

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

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Queensland
**Human Rights
Commission**

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

**Submission
to
Legal Affairs and Safety Committee**

May 2023

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Introduction

1. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The Commission has functions under the Queensland *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
3. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the *Anti-Discrimination Act 1991*, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the *Human Rights Act 2019*.
4. The *Anti-Discrimination Act 1991* prohibits vilification on the grounds of race, religion, sexuality and gender identity. It also currently provides for a criminal offence of serious vilification.
5. In 2020, the Commission facilitated the development and advocacy of the community representative group, the Cohesive Communities Coalition. The Coalition developed an Options Paper that led to the inquiry by this Committee into serious vilification and hate crimes (the **Inquiry**). The Commission provided the Committee with a briefing, a comprehensive submission to the Inquiry, evidence at a public hearing, and a supplementary submission.
6. The Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (the **Bill**) would implement some of the Committee's recommendations from the Inquiry. The Commission was consulted on a draft of the Bill and provided feedback to the department.
7. The Bill would:
 - (a) Relocate section 131A of the *Anti-Discrimination Act 1991* into the *Criminal Code*.
 - (b) Remove the requirement to obtain the written consent of the Attorney-General or Director of Public Prosecutions before commencing a prosecution for serious vilification.
 - (c) Increase the maximum penalty for the offence of serious vilification to three years imprisonment.
 - (d) Introduce a statutory circumstance of aggravation of hate or serious contempt to apply to certain criminal conduct in the *Criminal Code* and *Summary Offences Act 2005*.
 - (e) Create a criminal offence that prohibits the display of hate symbols.

Summary

8. The commission supports:
 - (a) The relocation of s131A of the *Anti-Discrimination Act 1991* into the Criminal Code, the removal of the requirement to obtain the consent of the Attorney-General or Director of Public Prosecutions before commencing a prosecution, and increasing the maximum penalty to three years imprisonment.
 - (b) The introduction of a statutory circumstance of aggravation regarding hate and serious contempt for certain offences.
 - (c) Prohibiting the display of hate symbols.
9. The Commission recommends that the Bill be amended to address the following:
 - (a) Clarify that for vilification and serious vilification, a public act may occur in a closed environment such as a workplace or educational institution.
 - (b) Simplify the test for aggravation.
 - (c) Add the ground of impairment to both the civil and criminal prohibitions of vilification and to the circumstance of aggravation.
 - (d) Make clear that the public display of prohibited symbols includes closed environments such as workplaces, educational institutions, and hospitals.
 - (e) Provide for a review of the operation of aggravated offences against Aboriginal and Torres Strait Islander peoples.
 - (f) Exclude aggravated offensive behaviour towards police

Relocation and amendment of serious vilification

10. The Commission recommended to the Inquiry that section 131A of the *Anti-Discrimination Act 1991* be relocated to the *Criminal Code*, that the maximum penalty be increased to three years, and that the requirement for prior approval for prosecution of an offence be removed.
11. The relocation of the offence and removal of prior approval is expected to aid police in identifying and prosecuting appropriate cases of serious vilification. The increase in the maximum penalty will enable police to obtain a warrant to access communications held by a telecommunications carrier, and it also reflects the serious impact of the offence on relevant communities.
12. Although the offence of serious vilification has been in force since June 2001, there have been very few charges under the provision (the Department of Justice and Attorney-General informed the Inquiry that as of 30 April 2021 there had been five charges laid and three convictions under section 131A). The Inquiry was informed that barriers to laying charges include police being unfamiliar with the provision and the need to obtain the consent of the Director of Public Prosecutions before laying charges. The maximum penalty of less than three years imprisonment also meant that police are unable to obtain the necessary warrant to preserve online and telecommunication evidence.

13. Additionally, the maximum penalty of six months imprisonment does not reflect the seriousness of the offence or community condemnation of the conduct, nor does the use of more common offences such as public nuisance and trespass.
14. The Bill addresses these concerns by relocating the offence into the Criminal Code, increasing the maximum penalty to three years imprisonment, and removing the requirement to obtain the prior consent of the Director of Public Prosecutions or the Attorney-General. The Commission supports these measures.

