

Contemporary Comment

The Cronulla riots: exposing the problem with Australia's Anti-vilification laws

It has been over three months since Australia witnessed a sea of violence motivated by racial and ethnic hatred in the Sydney beach town of Cronulla. Since then New South Wales Police has arrested over 80 people laying over 200 charges.¹ The alleged offences have ranged from assaulting police, affray, riot, threatening violence, malicious damage, and resisting arrest. The horrific pictures of offenders attacking victims have since been published in national newspapers naming and shaming the perpetrators in an attempt to find more of the culprits. Some offenders have now been convicted, others remain at large.

Yet none of these offenders will face hate crime charges.² That is because hate crimes do not specifically exist under Australian law. If the Cronulla riots had occurred in the United Kingdom or the United States the situation would be very different (Walters 2005). Offenders there would have been charged under hate crime laws where lengthier sentences could be imposed.³ The introduction of hate crime legislation in the UK and US has been recognition of the gross severity that crimes motivated by prejudice represent (Lawrence 1999; Jenness & Grattet 2001). The separate offence of 'hate crime' and the higher sentences imposed send a strong message to the community that serious racism leading to violence will not be tolerated in a democratic society.

Australia has chosen not to implement such laws. Instead it has relied on the standard criminal law offences of assault, aggravated assault, grievous bodily harm or wounding to deal with any offender (regardless of motivation) who commits a crime of violence. The belief is that all offenders should be treated the same regardless of motivation i.e. an assault is an assault whether it is motivated by hate or not (Uhrich 1990; Morsch 1991).

However, the issue of hate violence is much more complicated than this because the aftermath of hate violence can be far reaching. Hate violence can lead to prolonged periods of depression and anxiety amongst victims (Herek et al 1997; Levin 1999). The violence accompanying hate crimes is frequently more severe leading to higher hospitalisation rates compared with other assaults (Levin 1992–1993; 1999; Levin & McDevitt 1993; Kuehnle & Sullivan 2001). Few of those who witnessed the attacks on victims in Cronulla on the 15th of December would deny the brutality with which the attacks were carried out. Indeed, victims will often suffer permanent injuries and these crimes cause a disproportionately high number of fatalities (Tomsen 2002).⁴ Minority communities suffer immeasurably as they fear they too could be next (Walters 2005:210; Attorney General (NSW) 2003:51; Lawrence 1999:43–44; Stanko & Curry 1997; Thompson 1997; Tomsen 1993). The final

1 Information obtained from New South Police Media Department on the 26th of March 2006.

2 Hate crimes are offences which are motivated by a prejudice held towards the victim.

3 See for example ss28–32, 82 & 96 of the *Crime and Disorder Act 1998* (UK).

4 This is the resulting death from random attacks motivated by prejudice compared with the rate of deaths resulting from attacks not motivated by prejudice.

result is an offence so harmful to Australian communities that it bears heavily on John Howard's opinion that Australia is, 'a culturally diverse community, united by an overriding and unifying commitment to Australia'.⁵ Whether the Cronulla riots are symptomatic of endemic racism or an example of localised social unrest is not entirely clear. Either way one thing must be made certain; that is violence motivated by prejudice should be characterised by the law as different to other types of assault.

Australian law has not completely ignored hate crime offending. Seventeen years ago the New South Wales government amended the *Anti-Discrimination Act 1977* (NSW) to incorporate racial anti-vilification provisions (found under sections 20C & 20D). Other States have implemented similar provisions (see Walters 2005:213–214). The NSW provisions state that a person shall not publicly incite others to physically harm anyone on the ground of race.⁶ Those found guilty of the offence are liable to six months in prison.⁷ Yet no-one identified in the Cronulla riots has been charged with the offence of inciting racial violence. In fact, in the 17 years of the legislation being active no-one has been prosecuted under the Act. This is despite the fact that the Anti-Discrimination Board (ADB) has put forward a multitude of cases to the Director of Public Prosecutions (DPP). That suggests the DPP has found insufficient evidence to justify the cost of taking the offender to trial in these cases. Even the extensive footage of offenders inciting violence towards people of Middle Eastern appearance in Cronulla has failed to compel the DPP to take action.

