victim of the offence. As a result, potential breaches of NSW

[47] s 89A *Anti-Discrimination Act 1977*
[48] See <http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_vilification>
[49] s 91 *Anti-Discrimination Act 1977*
[50] s 91 *Anti-Discrimination Act 1977*
[51] Pursuant to s 11(6) of the *Director of Public Prosecutions Act* 1986 the DPP must advise the Attorney of any decision to commence or not commence a prosecution in relation to a matter so referred.
[52] Section 125 of the ADA provides that proceedings for an offence against the ADA (including the offence of serious racial vilification) are to be dealt with summarily before the Local Court. Section 179 of the *Criminal Procedure Act 1986* (**CPA**) provides that proceedings for a summary offence must be commenced no later than 6 months from when the offence was alleged to have been committed (unless another law specifies another period within which proceedings must be commenced).
[53] Noting that the ODPP is constrained by Director's Prosecution Guidelines
[54] s 18 *Director of Public Prosecutions Act 1986*

racial vilification laws are only enforced if an individual or organisation with standing to make a complaint decides to do so. However there may be many reasons why individual victims of vilification might elect not to make a complaint. Reasons may include language difficulties, fear of reprisals, cultural barriers, lack of understanding of the justice system, or fear that reporting could affect visa status.[55] Perceptions of the value of conciliating vilification complaints and the prospects of a prosecution may also play a part. There may be instances of serious racial vilification that could be prosecuted that are simply not brought to the attention of the President of the ADB and the ODPP.

A significant justification for vilification laws includes that they address potential threats to social cohesion and public order. Arguably, this should not be left to individuals to decide to complain. Rather, where there are serious instances of the offence that has the potential to promote public disorder, the state should be actively involved in enforcing the law and prosecuting alleged offenders.

Positioning of s 20D in anti-discrimination legislation

A further difficulty with the legislative process established by the ADA is that, by placing it in the context of an anti-discrimination law statute, it may entrench a perception that investigation of potential serious racial vilification offences is a matter for the ADB, not the Police.

The ADA does not create any statutory impediment to an instance of potential serious racial vilification being investigated by an agency other than the ADB (for example, the Police), to another person or agency making a direct application to the DPP for consent to prosecute, or to the DPP determining on its own behalf to prosecute.[56] However, in practice all matters are channelled through the ADB complaints process.

This is consistent with Meagher's 2006 evaluation of the NSW racial vilification offence, in which he concluded that the positioning of the serious racial vilification offence in the ADA rather than with other criminal law offences has 'prevented the new offence from taking root in the existing criminal law framework'.[57]

Both the Samios Report and the LRC Report considered that the requirement in the ADA that the Attorney General's consent be obtained before a prosecution is commenced entrenches the difficulty. The Samios Report stated:

> There are serious problems flowing from the Act's requirement that consent be given to launch a criminal case.
>
> First, the "prior consent" rule means that there is some doubt as to whether the police can arrest a suspected offender, without first seeking the necessary consent to prosecute. In practical terms, that doubt must translate into a general unwillingness to arrest when an offence is obviously being committed, for fear that there is no power so to arrest.
>
> Secondly, given the necessity to obtain the consent of the Attorney or the DPP, the police must get the impression that this is one criminal offence which has nothing to do with them. That impression would be heightened by the location of the offence. Section 20D is located, not in the *Summary Offences Act 1988*, but

[55] TLRI, note 39 above, p33.
[56] McNamara, note 29 above, pp140-141.
[57] Meagher, D (2006) 'So far no good: The regulatory failure of criminal racial vilification laws in Australia' *Public Law Review* 209, p213

> in the *Anti-Discrimination Act 1977*. And yet the essence of the offence of serious racial vilification is that there is an imminent threat of violence…[58]

The LRC agreed that the need to obtain the consent of the Attorney General cast some doubt as to whether the Police can arrest without the prior consent of the Attorney General to prosecute.

To remedy this issue, both the Samios Report and the LRC Report recommended removing the offence of serious racial vilification from the ADA and placing it general criminal statute (The Samios Report recommended that the offence be relocated to the *Summary Offences Act 1988*. The LRC recommended that it be placed in the *Crimes Act 1900*) [59].