Public act

15. Unlawful vilification and serious vilification can only occur by a public act.
16. Due to the relocation of section 131A of the *Anti-Discrimination Act 1991*, section 4A will be repealed and a definition of 'public act' will be included in section 124A (the prohibition of vilification that has a civil remedy) and in section 131A (which will become section 52A of the *Criminal Code*). These amendments in the Bill make no change to the current definition of 'public act' in section 4A.
17. In its submission to the Inquiry, the Commission referred to case law in Queensland and NSW where communications within workplaces and schools were considered not to be communications to the public.¹
 - (a) The complaint in *Park* concerned comments made by a trade's teacher to another in the presence of students. Although the Queensland Civil and Administrative Tribunal (the **QCAT**) found that the comments were unrelated to race and not capable of incitement, it also found that statements made in a classroom in the presence of students was not a communication to the public.
 - (b) The complaint in *Bero* concerned comments involving racial connotations made in a workplace that was a sugar Mill where other employees were present. The QCAT was not convinced that the comments incited any of the emotions in section 124A nor that they were in any way a communication to the public.
 - (c) The NSW matter in *Riley* concerned comments made and behaviour at a muster meeting within a school. The tribunal considered it was not a public act because a member of the public was not entitled to be present at the meeting or to hear what was said. The tribunal did not accept that 'public' can consist of employees and contractors at the school.²
18. These decisions that exclude communications within workplaces and schools are not consistent with the intention of the prohibition of vilification. The Premier at the

¹ *Park v State of Queensland & Anor* [2013] QCAT 183; *Bero v Wilmar Sugar Pty Ltd & Ors* [2016] QCAT 371; *Riley v State of New South Wales (Department of Education)* [2019] NSWCATAD 223.

² In NSW legislation makes it unlawful to enter inclosed lands (which includes government schools) without consent or a lawful excuse. In Queensland it is an offence to be on the premises of a State educational institution without lawful authority or reasonable excuse.

time said in the Second Reading Speech in March 2001 that the vilification prohibitions do not proscribe private behaviour.³

19. Work is generally considered a part of a person's public life. For example, the areas of activity in which discrimination is prohibited under the *Anti-Discrimination Act 1991* are areas of public life. Work is an area of activity in which discrimination is prohibited.⁴ Whilst entry into workplaces might be restricted to workers and service providers, an enclosed workplace might include numbers of people ranging from a few to many. Schools also include volunteers, parents, and lay people. People in a workplace comprise a segment of the public. Likewise for educational institutions.
20. The Commission's approach has been that groups of people in workplaces and schools are segments of the public. This approach is consistent with the intention that only private behaviour is excluded from the prohibition of vilification, and that work and education are areas of public life.
21. It would be anomalous that people who perform work outside with others, (for example construction workers, road workers, gardening and landscape providers, surveyors) are protected from vilification but those who work in enclosed environments do not have that protection.
22. The Commission urges the Committee to take this opportunity to recommend that the Bill clarify that a public act may occur in places such as workplaces and educational institutions. This could be achieved by adding a note to subsection (3) that is to be inserted to section 124A by clause 5 of the Bill, to the following effect:

Note: A public act may occur in a closed environment such as a workplace or an educational institution where people are present.
23. For consistency, a correspondent note should also be added to subsection (2) of section 131A that will, by clause 7 of the Bill, become section 52A of the *Criminal Code*.

Additional ground for vilification and aggravation

24. In undertaking the Inquiry, the Committee heard that people with disabilities are subjected to vilification in public as well as in other areas of public life. The Committee heard evidence of distressing harassment and vilification experienced by people of short stature when they try to go about their day-to-day life activities.⁵ The Committee also heard of the devastating impact of vilification on people with disability who are subjected to the conduct and on the community.
25. In a supplementary submission to the Inquiry the Commission considered that the criteria for including disability to the attributes protected from vilification were met. The criteria comprise: demonstrable need, additional harm, and suitability.

³ Paragraph 156 of the Submission.

⁴ *Anti-Discrimination Act 1991* section 6, and Chapter 2 Part 4 Division 2.

⁵ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 15 October 2021, 4.

