



# **Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023**

**Report No. 49, 57th Parliament  
Legal Affairs and Safety Committee  
June 2023**

## **Legal Affairs and Safety Committee**

|                     |                                           |
|---------------------|-------------------------------------------|
| <b>Chair</b>        | Mr Peter Russo MP, Member for Toohey      |
| <b>Deputy Chair</b> | Mrs Laura Gerber MP, Member for Currumbin |
| <b>Members</b>      | Ms Sandy Bolton MP, Member for Noosa      |
|                     | Ms Jonty Bush MP, Member for Cooper       |
|                     | Mr Jason Hunt MP, Member for Caloundra    |
|                     | Mr Jon Krause MP, Member for Scenic Rim   |

### **Committee Secretariat**

|                                       |                                                                                    |
|---------------------------------------|------------------------------------------------------------------------------------|
| <b>Telephone</b>                      | +61 7 3553 6641                                                                    |
| <b>Email</b>                          | lasc@parliament.qld.gov.au                                                         |
| <b>Technical Scrutiny Secretariat</b> | +61 7 3553 6601                                                                    |
| <b>Committee webpage</b>              | <a href="http://www.parliament.qld.gov.au/LASC">www.parliament.qld.gov.au/LASC</a> |

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All web address references are current at the time of publishing.

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## Abbreviations and acronyms

| Abbreviation                     | Definition                                                                                          |
|----------------------------------|-----------------------------------------------------------------------------------------------------|
| AD Act                           | <i>Anti-Discrimination Act 1991</i>                                                                 |
| ATSILS                           | Aboriginal and Torres Strait Islander Legal Service                                                 |
| Bill                             | Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023      |
| Building Belonging               | <i>Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991</i>                     |
| Caxton                           | Caxton Legal Centre Inc                                                                             |
| committee                        | Legal Affairs and Safety Committee                                                                  |
| Criminal Code                    | <i>Criminal Code Act 1899</i>                                                                       |
| CJIO                             | Criminal Justice Innovation Office                                                                  |
| DJAG                             | Department of Justice and Attorney-General                                                          |
| FNJO                             | First Nations Justice Office                                                                        |
| HRA                              | <i>Human Rights Act 2019</i>                                                                        |
| LSA                              | <i>Legislative Standards Act 1992</i>                                                               |
| MQAC                             | Multicultural Queensland Advisory Council                                                           |
| PPRA                             | <i>Police Powers and Responsibilities Act 2000</i>                                                  |
| QCCL                             | Queensland Council for Civil Liberties                                                              |
| QFCC                             | Queensland Family and Child Commission                                                              |
| QHRC                             | Queensland Human Rights Commission                                                                  |
| QLS                              | Queensland Law Society                                                                              |
| QPS                              | Queensland Police Service                                                                           |
| Report No. 22                    | <i>Inquiry into serious vilification and hate crimes, Report No. 22, 57<sup>th</sup> Parliament</i> |
| Respect Inc and Scarlet Alliance | Respect Inc and Scarlet Alliance, Australian Sex Workers Association                                |
| SO Act                           | <i>Summary Offences Act 2005</i>                                                                    |
| SSI                              | Settlement Services International Limited                                                           |
| UK                               | United Kingdom                                                                                      |

## Chair's foreword

When the Legal Affairs and Safety Committee (committee) reported on the *Inquiry into serious vilification and hate crimes* (Report No. 22, 57<sup>th</sup> Parliament) (Serious Vilification Inquiry) in January 2022, I referred to the fact that Queensland did not have a piece of legislation dedicated to serious vilification and hate crimes.

The Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Bill) goes some way to changing that issue. As we heard in evidence during the hearing, there will be significant changes when the revised *Anti-Discrimination Act 1991* is introduced into Parliament.

It is difficult to gauge whether things have improved or that people are trying to be kinder to each other. However, during our recent *Inquiry into the Births, Deaths and Marriages Registration Bill 2022* (Report No. 41, 57<sup>th</sup> Parliament), it was distressing to hear of the vitriol and hatred directed towards the LGBTIQ+ community and the impact on the transgender community.

I also don't believe that enough has been done to monitor Big Tech and social media. The government can distribute information through its own online presence for the benefit of the public, but the commentary that follows on social media is unsavoury and unhelpful. I believe the Australian eSafety Commissioner has a role in assisting the public to act. Particular departments also need to monitor their online presence and respond actively by taking down inflammatory and derisive comments. It is vital to dealing with this issue.

It was comforting to see the Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, introduce the Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023 into the Australian Parliament, which will make it a criminal offence to publicly display Nazi and Islamic State symbols or trade in items bearing these symbols.

Our legislation will take a similar stance as we seek to make the display of Nazi and Islamic State symbols a criminal offence. This is a very positive step, although I understand there is scope for further improvements to be made in this area in the future.

This Bill intends to make change by implementing several recommendations made by the committee focusing on a combination of education, community empowerment and inter-governmental cooperation.

My foreword from the Serious Vilification Inquiry is still relevant today. Each of us has a moral responsibility to ensure our conduct is appropriate and to teach our children to behave properly towards others. The unfortunate reality is that there will always be those in our society who traverse the bounds of proper behaviour. For those persons, deterrents and sanctions are needed.

Dr Martin Luther King said "it may be true that morality cannot be legislated, but behaviour can be regulated. It may be true that the law may not change the heart, but it can restrain the heartless".

I thank the secretariat and the committee for their work on this vital piece of legislation and I commend this report to the House.



Peter Russo MP

Chair

## Recommendations

- Recommendation 1** **3**
- The committee recommends the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 be passed.
- Recommendation 2** **9**
- That the Queensland Government considers, as part of its review of the *Anti-Discrimination Act 1991*, the possible inclusion of additional protected attributes, particularly age and impairment, in relation to ss 124A and 131A of the *Anti-Discrimination Act 1991* (vilification and serious vilification), s 52B of the *Criminal Code Act 1899* (circumstance of aggravation) and s 52C of the *Criminal Code Act 1899* (prohibited symbols).
- Recommendation 3** **11**
- That the Queensland Government considers amending the Bill to include closed environments, such as hospitals and educational institutions, in the proposed amended s 131A of the *Anti-Discrimination Act 1991* and proposed new s 52D(4) of the *Criminal Code Act 1899* in relation to the display, distribution or publication of prohibited symbols.
- Recommendation 4** **11**
- That the Queensland Government amends the definition of ‘public act’ in ss 124A and 131A of the *Anti-Discrimination Act 1991* to set out examples of communication by electronic means as, not limited to but including, online communication and social media posts and comments.
- Recommendation 5** **20**
- That the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.
- Recommendation 6** **20**
- That the Queensland Government conducts a review within 24 months of the commencement of the Bill to consider the impact of the amendments on First Nations peoples.
- Recommendation 7** **28**
- That the Queensland Government monitors the operation of the test in proposed new s 52D(1) of the *Criminal Code Act 1899* in relation to the display or prohibited symbols whereby a person commits an offence if they display, distribute or publish a prohibited symbol in a way that ‘might reasonably cause a member of the public to feel menaced, harassed or offended’ to ensure that the test is appropriate.
- Recommendation 8** **29**
- That the Queensland Government ensures that there is adequate culturally appropriate education and training in relation to the serious vilification and hate crime offences proposed by the Bill for the Queensland Police Service, the Office of the Director of Public Prosecutions, judicial officers and the public including community support groups.
- Recommendation 9** **30**
- That the Queensland Government commences a program of collecting accurate data in relation to serious vilification and hate crimes to ensure the effectiveness of the amendments included in the Bill.

## Executive Summary

The Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Bill) was introduced into the Legislative Assembly by the Hon Shannon Fentiman, the then Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence on 29 March 2023. The Bill was referred to the Legal Affairs and Safety Committee (committee) for detailed consideration.

### Summary of the Bill

The objective of the Bill is to implement recommendations 7, 8, 9 and 16 of the committee's report, *Inquiry into serious vilification and hate crimes*, Report No. 22, 57<sup>th</sup> Parliament. In addition to addressing these recommendations, the Bill will amend the *Anti-Discrimination Act 1991* to increase the existing penalty for the offence under s 131A (Vilification of serious racial, religious, sexuality or gender identity vilification).

The Bill will amend the following legislation:

- *Anti-Discrimination Act 1991*
- *Criminal Code Act 1899*
- *Police Powers and Responsibilities Act 2000*
- *Summary Offences Act 2005*.

### Key issues examined

The key issues raised during the committee's examination of the Bill included:

- the attributes to be protected
- in relation to serious vilification, the definition of a public act, removal of the requirement for a Crown Law Officer's consent and increasing the maximum penalty to 3 years imprisonment
- the circumstance of aggravation including the test to be applied and the prescribed offences
- in relation to prohibited symbols:
  - prohibiting symbols by regulation
  - the test for the offence
  - the reversal of the onus of proof
  - impact on freedom of expression
  - allowing police to search a person or vehicle without a warrant
- compliance of the Bill with the *Legislative Standards Act 1992* and the *Human Rights Act 2019*.

Other issues raised include the need for training and education and improved data collection and reporting in relation to serious vilification and hate crimes.

### Conclusion

The committee recommends that the Bill be passed.

The committee has made 8 further recommendations to ensure that the Bill is implemented in a manner that achieves its objectives.

## 1 Introduction

### 1.1 Policy objectives of the Bill

On 29 March 2023, the Hon Shannon Fentiman MP, the then Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence introduced the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (Bill) into the Queensland Parliament. The Bill was referred to the Legal Affairs and Safety Committee (committee) for detailed consideration.

The objective of the Bill is to implement recommendations 7, 8, 9 and 16 of the committee's report, *Inquiry into serious vilification and hate crimes*, Report No. 22, 57<sup>th</sup> Parliament (Report No. 22).<sup>1</sup> In addition to addressing these recommendations, the Bill will amend the *Anti-Discrimination Act 1991* (AD Act) to increase the existing penalty for the offence under s 131A (Vilification of serious racial, religious, sexuality or gender identity vilification).

The Bill will amend the following legislation:

- AD Act
- *Criminal Code Act 1899* (Criminal Code)
- *Police Powers and Responsibilities Act 2000* (PPRA)
- *Summary Offences Act 2005* (SO Act).

### 1.2 Background

The committee conducted an Inquiry into serious vilification and hate crimes in 2021, reporting to the Legislative Assembly on 31 January 2022.<sup>2</sup> For a detailed consideration of the definition of hate crimes, vilification and serious vilification, see Chapter 2 of Report No. 22.<sup>3</sup>

Report No. 22 made 17 recommendations. The Bill relates to the following recommendations:

#### **Recommendation 7**

The committee recommends that the Queensland Government investigate the viability of removing the requirement for the written consent of a Crown Law Officer before commencing a prosecution for serious vilification.

#### **Recommendation 8**

The committee recommends that the Queensland Government introduce a statutory aggravation regarding hate/serious vilification into the *Criminal Code Act 1899* (Qld) and *Summary Offences Act 2005* (Qld) to apply to criminal conduct.

#### **Recommendation 9**

The committee recommends that the Queensland Government relocate section 131A from the *Anti-Discrimination Act 1991* (Qld) into the *Criminal Code 1899* (Qld).

#### **Recommendation 16**

The committee recommends that the Queensland Government establish a criminal offence that prohibits the display of hate symbols, including those relating to Nazi and ISIS ideology, with considered exceptions to the prohibition.<sup>4</sup>

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<sup>1</sup> Explanatory notes, p 1.

