sentencing
ADVISORY
COUNCIL

Consultation Paper – Motivation of Prejudice or Hatred as an Aggravating Factor in Sentencing

August 2023

Information on the Sentencing Advisory Council

The Sentencing Advisory Council ('the Council') was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts, and the government by informing, educating, and advising on sentencing issues in Tasmania. At the time this Consultation Paper was concluded, the Council members were Michael O'Farrell SC (Chair), Mr Glenn Hay, Ms Kim Baumeler, Ms Jill Maxwell, Ms Kate Cuthbertson, Ms Rosalie Martin, Professor Lorana Bartels, Dr Helen Cockburn, Ms Linda Mason SC, and Commander Peter Harriss.

This Consultation Paper was written by Dr Matias Thomsen, with research assistance from Ms Julia Flint.

Terms of reference

Section 11B of the *Sentencing Act 1997* (Tas) provides that courts are to treat motivation of racial hatred or prejudice as an aggravated factor in sentencing. On 11 January 2023, the Tasmanian Attorney-General sought advice from the Sentencing Advisory Council ('the Council') on whether s11B should be expanded to include other forms of prejudicially motivated offending. The terms of reference provided are as follows:

1. Examine the current scope of s11B of the *Sentencing Act 1997* and the use of this provision by the courts in Tasmania to date.
2. Undertake a comparative analysis of relevant provision of sentencing legislation in other Australian jurisdictions.
3. Examine whether s11B could be expanded to consider whether the offence was motivated to any degree by religion, language, sexual orientation, gender, gender identity, innate variations of sex characteristics, a particular physical disability or cognitive impairment, or a mental illness. Alternatively, whether comparative amendments could be made elsewhere in the *Sentencing Act 1997* with a consideration of the benefits and challenges of such inclusions.
4. Provide advice as to whether amendment should be made to s11B, or any part of the *Sentencing Act 1997*, to extend the provisions of s11B to other motives.

Introduction to Sentencing Law in Tasmania

Sentencing is the punishment someone receives for committing a criminal offence. If a person pleads guilty, or is found guilty, the court decides their sentence. In Tasmania, adults are sentenced under the *Sentencing Act 1997*. The Act says that sentencing must protect the community, adopt fair procedures, be consistent with sentences for similar cases, and recognise the interests of victims. The purpose of sentencing is to:

- punish the offender in a manner that the community considers fair in all the circumstances
- discourage the offender (and others) from offending again
- rehabilitate the offender, that is, help them to deal with personal problems (like drugs or alcohol) that contributed to the offending
- send a message to the community that what the offender did is wrong.

When choosing a sentence, the court thinks carefully about the details of the case and the personal circumstances of the person who committed the offence. This process requires

judges and magistrates to consider both aggravating and mitigating factors. Aggravating factors are things that make the offending more serious (for example, if the offender has a history of similar offences, if the offence was premeditated, or if the offence was motivated by hatred or prejudice). Mitigating factors are things that make the offending less serious (for example, if it is the offender's first offence, if they plead guilty, or if they are doing well in rehabilitation and are unlikely to offend again).

Aggravating and mitigating factors can be either discretionary or mandatory. If the factor is discretionary, it means that the judge or magistrate may choose whether to consider it in sentencing the offender. If the factor is mandatory, it means that the judge or magistrate is required by law to consider it. Currently in Tasmania, the only mandatory aggravating factor in sentencing is where the offence was motivated by racial hatred or prejudice. The purpose of this Consultation Paper is to determine whether this should be extended to include other forms of prejudicial motivation.

Background to the concept of prejudicially motivated offending

On 31 March 2017, the *Sentencing Amendment (Racial Motivation) Act 2017* (Tas) introduced s11B of the *Sentencing Act 1997* (Tas) ('the Act'), which provides the following:

> **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.

In New South Wales (NSW), Victoria, South Australia, and the Northern Territory, aggravated sentencing for prejudicially motivated offences is not limited to racial hatred. These jurisdictions require courts to treat offences motivated by prejudice against an identifiable group to which the victim belongs as an aggravating factor, often citing religion, ethnicity, sexual affiliation, and disability as illustrative examples. A similarly broad approach is taken in Canada, New Zealand, and the United Kingdom (UK).

Prior to the insertion of s11B into the Act, the Tasmania Law Reform Institute ('TLRI') recommended introducing a sentence aggravation provision for racially motivated offences, but clarified that it 'believes that the Report provides a model for dealing with all forms of attribute-motivated offences'.[1] The purpose of this Consultation Paper is to determine whether further legislative reform is needed in Tasmania to include other forms of prejudice or hatred as statutory aggravating factors in sentencing.

Structure of the Paper and Guiding Questions

This Consultation Paper is divided into three Parts. Specific questions are provided at the end of each Part to prompt responses from the community. These questions are not intended to be exhaustive. The Council welcomes submissions or feedback on any relevant issues.