26. Vilification was specifically excluded from the terms of reference for the Commission's review of the *Anti-Discrimination Act 1991* that culminated in the Commission's *Building Belonging* report. Consequently, the *Building Belonging* report does not make any recommendations in relation to additional grounds for unlawful vilification or serious vilification.
27. However, a number of submissions to the Inquiry recommended expanding or clarifying the attributes for unlawful vilification and serious vilification. In the report on the Inquiry the Committee noted:
- Having reviewed all of the submitted suggestions, the committee considered that some very obvious omissions from protection, which can be the basis for people suffering from (in some cases, extreme) vilification, are 'disability/impairment', 'medical status – including HIV/AIDS status' and the intersex community.⁶
28. Recommendation 4 of the Committee recommended that anti-vilification provisions (in both civil and criminal laws) cover a range of attributes, including sex characteristics and/or intersex status, disability, and medical status including HIV/AIDS status.⁷ The government response to the Committee's report was tabled on 26 May 2022. The government supported in-principle recommendation 4, noting that the Commission was at that time reviewing the *Anti-Discrimination Act 1991* and as part of that review was considering whether there is a need for any reform regarding current attributes in section 7 of the *Anti-Discrimination Act 1991*. The response said the Committee's recommended expansion of sections 124A and 131A to capture additional attributes will be considered in the context of any broader reforms relevant to attributes recommended by the Commission.
29. Since the tabling of the government response to the Committee's recommendations:
- (a) The Commission presented the *Building Belonging* report on the review of the *Anti-Discrimination Act 1991*, and it was tabled in parliament by the Attorney-General on 1 September 2022.
 - (b) The Births, Deaths and Marriages Registration Bill 2022 was introduced into parliament on 2 December 2022.
 - (c) The final government response to the *Building Belonging* report on the review of the *Anti-Discrimination Act 1991* was tabled in parliament by the Attorney-General on 3 April 2023.
30. Recommendations in the *Building Belonging* report relating to attributes include, relevantly:
- (a) amend the definition of 'impairment' and rename it as 'disability';
 - (b) amend the definition of 'gender identity';
 - (c) amend the definition of 'sexuality' and rename it as 'sexual orientation';
 - (d) amend the definition of 'race' to include 'immigration or migration status';

⁶ Legal Affairs and Safety Committee, Parliament of Queensland, *Inquiry into serious vilification and hate crimes* (2022) 43.

⁷ *Ibid* 45.

- (e) include a new attribute of 'sex characteristics'.
31. In terms of additional attributes recommended by the Commission, the only relevant additional attribute is 'sex characteristics'.
32. Unlawful vilification (section 124A) and serious vilification (section 131A) will be amended by the Births, Deaths and Marriages Registration Bill 2022, currently before parliament, to include the attribute of 'sex characteristics'. The definition of 'gender identity' will be amended and a new attribute of 'sex characteristics' will be included. The definition of 'sex characteristics' will cover intersex status.
33. HIV/AIDS status is covered by the current definition of 'impairment' in the *Anti-Discrimination Act 1991*.⁸ Other medical statuses may also be covered.
34. Although the objective of the Bill is to give effect to Recommendations 7, 8, 9, and 16 of the Committee's report and to increase the maximum penalty for serious vilification, it is appropriate that this Bill also give effect to Recommendation 4. The two new attributes for vilification recommended by the Committee are disability and sex characteristics. Sex characteristics will be added by the Births, Deaths and Marriages Registration Bill 2022 leaving only disability to be added to the vilification protections. This could be achieved by a simple amendment to clauses 5 and 7 of the Bill to insert 'impairment' in sections 124A and 131A respectively.
35. A corresponding amendment should be made in clause 12 of the Bill to include the attribute of impairment in the proposed new section 52B of the *Criminal Code*, subsections (1)(a) and (b).
36. Adding impairment as a ground of unlawful vilification and serious vilification is consistent with obligations under the *Convention on the Rights of Persons with Disabilities* (the **CRPD**) to which Australia is a party. Article 16 of the CRPD imposes obligations to take legislative and other measures to protect persons with disability from violence and abuse, and to put in place effective legislation and policies to ensure that instances of violence and abuse against persons with disabilities are identified, investigated, and where appropriate, prosecuted. One of the indicators on freedom from violence, exploitation and abuse is:
- Legislation enacted to prohibit incitement to discrimination, hostility and violence and 'hate speech explicitly include disability among protected grounds.⁹
37. The Commission urges the Committee to recommend that adding the ground of impairment occurs now.

