

‘A NEGATION OF AUSTRALIA’S FUNDAMENTAL VALUES’: SENTENCING PREJUDICE-MOTIVATED CRIME

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[Since 2003, three Australian jurisdictions — New South Wales, the Northern Territory and Victoria — have codified the common law rule that a motive of prejudice against and/or hatred for a group of people is an aggravating factor at sentencing. In this article, we analyse the courts’ interpretations of these new provisions. In particular, we consider the evidence regarded by the courts as sufficient proof of a motive of prejudice or group hate beyond reasonable doubt and the groups that have been held to be contemplated by these provisions. We argue that while there is much consistency in judicial constructions of the scope of these provisions, enabling the identification of common features to cases where the provisions have been enlivened, some interpretations fail to promote their purpose, raising challenges for this rapidly emerging area of sentencing law.]

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I INTRODUCTION

Statutory provisions concerning offences motivated by prejudice or group hatred are a new feature of sentencing law in Australia. A provision of this nature was first introduced in New South Wales in 2003 following a series of sexual assaults with racial overtones in Sydney's western suburbs. Three years later, the Northern Territory quietly amended its sentencing legislation to include group hatred as an aggravating factor. In 2009, with greater publicity, Victoria enacted similar provisions amidst claims of racial violence against students from India. These reforms give statutory recognition to the common law position that a motive of prejudice or group hatred is an aggravating factor in sentencing. Comparable provisions for racially motivated offences have also been recommended for Tasmania.¹

These sentencing aggravation provisions allow for the more severe punishment of offenders who were motivated by prejudice against or hatred for a group to which the victim belongs or was presumed to belong. Commonly

¹ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, Final Report No 14 (2011) 42.

referred to as ‘hate crime’, typical examples of such offences include fire-bombing a mosque, assaulting a gay couple in public or painting a swastika on a synagogue. Australian research suggests that minority groups — particularly the Jewish, Muslim, Asian, gay, Aboriginal and disabled communities — are the primary victims of hate crime.² Such crime sends a ‘powerful message of intolerance and discrimination’³ that has a ‘general terrorizing effect’⁴ on all members of the target group.⁵ In attacking the security and confidence of entire communities, hate crime also undermines multiculturalism and tears at the fabric of democracy.⁶ In light of the Commonwealth’s new policy concerning multiculturalism, which commits to using ‘the force of the law’ to counter prejudice and discrimination,⁷ it is timely to scrutinise the contribution that state and territory law can make to denouncing and punishing criminal acts of prejudice.

In this article, we analyse the interpretation of sentencing aggravation provisions for prejudice-motivated offences in NSW, Victoria and the Northern Territory. We ask three questions: first, what evidence have the courts

² Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (Hawkins Press, 1997) 3; Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 387–8; Attorney-General’s Department (NSW), *You Shouldn’t Have to Hide to Be Safe: A Report on Homophobic Hostilities and Violence against Gay Men and Lesbians in Australia* (2003) i; NSW Police Service and Price Waterhouse Irwick, *Out of the Blue: A Police Survey of Violence and Harassment against Gay Men and Lesbians* (1995) 1; Holly Johnson, ‘Experiences of Crime in Two Selected Migrant Communities’ (Research Paper No 302, Australian Institute of Criminology, 2005) 4–6 <<http://www.aic.gov.au/documents/D/0/B/%7BD0BC7514-CD03-4965-A41D-ED3046A975D9%7Dtandi302.pdf>>; Stephen Tomsen, ‘Hatred, Murder and Male Honour: Anti-Homosexual Homicides in New South Wales, 1980–2000’ (Research and Public Policy Series No 43, Australian Institute of Criminology, 2002) 17 <<http://www.aic.gov.au/documents/4/4/4/%7b44428E17-E0C9-4833-8070-F59D23ACA0A7%7dRPP43.pdf>>.

³ Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred or Prejudice* (2009) 17 [G.8], quoting NY CLS Pen § 485 (2000).

⁴ Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 1 [A.4], quoting Manitoba Department of Justice, *Guideline No 2:HAT:1 Policy Directive: Hate Motivated Crime* (June 2008) 5 <http://www.gov.mb.ca/justice/prosecutions/policy/pdf/hate_crimes.pdf>.

⁵ See also Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge* (Routledge, 2002).

⁶ Frederick M Lawrence, ‘Enforcing Bias-Crime Laws without Bias: Evaluating the Disproportionate Enforcement Critique’ (2003) 66 *Law and Contemporary Problems* 49.

⁷ Australian Government, *The People of Australia: Australia’s Multicultural Policy* (2011) 5 <http://www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>. See also Australian Human Rights Commission, ‘National Anti-Racism Partnership and Strategy’ (Discussion Paper, 2012).

relied upon to infer a motive of prejudice or group hate beyond reasonable doubt; secondly, what groups have the courts held to be contemplated by these provisions; and, thirdly, are these judicial constructions of the meaning and scope of the provisions consistent with their purposes?

We begin by providing an overview of the provisions. We then consider — with a view to determining the provisions' purposes — why prejudice-motivated offences are considered more serious than comparable crimes that do not share this motive ('parallel crimes'). We find that the imposition of a harsher sentence is principally justified on the grounds that prejudice-motivated crime inflicts greater individual, group and social harm and is accompanied by heightened blameworthiness on the offender's part. Accordingly, we argue that the purpose of the provisions is to allow for the more severe punishment of offenders who knowingly cause harm to target groups that differ from the majority in harmless ways, and who thus breach liberal democratic values of acceptance of and respect for such groups.

We proceed to examine all appeal court decisions and supreme, district and county court sentencing judgments that consider the aggravation provisions. While the latter lack the authority of appeal court decisions, they reveal patterns of interpretation in those courts where criminal cases are most frequently heard. The cases that we analyse provide answers to the questions posed above. As to the evidence that is used to infer that the offence was motivated by prejudice or group hatred, the cases show that the courts largely rely upon evidence of group hostility on the offender's part as well as the *absence* of evidence of an alternative motive for offending. Cases where there is evidence of a pre-existing conflict, multiple motives or 'group selection' raise particular challenges for the courts and, in some instances, have produced judicial constructions of the provisions that are inconsistent with their purposes. As to the groups that have been held to be contemplated, in all cases where the provisions have been enlivened the offender and the victim have come from different social groups. Moreover, our analysis of the cases reveals that while there is agreement that racial minorities fall within the provisions' scope, there is more controversy concerning the application of the provisions to certain other groups — for example, women, gay men, paedophiles and dominant groups such as Christians. We argue that some judicial findings regarding the groups that are contemplated by the provisions have also failed to promote the provisions' purposes.

We conclude the article by highlighting common features to the cases where the provisions have been enlivened — the circumstances that turn an ordinary crime into a prejudice-motivated crime — and identifying the

challenges these judicial constructions raise for this rapidly emerging area of sentencing law.

II OVERVIEW OF STATUTORY SCHEMES ADDRESSING HATE CRIME IN AUSTRALIA

During the last few decades, legislation addressing hate crime has been introduced in most common law countries in response to several forces: minority group pressure; growing political power of the victims' rights movement; and periodic publicity from government inquiries or high-profile cases.⁸ Australia has seen two main waves of reform. First, from the late 1980s onwards, all states and territories, apart from Tasmania and the Northern Territory, created criminal offences of serious vilification, largely within existing anti-discrimination statutes. Built on liberal discourses of equality and opportunity, these provisions convert the civil wrong of vilification against specified groups into a criminal offence where it occurs by threat or incitement of physical harm.⁹ Western Australia is the only jurisdiction to introduce racial vilification offences directly into its Criminal Code.¹⁰ In 2004, Western Australia also introduced penalty enhancement provisions for racially aggravated offences.¹¹ Modelled on the England and Wales *Crime and Disorder Act 1998* (UK) c 37, these impose an enhanced maximum penalty for certain offences aggravated by racial hostility.

The second wave of hate crime reforms commenced in Australia in the early 2000s. It is marked by a preference for amending existing sentencing laws by codifying the common law position that a motive of prejudice against and/or hatred for a group of people is an aggravating factor at sentencing.

In 2003, NSW was the first to amend its *Crimes (Sentencing Procedure) Act 1999* (NSW). This, some have suggested, was a knee-jerk reaction to 'moral

⁸ Chris Ronalds, *Discrimination Law and Practice* (Federation Press, 3rd ed, 2008) 105. See generally Valerie Jenness and Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (Russell Sage Foundation, 2001); James B Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press, 1998); Nathan Hall, *Hate Crime* (Willan Publishing, 2005).

⁹ See, eg, *Anti-Discrimination Act 1977* (NSW) s 20D; *Racial Vilification Act 1996* (SA) s 4; *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) ss 24–5.

¹⁰ *Criminal Code Act Compilation Act 1913* (WA) sch ss 77–80D. It is also arguable that the federal offence of urging inter-group violence could be used to prosecute the encouragement of religious, racial or nationalist attacks: *Criminal Code Act 1995* (Cth) sch ss 80.2A–80.2B.

¹¹ *Criminal Code Act Compilation Act 1913* (WA) sch ss 313, 317–317A, 338B, 444.

panic about the rise of “ethnically” motivated Lebanese gang rape in Sydney.¹² Section 21A(2)(h) states that in determining the appropriate sentence, a court is to take into account that

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability) ...

In the Northern Territory, s 6A(e) of the *Sentencing Act 1995* (NT) came into force in 2006¹³ and states that an offence *may* be aggravated if it ‘was motivated by hate against a group of people’.¹⁴

In 2009, the Victorian legislature explicitly stated that it sought, through sentencing reform, to address public concerns about racial victimisation and crimes against other vulnerable groups.¹⁵ Following recommendations from the Sentencing Advisory Council,¹⁶ s 5(2)(daaa) was inserted into the *Sentencing Act 1991* (Vic).¹⁷ This provides that a court *must* have regard to

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

Two distinctions are worth noting for the purposes of our analysis: only the Victorian provision expressly includes partial motive; and only the NSW provision gives examples of the groups contemplated by the legislature.¹⁸

¹² Simon Bronnitt and James Stellios, ‘Sedition, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror”’ (2006) 30 *Melbourne University Law Review* 923, 948 (citation omitted). See also Kate Warner, ‘Gang Rape in Sydney: Crime, the Media, Politics, Race and Sentencing’ (2004) 37 *Australian and New Zealand Journal of Criminology* 344.

¹³ *Justice Legislation Amendment (Group Criminal Activities) Act 2006* (NT) s 6, inserting *Sentencing Act 1995* (NT) s 6A.

¹⁴ There is nothing in the explanatory material surrounding the reforms that inserted s 6A(e) into the *Sentencing Act 1995* (NT) that explains why the legislature chose to introduce this subsection: see Explanatory Statement, *Justice Legislation Amendment (Group Criminal Activities) Bill 2006* (NT); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 24 August 2006, 2827–8 (Peter Toyne, Attorney-General).

¹⁵ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3357–9 (Rob Hulls, Attorney-General).

¹⁶ Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 1 [A.1].

¹⁷ *Sentencing Amendment Act 2009* (Vic) s 3.

¹⁸ The Victorian Sentencing Advisory Council was of the view that the legislation should not contain either an exhaustive or inclusive list of groups because ‘the courts are best placed to

These provisions codify the common law principle that a prejudiced motive is an aggravating factor to be taken into account by a court when sentencing an offender.¹⁹ They provide a practical and symbolic response to ‘hate crime.’ Unlike serious vilification provisions, which have never been successfully prosecuted due to definitional and procedural barriers,²⁰ the provisions allow courts to punish prejudice-motivated crime whilst protecting judicial discretion: the court is required neither to increase the sentence nor quantify the amount of aggravation. They can be ‘readily used by the courts’ to denounce hate crime and send ‘a strong message that reaffirms social values of tolerance and respect’ for minorities.²¹ Comparable laws operate in Canada, New Zealand and England and Wales.²²

III PURPOSES OF AND THEORETICAL JUSTIFICATIONS FOR THE PROVISIONS

The purposes of sentencing aggravation provisions for prejudice-motivated crime must be examined in light of *why* it is that an offence that has been motivated by group prejudice aggravates an offender’s criminality. Most of the

identify and develop the groups to which the aggravating factors should apply on a case by case basis’: Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 12 [E.4].

¹⁹ See, eg, *DPP (Vic) v Caratozzolo* [2009] VSC 305 (29 July 2009) [14]–[16] (Harper J) (decided before the introduction of s 5(2)(daaa) of the *Sentencing Act 1991* (Vic)); *R v O J S* [2009] VSC 265 (30 June 2009) [35] (Kaye J) (decided before the introduction of s 5(2)(daaa) of the *Sentencing Act 1991* (Vic)); *R v Palmer* (Unreported, Victorian Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996); *Grivell v The Queen* (2008) 184 A Crim R 375, 383 [39] (Martin CJ) (decided after the introduction of s 6A(e) of the *Sentencing Act 1995* (NT), but that provision is not referred to in the judgment and does not appear to have been considered by the Court); *R v Crossman* [2011] 2 Qd R 435, 453 [69], 455 [83] (Chesterman JA); *R v Irving* [2004] QCA 305 (20 August 2004); *R v Hanlon* [2003] QCA 75 (28 February 2003) [24] (McMurdo P); Transcript of Proceedings (Sentence), *R v Bigwood* (Supreme Court of Tasmania, Evans J, 31 May 2010).