<sup>2</sup> Report No. 22, p 1.

<sup>3</sup> Report No. 22, pp 4-6.

<sup>4</sup> Report No. 22, pp ix-x.

The Queensland Government response to Report No. 22 supported recommendations 7, 9 and 16 and supported in-principle recommendation 8.<sup>5</sup>

### **1.3 Legislative compliance**

Our deliberations included assessing whether or not the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

#### **1.3.1 Legislative Standards Act 1992**

Our assessment of the Bill's compliance with the LSA identified issues which are discussed below.

Fundamental legislative principles require that legislation has sufficient regard to the rights and liberties of individuals and the institution of Parliament. The Bill raises issues in relation to the fundamental legislative principles including:

- whether proposed penalties are proportionate to the offence and consistent with other penalties within legislation
- reversal of the onus of proof
- searching persons and property without a warrant
- delegation of legislative power.

The committee was of the view that the Bill pays sufficient regard to the rights and liberties of individuals and the institution of Parliament.

#### **1.3.2 Human Rights Act 2019**

Our assessments of the Bill's compatibility with the HRA are included below.

The Bill may directly or indirectly impact on the following human rights, among others:

- freedom of expression: s 21 of the HRA
- property rights: s 24 of the HRA
- rights to privacy and reputation: s 25 of the HRA.<sup>6</sup>

The committee notes that any potential limitations on human rights proposed by the Bill are for the purpose of preventing violations of the rights of others and to protect vulnerable members of the community from serious vilification and hate crimes. As such, we find the Bill is compatible with human rights.

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

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<sup>5</sup> *Queensland Government response Legal Affairs and Safety Committee Report No. 22, 57<sup>th</sup> Parliament, Inquiry into serious vilification and hate crimes*, 26 May 2022, pp 3 and 5.

<sup>6</sup> Statement of compatibility, p 5.

#### **1.4 Should the Bill be passed?**

The committee is required to determine whether or not to recommend that the Bill be passed.

##### **Recommendation 1**

The committee recommends the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 be passed.

## 2 Examination of the Bill

This section discusses key issues raised during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments.

The majority of stakeholders were supportive of the Bill.<sup>7</sup>

### 2.1 Protected attributes

The current s 131A of the AD Act sets out the attributes protected from serious vilification as including the following grounds:

- race
- religion
- sexuality
- gender identity.

The *Births, Deaths and Marriages Registration Act 2022* will amend s 131A to include sex characteristics as a protected attribute.<sup>8</sup>

Sex characteristics are defined in s 157 of the *Births, Deaths and Marriages Registration Act 2022* as follows:

sex characteristics, of a person, means the person's physical features and development related to the person's sex, and includes—

- (a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy; and
- (b) the person's chromosomes, genes and hormones that are related to the person's sex; and
- (c) the person's secondary physical features emerging as a result of puberty.

The *Births, Deaths and Marriages Registration Bill 2022* was passed by the Legislative Assembly on 14 June 2023.<sup>9</sup> The *Births, Deaths and Marriages Registration Act 2022* will commence on a day to be fixed by proclamation.<sup>10</sup>

The Department of Justice and Attorney-General (DJAG) acknowledged the 'interdependency' of the Bill and the *Births, Deaths and Marriages Registration Act 2022*.<sup>11</sup>

The Bill proposes amendments to s 131A of the AD Act in relation to serious vilification and to move s 131A to the Criminal Code.

The Bill also proposes to apply a circumstance of aggravation for a prescribed offence where the offender was wholly or partially motivated by hatred or serious contempt for a person or group of persons on the grounds of:

- race
- religion
- sexuality
- sex characteristics

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<sup>7</sup> Submissions 1-6, 8-11, 14, 15, 17-29.

<sup>8</sup> *Births, Deaths and Marriages Registration Act 2022*, s 155.

<sup>9</sup> Record of Proceedings, 14 June 2023, pp 1885-6.

<sup>10</sup> *Births, Deaths and Marriages Registration Act 2022*, s 2.

<sup>11</sup> DJAG, correspondence, 24 April 2023, p 1.

- gender identity.<sup>12</sup>

These attributes are also used in the definition of a relevant group in relation to prohibited symbols under proposed new s 52C of the Criminal Code.<sup>13</sup>

### 2.1.1 Stakeholder views

Submitters suggested additional attributes should be protected by the serious vilification and hate crimes offences, including:

- age<sup>14</sup>
- disability<sup>15</sup>
- impairment<sup>16</sup>
- HIV/AIDS status<sup>17</sup>
- homelessness<sup>18</sup>
- sex<sup>19</sup>
- sex work and sex worker<sup>20</sup>
- all the attributes set out in s 7 of the AD Act.<sup>21</sup>

The Queensland Human Rights Commission (QHRC) referenced the United Kingdom (UK) Law Commission's *Hate crime laws: Final report* in relation to determining the criteria to guide the selection of protected attributes.<sup>22</sup> The *Hate crime laws: Final report* sets out the criteria as follows:

- (1) Demonstrable need: evidence of the prevalence of the criminal targeting of the characteristic group based on prejudice or hostility. A balance of the following considerations should inform this determination of need:
  - (a) Absolute prevalence: the total amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic.
  - (b) Relative prevalence: the amount of criminal behaviour that is targeted based on hostility or prejudice towards the characteristic, as compared with the size of the group who share the characteristic.
  - (c) Severity: the nature and degree of the criminal behaviour that is targeted towards the characteristic based on hostility or prejudice.

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<sup>12</sup> Bill, cl 12; proposed new s 52B of the Criminal Code.

<sup>13</sup> Bill, cl 12.

<sup>14</sup> Townsville Community Law Inc, submission 2, pp 1-2; QLS, submission 20, p 2; Caxton, submission 21, p 1.

<sup>15</sup> QLS, submission 20, p 2; Caxton, submission 21, p 1; Equality Australia, submission 23, p 2; Australian Lawyers for Human Rights, submission 25, p 5.

<sup>16</sup> QHRC, submission 22, pp 3 and 7.

<sup>17</sup> QHRC, submission 22, pp 6-7; Equality Australia, submission 23, p 2; Queensland Council for LGBTI Health, submission 24, p 5.

<sup>18</sup> Equality Australia, submission 23, p 2.

<sup>19</sup> Australian Feminists for Women's Rights, submission 8, p 2; E Williams, submission 12, p 1; S Clarke, submission 16, pp 1-2; Caxton, submission 21, p 1.

<sup>20</sup> Equality Australia, submission 23, p 2; Respect Inc and Scarlet Alliance, submission 26, p 1.

<sup>21</sup> Townsville Community Law Inc, submission 2, p 2; Caxton, submission 21, p 1.

<sup>22</sup> Public hearing transcript, Brisbane, 29 May 2023, p 2. See also UK Law Commission, *Hate crime laws: Final report*, 2021, pp 67-77.

- (2) Additional harm: there is evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.
- (3) Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, represent an efficient use of criminal justice resources, and is consistent with the rights of others.<sup>23</sup>

On the basis of these criteria, the QHRC recommended the inclusion of age and impairment as protected attributes.<sup>24</sup>

The Queensland Law Society (QLS) recommended age should be included as a protected attribute:

Our members report that age-based discrimination has become particularly prevalent as a result of the COVID-19 pandemic. Ageist hate speech further entrenches intergenerational tensions, promotes social isolation and facilitates elder abuse by devaluing older persons' social identity.

The World Health Organisation's recent Global Report on Ageism notes that one in two people hold moderately or highly ageist attitudes. Ageism increases the risk of violence being perpetrated against older people, without sufficient legislative protections. ... The current omission of age as a protected attribute is discriminatory, ageist and in breach of the values of the *Human Rights Act 2019* (HRA).<sup>25</sup>

Caxton Legal Centre Inc (Caxton) stated that they were also concerned about younger people, particularly in the context of Aboriginal and Torres Strait Islander young people and youth justice.<sup>26</sup> Caxton strongly recommended 'the expansion and improved alignment of the anti-vilification provisions to all existing and future protected attributes contained in s7 of the AD Act, or at least sex, disability and age'.<sup>27</sup> A representative from Caxton further stated in the public hearing:

You made recommendations in relation to including three additional attributes: sex/gender, disability and medical status. I could understand waiting if you were going to expand the vilification regime to the entire list of attributes under the Anti-Discrimination Act, but that is not what is being proposed so I do not think we should be leaving those three groups behind pending the outcome of that process. I would probably encourage you to consider making recommendations in relation to that modest expansion of the list of attributes at this stage, in line with your own recommendations.<sup>28</sup>

The QHRC recommended the inclusion of impairment as a ground of unlawful vilification and serious vilification on the basis that it is consistent with obligations under the *Convention on the Rights of Persons with Disabilities*, to which Australia is a party.<sup>29</sup> The QHRC stated that the ground of impairment would also capture HIV/AIDS status.<sup>30</sup>

Respect Inc and Scarlet Alliance, Australian Sex Workers Association (Respect Inc and Scarlet Alliance) highlighted the need for sex workers to be protected from vilification:

In 2022, a survey of sex workers found excessively high levels of discrimination across a broad range of areas and extremely high levels of unreported discrimination. While participants did not always refer to their experiences as vilification, many described it.<sup>31</sup>

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<sup>23</sup> UK Law Commission, *Hate crime laws: Final report*, 2021, p 77.

<sup>24</sup> Public hearing transcript, Brisbane, 29 May 2023, p 4.

<sup>25</sup> Submission 20, p 2.

<sup>26</sup> Public hearing transcript, Brisbane, 29 May 2023, p 10.

<sup>27</sup> Submission 21, p 1.

<sup>28</sup> Public hearing transcript, Brisbane, 29 May 2023, p 7.

<sup>29</sup> Submission 22, p 7.

<sup>30</sup> Submission 22, p 7.

<sup>31</sup> Submission 26, p 1.

Equality Australia stated that the serious vilification and hate crimes protections should 'be extended to all people who commonly experience hate crimes based on who they are or their protected attributes'.<sup>32</sup>

Equality Australia also raised the issue of serious vilification or hate crimes committed on mistaken beliefs or stereotypes relating to protected attributes:

Take for example an offender who attacks a drag artist by wrongly associating them with paedophilia or grooming. This has been a common basis of attack recently experienced by members of our communities. For example, in January 2020, a group of university students charged into the Brisbane Square Library where a Drag Queen story time event was being held, chanting 'drag queens are not for kids'. The event caused extreme distress for children and parents in attendance.

Currently, the Bill requires the prosecution to establish that the offender was motivated wholly or partly by the victim's sexual orientation or gender identity or presumed sexual orientation or gender identity. The difficulty with this may be the disconnect in the available evidence between the offender's mistaken belief and the attribute of the victim. The evidence may only show that the offender believes they are proceeding against someone because they are a risk to children, and it is the offender's motivation that frames how the provision will apply.<sup>33</sup>

Equality Australia provided a further example in the public hearing:

In London there was an electrician who had wires hanging out of their back pocket. He was killed by police officers who thought he had a bomb. Why did they think that? Because of what he looked like. They imputed to somebody whom they believed to be Muslim certain characteristics, that they were likely to be a terrorist. What motivated them in addressing that person was not whether or not the person was Muslim but a characteristic or a stereotype that they imputed to Muslim people that they were more likely to be a risk to society. They put all these things together and jumped to conclusion Y when he was just an electrician who happened to be Muslim.<sup>34</sup>

Townsville Community Law Inc recommended new ss 124B and 131B be inserted in the AD Act to address this issue by stating that vilification and serious vilification include vilification on the basis of:

- (a) a characteristic that a person with any of the attributes generally has; or
- (b) a characteristic that is often imputed to a person with any of the attributes; or
- (c) an attribute that a person is presumed to have, or to have had at any time, by the person vilifying; or
- (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.<sup>35</sup>

### 2.1.2 Department response

DJAG, in its response to submissions, referenced the protected attributes included in recommendation 4 of Report No. 22, which the Queensland Government supported in-principle.<sup>36</sup> Recommendation 4 included gender and/or sex, disability and medical status, including HIV/AIDS status, as additional protected attributes.<sup>37</sup> DJAG also noted that the recommended expansion to include additional attributes will be considered in the context of the QHRC's report, *Building Belonging – Review of Queensland's Anti-Discrimination Act 1991* (Building Belonging).<sup>38</sup>

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<sup>32</sup> Submission 23, p 7.

