



Tasmanian Aboriginal Legal Service (“TALS”) Written Submission:
Amendment of s11B of the *Sentencing Act 1997* (Tas)
September 2023

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Recommendations

Recommendation: S11B of the Sentencing Act 1997 (Tas) should be amended or replaced to:

- **Substitute “motivated to any degree by or demonstrating” for to the existing “motivated to any degree by.”**
- **Substitute or add “hostility towards” for/to the existing “hatred for or prejudice against.”**
- **Include an illustrative list of target groups against which hostility, hatred or prejudice may be directed, including but not limited to people of a particular race, sex, ethnic origin, language, sexual orientation, gender identity, age, religion, or people having a particular disability or an intersex variation.**
- **Maintain the language of “a person or group of persons with whom at the relevant time any victim of the offense was associated or believed by the offender to be associated.”**

Introduction

Thank you for seeking submissions in relation to the question of amendment or replacement of s11B of the *Sentencing Act 1997 (Tas)* to address motivations of prejudice or hatred as an aggravating factor in sentencing.

The Tasmanian Aboriginal Legal Service (TALS) is a member-based, independent, not-for-profit community legal centre that specialises in the provision of criminal, civil and family law legal information, advice and representation for Aboriginal and Torres Strait Islander peoples across Tasmania. We are an Aboriginal Community Controlled Organisation incorporated under the Office of the Registrar of Aboriginal Corporations.

In this submission, any reference to Aboriginal people is understood to also encompass Torres Strait Islander people.

TALS provides culturally safe, holistic and appropriate services that are inclusive and open to all Aboriginal Tasmanians. We understand that the most vulnerable people needing access to legal assistance are often also those who face the most difficulties asking for help, and we work hard to ensure everyone can access our services within and outside of traditional legal settings.

We also are an advocate for law reform and for justice, equality and human rights for all Aboriginal and Torres Strait Islander people in Tasmania. Our goal is to halve Aboriginal Tasmanians' rate of negative contact with the justice system in a decade.

Amendment of s11B

TALS position is that there is in fact a need to amend s11B, or to introduce a new provision, to encompass motivation of hostility, hatred or prejudice towards groups on grounds other than race.

We strongly concur with the analyses of Mason and Dyer 2013¹ and the Manitoba (Canada) Department of Justice, cited in the discussion paper, of the impacts of prejudicially-motivated offending on the individual,² the target group, other vulnerable groups, and the community as a whole, noting particularly the impact of hate crimes on other vulnerable groups and on the fundamental values of multicultural and diverse societies. This broader impact is as compelling a rationale for a broad-ranging approach to attribute-motivated offending as the impact on the individual victim(s) and target group(s).

Although courts are currently at liberty take prejudiced motivations of offenders into consideration when passing sentence, we believe that legislative reform, due to its symbolic value and denunciative effect, has the greatest potential to acknowledge the greater level of

¹ https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1700126/36_3_3.pdf

² See also <https://hatecrimeunit.org.uk/blog/howhatecrimelawswork> for a discussion of the disproportional psychological impact of hate crimes on individual victims.

harm compared with parallel offences without underlying prejudice, and to convey the fundamental community value of equality within difference.

As a consequence, we strongly support reform to the *Sentencing Act 1997* to make it mandatory for attribute-motivated offending to be treated as an aggravating factor, in order to clearly denounce such behaviour and to bring Tasmania into line with other Australian jurisdictions as well as international practice. As with racial hatred, the courts may retain the discretion as to whether to increase the sentence accordingly, as well as discretion in quantifying the amount of aggravation.³

In relation to other specific questions raised by the discussion paper:

Appropriate Tests

What is the appropriate test for imposing aggravated sentences on offenders who have targeted victims based on their perceived membership of a particular group?

The language of s11B, which refers to offending “motivated to any degree” by hatred or prejudice, is already a superior option to the language of some other jurisdictions: the requirement that a perpetrator be wholly motivated by prejudice sets an unreasonably high evidentiary bar, while compelling evidence of group selection can be enough to satisfy the test of partial motive.⁴ This point is particularly relevant in cases where there is a possibility of multiple motives,⁵ 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.⁶

However, we suggest that in the reformulation of s11B, Tasmania adopt:

- The substitution or addition of “hostility” for/to “hatred or prejudice,” in line with the language used by New Zealand and the United Kingdom. This language is potentially significant when it comes to establishing the requisite mental state, with hostility being a lower threshold to satisfy, but one that nevertheless captures the psychological backdrop of acts that impose significant impacts on victims.⁷