²⁰ Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002) 304–5. See also Dan Meagher, ‘So Far No Good: The Regulatory Failure of Criminal Racial Vilification Laws in Australia’ (2006) 17 *Public Law Review* 209. Western Australia has recently seen the first conviction under its distinct racial incitement provisions: see *O’Connell v Western Australia* [2012] WASCA 96 (4 May 2012) (dismissing appeals against conviction and sentence).

²¹ Tasmania Law Reform Institute, *Racially Motivated Offences (Final Report)*, above n 1, 43. It is worth noting that confining the question of hateful motive to sentencing means that it will not necessarily be considered by the finder of fact in determining guilt.

²² *Criminal Code*, RSC 1985, c C-42, s 718.2(a)(i); *Sentencing Act 2002* (NZ) s 9(1)(h); *Criminal Justice Act 2003* (UK) c 44, ss 145–6, sch 21 item 5.

justifications that have been advanced for treating a prejudiced motive as an aggravating factor at sentencing are based on the ‘just deserts’ principle that a sentence should be proportionate to the seriousness of the crime. In essence, it is said that prejudice-motivated offences cause greater harm — to individual victims, to the ‘targeted group’ and to society’s fundamental values — than similar offences that are not motivated by prejudice, and that prejudice-motivated offenders’ moral culpability is greater than that of similar offenders who lack a prejudiced motive.²³

A Harm to Individual Victims

It has been argued that, ‘there is a solid base of empirical evidence that shows that hate crimes are more violent and cause more harm to their victims than other victims in general.’²⁴ In our view, this is not a persuasive argument for treating a prejudiced motivation as an aggravating factor at sentencing. Assuming that ‘hate crimes’ do involve the infliction of greater *physical* violence (which seems questionable),²⁵ the law already provides a means by which such offenders may be punished more severely: such an offender may be charged with a more serious assault offence, and thus be exposed to a higher maximum penalty, than an offender who inflicts less physical harm on his or her victim.²⁶ Assuming that hate crime victims do suffer more *emotional and/or psychological* harm than other victims (which might be the case),²⁷ the law also adequately deals with this. For example, in the three Australian jurisdictions that have codified the aggravating factor, sentencing courts must

²³ See Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 16 G.2–G.5.

²⁴ Mark Walters, ‘Hate Crimes in Australia: Introducing Punishment Enhancers’ (2005) 29 *Criminal Law Journal* 201, 208. See also Mark Walters, ‘Changing the Criminal Law to Combat Racially Motivated Violence’ (2006) 8 *University of Technology Sydney Law Review* 66, 67; Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences*, (Issues Paper No 16, June 2010) 21–2; Office for Democratic Institutions and Human Rights, Organisation for Security and Cooperation in Europe, *Preventing and Responding to Hate Crimes: A Resource Guide for NGOs in the OSCE Region* (2009) 17–18; Mia Dauvergne, Katie Scrim and Shannon Brennan, *Canadian Centre for Justice Statistics Profile Series: Hate Crime in Canada* (Statistics Canada, 2006) 6.

²⁵ Paul Iganski, *‘Hate Crime’ and the City* (Policy Press, 2008) ch 4. See also John Ip, ‘Debating New Zealand’s Hate Crime Legislation: Theory and Practice’ (2005) 21 *New Zealand Universities Law Review* 575, 593 and the sources cited therein.

²⁶ As noted by Ip, above n 25, 593.

²⁷ Iganski, above n 25, 10–13, 78–83; Dauvergne, Scrim and Brennan, above n 24, 6.

consider the harm done by the offender to the victim.²⁸ Nevertheless, in his second reading speech for the Sentencing Amendment Bill 2009 (Vic), which inserted s 5(2)(daaa) into the *Sentencing Act 1991* (Vic), the then Victorian Attorney-General stated that one of the 'serious, significant and far-reaching harms' caused by hate crime was to 'the individuals who are victimised.'²⁹ Accordingly, it must be accepted that one of the justifications for at least s 5(2)(daaa) is the allegedly greater harm that prejudice-motivated crime inflicts on individual victims.

*B Harm to Group of Which Victim Is a Member,
or Is Presumed to Be a Member*

Hate crime has been said to have 'far-reaching implications' not only for the individual victim but for the 'social group [against whom the offender is prejudiced] as a whole.'³⁰ That is, hate crime 'makes all members of the target group feel vulnerable to victimization and thereby has a general terrorizing effect on the entire group to which the victim belongs.'³¹ This is a better justification for the rule that a prejudiced motive will aggravate an offender's criminality. However, it appears to us that whether the vulnerability felt by a group justifies the imposition of a heavier sentence depends on which group has been caused to feel fearful. For example, the feelings of vulnerability experienced by homosexual people as a result of homophobic offences certainly justify courts treating such offenders' prejudiced motivations as an aggravating circumstance. But, to use another example, what if a Holocaust denier is assaulted because of the assailant's hatred for Holocaust deniers? Although such a crime might make all Holocaust deniers feel vulnerable, this provides no justification for holding that the offender's criminality is aggravated. We discuss why this is so under the next heading.

²⁸ See *Sentencing Act 1991* (Vic) ss 5(2AC)(daa), 5(2)(db); *Sentencing Act 1995* (NT) s 5(2)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(g).

²⁹ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3358 (Rob Hulls).

³⁰ Walters, 'Hate Crimes in Australia', above n 24, 210. See also Office for Democratic Institutions and Human Rights, Organisation for Security and Cooperation in Europe, *Preventing and Responding to Hate Crimes*, above n 24, 18; Dauvergne, Scrim and Brennan, above n 24, 16; Kate Warner, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 385, 389.

³¹ Manitoba Department of Justice, above n 4, quoted in Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 1 [A.4].

C Hate Crime Undermines Fundamental Values

Another justification that has been advanced for the rule that a prejudiced motive for an offence is an aggravating factor at sentencing is that ‘racial violence and other hate crimes negate the fundamental values of tolerance, respect and equality which a multicultural society such as Australia aims to foster.’³² This point has also been made by various courts. For example, in *Director of Public Prosecutions (Vic) v Caratozzolo*, Harper J, when sentencing an offender who had been convicted of, among other offences, the robbery of a man of Indian descent whom the offender had targeted because of the victim’s ethnic background, stated:

Perhaps most serious of all, in a multicultural society like Australia, which celebrates diversity and encourages all groups to live together in harmony and equality, crime based upon racism is a negation of Australia’s fundamental values.³³

It seems to us that underlying this reasoning is a philosophical principle that has been accepted by liberal democratic states such as Australia. This is that individuals should be free to behave as they wish provided that this causes no harm to other people. It is because of liberal democratic states’ acceptance of this principle — or, to adapt Harper J’s words, their celebration of diversity³⁴ — that they consider a crime that is motivated by hatred for or prejudice against harmless groups to breach the state’s ‘fundamental values.’ To return to the examples that we used under the previous heading, this explains why the fear felt by Holocaust deniers because of crime motivated by

³² Warner, ‘Sentencing Review’, above n 30, 389.

³³ [2009] VSC 305 (29 July 2009) [15]. The offender also swore at the victim in Hindi, having earlier gone to the trouble of learning how to do this: at [14]. See also *Holloway v The Queen* [2011] NSWCCA 23 (28 February 2011) [32], where Hall J (James and Price JJ agreeing) said:

The violence offences, on the sentencing judge’s findings, were not only vicious assaults, but they were also racially motivated. 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 ...

R v Hanlon [2003] QCA 75 (28 February 2003) [24], where McMurdo P (Jerrard JA and Cullinane J agreeing) said:

During the second half of the 20th century, Australia developed into an homogenous society based on racial and religious tolerance of which we are now justly proud ... The appellant’s actions were a calculated attempt to cause division and confusion in our community at a time when reflective calm, not hysterical violence, was needed. A salutary deterrent sentence was required.

³⁴ *DPP (Vic) v Caratozzolo* [2009] VSC 305 (29 July 2009) [15].

hatred for this group does not justify regarding the offender's hateful motive as aggravating their offence. That is, offences motivated by hatred for Holocaust deniers — unlike offences motivated by hatred for homosexuals — are committed against a group that the liberal democratic state regards as being harmful.³⁵ Consequently, such crimes do not breach fundamental values.

Some scholars argue that before a crime may properly be regarded as being aggravated because it is motivated by hatred for a group, the group must be one that has suffered a history of oppression.³⁶ Certainly, hate crime laws were introduced in the United States partly in response to lobbying from historically oppressed groups and with the purpose of addressing the discrimination which these groups face.³⁷ This is true also of the Australian provisions: for instance, the Explanatory Memorandum for the Sentencing Amendment Bill 2009 (Vic) provides that

the amendment is particularly intended to promote protection of groups of people with common characteristics such as groups characterised by religious affiliation, racial or cultural origin, sexual orientation, sex, gender identity, age, impairment (within the meaning of the *Equal Opportunity Act 1995*) or homelessness ...³⁸

Therefore, it is clear that the groups *primarily* contemplated by s 5(2)(daaa) are groups with a history of oppression. But surely the reason why the liberal democratic state has considered these groups to be worthy of protection is that they have been persecuted though they differ from the majority only in *harmless* ways. If this is so, harmless groups that lack such a history of oppression should also be held to be contemplated by the provisions.³⁹

³⁵ See *Jones v Toben* (2009) 255 ALR 238, where Lander J said (of material published by the respondent, which conveyed a number of anti-Semitic imputations including that 'there is serious doubt that the Holocaust occurred': at 240 [5]) 'the freedom of speech citizens of this country enjoy does not include the freedom to publish material calculated to offend, insult or humiliate or intimidate people because of their race, colour or racial or ethnic origin': at 288 [300].

³⁶ Frederick M Lawrence, *Punishing Hate: Bias Crimes under American Law* (Harvard University Press, 1999) 11–13. See also Jenness and Grattet, above n 8, 122; Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (Routledge, 2001) 10.

³⁷ Jenness and Grattet, above n 8, 19–32.

³⁸ Explanatory Memorandum, Sentencing Amendment Bill 2009 (Vic) cl 3.

³⁹ See Jon Garland, "'It's a Mosher Just Been Banged for No Reason": Assessing Targeted Violence against Goths and the Parameters of Hate Crime' (2010) 17 *International Review of Victimology* 159.

In our opinion, then, a major justification for the provisions is that prejudice-motivated crime is an affront to the fundamental liberal democratic value of acceptance of and respect for harmless groups, especially those groups that have experienced historical oppression.

D *Increased Culpability*

It has also been argued that a prejudice-motivated offender is more culpable than a comparable offender who lacks this motive.⁴⁰ Von Hirsch notes that:

Culpability refers to the factors of intent, motive and circumstances that bear on the actor's blameworthiness — for example, whether the act was done with knowledge of its consequences or only in negligent disregard of them, or whether, and to what extent, the actor's criminal conduct was provoked by the victim's own misconduct.⁴¹

Accordingly, there are two reasons why a motive of prejudice or hatred increases an offender's culpability. First, this motive is considered to be an *inherently* reprehensible one. As Spigelman CJ noted in *R v Swan*, at sentencing, '[m]otive is always a relevant factor.'⁴² In so doing, his Honour implied — as von Hirsch implies in the above passage — that a blameworthy motive will increase, and a more understandable motive will reduce, an offender's moral culpability. That a motive of prejudice is regarded as a blameworthy motive, again, has seemingly much to do with the liberal philosophy underlying the Australian legal system. That is, the law considers a prejudiced motive to be a more culpable motive at least partly because the prejudice-motivated offender denies what liberal democratic states hold to be fundamental, namely, that individuals should be free to differ harmlessly from one another. Secondly, the prejudice-motivated offender is considered to be more culpable than a 'parallel offender' because he or she knowingly causes harmful consequences. That is, the offender intentionally — or at least recklessly — causes the victim and the group of which the victim is a member to feel fearful and intentionally undermines society's core value of acceptance of those who are harmlessly non-conformist.

⁴⁰ Warner, 'Sentencing Review', above n 30, 385, 391.

⁴¹ Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74 *Journal of Criminal Law and Criminology* 209, 214. See also Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Rutgers University Press, 1985) 64–5.

⁴² [2006] NSWCCA 47 (6 March 2006) [61].

E Conclusion

It follows that the main justifications for ss 5(2)(daaa), 21A(2)(h) and 6A(e)⁴³ are that prejudice-motivated crime oppresses and intimidates harmless people and groups, and by so doing breaches the fundamental liberal democratic value of respect for such groups. Further, the perpetrators of such crime are — because of their reprehensible motive and the harm that they intentionally or recklessly cause — more culpable than similar offenders who lack this motive.