<sup>33</sup> Submission 23, p 6.

<sup>34</sup> Public hearing transcript, Brisbane, 29 May 2023, p 19.

<sup>35</sup> Submission 2, pp 17-18.

<sup>36</sup> DJAG, correspondence, 17 May 2023, p 2.

<sup>37</sup> Report No. 22, p ix.

<sup>38</sup> DJAG, correspondence, 17 May 2023, p 2.

DJAG stated, in the public briefing:

The Queensland government's final response to the *Building belonging* supported in principle the recommendations of that report. Careful consideration is being given to ensuring the recommendations are implemented in a way that is cohesive across the entirety of the proposed new Anti-Discrimination Act and with regard to Queensland's wider legislative context in relation to anti-discrimination provisions. The department notes that the government has committed to introducing legislation in response to *Building belonging* in the current term of government. The implementation of recommendation 4 and any consequential changes to the circumstance of aggravation that may be required as a result—and obviously the new 131A that has been transferred to the Criminal Code—will be considered as part of those broader anti-discrimination reforms. That is where that current recommendation is so that it is holistically considered as part of the review of the Anti-Discrimination Act.<sup>39</sup>

DJAG stated that the inclusion of 'presumed race, religion, sexuality, sex characteristics or gender identity' in new s 52B 'will ensure offenders who commit offences based on a presumption (despite being erroneous) of the race, religion, sexuality, sex characteristics or gender identity of the person or group are captured by the new circumstance of aggravation.'<sup>40</sup> DJAG provided an example to explain this:

If a person is assaulted because the offender presumes that person is Hindu, for example, but that person is actually a Buddhist, they presumed that they were a person who held a particular attribute and they did not. Or if they assaulted someone because they presumed that they were a Christian but that person actually was an atheist, that is where the presumption comes in. The person is motivated by their hatred or prejudice for Christians, for example, but the person actually did not hold that attribute.<sup>41</sup>

In relation to crimes committed on the basis of mistaken or false beliefs or stereotypes related to protected attributes, DJAG stated:

The way the provision [s 52B] is drafted at the moment is that the offence—whichever one of the prescribed offences they have committed—has to be proved that it was 'wholly or partly motivated to commit the offence by hatred or serious contempt for a person or group of persons based on' the list of attributes. To the extent whether or not an attribute which is falsely attributed to a group is captured, I suppose practically speaking that would come down to the facts and circumstances of the case. The department's position is that it is broad enough or open enough as is to potentially capture such circumstances, but it would really be dependent on the facts and circumstances of an individual case.<sup>42</sup>

### **Committee comment**

The committee notes that the protected attributes included in the Bill were broadly supported by submitters. Submitters also raised a wide range of other attributes they would like to see included in the protected attributes in the Bill such as age, disability, impairment, HIV/AIDS status, homelessness, sex, sex work and sex worker and other attributes set out in s 7 of the AD Act.

The committee notes with approval the criteria of demonstrable need, additional harm and suitability in selecting additional attributes to be protected.

On the basis of these criteria, the committee is of the view that it would be appropriate to include age and impairment (including both disability and HIV/AIDS status) as additional protected attributes. This is particularly the case where these attributes are already protected under the current AD Act.

The committee recommends that the Queensland Government considers, as part of its review of the AD Act, the inclusion of additional protected attributes in relation to ss 124A and 131A of the AD Act

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<sup>39</sup> Public briefing transcript, Brisbane, 1 June 2023, p 3.

<sup>40</sup> DJAG, correspondence, 17 May 2023, p 9.

<sup>41</sup> Public briefing transcript, Brisbane, 1 June 2023, p 7.

<sup>42</sup> Public briefing transcript, Brisbane, 1 June 2023, pp 7-8.

(vilification and serious vilification), s 52B of the Criminal Code (circumstance of aggravation) and s 52C of the Criminal Code (prohibited symbols).

In relation to crimes committed on the basis of mistaken or false beliefs or stereotypes related to protected attributes, the committee is satisfied that this will be captured in relation to circumstances of aggravation by the inclusion of the term 'presumed' in s 52B of the Criminal Code. The committee is also of the view that such circumstances may also be captured under s 52B where the offender can be shown to be 'partly' motivated by hatred or serious contempt based on a protected attribute.

### **Recommendation 2**

That the Queensland Government considers, as part of its review of the *Anti-Discrimination Act 1991*, the possible inclusion of additional protected attributes, particularly age and impairment, in relation to ss 124A and 131A of the *Anti-Discrimination Act 1991* (vilification and serious vilification), s 52B of the *Criminal Code Act 1899* (circumstance of aggravation) and s 52C of the *Criminal Code Act 1899* (prohibited symbols).

## **2.2 Serious vilification**

The Bill proposes amendments to the serious vilification provision, including:

- removing the definition of 'public act' from the AD Act and inserting it into s 131A
- removing the requirement for a Crown Law Officer's written consent prior to a proceeding being commenced for a serious vilification offence
- increasing the maximum penalty to 3 years imprisonment
- relocating s 131A of the AD Act to s 52A of the Criminal Code.<sup>43</sup>

The serious vilification amendments proposed by the Bill were supported by numerous submitters.<sup>44</sup>

### **2.2.1 Definition of 'public act'**

The Bill proposes that the definition of 'public act' is removed from the AD Act.<sup>45</sup> A new definition of 'public act' is to be included in:

- s 124A of the AD Act in relation to vilification<sup>46</sup>
- s 131A of the AD Act in relation to serious vilification (which will become s 52A of the Criminal Code).<sup>47</sup>

<sup>43</sup> Bill, cl 7; explanatory notes, p 2.

<sup>44</sup> Multicultural Australia, submission 3, p 4; QFCC, submission 6, p 2; ATSILS, submission 11, p 2; QHRC, submission 22, p 3; QCCL, submission 17, p 1; Full Stop Australia, submission 14, p 1; SSI, public hearing transcript, Brisbane, 29 May 2023, p 35.

<sup>45</sup> Bill, cl 4.

<sup>46</sup> Bill, cl 5.

<sup>47</sup> Bill, cl 7.

The new definition of public act in both ss 124A and 131A is in the same terms and provides:

**public act—**

(a) includes—

- (i) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means; and
- (ii) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia; but

(b) does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter.<sup>48</sup>

The explanatory notes stated that this ensures that the definition of public act will continue to apply to s 124A once s 131A is relocated to the Criminal Code.<sup>49</sup>

### 2.2.1.1 Stakeholder views

The QHRC raised concerns about whether the definition of public act applied to closed environments such as workplaces, educational institutions or hospitals.<sup>50</sup> The QHRC highlighted Queensland and New South Wales cases where communications in workplaces and schools were not considered to be communications to the public.<sup>51</sup> They considered that this was not consistent with the intention of the prohibition of vilification and that work and education should be regarded as ‘areas of public life’.<sup>52</sup> The QHRC recommended a note be added to the definition of public act in both s 124A and s 131A of the AD Act as follows:

Note: A public act may occur in a closed environment such as a workplace or an educational institution where people are present.<sup>53</sup>

Caxton recommended that ‘posting and commenting on social media’ should be included in a list of examples of the forms of communication included in the definition of public act.<sup>54</sup> They explained that, while the definition is broad enough to cover social media, the inclusion of examples would be beneficial:

What I like to see in legislation is, when I am talking to somebody who is not accustomed to reading legislation, a section of the law I can show them and say, ‘This is what it says. You can clearly read this yourself to understand what this means.’ Being able to say, ‘Yes, okay, “by electronic means” does include social media,’ people will argue that. They will argue it to themselves; they will argue it to other people. The clearer you can be in the legislation, the better people interact with it and the more coherence there is between how people engage with that as individuals in their day-to-day lives. That is why we are asking for it to be included—not because it would change the meaning but because it will change the way people interact with the legislation.<sup>55</sup>

<sup>48</sup> Bill, cls 5 and 7(2), proposed new ss 124A(3) and 131A(2).

<sup>49</sup> Explanatory notes, p 7.

<sup>50</sup> Submission 22, p 3. Hospitals were discussed in more detail in relation to prohibited symbols: see submission 22, p 8 and public hearing transcript, Brisbane, 29 May 2023, p 3.

<sup>51</sup> Submission 22, p 4.

<sup>52</sup> Submission 22, p 4.

<sup>53</sup> Submission 22, p 4.

<sup>54</sup> Submission 21, p 2.

<sup>55</sup> Public hearing transcript, Brisbane, 29 May 2023, p 8.

The need to address serious vilification in workplaces and educational institutions and on social media posts was supported by other submitters.<sup>56</sup>

#### 2.2.1.2 *Department response*

DJAG stated that ‘the Government has committed to considering this recommendation in the context of the QHRC Report [Building Belonging]’.<sup>57</sup>

#### **Committee comment**

The committee is pleased to note the review of the AD Act based on the Building Belonging report and that it will address the issues of the definition of a public act and the use of social media.

The committee notes submitters’ concerns about the definition of public act and whether it is sufficiently wide to include closed environments such as workplaces, hospitals and education facilities. The committee considers that this is an issue that the Queensland Government should consider including in s 131A of the AD Act and proposed new s 52D(4) of the Criminal Code.

The committee is of the view that including social media as examples in the definition of a public act in ss 124A and 131A of the AD Act would be beneficial for members of the public who are subjected to vilification and serious vilification.

#### **Recommendation 3**

That the Queensland Government considers amending the Bill to include closed environments, such as hospitals and educational institutions, in the proposed amended s 131A of the *Anti-Discrimination Act 1991* and proposed new s 52D(4) of the *Criminal Code Act 1899* in relation to the display, distribution or publication of prohibited symbols.

#### **Recommendation 4**

That the Queensland Government amends the definition of ‘public act’ in ss 124A and 131A of the *Anti-Discrimination Act 1991* to set out examples of communication by electronic means as, not limited to but including, online communication and social media posts and comments.

#### 2.2.2 **Removal of requirement for Crown Law Officer’s consent**

The Bill proposes amendments to the AD Act to remove s 131A(2), which includes the requirement to obtain a Crown Law Officer’s written consent prior to proceedings being commenced for an offence under s 131A(1).<sup>58</sup>

Section 131A(4) provides:

**Crown Law Officer** means the Attorney-General or Director of Public Prosecutions.

The requirement for consent from a Crown Law Officer was regarded as ‘an unnecessary impediment to police expeditiously prosecuting serious vilification matters’.<sup>59</sup>

<sup>56</sup> Townsville Community Law Inc, submission 2, p 7; Queensland Council for LGBTI Health, submission 24, p 2.