The first problem is that the police do not deal with the offence of inciting racial violence even though it is a 'criminal' offence. Victims must contact the ADB who will investigate the complaint. Unlike the police the ADB rely on more limited resources. Indeed, after 17 years of active legislation in this area it has become obvious that complaints of incitement to racial violence will rarely make it past the Anti-Discrimination Board's gates. Those that do will find themselves knocking on the DPP's door only to find no-one is home.⁸

Some have argued that the government has rectified the uselessness of the anti-vilification laws by creating new laws of sedition. The provisions were passed late last year under *Anti-Terrorism Act (No 2) 2005* (Cth) (commencing in December). The Act amended *Criminal Code Act 1995* (Cth) to create the offence of urging one racial, religious, national or political group to commit violence against another. However, it is unlikely that these laws will have any impact at all on individuals who incite violence towards other individuals because of their race (or ethnicity or religion). Using the crime of sedition to punish a hate crime seems strange. It would be a far push to declare that shouting racial obscenities at an individual amounts to sedition. They are laws to protect against terrorism not racism (Saul 2005). The author predicts that the new laws of sedition will play little role in tackling the problem of racial violence. That is because the offender's actions must also threaten 'peace, order and good government of the Commonwealth'.⁹ With the DPP refusing to take cases on the lower burden of proving the offender has incited others to

5 Taken from the Transcript of the Prime Minister the Hon John Howard MP, Address to the National Press Club, Great Hall, Parliament House, 25 January 2006.

6 Other grounds include: 'homosexuality', 'HIV/AIDS', 'transgender',

7 The *Racial Discrimination Act 1975* (Cth) makes an act that offends, insults, humiliates or intimidates another because of that person's race, colour, national or ethnic origin unlawful but not an offence.

8 A Working Party has produced a report reviewing the racial vilification provisions of the *Anti-discrimination Act 1977* (NSW) but this has yet to be tabled in Parliament.

9 Sch 7 Part 5.1 (12) adding 80.2 to the end of Division 80 of the *Criminal Code Act 1995*.

physically harm someone, the added burden of threatening peace, order and good government will ensure that only the most serious threats to national security will be prosecuted.

The government must now look to longer term strategies at reducing hate violence. There are many areas of public life where the Government should be active; this article suggests the law is an important domain which it must reform.

Last year the Labor Party introduced the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) in response to the government's Anti-Terrorism Bill. The Bill stated that, 'A person must not threaten to cause physical harm to another person or a group because of the race, colour, or national or ethnic origin of the other person or of some or all of the people in the group.'¹⁰ The penalty imposed for such a crime would be imprisonment for two years. The Bill also proposed new acts of incitement to commit physical harm stating:

(1) A person must not, with the intention of inciting violence against another person or a group of people, or with the intention of inciting damage to property, do an act, otherwise than in private, if the act is: (a) reasonably likely, in all the circumstances, to incite violence against the other person or group of people; or damage to property, and (b) done because of the race, colour, or national or ethnic origin of the other person or of some or all of the people in the group.

This offence carries a term of one year imprisonment.¹¹

The burden of proof under the Bill is much lower when compared with current New South Wales legislation. Importantly the words 'reasonably likely' create room for the wide application of the provisions by the courts. The prosecution would have to prove the act was likely to incite violence rather than proving beyond reasonable doubt that it actually did; a burden which (as previously argued) has proven to be too high.

The Bill also states that the reason for doing the act must be the 'substantial reason (whether or not it is the dominant reason) for doing the act'.¹² Again the legislation would be open to the courts interpretation but it is reasonably clear that this would widen the net. The Bill (if passed) would go very close to creating the crime of hate speech at a Commonwealth level. In fact, the explanatory memorandum to the Bill states, '... law enforcement authorities should have the tools to target the purveyors of hateful, violent messages before, not simply after these messages are turned to action.' Of course threats of violence made towards someone are already criminal acts. However, the Bill would demarcate such acts as 'different' and ensure the penalty for committing such acts was enhanced.

The Bill provided by Labor is an excellent example of how the law should be changed. For now, it sits in Parliament awaiting its second reading. Its passage would be a welcome step in the reform of hate crime legislation in Australia. Unfortunately, there will be no surprise if it meets a similar fate to previous attempts to make racist threats criminal offences made under the Racial Hatred Bill 1994 and more recently the Racial and Religious Hatred Bill 2003. The Liberal and National parties have previously resisted such laws citing arguments that they will erode freedom of speech (Jonas 2002). However, if it does make it onto the statute books it will represent a staunch message that threatening or inciting racial and religious violence is unacceptable in Australian society.