Part 1 focuses on whether it is necessary to expand the Act beyond the existing aggravating factor of racial motivation in offending to include other forms of prejudice. It provides an overview of the impact of attribute-motivated offending on victims and on the community, explains the current state of the law in Tasmania, and compares aggravated sentencing legislation in other Australian states/territories and Commonwealth countries with similar legal traditions.

Without prejudice to the outcome of Part 1, **Part 2** considers whether the legislation should be amended to identify specific groups against which the prejudicial offending is directed. Two broad approaches are identifiable across different jurisdictions: (1) providing an exhaustive or illustrative list of groups; or (2) leaving it to the courts to determine the groups to which the aggravating provisions should apply on a case-by-case basis.

Part 3 examines the different tests for determining whether an offence is 'motivated' or influenced by hatred or prejudice. There are three main approaches across jurisdictions to establish whether the offending was relevantly motivated: (1) the perpetrator's hatred towards the group is the sole or dominant motivation behind the offence; (2) the perpetrator demonstrates hostility towards the group to which the perpetrator believes the victim belongs; or (3) the victim is chosen because of their membership to a particular group, irrespective of whether the perpetrator is motivated by prejudice or hatred.

[1] Tasmania Law Reform Institute, *Racial Vilification and Racially Motivated Offences* (Final Report No 14, 2011) ('TLRI Report').

Part 1: Is there a need for a new or amended provision?

1.1 Aggravating factors in sentencing

Aggravating and mitigating factors are relevant circumstances and/or characteristics of both the offender and the offending that a court considers in sentencing. The practical effect of these factors on the sentence remains at the Court's discretion. Aggravating factors may increase the sentence, while mitigating factors may lessen the sentence. Aggravating factors can include premeditation, using a weapon, committing the offence in the company of others, and a breach of trust between the offender and the victim. Examples of mitigating factors include the previous good character of the offender, an early plea of guilty, and the potential impact of imprisonment on the offender (for example, where the offender's mental health is in issue).

Currently in Tasmania, the only statutory aggravating factor applicable to all offences is whether an offence is motivated by racial hatred or prejudice.[2] There is a separate list of aggravating factors which apply only in sentencing for certain sexual offences, and a provision which provides that self-induced intoxication is not a mitigating factor.[3] Other than these three provisions, relevant aggravating and mitigating factors have developed through the common law.

The criminal standard applies to aggravating factors, meaning that, for prejudicially motivated offences, the Court must be satisfied beyond reasonable doubt that the conduct was motivated by the relevant aggravating factor.

1.2 The impact of hate crimes

'Hate crime' is a term given to an offence that is motivated by hatred or prejudice towards the victim(s) due to their perceived membership of a certain group. Prejudicially motivated offences are likely to exacerbate the harm to victims.[4] The impact extends beyond the individual and injures the target group, other vulnerable groups, and the community as a

[2] *Sentencing Act 1997* (Tas) s 11B.
[3] *Sentencing Act 1997* (Tas) ss 11A and 11C, respectively.
[4] Victorian Sentencing Advisory Council, *Sentencing for Offences Motivated by Hatred or Prejudice* (July 2009) ('VSAC Report'); Gail Mason and Andrew Dyer, '"A Negation of Australia's Fundamental Values": Sentencing Prejudice-Motivated Crime' (2013) 36(3) *Melbourne University Law Review* 871, 874.

whole. Quoted with approval by the Victorian Sentencing Advisory Council, the Manitoba Department of Justice in Canada articulated the wide-ranging impacts of prejudicially motivated offending as follows:

- *Impact on the Individual:* Hate crimes have a tremendous impact on the individuals who are victimized. In addition to the psychological and emotional harm caused by hate crime, and its repercussions on the identity and feelings of self-worth of the victim, the degree of violence involved in hate-motivated offences is often more extreme than in non-hate crimes.
- *Impact on the Target Group:* Hate crime makes all members of the target group feel vulnerable to victimization and thereby has a general terrorizing effect on the entire group to which the victim belongs.
- *Impact on Other Vulnerable Groups:* Hate crimes have a negative impact on other vulnerable groups that share minority status or identify with the targeted group, especially if the hate motivation is based on an ideology or doctrine that covers a number of the groups that live within the community.
- *Impact on the Community as a Whole:* This, perhaps, is the greatest evil of hate crime. In a multicultural society […] which celebrates diversity and encourages all groups to live together in harmony and equality, hate crime is a negation of the fundamental values.[5]

The purpose of enacting aggravating provisions for offences motivated by prejudice or hatred is to acknowledge the greater level of harm compared with parallel offences without the underlying prejudice. To give effect to this purpose, the legislature can impose harsher guidelines, introduce specific aggravated offences, or use prejudicial motivation as an aggravating factor in sentencing.[6] The latter is the focus of this Consultation Paper.