⁸ See for example *NC and others v Queensland Corrective Services Commission* [1997] QADT 22; *S v S* [2000] QADT 4.

⁹ *Article 16: Illustrative indicators on freedom from violence, exploitation and abuse* (2020), 16.11, Component of the SDG-CRPD Resource Package developed by the Office of the United Nations High Commissioner for Human Rights <<https://www.ohchr.org/en/disabilities/sdg-crpd-resource-package>>.

Hate symbols

38. The Commission submitted to the Inquiry that any regulation of the possession and display of symbols and insignia must contain appropriate exceptions that include the historical, cultural, and religious significance of some symbols. Of concern is the appropriation of the term 'swastika' in relation to the Nazi Party and its association with genocide, racism, and white supremacy. The swastika is an ancient and revered symbol with profound meaning in Hinduism, Buddhism, and Jainism. These communities feel strongly that the appropriation of this important religious symbol by the Nazi Party, and by other organisations such as the Carlsberg brewery, is highly offensive and cultural theft.
39. The Committee considered that the display of symbols of hate, such as the Nazi swastika and symbols of ISIS ideology, should be banned, and stressed that such a ban should include exceptions so that, for example, symbols from Hinduism, Buddhism, and Jainism are not inadvertently prohibited.
40. The Commission considers the proposed new offence that prohibits the public distribution, publication, or public display of prohibited symbols, achieves an appropriate balance of the objective of protecting Queenslanders, particularly those from persecuted communities, and freedom of religion and public interest. The criterion for prescribing a prohibited symbol takes account of those that are widely known by the public as well as those widely known by members of a relevant group. The process for prescribing a prohibited symbol by regulation requires consultation by the Minister and recommendation to the Governor in Council. The Commission considers the criterion is sufficiently comprehensive and the process is an appropriate delegation of legislative power to appropriate persons in order to achieve flexibility to account for current and emerging symbols of hate.
41. However, the definition of 'publicly displays' in subsection (4) of proposed section 52D of the Criminal Code would not apply to enclosed workplaces (such as offices where entry is restricted) and possibly schools and other educational institutions.
42. There is no apparent justification for the display of a prohibited symbol in an enclosed workplace to not be caught by the prohibition where the display in an outside workplace would be caught. This issue is similar to that discussed in the submission in relation to the definition of 'public act' for unlawful vilification and serious vilification.
43. Another concern is whether 'publicly displays' would apply to a hospital situation. The Commission is aware of a situation where a patient on a ward in a hospital had a tattoo of the SS Nazi symbol of their chest and refused to wear clothing to cover it.¹⁰ We know of at least one staff member who found it offensive and caused them distress is undertaking their work tasks. Whilst public hospitals are open to the public in some circumstances, for example to go to the emergency centre and to visit patients on wards during visiting hours, the wards are not

¹⁰ The Explanatory Notes (page 4) make it clear that the offence is intended to capture a broad range of circumstances including the public display of tattoos. The Attorney-General confirmed this intention in her introductory speech.

otherwise generally open to the public. And the question arises whether it would be a public display if the patient wore clothing that covered the tattoo during visiting hours but not otherwise.

44. The Commission recommends amendment of proposed section 52D(4) to make it clear that 'publicly displays' includes workplaces, educational institutions, and hospitals.

Test for aggravation

45. Aggravated offences involve hostility towards individuals or groups with specified attributes. The effect of adding a circumstance of aggravation to existing offences is to increase the maximum penalty that a judge or magistrate may impose. The Bill identifies hostility as hatred or serious contempt.¹¹
46. A key purpose of hate crime laws is to signal the unacceptability of the conduct. Aggravated offences are among the most powerful forms of condemnation of characteristic-based criminal hostility.¹²
47. The Bill prescribes the legal test for aggravation as the offender being wholly or partially motivated to commit the offence by hatred or serious contempt for a person or group based on prescribed attributes. The prescribed attributes are:
 - (a) race
 - (b) religion
 - (c) sexuality
 - (d) sex characteristics
 - (e) gender identity.¹³
48. The test of motivation, whether wholly or partially, requires proof of the defendant's subjective reason or reasons for committing the offence. This can be difficult for the prosecution to prove.
49. In the UK, the test for aggravated offences has two alternate limbs: a motivation limb and a demonstration limb. The reason for including a demonstration limb as well as motivation in the legal test was in recognition that proving motivation would create a difficult hurdle for prosecutors to overcome.¹⁴

