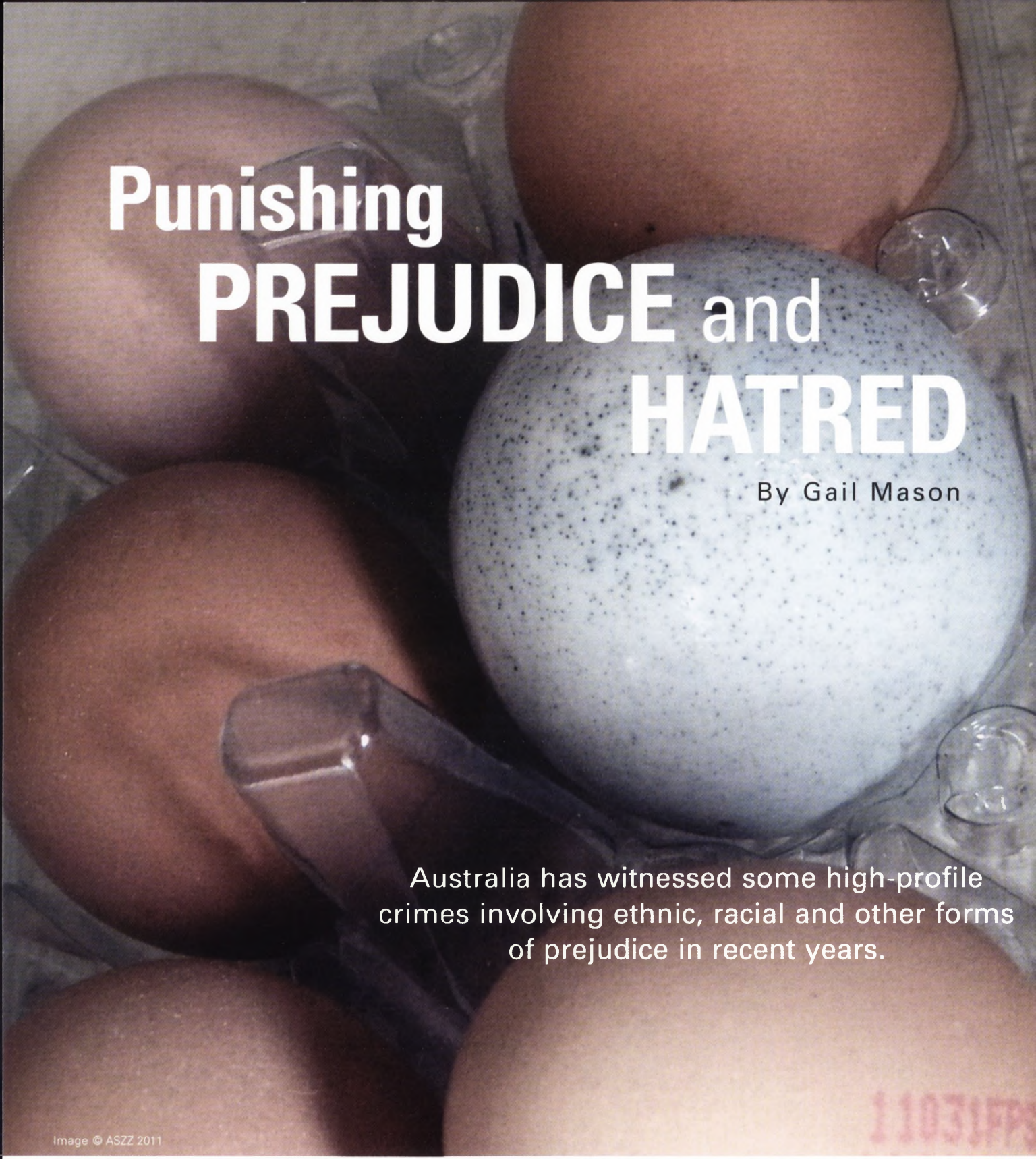
# Punishing PREJUDICE and HATRED

By Gail Mason



Australia has witnessed some high-profile crimes involving ethnic, racial and other forms of prejudice in recent years.