³ https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1700126/36_3_3.pdf

⁴ Mason, G (2010) “Hate crime laws in Australia: are they achieving their goals?” University of Sydney Law School Legal Studies Research Paper 10/46, <https://deliverypdf.ssrn.com/delivery.php?ID=465084070078097066026064068075116069120073069085030094102095078026125068069031005071042006097007012027110068103003116124070012104032014085018083071125087122020101064009073099101027023120089017085091085104086027127123127126078124098065102073012023111&EXT=pdf&INDEX=TRUE>

⁵ https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1700126/36_3_3.pdf

⁶ <https://www.aic.gov.au/sites/default/files/2020-05/vpt2.pdf>

⁷ <https://hatecrimeunit.org.uk/blog/howhatecrimelawswork>

- The wording of “motivated to any degree by or demonstrating,” in line with the language used by the United Kingdom. We agree with the discussion paper that this language removes the need to draw inferences about motivation where this is not clear.

Exhaustive or illustrative?

Should Tasmania provide an exhaustive or illustrative list of groups? Alternatively, should the courts be left to determine the groups to which the aggravating sentencing provisions apply on a case-by-case basis?

We argue that the need for this consultation in itself demonstrates why Tasmania should not provide an exhaustive list of groups that may experience hostility, hatred or prejudice: it is inadvisable to impose boundaries based on current groups of concern, as the limiting of the current s11B to race alone has done.

As to whether the language of an amendment should be open-ended or provide an illustrative list, in principle, the Victorian approach, which simply specifies “motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated,” or the Northern Territory approach, which simply refers to “hate against a group of people,” are adequate to cover all groups experiencing hostility, hatred or prejudice now and into the future.

In practice, however, we nevertheless argue that Tasmania should provide an illustrative list of groups that may attract hostility, hatred or prejudice, using language along the lines of “characteristics such as...” (NSW, NZ) or “including, without limiting this paragraph” (South Australia). This is because, as noted in the discussion paper, it is difficult enough to ensure that attribute-motivated offending is taken into account in sentencing even when groups are named in legislation, let alone when they are not; for example, as the discussion paper outlines, there are very few cases where the provision has been applied for offences involving people who are homosexual, despite express provision in the relevant jurisdictions. An enumeration of an illustrative list at least ensures that less-recognised groups experiencing attribute-motivated crime are kept in the sentencing frame.

In particular, we argue that an illustrative list has the potential to draw attention to two areas of particular relevance and concern to/for Aboriginal Tasmanians where attribute-motivated offending is all too often overlooked: victimisation of women and victimisation of people with a disability.

Victimisation of women: Australia-wide, violence against women is a problem of epidemic proportions. One in three Australian women has experienced physical violence since the age of

15, and one in 5 has experienced sexual violence; on average, a woman is killed by an intimate partner every 10 days.⁸

Aboriginal women experience disproportionate levels of gender-based and sexual violence. Aboriginal and Torres Strait Islander women are 6 times more likely to be victims of homicide due to domestic violence than non-Indigenous women. They are also 33 times more likely to be hospitalised as a result of the domestic violence they face.⁹

The victimisation of women is a category which is frequently excluded from discussions of hate crime globally.¹⁰ As noted in the consultation paper, among Australian jurisdictions, only South Australia explicitly names a victim's sex as a basis for hatred or prejudice; the open language of Victorian and Northern Territory legislation leaves room for sex/gender to be considered, but it is not clear if this has ever been applied.

This situation flies in the face of current efforts to end gender-based violence at the national and state levels in Australia. It is widely accepted that gender-based violence against women, including physical, mental or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty, is a manifestation of discrimination against women, as detailed in the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, to which Australia is a signatory. In other words, gender has clearly been identified as an attribute motivating hostility, hatred or prejudice, and the absence of its clear identification as such in sentencing indirectly condones attitudes and behaviours that perpetuate gender-based violence.

We note and concur with the detailed argumentation provided in a 2018 review of Scotland's hate crime legislation, supporting the creation of a new statutory aggravation based on gender hostility, and note review author Lord Bracadale's comments:

"By categorising this behaviour as hate crime, I consider that we would achieve certain important results:

- It would make it more culturally acceptable to object to the behaviour – victims would have more confidence that it will be taken seriously by the criminal justice system (whether the police, prosecutors or the courts).
- It would recognise the additional harm caused to the individuals involved and others who identify with them.
- It would have a symbolic value – giving security to community and 'send a message'.
- It would allow for record keeping, the collection of data, and a targeted response to offenders."¹¹

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https://www.dss.gov.au/sites/default/files/documents/11_2022/national_plan_to_end_violence_against_women_and_children_2022-2032.pdf

⁹ https://www.dss.gov.au/sites/default/files/documents/08_2023/np-atsi-action.pdf

