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

Submission No:	17
Submitted by:	Queensland Council for Civil Liberties
Publication:	Making the submission and your name public

See attached:

Committee Secretary
Legal Affairs and Safety Committee
House
George Street
Brisbane Qld 4000
lasc@parliament.qld.gov.au

Dear Madam/Sir

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

Kindly accept this submission in relation to the above Bill

1. Amendments to Anti-Discrimination Act

We support these amendments.

In our view section 131A of the *Anti–Discrimination Act* (QLD), is from a free-speech point of view a perfectly appropriate provision, which deals with serious conduct and impinges on free speech to a very limited and acceptable extent.

The need for aggravating factors and proof of incitement is intended to ensure that only conduct amounting to serious cases of racial vilification threatening violence is subject to criminal sanctions

As a matter of principle, generally, criminal liability should only be imposed where it is proved the person had a guilty mind. We acknowledge that the section extends liability to cases where the conduct is reckless. In this case we accept this lower standard having regard to the fact that it requires proof of threatening violence or inciting violence.

We support increasing the penalty to 3 years and moving the offence to the *Criminal Code* as an indictable offence.

We support removing the requirement for the approval of the Director of Public Prosecutions or Attorney-General in order to commence prosecution under s131A.

2. Proposed section 52B, clauses 16 -22 and clauses 28-30

We have no objection to making racial or religious motivation a circumstance of aggravation to existing offences such as assault and the public nuisance offence, where it involves threats of violence or actual violence.

A physical assault or threat of such is not by any stretch of the imagination a type of speech protected by any concept of free speech. However, disorderly and offensive behaviour raises free speech issues, as this type of conduct quite often involves speech with no violence or threats of violence.

It is quite common for sentencing judges to consider a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on an offender.

In addition, hate-motivated crimes are more likely to provoke retaliatory crimes and inflict distinct emotional harms on their victims. These features of such crimes provide justification for adding a further penalty in those situations over and above mere disagreement with offenders' beliefs.

Therefore, we support these amendments except to the extent that they apply to disorderly and offensive behaviour.

3. Proposed sections 52C and 52D

(a) Free Speech principles

We oppose this law as a matter of principle, 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. This intended audience must not be the widest possible audience, but it must be more than one or two people. Private conversations are not, in general, a matter for free speech. They are a matter for the right of privacy.

The American political philosopher TM Scanlon argues[1] that the "right of freedom of expression includes three broad categories of interests: interests that individuals have, as potential speakers, in having opportunities to make their views known, interests that individuals have as potential audience members in having access to the expressive activities of others, and interests that individuals have as bystanders who are affected by these expressive activities....The interests of potential speakers, or participants, include interests in participating in electoral politics, in seeking to influence government policy in other ways by, for example, criticizing the conduct of public officials, and interests in expressing their values and generally participating in the cultural and intellectual life of the society, perhaps seeking to influence its character."

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."

Scanlon again says[2]:

> It is legitimate for the government to promote our personal safety by restricting information about how to make your own nerve gas but not legitimate for it to promote our safety by stopping political agitation which could, if unchecked, lead to widespread social conflict... The difference (between the two cases) is rather that where political issues are involved government is notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests. To the degree that the considerations of safety involved in the first case are clear and serious, and the participant and audience interests that might suffer from restriction are not significant, regulation could be acceptable[3].

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[1] Scanlon *A Framework for Thinking about Freedom of Speech, and Some of its Implications*. Pages 6-7 A lecture delivered in 2018 and found at https://www.law.berkeley.edu/wp-content/uploads/2018/10/Freedom-of-Speech-Berkeley.pdf

[2] TM Scanlon *Freedom of Expression and Categories of Expression* page 98 in Scanlon *The Difficulty of Tolerance* Cambridge University Press 2003

[3] of course, the State is entitled to take action to suppress speech if it is intended and likely to produce imminent lawless action

Further when making laws about speech the state must use criteria that are generalisable. In this regard we have long argued that the fact that someone might be offended is not an appropriate ground for restricting speech as too many things offend people[4]

This statute is clearly attempting to avoid these types of strictures by extending the criteria of liability beyond offence to harassment.

Laws against harassment, stalking and the like do not offend against free-speech principles. Firstly, because such laws are directed at conduct, where speech is only usually an incidental component. Secondly, such laws are directed at communications to one person, and to whom the communications are intended to cause psychological harm or the recipient has made it clear, that they do not wish to receive those communications. Even when those communications are posted on a social media site, they are still directed at that person in circumstances where that person is an unwilling recipient of the communications. Furthermore, the recipient of those communications has very strong reasons for being protected against the speech acts, and there is no issue of wanting to engage in political argument[5].

You might, of course, have a case in which a person knows that the person they are harassing or stalking is of Jewish background, and therefore decides to use a swastika as part of their course of conduct to cause harm to the person. Again, for the reasons enunciated, that would not be protected by the free speech principle articulated here

There is no reason for someone to harass or stalk another person and the victims have strong claims to protection from the psychological and potential physical harms that flow from the continuation of that behaviour.

But this law is not of that type. It is a law which on its face applies to the publication to a wide audience of political content.

It is commonly argued that hate speech is antagonistic to free speech values including equality because it silences its targets. This silence happens, it is argued, with the creation of a climate that discredits members of racial or ethnic minorities. There are three responses to this argument.