<sup>57</sup> DJAG, correspondence, 17 May 2023, p 6. See also public briefing transcript, Brisbane, 1 June 2023, p 7.

<sup>58</sup> Explanatory notes, p 2.

<sup>59</sup> DJAG, correspondence, 24 April 2023, p 2.

### 2.2.2.1 *Stakeholder views*

Submitters suggested that the requirement for consent from a Crown Law Officer limited the application of s 131A.<sup>60</sup>

The removal of the requirement was supported by a number of submitters.<sup>61</sup>

The QHRC stated:

Although the offence of serious vilification has been in force since June 2001, there have been very few charges under the provision (the Department of Justice and Attorney-General informed the Inquiry [by the committee into serious vilification and hate crimes] that as of 30 April 2021 there had been five charges laid and three convictions under section 131A). The Inquiry was informed that barriers to laying charges include police being unfamiliar with the provision and the need to obtain the consent of the Director of Public Prosecutions before laying charges.<sup>62</sup>

Full Stop Australia suggested that this would remove ‘an administrative bottleneck for the prosecution of serious vilification offences, which will hopefully allow such offences to be dealt with more expeditiously.’<sup>63</sup> The Queensland Family and Child Commission (QFCC) stated the amendment will ‘make it easier to prosecute vilification’.<sup>64</sup>

The QLS stated ‘[i]n its place we recommend alternative safeguards be put in place to guide prosecutions in these matters including better guidance in the police operation procedure manuals.’<sup>65</sup>

One submitter raised concerns that the removal of the requirement could lead to the possibility of vexatious complaints.<sup>66</sup>

### 2.2.2.2 *Fundamental legislative principles*

The explanatory notes provide that this potentially breaches the requirement for laws not to retrospectively adversely affect rights and liberties under s 4(3) of the LSA. However, the retrospective application of the amendment is considered justified as it is largely procedural and an unnecessary impediment to the expeditious prosecution for an offence under s 131A of the AD Act.<sup>67</sup>

## **Committee comment**

The committee is supportive of the removal of the requirement to obtain the written consent of the Attorney-General or the Director of Public Prosecutions prior to proceedings being commenced for an offence under s 131A of the AD Act.

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<sup>60</sup> Townsville Community Law Inc, submission 2, p 14; Multicultural Australia, submission 3, pp 3-4; QLS, submission 20, p 2; MQAC, submission 29, p 3.

<sup>61</sup> QLS, submission 20, p 2; Multicultural Australia, submission 3, pp 3-4; ATSILS, submission 11, p 2; Full Stop Australia, submission 14, p 2; QCCL, submission 17, p 1; QHRC, submission 22, pp 3-4; Queensland Council for LGBTI Health, submission 24, p 2; MQAC, submission 29, p 3.

<sup>62</sup> Submission 22, p 3.

<sup>63</sup> Submission 14, p 2.

<sup>64</sup> Submission 6, p 1.

<sup>65</sup> Submission 20, p 2.

<sup>66</sup> Australian Feminists for Women’s Rights, submission 8, p 4.

<sup>67</sup> Explanatory notes, p 5.

### 2.2.3 Increasing maximum penalty to 3 years imprisonment

The Bill proposes to amend s 131A of the AD Act to increase the maximum penalty to 3 years imprisonment. Section 131A will be relocated to the Criminal Code as s 52A.<sup>68</sup>

The increase in the penalty under s 131A means that the police will be able to apply for a stored communications warrant under the *Telecommunications (Interception and Access) Act 1979* (Cth) when investigating a suspected breach of s 131A of the AD Act.<sup>69</sup>

#### 2.2.3.1 *Stakeholder views*

The increase in the maximum penalty for serious vilification was supported by a number of submitters.<sup>70</sup>

The QHRC stated that the current maximum penalty of 6 months imprisonment ‘does not reflect the seriousness of the offence or community condemnation of the conduct’.<sup>71</sup> Multicultural Australia considered that the maximum penalty ‘appropriately reflects the seriousness’ of the offence and ‘aligns with incitement of violence laws’.<sup>72</sup> The Multicultural Queensland Advisory Council (MQAC) stated that the maximum penalty should be reserved for serious forms of vilification and there should be ‘greater utilisation of restorative pathways, focusing on rehabilitation’.<sup>73</sup>

The QHRC noted that while the maximum penalty is less than 3 years imprisonment ‘police are unable to obtain the necessary warrant to preserve online and telecommunication evidence’.<sup>74</sup>

The QLS stated:

In circumstances where there have been very few prosecutions of this offence historically, QLS urges the Government to satisfy itself and in turn, key stakeholders, of its efficacy and fitness for purpose before any increase in penalty can be properly considered. Accordingly, QLS does not support increasing the penalty to three years imprisonment[.]<sup>75</sup>

The QLS, while noting the ‘evidentiary obstacles’ created by a maximum penalty of less than 3 years, did not support an increase in penalty ‘based on this tension’.<sup>76</sup>

#### 2.2.3.2 *Department response*

DJAG stated that the increase in the maximum penalty ‘reflects the seriousness of this type of offending and the community’s denunciation of such conduct’.<sup>77</sup>

DJAG explained:

A stored communications warrant authorises access to stored communications (for example, a text message) made by a person in respect to whom a warrant was issued. A warrant may be issued if the issuing authority (a judicial officer appointed as an issuing authority) is satisfied there are reasonable grounds for suspecting that a carrier holds stored communications and that the information obtained

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<sup>68</sup> Explanatory notes, p 2; Bill, cl 7.

<sup>69</sup> DJAG, correspondence, 24 April 2023, p 3.

<sup>70</sup> Multicultural Australia, submission 3, p 5; ATSILS, submission 11, p 2; Full Stop Australia, submission 14, p 2; QCCL, submission 17, p 1; QHRC, submission 22, p 3.

<sup>71</sup> Submission 22, p 4.

<sup>72</sup> Submission 3, p 5.

<sup>73</sup> Submission 29, p 3.

<sup>74</sup> Submission 22, p 3.

<sup>75</sup> Submission 20, p 2.

<sup>76</sup> Submission 20, supplementary submission, p 1.

<sup>77</sup> DJAG, correspondence, 24 April 2023, p 1.

under the warrant is likely to aid in the investigation of a serious contravention of a law of the Commonwealth, a State or a Territory.

As noted in the LASC Report [Report No. 22], a serious contravention of a law under the *Telecommunications (Interception and Access) Act 1979* is limited to offences under a Commonwealth, State or Territory law for which there is a maximum penalty of at least three years imprisonment. The Queensland Police Service is therefore unable to apply for a stored communications warrant when investigating a suspected breach of section 131A of the AD Act as the maximum penalty is only six months imprisonment.<sup>78</sup>

### **Committee comment**

The committee is satisfied that the increase in penalty is designed to protect the community from fear and harassment. Further, the proposed amendment is reasonable, proportionate to the specific offence and consistent with other penalties.

The committee considers that the increase in penalty sends a message to the community that this kind of behaviour is unacceptable.

The committee notes that the increase in penalty may limit a person's right to liberty. However, the committee is of the view that any limitation on the right to liberty is outweighed by the importance of protecting vulnerable members of the community from serious vilification.

### **2.3 Circumstance of aggravation**

The Bill proposes amendments to the Criminal Code and the SO Act to introduce a circumstance of aggravation regarding hate/serious vilification for prescribed offences.<sup>79</sup>

The new circumstance of aggravation will apply where the offender is wholly or partly motivated by hatred or serious contempt for a person or group of persons in committing the following existing offences in the Criminal Code:

- going armed as to cause fear: s 69
- threatening violence: s 75
- disturbing religious worship: s 207
- common assault: s 335
- assaults occasioning bodily harm: s 339
- threats: s 359
- punishment of unlawful stalking, intimidation, harassment or abuse: s 359E
- wilful damage: s 469.<sup>80</sup>

The new circumstance of aggravation will apply where the offender is wholly or partly motivated by hatred or serious contempt for a person or group of persons in committing the following existing offences in the SO Act:

- public nuisance: s 6
- trespass: s 11.<sup>81</sup>

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<sup>78</sup> DJAG, correspondence, 24 April 2023, p 3.

<sup>79</sup> Explanatory notes, pp 1-3; Bill, cls 12-22 and 28-30.

<sup>80</sup> Explanatory notes, p 3; Bill, cls 13-22.

<sup>81</sup> Explanatory notes, p 3.

A new maximum penalty is introduced for each of these aggravated offences.<sup>82</sup>

The explanatory notes stated that '[n]o changes to the existing jurisdictional disposition are made to any of the offences where the circumstance of aggravation applies.'<sup>83</sup>

Stakeholders generally supported the introduction of proposed new s 52B.<sup>84</sup>

### **2.3.1 Test of wholly or partly motivated by hatred or serious contempt**

#### **2.3.1.1 Stakeholder views**

The test set out in s 52B relating to circumstances of aggravation for particular offences is that 'the offender was wholly or partly motivated to commit the offence by hatred or serious contempt for a person or group of persons'.

Multicultural Australia stated:

We particularly support the introduction of the test for the application of the circumstance of aggravation in clause 52B as one based on the whole or partial motive of the offender. We consider that this test provides clarity and guidance for police and the community about hate crime (and will therefore support appropriate charge and prosecution decisions), aligns with international precedent, and is consistent with the recommendation made by the Queensland Human Rights Commission in *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991* to require proof that discrimination was 'one of the reasons' for the treatment in redefining the test for direct discrimination as a test of unfavourable treatment (and with the test applicable under federal anti-discrimination law).<sup>85</sup>

Other submitters raised concerns about the test as it 'requires proof of the defendant's subjective reason or reasons for committing the offence'.<sup>86</sup> The Aboriginal and Torres Strait Islander Legal Service (ATSILS) stated:

... establishing hate or serious contempt (in the manner contemplated by proposed section 52B) as an alleged perpetrator's motive might be difficult and failure to establish this might result in such an offence not being able to be proven. This might result in a failure to achieve adequate justice for the victim. We are of the view that establishment of the circumstance of aggravation should not rely upon establishing the motivation of the perpetrator, rather proposed section 52B should contain a 'harms-based' test, which is both subjective (the alleged victim actually held fears for their safety, security or property) and objective (a reasonably minded person in similar circumstances would be fearful).<sup>87</sup>

Further, ATSILS submitted that the test in proposed s 52B does not consider the victim's point of view or state of mind.<sup>88</sup>

The QHRC compared the proposed new s 52B with the test for aggravated offences in the UK:

49. In the UK, the test for aggravated offences has two alternate limbs: a motivation limb and a demonstration limb. The reason for including a demonstration limb as well as motivation in the legal test was in recognition that proving motivation would create a difficult hurdle for prosecutors to overcome.

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<sup>82</sup> Explanatory notes, p 3. See also DJAG, correspondence, 24 April 2023, p 8.

<sup>83</sup> Explanatory notes, p 3.

<sup>84</sup> Multicultural Australia, submission 3, p 4; Full Stop Australia, submission 14, pp 1-2; QCCL, submission 17, p 1; SSI, submission 18, p 21; QHRC, submission 22, p 3.

<sup>85</sup> Submission 3, p 4.

<sup>86</sup> QHRC, submission 22, p 9.

<sup>87</sup> Submission 11, p 3.

<sup>88</sup> Submission 11, p 3.