However, both reports also recommended that the President of the ADB retain a significant role in the prosecution of serious racial vilification, as they considered that there is an important connection between the enforcement of the civil and criminal sanctions against racial vilification. The LRC recommended that the President be empowered to refer a matter to the DPP where he/she is of the view that it may constitute serious vilification. The Samios Report recommended that the President be empowered to either initiate a prosecution or refer a matter to others for prosecution where of the view, on reasonable grounds, that an offence of serious racial vilification may have been committed.[60]

Both reports considered that these measures would increase the flexibility by which potential cases of serious racial vilification could be investigated and prosecuted and by whom, and would increase the likelihood of the offence being prosecuted.

There are a number of jurisdictions in which racial vilification offences are contained within general criminal law legislation. These include Western Australia and the Commonwealth, and overseas, the United Kingdom and Canada. While no data has been located about the number of prosecutions of the UK offences, the Canadian and Western Australian offences have been used to a greater extent than those in other Australian jurisdictions and NZ. (Of course, the fact that these offences have been more often enforced may be due to other factors).

In other jurisdictions, racial vilification laws, while not placed in general criminal statutes, have been separated from discrimination provisions and placed in stand-alone legislation. These include the *Racial and Religious Tolerance Act 2001* in Victoria and the *Racial Vilification Act 1996* in South Australia. This emphasises the distinctness of these prohibitions on vilification (including criminal sanctions) from civil prohibitions on discrimination.

Supporting reporting of racially motivated crime

In some jurisdictions, a much greater emphasis is also placed on reporting of racially motivated offences. In Victoria, Canada and the UK, this is a targeted priority for law enforcement agencies. For example:

- Victoria Police has multicultural liaison officers who are available to support people reporting a racial vilification offence through the process.

[58] Samios Report, note 10 above, p29
[59] LRC Report, note 11 above, Recommendation 96, p553
[60] Samios Report, note 10 above, p30

- Canada has a multi-agency Hate Crime Team to ensure the effective identification, investigation and prosecution of crimes motivated by hate, including Canada's hate propaganda offences.[61]

The UK has a racial and violent crime taskforce alongside a range of institutional measures to combat hate crime.[62]

Non-legislative responses to racial vilification

Legislative responses alone are unlikely to be an effective way to combat racial vilification in NSW or to mitigate the risk of it occurring. Measures such as education, awareness raising, promoting respect and celebrating cultural diversity also have an important role to play. By supporting positive and respectful relationships, non-legislative responses such as these can act to address the causes of racial vilification at a grassroots level.

Recommendation: The Inquiry should consider:

1. **who should be responsible for investigating and referring potential s 20D matters for prosecution,**
2. **whether potential s 20D matters should be able to be investigated without the requirement that a complaint has been made,**
3. **whether the offence of serious racial vilification should be removed from the ADA and relocated in criminal statute of general application or in standalone vilification legislation,**
4. **whether and what measures (including non-legislative measures) could be introduced to increase reporting of serious incidents of racial vilification and other race-related crime in NSW,**
5. **what non-legislative measures could be adopted to combat racial vilification in NSW or mitigate the risk of it occurring.**

[61] Ministry of Attorney General (Canada) (2008), *End Hate Crime: BC Hate Crime Team Roles and Responsibilities* <http://www.ag.gov.bc.ca/prosecution-service/pdf/EndHateCrimes_booklet.pdf>

[62] Moran, L, *Policing and Prosecuting Hate Crime in the UK, Roundtable on Hate Crime and Vilification Law: Developments and Directions,* Institute of Criminology, Faculty of Law, University of Sydney, 28 August 2009 <http://sydney.edu.au/law/crimology/ahcn/docs_pdfs/Hate_Crime_Seminar_Moran_Sydney.ppt>

[62] LRC Report, note 11 above, paragraph 7.65

Appendix A:

Overview of the legislative models in Australia, Canada, New Zealand, and the United Kingdom

Substantive racial vilification offences

Commonwealth

Sections 80.2A and 80.2B of the *Criminal Code Act 1995* (Cth) are offences related to intentionally urging violence against groups or members of groups distinguished by, amongst other things race, nationality, national or ethnic origin.