The Cronulla riots in 2005 and a spate of reported attacks upon Indian students in Melbourne and Sydney in 2009 stand out. Crime that is motivated or aggravated by prejudice or group hatred is often referred to as *hate crime*. The main, although not the only, targets of such crime are members of minority groups including the Jewish, Muslim, Asian, gay, Aboriginal and disabled communities.[1] Typical examples include fire-bombing a mosque, assaulting a gay couple in public or painting a swastika on a synagogue.

Hate crime inflicts serious and far-reaching harm. In addition to physical and psychological injury, it sends a 'powerful message of intolerance and discrimination'

that has a 'general terrorising effect' on all members of the target group.[2] In attacking the security and confidence of entire communities, hate crime undermines multiculturalism and tears at the fabric of democracy.[3]

Most common law countries have introduced purpose-built criminal legislation to address hate crime since the 1980s. Australia, too, has experienced a rapid rate of reform in this area. This article will present recent developments in hate crime law and, focusing on sentencing laws, consider how the courts have interpreted the question of motive.

## MODELS OF HATE CRIME LAW

Hate crime laws can be divided into three broad models (some jurisdictions have adopted more than one model):

- The penalty enhancement model: This model imposes a mandatory additional penalty on specified offences, where the conduct is motivated or aggravated by prejudice or group hostility. Western Australia enacted penalty enhancement provisions for racially aggravated offences in 2004,[4] but is the only jurisdiction to have done so (although they are common in the US and also operate in the UK).
- The sentence aggravation model: This model takes prejudice into account as an aggravating factor at sentencing, and allows greater judicial discretion than the penalty enhancement model. It was introduced in NSW in 2003, NT in 2006 and Victoria in 2009.[5] The provisions in each state make it an aggravating factor at sentencing if there is evidence beyond reasonable doubt that an offence is motivated by hatred for or prejudice against a group of people.
- The substantive offence model: This approach criminalises a range of conduct that incites or is motivated by prejudice or group hostility. Racial vilification offences in Western Australia's Criminal Code[6] and serious vilification offences within anti-discrimination statutes in NSW, Vic, SA, Qld and ACT can all be classified as substantive hate crime offences.[7] 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.[8]

## SENTENCE AGGRAVATION PROVISIONS IN NSW AND VICTORIA

Although there is a virtual proliferation of criminal legislation designed to address prejudice-related crime, many of these laws are rarely used in practice; for example, there has never been a successful prosecution for serious vilification in any of the five jurisdictions where this offence exists. Sentence aggravation provisions, however, are increasingly being relied upon by prosecutors and their application has now been considered in a number of reported cases in NSW and Victoria. Of particular interest are the different interpretations given in NSW and Victoria to the requirement that the offence be 'motivated' by prejudice or group hate. Before considering these cases, it is helpful to look at the major similarities and differences between the provisions in Victoria and NSW.

### Group of people

Perhaps the most apparent difference between the sentence aggravation provisions in the Victorian and NSW statutes is that the former does not describe the kind of groups to which the provision applies, stating only that it will be an aggravating factor at sentencing if the offence is motivated by hatred or prejudice against 'a group of people with common characteristics'. In contrast, the NSW subsection provides examples of groups to which the provision will apply: 'such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability'. Moreover, in NSW, the offender must believe that the victim 'belonged' to the group in question (whereas, in Victoria, it is sufficient if the victim was 'associated' with the group or the offender believed him/her to be associated).

Thus, under the Victorian Act, the term 'group of people' is not defined. The Victorian Sentencing Advisory Council recommended this wording in its 2009 report. It was of the view that the legislation should not contain a list of either exhaustive or inclusive groups, because 'the courts are best placed to identify and develop the groups to which the aggravating factors should apply on a case by case basis'.[9] However, the Explanatory Memorandum to the amending Bill does provide some guidance on this issue. It states 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'.[10]

The intention of the Victorian parliament appears to be to protect groups traditionally recognised as the targets of discrimination and other forms of inequality. In NSW, however, no such aid to interpretation was available to the court in the 2007 case of *Dunn v R*.