50. The demonstration limb requires proof of the demonstration of hatred or serious contempt. It is an objective test and does not require subjective intent or motivation.<sup>89</sup>

The QHRC recommended that the test for s 52B should include demonstration of hatred or serious contempt as well as the proposed motivation test.<sup>90</sup>

### 2.3.1.2 Department response

DJAG stated, in its response to submissions, that the ‘threshold for the circumstances of aggravation is a policy decision of Government’.<sup>91</sup>

DJAG also stated that it is intended that the circumstance of aggravation will be made out if the offending is partly motivated by one of the attributes included in s 52B.<sup>92</sup> Further, the use of the term ‘presumed’ will ensure that offenders who commit offences based on a presumption of the race, religion, sexuality, sex characteristics or gender identity of a person or group are captured by the circumstance of aggravation, even when the presumption is erroneous.<sup>93</sup>

## **2.3.2 Offences to which the circumstance of aggravation applies**

### 2.3.2.1 Stakeholder views

Submitters generally supported the inclusion of the circumstance of aggravation for prescribed offences.<sup>94</sup>

Some submitters suggested additional offences which should also be included:

- property offences such as stealing, robbery and graffiti<sup>95</sup>
- grievous bodily harm<sup>96</sup>
- deprivation of liberty<sup>97</sup>
- endangering the safety of a person in a vehicle with intent<sup>98</sup>
- administering poison with intent to harm<sup>99</sup>
- torture<sup>100</sup>
- sexual offences<sup>101</sup>
- rape<sup>102</sup>

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<sup>89</sup> Submission 22, pp 9-10.

<sup>90</sup> Submission 22, p 10.

<sup>91</sup> DJAG, correspondence, 17 May 2023, p 8.

<sup>92</sup> DJAG, correspondence, 17 May 2023, p 9.

<sup>93</sup> DJAG, correspondence, 17 May 2023, p 9.

<sup>94</sup> ATSILS, submission 11, p 3; Full Stop Australia, submission 14, pp 1-2; QCCL, submission 17, p 1; Equality Australia, submission 23, p 5.

<sup>95</sup> Equality Australia, submission 23, p 2.

<sup>96</sup> ATSILS, submission 11, p 3; Queensland Chinese Forum, submission 19, p 1.

<sup>97</sup> ATSILS, submission 11, p 3.

<sup>98</sup> Queensland Chinese Forum, submission 19, p 1.

<sup>99</sup> Queensland Chinese Forum, submission 19, p 1.

<sup>100</sup> Queensland Chinese Forum, submission 19, p 1.

<sup>101</sup> Caxton, submission 21, p 2; Equality Australia, submission 23, p 2.

<sup>102</sup> SSI, public hearing transcript, Brisbane, 29 May 2023, p 35.

- domestic violence<sup>103</sup>
- murder.<sup>104</sup>

Equality Australia stated that the prescribed offences should be expanded to include:

[A]ll offences directed at a person or their property which are commonly experienced by the groups protected by the legislation. At a minimum, this should include sexual offences, domestic violence offences and property offences such as stealing, robbery and graffiti offences.<sup>105</sup>

Caxton recommended 'sexual assault and related sexual offences be included in offences which may include hatred as an aggravating feature.'<sup>106</sup> This was on the basis that:

[I]n Queensland some people continue to experience sexual violence that is motivated by hatred on the basis of their gender, gender identity, sexuality, race and other protected attributes including lawful employment as a sex worker. There is no reason to exclude sexual offences from the list of offences which may include hatred as an aggravating feature.<sup>107</sup>

The Queensland Council for Civil Liberties (QCCL) suggested that the circumstance of aggravation should only apply to existing offences such as assault and public nuisance involving violence or threats of violence.<sup>108</sup> The QCCL considered that the circumstance of aggravation should not apply in relation to disorderly and offensive conduct, stating that this raised free speech issues.<sup>109</sup>

The QHRC also expressed concern that the inclusion of public nuisance might have 'a disproportionate impact on Aboriginal and Torres Strait Islander people, particularly in engagement with police.'<sup>110</sup> The QHRC stated:

57. The Commission is concerned that an aggravated offence of public nuisance might be used in circumstances that involve swearing at police officers. Minority groups that are over-represented in the criminal justice system and those who come to the attention of police, might be more inclined to swear at the officers. The Queensland Productivity Commission found that Aboriginal and Torres Strait Islander offenders had higher rates of police contact than non-Indigenous offenders, and the average Indigenous offender also experienced a much higher rate of contact with police while under the age of 18 years. Aboriginal and Torres Strait Islander women had 14 times more frequent contact with police than non-Indigenous women. The 2008 report of the Crime and Misconduct Commission on its review of public nuisance offences noted that empirical evidence has repeatedly shown Indigenous people are disproportionately likely to be arrested and that public order offences are a major trigger leading to the detention of Indigenous people in police custody.
58. As swearing at police in public has been held to be offensive, an additional spoken word might move the offence into the aggravated category.
59. Indigenous people are significantly over-represented in those charged with public nuisance for using offensive language, often in circumstances where they have accused a police officer of racism. Analysis of reported public nuisance decisions indicates that offensive language directed at police officers by Indigenous women reflects their feelings of powerlessness and marginalisation.<sup>111</sup>

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<sup>103</sup> Equality Australia, submission 23, p 2.

<sup>104</sup> SSI, public hearing transcript, Brisbane, 29 May 2023, p 35.

<sup>105</sup> Submission 23, p 2.

<sup>106</sup> Submission 21, p 2.

<sup>107</sup> Caxton, submission 21, p 2.

<sup>108</sup> Submission 17, p 1.

<sup>109</sup> Submission 17, p 1.

<sup>110</sup> Submission 22, p 10.

<sup>111</sup> Submission 22, p 11. See also public hearing transcript, Brisbane, 29 May 2023, pp 1-2.

The QHRC recommended that there should be an independent review of the operation of aggravated offences against First Nations peoples within 3 years of operation.<sup>112</sup> Further, the QHRC recommended that offensive behaviour towards police constituted by words should be excluded from the offence of aggravated public nuisance.<sup>113</sup>

### 2.3.2.2 Department response

DJAG stated, in its response to submissions, that the application of the circumstance of aggravation is a policy matter for Government.<sup>114</sup>

In relation to the QHRC's concerns about how the proposed amendments will impact First Nations peoples, DJAG stated:

The Queensland Government has established the Criminal Justice Innovation Office (CJIO) and First Nations Justice Office (FNJO). The CJIO is a dedicated multidisciplinary office established to identify, implement and support initiatives with a focus on innovative and long-term solutions to reforming the criminal justice system and improving community safety. The CJIO aims to modernise Queensland's laws, reduce demand on courts and prisons, enhance diversionary programs and help break the cycle of reoffending. The FNJO has been tasked with co-designing a whole-of-government and community justice strategy to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, which will significantly contribute to achieving the Queensland Government's commitments under the National Agreement on Closing the Gap. The FNJO will work with the CJIO to monitor any adverse impact of the aggravated offences on Aboriginal and Torres Strait Islander peoples.<sup>115</sup>

## **2.3.3 Judicial discretion**

### 2.3.3.1 Stakeholder views

Some stakeholders referred to alternative models to the circumstance of aggravation model proposed in the Bill.<sup>116</sup> The option of a judicial discretion in sentencing to deal with serious vilification and hate crimes in the context of other offences was canvassed by a number of submitters.<sup>117</sup>

Multicultural Australia suggested that there should be judicial discretion in sentencing 'to cover circumstances where police have not identified the aggravation but a judge considers it appropriate'.<sup>118</sup>

ATSILS also supported the inclusion of a general provision in the Criminal Code which allows for judicial discretion when hearing a relevant matter such that a court may determine that a circumstance of aggravation exists, where police have not initially identified the circumstance of aggravation.<sup>119</sup>

Equality Australia recommended:

Introducing a sentencing consideration into section 9 of the *Penalties and Sentences Act 1992* (Qld) that allows a court to increase the severity of a sentence for any offence (other than those offences captured by the aggravated offences framework) where the offence is motivated by prejudice against a group of

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<sup>112</sup> Submission 22, p 11.

<sup>113</sup> Submission 22, p 12. See also public hearing transcript, Brisbane, 29 May 2023, pp 4-6.

<sup>114</sup> DJAG, correspondence, 17 May 2023, p 10.

<sup>115</sup> DJAG, correspondence, 17 May 2023, p 11.

<sup>116</sup> Equality Australia, submission 23, p 2.

<sup>117</sup> Multicultural Australia, submission 3, p 4; QFCC, submission 6, p 2; ATSILS, submission 11, p 5; Equality Australia, submission 23, pp 2, 6 and 8.

<sup>118</sup> Submission 3, p 4.

<sup>119</sup> Submission 11, p 5.

people. This will plug a gap left by the aggravated offences framework introduced by the Bill which means that prejudice-based motivations can inform sentencing for the most serious offences.<sup>120</sup>

Equality Australia submitted that this approach has been taken in New South Wales, Victoria, the Northern Territory and South Australia.<sup>121</sup>

### 2.3.3.2 *Department response*

DJAG, in its response to submissions, stated that the introduction of the circumstance of aggravation is in keeping with recommendation 8 of Report No. 22. DJAG further provided:

Section 564(2) of the Criminal Code provides that if any circumstance of aggravation is intended to be relied on it must be charged in the indictment (or complaint) and therefore becomes a matter that the prosecution must prove beyond a reasonable doubt.

Where a circumstance of aggravation is not included on the indictment or the complaint, or where it is included but not proved, the proposed amendment to the PSA [*Penalties and Sentences Act 1992*] may have the counter-productive effect (depending on the facts and circumstances of an individual case) of limiting the extent to which the prejudiced motive may be considered by the sentencing court in circumstances where the offender is being sentenced for the simpliciter offence (i.e. the court may not be able to take the prejudiced motive into account).

However, subject to the above, a Court will continue to be able to consider the factual matrix of the offending, inclusive of any facts that tend to increase the moral culpability of the offender (such as racial hatred), when sentencing an offender.<sup>122</sup>

### **Committee comment**

The committee accepts that the test in proposed new s 52B is a subjective one, where the issue is the motivation of the defendant. While the committee notes concerns from submitters in relation to the difficulty this may present in prosecuting offences under s 52B, the committee considers this is an appropriate test in the context of serious vilification where the motivation of the offender is key to the offence.

The committee is satisfied that the threshold test set out in proposed s 52B will capture instances where the serious vilification is motivated partly by one of the protected attributes and that the inclusion of the term 'presumed' ensures that offences motivated by erroneous presumptions will also be captured.

The committee notes submitters' concerns in relation to the prescribed offences to which a circumstance of aggravation applies. The committee recognises that the prescribed offences may not cover all offences which occur in the context of serious vilification and hate crimes. The committee recommends that the Queensland Government should review the offences to which the circumstances of aggravation apply within 24 months of the commencement of the Bill. The review should ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.

The committee recognises the concerns of submitters that vilification and hate crimes should be considered in sentencing, regardless of whether it is in relation to an offence for which there is a circumstance of aggravation and whether the circumstance of aggravation has been included in the charge by police. The committee notes the advice from DJAG that a court will continue to be able to consider the factual matrix of the offending, including any facts that tend to increase the moral

<sup>120</sup> Submission 23, pp 6 and 8. See also public hearing transcript, Brisbane, 29 May 2023, p 20.

<sup>121</sup> Submission 23, pp 6 and 8.

