



Tasmanian Council of Social Service Inc.

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# Review of section 11B of the *Sentencing Act* *1997 (Tas)*

*September 2023*



**INTEGRITY  
COMPASSION  
INFLUENCE**

## About TasCOSS

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TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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## Introduction

TasCOSS welcomes the opportunity to provide a response to the Sentencing Advisory Council ('the SAC') in relation to the current review of section 11B of the *Sentencing Act 1997 (Tas)* ('the Act').

As per the Consultation Paper, we understand the primary purpose of the review is to consider whether section 11B should be expanded to apply in a broader range of circumstances, taking into consideration the current application and use of this provision in Tasmania, as well as the approach in other Australian jurisdictions.

TasCOSS strongly supports measures which promote respect, equality and understanding in our community. We agree there are groups in Tasmanian society who continue to experience social stigma, disadvantage and discrimination, and we strongly support measures which seek to address inequality. However, we believe the introduction of further legislative provisions alone will not address the root underlying causes driving prejudice, intolerance and fear. We believe there is a need for greater community awareness and understanding of the experiences of groups in circumstances of marginalisation, as well as the promotion of the rights and dignity of all Tasmanians.

## The Current Provision

Section 11B of the Act reads as follows:

### ***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.*

The inclusion of the aggravated sentencing provision in section 11B was a recommendation of the Tasmanian Law Reform Institute ('the TLRI') in a paper examining racially motivated offending.<sup>1</sup> Their report recommended the introduction of an aggravated sentencing provision as the most appropriate way for the law to address racially motivated offending, by recognising the harmful effects of being subjected to racist or racially vilifying behaviour, sending a strong message that racial intolerance will not be taken lightly, and to provide judicial officers with the opportunity to publicly condemn racially motivated offending by addressing this as a factor in sentencing.<sup>2</sup>

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<sup>1</sup> Tasmania Law Reform Institute, 'Racial Vilification and Racially Motivated Offences' (April 2011).

<sup>2</sup> Ibid, p. 44.

## Key Issues

The SAC is considering potential legislative amendments to increase the range of circumstances in which aggravated sentencing provisions may apply, so that more significant penalties could be imposed in instances where offending is motivated by religion, language, sexual orientation, gender, gender identity, innate variations of sex characteristics, a particular physical disability or cognitive impairment, or a mental illness.

Many community organisations in Tasmania are supportive of provisions which could be applied to increase penalties in a wider number of instances. For example, Equality Tasmania has highlighted the ongoing harassment and abuse experienced by LGBTIQ+ people,<sup>3</sup> and that aggravated sentencing provisions would send a strong message that hate crimes are not acceptable, as well as permitting judges to impose tougher penalties. These sentiments were echoed by the Migrant Resource Centre, who noted the significant and ongoing impact of hate crimes on minority groups such as Muslim women.<sup>4</sup>

However, TasCOSS is concerned an expansion of the aggravated sentencing provisions in section 11B alone is unlikely to address discrimination without additional measures to increase understanding and awareness of the experiences of minority groups. As per the Consultation Paper, “the vast majority of studies in this area have concluded that increasing the severity of sentences does not reduce offending or prevent recidivism,”<sup>5</sup> and that studies from other jurisdictions show ‘lengthier sentences have neither a specific deterrent effect on the offender nor a general deterrent effect on the broader community’.<sup>6</sup> We have previously raised concerns about punitive criminal justice policies which can increase the length or likelihood of a prison sentence without addressing the underlying factors contributing towards the offending,<sup>7</sup> as well as the criminogenic aspects of criminal justice involvement (including imprisonment) which increase the chances of reoffending (including difficulties maintaining employment and/or housing, fractured social networks, and social stigma).

The expansion of the aggravated provision seeks to address the impact of hate crimes upon those who experience vulnerability in our community (for example, due to their disability or their status as a member of a minority group). However, for these laws to be applied, a victim of a hate crime would still need to go through a police reporting and court process, which can be difficult — if not traumatising — for many minority groups. For example, there is a wealth of evidence demonstrating the ongoing impact of discriminatory policing practices on Aboriginal and Torres Strait Islander people across Australia,<sup>8</sup> and recent reports have highlighted the ongoing tensions between the LGBTIQ+ community and police,<sup>9</sup> resulting from the disproportionate and discriminatory targeting of the LGBTIQ+ community under previous laws and policies criminalising homosexuality and offences such as cross-dressing. Without more

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<sup>3</sup> Gibson, J 2023, ‘[Tasmania considers tougher sentencing laws for crimes motivated by hate and prejudice](#)’, *ABC News*, 24 August 2023.