Australian Capital Territory

The Australian Capital Territory's racial vilification offence is similar to that in NSW insofar as it incorporates notions of an act, that occurs in public, that is threatening (note the concept of inciting others to threaten is absent) and that the act is an incitement.[63] However, the mental elements are quite different, potentially broadening the conduct captured. In particular while the act itself must be intentional, in contrast to NSW, the person need not intend that the act be public or incite. Instead it must be proven that the person was reckless as to whether the act was a public act and about whether the act incites. This suggests less serious conduct would be captured by the offence, as does the lower penalty - the offence is not punishable by imprisonment.

Queensland

The Queensland offence, section 131A of the *Anti-Discrimination Act 1991* (QLD), provides that a person must not by a public act 'knowingly or recklessly' incite hatred. This is in contrast with the accepted, though not yet tested, view that to establish the NSW offence it must be proven that the person intended to incite by their public act.[64] The maximum term of imprisonment is six months, the same as that in NSW. Queensland has higher maximum fines for both individuals and corporations compared to NSW.

South Australia

The South Australian offence, section 4 of the *Racial Vilification Act 1996* (SA), is the same as that in New South Wales, although it has a higher maximum penalty of 3 years imprisonment. The South Australian Office of Crime Statistics and Research has advised that between 2008 and 2011 no charges against the Racial Vilification Act were listed on cases finalised in South Australian Courts.

Victoria

Victoria's *Racial and Religious Tolerance Act 2001* (Vic) contains two separate racial vilification offences. Both differ in substantive ways to the NSW provisions. The first offence, section 24(1) of the Racial and Religious Tolerance Act, provides that a person must *intentionally engage in conduct that the offender knows is likely to* incite hatred towards a group of person and to threaten or incite others to threaten physical harm to or harm to property of that group of persons. Unlike in NSW, this conduct need not be a public act. Instead it must be established that the person's conduct was intentional and

[63] s 67 of the *Discrimination Act 1991* (ACT)

[64] While s 20D of the ADA does not expressly require that the incitement be with intent, the second reading speech for the introduction of the racial vilification legislation in 1989 notes that the criminal provisions require intent to be proved.

that they knew that the *likely effect* of the act would be incitement. As in NSW the means of incitement must be to threaten harm or to incite others to threaten harm.

Section 24(2) of the Racial and Religious Tolerance Act is a second alternative offence that does not include 'harm' as part of its elements. It provides that a person must not, on grounds of race, *intentionally engage in conduct that the offender knows is likely to incite* serious contempt for, or revulsion or severe ridicule of, another person or class of persons of that race. This potentially captures a much wider range of conduct than the NSW offence, as there is no need to establish that the incitement was by means of a threat of harm or inciting others to threaten harm.

The offences first commenced in 2002 and have since been criticised as unacceptably limiting freedom of speech.[65] Between their introduction in 2002 and 2011-12, there have been nine alleged offences under section 24(1) reported to police and 14 alleged offences under section 24(2). Information on prosecution of the offences was not able to be sourced.

The same penalties apply for both offences and are similar to those in NSW. It is noted that this is even though section 24(2) potentially captures less serious conduct as there is no need to prove that the incitement was by means of harm or threatening harm.

Western Australia

Western Australia has a range of offences related to racial harassment and incitement to racial hatred in Chapter XI of the *Criminal Code Compilation Act 1913* (WA). Unlike NSW, Western Australia does not have a civil prohibition on racial vilification.

The offences potentially cover a much wider range of conduct than in any other Australian jurisdiction. A number of the offences include a mental element. These include:

- Conduct intended to incite racial animosity or racial harassment. There is no need prove that the conduct was likely to incite or that the means of incitement was through threat of harm or inciting others to threaten harm.[66]
- Possession of material with intent to publish and intent incite racial animosity or racial harassment.[67]
- Conduct intended to racially harass.[68]
- Possession of material for display with intent to racially harass.[69]

A number of strict liability offences, with lower penalties are also established, including:

- Conduct likely to incite racial animosity or racial harassment.[70]
- Possession of material that is likely to incite racial animosity or racial harassment and with intent to publish. [71]

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[65] See for example, Zwartz, Barney, 'Speaking freely is risky business, rally told', *The Age* (9 August 2006. <http://www.theage.com.au/news/national/speaking-freely-is-risky-business-rally-told/2006/08/08/1154802889839.html>

[66] s 77

[67] s 79

[68] s 80A

[69] s 80C

[70] s 78

[71] s 80

- Conduct likely to racially harass.[72]
- Possession of material for display that is likely to racially harass.[73]

Defences apply to the strict liability offences, including for the performance of an artistic work and genuine academic debate.

