

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

Background and Policy Objectives

On 31 January 2022 the Legal Affairs and Safety Committee (LASC) tabled in the Legislative Assembly, its Report *Inquiry into serious vilification and hate crimes* (No. 22, 57th Parliament) (the LASC Report).

The LASC Report contained 17 recommendations, all of which were supported, or supported in principle, by the Queensland Government on 23 May 2022. The Government response can be accessed by using the following link: <https://documents.parliament.qld.gov.au/tp/2022/5722T717-4755.pdf>.

The objective of the Bill is to give effect to Recommendations 7, 8, 9 and 16 of the LASC Report. These recommendations were set out in the LASC Report as follows, namely:

- **Recommendation 7**, that the Queensland Government investigate the viability of removing the requirement for the written consent of a Crown Law officer before commencing a prosecution under section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) of the *Anti-Discrimination Act 1991* (AD Act);
- **Recommendation 8**, that the Queensland Government introduce a statutory aggravation regarding hate/serious vilification into the Criminal Code and *Summary Offences Act 2005* (SO Act);
- **Recommendation 9**, that the Queensland Government relocate section 131A of the AD Act into the Criminal Code; and
- **Recommendation 16**, 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.

An additional objective identified through consideration of the LASC Report is to increase the maximum penalty for the offence under section 131A of the AD Act from 70 penalty units or six months imprisonment (or 350 penalty units for a corporation) to three years imprisonment. The increase to the maximum penalty reflects the seriousness of this type of offending and the community's denunciation of such conduct.

In achieving these objectives, the Bill seeks to amend the AD Act, Criminal Code, *Police Powers and Responsibilities Act 2000* (PPRA), and SO Act.

Amendments in the Bill

Commencement

The amendments to the AD Act, Criminal Code, PPRA and SO Act will commence on proclamation. This acknowledges the interdependency with certain amendments from the Births, Deaths and Marriages Registration Bill 2022 (BDMR Bill) which was introduced by the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence on 2 December 2022. The BDMR Bill includes

changes to the AD Act which amend the existing definition of gender identity, introduce a new attribute of sex characteristics and make consequential amendments to section 131A.

In addition, commencing the new offence by proclamation will provide the opportunity to undertake consultation regarding the potential symbols and images to be prescribed under new section 52C (Prohibited symbols of the Criminal Code).

Amendments to the AD Act (Recommendations 7 and 9 and increase to the maximum penalty for the offence in section 131A)

Section 131A of the AD Act provides that a person must not, by a public act, knowingly or recklessly incite hatred towards, or serious contempt for, or severe ridicule of, a person or persons on the ground of race, religion, sexuality or gender identity of the person or members of the group in a way that includes:

- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The written consent of a Crown Law Officer (which is either the Director of Public Prosecutions (DPP) or the Attorney-General) must be obtained before a proceeding is started for an offence under this section. The offence currently carries a maximum penalty of 70 penalty units or six months imprisonment for an individual. The maximum penalty for a corporation is 350 penalty units.

Recommendation 7 of the LASC Report – Removal of Crown Law Officer consent

In making Recommendation 7, the LASC noted that most submitters were in favour of removing the requirement for the consent of a Crown Law Officer and commented that the requirement is an unnecessary impediment to police expeditiously prosecuting serious vilification matters.

The Queensland Government response supported Recommendation 7, noting that the Government was committed to further investigating the viability of removing this requirement and would consult with key legal and community stakeholders.

The implementation of Recommendation 7 is reflected in Clauses 7 (Amendment, relocation and renumbering of s 131A (Offence of serious racial, religious, sexuality or gender identity vilification)) and 8 (Insertion of new ch 11, pt 9) of the Bill. Clause 7 removes existing sections 131A(2) – (4) to remove the requirement for the written consent of a Crown Law Officer prior to commencing a prosecution under section 131A of the AD Act.

Recommendation 9 of the LASC Report – relocation of s131A of AD Act into the Criminal Code

In making Recommendation 9, the LASC noted that a number of submitters were in favour of moving section 131A from the AD Act into the Criminal Code and commented such an amendment would better reflect the gravity of the conduct that it addresses.

The Queensland Government supported the implementation of Recommendation 9 in its response to the LASC Report.

The implementation of Recommendation 9 is reflected in Clause 7 of the Bill. Clause 7 relocates the entirety of section 131A of the AD Act to the Criminal Code and renumbers it as new Section 52A of the Criminal Code.

Increase to the maximum penalty for the offence in section 131A

Whilst not making any recommendation regarding the maximum penalty under section 131A of the AD Act, the LASC Report noted that:

Police need to access communications held by a carrier to establish who is responsible for offensive online communications. A stored communications warrant issued under the Telecommunications (Interception and Access) Act 1979 (Cth), is necessary for police to access and preserve the communications. Those warrants are only available for the investigation of a serious offence (typically one subject to at least 3 years imprisonment)¹.