According to Gail Mason and Andrew Dyer, using a motivation of hatred or prejudice as an aggravating factor in sentencing allows 'for more severe punishment of offenders who knowingly cause harm to individuals and target groups and breach fundamental liberal values of acceptance of harmless difference'.[7] Harsher sentences may more appropriately

[5] Manitoba Department of Justice, *Guideline No 2:HAT:1 Policy Directive: 'Hate Motivated Crime'* (June 2008) <https://www.gov.mb.ca/justice/crown/prosecutions/pubs/hate_crimes.pdf>. This definition of harm was adopted by the Victorian Sentencing Advisory Council. See VSAC Report (n 4).
[6] These different options were explored by the Tasmania Law Reform Institute, which recommended introducing a sentence aggravation provision, and not introducing a penalty enhancement provision or specific offence. See TLRI Report (n 1).
[7] Mason and Dyer (n 4) 883.

enable a sentencing officer to 'denounce, deter, adequately punish, and recognise the harm done to the victim and the community by such crime'.[8] It should be noted that the vast majority of studies in this area have concluded that increasing the severity of sentences does not reduce offending or prevent recidivism. For example, in the UK, the Sentencing Council found that lengthier sentences have neither a specific deterrent effect on the offender nor a general deterrent effect on the broader community. Based on a substantive literature review, the UK Sentencing Council concluded that:

> The weight of evidence suggests that increased sentence severity does not inherently result in greater general deterrent effects … Empirical research has identified many situational and psychological factors that may help explain why severe sentences do not appear to be a significant deterrent of criminal behaviour.[9]

Commentators in Australia have similarly argued that there is 'very little support for the hypothesis that increasing the severity of sentences … is effective in reducing crime'.[10] These studies suggest that crime reduction and deterrence should not be considered as valid reasons for introducing aggravated sentencing provisions.

However, aggravated sentencing for prejudicially motivated offending can be an important means of condemning attitudes and behaviours that are contrary to social values and acknowledging the harm caused to both the victim and the broader community.[11]

1.3 Current law in Tasmania

Section 11B of the Act provides that a motivation of racial hatred or prejudice is a relevant aggravating factor in sentencing. While the Court may consider any aggravating or

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[8] Ibid 884 (footnotes omitted).
[9] Sentencing Council, *The Effectiveness of Sentencing Options on Reoffending* (2022) 22–28, <https://www.sentencingcouncil.org.uk/wp-content/uploads/Effectiveness-of-Sentencing-Options-Review-PUBLISHED-FINAL.pdf>. See also Julian Roberts and Richard Frase, *Paying for the Past: The Case Against Prior Record Sentence Enhancements* (Oxford University Press, 2019); Richard Frase, Kelly Lyn Mitchell, Rhys Hester and Julian V Roberts, 'Prior Record Enhancements at Sentencing: Unsettled Justifications and Unsettling Consequences' (2018) 47 *Crime and Justice* 209.
[10] Kate Warner, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 385, 392, citing A Doob and C Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis' (2003) 30 *Crime and Justice: A Review of Research* 143; Andrew Ashworth, *Sentencing and Criminal* Justice (5th ed, Cambridge University Press, 2010) 80–84; Bill Dixon and David Gadd, 'Getting the Message? "New" Labour and the Criminalisation of "Hate"' (2006) 6 *Criminology and Criminal Justice* 309; Ben Knight, 'Do Harsher Punishments Deter Crime?', *UNSW Newsroom* (online, 16 July 2020) <https://newsroom.unsw.edu.au/news/business-law/do-harsher-punishments-deter-crime>.
[11] Gail Mason, 'Hate Crime Laws in Australia: Are They Achieving Their Goals?' (2009) 33 *Criminal Law Journal* 326, 326; VSAC Report (n 4).

mitigating factor it determines to be relevant in the circumstances of the case, racial hatred or prejudice is the only aggravating factor which the Court is required by statute to take into account, outside of specific aggravating factors which apply in sentencing certain sexual offenders.[12] While the Court must consider racial hatred as aggravating factor, the Court retains the discretion as to whether to increase the sentence accordingly: there is no mandatory requirement to increase the sentence.

Prior to the introduction of s11B, Tasmanian courts had occasionally considered whether the offence was motivated by hatred or prejudice alongside other relevant factors when exercising their discretion in sentencing. In *Tasmania v Bigwood*,[13] the Supreme Court held that prejudicial motivation can be inferred where explicit words are spoken and the attack is otherwise unprovoked, particularly in light of contextual evidence of social media posts explicitly depicting the prejudice or hatred. In *DPP (Tas) v Broadby*,[14] however, the Court held that choosing victims on the basis of their membership of a certain group will be insufficient, in the absence of actual prejudice or hostility – for example, where such membership makes the victim an easier and more vulnerable target.