That these are the main justifications for these provisions is reinforced by the then Victorian Attorney-General's second reading speech for the Sentencing Amendment Bill 2009 (Vic).⁴⁴ The Attorney repeated the Explanatory Memorandum's statement that the amendment is 'particularly intended to promote protection of groups of people'⁴⁵ that have suffered a history of oppression. Nevertheless, the use of the word 'particularly' in both the Attorney's speech and the Explanatory Memorandum indicates that other harmless groups are also contemplated by s 5(2)(daaa). There is very little extrinsic material in which the justification for either the NSW or Northern Territory provisions is explained,⁴⁶ but it is likely that these provisions have the same rationale as that identified by the Victorian Attorney-General.

If these are the main justifications for the provisions, their purpose — consistently with the aims of sentencing in NSW, Victoria and the Northern Territory⁴⁷ — must be to allow for more severe punishment of offenders who knowingly cause harm to individuals and target groups and breach fundamental liberal values of acceptance of harmless difference. Such punishment enables sentencing judges, through the sentences they impose, to denounce,⁴⁸

⁴³ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

⁴⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 2009, 3358–9 (Rob Hulls).

⁴⁵ *Ibid* 3358.

⁴⁶ See Gail Mason, 'Hate Crime Laws in Australia: Are They Achieving Their Goals?' (2009) 33 *Criminal Law Journal* 326, 334, 337.

⁴⁷ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (NT) s 5(1).

⁴⁸ *Sentencing Act 1991* (Vic) s 5(1)(d); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f); *Sentencing Act 1995* (NT) s 5(1)(d). Section 5(1)(d) of the *Sentencing Act 1995* (NT) also refers to the need to convey the community's disapproval to the offender. Warner argues that an aggravated sentence may publicly 'denounce and condemn' prejudice as conduct that violates core social values and standards of behaviour: Warner, 'Sentencing Review', above n 30, 392.

deter,⁴⁹ adequately punish,⁵⁰ and recognise the harm done to the victim and the community⁵¹ by such crime. Considering that in each of these jurisdictions, a construction of legislation that promotes the legislation's purpose is to be preferred to one that does not,⁵² we must keep these purposes in mind when assessing whether the courts have been correct in their constructions of the meaning and scope of the provisions. Such an assessment requires us to consider two key requirements of the provisions. First, there must be an offender who is motivated by prejudice or hatred. Secondly, such prejudice or hatred must be against a group of people to which the victim belongs or is presumed to belong. Below we consider the kinds of evidence the courts have relied upon to infer a motive of prejudice or hatred, and the groups that have been held to be contemplated by the provisions.

IV WHAT EVIDENCE HAVE THE COURTS RELIED UPON TO INFER A MOTIVE OF PREJUDICE OR GROUP HATRED?

Ascertaining a motive requires an assessment of *why* an offender acted as he or she did. This inquiry into the attitudes, feelings or desires that caused an offender to commit an offence is beset with difficulties of proof.⁵³ This is not helped by the absence of definitions of prejudice or hatred for the purposes of ss 5(2)(daaa), 21A(2)(h) and 6A(e).⁵⁴ In some cases, the Crown has been able

⁴⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1991* (Vic) s 5(1)(d); *Sentencing Act 1995* (NT) s 5(1)(c). Of course, it may be doubted whether sentences of imprisonment do achieve general, or especially specific, deterrence: see Sentencing Advisory Council (Vic), *Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence* (2011) 14, 17, 22. Research suggests that there is 'no evidence that increases in the length of imprisonment has any short or long-run impact on crime rates': see Wai-Yin Wan et al, 'The Effect of Arrest and Imprisonment on Crime' (2012) 158 *NSW Bureau of Crime Statistics and Research Crime and Justice Bulletin* 1, 1. Nevertheless, for as long as deterrence remains an aim of sentencing in each of these jurisdictions, it must be said that the purpose of ss 5(2)(daaa), 21A(2)(h) and 6A(e) is to — among other things — enable judges to impose sentences that aim to deter crime that is motivated by prejudice against or hatred for harmless groups.

⁵⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act 1991* (Vic) s 5(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a).

⁵¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g).

⁵² *Interpretation Act 1987* (NSW) s 33; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1978* (NT) s 62A.

⁵³ Elizabeth Burney and Gerry Rose, 'Racist Offences: How Is the Law Responding?' (Research Study No 244, Home Office, July 2002) 94; Tasmania Law Reform Institute, *Racially Motivated Offences (Final Report)*, above n 1, 61.

⁵⁴ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT). By way of comparison, in *R v Keegstra* [1990] 3 SCR 697, 777, Dickson CJ (for

successfully to rely upon direct admissions by the offender that they committed the offence out of hatred for a particular group.⁵⁵ In most cases, however, it has been necessary to infer motive from evidence of group hostility on the offender's part.

A Evidence of Group Hostility

1 Derogatory and Hostile Statements about the Victim's Group

As at common law,⁵⁶ courts applying these statutory provisions have consistently inferred a prejudiced motive from evidence of derogatory or hostile statements by the offender about the victim's group immediately before, during or after the commission of the offence, provided that there is no evidence of another motive. For instance, s 21A(2)(h) was enlivened in *Holloway v The Queen* where the victims, who were seemingly of African heritage, were followed and physically assaulted by the offenders.⁵⁷ The offenders engaged in verbal abuse of the victims from the beginning of the incident, calling them 'fucking black cunt[s]', 'black bastard[s]' and telling them to 'go home'.⁵⁸ Similarly, in *Hussein v The Queen*, the Crown presented evidence that the offenders made racist remarks to two Indian men outside a shop and returned five minutes later to viciously assault eight people, during the course of which they made racial insults, including '[b]loody Indians. Fuck off.'⁵⁹ The Victorian Court of Appeal accepted that the violence was

Dickson CJ, Wilson, L'Heureux-Dubé and Gonthier JJ) defined hatred as connoting 'emotion of an intense and extreme nature,' and as implying that members of the specified group are to be 'despised, scorned, denied respect and made subject to ill-treatment'. See also Myron Claridge, 'The Criminal Code and Hate: A Criminal Law Approach to Combating Hate' [2006] (Spring) *Canadian Issues* 93, 95.

⁵⁵ *Dunn v The Queen* [2007] NSWCCA 312 (13 November 2007) [12]–[17] (Hoeben J). See also *Grivell v The Queen* (2008) 184 A Crim R 375, 380 [20] (Martin CJ) (where Mackley admitted his racial motivation to a psychologist).

⁵⁶ See, eg, *R v Palmer* (Unreported, Victorian Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996); *DPP (Vic) v Caratozzolo* [2009] VSC 305 (29 July 2009) [12], [14] (Harper J); *R v Irving* [2004] QCA 305 (20 August 2004). At common law, evidence of statements by the offender on MySpace have also been held to be relevant: Transcript of Proceedings (Sentence), *R v Bigwood* (Supreme Court of Tasmania, Evans J, 31 May 2010).

⁵⁷ [2011] NSWCCA 23 (28 February 2011).

⁵⁸ *Ibid* [11] (Hall J).

⁵⁹ [2010] VSCA 257 (4 October 2010) [6] (Buchanan JA).

caused by anti-Indian feeling⁶⁰ and that the offence was a ‘violent, racially motivated, terrifying attack.’⁶¹

In other cases, disparaging and hostile remarks made to the victim or other witnesses hours before the offence have been relied upon to support a finding that the offences were motivated by prejudice.⁶² In *R v Al-Shawany*, statements by the offender immediately after the offence *and* statements made at an unspecified time before the offence meant that ‘the strongest inference, and indeed ... the only inference’⁶³ was that the offender’s sexual assault of the victim was motivated by his anti-Christian sentiment.⁶⁴

2 *Serious Violent Conduct and Psychological Evidence*

In circumstances of severe violence, some courts have been prepared to infer a motive of prejudice or group hate without evidence of derogatory or hostile statements by the offender. In *R v ID*, multiple and prolonged acts of aggravated sexual assault, and psychological evidence that the offenders had a deep-seated prejudice against women, was enough to satisfy Nicholson DCJ that the offences were motivated by gender prejudice.⁶⁵

In *R v Doody*,⁶⁶ however, the Supreme Court of the Northern Territory seemingly relied upon neither statements by the offenders nor psychological reports. In this case, five intoxicated male offenders deliberately harassed and intimidated a group of Aboriginal people sleeping in a riverbed outside Alice Springs. One victim who attempted to retaliate was severely assaulted and consequently died from a burst aneurysm.⁶⁷ All five offenders were convicted of manslaughter. In the absence of any other possible motive, Martin CJ was satisfied that underlying the offenders’ violent conduct was a ‘negative attitude to, and a complete lack of respect for, those camped in the riverbed because

⁶⁰ Ibid [6], [8].

⁶¹ Ibid [19].

⁶² *R v Al Mostafa* [2007] NSWDC 219 (24 August 2007) [11], [16] (Cogswell DCJ).

⁶³ [2007] NSWDC 141 (15 June 2007) [112] (Knox DCJ).

⁶⁴ Ibid [111]–[114], [124].

⁶⁵ [2007] NSWDC 51 (1 June 2007) [128], [157]. Unlike in cases such as *Dunn v The Queen* [2007] NSWCCA 312 (13 November 2007) and *Grivell v The Queen* (2008) 184 A Crim R 375, this psychological evidence did not contain a direct confession by the offenders of their motive for offending.

⁶⁶ Transcript of Proceedings (Sentence), *R v Doody* (Supreme Court of the Northern Territory, 20925481, Martin CJ, 23 April 2010).

⁶⁷ Ibid [41].

they were Aboriginal people.⁶⁸ The Chief Justice stated that this ‘atmosphere’ of racial ‘antagonism’ was a ‘significant [feature]’ relevant to the sentencing discretion.⁶⁹ In arriving at this conclusion, his Honour was certain that the offenders would not have behaved in the same way towards white people.⁷⁰

3 ‘Typical’ Hate Crimes

The above cases share many features of ‘typical’ hate crime: random and unprovoked attacks by multiple offenders who are strangers to the victim and who use violence to express their contempt, disrespect or resentment towards a group of people, usually a minority group.⁷¹ We have argued above that the strongest justifications for enabling courts to increase sentences in such circumstances is that the offender knowingly causes harm to the victim and target group and undermines liberal values of acceptance and respect for harmless diversity. Such attacks send a message of intolerance and animosity towards marginalised communities who, through no fault of their own, are already subject to social exclusion and inequality. As this is not a harm we find in parallel crimes, the imposition of a harsher sentence recognises and denounces the higher degree of social injury and culpability associated with such crimes.

B *The Absence of an Alternative Motive*

The above cases also share a feature that is not immediately apparent from individual sentencing decisions: the absence of cogent evidence from which another non-prejudiced motive can be inferred. This is made clear when these cases are compared to cases where there was verbal or other evidence of the offender’s group hostility yet the Crown was unsuccessful in proving a prejudiced motive beyond reasonable doubt.⁷² In these latter cases there was

⁶⁸ Ibid [18].

⁶⁹ Ibid [119]. The Chief Justice made no reference to the *Sentencing Act 1995* (NT) in his sentencing remarks and did not specify the degree of aggravation or whether he increased the defendants’ sentences because of their prejudiced motivation.

⁷⁰ Transcript of Proceedings (Sentence), *R v Doody* (Supreme Court of the Northern Territory, 20925481, 23 April 2010) [18].

⁷¹ Phyllis B Gerstenfeld, *Hate Crimes: Causes, Controls, and Controversies* (Sage Publications, 2004) 72. Cf Gail Mason, ‘Hate Crime and the Image of the Stranger’ (2005) 45 *British Journal of Criminology* 837.

⁷² See, eg, *R v Winefield* [2011] NSWSC 337 (20 April 2011) [26]–[28] (Fullerton J); *R v Robinson* [2007] NSWDC 344 (11 December 2007) [25]–[26] (Nicholson DCJ); *R v Thomas*

evidence from which an alternative motive could be inferred. Such evidence presents a challenge for sentencing courts concerning the degree to which an offence must be motivated by hate or prejudice to activate the provisions. While there has been some consistency in judicial interpretations where the expression of prejudice was clearly incidental to the offender's primary motive, this cannot be said of cases where the offender was partially motivated by prejudice or selected the victim because of his or her membership of a group.