¹¹ The meaning of hatred and contempt were considered by the President of former Anti-Discrimination Tribunal at the time, Walter Sofronoff QC, in *Deen v Lamb* [2001] QADT 20 with reference to a passage from a decision of the Canadian Supreme Court. Hatred is essentially extreme ill-will and contempt suggests a mental process of looking down upon or treating as inferior.

¹² Law Commission (UK), *Hate Crime Laws* (Consultation paper 250, 23 September 2020) 381 [16.32].

¹³ The attributes of race, sexuality, sex characteristics, and gender identity take on the definitions of these attributes in the *Anti-Discrimination Act 1991*. The Births, Deaths and Marriages Registration Bill 2022 currently before parliament will amend the definition of the attributes of sexuality and gender identity and insert and define a new attribute of sex characteristics.

¹⁴ Law Commission (UK), *Hate Crime Laws* (Final Report No. 402, 6 December 2021) 361 [9.39].

50. The demonstration limb requires proof of the demonstration of hatred or serious contempt. It is an objective test and does not require subjective intent or motivation.
51. The following is an example of how the demonstration limb may apply.
- A passenger on public transport became angry when a group of people entered an already crowded carriage. As a woman and two children who all had luggage tried to move into the carriage, the passenger verbally abused them with references to their race and telling them to go back to where they came from, and the passenger pushed one of the children. The passenger might argue that the assault on the child was because the child entered the already crowded carriage and not because of the child's race.
52. The significance of the demonstration of hatred or serious contempt is that it highlights the context of the offending behaviour, which in the example above was assault. In response to the UK Law Commission's consultation on hate crimes and the question of whether the demonstration limb of aggravated offences should be retained, the Welsh government said, in supporting maintaining the demonstration limb:
- Whether the demonstration of hate at the commissioning of the crime aligns to the underlying motivating intent is immaterial to the impact of the crime on the victim and wider society.¹⁵
53. The impact of the crime on both the victim and wider society is a primary reason for legislating circumstances of aggravation to relevant offences.¹⁶
54. To better achieve the objectives of circumstances of aggravation, the Commission recommends that the test for hatred or serious contempt include demonstration of hatred or serious contempt, as well as the proposed motivation test.

Review of aggravated offences

55. In the submission to the Inquiry, the Commission expressed concern that an aggravated offence of public nuisance might have a disproportionate impact on Aboriginal and Torres Strait Islander people, particularly in engagement with police.
56. The public nuisance offence is committed if a person's behaviour interferes with, or is likely to interfere with, the peaceful passage through or enjoyment of a public place, and the behaviour is in a way that is disorderly, offensive, threatening, or violent. Behaving in an offensive way includes using offensive, obscene, indecent, or abusive language, and behaving in a threatening way includes threatening language.

¹⁵ Ibid 364 [9.48].

¹⁶ In the report on the Inquiry, the Committee considered that providing that a bias motivation is an aggravating factor for certain criminal offences acknowledges the psychological harm caused by vilification and reflects that by way of an increased sanction for offending conduct.