<sup>122</sup> DJAG, correspondence, 17 May 2023, p 7.

culpability of the offender (such as racial hatred), when sentencing an offender. The committee is of the view that the Queensland Government should consider amending s 9 of the *Penalties and Sentences Act 1992* to allow judicial discretion in sentencing to increase a sentence where serious vilification or a hate crime may be identified as an aggravating circumstance.

The committee notes with approval advice from DJAG that the Queensland Government has established the Criminal Justice Innovation Office and First Nations Justice Office, which will monitor any adverse impacts of the aggravated offences on First Nations peoples. Nonetheless, the committee is persuaded by the recommendation of the QHRC that a review should be conducted of the operation of the proposed amendments with respect to their operation and impact on First Nations peoples. This review should specifically consider whether the inclusion of the circumstance of aggravation for public nuisance is disproportionately impacting First Nations peoples in their interactions with police within 24 months of the commencement of the Bill.

#### **Recommendation 5**

That the Queensland Government conducts a review within 24 months of the commencement of the Bill to ensure that the offences to which the circumstance of aggravation apply are adequate to address the serious vilification and hate crimes experienced by members of the Queensland community, with particular consideration to be given to the inclusion of sexual offences and property crimes such as graffiti.

#### **Recommendation 6**

That the Queensland Government conducts a review within 24 months of the commencement of the Bill to consider the impact of the amendments on First Nations peoples.

## **2.4 Prohibited symbols**

The Bill proposes to introduce a new s 52C (Prohibited symbols) into the Criminal Code, which establishes a framework to prescribe symbols or images that are representative of an ideology of extreme prejudice against a relevant group.<sup>123</sup> The Minister may recommend the Governor in Council make a regulation prescribing a prohibited symbol.<sup>124</sup> This is discussed further in section 2.4.1 of this report.

The Bill also proposes to introduce a new offence under s 52D (Display, distribution, or publication of prohibited symbols) of the Criminal Code.<sup>125</sup> The explanatory notes stated that '[t]he offence is intended to capture a broad range of circumstances, including the public display of tattoos and the public distribution or publication of prohibited symbols online.'<sup>126</sup>

The maximum penalty for the offence is 70 penalty units or 6 months imprisonment.<sup>127</sup>

<sup>123</sup> Explanatory notes, p 3; Bill, cl 12, proposed new ss 52C and 52D.

<sup>124</sup> Explanatory notes, p 4; Bill, cl 12, proposed new s 52C(2)-(4).

<sup>125</sup> Explanatory notes, p 4; Bill, cl 12.

<sup>126</sup> Explanatory notes, p 4.

<sup>127</sup> Explanatory notes, p 4; Bill, cl 12, proposed new s 52D(1).

There are excuses under s 52D, including that the person engaged in conduct for:

- a genuine artistic, religious, educational, historical, legal, law enforcement purpose
- a public interest purpose, or
- to oppose the ideology represented by the prohibited symbol.<sup>128</sup>

The explanatory notes stated that the list of excuses is not exhaustive:

Although the Bill does not prescribe a prohibited symbol, the Nazi Hakenkreuz (or Hooked Cross) significantly resembles the swastika, which has peaceful and profound meaning in some religions including Hinduism, Buddhism and Jainism. The 'religious' excuse is intended to ensure that the display of symbols, such as the swastika, in these contexts is not captured by the offence.<sup>129</sup>

Proposed new s52D(4) provides that a person publicly displays a prohibited symbol if the person:

- (a) displays the symbol—
  - (i) in a place that the public is entitled to use, is open to members of the public or is used by the public, whether or not on payment of money; or
  - (ii) in a place the occupier of which allows, whether or not on payment of money, members of the public to enter; or
- (b) displays the symbol in a way that is visible from a place mentioned in paragraph (a).

The offence is intended to capture a broad range of circumstances, including the public display of tattoos and the public distribution or publication of prohibited symbols online.<sup>130</sup>

DJAG noted that, while there is no current offence in Queensland prohibiting the display of hate symbols, most Australian jurisdictions have recently implemented similar offences or have announced an intention to do so.<sup>131</sup>

The Bill amends ss 30 and 32 of the PPRA to allow a police officer to search a person or vehicle without a warrant where the officer reasonably suspects the person has committed or is committing the offence under new s 52D of the Criminal Code.<sup>132</sup>

Generally, stakeholders supported these amendments,<sup>133</sup> while a number of stakeholders did not support this part of the Bill.<sup>134</sup>

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<sup>128</sup> Explanatory notes, p 4.

<sup>129</sup> Explanatory notes, p 4.

<sup>130</sup> DJAG, correspondence, 24 April 2023, p 6.

<sup>131</sup> DJAG, correspondence, 24 April 2023, p 5. See for example, *Crimes Act 1900* (NSW), s 93ZA and *Summary Offences Act 1966* (Vic), ss 41I-41M.

<sup>132</sup> Explanatory notes, p 5.

<sup>133</sup> Multicultural Australia, submission 3, p 6; QFCC, submission 6, p 1; PeakCare Queensland Inc., submission 9, p 3; QHRC, submission 22, p 3; Australian Lawyers for Human Rights, submission 25, p 4; MQAC, submission 29, p 4.

<sup>134</sup> Name withheld, submission 13, p 1; N Aroney and P Taylor, submission 15, p 1; QCCL, submission 17, p 2; QLS, submission 20, pp 3-4.

### 2.4.1 Prohibiting symbols by regulation

Proposed new s 52C states that a prohibited symbol is prescribed by regulation.

Proposed new 52C(3) provides that the Minister may recommend the making of a regulation only if the Minister is satisfied the symbol or image:

- (a) is widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group; or
- (b) is widely known by members of a relevant group as being solely or substantially representative of an ideology of extreme prejudice against that group.<sup>135</sup>

The Minister must consult with the chairperson of the Crime and Corruption Commission, the Human Rights Commissioner and the Commissioner of the Queensland Police Service (QPS) before making the recommendation.<sup>136</sup>

#### 2.4.1.1 *Stakeholder views*

Settlement Services International Limited (SSI) stated that they were ‘comfortable’ with the Minister prescribing prohibited symbols by regulation as ‘this process has taken multiple years to get to’.<sup>137</sup>

Multicultural Australia welcomed the requirement for consultation before a prohibited symbol is prescribed under s 52C(4).<sup>138</sup> They considered that the consultation should include the views of relevant communities.<sup>139</sup> SSI recommended the establishment of a committee, independent of government, to address serious vilification and hate crimes including consulting community regarding the prohibition of hate symbols and holding individuals and platforms which distribute hate symbols to account.<sup>140</sup>

Australian Feminists for Women’s Rights recommended that s 52C(4) should be amended to require consent from 2 of the 3 entities the Minister must consult (the Crime and Corruption Commission, the Human Rights Commissioner and the Commissioner of the QPS) before recommending a prohibited symbol be prescribed ‘to ensure a Government does not misuse the provision’.<sup>141</sup>

The QHRC considered that ‘the criterion is sufficiently comprehensive and the process is an appropriate delegation of legislative power to appropriate persons in order to achieve flexibility to account for current and emerging symbols of hate.’<sup>142</sup>

A number of submitters expressed concerns about allowing a Minister to prescribe prohibited symbols by regulation.<sup>143</sup>

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<sup>135</sup> Explanatory notes, p 4; Bill, cl 12, proposed new s 52C(3).

<sup>136</sup> Explanatory notes, p 4; Bill, cl 12, proposed new s 52C(4).

<sup>137</sup> Public hearing transcript, Brisbane, 29 May 2023, p 36.

<sup>138</sup> Submission 3, p 5.

<sup>139</sup> Submission 3, p 5.

<sup>140</sup> Submission 18, p 21.

<sup>141</sup> Submission 8, p 3.

<sup>142</sup> Submission 22, p 8.

<sup>143</sup> Australia Feminists for Women’s Rights, submission 8, p 3; S Clarke, submission 16, p 1; QCCL, submission 17, p 4; G Orr, submission 27, p 1; QLS, public hearing transcript, Brisbane, 29 May 2023, p 26.

Professor Graeme Orr stated:

[I]t is not clear why the ordinary principle that criminalisation of conduct is a matter for Parliament is not followed in this Bill. Legislating to ban particular symbols would involve more representative and public debate about public, misuse of such symbols. It would provide a pre-emptive veto of any misuse of executive proposals to prohibit such symbols. Such debate might in itself be educative in condemning extreme symbols, as well as limiting the potential for executive misuse of the power in the Bill.<sup>144</sup>

The QCCL was concerned that:

This violates what is in our view a fundamental principle that the key concepts creating criminal liability should not be made by regulation. The decision to criminalise conduct should be made by the Parliament, to ensure democratic accountability. This is our position notwithstanding that this may be a disallowable instrument.<sup>145</sup>

#### *2.4.1.2 Fundamental legislative principles*

Prescribing prohibited symbols by regulation may be regarded as failing to have sufficient regard for the institution of Parliament, unless justified.<sup>146</sup> The explanatory notes stated:

This potential breach is considered justified on the basis that the approach is in the public interest, as it will allow the Minister to quickly respond to emerging symbols and images associated with extremist ideology.<sup>147</sup>

The explanatory notes further stated that there are a number of limitations and safeguards including that the Minister is satisfied that the symbol is widely known by the public as representative of an ideology of extreme prejudice against a relevant group and that the Minister consults with specified stakeholders.<sup>148</sup>

#### *2.4.1.3 Department response*

DJAG stated, in its response to submissions, that the 'extent of consultation required under the Bill is a policy matter for Government'.<sup>149</sup>

DJAG further provided that any regulation made under the provision would be subject to general disallowance procedures:

It is, however, noted that any regulation made under the provision would be subject to general disallowance procedures and, due to the operation of the *Human Rights Act 2019* (HR Act), the Minister would be required to consider human rights in the making of the Regulation and would be required to table a Human Rights Certificate in the Legislative Assembly. This would involve a consideration of the extent to which any regulation limits human rights, including Property rights, Freedom of expression and Peaceful assembly.<sup>150</sup>

### **2.4.2 Test for the offence**

Section 52D(1) provides that a person who publicly distributes, publishes or publicly displays a prohibited symbol in a way that 'might reasonably be expected to cause a member of the public to feel menaced, harassed or offended' commits an offence.

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<sup>144</sup> Submission 27, p 1.

<sup>145</sup> Submission 17, p 4.

<sup>146</sup> LSA, s 4(4).

<sup>147</sup> Explanatory notes, p 6.

<sup>148</sup> Explanatory notes, p 4.

<sup>149</sup> DJAG, correspondence, 17 May 2023, p 15.

<sup>150</sup> DJAG, correspondence, 17 May 2023, pp 15-16.