C Problems Posed by Multiple Motives

1 Incidental Prejudice: Statements Made during Pre-Existing Conflict

Evidence that the offender made derogatory and hostile statements about the victim's group has been insufficient to enliven the provisions where the statements have been made in the context of a pre-existing conflict about an unrelated matter. In *R v Winefield*, for example, it appears that the initial confrontation between Winefield and the victim was not racially motivated but was instead caused by Winefield reversing out of his driveway and nearly colliding with the victim.⁷³ An altercation ensued, during which the victim was fatally wounded by Winefield. As he left the scene, Winefield said to the victim and the victim's friends: 'I got you, you black c--s'.⁷⁴ At sentencing, Fullerton J described Winefield's comments as 'racial taunts' made 'in a boastful and belligerent way when the fight was over'⁷⁵ but she was not satisfied that Winefield knew when he got out of his car, and flicked open a knife, that the victim was Aboriginal.⁷⁶ Her Honour stated: '[b]ecause I am left in doubt as to whether the use of the knife thereafter was racially motivated, despite some suspicions that I have that it might be the case, the aggravating factor in s 21A(2)(h) ... is not enlivened.'⁷⁷

In *R v Robinson*, the offenders made anti-Russian and ridiculing remarks to a security guard after a conflict had begun over entry into a hotel. The Court drew a distinction between an offence that is 'motivated' by racism and

[2007] NSWDC 69 (30 March 2007) [40] (Nicholson DC); *DPP (Vic) v RSP* [2010] VSC 128 (31 March 2010) [21] (Curtain J).

⁷³ [2011] NSWSC 337 (20 April 2011).

⁷⁴ *Ibid* [13] (Fullerton J).

⁷⁵ *Ibid* [26].

⁷⁶ *Ibid* [28].

⁷⁷ *Ibid*.

one where remarks ‘based on racism’ are uttered during the course of the offence, seemingly placing the offence into the latter category.⁷⁸ Similarly, in *Director of Public Prosecutions (Vic) v RSP*, the accused became aggressive after being bumped while dancing at a party with male Indian students.⁷⁹ Although he racially abused the other partygoers, the Court held that his later assaults were ‘motivated by ... alcohol consumption and poor anger management’ rather than racism.⁸⁰

A key difference between these cases and those where the provisions have been enlivened, such as *Holloway v The Queen*⁸¹ or *Hussein v The Queen*,⁸² is they all contain evidence of a pre-existing conflict over an unrelated matter, thus suggesting that the verbal insults are being used to express ‘anger or other emotion in an impulsive manner’⁸³ and do not amount to cogent evidence of the offender’s motivation. Seemingly, the existence of this evidence enables the courts to infer that prejudice is incidental or ancillary to the offender’s ‘real’ motive (even if in some cases they may be suspicious that it inflamed the offender’s conduct).⁸⁴

This raises the question of whether the expression of prejudice during a pre-existing conflict over an unrelated matter *should* be sufficient to activate the provisions. In discussing similar Canadian sentencing aggravation provisions, Roberts and Hastings argue that the true harm of hate crime stems not from the offender’s motive or mental state — the subtleties of sole or partial motive are said to be lost on most victims — but rather from the additional injury to the victim’s dignity and the secondary victimisation of the

⁷⁸ [2007] NSWDC 344 (11 December 2007) [26] (Nicholson DCJ).

⁷⁹ [2010] VSC 128 (31 March 2010).

⁸⁰ *Ibid* [21] (Curtain J).

⁸¹ [2011] NSWCCA 23 (28 February 2011).

⁸² [2010] VSCA 257 (4 October 2010).

⁸³ Nickie Phillips, ‘The Prosecution of Hate Crime: The Limitations of Hate Crime Typology’, (2009) 24 *Journal of Interpersonal Violence* 883, 902. See also Burney and Rose, above n 53, 14, 93.

⁸⁴ It may be that the racial slurs in these cases are also less sustained than in the ‘typical’ cases, thus making it difficult to infer motive from them. For instance, in *R v Lee* [2010] NSWSC 632 (18 June 2010), in circumstances where there was no evidence that the initial conflict concerned race, the offender’s inquiry ‘are you Korean?’ of the victim’s group immediately before the offence was not enough to enliven s 21A(2)(h): at [20]–[22] (Price J). By contrast, in *R v Dean-Willcocks* [2012] NSWSC 107 (24 February 2012), the provisions were enlivened upon evidence of the ‘persistent use ... of racially directed comments’ in circumstances where there was no pre-existing conflict between the offender and victim: at [73] (Garling J).

community that flows from being subject to hateful comments.⁸⁵ In the UK, this partly explains why the ‘demonstration’ of group hostility immediately before, during or after the commission of an offence — for example, racist language used in the course of a robbery — is normally sufficient to activate penalty enhancement provisions.⁸⁶

We do not question that such ‘hate speech’ is insulting and hurtful and ‘exacerbates the impact of the crime on the victim.’⁸⁷ However, international research suggests that where statements of prejudice are made in ‘the context of an already existing interpersonal confrontation’⁸⁸ they are generally made without any deliberate intention to be racially offensive.⁸⁹ While it is justifiable to impose an additional penalty upon an offender who intentionally or recklessly (not just negligently) intimidates, belittles and injures harmless groups, it is far more difficult to justify the imposition of a harsher penalty for an impulsive remark that is incidental to the offence. To aggravate the offender’s sentence for such ‘hate speech’ would be inconsistent with the provisions’ purpose, which is to punish offenders more severely for *knowingly* causing harm to the victim and target group and undermining values of respect and equality that are crucial to social cohesion in a multicultural democracy. These cases make it clear that the courts are not prepared to activate sentencing aggravation provisions in cases where offenders express ancillary prejudice in the context of a pre-existing conflict.

⁸⁵ Julian V Roberts and Andrew J A Hastings, ‘Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the *Criminal Code*’ (2001) 27 *Queen’s Law Journal* 93, 103–6.

⁸⁶ *Crime and Disorder Act 1998* (UK) c 7, ss 28–33; Burney and Rose, above n 53, 114. See, eg, *R v Londesbrough* [2005] EWCA Crim 151 (24 January 2005); *R v Alexander* [2004] EWCA Crim 3398 (20 December 2004). While these penalty enhancement provisions also apply to offences where the offender was motivated by racial or religious hostility, the difficulty of finding admissible evidence to prove motive means that the vast majority of UK prosecutions proceed under the much wider ‘demonstration’ test. As a consequence, official recording, prosecution and conviction rates for racially or religiously aggravated offences in the UK far outstrip rates for comparable offences throughout Europe and the US, raising questions about the over-regulation and criminalisation of expression during the commission of an offence: Office for Democratic Institutions and Human Rights, Organisation for Security and Cooperation in Europe, *Hate Crimes in the OSCE Region — Incidents and Responses: Annual Report for 2009* (November 2010) 24–6; Bill Dixon and David Gadd, ‘Getting the Message? “New” Labour and the Criminalisation of “Hate”’ (2006) 6 *Criminology and Criminal Justice* 309.

⁸⁷ Warner, ‘Sentencing Review’, above n 30, 391.

⁸⁸ Phillips, above n 83, 895.

⁸⁹ Burney and Rose, above n 53, 20, 94, 113.

2 Partial Motivation

There is an important difference between cases where prejudice is incidental to the offender's motive and cases where prejudice is not the sole motive but, nonetheless, is a partial motive for the offence. In the former, prejudice is not really a motive at all, while in the latter it is one motive amongst others, requiring the courts to determine the degree to which an offence must be motivated by prejudice to enliven the provisions. The question of the degree to which an offender must be motivated by prejudice is especially important in light of empirical research that suggests that it is more common for hate crime offenders to have mixed motives than it is for them to be motivated by prejudice alone.⁹⁰ The statutes in NSW and the Northern Territory are silent on this point, although the NSW Court of Criminal Appeal has held that it is sufficient if prejudice or group hate is a 'significant factor'.⁹¹ In Victoria, s 5(2)(daaa) explicitly includes 'partial' motive, meaning that the prosecution need not establish that prejudice was the sole motive for the offence.

The challenge presented where offenders seemingly have a number of motives is apparent in *R v Rintoull* ('*Rintoull*').⁹² The two offenders attacked and killed a young Sudanese man in the Melbourne suburb of Noble Park. There was evidence of previous conflict between the offenders and a group of young Sudanese men in the area, with Rintoull telling the police three days before the attack that Sudanese men were causing problems in Noble Park and that if the police were not going to do something about them, he would.⁹³ On the day of the killing, the accused and others vandalised the property where they were staying, with Rintoull spray-painting '[f]uck da niggas' on the walls.⁹⁴ Shortly before the killing Rintoull was also heard by witnesses to say that he was going to 'take his anger out on some niggers'⁹⁵ and that '[t]hese blacks are turning the town into the Bronx. I am going to take my town back, I'm looking to kill the blacks.'⁹⁶ The victim was bashed to death by Rintoull

⁹⁰ Iganski, above n 25, 42–3; Larry Ray, David Smith and Liz Wastell, 'Shame, Rage and Racist Violence' (2004) 44 *British Journal of Criminology* 350, 354–5; David Gadd, 'Aggravating Racism and Elusive Motivation' (2009) 49 *British Journal of Criminology* 755, 768.

⁹¹ *Dunn v The Queen* [2007] NSWCCA 312 (13 November 2007) [17], [31] (Hoeben J).

⁹² [2009] VSC 617 (18 December 2009).

⁹³ *Ibid* [66]–[67] (Curtain J).

⁹⁴ *Ibid* [74].

⁹⁵ *Ibid* [75].

⁹⁶ *Ibid* [76].

and Sabatino, after which Rintoull reported that he had ‘bashed a nigger and I think he’s dead’.⁹⁷

While Curtain J stated that it ‘cannot be denied’ that there was a ‘racial aspect’ to Rintoull’s ‘derogatory and insulting’ verbal and written statements,⁹⁸ her Honour continued:

To say that this killing was racially motivated is to deny a complex set of factors. Your concerns seem to have stemmed from the presence of a group of youths congregating in the vicinity of the Noble Park Railway Station. Your perception of lawlessness as a result of this and the police’s inability to deal with the problem as you perceived it, your own experience with the gang in the days before and the Article in the local paper under the headline ‘Bronx fear’.⁹⁹

Despite what Curtain J referred to as Rintoull’s ‘racist comments’ and ‘infelicitous language’,¹⁰⁰ her Honour was not satisfied beyond reasonable doubt that ‘racism per se was a motive for the attack’¹⁰¹ concluding instead that the offenders directed their anger towards the group ‘irrespective of their race’.¹⁰²

At first blush, the decision in *Rintoull* might seem consistent with the above cases where ancillary racism is expressed in the course of a conflict over a different matter.¹⁰³ However, in our opinion, the verbal and written remarks by Rintoull went beyond a mere demonstration of prejudice to reveal a deliberate decision to ‘fuck da niggas’ and ‘kill the blacks’. Rintoull’s hostility may well have been ‘motivated by frustration and anger’ towards the group of young men he regarded as ‘violent, out of control and taking over the Noble Park Railway Station’,¹⁰⁴ but his derogatory and racist statements, and his random targeting of any member of the group, suggest that anti-Sudanese sentiment was an integral reason for the anger and resentment that he felt towards this group — this was not just *any* group of young men — and thus one of his motives for the fatal attack.

Justice Curtain’s conclusion that ‘racism per se’ was not a motive for the offence is especially troubling given that s 5(2)(daaa) specifically provides that

⁹⁷ Ibid [77].

⁹⁸ Ibid [106].

⁹⁹ Ibid [107].

¹⁰⁰ Ibid [149].

¹⁰¹ Ibid [108].

¹⁰² Ibid [149]. Some emphasis was placed by Curtain J on evidence that Rintoull had tried to give a sandwich to one of the Sudanese youths in the days before the attack: at [108].

¹⁰³ See above Part IVC1.

¹⁰⁴ *Rintoull* [2009] VSC 617 (18 December 2009) [149].

racism need only be a partial motive. If, as we have argued above, one justification for imposing a heavier sentence upon an offender who is motivated by prejudice or group hate is to punish him or her for knowingly causing harm to the 'dignity and autonomy'¹⁰⁵ of the targeted community it is clear that a heavier sentence will be justified where the offender was only partially motivated by prejudice. Indeed, the homicide of Liep Gony, the victim in *Rintoull*, had a severe impact upon Melbourne's Sudanese community and race relations in Victoria.¹⁰⁶ The fact that Rintoull's racial hostility was closely tied to his belief that this group of young men were taking over the neighbourhood provides a context for, rather than a negation of, his racial attitudes.

Did Curtain J come closer to effectively applying an appropriate test when she concluded that the offenders directed their anger towards the group 'irrespective of their race'?¹⁰⁷ In doing so, her Honour adopted a similar approach to that taken by Martin CJ in *R v Doody* when he asked, amongst other questions, whether the offenders would have behaved in the same way had the victim been white.¹⁰⁸ While Martin CJ was satisfied that the offenders 'would have reacted angrily and sought to confront' a white man, he found it 'difficult to avoid the conclusion that the nature and rapidity' of the offenders' actions 'were influenced, at least to some degree, by the fact that that the deceased was an Aboriginal person.'¹⁰⁹ Although Curtain J and Martin CJ arrived at different answers, they both effectively applied a 'but-for' test: but for the race of the victim, would the crime have been committed?

In criminal law, the but-for test is useful for revealing the existence of a factual causal link but has been displaced largely by the 'substantial cause' test in determining whether this objective causal link is sufficiently cogent to attribute legal responsibility.¹¹⁰ The but-for test is probably even less helpful in

¹⁰⁵ Lawrence, *Punishing Hate*, above n 36, 63.