¹⁰ <https://www.aic.gov.au/sites/default/files/2020-05/vpt2.pdf>

¹¹ <https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/pages/5/>

We note that in the absence of an overarching establishment of gender as an aggravating factor in sentencing, many other countries have resorted to inefficient piecemeal approaches. France, for example, considers the commission of an offence on the grounds of the victim's gender to be an aggravating factor in cases of domestic violence, sexual violence and rape, sexual harassment, female genital mutilation, stalking, non-consensual use of private images, and murder, but not forced marriage. In Lithuania's case, the victim's gender is relevant to aggravation in relation to all of the above except murder.¹² Under Spanish law, gender is considered an aggravating circumstance in relation to all but intimate partner violence, which is covered under separate legislation on gender-based violence.¹³

By contrast, explicit inclusion in hate crime sentencing of gender as an attribute motivating hostility, hatred or prejudice is efficient and supports the values and objectives of the *National Plan to End Violence against Women and Children 2022-2032* and its *Aboriginal and Torres Strait Islander Action Plan 2023-2025*, as well as Tasmania's *Third Family and Sexual Violence Action Plan 2022-2027* and *Women's Strategy 2022-2027*.

Though it has been claimed that the difficulties of proving the aggravating circumstance are greater where the offender and the victim know one another — as is often the case with violence against women — we note Mason and Dyer (2013)'s observation that in many cases both of domestic violence and sexual assault between intimates, the violence that is inflicted on the victim is accompanied by gender-derogatory epithets, and that testimony from former wives, girlfriends, partners, or family members of those individuals may provide evidence of anti-female comments and/or previous violent offending against women. Meanwhile, some courts have been prepared to infer a motive of prejudice or group hate without evidence of derogatory or hostile statements by the offender: in *R v ID*, multiple and prolonged acts of aggravated sexual assault, and psychological evidence that the offenders had a deep-seated prejudice against women, were enough to satisfy Nicholson DCJ that the offences were motivated by gender prejudice. In short, Mason and Dyer argue, the difficulties of proving the aggravating factor may have been overstated.¹⁴

Victimisation of people with a disability: Australia-wide, the rate of disability for Indigenous people, including children, is twice as high as that among the general population.¹⁵ As of 2014-15, 54% of Aboriginal people in Tasmania aged 15+ had a disability or a long-term restrictive condition, compared with 45% of Aboriginal people nationwide.¹⁶

¹² <https://www.equalitylaw.eu/downloads/5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb>

¹³ <https://www.equalitylaw.eu/downloads/5535-criminalisation-of-gender-based-violence-against-women-in-european-states-including-ict-facilitated-violence-1-97-mb>

¹⁴ https://law.unimelb.edu.au/__data/assets/pdf_file/0017/1700126/36_3_3.pdf

¹⁵ https://wwda.org.au/wp-content/uploads/2019/09/Factsheet_No_5_Violence.pdf

¹⁶ <https://www.niaa.gov.au/sites/default/files/publications/indigenous/hpf-2017/tier1/114.html>

Australians with disability are more likely than those without disability to have experienced violence, abuse or sexual harassment at some point in their lives.

- 65% of adults with disability have experienced violence after the age of 15, compared to 45% without disability (1.4 times).
- 18% of people with disability have experienced violence in the last year (2017), compared to 10% of people without disability (1.8 times).¹⁷

Aboriginal people with disability, who are already at higher risk of violence due to their Indigenous status, experience a double elevation of risk compared to non-disabled non-Indigenous Australians.¹⁸ Presence of a disability among Aboriginal Australians is associated with a 1.5- fold increase in the odds of exposure to violence compared to non-Indigenous, non-disabled Australians, and a doubling of the odds of reporting violent threats. Aboriginal people with profound or severe disability experience in excess of double the odds of violence, as do those with specific types of disabilities such as psychological or head injury, stroke and brain damage conditions.¹⁹

Crimes against people with disability are often treated as crimes of opportunity, motivated by a perception that people with disability are “easy targets.” This targeting in itself can be said to be a manifestation of bias, in that it is based on an assumption of vulnerability on the part of disability: the perception of all people with disabilities as vulnerable ultimately minimizes or disregards the social factors associated with their participation and inclusion within society, and is prejudicial.²⁰ However, perpetrators of attribute-motivated offending against people with disability can also hold hostile, contemptuous or otherwise prejudiced and discriminatory attitudes towards disability and people with disability.

The OSCE has listed indicators that can help identify a bias against people with disability and should prompt authorities to investigate a crime as a disability hate crime (see Appendix A).