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 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, 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.

In light of this commentary, and in order to reflect the seriousness of this type of offending and the community's denunciation of such conduct, Clause 7 of the Bill increases the maximum penalty to 3 years imprisonment.

Transitional Provision

Clause 8 is a transitional provision relevant to the implementation of Recommendations 7 and 9 and the increase to the maximum penalty for the offence in section 131A of the AD Act.

Clause 8 inserts a new section 281 into the AD Act which provides that, after commencement, former section 131A continues to apply where a person is already charged with the offence at the time of commencement. For conduct that occurred prior to the commencement of the Bill (but for which proceedings have not yet commenced), the proceeding may be started under former section 131A as if the Bill had not commenced; however, the proceeding may be heard and decided without a Crown Law Officer's written consent. The increased

¹ Page 13

maximum penalty for the offence in section 131A of the AD Act will not apply to conduct that occurred prior to the commencement of the Bill.

Amendments to the Criminal Code and SO Act (Recommendations 8 and 16)

The Bill amends the Criminal Code and the SO Act to give effect to Recommendations 8 and 16 of the LASC Report.

Recommendation 8 of the LASC Report – new circumstance of aggravation

The LASC noted that some submitters supported making bias motivations a circumstance of aggravation on existing offences. In making Recommendation 8, the committee considered that providing that a bias motivation as an aggravating factor for certain criminal offences would acknowledge the psychological harm caused by vilification and reflect that by way of an increased sanction for offending conduct.

In its response, the Queensland Government supported Recommendation 8 on an in-principle basis.

The implementation of Recommendation 8 is reflected in Clauses 12 (Insertion of new pt 2, ch 7A), 29 (Amendment of s 6 (Public nuisance)) and 30 (Amendment of s 11 (Trespass)) of the Bill. These Clauses amend the following existing offences in the Queensland Statute Book by introducing a new circumstance of aggravation:

1. section 69 (Going armed so as to cause fear) of the Criminal Code;
2. section 75 (Threatening violence) of the Criminal Code;
3. section 207 (Disturbing religious worship) of the Criminal Code;
4. section 335 (Common assault) of the Criminal Code;
5. section 339 (Assaults occasioning bodily harm) of the Criminal Code;
6. section 359 (Threats) of the Criminal Code;
7. section 359E (Unlawful stalking, intimidation harassment or abuse) of the Criminal Code;
8. section 469 (Wilful damage) of the Criminal Code;
9. section 6 (Public nuisance) of the SO Act; and
10. section 11 (Trespass) of the SO Act.

The amendments impose a new circumstance of aggravation for each of these offences, thereby increasing the available maximum penalty, where the offender was wholly or partly motivated to commit the offence by hatred or serious contempt for a person or group of persons.

The new circumstance of aggravation captures motivations towards both individuals and groups.

With respect to a person, the circumstance of aggravation captures circumstances where the offender was wholly or partly motivated to commit the offence by hatred or serious contempt for a person based on the person's race, religion, sexuality, sex characteristics or gender identity or the person's presumed race, religion, sexuality, sex characteristics or gender identity.

In relation to a group of persons, the circumstance of aggravation captures circumstances where the offender was wholly or partly motivated to commit the offence by hatred or serious contempt for a group of persons based on the actual or presumed race, religion, sexuality, sex characteristics or gender identity shared by members of the group.

The characteristics that the circumstance of aggravation will capture are race, religion, sexuality, sex characteristics or gender identity. These characteristics are consistent with those captured by the offence in section 131A of the AD Act, subject to its amendment by the BDMR Bill to include the additional attribute of sex characteristics and, amend the definition of gender identity in the AD Act².

Attachment 1 is a table outlining the offences to which the circumstance of aggravation will apply, the existing maximum penalty for each simpliciter offence and the maximum penalty for the circumstance of aggravation.

Recommendation 16 of the LASC Report – prohibition on the display of hate symbols

The LASC considered that the display of symbols of hate, such as the Nazi Hakenkreuz and symbols of ISIS ideology, should be banned. In making the recommendation, the LASC commented that such symbols can cause distress to Queenslanders, particularly those from persecuted communities. The LASC emphasised that such a ban should include exceptions so that, for example, symbols from Hinduism, Buddhism, and Jainism are not inadvertently prohibited.

There is no current offence in Queensland prohibiting the display of hate symbols. However, most jurisdictions in Australia have either recently implemented similar offences prohibiting the display of hate symbols or the Nazi Hakenkreuz, or have announced an intention to introduce legislation.

The implementation of Recommendation 16 is reflected in Clause 12 (Insertion of new pt 2, ch 7A) of the Bill. Clause 12 introduces new sections 52C (Prohibited symbols) and 52D (Display, distribution or publication of prohibited symbols) into the Criminal Code.