¹⁰⁶ Eve Vincent, 'Learning from Liep Gony's Murder', *New Matilda* (online), 24 March 2010 <<http://newmatilda.com/2010/03/24/learning-liep-gonys-murder>>; Victorian Equal Opportunity & Human Rights Commission, *Rights of Passage: The Experiences of Australian-Sudanese Young People* (2008) 5–6, 22, 25, 27, 32–3.

¹⁰⁷ *Rintoull* [2009] VSC 617 (18 December 2009) [149].

¹⁰⁸ Transcript of Proceedings (Sentence), *R v Doody* (Supreme Court of the Northern Territory, 20925481, 23 April 2010) [18].

¹⁰⁹ *Ibid* [43].

¹¹⁰ *R v Hallett* [1969] SASR 141, 149 (Bray CJ, Bright and Mitchell JJ); *Royall v The Queen* (1991) 172 CLR 378, 411 (Deane and Dawson JJ); *McAuliffe v The Queen* (1995) 183 CLR 108, 118–19 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ). This is largely because the but-for test 'is capable of indicating that a negligible causal relationship will suffice': *Arulthil-*

determining the subjective question of motive. For example, whether Rintoull would have targeted victims who belonged to a different racial group does not tell us anything about whether the offence that he did commit was racially motivated.¹¹¹ In effect, the but-for test excludes all offences from the ambit of the provisions except those that are solely or primarily motivated by prejudice.¹¹² This is inconsistent with the advice of the Sentencing Advisory Council that under s 5(2)(daaa) it is unnecessary for prejudice to be the 'primary' motive if it is part of the 'overall course of offending' against the victim.¹¹³ Nevertheless, prejudice needs to be more than a trivial factor in this course of offending. To ensure that sufficient weight is given to appropriate evidence this question of proportionality may be more effectively tested by asking whether prejudice is a 'substantial' motive for the offence.¹¹⁴

3 Group Selection

At common law, it is clear that an offence will not be aggravated merely because the offender selected the victim on the basis of his or her membership of a group of people.¹¹⁵ The NSW Court of Criminal Appeal has similarly held that evidence of group selection alone is not sufficient to activate s 21A(2)(h).¹¹⁶ In *R v Aslett*, the Court overturned the trial judge's decision that s 21A(2)(h) applied in circumstances where the victims of a home

akan v The Queen (2003) 203 ALR 259, 268 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

¹¹¹ A point recognised by Martin CJ when he stated: 'Ultimately it remains unknown whether the attack would have gone as far as it did if the deceased had been a drunk white person. I doubt that any of the offenders now know the answer to that question': Transcript of Proceedings (Sentence), *R v Doody* (Supreme Court of the Northern Territory, 20925481, Martin CJ, 23 April 2010) [43].

¹¹² Jenness and Grattet, above n 8, 117.

¹¹³ Sentencing Advisory Council (Vic), '*Sentencing for Offences Motivated by Hatred*', above n 3, 22.

¹¹⁴ US courts have sought to exclude circumstances where bias is merely a 'trivial factor' by holding that bias should be a 'substantial factor' in the selection of the victim: see Jenness and Grattet, above n 8, 117. The *Crime and Disorder Act 1998* (UK) c 37 offers little guidance on this matter as it is immaterial whether the offender's behaviour is also based, to any extent, on some other factor: see at s 28(3); *Johnson v DPP* [2008] EWHC 509 (Admin) (26 February 2008) [12] (Richards LJ); Chris Newman, 'Racially Aggravated Public Order Offences: Sufficiency of Partial Racial Hostility' (2008) 72 *Journal of Criminal Law* 265, 266.

¹¹⁵ See, eg, *DPP (Vic) v MM* [2009] VSC 336 (12 August 2009) [6]. In *DPP (Tas) v Broadby* [2010] TASSCA 13 (17 September 2010), although the offenders deliberately chose a group of vulnerable victims (young, female, Asian), the offence was not held to be aggravated on this account.

¹¹⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW).

invasion had been selected by the appellant on the basis that they were 'Asian' and 'Asians tended to keep money and jewellery in their homes'.¹¹⁷ As there was 'no evidence that the appellant hated Asians' the court held that his crimes were not motivated by racial hatred or prejudice.¹¹⁸

If, however, there is evidence that *the reason why* the offender selected members of a specified group for victimisation was his or her *prejudice against that group*, the court may be satisfied beyond reasonable doubt that the offence was motivated by such prejudice. For instance, in *Department of Public Prosecutions (Vic) v Caratuzzolo* there was evidence that the offender selected members of the Indian community to rob and assault because he was 'intent on' physically injuring Indians and had learnt to swear in Hindi so he could cause the 'maximum offence'.¹¹⁹ This was enough to satisfy Harper J that the accused's conduct was 'unequivocally racist'.¹²⁰

However, the interpretation of s 5(2)(daaa) in *R v Gouros*¹²¹ is troubling. Gouros was convicted of armed robberies against victims of Indian appearance in four separate incidents in Melbourne's western suburbs. The Crown argued that the offences were motivated by prejudice against persons of Indian appearance and tendered evidence that in three previous armed robbery convictions committed by the offenders in 2008, all of the victims were of Indian appearance.¹²² In accepting that s 5(2)(daaa) specifically provides that an offence will be aggravated if partially motivated by prejudice, Judge Cohen was satisfied beyond reasonable doubt that the defendant was aware when he started the current offences that 'the choice of victims was, at least, partly based on their apparent race or ethnic origin' and that this amounted to a prejudiced motivation within the meaning of the provision and thus was an aggravating feature in sentencing.¹²³

¹¹⁷ [2006] NSWCCA 49 (20 February 2006) [124] (Barr J).

¹¹⁸ *Ibid.* See also Gail Mason, 'R v Gouros: Interpreting Motive under Victoria's New Hate Crime Laws' (2010) 34 *Criminal Law Journal* 323.

¹¹⁹ [2009] VSC 305 (29 July 2009) [14] (Harper J).

¹²⁰ *Ibid.*

¹²¹ [2009] VCC 1731 (14 December 2009).

¹²² *Ibid* [14] (Judge Cohen).

¹²³ *Ibid* [30]; see also at [25]–[32]. There is inconsistency in the case law as to whether it is enough if the *offence* is motivated by hatred for or prejudice against a group or whether the Crown must also prove that the *individual offender* is motivated by prejudice/hatred: at [24]. Cf *Grivell v The Queen* (2008) 184 A Crim R 375, 380 [20]–[24] (Martin CJ); *Rintoull* [2009] VSC 617 (18 December 2009) [107]–[111] (Curtain J). See also Mason, 'Interpreting Motive', above n 118, 325.

The Court in *R v Gouros* may have been influenced by the publicity surrounding the racial victimisation of Indian students at the time, causing it to ask the wrong question.¹²⁴ Instead of asking whether the offence was motivated by prejudice or group hatred against people of Indian appearance, Judge Cohen asked whether the choice of victims was (at least partly) motivated by their apparent Indian heritage.¹²⁵ Yet there was no evidence of racial prejudice towards Indian people and, indeed, no evidence at all as to *why* the offender and his co-offenders selected victims presumed to be Indian (it could, for example, have been because of a belief they possessed items worth stealing).

The group selection test has been used in the US, where courts have sought to avoid an examination of the offender's emotional state or motive by restricting the application of hate crime statutes to conduct only, thereby forestalling constitutional challenges based on the claim that hate crime laws fetter free thought or expression. This has been done by drawing an analogy with anti-discrimination statutes. Following the US Supreme Court's decision in *Wisconsin v Mitchell*,¹²⁶ the key question has become whether there is evidence that the victim was intentionally selected because of his or her membership of the specified group; in other words, 'it is not the prejudice of the perpetrator but rather the act of discrimination that is punished.'¹²⁷ However, as Mason has argued elsewhere, most US statutes require proof only that the victim was selected 'because of' or 'by reason of' his or her perceived membership of a protected group.¹²⁸ In contrast, Australian statutes use the language of motive. Although not determinative, as a purposive interpretation of the statute is required, it is arguable that this sets a higher evidentiary standard: even partial motive requires evidence that the offender selected the

¹²⁴ [2009] VCC 1731 (14 December 2009) [31]. See also Gail Mason, '“I Am Tomorrow”: Violence against Indian Students in Australia and Political Denial' (2012) 45 *Australian and New Zealand Journal of Criminology* 4. In *R v Aslett* [2006] NSWCCA 49 (20 February 2006), by way of comparison, there was no such context.

¹²⁵ See *R v Gouros* (Unreported, County Court of Victoria, 14 December 2009) [34]; see also at [30].

¹²⁶ 508 US 476 (1993).

¹²⁷ Jenness and Grattet, above n 8, 116. See also *RAV v City of St Paul, Minnesota*, 505 US 377 (1992).

¹²⁸ See Mason, 'Interpreting Motive', above n 118, 326–7. For example, under Iowa Code § 729A.2 (2013), hate crime is defined as certain criminal acts that are 'committed against a person or a person's property because of the person's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age or disability'. See also Lawrence, *Punishing Hate*, above n 36, 36–7, where Lawrence points out that when 'maliciousness' is combined with 'because of' this comes closer to an animus or motive test.

victim 'because of hatred or prejudice against the victim on the basis of the victim's identity', not just because of their group membership.¹²⁹

Group selection may well inflict greater harm upon victims who feel 'singled out and vulnerable to further attacks',¹³⁰ which, in turn, may lead to 'increased psychological and emotional effect on both the victim and other members of the "selected" group'.¹³¹ Nonetheless, in our view, group selection that is not accompanied by evidence that the selection was based on prejudice should not enliven ss 5(2)(daaa), 21A(2)(h) or 6A(e).¹³² An offender may select members of a particular group for many, often pragmatic, reasons such as the belief that the members of the group in question are wealthy or unlikely to fight back. While such beliefs may be based on stereotypes, this does not mean that the offence itself is motivated by sentiments that even come close to prejudice or group hatred. Such offenders are not on the same 'moral plane'¹³³ as those who are motivated by prejudice to inflict harm upon the group in question. They are less culpable because, first, they lack the blameworthy prejudiced motive and, secondly, although they may cause harm to individuals and target groups, they do so neither intentionally nor recklessly. In circumstances where there is no other explanation for group selection it may provide persuasive evidence of a prejudiced motive,¹³⁴ but in cases where there is evidence of an alternative motive such as financial gain (as in *R v Gouros*),¹³⁵ and no evidence of prejudice on the offender's part, it is unsafe to infer a prejudiced motive on this basis alone.

Violent and criminal acts of prejudice are a 'calculated attempt to cause division and confusion in our community'.¹³⁶ While a spate of cases involving group selection of minority group victims does have the capacity to inflict

¹²⁹ Sentencing Advisory Council (Vic), *Sentencing for Offences Motivated by Hatred*, above n 3, 12 [D.13]. Although Jenness and Grattet note that the Florida Supreme Court in *State v Stalder*, 630 So 2d 1072 (Fla, 1994) adopted a 'group selection' interpretation of a statute that required prejudice to be established, they comment that this interpretation ignored the statute's specific terms; the court's interpretation followed the discrimination approach taken to statutes with 'because of' or comparable terminology: Jenness and Grattet, above n 8, 117.

¹³⁰ Tasmania Law Reform Institute, *Racially Motivated Offences (Final Report)*, above n 1, 43.

¹³¹ *Ibid* 44.

¹³² *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

¹³³ Lawrence, *Punishing Hate*, above n 36, 74.

¹³⁴ *Ibid* 79.

¹³⁵ [2009] VCC 1731 (14 December 2009).

¹³⁶ *R v Hanlon* [2003] QCA 75 (28 February 2003) [24] (McMurdo P). See also *DPP (Vic) v Caratozzolo* [2009] VSC 305 (29 July 2009) [14]–[15] (Harper J).

harm by generating a sense of community vulnerability, we must bear in mind that the purpose of sentencing aggravation provisions in Australia is to punish offenders more harshly for the harm inflicted by intentional or reckless acts of criminal prejudice, not for discrimination in the selection of victims.

V WHICH GROUPS HAVE THE COURTS HELD TO BE CONTEMPLATED BY THE SENTENCING AGGRAVATION PROVISIONS?

A *Offenders and Victims from Different Groups*

In all of the cases we examined, the offenders and victims were seemingly members of different social groups: for example, white perpetrators and African victims.¹³⁷ It is unnecessary that the victim is actually a member of the group in question, only that the offender believes that he or she is a member. For example, if an offender targets a victim because he or she believes the victim is of Indian heritage when the victim is actually Nepali, the aggravating circumstance will still apply.¹³⁸ Yet the courts must still consider which victim groups are contemplated by the sentencing aggravation provisions.