Against this backdrop, the TLRI recommended the introduction of a new provision to explicitly address racially motivated offences, resulting in the insertion of s11B into the Act. The TLRI stated that, 'as demonstrated by the *Bigwood* case, Tasmanian Courts are currently able to take the racist motivation of offenders into consideration when passing sentence [by using s 80(2)(a) of the Act]; however, this alone does not necessarily have the same symbolic value or denunciative effect that a specific provision would'.[15] This approach is consistent with the Victorian Sentencing Advisory Council Report, *Sentencing for Offences Motivated by Hatred or Prejudice*, which states: 'Even where aggravating or mitigating factors exist at common law, there are past examples in Victoria of common law factors being codified and introduced […] to draw them more sharply into focus'.[16]

Tasmania has similar examples of recent legislative developments. The change from the offence of 'maintaining a sexual relationship with a person under the age of 17 years' to 'persistent sexual abuse of a child or young person' (s 125A of the Tasmanian *Criminal*

[12] *Sentencing Act 1997* (Tas) s 11A.
[13] *Tasmania v Bigwood* (unreported, Supreme Court of Tasmania, Evans J, 31 May 2010).
[14] *DPP (Tas) v Broadby* [2010] TASSCCA 13; see also *DPP (Vic) v MM* [2009] VSC 336 [6].
[15] TLRI Report (n 1) 33 [5.2.9].
[16] VSAC Report (n 4) 11 [B.7].

Code)[17] acknowledged that, 'Whilst these crimes may be technically advanced, their terminology is not. It is for this reason that these crimes will be amended to reflect the predatory and exploitative nature of the offending'.[18] The introduction in 2022 of the specific offence of non-fatal strangulation (s 170B of the *Criminal Code*),[19] historically charged as assault, was done 'in recognition that non-fatal strangulation, choking or suffocation is a significant form of violence which can unfortunately be a precursor for escalation in the severity of family and domestic violence'.[20] Both of these legislative interventions reflect the importance of symbolically denouncing certain conduct through a specific provision, even if the technicalities of the offending are covered by existing law.

1.4 Other jurisdictions

Australian Jurisdictions

Section 5(2) of the *Sentencing Act 1991* (Vic) provides:

> In sentencing an offender a court must have regard to—
>
> (daaa) whether the offence was 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.[21]

Section 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides:

> **Aggravating factors** The aggravating factors to be taken into account in determining the appropriate sentence for an offence are as follows—
>
> (h) 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).

It is important to note that while the Victorian and NSW provisions have the same test – that the offence was motivated by hatred or prejudice – there is a crucial difference between the two: the NSW provision has no explicit reference to partial motivation. Mason suggests that the different interpretations of the provisions can be attributed, at least in part, to this distinction.[22] The contrasting application of the two provisions is highlighted by Mason

[17] Effected through the *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas).
[18] House of Assembly (Tasmania), Hansard, 18 March 2020, 38 (Elise Archer).
[19] Effected through the *Criminal Code Amendment Act 2022* (Tas).
[20] House of Assembly (Tasmania), Hansard, 10 March 2022, 90 (Elise Archer).
[21] This provision was inserted in 2009 following the Victorian Sentencing Advisory Council's report on the issue.
[22] Mason, 'Hate Crime Laws in Australia' (n 11); Gail Mason, 'R v Gouros: Interpreting Motivation under Victoria's New Hate Crime Laws' (2010) 34 *Criminal Law Journal* 323.

through comparison of the Victorian judgment of *R v Gouros*[23] with the NSW judgment of *R v Aslett.*[24]

In *Gouros*, Justice Cohen was satisfied beyond reasonable doubt that the defendant chose the victims 'at least partly based on their apparent race or ethnic origin'.[25] At no point in the sentencing remarks did Justice Cohen explicitly link this choice with an underlying motive of prejudice against, or hatred towards, the victims' race. On its face, the remarks imply that compelling evidence of group selection was enough to satisfy the test of partial motive.

By contrast, in *Aslett,* the distinction was made between selecting a victim due to their presumed membership of the group and selecting a victim due to hatred or prejudice towards that group. The judgment stated that there must be clear proof of actual ill will, hatred, or prejudice felt by the perpetrator towards the victim group to satisfy the provision.[26]

The South Australian provision is a blend of the Victorian and NSW provisions, with s11(1) of the *Sentencing Act 2017* (SA) providing that:

> 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).

In the Northern Territory, s 6A of the *Sentencing Act 1995* (NT) is brief, stating simply that an aggravating factor to which the Court must have regard under s 5(2)(f) may include that:

> (e) the offence was motivated by hate against a group of people.

The authors of this Consultation Paper have not been able to locate any cases applying the above provisions in South Australia or the Northern Territory. Western Australia (WA),[27]

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[23] *R v Gouros* (unreported, County Court of Victoria, Cohen J, 14 December 2009).
[24] *R v Aslett* [2006] NSWCCA 49.
[25] *R v Gouros* (unreported, County Court of Victoria, Cohen J, 14 December 2009) [30].
[26] *R v Aslett* [2006] NSWCCA 49 [124].
[27] Western Australia has followed a different model, introducing specific racial vilification offences and penalty enhancement provisions into its Criminal Code in 2004. See *Criminal Code Act Compilation Act 1913* (WA) Chapter XI.

Queensland, the Australian Capital Territory (ACT), and the Commonwealth do not have statutory aggravating provisions for sentencing offences motivated by hatred or prejudice.