Victimisation on the basis of sexual orientation or gender identification: Beyond the above two categories of particular relevance to Aboriginal Tasmanians, TALS also notes the importance of drawing attention to violence on the basis of sexual orientation or gender identity through explicit inclusion of these as an aggravating factor. Figures on the number and proportion of Aboriginal and Torres Strait Islander people identifying as LGBTIQ+, or who have experienced violence on the basis of their LGBTIQ+ status, are difficult to obtain.²¹ However, the largest study of Australian LGBTIQ+ experience of crime found that:

¹⁷ <https://www.afdo.org.au/about-australians-with-disability/abuse-of-people-with-disability/>

¹⁸ <https://disability.royalcommission.gov.au/system/files/2022-03/Issues%20paper%20-%20The%20experience%20of%20First%20Nations%20people%20with%20disability%20in%20Australia.pdf>

¹⁹ <https://bmcpublikehealth.biomedcentral.com/articles/10.1186/s12889-020-09684-4>

²⁰ <https://www.osce.org/odihr/hate-crime-against-people-with-disabilities>

²¹ <https://theconversation.com/new-research-shows-how-indigenous-lgbtqi-people-dont-feel-fully-accepted-by-either-community-161096>

- In the previous two years, 53% of LGBTIQ people had experienced violence or harassment.²²
- In their lifetimes, 72% of LGBTIQ people, including 92% of trans women and 55% of trans men, had experienced verbal abuse.
- 23%, including 46% of trans women and 36% of trans men, had experienced physical assault.²³

With numbers like these, Aboriginal Australians will almost certainly have found themselves among those victimised.

Limitation of Groups?

Should the legislation in Tasmania limit the groups to those that are vulnerable or suffer historical oppression?

While we understand Warner’s concerns, as outlined in the discussion paper, that allegation of racial or other motivation in crimes against members of a majority group can be used to demonise offenders of a minority group, we believe that consistency is important in establishing universal values. Currently, s11B simply requires that racial hatred be considered as an aggravating factor in sentencing, not that it be mandatorily applied, which leaves room for discretion by the Court; the same situation is likely to apply to any new language. Meanwhile, while a prospective sentence may be aggravated by prejudice, the background of the offender will also be a relevant sentencing consideration – for instance, in a case of a prejudiced attack on a member of a majority group by a person who has suffered discrimination as a member of a minority group.²⁴

Recommendation: S11B of the Sentencing Act 1997 (Tas) should be amended or replaced to:

- **Substitute “motivated to any degree by or demonstrating” for to the existing “motivated to any degree by.”**
- **Substitute or add “hostility towards” for/to the existing “hatred for or prejudice against.”**
- **Include an illustrative list of target groups against which hostility, hatred or prejudice may be directed, including but not limited to people of a particular race, sex, ethnic origin, language, sexual orientation, gender identity, age, religion, or people having a particular disability or an intersex variation.**

²²

https://www.australianacademicpress.com.au/books/details/158/Speaking_Out_Stopping_Homophobic_and_Trasphobic_Abuse_in_Queensland

²³ <https://theconversation.com/inquiry-into-lgbtq-hate-crime-could-improve-how-police-and-communities-respond-108493>

²⁴ https://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0004/576139/A-Guide-to-Sentencing-in-Tasmania-July-2020.pdf.

- **Maintain the language of “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 be associated.”**

Thank you for the opportunity to comment on the amendment or replacement of s11B of the *Sentencing Act 1997* (Tas). Please do not hesitate to be in contact if any points require clarification or elaboration.

Yours faithfully,

A handwritten signature in black ink, appearing to be 'H.P.' or similar initials, written in a cursive style.

Hannah Phillips
Acting State Manager
Tasmanian Aboriginal Legal Service

Appendix A: How to Recognize Hate Crimes Against People With Disability

- Do the victims or witnesses perceive the incident as motivated by bias against people with disabilities?
- Was the attack accompanied by insults and accusations targeting people with disabilities?
- Did the incidents escalate in severity and frequency?
- Did the perpetrator target a victim's disability aids, such as canes or hearing aids?
- Did the perpetrator use excessive violence?
- What was the nature of the attack? Was the victim subjected to cruelty, humiliation or degrading treatment related to their disability?
- Was the perpetrator known to the victim? Disability hate crimes are often perpetrated by "friends," caregivers, acquaintances or neighbours of the victim.
- Where did the attack occur? Disability hate crimes may take place in care institutions and be carried out by staff.
- Did the attack also involve theft by people close to the victim, such as caregivers or family members? This can include the theft of welfare benefits and other forms of exploitation, such as unpaid work.
- Were multiple perpetrators involved in the incident?
- Is there any other clear motive? The lack of other motives is also a reason to consider bias motivation.²⁵

²⁵ <https://www.osce.org/odihr/hate-crime-against-people-with-disabilities>