

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

**Submission No:** 20  
**Submitted by:** Queensland Law Society  
**Publication:** Making the submission and your name public  
**See attached:**

4 May 2023

Our ref: [BC:MC]

**Confidential**

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

By email: [LASC@parliament.qld.gov.au](mailto:LASC@parliament.qld.gov.au)

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (**the Bill**).

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professional, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Human Rights and Public Law and QLS Criminal Law Committees, whose members have substantial expertise in this area.

**1. Introductory comments**

Serious vilification and hate crimes are sinister in nature and contribute to a continuum of prejudice and victimisation of, generally, already vulnerable and marginalised community members.

In our 2021 submission to the Legal Affairs and Safety Committee's Inquiry (**LASC Inquiry**) into serious vilification and hate crimes, QLS recommended that consideration ought to have been given to the protected attributes covered by the current vilification laws, ensuring that they are responsive to community needs and reflect contemporary understanding. Consideration was given by the Committee in Recommendation 4 which recommends that the Queensland



Government ensure anti-vilification provisions cover an expanded list of attributes including race, religion, gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability and medical status including HIV/AIDS status<sup>1</sup>. We note, in particular, that this recommendation was supported in principle by the Government but has not been implemented in the present Bill. QLS submits that age and disability ought to be included as protected attributes under the proposed legislation.

Additionally, we observe that the Bill does not propose any civil law reform. We take this opportunity to repeat the position ventilated in QLS's 2021 submissions on this matter, namely the utility in introducing civil law reform in the form of a civil hate crime injunction and new Order scheme to target vilification and hate crimes as a means of preventing harmful behaviour of this kind.

### **2. Addition of other forms of vilification**

We observe that the proposed protected attributes in the Bill does not include age or disability. QLS recommends that the list of protected attributes be expanded to include age and disability.

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<sup>2</sup>. Ageism increases the risk of violence being perpetrated against older people, without sufficient legislative protections. The lack of disability as a protected attribute poses a similar problem. 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)*. Section 15 of the HRA requires recognition and equality before the law, the omission of age and disability as protected attributes undermines this principle.

### **3. Consent from the Attorney-General or Director of Public Prosecutions**

QLS supports the Bill's proposal to remove the requirement for the written consent of the Attorney-General or Director of Public Prosecutions (DPP) before commencing a prosecution for serious vilification under section 131A of the *Anti-Discrimination Act 1991 (Qld) (AD Act)*.

QLS notes that this procedural step represented a practical barrier which may have contributed to the underutilisation of s131A of the AD Act. In 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.

### **4. Increase in penalty for contravention of s131A of the AD Act**

The Bill increases the maximum penalty for the offence (s131A of the AD Act once relocated to the Criminal Code) from six months to three years of imprisonment. In circumstances where there have been very few prosecutions of this offence historically<sup>3</sup>, 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

<sup>1</sup> LASC Report No. 22, 57<sup>th</sup> Parliament, Inquiry into serious vilification and hate crimes, p. 45.

<sup>2</sup> World Health Organisation *Global Report on Ageism* (March 2021), 31.

<sup>3</sup> QLS Submission to Inquiry into serious vilification and hate crime 2021.



the penalty to three years imprisonment for the reasons outlined above and in our 2021 submissions<sup>4</sup>.

#### **5. Introduction of statutory circumstance of aggravation to certain Criminal Code offences**

QLS refers to its previous submissions to the LASC Inquiry in relation to vilification and hate speech as a circumstance of aggravation on the offences described in clauses 12 – 20 of the Bill. When compared with other options, this approach may have practical and operational benefits for police who are already familiar with charging, investigating and prosecuting existing laws. Introducing a circumstance of aggravation, of the kind proposed, also serves to recognise the experiences of victims and acknowledges the serious and unacceptable nature of vilification and hate crime.

Accordingly, QLS welcomes the proposal to introduce statutory circumstances of aggravation regarding serious vilification and hate speech into the Criminal Code and *Summary Offences Act 2005* (Qld).

#### **6. Proposed public display offence**

The Bill proposes the creation of a new offence in the Criminal Code in relation to display, distribution or publication of prohibited symbols. The proposed offence 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. The proposed maximum penalty for the offence is 70 penalty units or six months imprisonment.

QLS has previously opposed the introduction of new criminal offence provisions without any, or any adequate, evaluation of the efficacy of intent underpinning the proposed new offences and unintended consequences that may flow.<sup>5</sup>

In addition to our previous submissions in this regard, we observe the following in relation to the drafting of proposed section 52D and implications of same that require further consideration.