Overseas jurisdictions

Under the *Sentencing Act 2020* (UK), every court must follow the sentencing guidelines as prepared by the UK Sentencing Council (ss 59 and 60, inter alia), which include treating an offence as aggravated by hostility (s 66). Section 66(1) provides the following list of factors which aggravate the seriousness of the offence:

- offence was racially or religiously aggravated;
- offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation);
- offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability);
- offence motivated by hostility towards a minority group, or a member or members of it.

The guidelines use the word 'hostility' rather than 'hatred' or 'prejudice'. This difference is potentially significant when it comes to establishing the requisite mental state, with hostility being a lower threshold to satisfy. Crucially, the offence is aggravated where the offender *demonstrates* hostility (s 66(4)(a)), removing the need to draw inferences about motivation. It is therefore enough for the Court to be satisfied that the offender's conduct itself demonstrates hostility, without needing to take the extra step of being satisfied beyond reasonable doubt that their offending was motivated by that hostility.

Section 9(1) of the *Sentencing Act 2002* (NZ) also uses 'hostility' rather than 'hatred' and/or 'prejudice', and adds two additional requirements:

> In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:
>
> (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
>
> (i) the hostility is because of the common characteristic; and
> (ii) the offender believed that the victim has that characteristic:

This is the only provision of those studied in this Consultation Paper to include the word 'enduring'; the practical effect of this added term is not clear. The two additional

requirements are that the hostility towards the victim 'is because of the common characteristic' and that the offender 'believed that the victim has that characteristic'. These additional requirements are already applied in the reasoning of courts in other jurisdictions (as discussed above, for example, in *Aslett*). The New Zealand *Sentencing Act* makes them explicit preconditions for using prejudicial motivation as an aggravating factor in sentencing.

Section 718.2 of Canada's *Criminal Code 1985* introduces the term 'bias'. As a synonym for 'prejudice', it is not clear what this adds to the provision. The provision does not explicitly include partial motivation, stating:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > **(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor.

1.5 Questions

1. *Is there a need to amend s11B, or to introduce a new provision, to encompass motivation of hatred or prejudice towards groups other than on racial grounds?*

2. *Is the current discretionary power of Tasmanian courts sufficient, or is reform needed to make it mandatory for attribute-motivated offending to be treated as an aggravating factor, to clearly denounce such behaviour?*

3. *Are the approaches in other Australian or Commonwealth jurisdictions convincing? If so, why/why not?*

Part 2: Which groups should be covered by a new or amended provision?

The two main approaches to determining which groups are included in aggravated sentencing for prejudicially motivated offending are: (1) providing an exhaustive or illustrative list of groups; or (2) leaving it to the courts to determine the groups to which the aggravating provisions should apply on a case-by-case basis. Whichever approach is adopted, the case law highlights some important considerations when determining which groups should qualify for inclusion.

2.1 Historically oppressed minority groups

Groups that are explicitly listed in hate crime provisions are generally the same as those traditionally protected by discrimination laws; namely, race, religion, ethnicity, language, sexual orientation, gender identity, age, and disability.[28] Professor Kate Warner argues that there are good reasons to limit the protection to such minority groups, stating:

> That the real purpose of hate crime provisions is to protect ethnic minorities and to target hatred and prejudice directed at such groups strongly suggests that the provisions should not apply when the dominant group is targeted. The higher levels of harm and culpability which justify aggravation when the victim is a member of a vulnerable minority group are not present when the victim is a member of the dominant race and culture.[29]

By contrast, the Victorian Sentencing Advisory Council recommended leaving it to the courts to decide which groups are or are not protected by the relevant legislation on a case-by-case basis.[30]

Including a group expressly in the provision is not guaranteed to provide the intended protection. For example, there are very few cases where such a provision has been enlivened for offences involving hatred or prejudice against people who are homosexual, despite its being expressly provided for in the relevant jurisdictions. In *DPP (Vic) v RSP*, the prosecution did not raise s 5(2)(daaa) of the *Sentencing Act 1991*, discussed above, despite the accused's admission that the offences had been triggered by a homosexual advance and the accused's homophobia.[31] In several other cases, the aggravating factor of hatred or

[28] Mason, 'Hate Crimes in Australia' (n 11) 338–339.
[29] Warner (n 10) 393.
[30] VSAC Report (n 4) 12.
[31] *DPP (Vic) v RSP* [2010] VSC 12 [8] (Curtain J).

prejudice towards homosexual people was not raised, despite the availability of ample relevant evidence.[32] In *R v El Masri*, the NSW Court of Criminal Appeal rejected the argument that the offence was motivated by hatred for or prejudice against homosexuals, and instead treated the victim's 'provocative' behaviour as mitigating.[33] In *R v Hodge,* the NSW Supreme Court emphasised the victim's conduct and refused to find that the offence was aggravated by a motive of prejudice against gay men, instead finding that it occurred as a result of provocation in the form of an unwanted sexual advance.[34]

2.2 Harmless groups

A uniting factor between the groups often listed in provisions of this type, beyond historical oppression, is the ability to classify the group as 'harmless'. Mason and Dyer draw this criterion back to the overall purpose of the legislation – namely, to protect fundamental values of society – and suggest that the provisions should, accordingly, extend beyond historically oppressed groups to any harmless group.[35] 'Harmless' in this context refers to a group whose distinctive attributes cause no objective harm to others. This can be contrasted with groups such as Nazi sympathisers or paedophiles. A potentially unintended consequence of a provision which is not limited to harmless groups is that such a provision could be triggered even where the target group undermines societal values and laws.