#### 2.4.2.1 *Stakeholder views*

Professor Nicolas Aroney and Dr Paul Taylor stated that the test is objective in that includes the phrase ‘might reasonably be expected’. However, the second part of the test, ‘to cause a member of the public to feel menaced, harassed or offended’, is ‘highly subjective’ and ‘sets a very low threshold for criminality’.<sup>151</sup> Concerns about the low threshold were echoed by Caxton.<sup>152</sup>

The QLS suggested the proposed provision be reframed as follows to avoid subjectivity in the test:

A person who publicly distributes, published or publicly displays a prohibited symbol in a way that causes or could reasonably be expected to cause a member of the public to feel menaced, harassed or offended, commits an offence, unless the person has a reasonable excuse.<sup>153</sup>

The QCCL stated the fact that someone might be offended is not an appropriate ground for restricting speech.<sup>154</sup> The QCCL considered that the offence should require that the person intends the display to cause offence.<sup>155</sup> This is on the basis that criminal liability should only be imposed where there is a guilty intent.<sup>156</sup>

The QHRC stated the intent behind the legislation is to protect people from harm and as such ‘the subjective test in this circumstance is appropriate’.<sup>157</sup>

#### 2.4.2.2 *Department response*

DJAG stated, in its response to submissions, that the ‘threshold of the proposed offence in section 52B (as inserted by Clause 12 of the Bill) is a policy decision by Government’.<sup>158</sup>

DJAG further stated in relation to new s 52D:

The provision is drafted to ensure that it would be sufficient for a court to determine that a particular minority might reasonably be expected to feel menaced, harassed or offended as they are ‘a’ member of the public. The term ‘might reasonably be expected’ is a threshold that is reflected in existing sections 207A (Definitions for chapter 22) and 328A (Dangerous operation of a vehicle) of the Criminal Code and, accordingly, the judiciary is well-placed to interpret the meaning of these terms using established means of statutory interpretation.<sup>159</sup>

### 2.4.3 **Reversal of the onus of proof**

Section 52D(1) provides a person commits an offence as set out above ‘unless the person has a reasonable excuse’.

The explanatory notes stated:

To rely on an excuse, the defendant will be required to point to evidence to raise the excuse (evidential burden), which the prosecution must then disprove beyond a reasonable doubt (legal burden).<sup>160</sup>

The explanatory notes further stated:

The amendment is a potential infringement of rights and liberties of individuals (section 4(2)(a) LSA). The potential breaches are considered justified to protect the general community and minorities from fear

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<sup>151</sup> Submission 15, p 1.

<sup>152</sup> Submission 21, p 3.

<sup>153</sup> Submission 20, supplementary submission, p 2.

<sup>154</sup> Submission 17, p 3.

<sup>155</sup> Submission 17, p 4.

<sup>156</sup> QCCL, submission 17, p 4.

<sup>157</sup> Public hearing transcript, Brisbane, 29 May 2023, p 3.

<sup>158</sup> DJAG, correspondence, 17 May 2023, p 14.

<sup>159</sup> DJAG, correspondence, 17 May 2023, p 15.

<sup>160</sup> Explanatory notes, p 4.

and harassment and to prevent the spread of harmful extremist ideology. To limit the breach and provide a safeguard, several excuses are provided to the offence. They necessarily reverse the evidential onus of proof as the defendant is best placed to provide evidence of the purpose of their conduct.<sup>161</sup>

#### 2.4.3.1 Stakeholder views

The QCCL stated that the onus of proof 'should at all times lie with the Crown'. They further stated there is 'a serious prospect' that people of different faiths who use the swastika and other symbols as an ordinary part of their religious beliefs are going to be subject to prosecution under this legislation and asked 'why should any part of the burden of proof lie upon them?'<sup>162</sup>

#### 2.4.3.2 Department response

DJAG stated, in its response to submissions, that:

Proposed new section 52D(3) provides that the evidential burden is placed on the defendant, which can be discharged by calling or raising evidence that is capable of being able to prove the excuse. It alone does not have to actually prove the offence. The legal burden, to negative the excuse beyond reasonable doubt, and therefore persuade the decision maker that the excuse does not apply, still remains with the prosecution.<sup>163</sup>

### **2.4.4 Freedom of expression**

#### 2.4.4.1 Stakeholder views

A number of submitters raised the issue of freedom of speech in the context of prohibiting the public distribution, publication or public display of a prohibited symbol.<sup>164</sup>

Professor Nicolas Aroney and Dr Paul Taylor stated that freedom of expression, as included in article 19(3) of the *International Covenant on Civil and Political Rights*, protects expressions that may be regarded as 'deeply offensive'.<sup>165</sup>

The QCCL opposed proposed ss 52C and 52D 'as a matter of principle'.<sup>166</sup> The QCCL stated:

...the test of whether you support freedom of speech is not whether you support it for those with whom you agree but whether you support it for those with whom you most disagree.

We start by noting that the actions to which freedom of speech applies are actions that aim to bring something to the attention of a wide audience.

...

Given the lack of consensus about values in our society the underlying idea must be that everyone of us would want equal freedom with everyone else to be able to express our values and ideas as they relate to government and the management of our society. When we suppress a person's ideas, we are violating that basic conception that everybody has an equal right to participate in the decision-making process on matters which may affect them. What must be added to this is the notorious fact that Governments consistently overestimate threats to the country and to their policies. Furthermore, when regulating speech which interferes with its activities government is in essence in a conflict of interest situation. This is not meant to be some conspiracy theory. It derives from the fact that in the words of Lord Acton 'All power tends to corrupt.'<sup>167</sup>

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<sup>161</sup> Explanatory notes, p 6.

<sup>162</sup> Public hearing transcript, Brisbane, 29 May 2023, p 24.

<sup>163</sup> DJAG, correspondence, 17 May 2023, p 15.

<sup>164</sup> N Aroney and P Taylor, submission 15, p 1; QCCL, submission 17, p 4; G Orr, submission 27, p 1.

<sup>165</sup> Submission 15, p 1.

<sup>166</sup> Submission 17, p 2.

<sup>167</sup> Submission 17, p 2.

Professor Graeme Orr raised the issue that the prohibition of symbols may make them ‘perversely more attractive to some in the community who simply wish to be transgressive’.<sup>168</sup>

The QHRC considered that the new offence satisfied the criteria for restricting human rights, stating:

The Commission considers that criminalising conduct that advocates national, racial, or religious hatred that constitutes discrimination, hostility, or violence and violence and abuse of persons with disability, are consistent with the permissible limitation of rights and are demonstrably justified in a free and democratic society based on human dignity, equality, and freedom.<sup>169</sup>

Australian Lawyers for Human Rights considered that prohibiting symbols was ‘a proportionate legislative response that appropriately balances rights in order to protect the equal dignity, safety and security of all individuals’.<sup>170</sup>

#### 2.4.4.2 Department response

DJAG stated, in its response to submissions, that the human rights impacts of the Bill were addressed in the statement of compatibility and that the committee is required by s 39 of the HRA to report to the Legislative Assembly about whether or not the Bill is compatible with human rights.<sup>171</sup>

The statement of compatibility notes that freedom of expression, as contained in s 21 of the HRA, will be limited by s 52D of the Bill.<sup>172</sup> The statement of compatibility justified the limitation, stating:

... whilst limitations on human rights are acknowledged, it is considered the offence strikes a fair balance between the benefits gained by the public in fulfilling the purpose of the limitation, and the limitations imposed on human rights through the creation of a criminal offence banning hate symbols in circumstances where public display would reasonably cause any person or group of people to feel menaced, harassed or offended. The proposed offence has been drafted as narrowly as possible, with appropriate safeguards in the form of the reasonable excuse provisions and the Regulation-making power relevant to the prescribing of prohibited symbols.<sup>173</sup>

The statement of compatibility also stated that proposed new s 52D promotes ‘the right to equality and non-discrimination, freedom of religion and cultural rights in sections 15, 20 and 28 of the HR Act’.<sup>174</sup>

#### **2.4.5 Search without a warrant**

The Bill proposes amendments to ss 30 and 32 of the PPRA to allow police to search a person or a vehicle without a warrant where the person commits an offence against proposed new s 52D.<sup>175</sup>

Australian Lawyers for Human Rights expressed reservations in relation to the ‘expanding police powers to permit searches without a warrant as it risks unintended discriminatory impacts on vulnerable or marginalised groups who may already be subject to “over-policing.”’<sup>176</sup> Australian Lawyers for Human Rights stated that they did not support the expansion of police stop and search powers without appropriate judicial oversight.<sup>177</sup>

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<sup>168</sup> Submission 27, p 1.

<sup>169</sup> Submission 22, p 14.

<sup>170</sup> Submission 25, p 4.

<sup>171</sup> DJAG, correspondence, 17 May 2023, p 23.

<sup>172</sup> Statement of compatibility, p 8.

<sup>173</sup> Statement of compatibility, p 12.

<sup>174</sup> Statement of compatibility, p 5.

<sup>175</sup> Explanatory notes, p 6; Bill, cls 25-6.

<sup>176</sup> Submission 25, p 6.

<sup>177</sup> Submission 25, p 6.

The statement of compatibility provided that these amendments may limit the right to property in s 24 of the HRA and the right to privacy and reputation in s 25 of the HRA.<sup>178</sup> The statement of compatibility stated:

The purpose of the amendments is to ensure a police officer can stop, detain and search a person, or a vehicle and subsequently seize an item that may provide evidence of the commission of the offence in a timely and efficient way, prevent loss of evidence, and to prevent further display of the prohibited symbol.<sup>179</sup>

The statement of compatibility concluded:

Whilst limitations on property rights and the right to privacy and reputation are acknowledged, it is considered the offence strikes a fair balance between the benefits gained by the public in fulfilling the purpose of the limitation, and the limitations imposed on human rights through the creation of a criminal offence banning hate symbols in circumstances where the public display would reasonably cause any person or group of people to feel menaced, harassed or offended.<sup>180</sup>

### **Committee comment**

In relation to the Minister's regulation-making power under proposed s 52B, the majority of the committee is of the view that it is appropriate for the Minister to be able to prescribe prohibited symbols by regulation. This is particularly the case when the regulation-making power is accompanied by the safeguard requirement that the Minister must consult with the QHRC, the Crime and Corruption Commission and the Commissioner of the QPS.

The committee notes that the regulation making power may be regarded as not having sufficient regard for the institution of Parliament. However, the committee considers that this is justified in the public interest as it allows the Minister to respond quickly to emerging symbols associated with extremist ideologies.

In relation to the proposed new s 52D(1), the committee notes the concerns of submitters in relation to the test to be applied, that of 'might reasonably be expected'. The committee also notes that 'might reasonably be expected' is already in use in other provisions in the Criminal Code. The committee is of the view that, where the purpose of the provision is to protect members of the public from harm resulting from the public display, distribution or publication of prohibited symbols, the test is appropriate. However, the committee considers that there is merit in the Queensland Government monitoring the operation of the test to ensure that it operates as intended.

In the context of the burden of proof required to prove the proposed new offence in s 52D(1), the committee notes the concern of a submitter in relation to the reversal of the onus of proof. The committee accepts the view of DJAG that the reversal of the onus of proof only relates to providing evidence of a reasonable excuse for the public display, distribution or publication of prohibited symbols. The committee considers this is appropriate in circumstances where the defendant is best placed to be able to provide proof of their reasonable excuse.

The committee notes a number of submitters expressed concerns about the impact of the prohibition of hate symbols regime on freedom of expression, as included in s 21 of the HRA. The committee also notes that human rights are not absolute and that freedom of expression must be balanced against the rights of equality and non-discrimination, freedom of religion and cultural rights. The committee considers proposed new s 52D strikes the right balance between these competing rights.

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<sup>178</sup> Statement of compatibility, p 12.

<sup>179</sup> Statement of compatibility, p 13.

<sup>180</sup> Statement of compatibility, p 14.

### **Recommendation 7**

That the Queensland Government monitors the operation of the test in proposed new s 52D(1) of the *Criminal Code Act 1899* in relation to the display or prohibited symbols whereby a person commits an offence if they display, distribute or publish a prohibited symbol in a way that ‘might reasonably cause a member of the public to feel menaced, harassed or offended’ to ensure that the test is appropriate.

