

# The need to criminalise hate crimes

By Mahmud Hawila<sup>1</sup>

Australia's statutory response to hate crime – crimes motivated by hostility, bias or hatred – is sluggish and over three decades behind comparable western nations. Since 1980, hate crime has been criminalised in the United States. Lawmakers in the United Kingdom and Canada quickly followed America's lead. Decades later, here in Australia, the legislative response to hate crime is still in its infancy.

The first example of hate crime legislation in post-civil rights movement America was not motivated by the advent of a new crime type. Crimes motivated by hate have been perpetrated for many centuries and, in some places, were even state-sanctioned. Rather, the laws recognised a crime which has plagued humanity for far too long.

COVID-19 underscores the risks of leaving hate crime unchecked. In Australia, the pandemic brought with it skyrocketing rates of racist attacks against minority communities. Throughout 2021, Australian Security Intelligence Organisation's (ASIO) Director-General of Security, Mike Burgess, warned of increased activity from violent right-wing extremists, white supremacists, and neo-Nazis. In August 2021, the spy chief revealed that investigations of ideologically motivated violent extremists – specifically nationalist and racist extremists – had risen to 50 per cent of ASIO's onshore priority counter-terrorism caseload;<sup>2</sup> up from 40 per cent in April.<sup>3</sup>

But the influx of hate crime – also referred to as bias, prejudice or identity-motivated crime – is not a new phenomenon downunder. Academic research records the first examples of hate crime in Australia as far back as the colonial period. The conflation of COVID-19 with global ideological extremist trends simply made our hate crime problem worse.

## The absence of evidence

You might ask: If the assertion that we have an age-old hate crime problem is true, where is the mountain of evidence to prove it? Where is the public outrage and political willpower?

If you did embark on a search for the mountain of evidence in official crime



statistics, you would be forgiven for thinking the assertion is altogether false. For example, if you log onto the NSW Bureau of Crime Statistics and Research (BOSCAR) website today, type 'hate crime' or 'bias crime' and press search – you will see the words '*Nothing here matches your search*'.

The question follows: Is it possible for Australia to have a longstanding hate crime problem if the official crime statistics are silent on the issue?

In Australia, police are responsible for the collection, analysis and reporting of official crime data to agencies like BOSCAR. However, without hate crime laws to enforce, there is simply nothing to report.<sup>4</sup> The lack of political will to enact hate crime laws is, for the most part, the corollary of the complete absence of official hate crime statistics needed to inform evidence-based decision making.<sup>5</sup> Another part of the story is the fact prejudice-motivated crimes are notoriously underreported. There are myriad reasons for underreporting, including fear of reprisals, insufficient police training on responding to hate crimes or dealing with minorities, as well as historical tensions between targeted groups and law enforcement.<sup>6</sup>

Another possible reason for the lack of legislative action is that Australia has been quite fortunate to have avoided a high-profile hate crime incident onshore. On 15 March 2019, a Grafton man targeted mosques in Christchurch, New Zealand as part of a hate fuelled, Islamophobic terrorist attack. The Australian massacred 51 Muslim New

Zealanders in an act of express terrorism. Another 40 suffered gunshot wounds and survived; forced to live with ongoing pain, numbness from bullet fragments, and repeated flashbacks of the traumatic events. Survivor's guilt was felt here in Australia too.

While the Christchurch attacks may not have been onshore, they were certainly close to home and inextricably linked to Australia. Despite the terrorist's Australian origins, the links to his radicalisation here, and the close ties we share with New Zealand, the legislative lacuna remains.

## The recording of evidence

Notwithstanding the absence of official hate crime data, there is an overwhelming body of scientific and qualitative data telling of Australia's hate crime problem. Over the years, targeted communities have worked tirelessly to fill the gap left by legislative inaction. Organisations comprised mostly of volunteers, for example, the Executive Council of Australian Jewry (ECAJ) and the Online Hate Institute and Islamophobia Register Australia, regularly conduct victimisation surveys and qualitative studies to monitor, document and analyse hate crime trends in Australia. The 2020 ECAJ Antisemitism Report documented 331 antisemitic incidents, including 188 physical attacks.<sup>7</sup> Similarly, Islamophobia Register Australia reported 551 incidents in their 2020 report, including 137 attacks.<sup>8</sup> Most victims were women, often with children nearby. Most offenders were men.

