

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

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Submitted by: Aboriginal and Torres Strait Islander Legal Service
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See attached:



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2nd May 2023

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LASC@parliament.qld.gov.au

Dear Committee Secretary,

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

Thank you for the opportunity to provide comments in relation to the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (**Bill**) which proposes to make amendments to the *Anti-Discrimination Act 1991* (Qld), Criminal Code (Qld), *Summary Offences Act 2005* (Qld) and *Police Powers and Responsibilities Act 2000* (Qld) in relation to serious vilification and hate crimes and which includes amendments to legally recognise the seriousness of crimes that are committed with a motivation of hatred or serious contempt for a person or group of persons based on race, religion, sexuality, sex characteristics or gender identity. As we have recently provided a submission on the Consultation Draft of this Bill, our response in this submission is framed with reference to changes between the Consultation Draft and Bill which we consider to be noteworthy. We have also taken the opportunity to reiterate some of the comments in our earlier submission which, in our view, remain important considerations in the context of the Bill.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by over five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Comments on the Bill

Amendments to the *Anti-Discrimination Act 1991 (Qld)*

We support the following proposed amendments to the A-D Act contained in the Bill:

- the relocation of section 131A of the A-D Act (Offence of serious racial, religious, sexuality or gender identity vilification) (**Serious Vilification Offence**) to new section 52A of the Criminal Code;
- increasing the maximum penalty for the Serious Vilification Offence to 3 years imprisonment; and
- the removal of requirement for the written consent of the Attorney-General or Director of Public Prosecutions before a prosecution can be commenced for a Serious Vilification Offence.

Amendments to the Criminal Code

Clause 11 – Insertion of new pt 2, ch 7A

While we are supportive of the proposed introduction of statutory circumstances of aggravation for hatred or contempt in relation to certain prescribed offences, we do not support proposed section 52B to the extent that it relies upon establishing the perpetrator’s state of mind, i.e., that 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 the Queensland Government’s Fact Sheet for the Consultation Draft of this Bill (**Fact Sheet**), there is reference to the Legal Affairs and Safety Committee recognising the psychological harm caused by vilification to a victim¹. However, we are concerned that the proposed offence does not appear to consider the victim’s point of view or state of mind.

In our view, 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).

Prescribed offences to which the circumstances of aggravation apply

While we support the list of prescribed offences to which the circumstances of aggravation are proposed to apply, in our view, the following offences should also be prescribed offences under proposed section 52B(2):

- section 355 of the Criminal Code (Deprivation of Liberty); and
- section 320 of the Criminal Code (Grievous Bodily Harm).

¹ Department of Justice and Attorney General, Fact Sheet, *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023*, page 2.

Clause 20 – Amendment of section 552B (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial)

In our submission on the Consultation Draft, we raised concerns regarding the approach taken with respect to how Common Assault and Assaults Occasioning Bodily Harm (AOBH) matters would be heard (i.e., pursuant to proposed amendments to section 552B and existing provisions of the Criminal Code).

When reviewing the Bill, we see that these provisions have now been amended, such that Common Assault matters:

- with the relevant circumstance of aggravation would be heard summarily; and
- without the relevant circumstance of aggravation would be heard summarily *on prosecution election*.

Whilst this clarity is welcomed, it seems anomalous to have a more serious version of the charge made mandatory summary whilst the less serious version to be a matter at the election of the prosecution. Given the position taken on the new offence with the circumstance of aggravation (that it must be dealt with summarily), it would be appropriate to make the same offence without the circumstance of aggravation dealt with in the same manner – i.e., mandatory summary also.

We further note that provisions regarding AOBH remain unchanged.

Section 552B(1)(b) currently provides that “an offence against section 339(1)” must be heard and decided summarily unless the defendant elects for a jury trial. The drafting does not explicitly make reference to the offence with or without a circumstance of aggravation (as is the approach for many other offences captured under section 552B(1)). The interpretation of this drafting in the context of whether a Magistrate had jurisdiction to hear a matter involving AOBH with a circumstance of aggravation was the subject of judicial consideration in *Fullard v Vera & Byway* [2007]². In that case, it was held that the Magistrates Court has jurisdiction to deal with the aggravated offence.

It appears that clause 20 of the Consultation Draft sought to address this issue by proposing to amend section 552B(1)(b) to read “an offence against section 339(1) with

² We note that judicial consideration in this case in relation to the earlier provision of s552B, i.e., prior to the version in the current reprint, however, the particular drafting used for the subparagraph relating to AOBH matters remained unchanged between the prior provision and the current reprint provision.

or without a circumstance of aggravation under section 339(4)". However, it appears that clause 20 of the Consultation Draft was removed from the Bill.

In our view, the Bill should take the opportunity to rectify the vague drafting contained in section 552B(1)(b). Accordingly, we recommend that clause 20 of the Consultation Draft should be re-inserted into the Bill.

Other recommendations for consideration

We support the following additional recommendations that were contained in the Cohesive Communities Coalition Working Group paper on this issue entitled "Options for Reform on Serious Vilification and Hate crime in Queensland" which we co-authored and which the Deputy Premier referred to the Legal Affairs and Safety Committee for review and consultation:

- 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;
- the provision of additional powers to the Queensland Human Rights Commission (QHRC) to support the legislative framework for laws relating to incitement of hate/racial vilification, for example, which enables QHRC to: issue take-down notices to platforms publishing/disseminating relevant material; investigate complaints regarding the same; and issue fines; and
- the introduction of a new "order" similar to the Peace and Good Behaviour Order under the *Peace and Good Behaviour Act 1982* to address offending behaviour that falls short of criminal offences, but which, if repeated, could be penalised as a breach of the order (we anticipate that such an order could protect, for example, a previously targeted individual or group or a culturally or religiously significant place, such as, a place of worship).

Conclusion

Consistent with our comments on the Consultation Draft, we strongly support measures which strengthen the current approach to addressing hate crimes and racial vilification. This issue has particular gravity in the current climate taking into account very concerning reports that we have received, and which have been widely reported, of vigilante groups mobilising and threatening violence against Aboriginal and Torres

Strait Islander youths, including children in out-of-home care, which such individuals consider justified as a response to the current youth justice crisis. While we are broadly supportive of the proposed amendments contained in the Bill, we have identified some opportunities to strengthen the framework proposed which we have sought to outline in this submission.

We thank you for the opportunity to provide feedback on the Bill.

Yours faithfully,



Shane Duffy
Chief Executive Officer