B *Minority Religious, Racial or Ethnic Groups*

In a number of cases decided both before¹³⁹ and after¹⁴⁰ the introduction of ss 5(2)(daaa), 21A(2)(h) and 6A(e),¹⁴¹ offenders were found beyond reasona-

¹³⁷ See, eg, *Holloway v The Queen* [2011] NSWCCA 23 (28 February 2011). The NSW Supreme Court has been clear that the purpose of s 21A(2)(h) is to punish group hatred, not hatred towards an individual: *R v MAH* [2005] NSWSC 871 (30 August 2005) [32] (Hislop J).

¹³⁸ See, eg, *R v Gouros* [2009] VCC 1731 (14 December 2009). The wording of the NSW legislation suggests that the offender must believe the victim 'belonged' to the group (*Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h)), while in Victoria (*Sentencing Act 1991* (Vic) s 5(2)(daaa)) it is sufficient if the offender believed the victim was 'associated' with the group. In the Northern Territory, the offender must merely be motivated by hatred 'against a group of people' (*Sentencing Act 1995* (NT) s 6A(e)).

¹³⁹ *R v Hussein* (Unreported, County Court of Victoria, Judge Jenkins, 23 October 2009) [9] (this finding was not challenged on appeal: *Hussein v The Queen* [2010] VSCA 257 (4 October 2010)); *DPP (Vic) v Caratozzolo* [2009] VSC 305 (29 July 2009) [14]–[15] (Harper J); *R v Palmer* (Unreported, Victorian Court of Appeal, Winneke ACJ, Charles and Callaway JJA, 13 September 1996).

¹⁴⁰ *R v Dean-Willcocks* [2012] NSWSC 107 (24 February 2012) [71]–[73]; *R v Holloway* (Unreported, District Court of New South Wales, Judge English, 21 August 2009) (this finding was not challenged on appeal: *Holloway v The Queen* [2011] NSWCCA 23 (28 February 2012)); *R v el Mostafa* [2007] NSWDC 219 (24 August 2007) [16] (Cogswell DCJ); *R v Gouros*

ble doubt to be motivated by hatred for, or prejudice against, a minority racial or ethnic group.¹⁴² It is clearly consistent with the purpose of these provisions to hold that these groups are among those contemplated by them; indeed, s 21A(2)(h) expressly provides that some of the ‘group[s] of people’ to whom it refers are ‘people of a particular religion, racial or ethnic origin’.

C Dominant Groups

In *R v Al-Shawany*,¹⁴³ the complainant and the offender were both Muslims. While the complainant was at the Villawood Detention Centre, the offender visited her; he noted then that the complainant had come into contact with Christians. According to the complainant’s evidence, the offender warned her that Christians ‘are very infidel people’ and informed her that if she were to convert to Christianity a person who killed her would ‘go to heaven straight away’.¹⁴⁴ At some stage after this visit, the offender lured the complainant to a block of units where he had non-consensual anal and penile/vaginal intercourse with her. After the offender finished the second act of intercourse, he said to the complainant words to the effect of ‘may your Jesus help you now’.¹⁴⁵ Knox DCJ found that the aggravating factor provided for by s 21A(2)(h) had been enlivened.¹⁴⁶ His Honour stated:

It seems clear to me from the evidence, and I so find, that the offender was motivated by the fact that he was of the Muslim faith and so was the victim. Further that she was going outside that religious or cultural grouping of which they had previously both been a part. ...

[2009] VCC 1731 (14 December 2009) [28]–[30] (Judge Cohen); *Grivell v The Queen* (2008) 184 A Crim R 375; Transcript of Proceedings (Sentence), *R v Doody* (Supreme Court of the Northern Territory, 20925481, Martin CJ, 23 April 2010).

¹⁴¹ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

¹⁴² Findings that an offender’s criminality was aggravated because his or her offence was motivated by hatred for or prejudice against minority racial or religious groups have also been made in Australian jurisdictions that lack provisions such as ss 5(2)(daaa), 21A(2)(h) and 6A(e): see *R v Hanlon* [2003] QCA 75 (28 February 2003) [24] (McMurdo P); *R v Crossman* [2011] 2 Qd R 435, 453 [69] (Chesterman JA); Transcript of Proceedings (Sentence), *R v Bigwood* (Supreme Court of Tasmania, Evans J, 31 May 2010).

¹⁴³ [2007] NSWDC 141 (15 June 2007).

¹⁴⁴ *Ibid* [12] (Knox DCJ).

¹⁴⁵ *Ibid* [20].

¹⁴⁶ *Crimes (Sentencing Procedure) Act 1999* (NSW).

I think the only inference I can draw ... [is] that the offender's motivation to sexually assault her was because either she had been reading the Bible, or a Christian Bible, or associating with Christian people, and was therefore seen in some way as being an 'infidel' ...¹⁴⁷

It is clear from these remarks that his Honour found that it had been proven beyond reasonable doubt that the offender's crimes were motivated by prejudice against, or hatred for, either Christians or Muslim converts to Christianity. Assuming that the former is the case, the question arises whether the judge was correct to conclude that a dominant group such as Christians are contemplated by s 21A(2)(h). Warner has stated that 'there are good reasons for arguing' that the courts should hold that dominant groups are not contemplated by such a provision.¹⁴⁸ She contends: 'The higher levels of harm and culpability which justify aggravation when the victim is a member of a vulnerable minority group are not present when the victim is a member of the dominant race and culture.'¹⁴⁹ Indeed, in Warner's opinion, if the courts were to hold that dominant groups are contemplated, the provisions' purpose might be undermined, as

[f]irst, it is easy to exaggerate the element of racism in crimes where members of the dominant culture are victims of minority group perpetrators. Secondly, rather than reaffirming values of racial tolerance and respect, highlighting the racial element can have the opposite effect — demonising the ethnic community to which the perpetrator belongs.¹⁵⁰

But is it true that an offender whose offence was motivated by prejudice against a dominant group causes no more harm and is no more culpable than a comparable offender who lacks his or her prejudiced motivation? In our opinion, although such an offender might not cause as much harm as a person whose offence is motivated by prejudice against an historically oppressed group, he or she does cause more harm and is more culpable than a 'parallel offender' as he or she knowingly breaches the fundamental liberal democratic value of respect for harmless difference. He or she may also knowingly cause the victim and the majority group to feel fearful. In other words, assuming that Knox DCJ found that Christians are one of the groups contemplated by s

¹⁴⁷ *R v Al-Shawany* [2007] NSWDC 141 (15 June 2007) [111]–[112] (Knox DCJ).

¹⁴⁸ Warner, 'Sentencing Review', above n 30, 393.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* 394.

21A(2)(h), his Honour's interpretation is consistent with what we have identified as the purpose of this provision.

Warner is correct to note that the courts should not exaggerate minority group prejudice. However, it does not follow from this that in a case where a minority group offender's offence *was* motivated by hatred for a majority group, the court should refrain from finding that this aggravated his or her offence. Finally, Warner is also correct to note that the effect of press reports about cases such as the Sydney 'Lebanese gang rapes'¹⁵¹ has been to demonise minority groups. However, the possibility of irresponsible media reports should not lead the courts to decline to hold that an offender's crime is aggravated because it is motivated by prejudice against a group.

D Homosexuals

It is clear that gay men and lesbians are two of the 'group(s) of people' contemplated by ss 5(2)(daaa), 21A(2)(h) and 6A(e);¹⁵² indeed, the NSW provision expressly refers to 'people of a particular ... sexual orientation'. However, surprisingly,¹⁵³ there have seemingly been few cases after the introduction of the sentencing aggravation provisions in Victoria, NSW and the Northern Territory where an offender's criminality has been held to be aggravated because his or her offence was motivated by hatred for, or prejudice against, people who are gay or lesbian.

In *R v Irving*,¹⁵⁴ decided in a jurisdiction (Queensland) that lacks a provision such as ss 5(2)(daaa), 21A(2)(h) and 6A(e),¹⁵⁵ the offender violently assaulted the victim after he thought that he detected the victim giving him an 'inappropriate' smile.¹⁵⁶ The offender said as he attacked the victim, 'I'm going

¹⁵¹ *Ibid.*

¹⁵² *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

¹⁵³ Although McDonald noted in 2006 that:

At the time of writing, I can still find no reference to any cases in which section 9(1)(h) [the New Zealand equivalent of ss 21A(2)(h), 5(2)(daaa) or 6A(e)] has been relied on in the sentencing of someone who has offended out of hostility towards gays and lesbians.

Elisabeth McDonald, 'No Straight Answer: Homophobia as Both an Aggravating and Mitigating Factor in New Zealand Homicide Cases' (2006) 37 *Victoria University of Wellington Law Review* 223, 225 (citations omitted).

¹⁵⁴ [2004] QCA 305 (20 August 2004).

¹⁵⁵ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

¹⁵⁶ *R v Irving* [2004] QCA 305 (20 August 2004) (McPherson JA).

to kill you, you dirty poofter. I'm going to kill you faggot.¹⁵⁷ The Court found that the offender's homophobic motive 'can only aggravate the offence.'¹⁵⁸ However, in other apparently similar cases in Victoria and NSW, courts have either rejected a Crown submission that it had proven the aggravating circumstance beyond reasonable doubt, or, more frequently, have not considered at all whether the offence was aggravated by a homophobic motive. There are two main reasons for this. First, in one case, *Director of Public Prosecutions (Vic) v RSP*,¹⁵⁹ the prosecution seems to have completely overlooked¹⁶⁰ s 5(2)(daaa) or considered that the aggravating circumstance could not be proven beyond reasonable doubt. In that case, the Crown did not argue that the offences were motivated by homophobia, even though the offender stated that the offences had been triggered by a (seemingly imagined) homosexual advance that, because he was homophobic, caused him to 'los[e] it'.¹⁶¹ Secondly, regrettably, some courts have been more concerned to establish whether the victim's behaviour has been 'provocative' enough to justify *mitigating* the offence than to determine whether the offender's homophobic motive should aggravate the offence.

In *R v El Masri*,¹⁶² the victim seemingly made a sexual advance towards the offender while both were in a public toilet. The applicant said that this made him upset and stressed and that he followed the victim outside, where he asked the victim whether he was waiting for another homosexual. The victim denied this and tried to get away. The applicant claimed, seemingly implausibly, that the victim was not only trying to escape but was also being aggressive and swearing at him, so the applicant punched the victim to the side of the head with a closed fist. Shillington ADCJ rejected a Crown submission that the court could be satisfied beyond reasonable doubt that the offence was

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ [2010] VSC 128 (31 March 2010).

¹⁶⁰ Similarly, in some cases decided before the introduction of the provisions or in jurisdictions that lack such provisions, the Crown seemingly failed to argue that the offender's crime was aggravated by a homophobic motive where there apparently was ample evidence to justify such a finding: see *R v Peres* [2000] NSWCCA 353 (7 August 2000); *R v Mason* [1997] QCA 67 (19 March 1997); *R v Preston* [1992] FCA 12 (24 January 1992).

¹⁶¹ *DPP (Vic) v RSP* [2010] VSC 128 (31 March 2010) [8] (Curtain J). The Crown also did not argue that the offences were racially motivated, even though the offender had racially abused the victims and other people in the vicinity immediately before he committed the offences.

¹⁶² [2005] NSWCCA 167 (29 April 2005).

motivated by hatred for or prejudice against homosexuals.¹⁶³ Indeed, his Honour appears to have placed far greater emphasis on the victim's 'provocative' conduct than on any homophobia on the offender's part, stating:

I am disposed to deal with the matter on the basis of the account given by the prisoner in his interview, that is that he struck him once outside the toilet, having been, according to him, somewhat provoked by his conduct in the toilet and also by a somewhat aggressive attitude outside.¹⁶⁴

Unfortunately, other courts have been similarly preoccupied with the victim's, and not the offender's, conduct in cases where it was at least open to them to find that the offender was motivated by prejudice against, or hatred for, gay men. In *R v Johnstone*,¹⁶⁵ the offender was convicted of the murder of his housemate, who was gay, and who, according to the offender, made a sexual advance towards the offender immediately before the fatal attack. Although Osborn J found that there were 'a number of aggravating factors associated with [the prisoner's] offending',¹⁶⁶ his Honour did not refer to the aggravating circumstance provided for by s 5(2)(daaa) as the Crown had seemingly made no submission concerning this provision. Rather, the Court's energies were devoted to explaining, in some detail, why it could not accept the defence submission that the deceased's alleged 'provocation' of the offender *mitigated* the offender's criminality.¹⁶⁷

A focus on the victim's, not the offender's, behaviour where gay men have been killed or assaulted following either an alleged homosexual advance or other 'provocative' conduct, is also a feature of some cases decided before the introduction of the sentencing aggravation provisions.¹⁶⁸ A particularly

¹⁶³ Ibid [16] (Johnson J). Despite attempting to do so, we have been unable to obtain a copy of Shillington ADCJ's sentencing remarks in *El Masri*, and instead have had to rely on excerpts from that judgment that appear in the NSW Court of Criminal Appeal's decision: see generally *ibid*.

¹⁶⁴ Ibid [9].

¹⁶⁵ [2011] VSC 300 (30 June 2011).