In contrast to other Australian jurisdictions, Western Australia uses the concept of conduct 'otherwise than in private'. This is defined under section 80E to be any form of communication with the public or a section of the public or conduct that occurs in a public place or in the sight or hearing of people in a public place.

The penalties that apply are significantly higher than those in NSW and other Australian jurisdictions, for example, the offence relating to conduct intending to incite racial animosity or racist harassment has a maximum penalty of 14 years imprisonment.

Offences related to racist harassment and incitement to racial hatred were first introduced in Western Australian 1990. Meagher notes that the laws 'were specifically drafted to counter the activities of the Australian Nationalists Movement, a neo-Nazi organisation operating in Perth at the time.' The original provisions were repealed and replaced with the current offences in 2004, significantly expanding the range of conduct now considered criminal.[74]

While prosecutions are not common, some have occurred under the Western Australia offence provisions, most recently in relation to a series of statements made by Mr Brendan O'Connell in 2009.[75]

Given the Western Australian offences were developed in a different historical context, it is suggested that they do not provide an appropriate model for NSW.

Other Australian Jurisdictions

The Northern Territory and Tasmania do not have racial vilification offences. A 2011 inquiry by the Tasmania Law Reform Institute (**TLRI**) recommended against introducing racial vilification offences on the basis that given the lack of successful prosecutions in any other Australian jurisdiction with similar offences, such provisions cannot be regarded as an effective means to address racist behaviour. The TLRI concluded that it did 'not believe that any procedural changes to the current models in any of the jurisdictions where serious racial vilifications exist will be sufficient to make this form of provision effective.'[76] Instead, the TRLI recommended the introduction of sentence aggravation provisions, modelled on section 5(2)(daaa) of the Victorian *Sentencing Act 1991*. As of February 2013 no corresponding amendment to the *Sentencing Act 1997* (Tas) has been introduced.

Canada

Canada's 'hate propaganda' offences are set out in sections 318 and 319 of the Canadian Criminal Code. There are three separate offences - advocating genocide, public incitement of hatred and the wilful promotion of hatred against an identifiable group.

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[72] s 80B
[73] s 80D
[74] Meagher, note 57 above, p219
[75] *O'Connell v The State of Western Australia* [2012] WASCA 96
[76] TLRI, note 39 above, paragraph 5.3.18

Consideration of the Canadian offence provisions needs to be undertaken with Canada's constitutional context in mind. In practice, courts have interpreted the provisions with reference to the right to 'freedom of thought, belief, opinion and expression' contained in the Canadian Charter of Human Rights and Freedoms.

In *R v Keegstra*, the Supreme Court of Canada interpreted 'wilfully' to require proof of either an intention to promote racial hatred or 'knowledge of the substantial certainty of such a consequence', thus imposing 'a stringent standard of mens rea'.[77]

The offence of 'wilfully promoting' hatred was made out successfully in the case of R v Harding 45 O.R (3d), [1998].

'Wilfully' is not a widely used mental element in Australian criminal law and consequently, were such a formulation introduced in Australia there could be difficulties in its application in Australian courts.

New Zealand

In New Zealand, the relevant provision is section 131 of the *Human Rights Act 1993* (NZ). Section 131 provides that it is an offence to engage in the following kinds of conduct with intent to excite hostility or ill-will:

- publish or distribute written material or broadcast by means of radio or television words that are threatening, abusive or insulting, with intent to excite hostility or ill-will
- use words in any public place or within hearing of a public place that are threatening, abusive or insulting, with intent to excite hostility or ill-will

Section 131 differs from the NSW racial vilification offence as it does not need to be proven that the actions of the defendant were an incitement or that the means of incitement was threatening harm or inciting others to threaten harm. As in NSW, the act must be a public one, however unlike in NSW the types of acts are exclusively defined.