<sup>4</sup> *Ibid.*

<sup>5</sup> Sentencing Advisory Council, ‘Consultation Paper: Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing’ (August 2023), p. 6.

<sup>6</sup> *Ibid.*

<sup>7</sup> For example, see TasCOSS, Submission to the Legislative Council Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters (April 2023).

<sup>8</sup> For example, see Aboriginal and Torres Strait Islander Legal Service (ATSILS) Queensland, Submission on the Review of the Crime and Corruption Commission Act 2001 (July 2015); Browne, K, Victorian Aboriginal Legal Service (VALS), Submission to the Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria (September 2017); Police Accountability Project, ‘Independent Investigation of Complaints against the Police: Policy Briefing Paper’ (2017).

<sup>9</sup> Dwyer, A et al. 2021, ‘LGBTIQ+ Tasmanians: Telling us the Story Final Report’, pp. 53-57.

comprehensive systems reform, we are therefore concerned these provisions alone would fail to have the intended impact.

When originally considering whether a new racial vilification law should be introduced in Tasmania, we note the TLRI report stressed that any such law “... needs to be accompanied by a highly visible awareness and education campaign. This campaign should include information about the operation of any new laws as well as what constitutes racism, why such behaviour is considered abhorrent and what avenues are available to address such behaviour... If changes to the law are warranted, these need to be accompanied by other measures.”<sup>10</sup> As far as we are aware, this has not yet occurred.

To address these concerns, TasCOSS make the following recommendations:

- 1. If section 11B is to be expanded to potentially be applied in a broader range of circumstances, TasCOSS recommend a provision which continues to allow for a high level of judicial discretion (consistent with the original recommendations of the TLRI).**
- 2. TasCOSS support the recommendation of Community Legal Centres Tasmania that the provisions in the Act include an inclusive (but not exhaustive) list of groups who may experience hostility, hatred or prejudice,<sup>11</sup> similar to the South Australian legislative provisions.<sup>12</sup>**
- 3. Given harsher penalties alone are unlikely to offer either specific or generally deterrence against prejudice-motivated crime, TasCOSS recommend consideration of an expansion of sentencing options to give judicial officers the opportunity to promote (or even mandate) therapeutic treatment. This could include the development and promotion of behavioural change programs to work with offenders (such as existing programs designed to work with perpetrators of family violence), ideally with the collaboration of community organisations and those with lived experience as members of a minority group.**
- 4. Alongside any legislative reform, the Tasmanian Government should commit to an extensive community campaign to raise awareness and understanding of the experience of minority groups in Tasmania, and to promote diversity and inclusion. There are existing examples of Tasmanian programs, such as the diversity and inclusion training offered by A Fairer World,<sup>13</sup> and education and counselling around gender and sexual orientation offered by Working It Out.<sup>14</sup>**

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<sup>10</sup> Tasmania Law Reform Institute, ‘Racial Vilification and Racially Motivated Offences’ (April 2011), p. 31.

<sup>11</sup> Community Legal Centres Tasmania, Submission to the Sentencing Advisory Council, ‘Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing’ (October 2023).

<sup>12</sup> *Sentencing Act 2017 (SA)* s11(1).

<sup>13</sup> [For more information, see A Fairer World diversity and inclusion training.](#)

<sup>14</sup> For more information, see [Working It Out gender and sexual orientation education and counselling.](#)

5. **TasCOSS echo the recommendations from Community Legal Centres Tasmania that specialised training should be developed for police officers, and that ongoing education and training should be a mandatory requirement for all judicial officers.<sup>15</sup>**
  
6. **The Tasmanian Government should prioritise the development and implementation of a Human Rights Act or Charter to affirm the rights of all Tasmanians. TasCOSS believe such legislation could encourage a cultural change in attitudes and beliefs, improved accountability and transparency, greater community awareness and empowerment, and as a tool for legal and social advocacy. The introduction of human rights legislation should be accompanied by action to raise awareness of, and promote understanding of, the rights of all Tasmanians and ensure the public is provided with education and information on how to take action to respond in situations where their rights, or the rights of others, may have been violated.**

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<sup>15</sup> Community Legal Centres Tasmania, Submission to the Sentencing Advisory Council, 'Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing' (October 2023).