### *Dunn v R*: should paedophiles be included as a protected group?

In *Dunn v R*,[11] the NSW Court of Criminal Appeal upheld the application of that state's sentence aggravation provisions to an offender who had burnt down his neighbour's flat because he believed his neighbour to be a paedophile. The court held that:

> 'Applying s21A(2)(h), 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. The examples given in parentheses are merely that, ie examples, they do not comprise an exhaustive list of the groups envisaged by the subsection.'[12]

Vigilantism against adults who sexually abuse children is unacceptable and demands a swift and certain response from the criminal law. It is arguable, however, that the principles of equality and freedom that underpin hate crime laws become problematic when applied to paedophiles.[13] >>

The *Gouros* decision offers an interpretation of the motive test under Victoria's new sentence aggravations provisions for offences motivated by prejudice or group hatred.

### Mistake as to victim's membership of a group

Both the Victorian and NSW statutes explicitly provide for circumstances where an offender may be mistaken about the victim's membership of a particular group by referring to the offender's belief about the victim's group membership. Thus, an offender who targets a victim because he/she thinks the victim is, for example, Aboriginal, most likely would be caught by the provisions even if the victim turned out to be non-Aboriginal. In NSW, however, the offender's belief must be towards the victim's membership of the group in question: the victim must be believed to 'belong' to that group. Arguably, this would exclude, for example, an offence against a non-Muslim person who was targeted because he/she worked at a Muslim community organisation, not because the offender believed him/her to be Muslim. The Victorian provisions are broader in this respect. The victim need only be believed to be associated with the group that the offender hates or is prejudiced against (for example, the non-Muslim employee is associated with Muslims and is targeted because the offender hates Muslims).

### Motivation: whole or partial

Another important distinction between the NSW and Victorian provisions is that the latter specifies that it is not necessary for an offender's conduct to be wholly motivated by hatred or prejudice and that partial motivation will be sufficient: the offence is 'motivated (wholly or partly) by the hatred or prejudice'. The NSW law makes no reference to partial motivation, referring only to offences 'motivated by hatred or prejudice against a group of people'. The significance of this distinction is highlighted in the recent cases of *R v Gouros*[14] and *R v Aslett*.[15]

## *GOUROS*: GROUP SELECTION AMOUNTS TO MOTIVATION

The decision of the Victorian County Court in *R v Gouros* is significant as it offers one of the first interpretations of the motive test under Victoria's new sentence aggravation provisions for offences motivated by prejudice or group hatred.[16] On 14 December 2009, John Gouros was sentenced by Judge Cohen for one count of theft of a motorcar, three counts of armed robbery, one count of attempted armed robbery, one count of arson and one count of robbery. He was given a total effective sentence of 35 months' imprisonment to be served in a Youth Justice Centre. The facts were that on 9 March 2009, having earlier stolen a car, Gouros and three co-offenders approached two men of Indian appearance in the Melbourne suburb of Glenroy. Armed with a handgun, Gouros demanded that both victims hand over their mobile phones and wallets. On the 29th March, Gouros and one co-offender followed and confronted a man and woman of Indian appearance who had alighted from a train at Pascoe Vale. Armed with a knife, the offenders demanded a wallet and mobile phone from the man. Two days later, on 1 April 2009, Gouros and the same co-offender approached Mr Abdul Khan at Glenroy station. The co-offender demanded Mr Khan's mobile phone and grabbed his backpack. On 5 April 2009, Gouros and the same co-offender approached two Indian students, again at Glenroy station, and armed with bottles, stole a mobile phone.

In all, three of Gouros' convictions involved victims described by the court as of Indian, Pakistani or Nepalese background. In considering whether motivation as set out in the subsection should be taken into account in sentencing Gouros, Judge Cohen considered two main issues. First, whether the court should have regard only to the individual offender's motive or to the wider question of whether the offence itself was so motivated. This issue arose because Gouros claimed that it was his co-offenders who selected the victims and that he 'personally had no prejudice or ill-will towards people of Indian origin'.[17] In light of evidence to this effect, Judge Cohen was not satisfied beyond reasonable doubt that Gouros was personally motivated in this manner. Nonetheless, she recognised that in order to give effect to the policy purpose of the provision, particularly its general deterrent effect, the provision should apply to the motivation for the offence as a whole rather than the motivation of the individual offender (but that the actual degree to which such a motive will affect an individual offender's sentence still requires consideration of his/her personal motives).