The term 'excite' is not defined in the Act but it is presumed that it has a similar meaning to 'incite'. As in NSW, it still needs to be shown that the person intended to 'excite' but in addition it must be shown that the words or matter are likely to 'excite'. In other words, the offence is based around the intended and likely effect of the material or words and the way they are communicated rather than their actual effect. The maximum penalty is 3 months or a fine of $7,000 (NZ).

In a 2012 report to the Committee on the Elimination of Racial Discrimination, the New Zealand Government reported that there has been only one prosecution under the section, in 2008. The case did not result in a conviction.

United Kingdom

Racial hatred offences in the United Kingdom are contained within the *Public Order Act 1986* (UK). The Act provides separate offences in relation to words, images or behaviour which are 'threatening, abusive or insulting' for:

- use of words or behaviour or display or written material
- publishing or distributing written material
- public performance of the play

[77] See discussion of *R v Keegstra* [1990] 3 SCR 697 in Australian Human Rights and Equal Opportunity Commission, *An International Comparison of the Racial Discrimination Act 1975: Backgrond Paper 1* (2008) <http://www.humanrights.gov.au/racial_discrimination/publications/int_comparison/0.html>

- distributing, showing or playing a record
- broadcasting or including programme in cable programme service and
- posession of racially inflammatory material.

The United Kingdom is similar to Western Australia in that while for some offences the threshold for establishing the offence is relatively low it is accompanied by defences dealing with freedom of speech considerations such as artistic expression.

Sentencing aggravation factors

Racial vilification offences sit alongside other measures to combat racially motivated crime in some jurisdictions. Both NSW and Victoria have sentencing aggravation factors[78] in addition to the civil and criminal prohibitions on racial vilification.

Sentencing aggravation factors expressly recognise the ability of the judge to impose a more severe punishment where a crime is motivated by hatred or prejudice towards a particular group based on race. The court is required to take sentencing aggravation factors into account in sentencing, though how that factor is taken into account by the court is discretionary.

Canada, New Zealand and Great Britain have similar provisions.[79] The Northern Territory also has sentencing aggravation factors, noting that it does not have civil or criminal prohibitions on racial vilification.[80] In its 2011 inquiry into racial vilification offences, the TLRI recommended the introduction of sentence aggravation provisions in Tasmania, modelled on Victoria's provisions.[81]

Penalty enhancement provisions

Penalty enhancement provisions are another legislative mechanism used to combat racially motivated crime. They impose 'an additional maximum or minimum penalty on specified pre-existing offences if the conduct is motivated or aggravated by racial, religious or other forms of prejudice or hostility'.[82]

The *Crime and Disorder Act 1998* (UK) contains offences of racially aggravated assault, criminal damage, public order and harassment.[83] These provisions are extensions of existing offences that provide that where the underlying offence is 'racially aggravated', higher maximum penalties apply.

Western Australia similarly has aggravated offences where an offence of assault, threat or criminal damage occurs is in 'circumstances of racial motivation'.[84] The TLRI evaluated penalty enhancement provisions as an option. It concluded that, while not suitable for Tasmania's legislative scheme, legal commentators tended to be 'generally positive' about penalty enhancement provisions on the basis that 'they provide an express denunciation of racially motivated crimes by increasing the penalties for such offences needing to draft entirely new laws'.[85]

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[78] s 21A(2)(h) of the *Crimes (Sentencing Procedure) Act 1997 (NSW)* and s 5(2)(daaa) of the *Sentencing Act 1991* (Vic)
[79] Canada: s 718.2 *Criminal Code 1985* (Can); New Zealand: s 9 *Sentencing Act 2000* (NZ); United Kingdom: s 145 *Criminal Justice Act 2003* (UK)
[80] s 6A of the *Sentencing Act* (NT)
[81] TLRI, note 39 above, p45-46
[82] Mason, note 36 above
[83] ss 28-32
[84] ss 313, 317, 317A, 338B and 444 *Criminal Code Act Compilation Act 1913* (WA)
[85] TLRI, note 39 above, pp58-60