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

Submission No:	15
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See attached:

Submission by Professor Nicholas Aroney[*] and Dr Paul Taylor[**]

to the Legal Affairs and Safety Committee

in connection with the

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

We are grateful for the opportunity to contribute this submission, which focuses on one issue: the need to provide Parliament with full justification for the radical measure that is being proposed in the form of the proposed section 52D of the *Criminal Code*, which would create an offence where a person 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".

The Report of the Committee noted the concerns expressed by us, and in different terms by Julian Burnside QC and Professor Sarah Joseph.[1] Our own concerns are based on the incompatibility of such a provision with the requirements of article 19(3) of the International Covenant on Civil and Political Rights (ICCPR), and the related need to justify such a provision under section 13 of the *Human Rights Act 2019* (Qld).

We consider that the degree of engagement with this issue by the Committee in its Report, and by the Government in response is, with respect, insufficient. We consider the incompatibility of this aspect of the Bill to be of sufficient importance that it should specifically be drawn to the attention of Parliament, with supporting justifications under section 13 of the *Human Rights Act 2019*, so that they may be considered and debated openly, in accordance with one of the central purposes of that Act.

On the question whether conduct caught by the proposed section 52D is a protected form of freedom of expression, we would respectfully remind the Committee that in General Comment 34 the Human Rights Committee stated that freedom of expression under article 19(2) protects "even expression that may be regarded as deeply offensive, although such expression may be restricted in accordance with the provisions of article 19, paragraph 3 and article 20."[2]

On the question of whether section 52D is justified according to section 13 of the *Human Rights Act 2019*. we would point out that the following matters should be taken into account in any reasoned analysis:

- Section 52D is a radical measure. Although it imports an objective test in so far as it criminalises conduct that "might *reasonably be expected*" to have a deleterious effect, it embeds a highly subjective element at its core because it criminalises conduct that "*might*" be expected to cause "a member of the public … to *feel* menaced, harassed or offended" (emphasis added). It also sets a very low threshold for criminality by extending it to conduct that might be expected to cause a person to "feel … *offended*",

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[1] Legal Affairs and Safety Committee, *Inquiry into serious vilification and hate crimes* (Report No. 22, January 2022), pp. 31-32.

[2] UN Human Rights Committee (HRC), *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, CCPR/C/GC/34 , available at: https://www.refworld.org/docid/4ed34b562.html [accessed 28 April 2023], 90.

rather than limiting the provision to conduct that might reasonably be expected to cause a person to be "menaced" or "harassed".

- In Australian states and territories, criminal provisions generally only apply to "serious vilification," which includes the important element of actual "incitement" of hatred against/towards, serious contempt for, or severe ridicule of a person or group.[3]
- The *Rabat Plan of Action* clearly indicated that a high threshold should be adopted when defining restrictions on freedom of expression and that "[c]riminal sanctions related to unlawful forms of expression should be seen as *last resort measures* to be applied *only in strictly justifiable situations*".[4]
- The Committee on the Elimination of All Forms of Racial Discrimination (referring to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)) recommended that the criminalisation of expression covered by ICERD "should be reserved for serious cases, to be proven beyond reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups."[5]
- Both the UN Committee on the Elimination of All Forms of Racial Discrimination and the *Rabat Plan of Action* identified the factors that would denote the severity necessary to criminalise "incitement".[6]

In light of this it is important that Parliament know more precisely than the Report and Government response indicate, how section 52D is appropriate to achieve its protective function, how it is the least intrusive means of achieving its protective purpose, and how it is not overbroad.

1 May 2023

[3] *Criminal Code 2002* (ACT) s. 750; *Crimes Act 1900* (NSW) s. 93Z; *Anti-Discrimination Act 1991* (Qld) s. 131A; *Racial and Religious Tolerance Act 2001* (Vic), ss. 24-25; *Racial Vilification Act 1996* (SA) s.4; *Criminal Code Act Compilation Act 1913* (WA) ss. 77 to 80H.

[4] *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, A/HRC/22/17/Add.4, available at: https://www.ohchr.org/en/documents/outcome-documents/rabat-plan-action [29], [34].

[5] *General recommendation No. 35: Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, (GR 35) available at: https://www.refworld.org/docid/53f457db4 html [accessed 30 April 2023] [12].

[6] *Rabat Plan of Action* [29]; GR 35 [15].