The second issue considered by the court was what is meant by motivation. The arguments put before the court hinged on the key question of whether the offender's choice of victims from a particular group was sufficient to establish a prejudicial motive. Judge Cohen accepted that the prejudicial motive need not be the only motive, as the subsection clearly provides for situations where the offence is only partially motivated by prejudice or group hatred. Significantly, the Crown tendered evidence that in three previous armed robbery convictions committed by John Gouros in 2008, all of the victims were of Indian appearance. This was sufficient to satisfy Judge Cohen beyond reasonable doubt that the defendant was aware when he started the current offences that 'the choice of victim was at least partly based on their apparent race or ethnic origin'.[18] Further, this was sufficient for her to accept that this was a motivation within the meaning of the new provision, and thus an aggravating feature in sentencing terms. Judge Cohen concluded:

> 'In relation to the issue of whether choice of victims was, at least, partly motivated by their apparent race or ethnic background, as I have already said, I am satisfied that by the time of these offences you were knowingly complicit in the selection of victims.'[19]

In arriving at this decision, the court made explicit reference to the 'abhorrent' nature of offences where victims are selected because of their race and the 'recent publicity and legitimate community concern' about 'racist victimisation of people of Indian origin in Melbourne'.[20]

## *ASLETT*: GROUP SELECTION DOES NOT AMOUNT TO MOTIVATION

It is helpful to compare the decision in *R v Gouros* with the view taken by the NSW Court of Criminal Appeal (NSWCCA) in *R v Aslett* on the application of that state's sentencing aggravation provisions. As indicated above, the wording of the motive test in NSW and Victoria is identical – the offence must be motivated by hatred for or prejudice against a group of people – except for one important difference: Victoria's subsection explicitly includes partial motive, whereas the NSW subsection is silent on this point. In *R v Aslett*, the prosecution argued that the offence, which was a home invasion, was aggravated because the offenders selected the victims on the basis they were 'Asian' and their belief that 'Asians tended to keep money and jewellery in their homes'.[21] The NSWCCA rejected this argument and held that the motive in this case was different from crimes committed out of race hatred or prejudice:

> '[T]he appellant approved the attack on Mr and Mrs A's home not because Mr and Mrs A were Asian but because he believed that as Asians they fell into a category of people whose homes might contain valuables suitable for stealing. There was no evidence that the appellant hated Asians. There was no evidence that he was prejudiced against Asians.'[22]

The NSWCCA's interpretation of the motive test in *R v Aslett* sets a standard that most likely will not be met without clear proof of actual ill-will or hatred by the perpetrator towards the victim group in question. The point made in *R v Aslett* is that selection of a victim on the basis of their presumed membership of a racial or national group is not the same as selecting a victim because you hate or are prejudiced against that group. Victims from particular racial backgrounds may be chosen for a variety of (albeit often stereotyped) reasons: for instance, because they are believed to have more goods or money worth stealing; because they are believed to be 'soft targets' who will not resist; or because they are believed to be less likely to report the incident to the police. In *R v Gouros*, however, evidence that the victims had been selected from a particular racial group was sufficient for the Victorian County Court to accept that the offence was aggravated for sentencing purposes. >>

While there is a diversity of criminal laws across Australia dealing with hate crime, most are under-utilised by police and prosecutors. But sentence aggravation provisions are being taken up by prosecutors in NSW and Victoria.

## VICTORIAN SENTENCING ADVISORY COUNCIL

In its advice on sentencing for offences motivated by hatred or prejudice in 2009, the Victorian Sentencing Advisory Council recommended that any new statutory aggravating factor should apply in circumstances where the offence is *partially* motivated by hatred or prejudice. As indicated above, this is reflected in the Victorian, but not the NSW, subsection. The Council points out that partial motive should thus include circumstances where the offender 'selects the victim of the offence because of hatred of or prejudice against the victim on the basis of the victim's identity'.[23] However, it is important to note that the Council's suggestion that group selection can amount to a partial motive is confined to situations where the selection is because of *the offender's hatred or prejudice*: it gives the example of an overseas-born Australian man convicted of rape who decides to rape the victim because she is Western and he believes that all Western women are sexually promiscuous. The Sentencing Advisory Council does not comment on whether evidence of selection simply because of the victim's group membership would be sufficient to prove partial motive (as opposed to selection because of hatred or prejudice towards that group). Recommendations on partial motive are confined to circumstances where there is: (i) group selection *and* (ii) that selection is based on prejudice or, seemingly from the above example, negative stereotypes that point to prejudice. In the Council's view, this amounts to partial motivation and should aggravate an offence.