New section 52C is a regulation-making power relevant to the definition of a 'prohibited symbol'. A 'prohibited symbol' is defined as a symbol prescribed by regulation under new section 52C of the Criminal Code or a symbol or image that so nearly resembles a symbol prescribed by regulation that it is likely to be confused with or mistaken for that symbol.

Before recommending the making of the regulation to prescribe a prohibited symbol, the Minister responsible for the administration of the Criminal Code will need to be satisfied the symbol or image is widely known by the public, or by members of a 'relevant group', as being solely or substantially representative of an ideology of extreme prejudice against a relevant group. 'Relevant group' is defined by the Bill to mean a group of persons who identify with each other on the basis of an attribute or characteristic that is, or is based on, the race, religion, sexuality, sex characteristics or gender identity of the persons.

² The Births, Deaths and Marriages Registration Amendment Bill 2022 (BDMR Bill), introduced on 2 December 2022, seeks to amend section 131A of the AD Act to include the additional attribute of *sex characteristics*. The BDMR Bill also seeks to amend the definition of gender identity in the AD Act.

Further, new section 52C of the Criminal Code will provide that the Minister may only recommend the making of the regulation prescribing a prohibited symbol after consultation with the Crime and Corruption Commission, Queensland Police Service and the Queensland Human Rights Commission.

Section 52D is the new offence provision reflecting the implementation of Recommendation 16 which prohibits the public display, public distribution or publication of a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, unless the person has a reasonable excuse.

For the purposes of the offence, the display must have occurred in a place that (a) 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; (b) in a place the occupier of which allows, whether or not on payment of money, members of the public to enter; or (c) in a place that is visible from a place mentioned in (a) or (b).

The Bill contains a number of non-exhaustive exceptions and excuses to the offence. For example, a person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol. The purpose relied on must be showed to have been reasonable in the circumstances.

As noted in the Explanatory Notes for the Bill, it is intended that an excuse might be available where the public display is made in books, body art, plays, satire, film and documentaries, museums and universities, on historical models, during historical re-enactments, and for religious or scientific and research purposes. Further, 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.

As noted by the LASC, the offence reflecting the implementation of Recommendation 16 should include exceptions so that symbols from Hinduism, Buddhism, and Jainism are not inadvertently prohibited. 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 purpose* excuse is intended to ensure that the display of symbols, such as the swastika, in these contexts is not captured by the offence.

Amendments to the Police Powers and Responsibilities Act

The Bill amends the PPRA to assist in the enforcement of amendments that give effect to Recommendation 16.

Clauses 25 and 26 of the Bill amend sections 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 section 52D (Display, distribution, or publication of prohibited symbols) of the Criminal Code. A police officer will therefore have the power to stop, detain and search the person/vehicle and seize all or part of a thing that may provide evidence of the commission of the offence.

Fundamental legislative principles

Potential breaches of Fundamental Legislative Principles (FLPs) raised by the amendments are considered justified. The FLP issues and justification are outlined in detail in pages 5 and 6 of the Explanatory Notes to the Bill.

Human rights

The amendments are considered compatible with human rights. The human rights issues and justification are outlined in detail in the Statement of Compatibility for the Bill.

ATTACHMENT 1: Circumstance of Aggravation (Recommendation 8)

Provision	Statute	Maximum penalty for simpliciter offence	Maximum penalty for circumstance of aggravation
Section 69 (Going armed as to cause fear)	Criminal Code	Two years imprisonment	Three years imprisonment
Section 75 (Threatening violence)	Criminal Code	Two years imprisonment	Three years imprisonment
Section 207 (Disturbing religious worship)	Criminal Code	Two months imprisonment or a fine of \$10	Six months imprisonment
Section 335 (Common Assault)	Criminal Code	Three years imprisonment	Four years imprisonment
Section 339 (Assault occasioning bodily harm) of the Criminal Code. Current maximum penalty for simpliciter offence: Proposed maximum penalty for circumstance of aggravation	Criminal Code	Seven years imprisonment	10 years imprisonment
Section 359 (Threats)	Criminal Code	Five years imprisonment	Seven years imprisonment
Section 359E (Unlawful stalking, intimidation, harassment or abuse)	Criminal Code	Five years imprisonment	Seven years imprisonment
Section 469 (Wilful damage)	Criminal Code	Five years imprisonment	Seven years imprisonment
Section 6 (Public Nuisance)	<i>Summary Offences Act 2005</i>	10 penalty units or six months imprisonment	25 penalty units or six months imprisonment
Section 11 (Trespass)	<i>Summary Offences Act 2005</i>	20 penalty units or 1 year imprisonment	40 penalty units or 1 year imprisonment