QLS observe that the (assumed) conduct intended to be captured by proposed section 52D in Clause 11, may also be captured within the ambit of sections 131A and 124 of the AD Act. The proposed definition of '**public act**' in Clause 7 of the Bill 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;..." [Emphasis added]

In Clause 11, proposed section 52D states:

"(1) 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, unless the person has a reasonable excuse." [Emphasis added]

<sup>4</sup> QLS Submission to Inquiry into serious vilification and hate crime 2021.

<sup>5</sup> QLS Submission to Inquiry into serious vilification and hate crime 2021 p. 5.

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

The conduct of a person who publicly distributes, publishes or displays a symbol in a way that satisfies the elements of section 52D, is conduct that could also be argued as satisfying the elements in s131A of the AD Act. In other words, it is not clear, on the current drafting of proposed section 52D how it is intended to operate, and be distinguished from, section 131A.

Furthermore, the words "*might reasonably be expected*", within the context of s52D, are obscure. It is not clear what the intent of this phrasing is or the judicial test it creates. The shifting of the onus onto the accused to meet the "*reasonable excuse*" threshold is not quibbled with, however the test the Court must apply in making a determination of whether or not "*a person, who publicly distributes, publishes or publicly displays a prohibited symbol*" did so '*in a way that might reasonably be expected*' to have caused a member of the public to feel menaced, harassed or offended, must be clear.

Accordingly, QLS submits that the introduction of new section 52D, in its currently drafted form, is premature and unsatisfactory. To this end, QLS recommends that the Government give further consideration to the phrasing of this new offence provision, so as to make clear the test the Court must apply, and recommends having regard to the test outlined in section 6 (2) (b) of the *Summary Offences Act 2005* (Qld) in this regard.

In conclusion, QLS supports the aspects of the Bill which offer pragmatic solutions to previously identified barriers and enhance policing responses to hate crimes. However, there are aspects of the Bill which are concerning for the reasons outlined above including the creation of a new offence in relation to the public display of hate symbols.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

[REDACTED]  
Chloe Kopilovic  
President

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

**Submission No:** 20 - Supplementary Submission  
**Submitted by:** Queensland Law Society  
**Publication:** Making the submission and your name public  
**See attached:**



8 June 2023

Our ref: [BC:MC]

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

By email: [LASC@parliament.qld.gov.au](mailto:LASC@parliament.qld.gov.au)

Dear Committee Secretary

**Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 – Supplementary submission**

Thank you for the opportunity to appear before the Legal Affairs and Safety Committee on 29 May 2023 on the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023.

Queensland Law Society (QLS) makes this supplementary submission in relation to two matters: the interoperability of section 5E in the *Telecommunications (Interception and Access) Act 1979* (Cth) (**Telecommunications Act**) and the proposed increase in penalty from 6 months to three years in relation to section 131A; and clarification in relation to the proposed drafting of section 52D of the Bill.

**Telecommunication offences**

In evidence before the Committee, representatives of the Queensland Human Rights Commission (QHRC) raised the need to obtain a stored communication warrant, in circumstances where the offending conduct involves the use of telecommunications, in order to access and preserve those communications. A stored communications warrant is issued under the Telecommunications Act and is only available for the investigation of a serious contravention. Generally, the offence must be a serious offence, or an offence punishable for a maximum period of three years.

QLS acknowledges the evidentiary obstacles created by virtue of the relevant provisions of the Telecommunications Act raised by the QHRC, however QLS does not support the increase in penalty to contravention of section 131A based on this tension.

**Proposed section 52D**

In its primary submission, QLS recommended that the Committee have regard to the judicial test created by the drafting of section 6 (2) (b) of the *Summary Offences Act 2005* (Qld), namely:

*(b) the person's behaviour interferes, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.*

To clarify, the reference to this section was made for the exclusive purpose of providing an example of alternative drafting of a judicial test rather than to draw any analogy between the nature of the offence it relates to the conduct the subject of the Bill.

To this end, we observe that when determining whether the elements of section 131A of the AD Act are made out, it is not necessary to prove that anyone was actually “*incited*” as the drafting of the provision is directed at the nature of the act rather than the result of it.

The use of the words “*might reasonably be expected to cause*” creates a subjective test. Upon further consideration, it may also suggest that proposed section 52D is intended to operate in a similar way to section 131A. That is, that the offence can be successfully prosecuted in the absence of a consequence of the conduct being proved. If this is so, confusion as to the test may be resolved by reframing the draft provision as follows:

*A person who publicly distributes, publishes 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.*

The proposed alternative drafting amends the test to an objective standard, which is easier to apply in the absence of an identifiable audience as well as enabling the provision to be applied to public displays of prohibited symbols on the basis of a protected attribute, without the need for a member of the public to feel menaced, harassed or offended.

QLS restates its position that, to be effective, legislative reform should be accompanied by a broader suite of measures, including education and awareness raising

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED] or by phone on [REDACTED]

Yours faithfully

[REDACTED]

Chloe Koprivic  
**President**