In arriving at its decision in *R v Gouros*, it is possible that the Victorian County Court relied upon evidence of the offender's selection of victims presumed to be Indian over multiple offences (the offender's conduct) as probative of an underlying motive of prejudice or group hatred (the offender's mental state). Yet, there is nothing in the sentencing remarks to indicate whether this is the case. As it stands, compelling evidence that the victims were chosen because of their assumed Indian heritage appears to have constituted partial motivation in the eyes of the court.

## CONCLUSION

While there is a diversity of criminal laws across Australia to deal with hate crime, most of these are under-utilised by police and prosecutors. Sentence aggravation provisions, by contrast, are being taken up by prosecutors in NSW and Victoria. The laws require proof beyond reasonable doubt that the offence was motivated by prejudice or hatred against a particular group of people. While we might expect that such groups would include people traditionally marginalised on the basis of their race, ethnicity, religion, sexuality or disability, it is striking that hate crime laws have also been relied upon to impose a heavier penalty against an offender who hated paedophiles. Although sentence aggravation provisions require proof that the offence was motivated by prejudice or group hatred, it may be that selecting a victim because they belong to a particular group – such as a particular racial or religious group – is sufficient evidence of such motive, even in the absence of proof that the offender bears malice or ill-will towards that group. The implication is that it may not matter why the offender selected this group of people to victimise, only that he/she did. As sentence aggravation provisions impose harsher sentences on offenders, it is important to consider whether this is a sufficient justification for more punitive penalties, especially in light of Australia's escalating rate of imprisonment. ■

**Notes:** **1** HREOC (Human Rights and Equal Opportunity Commission) (1991) *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, HREOC; H Johnson, (2005) 'Experiences of Crime in Two Selected Migrant Communities', *Trends and Issues in Criminal Justice*, Australian Institute of Criminology; C Cunneen, D Fraser, & S Tomsen, (1997) (eds) *Faces of Hate: Hate Crime in Australia*, Federation Press; NSW Attorney-General's Department (2003) *'You Shouldn't Have To Hide To Be Safe': A Report on Homophobic Hostilities and Violence against Gay Men and Lesbians in NSW*, NSW Attorney-General's Department. **2** Victorian Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice*, 2009: 8, 1. **3** F Lawrence, (2003) 'Enforcing Bias-crime Laws without Bias: Evaluating the Disproportionate Enforcement Critique' 66 *Law and Contemporary Problems*, 49. **4** *Criminal Code* 1913 (WA) ss313, 317, 317A, 338B, 444. **5** *Crimes (Sentencing Procedure) Act* 1999 (NSW) s21A(2)(h); *Sentencing Act* 1995 (NT) s6A; *Sentencing Act* 1991 (Vic) s5(2). **6** *Criminal Code 1913* (WA) ss77-80D. **7** For example, the *Racial and Religious Tolerance Act* 2001 (Vic) ss24, 25. **8** *Criminal Code (Cth)* s80.2(5). **9** Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice*, 2009, 12. **10** Sentencing Amendment Bill 2009, Explanatory Memorandum Clause 3. **11** *Dunn v R* [2007] NSWCCA 312. **12** *Ibid* [32]. **13** For further discussion, see: Gail Mason, 'Hate Crime Laws in Australia: Are They Achieving Their Goals?' *Criminal Law Journal*, 2009a, 33(6) 336-340; Gail Mason, 'Prejudice and Paedophilia in Hate Crime Laws: *Dunn v R*' *Alternative Law Journal*, 2009b, 34(4) 259. **14** *R v Gouros* (unreported, County Court of Victoria, Judge Cohen, 14 December 2009). **15** *R v Aslett* [2006] NSWCCA 49. **16** *R v Gouros*, see note 14 above. **17** *Ibid* at [19]. **18** *Ibid* at [30]. **19** *Ibid* at [34]. **20** *Ibid* at [31]. **21** *R v Aslett* [2006] NSWCCA 49 at [124]. **22** *Ibid*. **23** Sentencing Advisory Council, note 1, p12.

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