By way of illustration, in *Dunn v The Queen*, it was held that an offence against a paedophile was motivated by hatred or prejudice against the victim 'solely because the applicant believed him to be a member of a particular group, ie paedophiles'.[36] The decision has been criticised for interpreting the provision in a way that does not promote its purpose – that of protecting harmless difference within society.[37] It also ignores the fact that vigilantism (as was the case in *Dunn*) is itself an aggravating feature,[38] which dilutes the justification for extending the motivation of hatred or prejudice beyond harmless groups.

[32] *R v Peres* [2000] NSWCCA 353; *R v Mason* [1997] QCA 67; *R v Preston* [1992] FCA 12; *R v Johnstone* [2011] VSC 300.
[33] *R v El Masri* [2005] NSWCCA 167 (Shillington ADCJ).
[34] *R v Hodge* [2000] NSWSC 897 (Dunford J).
[35] Mason and Dyer (n 4) 881.
[36] *Dunn v The Queen* [2007] NSWCCA 312 [32] (Hoeben J).
[37] Mason and Dyer (n 4) 906.
[38] *DPP (VIC) v Whiteside* (2000) 1 VR 331, 339 [19]-[24]. In this case, the Court recognised that evidence of vigilantism warrants a more severe punishment.

2.3 Any group

There are conflicting views about whether such a provision should apply only to certain groups, as above, or to any group of people no matter which descriptor unites them, including dominant groups. As Mason has observed:

> Although most laws now define protected groups in terms of group categories that are applicable to both minority and majority groups (e.g. sexuality is protected, not just homosexuality), such neutral definitions are open to criticism on the grounds that they undermine the real purpose of hate crimes laws which is to protect subjugated groups in the face of long-standing and disproportionate problems of prejudice-related crime and violence.[39]

Warner has warned against extending the provision to cover dominant groups:

> [T]he higher levels of harm and culpability which justify aggravation when the victim is a member of a vulnerable minority group are not present when the victim is a member of the dominant race and culture … First, it is easy to exaggerate the element of racism in crimes when members of the dominant culture are victims of minority group perpetrators. Secondly, rather than reaffirming values of racial tolerance and respect, highlighting the racial element can have the opposite effect – demonising the ethnic community to which the perpetrator belongs.[40]

However, courts have not always required the perpetrator to believe the victim belongs to a vulnerable or historically oppressed group. In *R v Al-Shawany* it was held that the victim was selected due to the accused's prejudice or hatred towards Christians or Muslim converts to Christianity, and that this was an aggravating factor in sentencing.[41] The same broad approach was taken, if somewhat controversially, in *Dunn*.[42]

[39] Mason, 'Hate Crimes in Australia' (n 11) 329.
[40] Warner (n 10) 393–394.
[41] *R v Al-Shawany* [2007] NSWDC 141 [111]–[112] (Knox DCJ).
[42] *Dunn v The Queen* [2007] NSWCCA 312 [32] (Hoeben J) .

2.4 Questions

1. *Is legislative reform required to denounce prejudicially motivated offending?*

2. *If so, should Tasmania provide an exhaustive or illustrative list of groups?*

3. *Alternatively, should the courts be left to determine the groups to which the aggravating sentencing provisions apply on a case-by-case basis?*

4. *Should the legislation in Tasmania limit the groups to those that are vulnerable or suffer historical oppression, or should it be left completely open?*

Part 3: What is the test for using prejudice as an aggravating factor?

Three dominant tests are used to determine the extent to which the offending was motivated or influenced by prejudice: (1) the perpetrator's prejudice or hatred towards the group is the sole or dominant motivation behind the offence; (2) the perpetrator demonstrated hostility towards the group to which the perpetrator believes the victim belongs; or (3) the perpetrator chose the victim due to their membership of a particular group, irrespective of whether the perpetrator was motivated by prejudice or hatred or demonstrated hostility towards the relevant group.

3.1 The terms: hatred, prejudice, hostility

Hatred and prejudice appear together in every legislative variation and are interpreted similarly, despite their distinct ordinary meanings. While hatred is a term in common usage, prejudice may require more explanation: its ordinary meaning is that of a 'preconceived opinion that is not based on reason or actual experience'.[43] Hatred or prejudice will almost invariably need to be inferred from the actions and words of the offender and the circumstances of the offence – except for rare cases where the offender makes an admission.[44]

Demonstrating hostility (that is, hostile behaviour, unfriendliness, or opposition)[45] is not entirely dissimilar from being motivated by hatred or prejudice, although it appears to be a simpler test: the ability to rely on the overt demonstration of hostility removes the extra step of drawing an inference as to motive. In practice, a demonstration of hostility has been used to establish that an offence was motivated by hatred or prejudice, in the absence of any other motive, both with,[46] and without,[47] taking the extra step of drawing an inference.