10 Sch 1 Part IVA

11 Sch 1 Part IVA. The Bill also covers acts motivated by religious hatred.

12 Sch 1 Part IVA.

Inciting violence is only one part of a larger picture. Hate crime legislation must be introduced by Parliament that separately defines violent offences which have been committed by reason of a prejudice evinced towards the victim. This will include all violent acts which are motivated by racism, ethnic or religious hatred.¹³ It will enable the police and the courts to successfully prosecute those who partake in acts such as those carried out in Cronulla as hate crime offenders. Hate crime laws will stigmatise perpetrators not just as criminals but as racists. The message sent to the Australian community is that hate violence is so abhorrent to our democratic ideology that it warrants separate punishment. It recognises that crimes motivated by racism are more severe and that this must be reflected by the punishment imposed on the offender. The government has an obligation to communicate that violence motivated by racism, ethnicity, or religion must not be tolerated. That message in turn, if nothing else, will help to reduce racial, ethnic and religious violence.

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References

Attorney-General (NSW) (2003) “‘You shouldn’t have to hide to be safe’”: A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in New South Wales’, Attorney Generals Department New South Wales.

Herek, G, Cogan, J & Gillis, J (November, 1997) ‘The Impact of Hate Crime Victimization’ (Paper presented at a congressional briefing co-sponsored by the American Psychological Association and the Society for the Psychological Study of Social Issues, Washington, DC. A summary of the findings are found at <<http://www.apa.org/ppo/issues/pherek.html>>, viewed 25 March 2006.

Jenness, V & Grattet, R (2001) *Making Hate a Crime*, Russell Sage Foundation, New York.

Kuehnle, K & Sullivan, A (2001) ‘Patterns of Anti-Gay Violence: An Analysis of Incident Characteristics and Victim Reporting’, *Journal of Interpersonal Violence*, vol 16, no 9, p 28.

Lawrence, F (1999) *Punishing Hate*, Harvard University Press, Cambridge.

Levin, B (1992–1993) ‘Bias Crimes: A Theoretical and Practical Overview’, *Stanford Law & Policy Review* vol 4, p 165.

Levin, B (1999) ‘Hate Crime: Worse by Definition’, *Journal of Contemporary Justice* vol 15, no 1, p 6.

Levin, B & McDevitt, J (1993) *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, Plenum, New York.

¹³ It should also include acts motivated because of someone’s disability or sexual orientation.

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Morsch, J (1991) 'The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation', *Journal of Criminal Law & Criminology* vol 82, p 659.

Saul, B (2005) 'Speaking of Terror: Criminalising Incitement to Violence', *The University of New South Wales Law Journal*, vol 28, no 3, p 868.

Stanko, E & Curry, P (1997) 'Homophobic Violence and The Self "At Risk": Interrogating The Boundaries', *Social & Legal Studies*, vol 6, no 4, p 513.

Thompson, S (1997) 'Hate Crimes Against Gays and Lesbians: A New South Wales Police Response' in Mason, G & Tomsen, S (eds) *Homophobic Violence*, Hawkins Press, Sydney.

Tomsen, S (1993) 'The Political Contradictions of Policing and Countering Anti-Gay Violence in New South Wales', *Current Issues in Criminal Justice*, vol 5, no 2, p 209.

Tomsen, S (2002) *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.

Uhrich, C (1999) 'Hate Crime Legislation: A Policy Analysis', *Houston Law Review*, vol 36, p 1467.

Walters, M (2005) 'Hate Crimes in Australia: Introducing punishment enhancers', *Criminal Law Journal*, vol 29, no 3, p 201.

Speeches

Jonas, W (2002) 'Racism and the fourth estate: free speech at what cost?' Aboriginal and Torres Strait Islander Social Justice Commissioner & Acting Race Discrimination Commissioner, Human Rights and Equal Opportunity Commission, Office of Multicultural Interests -- Western Australia.

Legislation

Anti-Discrimination Act 1977 (NSW).

Anti-Terrorism Act 2005 (Cth).

Crime and Disorder Act 1998 (UK).

Racial Discrimination Act 1975 (Cth).

Bills

Anti-Terrorism Bill 2005 (Cth).

Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth).

Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) — Explanatory Memorandum.

Racial Hatred Bill 1994 (Cth).

Racial and Religious Hatred Bill 2003 (Cth).