Firstly, Andrew Kopelman[6] has argued, "the advocates of censorship were never able to establish a persuasive causal nexus between silencing and any particular speech act. It was impossible to show that any single instance of racist speech …..could have that kind of devastating effect on a person. Speech is certainly integral to the problem: racism and sexism are ideas in people's heads….. Antidiscrimination law is necessarily committed to the reshaping of culture to eliminate or marginalise such malign ideologies. Censorship is the wrong tool this job. The cost to free speech of a hate speech prohibition – and there is every reason to think that it would be substantial – would not buy much."[7]

There are psychological studies that show, as well as the evidence of history, that censored speech becomes more appealing and persuasive to many listeners merely by virtue of being censored.[8]

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[4] Scanlon *A Framework for Thinking about Freedom of Speech, and Some of its Implications* pages 7 -8 A lecture delivered in 2018 and found at https://www.law.berkeley.edu/wp-content/uploads/2018/10/Freedom-of-Speech-Berkeley.pdf

[5] of course, public figures and officials are not expected to be sitting ducks, but somewhat greater leeway has to be given when people try to communicate with them one on one about public matters

[6] Professor of Law and Political Science and author of an American text on Antidiscrimination Law

[7] *Revenge, pornography and First Amendment Exceptions* (2016) 65 Emory Law Journal 661 at pages 685-686

[8] Nadine Strossen *Regulating Racist Speech on Campus – a modest proposal* 1990 Duke Law Journal 484 at page 512

Mill also argued that being exposed to false ideas is critical to continuing to hold true beliefs[9]

(b) Criticisms of the Bill

We move from a critique of the law in general terms to a commentary on a number of concerning features.

It provides a person commits an offence and is liable to punishment including prison if it "might reasonably to expected" the display of the symbol would cause someone to be offended etc, rather than what the accused person knew or intended. Given the very serious consequences of being convicted of such an offence if it is to be enacted the offence should require that person intends by the display to cause the offence etc.

This submission is based on the principle set out above that generally criminal liability should only be imposed where there is a guilty intent and free speech principles seeking to limit the extent of the offence and hence the effect on free speech.

Secondly the proposed provision contains a reverse onus on an accused person to make out a defence (such as religious belief, academic work or artistic expression) by putting an evidential burden on them. This is better than the usual reversal of onus that the reasonable excuse form creates[10], but in our view the onus of proof in a criminal prosecution should at all times lie on the Crown. This is a fundamental safeguard of individual liberty.

This law was originally promoted to enact a policy to ban the swastika or in German the hakenkreuz. It has the potential to extend way beyond that, a point to which we shall return.

We all know the Swastika has been around for millennia including being a prominent symbol in the Roman world. But today it is of course used extensively in Hinduism. The law tries to address this concern by the defence of genuine religious purpose. However, clearly it is most likely the need to defend charges under this law will fall on religious and cultural groups who make use of the symbol on a regular basis, not to mention artists and satirists.

Finally, and most critically the law allows the Minister to prescribe by regulation the prohibited symbols. 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. We note that this is not the approach taken in Victoria.

This feature of the proposed law also reinforces the concerns listed above. The extension of these laws will lie in the hands of the government. We have already seen proposals to ban the fascist salute. The far-right has shown a clear capacity to evolve its symbols often using initially benign symbols (such a 'Pepe the Frog' or even the 'okay' symbol) or religious iconography (such as of crusaders and saints). In the face of this it appears likely this section could be used regularly. There is no reason for thinking that some future less benign government might not use this power against its enemies.

The section purports to set limits on this power by requiring the minister to be satisfied of the matters set out in proposed subsection 3. However, the scope for review by a Court of any such decision may well be limited to whether the opinion of the Minister could not be held at all by a reasonable decision maker- *Minister for Immigration and Multicultural Affairs V Eshetu* (1999) 162 ALR 577 paras 130-137 per Gummow J or the decision of the Governor in Council was made

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[9] see Kelly, Paul (2006) Liberalism and epistemic diversity: Mill's sceptical legacy. Episteme, 3 (3). pp. 248-265 http://eprints.lse.ac.uk/5186/1/Kelly_Liberalism-and-epistemic-diversity-Mill's-sceptical-legacy_2006.pdf

[10] see the views of the Office of the Queensland Parliamentary Counsel set out in *Principles of good legislation: OQPC guide to FLPs - Reversal of Onus of Proof* https://www.legislation.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

in bad faith - *Re Toohey; Ex Parte Northern Land Council* (1981) 38 ALR 439 – see Gibbs CJ at page 453 and Stephen J at 476

The first individuals prosecuted under the *British Race Relations Act 1965* were black power leaders. It was also used against the Anti-Nazi League.

These laws are blunt instruments that are not likely to suppress far right ideas. The long-standing prohibition of the swastika in Germany has done nothing to prevent the recent re-emergence of far-right extremism. There is in fact a prospect they will give publicity to these causes. Weimar Germany had anti-hate laws. Those laws were in fact enforced with some vigour. During the 15 years before Hitler came to power there were more than 200 prosecutions based on anti-Semitic speech. There is evidence that what happened is that the Nazis made use of the trials to promote their cause. [11] There is no reason for thinking that won't happen here.

We remain of the view that you cannot end racism and other pernicious ideas by censorship and policing. What needs to be done is to focus on addressing the root causes of why some people are attracted to such ideologies in the first place, including social isolation, growing economic insecurity and mistrust in government and the media.

We trust this is of assistance to you in your deliberations.

Yours faithfully

[redacted]

For and on behalf of the
Queensland Council for Civil Liberties
2 May 2023

[11] A. Alan Borovoy *When Freedoms Collide – The Case for our Civil Liberties* – Lester & Orpen Dennys 1988 at page 50.