More evidence of Australia's enduring hate crime problem came to light in May 2021, when the NSW Legislative Council Standing Committee on Social Issues tabled its report after a two-year parliamentary inquiry into gay and transgender hate crimes between 1970-2010.<sup>9</sup> The Standing Committee investigated, among other things, 88 alleged gay and transgender hate killings that took place in NSW. One of the sobering facts which emerged in the inquiry was that the actual number of alleged hate-fuelled homicides exceeded 88. There were countless more, and the number did not include reports of lesbian or bisexual deaths either.



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Such reports shine a burning light on the dark realities of Australia's hate crime problem which do not make their way into official hate crime statistics. The reports are confronting. The impact and pain arising from hate crime runs deep in minority communities.

### International legislative hate crime models

A review of hate crime legislation enacted by our international counterparts reveals three distinct types of legislative responses to hate crime.

#### *Penalty enhancement laws*

This is the most common legislative response to hate crime. It forms the central component of legislative models for countries like the United States, Canada, United Kingdom, Scotland, and recently, New Zealand. It increases the maximum penalty for pre-existing criminal offences, otherwise known as 'base' offences, if motivated by hatred against protected groups.

#### *Sentence aggravation laws*

This model requires the Courts to consider the offender's hate motivation as an aggravating factor during sentencing proceedings. Unlike penalty enhancement laws, sentence aggravation laws do not specify the increased penalty which ought to be imposed. Instead, this is a matter for judicial consideration at sentence. The United Kingdom, Scotland, Canada and United States have each enacted sentence aggravation laws.

#### *Substantive offences*

This model involves the legislating of offence-creating provisions which include hate, bias or prejudice as an element. Examples of offences include incitement to violence and advocating genocide. Again, Canada, America, Scotland and the United Kingdom have all legislated substantive hate crime offences.

### Existing hate crime laws in Australia

Australia has adopted a piecemeal and inadequate approach to outlawing hate crimes. Western Australia is the only state or territory to have passed a *penalty enhancement law*. This was done in 2004. It only applies to race and not other protected attributes, such as religion, age, sex, sexual orientation, gender identity or disability.

New South Wales, Victoria, Tasmania and Northern Territory have enacted *sentence aggravation laws*. Except for Tasmania and Northern Territory, all states and territories have a *substantive offence* against criminal vilification by threat or incitement to physical harm albeit with varying protected attributes in each jurisdiction.



Taking a closer look at the statutory response to hate crime in New South Wales, there are two hate crime laws:

- a. s 21A(2)(h) *Crimes (Sentencing Procedure) Act 1999* (NSW): This is a sentence aggravation law where the court is required to take into account whether 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). There are very limited data on how often this provision is enlivened at sentence and the impact, if any, on penalties imposed.
- b. s 93Z *Crimes Act 1900* (NSW): A substantive hate crime offence making it an offence to publicly threaten or incite violence against a person because the person has particular characteristics, including gender identity, HIV/AIDS status, intersex status, race, religious belief and sexual orientation. It does not offer protection for offences motivated by prejudice against age, disability or gender. The offence requires approval from the Director of Public Prosecutions (DPP) before charge. Section 93Z was enacted on 20 June 2018 and has been marred with controversy ever since. Critics regularly cite three reasons. First, the essential ingredient of 'threat or incite to violence' has a high legal threshold and is notoriously difficult to prove beyond reasonable doubt. Second, s 93Z criminalises a niche example of hate crime which, although objectively serious, is uncommon. The vast majority of hate crimes are high volume offences which appear at the mid-lower tiers of the criminal calendar and remain unaddressed in NSW. Lastly, the need for NSW Police Force to obtain DPP approval before filing charges creates an administrative bottleneck.<sup>10</sup> To date, there has not been a successful prosecution under s 93Z. Two prosecutions have been attempted by NSW Police. Both were commenced without the consent of the DPP and the convictions were accordingly annulled arising from the procedural defect.<sup>11</sup>

It is the unanimous view of hate crime academics that the legislative response in Australia is inadequate and requires reform.<sup>12</sup>

### Why legislate against hate crime?

The policy objective underlying hate crime laws is to punish hate crime offenders more severely than offenders of parallel base offences. This approach has four advantages.<sup>13</sup>

First is proportionality. The additional punishment attached to the offence is considered proportionate to the additional harm caused. The targeting of a victim because of a presumed or identifiable characteristic causes greater public harm both because the victim suffers more physical, mental and emotional trauma and because a targeted attack on an individual because of their identity affects groups who share, or appear to share, that targeted characteristic. This concept is known to hate crime academics as the 'ripple effect'. Left unchecked, it leads to increased levels of fear and vulnerability in targeted communities and eventually spreads to wider society. Targeted communities are often vulnerable people, coming from marginalised backgrounds or having experienced systemic oppression, and are as a result far less likely to report matters to police.