[43] Oxford English Dictionary (online).
[44] See, eg, *Dunn v The Queen* [2007] NSWCCA 312 (13 November 2007) [12]–[17] (Hoeben J); *Grivell v The Queen* (2008) 184 A Crim R 375, 380 [20] (Martin CJ).
[45] Oxford English Dictionary (online).
[46] *Holloway v The Queen* [2011] NSWCCA 23 (28 February 2011) [11] (Hall J); *Hussein v The Queen* [2010] VSCA 257 (4 October 2010) [6], [8], [19] (Buchanan JA).
[47] *R v Amir Ibrahim El Mostafa* [2007] NSWDC 219 (24 August 2007) [11], [16] (Cogswell DCJ); *R v Al-Shawany* [2007] NSWDC 141 (15 June 2007) [111]–[114], [124] (Know DCJ).

3.2 Current interpretation of the tests

Allowing for different legislative requirements, Australian courts have generally required that the offence is motivated by prejudice or hatred towards a group. With a few exceptions, simply choosing victims based on their membership of a group, but without proof of prejudice or hatred towards that group, has been deemed insufficient to attract an aggravating factor in sentencing.[48] However, this interpretation is not uniform. In *R v Gouros*, the fact that the victims were chosen due to their Indian heritage was taken to be a prejudicial motive under s 5(2)(daaa), despite a lack of hatred, prejudice or demonstrated hostility.[49] This is more in line with certain jurisdictions in the United States, where the test is that of discrimination rather than prejudice or hatred, or hostility.[50] Mason posits:

> The implication [of *Gouros*] is that it does not matter whether the reason for this selection was strong prejudice against Indian people, a mild dislike of Indian people or simply a belief that there is some characteristic (whether stereotypical or empirically valid) of Indians that makes them attractive targets for robbery. This interpretation of s 5(2)(daaa) *Sentencing Act 1991* imposes a heightened penalty on the selective conduct of an offender without determining the reasons for this conduct. The imposition of heavier penalties in hate crime laws is said to be justified on the grounds that such offences are more serious than parallel offences that are not motivated by prejudice … The decision of the Victorian County Court in *R v Gouros* needs to be considered in this light: does it over-reach in its interpretation that group selection is sufficient to establish motive or is it a necessary denunciation of the seriousness of such anti-social conduct in a multicultural society?[51]

It is worth noting that *Gouros* appears to be an outlier in Australian jurisdictions. Group selection was used to establish a motive of prejudice in *DPP (Vic) v Caratozzolo*, but only due to the accused's prejudice towards that group in general.[52] Mason and Dyer argue that a narrower test is appropriate, keeping in mind that the purpose of sentencing aggravating provisions is to punish offenders more harshly for harm inflicted by intentional or reckless acts of criminal prejudice.[53]

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[48] See, eg, *DPP (Vic) v MM* [2009] VSC 336 [6]; *DPP (Tas) v Broadby* [2010] TASSCA 13.
[49] *R v Gouros* (unreported, County Court of Victoria, Cohen J, 14 December 2009) [31].
[50] See, eg, *Wisconsin v Mitchell* 508 US 476 (1993).
[51] Mason, 'R v Gouros' (n 22) 327.
[52] *DPP (Vic) v Caratozzolo* [2009] VSC 305 [14] (Harper J).
[53] Mason and Dyer (n 4) 898.

3.3 Proving motivation

In addition to the different tests, there are also conflicting views about the required degree of motivation and the level of proof required to establish such motivation. Different jurisdictions have taken different approaches to the degree to which the offence must be motivated by prejudice in order to satisfy the aggravating provision, and whether to make this explicit or implied. This is a crucial consideration, as research suggests that it is more common for hate crime offenders to have mixed motives than just one.[54] However, the issue of partial motive is fraught, and courts have tried to draw a line between evidence of a partial motive of hatred or prejudice and hatred or prejudice which is incidental to the offence. As Mason and Dyer state:

> While it is justifiable to impose an additional penalty upon an offender who intentionally or recklessly (not just negligently) intimidates, belittles and injures harmless groups, it is far more difficult to justify the imposition of a harsher penalty for an impulsive remark that is incidental to the offence.[55]

In general, courts have held that there is a distinction between an offence 'motivated' by racism and one where remarks 'based on racism' are uttered during the offence.[56]

In NSW, the test has been held to be that the prejudice or hate towards the group was a 'significant factor'.[57] In *R v Winefield*, the Supreme Court was not satisfied that the offence was racially motivated, even in part, despite 'some suspicions that [...] it might be the case'; as such, the aggravating factor was not enlivened.[58] In the Victorian case of *R v Rintoull*, a similarly high threshold can be inferred by the Court's lack of satisfaction beyond reasonable doubt that racism was a motive, despite explicit racist statements by the accused in the context of the offence. Instead, it was held that the accused would have directed anger at the group 'irrespective of their race'.[59] By contrast, in *R v Dean-Willcocks*,[60] Justice Garling held that the offender's anti-Japanese statements during the offence amounted to an

