

COMMUNITY LEGAL CENTRES TASMANIA

2 October 2023

Sentencing Advisory Council
GPO Box 825
Hobart TAS 7001

via email: sac@justice.tas.gov.au

To the Sentencing Advisory Council,

Re: Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the Sentencing Advisory Council's review of section 11B of the *Sentencing Act 1997* (Tas) and relevantly whether the sentence aggravation provision should be expanded to include other forms of prejudicially motivated offending.¹

Although the last twenty years has seen significant advances in the protection of the rights of minority groups in Tasmania, including the passing of Tasmania's *Anti-Discrimination Act 1997*, the banning of the Nazi symbol and salute² and indeterminate or non-binary gender recognition³ it is also clear that hate crimes against minority groups continues. A sentence aggravation provision that includes other forms of prejudicially motivated offending is supported because it will more sharply draw into focus community condemnation.

CLC Tas is the peak body representing the interests of nine community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

Offences that are motivated by hatred or prejudice ('hate crimes') often cause a greater level of harm because the victim suffers more physical, mental and emotional trauma. As well, a targeted attack against an individual because of their identity affects groups who share the same characteristic. This ripple effect may lead to increased levels of fear and vulnerability in targeted communities who often come from marginalised backgrounds.

In 2011 the Tasmania Law Reform Institute ('the TLRI') published a report entitled *Racial Vilification and Racially Motivated Offences*⁴ which considered the adequacy of Tasmanian laws in relation to racial vilification and racially motivated offences and recommended the

¹ CLC Tas would like to acknowledge those persons and organisations who gave freely of their time in assisting with our submission.

² *Police Offences Amendment (Nazi Symbol and Gesture Prohibition) Bill 2023* (Tas).

³ Section 3A of the *Births, Deaths and Marriages Registration Act 1999* (Tas).

⁴ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No. 14).

introduction of a sentence aggravation provision.⁵ Whilst the TLRI acknowledged that racially motivated offences are already recognised as a relevant sentencing consideration in common law,⁶ law reform was recommended because “this alone does not necessarily have the same symbolic value or denunciative effect that a specific provision would”.⁷

In 2017, Tasmania’s Parliament amended the *Sentencing Act 1997* (Tas) (‘the Act’) with the introduction of section 11B which provides that a motivation of racial hatred or prejudice is a relevant aggravating factor in sentencing:

11B. Racial motivation to be taken into account in sentencing offenders

In determining the appropriate sentence for an offender, the court is to take into account, as an aggravating circumstance in relation to the offence, whether the offence was motivated to any degree by –

- (a) hatred for or prejudice against, on racial grounds, any victim of the offence;*
- or*
- (b) hatred for or prejudice against, on racial grounds, a person or group of persons with whom at the relevant time any victim of the offence was associated or believed by the offender to have been associated.*

Importantly, whilst section 11B requires courts to take into account racial hatred as an aggravating factor, there is no mandatory requirement to increase the sentence, with the court continuing to retain the discretion as to the ultimate sentence imposed.

We support the expansion of section 11B to include other forms of prejudicially motivated offending including sexual orientation, gender, age, religion and disability. Whilst all prejudicially motivated offending is able to be taken into account in sentencing,⁸ the codification of a specific provision provides symbolic significance as a means of expressing community condemnation.

As the law currently stands, section 11B of the Act requires the court to be satisfied that the offending was “motivated to any degree” by hatred or prejudice. This threshold is supported on the basis that convictions have proven difficult in jurisdictions such as NSW which do not recognise part motivation.⁹ As the Tasmanian Aboriginal Legal Service notes in its response, the recognition of part motivation as a test “is particularly relevant in cases where there is a possibility of multiple motives, or where attributes are assumed by the perpetrator - for example, an attack motivated by prejudice against homosexuals directed at an individual who the perpetrator assumes is homosexual based on dress alone”.¹⁰

We endorse the Tasmanian Aboriginal Legal Service’s recommendation that the language of the *Sentencing Act 2020* (UK) should be adopted with its focus on ‘hostility’ rather than hatred’ or ‘prejudice’ on the basis that it requires the satisfaction of a lower threshold. We also support the

⁵ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No. 14), Recommendation 5.

⁶ *Tasmania v Bigwood* (unreported, Supreme Court of Tasmania, Evans J, 31 May 2010).

⁷ Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No. 14), Recommendation 5.

⁸ Section 80(2)(a) of the *Sentencing Act 1997* (Tas).

⁹ Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that “the offence was motivated by hatred for or prejudice...” In the case of *R v Aslett* [2006] NSWCCA 49 at para. [124] the NSW Court of Criminal Appeal held that the test in NSW required clear proof of hatred or prejudice felt by the perpetrator towards the victim group.

¹⁰ Tasmanian Aboriginal Legal Service, *Amendment of s11B of the Sentencing Act 1997 (Tas)* submission.

United Kingdom’s use of the term *demonstrate* hostility with the relevant provision providing for “offence motivated by, or demonstrating, hostility to the victim based on [prescribed attribute]”. As both the Tasmanian Aboriginal Legal Service and the Sentencing Advisory Council have noted, proving that an offence has demonstrated hostility based on a particular attribute removes the need to draw inferences about motivation.

Finally, we support the recommendation that section 11B of the Act contain an inclusive list of groups that may experience hostility, hatred or prejudice as well as an illustrative list of examples.¹¹ A good model that could be considered is section 11(1) of the *Sentencing Act 2017* (SA) which provides as follows:

In determining a sentence for an offence, a court must take into account such of the factors as are known to the court that relate to the following matters as may be relevant:

(ca) whether the offence was wholly or partly motivated by hatred for, or prejudice against, a group of people to which the defendant believed the victim belonged (including, without limiting this paragraph, people of a particular race, religion, sex, sexual orientation, gender identity or age, or people having an intersex variation or a particular disability).

However, the expansion of section 11B of the Act to include other forms of prejudicially motivated offending cannot be introduced in isolation. Comprehensive reform must include police training so that prejudicially motivated offending is identified and victims supported. There also needs to be investment in educational resources including public awareness campaigns to reduce prejudice and support victims of hate crimes.

We also strongly believe that all judicial officers should be required to undertake ongoing education and professional development as is currently required in Victoria and New South Wales.¹² This training should include anti-discrimination training and the impact of hate crimes on minority groups.

If you have any queries, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
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Community Legal Centres Tasmania

¹¹ Tasmanian Aboriginal Legal Service, *Amendment of s11B of the Sentencing Act 1997 (Tas)* submission.

¹² The Judicial College of Victoria notes that it “is where the Victorian judiciary come for ongoing education and professional development. The Judicial Commission of New South Wales provides “a continuing education and training program for NSW judicial officers”. As found at <https://www.judicialcollege.vic.edu.au/about-us> and <https://www.judcom.nsw.gov.au/about-the-commission/> (accessed 28 September 2023).