Secondly, an offender who commits a crime motivated by hate, and not just the base offence, is more culpable because of their specific intent or recklessness to inflict hate. The offender's increased culpability arises from their decision to purposefully cause such harm and radically depart from western liberal democratic values of equality and diversity.

Thirdly, for the purpose of consequentialist and retributivist theories of punishment, it is arguable that hate crime is more wrong than the parallel base crime and the offender should be liable to greater punishment as a consequence.

Finally, more severe penalties deliver a strong message to the community. By giving prominence to the principles of punishment, denunciation, and specific deterrence, more severe penalties send a strong message to offenders.

### New South Wales to take the lead?

Many of our international counterparts enacted comprehensive hate crime legislation decades ago when criminalisation was the go-to tool for social change. The penalty enhancement model was, and still is, the most common legislative response to hate crime. It uses increased maximum penalties and punishment to address social harms.

Social and legal theory has developed significantly since the 1980s when those first hate crime laws were enacted overseas. For example, we now widely recognise that criminalisation is just one of the many tools needed to effect positive social change. We also have an enhanced understanding of the benefits of therapeutic and restorative justice

initiatives to rehabilitate offenders, repair harms to victims, and create a more inclusive environment in Australia.<sup>14</sup>

But the resounding inarguable matter remains: Australia's legislative response to hate crime is long overdue. The state of New South Wales is in the opportune position to enact a modern socio-legal response. With the oldest hate crime policing unit in Australia, the NSW Police Force is standing-by and ready to meet the challenge head-on. The proposed legislative framework could simultaneously draw upon existing models – specifically *penalty enhancement* and *substantive offence-creating* provisions – and critically, move beyond a purely punitive response to establish alternatives to prosecution.

In this defining moment of Australia's history, where an unprecedented tide of nationalist and racist extremism has reached our doorsteps, the 'fierce urgency of now' demands a contemporary socio-legal response to hate crime before it is too late. **BN**

### ENDNOTES

- 1 Mahmud Hawila, Barrister, Black Chambers.
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- 3 Mike Burgess, 'Statement: PJCSIS inquiry into extremist movements and radicalisation in Australia' (29 April 2021) <<https://www.asio.gov.au/publications/speeches-and-statements/pjcsis-inquiry-extremist-movements-and-radicalisation-australia.html>>.
- 4 Nick Kaldas, 'Australia has Eight Police Forces but None are Tracking Hate Crimes', *The Sydney Morning Herald* (online, 17 March 2019) <<https://www.smh.com.au/national/australia-has-eight-police-forces-but-none-are-tracking-hate-crimes-20190316-p514tk.html>>.
- 5 Gail Mason and Leslie Moran, 'Bias Crime Policing: The graveyard shift' (2019) 11(1) *International Journal for Crime, Justice and Social Democracy* 1, 12.
- 6 Australian Hate Crime Network, Submission No 13 to NSW Legislative Council Standing Committee on Social Issues, Inquiry into Gay and Transgender Hate Crimes between 1970 and 2010, 4 <<https://www.parliament.nsw.gov.au/ldocs/submissions/67294/0013%20-%20Australian%20Hate%20Crime%20Network.pdf>>. See also Kevin Nguyen, 'Former NSW Police Prosecutor says Hate Crime Reforms 'a Matter of Life and Death' after Scott Johnson Arrest', *ABC News* (online, 17 May 2020) <<https://www.abc.net.au/news/2020-05-17/scott-johnson-arrest-prompts-calls-for-police-hate-crime-reform/12241878>>.
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- 9 NSW Legislative Council, *Report of the Standing Committee on Social Issues – Inquiry into Gay and Transgender Hate Crimes between 1970 to 2010* (4 May 2021) 58.
- 10 Above, at 6.
- 11 Christopher Knaus and Michael McGowan, 'NSW police botch the only two race hate prosecutions under new laws', *The Guardian* (online, 2 March 2021) <<https://www.theguardian.com/australia-news/2021/mar/02/nsw-police-botch-the-only-two-race-hate-prosecutions-under-new-laws>>.
- 12 Gail Mason, 'Penalty Enhancement Laws: A model for regulating hate crime in Australia', *University of Western Australia Law Review* 48.2 (2021): 470.
- 13 Ibid.
- 14 See also Law Commission, *Hate Crime Laws: A Consultation Paper* (Consultation Paper 250, 23 September 2020).