¹⁶⁶ Ibid [16].

¹⁶⁷ Ibid [18]–[21]. Justice Coghlan made similar remarks when sentencing Johnstone after a previous trial: *R v Johnstone* [2008] VSC 584 (19 December 2008) [42]–[52]. Justice Coghlan also noted that, while the deceased's sexual advance did not excuse the offender's conduct, the advance 'may have carried more weight' had the accused not known of the deceased's tendency to make homosexual advances when drunk: at [14].

¹⁶⁸ See, eg, *R v Hodge* [2000] NSWSC 897 (6 September 2000) [12]–[14], [17] (Dunford J); *R v Graham* [2000] NSWSC 1033 (10 November 2000) [31] (Whealy J); *R v Johnstone* [2008] VSC 584 (19 December 2008) [14], [42]–[52] (Coghlan J); *R v Smith* [2004] VSC 134 (7 April 2004) [15], [20]–[23], [26] (Harper J); *R v Martin* [2003] VSC 197 (27 May 2003) [19]–[21]

glaring example of this is *R v Hodge*.¹⁶⁹ In that case, the offender killed the deceased with a mallet in response to a homosexual advance. After noting that 'although the deceased maintained an air of respectability, he was an active homosexual',¹⁷⁰ Dunford J found that the offender had 'lost his self-control as a result of *provocation* by the deceased in the form of an unwanted sexual advance'.¹⁷¹ His Honour proceeded to place further emphasis on the victim's 'conduct', casually speculating that, 'although there is no evidence of it' the deceased might have drugged the offender on the night of the murder.¹⁷² Justice Dunford did not find that the offender's crime was aggravated by a motive of prejudice against gay men; he instead contented himself with finding that '[t]he case is a tragic one, not only for the deceased who, whatever his shortcomings did not deserve to die in [this] manner ... but ... also ... for the prisoner and for his family'.¹⁷³

It is concerning that this unwillingness to hold that an offender who has killed or committed an assault offence in response to a real or imagined homosexual advance has survived the introduction of the sentencing aggravation provisions. McDonald has commented on the 'undesirable tension between the availability of the defence of provocation in cases of unwanted homosexual advances and [the New Zealand equivalent of ss 5(2)(daaa), 21A(2)(h) and 6A(e)]:'¹⁷⁴ But even in jurisdictions such as Victoria where the partial defence has been repealed, a similar tension exists: this is between, on one hand, the sentencing aggravation provisions, and, on the other, dominant attitudes that see homosexual advances, however harmless, as both provoca-

(Osborn J); *Jardine v O'Brien* [1987] NTSC 44 (5 August 1987) [15] (Kearney J). However, see also *R v Mihailovic* (Unreported, Supreme Court of New South Wales, 15 April 1991), where Badgery-Parker J apparently both refused to find that the 'provocative' conduct of men who met at a gay 'beat' 'mitigate[d] the seriousness of the [offenders'] savage attack' on the deceased *and* found that the offenders' homophobic motive aggravated the offence. His Honour said: 'Our society can never be permitted to develop into one where any member of it is regarded as fair game by reason of his departure in whatever fashion from some norm. Hence, the factor of general deterrence must in this case be given a great deal of weight.'

¹⁶⁹ [2000] NSWSC 897 (6 September 2000).

¹⁷⁰ *Ibid* [8].

¹⁷¹ *Ibid* [13] (emphasis added). However, because of the jury's rejection of the partial defence of provocation, Dunford J then noted that 'the approach by the deceased was not such as would have caused an ordinary person of the prisoner's sex, age and maturity, unaffected by alcohol or drugs, to have so lost his self control to that degree': at [13].

¹⁷² *Ibid* [17].

¹⁷³ *Ibid* [14].

¹⁷⁴ McDonald, above n 153, 225.

tive and threatening. These attitudes apparently continue to influence both Crown and defence submissions and some judicial findings.

E Paedophiles

It has been held in two NSW cases that paedophiles are one of the 'group[s] of people' contemplated by s 21A(2)(h).¹⁷⁵ In *Dunn v The Queen* ('*Dunn*'),¹⁷⁶ the applicant had been convicted of two arson offences after he twice set fire to his neighbour's property. The NSW Court of Criminal Appeal upheld Marien DCJ's finding that it had been proven beyond reasonable doubt that the applicant had been motivated to offend by hatred for paedophiles, a group to which he (wrongly) believed the victim belonged.¹⁷⁷ The Court stated:

Applying s 21A(2)(h) to those facts, it is clear that the offences come fairly and squarely within it. The offence was motivated by a hatred or prejudice against Mr Arja solely because the applicant believed him to be a member of a particular group, ie paedophiles.¹⁷⁸

The same finding appears to have been made in *R v Robinson*.¹⁷⁹ In that case, the offender and the deceased were inmates in the same 'pod' in gaol. The offender and other prisoners in the 'pod' came to suspect that the deceased had been convicted of sexual offences against schoolchildren. Upon discovering documents in the deceased's cell that confirmed these suspicions, the other prisoners decided to give him a 'hiding'.¹⁸⁰ The offender and his co-offender attacked the deceased in his cell; as a result of the attack, the deceased died. When sentencing the offender, Greg James J noted that the Crown alleged that the offence was motivated by hate or prejudice.¹⁸¹ Although his Honour did not expressly state that he found the s 21A(2)(h) factor proven beyond reasonable doubt, it appears from the following extract from his judgment that he did so find:

I accept [that] the offender suffered from sudden episodes of anger ... That ... resulted in his developing the attitude, not only to persons other than of an or-

¹⁷⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁷⁶ [2007] NSWCCA 312 (13 November 2007).

¹⁷⁷ *Ibid* [31] (Hoeben J).

¹⁷⁸ *Ibid* [32].

¹⁷⁹ [2004] NSWSC 465 (10 June 2004).

¹⁸⁰ *Ibid* [8] (Greg James J).

¹⁸¹ *Ibid* [38].

thodox sexuality, but in particular to persons thought to be homosexual, of hatred, producing real danger for those who he might come into contact with whom he believed to be homosexual.

Specifically I find that it was that attitude of mind which gave rise to the commission of this offence ...¹⁸²

Mason has criticised elsewhere the decision in *Dunn*.¹⁸³ Her argument is that, although '[v]igilantism against adults who sexually abuse children is unacceptable',¹⁸⁴ the Court's decision that paedophiles are contemplated by s 21A(2)(h)¹⁸⁵ 'rests upon its failure to acknowledge that the examples of groups in parentheses [in s 21A(2)(h)] have anything in common'.¹⁸⁶ What these groups *do* have in common, Mason argues, is that they have all been subjected to 'unjustified prejudice and discrimination'.¹⁸⁷ Paedophiles, on the other hand,

can be distinguished from groups conventionally protected under hate crime law on the basis that moral condemnation of their conduct is far from unjustified; their sexual conduct inflicts a clear and identifiable harm upon others (children) ...¹⁸⁸

That is, to extend s 21A(2)(h)'s protection to a harmful group — paedophiles — is to interpret that provision in a way that does not promote its purpose, which, as we have noted above, is to enable judges to denounce and adequately punish (among other matters) those who knowingly or recklessly harm *harmless* individuals and groups, thereby breaching society's fundamental values.

Ardill and Wardle argue that, though '[a]t first glance' Mason's argument is 'appealing',¹⁸⁹

¹⁸² Ibid [16]–[17].

¹⁸³ Mason, 'Hate Crime Laws in Australia', above n 46; Gail Mason, 'Prejudice and Paedophilia in Hate Crime Laws: *Dunn v R*' (2009) 34 *Alternative Law Journal* 253.

¹⁸⁴ Mason, 'Hate Crime Laws in Australia', above n 46, 339.

¹⁸⁵ *Crimes (Sentencing Procedure) Act 1999* (NSW).

¹⁸⁶ Mason, 'Hate Crime Laws in Australia', above n 46, 339.

¹⁸⁷ Ibid 338 (citations omitted).

¹⁸⁸ Ibid 337.

¹⁸⁹ Allan Ardill and Ben Wardle, 'Firebombs and *Ferguson*: A Review of Hate Crime Laws as Applied to Child Sex Offenders' (2009) 34 *Alternative Law Journal* 257, 257–8.

there are ‘practical’ reasons to include paedophiles in s 21A(2)(h) ... a ‘practical benefit’ of s 21A(2)(h) as it was applied in *Dunn v R* is that it can deter violence against a person merely accused of a sexual offence against children.¹⁹⁰

However, this argument wrongly assumes that, before the decision in *Dunn*,¹⁹¹ the courts had not developed principles concerning the relevance of a vigilante motivation to the sentencing discretion. In fact, this question has been considered on many occasions. For example, in *Director of Public Prosecutions (Vic) v Whiteside*, the Victorian Court of Appeal made it clear that the vigilante nature of the attack aggravated the respondents’ criminality.¹⁹²

It is true that it has not *always* been held that it is an aggravating circumstance that the offender was engaged in a vigilante enterprise. In *R v Mitchell*,¹⁹³ for instance, the NSW Court of Criminal Appeal stated that the offenders’ motive (to avenge a sexual assault that the victim had allegedly perpetrated against the respondent, Mitchell, when Mitchell was 10 or 11 years old) was ‘of limited *mitigating* value.’¹⁹⁴ But this does not undermine our argument. Rather, it indicates that Ardill and Wardle might be wrong to assume that in *all* cases where an offender engages in a vigilante attack against a paedophile or alleged paedophile, his or her vigilante motivation should be held to aggravate his or her criminality. Even if a vigilante motivation should always be an aggravating factor, the way to achieve this is surely to reverse decisions such as *R v Mitchell*; it is not to adopt an interpretation of s 21A(2)(h) that undermines that provision’s purpose.

There is another problem with the decision in *R v Robinson*.¹⁹⁵ In that case, the Court, of course, observed that it was only after the offender and his fellow prisoners found out that the deceased was a paedophile that they decided to give him a ‘hiding’.¹⁹⁶ We infer from this that when the Crown alleged, and the Court accepted, that the offence was motivated by hatred or prejudice

¹⁹⁰ Ibid 258.

¹⁹¹ [2007] NSWCCA 312 (13 November 2007).

¹⁹² (2000) 1 VR 331, 339 [42] (Brooking JA). See also, eg, *R v Brelsford* [1995] QCA 594 (14 September 1995); *R v Demittis* [1997] QCA 217 (29 May 1997).

¹⁹³ (2007) 177 A Crim R 94.

¹⁹⁴ Ibid 101 [30] (Howie J) (emphasis added). See also *Quealey v The Queen* [2010] NSWCCA 116 (4 June 2010) [28], where Latham J (Giles JA and Hulme J agreeing) held that the applicant’s motive (to punish her former de facto spouse for allegedly sexually abusing her daughter) ‘did not *reduce* her moral culpability to any significant degree’ (emphasis added).

¹⁹⁵ [2004] NSWSC 465 (28 May 2004).

¹⁹⁶ Ibid [8] (Greg James J).

against a particular group, the group to which they were referring was paedophiles. Why, then, did the sentencing judge place so much emphasis on the offender's hatred of *homosexuals*?¹⁹⁷ Could it be that it was a hatred of homosexuals, and not paedophiles, which motivated the fatal attack? This seems unlikely, because it was evidence that the deceased was a *paedophile* that caused the prisoners to decide to attack him. It is true that they might have found out at the same time that the deceased was gay. But the emphasis that his Honour places on the offender being sexually abused as a child¹⁹⁸ and on the deceased's conviction for offences against schoolchildren¹⁹⁹ indicates that the offender was motivated by a hatred of paedophiles. Accordingly, it is unfortunate that the judge, when discussing the offender's motivation, referred not to the offender's hatred of paedophiles, but, instead, to his hatred of homosexuals.²⁰⁰ By referring to the offender's homophobia, Greg James J was not as careful as he should have been to distinguish between these two very different sexual orientations. Indeed, his Honour's judgment tends to perpetuate the homophobic idea that the terms 'homosexual' and 'paedophile' can be used more or less interchangeably.

F Women

In *R v ID*,²⁰¹ it was found that women were one of the 'group[s] of people' contemplated by s 21A(2)(h).²⁰² As noted above, in that case, the offenders broke into a unit occupied by the victim and committed upon her a number of very degrading sexual assaults. Nicholson DCJ stated:

It was submitted that neither type of offence was motivated by hatred for or prejudice against any group to which the offenders did not belong ... I am satisfied beyond reasonable doubt there was a gender based prejudice which can best be expressed as a lack of understanding of and respect for the role and position of women in our community. Women are not to be viewed as menial ob-

¹⁹⁷ Ibid [16].

¹⁹⁸ Ibid [14].

¹⁹⁹ Ibid [8].

²⁰⁰ A similar mistake was made by Barr J when sentencing the offender after an earlier trial, when his Honour said that the offender's 'hatred of *homosexual* men, has the potential to result in real danger for anyone with whom he comes into contact and whom he believes is *homosexual*': *R v Robinson* [2000] NSWSC 541 (16 June 2000) [13] (emphasis added).