## **2.5 Other issues raised by submitters**

Submitters raised a range of other issues including the need for training and education, victim impact statements from communities and data and reporting requirements.

### **2.5.1 Training and education**

Submitters raised the need for training and education to support the new provisions proposed by the Bill.

The QLS stated that ‘to be effective, legislative reform should be accompanied by a broader suite of measures, including education and awareness raising’.<sup>181</sup>

Multicultural Australia emphasised:

... the importance of community education to support public awareness on this important legislative reform. We see this as critical to the success of the legislation. We support a wide-ranging implementation process that includes communication, education, resourcing and a carefully planned and staged lead-in time.<sup>182</sup>

Multicultural Australia also acknowledged the importance of ‘developing policing and judicial capacity to enforce the laws in a culturally safe and competent way’ and that this is properly resourced.<sup>183</sup>

SSI stated that there needs to be culturally responsive education in the community to break down social barriers but also very specific education for communities so that they are aware ‘(a) that they can report; and (b) how to report’.<sup>184</sup>

This was supported by a number of other submitters.<sup>185</sup>

DJAG stated that recommendation 17 of Report No. 22 in relation to community education campaigns was supported by the Queensland Government and will be considered with the Building Belonging report and the review of the AD Act.<sup>186</sup>

### **Committee comment**

The committee shares submitters’ concerns with the need for a culturally appropriate education campaign for the general public to ensure they are aware of the serious vilification and hate crimes offences proposed by the Bill and how to report them.

<sup>181</sup> Submission 20, supplementary submission, p 2.

<sup>182</sup> Public hearing transcript, Brisbane, 29 May 2023, p 12.

<sup>183</sup> Submission 3, p 6.

<sup>184</sup> Public hearing transcript, Brisbane, 29 May 2023, p 37. See also submission 18, pp 2-3.

<sup>185</sup> Australian Medical Association Queensland, submission 5, p 1; Australian Feminists for Women’s Rights, submission 8, p 4; Queensland Council for LGBTI Health, submission 24, p 9; MQAC, submission 29, p 5.

<sup>186</sup> Public briefing transcript, Brisbane, 1 June 2023, pp 5-6.

The committee is also of the view that training in relation to the serious vilification and hate crime offences proposed by the Bill is required for the QPS, the Office of the Director of Public Prosecutions and judicial officers to ensure there is awareness of the offences and that they are used when appropriate.

### **Recommendation 8**

That the Queensland Government ensures that there is adequate culturally appropriate education and training in relation to the serious vilification and hate crime offences proposed by the Bill for the Queensland Police Service, the Office of the Director of Public Prosecutions, judicial officers and the public including community support groups.

#### **2.5.2 Victim impact statements from communities**

Multicultural Australia suggested that communities could provide victim impact statements in circumstances where the community is impacted by serious vilification or a hate crime or when an individual from the community is impacted by serious vilification or a hate crime.<sup>187</sup> It was raised in the public hearing that this would have been helpful for the committee's previous Inquiry into support for victims of crime, however, Multicultural Australia stated that that Inquiry 'might have passed [their] attention'.<sup>188</sup>

Multicultural Australia emphasised the need to understand 'diverse communities and diverse cultures', some of which are 'very collective'.<sup>189</sup> They stated:

They work as communities; they work as a group. When there is behaviour that impacts on an individual, what you often find is that it will reverberate through the community and also then create impacts. This is a piece where it is potentially a different form of thinking around what happens and what the flow-on impact is from behaviour when you have a hate crime and serious vilification, noting that in the criminal context we are talking about very significant behaviour that leads to it becoming a criminal act. You are talking about acts of violence; you are talking about very strong language. It just reverberates and has an impact in terms of a sense of safety and a sense of trust in systems right across the community which adds then to the impact of the behaviour that is the subject of the criminal offence in this instance. While we appreciate the challenges, we are simply trying to say that in the victim impact statement space there should be consideration not just of going to the one individual but of understanding the full impact of the crime by then also seeking and giving communities an opportunity to make a victim impact statement.<sup>190</sup>

In relation to how this could work in practice, Multicultural Australia stated:

... this comes down to the different ways in which the individuals who come from those communities live and operate. They do have structures. In most instances people will be connected into a community organisation that has a community leader. Often they will have elected office bearers; sometimes they are less formal than that. It is very possible to go find a collective. Absolutely, we agree: a broader call-out to the community is probably not going to be workable in terms of seeking victim impact statements, depending on the type of behaviour. For the most part, how we saw that happening was that obviously you would go to the individual first to make their victim impact statement, but they would generally be connected in some way, shape or form to a community or there would be a community from a different

<sup>187</sup> Submission 3, p 4.

<sup>188</sup> Public hearing transcript, Brisbane, 29 May 2023, p 12.

<sup>189</sup> Public hearing transcript, Brisbane, 29 May 2023, p 12.

<sup>190</sup> Public hearing transcript, Brisbane, 29 May 2023, p 13.

background. There are hundreds of these communities that exist so there is an organised collective that you could go to fairly readily.<sup>191</sup>

DJAG advised that this is currently not possible in Queensland due to the definition of victim in the *Victims of Crime Assistance Act 2009*.<sup>192</sup> They further stated that amendments of the *Victims of Crime Assistance Act 2009* were beyond the scope of the Bill and noted that the Queensland Government had supported in principle the establishment of a victims' commissioner.<sup>193</sup>

#### **Committee comment**

The committee notes the suggestion from Multicultural Australia for communities to provide victim impact statements in cases relating to serious vilification and hate crimes.

The committee is of the view that the establishment of the victims' commissioner may address community concerns in relation to serious vilification and hate crimes.

#### **2.5.3 Data and reporting**

Townsville Community Law Inc recommended that the Queensland Government 'should make necessary changes to data reporting systems in all relevant agencies to ensure useful, disaggregated data is kept on hate crimes in Queensland.'<sup>194</sup> The collection of data would help in understanding 'the societal context and prevalence' of serious vilification and hate crimes, the ability of the government to understand serious vilification and hate crimes, its impact on the community and the need for reform.<sup>195</sup>

The QHRC, in relation to its recommendation that there should be a review of the operation of the circumstance of aggravation offences against First Nations peoples, stated that this required appropriate record keeping and that the data should be made publicly available.<sup>196</sup>

#### **Committee comment**

The committee supports submitters' calls for the collection of data on serious vilification and hate crimes to ensure the government and the public are aware of the context and prevalence of serious vilification and hate crimes, its impact on the community and the need for further reform.

#### **Recommendation 9**

That the Queensland Government commences a program of collecting accurate data in relation to serious vilification and hate crimes to ensure the effectiveness of the amendments included in the Bill.

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<sup>191</sup> Public hearing transcript, Brisbane, 29 May 2023, p 15.

<sup>192</sup> DJAG, correspondence, 6 June 2023, p 2.

<sup>193</sup> DJAG, correspondence, 6 June 2023, p 2.

<sup>194</sup> Submission 2; Annexure, p 3.

<sup>195</sup> Submission 2; Annexure, p 16.

<sup>196</sup> Submission 22, p 11.

## Appendix A – Submitters

| <b>Sub #</b> | <b>Submitter</b>                                                     |
|--------------|----------------------------------------------------------------------|
| 001          | Name withheld                                                        |
| 002          | Townsville Community Law Inc                                         |
| 003          | Multicultural Australia                                              |
| 004          | Name withheld                                                        |
| 005          | Australian Medical Association Queensland Limited                    |
| 006          | Queensland Family & Child Commission                                 |
| 007          | Number not used                                                      |
| 008          | Australian Feminists for Women’s Rights                              |
| 009          | PeakCare Queensland Inc.                                             |
| 010          | Melissa Costin                                                       |
| 011          | Aboriginal and Torres Strait Islander Legal Service                  |
| 012          | Evelyn Williams                                                      |
| 013          | Name withheld                                                        |
| 014          | Full Stop Australia                                                  |
| 015          | Professor Nicholas Aroney and Dr Paul Taylor                         |
| 016          | Sue Clarke                                                           |
| 017          | Queensland Council for Civil Liberties                               |
| 018          | Settlement Services International Limited                            |
| 019          | Queensland Chinese Forum                                             |
| 020          | Queensland Law Society                                               |
| 021          | Caxton Legal Centre Inc                                              |
| 022          | Queensland Human Rights Commission                                   |
| 023          | Equality Australia                                                   |
| 024          | Queensland Council for LGBTI Health                                  |
| 025          | Australian Lawyers for Human Rights                                  |
| 026          | Respect Inc and Scarlet Alliance, Australian Sex Workers Association |
| 027          | Professor Graeme Orr                                                 |
| 028          | Ukrainian Community of Queensland Inc.                               |
| 029          | Multicultural Queensland Advisory Council                            |

## Appendix B – Officials at public departmental briefing

**1 June 2023**

### **Department of Justice and Attorney-General**

- Ms Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Adele Bogard, Acting Director, Strategic Policy and Legal Services
- Mr Michael Shears, Principal Legal Officer, Strategic Policy and Legal Services

## Appendix C – Witnesses at public hearing

**29 May 2023**

### **Queensland Human Rights Commission**

- Mr Scott McDougall, Human Rights Commissioner
- Ms Julie Ball, Principal Lawyer

### **Caxton Legal Centre Inc**

- Ms Bridget Burton, Director, Human Rights and Civil Law Practice

### **Multicultural Australia**

- Ms Christine Castley, Chief Executive Officer

### **Equality Australia**

- Mr Ghassan Kassisieh, Legal Director

### **Queensland Council for Civil Liberties**

- Mr Michael Cope, President

### **Queensland Law Society**

- Ms Rebecca Fogerty, Vice President
- Mr Patrick Quinn, Deputy Chair, QLS Criminal Law Committee

### **Respect Inc**

- Ms Lulu Holiday, State Coordinator
- Ms Janelle Fawkes, #DecrimQLD Campaign Leader

### **Scarlet Alliance, Australian Sex Workers Association**

- Ms Mish Pony, Chief Executive Officer
- Dr Elena Jeffreys, Policy and Advocacy Manager

### **Settlement Services International Limited**

- Mr Joshua Lucey, Government Relations
- Ms Jantina Kraai, Settlement and Youth Services Lead
- Ms Kenny Duke, Manager Community Engagement

## **Appendix D – Statements of Reservation**

## Statement of Reservation - Sandy Bolton MP, Member for Noosa

This Statement of Reservation relates to Recommendation 2 of this report, which has not captured the original recommendation within the Legal Affairs and Safety Committee's Report 22 into Serious Vilification and Hate Crimes, that the Government adopt an expanded set of protected attributes for anti-vilification provisions in the *Anti-Discrimination Act* and circumstances of aggravation in the Criminal Code.

The Committee recommended in Report 22 that the Queensland Government ensures anti-vilification provisions (in both civil and criminal laws) cover the attributes of:

- a. race
- b. religion
- c. gender and/or sex
- d. sexual orientation
- e. gender identity and/or gender expression
- f. sex characteristics and/or intersex status
- g. disability
- h. medical status, including HIV/AIDS status

In its response to the report, the Government supported the recommendation "in principle".

The current report merely refers to age and impairment as examples of additional attributes, and there has been no justification provided for this.

With the Government now in the process of re-writing the *Anti-Discrimination Act*, as recommended by the Queensland Human Rights Commission, the list of attributes recommended in the Committee's Report 22 should be adopted to ensure that the concerns brought forward by submitters and witnesses are addressed appropriately.



**SANDY BOLTON MP**  
**Member for Noosa**