[54] Ibid 891, plus footnotes.
[55] Ibid 890.
[56] *R v Robinson* [2007] NSWDC 344 [26] (Nicholson DCJ); *DPP (Vic) v RSP* [2010] VSC 128; *R v Rintoull* [2009] VSC 617 [149].
[57] *Dunn v The Queen* [2007] NSWCCA 312 [17], [31] (Hoeben J).
[58] *R v Winefield* [2011] NSWSC 337 [28].
[59] *R v Rintoull* [2009] VSC 617 (18 December 2009) [149] (Curtain J).
[60] *R v Dean-Willcocks* [2012] NSWSC 107 (Garling J).

aggravating feature of the offender's conduct, despite no prior evidence of prejudice, stating:

> Whilst I accept that Mr Dean-Willcocks was not a person who acted or spoke contrary to the interests of any racial group, that does not tell against, on this occasion, his being motivated by hatred or prejudice against a specific racial group. The persistent use by him of racially directed comments whilst assaulting Mr Alvarado leaves no real room for debate that what he was doing was racially motivated.[61]

Courts have shown reluctance to infer a motivation of hatred or prejudice where there is evidence of another motive, or a pre-existing conflict between the offender and the victim. However, in the absence of another motive, courts have inferred such a motivation from the offender's derogatory statements immediately prior to or following the offence;[62] hostile remarks made ahead of time;[63] or even psychological evidence of prejudice (in circumstances of severe violence).[64]

3.4 Questions

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

2. *Should it be a requirement that the offending is motivated, either in whole or in part, by prejudice or hatred towards a particular group?*

3. *Alternatively, is it sufficient that:*
   (a) the perpetrator demonstrated open hostility towards the group to which the victim is perceived to belong?
   (b) the victim was chosen because of perceived membership of a particular group, irrespective of whether the perpetrator demonstrated hostility against, or is motivated by hatred or prejudice towards, that group?

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[61] Ibid [71]–[73].
[62] *Holloway v The Queen* [2011] NSWCCA 23 [11] (Hall J); *Hussein v The Queen* [2010] VSCA 257 [6], [8], [19] (Buchanan J).
[63] *R v Amir Ibrahim El Mustafa* [2007] NSWDC 219 [11], [16] (Cogswell DCJ); *R v Al-Shawany* [2007] NSWDC 141 [111]–[114], [124] (Know DCJ).
[64] *R v ID* [2007] NSWDC 51 [128], [157].

Conclusion

Section 11B of the *Sentencing Act 1997* (Tas) provides that courts must consider, as an aggravating factor in sentencing, whether the offence is motivated by racial hatred or prejudice. This Consultation Paper is seeking feedback from stakeholders and the community on whether the *Sentencing Act* should be amended to include other forms of prejudicial motivation on grounds such as religion, language, sexual orientation, gender, gender identity, innate variations of sex characteristics, a particular physical disability or cognitive impairment, or a mental illness.

Part 1 encourages feedback on whether such legislative reform is necessary. On the one hand, there is no research to suggest that harsher sentences for prejudicially motivated offences will reduce offending. However, academics and professionals in this field have pointed to the symbolic value in denouncing prejudicially motivated offending based on the elevated harm that these crimes cause to the victim, the group to which the victim belongs, and to the broader community.

Part 2 proceeds on the assumption that legislative reform is required in Tasmania. It asks the community to consider the two main approaches used to identify the groups against which the prejudicial offending is directed: (1) providing an exhaustive or illustrative list of groups; or (2) leaving it to the courts to determine the groups to which the aggravating provisions should apply on a case-by-case basis.

Part 3 asks for community feedback on the three main tests for determining whether an offence is motivated or influenced by hatred or prejudice: (1) the perpetrator's hatred towards the group is the sole or dominant motivation behind the offence; (2) the perpetrator demonstrates hostility towards the group to which the perpetrator believes the victim to belong; or (3) the victim is chosen because of their membership of a particular group, irrespective of whether the perpetrator is motivated by prejudice or hatred.

The Sentencing Advisory Council looks forward to receiving feedback from relevant stakeholders and the broader community on these issues or any other matters related to prejudice or hatred as an aggravated factor in sentencing.

How to Provide your Feedback

We welcome your comments on this Consultation Paper and your responses to the questions set out at the end of each Part. You may choose to address some or all of the questions, or simply provide general comments instead.

After considering all responses, the Sentencing Advisory Council intends to publish a Final Report containing advice to the Attorney-General. Your answers may be referred to or quoted in the Final Report. If you do not wish your response to be published, or if you wish to remain anonymous, please indicate this in your response.

Written responses may be forwarded to the Sentencing Advisory Council via:

- Email to sac@justice.tas.gov.au.
- Post to Sentencing Advisory Council, GPO Box 825 Hobart 7001

Responses must be received by close of business on Monday, 25 September 2023.

This Consultation Paper is available on the Sentencing Advisory Council's website. To request a copy via email, please contact the Council at sac@justice.tas.gov.au.