²⁰¹ [2007] NSWDC 51 (25 January 2007).

²⁰² *Crimes (Sentencing Procedure) Act 1999* (NSW).

jects whose feelings, sensitivities, do not matter, nor as objects available for random and non consensual sexual defilement.²⁰³

His Honour also noted that

disparagement, disrespect and contempt for the victim was displayed by both offenders. It is hard to resist that the foundations of their contempt of the victim was gender based and learned in both cases within the family at the hands of the senior adult male.²⁰⁴

We have found no Victorian or Northern Territory decisions where the court expressly found that an offence was aggravated because it was motivated by prejudice against, or hatred for, women.²⁰⁵

There has been a great deal of, mainly academic, discussion — especially in the US — concerning whether crimes motivated by misogyny should be held to be hate crimes.²⁰⁶ The main argument in favour of holding that women are

²⁰³ *R v ID* [2007] NSWDC 51 (25 January 2007) [50].

²⁰⁴ *Ibid* [157]; see also his Honour's remarks concerning the offenders' misogynistic motivation: at [50], [128], [156].

²⁰⁵ However, see *R v Dupas* [2010] VSC 540 (26 November 2010), where Hollingworth J imposed a sentence of life imprisonment on an offender who had been convicted of the random stabbing murder of a woman; had an 'appalling criminal history' characterised by 'wanton and despicable acts of violence to defenceless women' (at [19], quoting *R v Dupas* [2004] VSC 281 (16 August 2004) [10] (Kaye J)); and was already, at the time of sentencing, serving life sentences for the murders of two other women. Although her Honour did not expressly refer to *Sentencing Act 1991* (Vic) s 5(2)(daaa), she did state: 'I agree with previous judicial observations, to the effect that you seem to be motivated by a deeply entrenched, perverted and sadistic hatred of women, and a complete contempt for them and their right to live': at [19].

²⁰⁶ See, eg, Hannah Mason-Bish, 'Examining the Boundaries of Hate Crime Policy: Considering Age and Gender' *Criminal Justice Policy Review* (published online 4 January 2012) <<http://cjp.sagepub.com/content/early/2012/01/03/0887403411431495>>; Jessica P Hodge, *Gendered Hate: Exploring Gender in Hate Crime Law* (Northeastern University Press, 2011); Michele Burman et al, 'Responding to Gender-Based Violence in Scotland: The Scope of the Gender Equality Duty to Drive Cultural and Practical Change' (Final Report, Equality and Human Rights Commission (Scotland), November 2009); Beverley A McPhail and Diana M DiNitto, 'Prosecutorial Perspectives on Gender-Bias Hate Crimes' (2005) 11 *Violence against Women* 1162; Charlotte Brown, 'Legislating against Hate Crime in New Zealand: The Need to Recognise Gender-Based Violence' (2004) 35 *Victoria University of Wellington Law Review* 591; Valerie Jenness, 'Engendering Hate Crime Policy: Gender, the "Dilemma of Difference," and the Creation of Legal Subjects' (2003) 2 *Journal of Hate Studies* 73; Beverley A McPhail, 'Gender-Bias Hate Crimes: A Review' (2002) 3 *Trauma, Violence and Abuse* 125; Katherine Gelber, 'Hate Crimes: Public Policy Implications of the Inclusion of Gender' (2000) 35 *Australian Journal of Political Science* 275; Julie Goldscheid, 'Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement' (1999) 22 *Harvard Women's Law Journal* 123; Marguerite Angelari, 'Hate Crime Statutes: A Promising Tool for Fighting Violence against Women' (1994) 2 *Journal of Gender & the Law* 64; Elizabeth A Pendo, 'Recog-

one of the ‘group(s) of people’ contemplated by provisions such as ss 5(2)(daaa), 21A(2)(h) and 6A(e)²⁰⁷ is that many acts of male violence against women are motivated by hatred for women. The main arguments against holding that women are a ‘group of people’ contemplated by such provisions are the

difficulties in proving that a crime was committed against someone purely because of their gender [and] the potential for creating a spectrum of seriousness, whereby some cases are allegedly motivated by gender hatred and others are not.²⁰⁸

As to the difficulties of proof, it is true that the prosecution must prove beyond reasonable doubt that the offender’s crime was motivated by prejudice against women.²⁰⁹ But this standard of proof applies regardless of whether the victim of a hate crime is a woman. Writing about US hate crime legislation, Goldscheid concludes that the evidence that is used to prove that the offender was motivated by racial prejudice will also ‘reflect discriminatory motivation in cases of gender-motivated violence.’²¹⁰ This is correct. Indeed, *R v ID* provides an example of a case where there was clearly enough — mainly psychological/psychiatric — evidence to prove that the offenders were motivated by gender prejudice.²¹¹

As to the second main argument against holding that women are a ‘group of people’ within the meaning of ss 5(2)(daaa), 21(2)(h) and 6A(e)²¹² — that this may perpetuate the misconceived view that only a minority of male violence against women is motivated by misogyny — it may well be that the aggravating factor will not be able to be proven in some cases where the offender was, in fact, motivated by prejudice against women. However, even if the aggravating circumstance cannot be proven beyond reasonable doubt in all cases where the offender was motivated by prejudice (as seems certain),

nizing Violence against Women: Gender and the *Hate Crime Statistics Act*’ (1994) 17 *Harvard Women’s Law Journal* 157.

²⁰⁷ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

²⁰⁸ Burman et al, above n 206, 27.

²⁰⁹ *R v Olbrich* (1999) 199 CLR 270, 281 [27] (Gleeson CJ, Gaudron, Hayne and Callinan JJ), quoting *R v Storey* [1998] 1 VR 359, 369 (Winneke P, Brooking and Hayne JJA and Southwell AJA).

²¹⁰ Goldscheid, above n 206, 138.

²¹¹ See *R v ID* [2007] NSWDC 51 (25 January 2007) [128], [156] (Nicholson DCJ).

²¹² *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

this is true not only of hate crime against women, but also against all other groups. An example of this might be the case of *R v Winefield*, where Fullerton J found that the evidence did not enable her to find beyond reasonable doubt that the offender was motivated by racial prejudice, ‘despite some suspicions [she had] that it might be the case.’²¹³ Failure to prove the aggravating circumstance beyond reasonable doubt in a sexual assault or domestic violence case does not necessarily convey that the offender was free from gender prejudice. All it means is that the evidence did not satisfy the court, beyond reasonable doubt, that this was the case.

Nevertheless, it is important that the Crown does not allege the aggravating factor in cases of male violence against women only where the victim and the offender were strangers. Women’s groups have correctly argued that ‘[s]imply because a perpetrator knows his victim ... does not mean that the crime does not reveal hatred or ill will towards women as a whole.’²¹⁴ McPhail and DiNitto note that many Texas prosecutors whom they interviewed considered that sexual assault offenders — and especially those who attacked intimates — were motivated not by hostility towards women as a whole, but by a desire to control individual women.²¹⁵ It is hoped that Australian prosecutors do not have similar attitudes. Moreover, though it has been claimed that the difficulties of proving the aggravating circumstance are greater where — as is often the case with violence against women — the offender and the victim know one another,²¹⁶ in many cases both of domestic violence and sexual assault between intimates, the violence that is inflicted on the victim is accompanied by, in Goldscheid’s words, ‘gender-derogatory epithets such as “bitch”, “slut” or “whore”’.²¹⁷ In addition, ‘[t]estimony from former wives, girlfriends, partners, or family members of those individuals may provide evidence of anti-female comments’ and/or previous violent offending against women.²¹⁸ In short, as stated above, it is quite possible that the difficulties of proving the aggravating factor have been overstated.

It is also important that the Crown does not allege the aggravating factor only in cases where the offenders come from minority racial and/or religious groups. Is it a coincidence that in the one case that we have found where the

²¹³ [2011] NSWSC 337 (19 April 2011) [28].

²¹⁴ Burman et al, above n 206, 25.

²¹⁵ McPhail and DiNitto, above n 206, 1176.

²¹⁶ See, eg, *ibid* 1174.

²¹⁷ Goldscheid, above n 206, 147.

²¹⁸ *Ibid* 148.

Court held that it had been proven beyond reasonable doubt that the offenders were motivated by gender prejudice, the offenders (as well as being strangers to the victim) came from, respectively, Lebanese and Algerian backgrounds?²¹⁹ These offenders were undoubtedly misogynistic. But was their misogyny more apparent to the prosecution because of their cultural background?

If, as we think, the main purpose of sentencing aggravation provisions such as ss 5(2)(daaa), 21A(2)(h) and 6A(e)²²⁰ is to allow for the more severe punishment of offenders who knowingly cause harm to harmless individuals and groups and breach society's fundamental values, the Court's decision in *R v ID* is clearly correct. If crimes motivated by prejudice against, or hatred for, other harmless groups are to be punished more severely than parallel crimes, this should also be the case for crimes that are motivated by hatred for or prejudice against women.

VI CONCLUSION

In Australia, the task of providing a legal response to the problem of hate crime has fallen largely to sentencing courts. Victoria, NSW and the Northern Territory have now codified the common law position that a motive of prejudice or group hatred is an aggravating factor at sentencing. These statutory reforms underscore the need to provide clear and consistent judicial guidance concerning the definition of prejudice-motivated crime which, in turn, can be relied upon by law enforcement officers.²²¹

With some troubling exceptions, there is much consistency in judicial constructions of ss 5(2)(daaa), 21A(2)(h) and 6A(e).²²² In short, there are three key features, or common denominators, in cases where the provisions have been activated:

- 1 evidence of group difference between offenders and victims where the latter are largely, although not exclusively, members of subjugated and harmless minority groups;

²¹⁹ *R v ID* [2007] NSWDC 51 (25 January 2007) [115], [152] (Nicholson DC).

²²⁰ *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

²²¹ See Office for Democratic Institutions and Human Rights, Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide* (2009) 11.

²²² *Sentencing Act 1991* (Vic); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT).

- 2 evidence of group hostility on the offender's part, manifested either by derogatory and hostile statements about the victim's group or, alternatively, by the offender's violent conduct alone or accompanied by psychological evidence; and
- 3 the *absence* of evidence from which to infer another motive.

Together, these forms of evidence have been sufficient to establish beyond reasonable doubt that the offence was motivated by prejudice against or hatred for the group to which the victim belonged or was presumed to belong. In other words, it is this conduct that turns an ordinary crime into a prejudice-motivated crime.

An offender who is wholly or substantially motivated by prejudice towards other groups of people, especially minority groups, is an offender who knowingly causes a particular type of harm: the intimidation, denigration and marginalisation of harmless, often subjugated, groups. This, in turn, is an affront to the core liberal democratic values of acceptance of and respect for those who differ from the majority in harmless ways, especially those groups that have experienced historical oppression. The purposes of sentencing aggravation provisions are to enable courts to denounce, deter, punish and recognise the harm of such offending by imposing a harsher penalty upon the offender — a punishment that is said to be proportionate to the severity of this harm and the offender's heightened culpability. In two cases, the courts have apparently held that, respectively, women and dominant groups, such as Christians, are also contemplated by these provisions.²²³ Extending the scope of the provisions to both of these groups is justifiable if we accept that the purpose of the provisions is to redress crimes that damage fundamental values of social cohesion and equality.

In some circumstances, however, the courts have struggled to construe and apply the provisions in ways that are consistent with, or further, their purposes. Four concerns arise. First, the third feature we have identified above — the absence of evidence from which to infer an alternative motive — often proves determinative, meaning that the provisions are less likely to be enlivened in circumstances where the offence was only partly motivated by prejudice. Indeed, to date, the courts have not established a consistent or appropriate test for determining, in cases of mixed motives, the extent to which the offence must be motivated by prejudice in order to enliven the provisions. To avoid

²²³ *R v ID* [2007] NSWDC 51 (25 January 2007); *R v Al-Shawany* [2007] NSWDC 141 (15 June 2007).

the imposition of a harsher penalty where prejudice is only a trivial factor, and thereby ensure that sufficient weight is given to appropriate evidence, it may be helpful for the courts to ask whether prejudice makes a substantial contribution to the offender's motive. Secondly, we have argued that it is unsafe to infer a prejudiced motive from evidence of group selection alone as it does not establish that the offender knowingly inflicted harm upon the target group or the wider community. Unfortunately, there is inconsistency in judicial interpretations of the provisions, and with the common law, on this point. Thirdly, some courts have overreached in their interpretations of the provisions by holding that they apply to groups that are harmful, rather than harmless, such as paedophiles. Extending the scope of the provisions in this group undermines the purpose of denouncing violence against harmless and subjugated groups. Fourthly, the provisions appear to be under-utilised, adding little to the common law, in cases involving homosexual victims, where there is a tendency for the courts to become preoccupied with the victim's, rather than the offender's, conduct. Together, these remain key challenges in the interpretation and application of sentencing aggravation provisions for prejudice-motivated crime.