57. The Commission is concerned that an aggravated offence of public nuisance might be used in circumstances that involve swearing at police officers. Minority groups that are over-represented in the criminal justice system and those who come to the attention of police, might be more inclined to swear at the officers. The Queensland Productivity Commission found that Aboriginal and Torres Strait Islander offenders had higher rates of police contact than non-Indigenous offenders, and the average Indigenous offender also experienced a much higher rate of contact with police while under the age of 18 years. Aboriginal and Torres Strait Islander women had 14 times more frequent contact with police than non-Indigenous women.¹⁷ The 2008 report of the Crime and Misconduct Commission on its review of public nuisance offences noted that empirical evidence has repeatedly shown Indigenous people are disproportionately likely to be arrested and that public order offences are a major trigger leading to the detention of Indigenous people in police custody.¹⁸
58. As swearing at police in public has been held to be offensive,¹⁹ an additional spoken word might move the offence into the aggravated category.
59. Indigenous people are significantly over-represented in those charged with public nuisance for using offensive language, often in circumstances where they have accused a police officer of racism. Analysis of reported public nuisance decisions indicates that offensive language directed at police officers by Indigenous women reflects their feelings of powerlessness and marginalisation.²⁰
60. The United Nations Human Rights Committee General Comment on the right to freedom of expression states that ‘the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties’, and ‘laws should not provide for more severe penalties solely on the basis of the identity of the person who may have been impugned’.²¹
61. In the circumstances, the Commission considers there should be a legislative requirement for an independent review of the operation of aggravated offences against Aboriginal and Torres Strait Islander people to commence within three years of operation. The terms of reference for a review should include quantitative and qualitative assessment of the use of the provision against Aboriginal and Torres Strait Islander defendants. This will necessitate appropriate record-keeping.²² The data should be made publicly available.

¹⁷ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* Report 2020, 76.

¹⁸ Crime and Misconduct Commission, *Policing public order: A review of the public nuisance offence* (May 2008) 116.

¹⁹ See for example, *Kris v Tramacchi* [2006] QDC 035; *David v Joel* [2017] QDC 256.

²⁰ Tamara Walsh, ‘Public nuisance, race and gender’ (2017) 26(3) *Griffith Law Review*.

²¹ Human Rights Committee, *General Comment No 34: Article 19 Freedoms of opinion and expression*, 102nd sess, UN doc CCRP/C/GC/34 (12 September 2011).

²² In the report on the Inquiry, the Committee recommended that the Queensland Police ensure standardisation of record-keeping for reports of hate crime and serious vilification. See recommendation 2.

Exclude aggravated offensive behaviour towards police

62. As explained above, there is a real risk that minority groups, in particular Aboriginal and Torres Strait Islander people, may be charged with aggravated offensive behaviour in swearing at police. The purpose of the hatred and serious contempt being a circumstance of aggravation to existing offences such as public nuisance is to protect members of the public from hate-based crimes. It is not intended to protect police from being the subject of abusive language. This is an unintended consequence of the circumstance of aggravation.

63. In *Coleman v Power*,²³ some of the judges of the High Court have said that police would be expected to be able to resist reacting to insults directed at them. For example:

By their training and temperament police officers must be expected to resist the sting of insults directed to them. Gummow & Hayne JJ [200].

... the law would not impute [the] possibility [being provoked to unlawful physical violence] to police officers who, like other public officials, are expected to be thick skinned and broad shouldered in the performance of their duties. Kirby J [258].

... it is to be expected that the object of words will resist their sting, it being contrary to the training of a police officer to engage in, and it being the duty of a police officer to refrain from, unlawful physical retaliation. Heydon J [313].

64. In that case the Court considered the meaning of ‘using insulting words’ in the offence in section 7(1)(d) of the *Vagrants Gaming and Other Offences Act 1931* (since repealed). That phrase is similar to behaving ‘in an offensive way’ in the public nuisance offence in section 6(2)(a)(ii) of the *Summary Offences Act 2005*.

65. The Commission recommends that offensive behaviour towards police constituted by words is excluded from the offence of aggravated public nuisance. This requires an amendment to clause 28 of the Bill.

Human rights

66. The obligations under the *Human Rights Act 2019* (the **HR Act**) operate to ensure that laws, policies, and decisions are made and applied in a way that is compatible with human rights. The expression ‘compatible with human rights’ is defined in the HR Act as meaning, either, that a human right is not limited, or, that a human right is limited only to the extent that is reasonably and demonstrably justified in a free and democratic society based on human dignity, equality, and freedom.

67. In the Statement of Compatibility, the Attorney-General identifies nine human rights in the HR Act that will be limited by increasing the maximum penalty for serious vilification and introducing circumstances of aggravation to certain offences and a new offence of displaying, distributing or publishing prohibited symbols. These rights are:

²³ *Coleman v Power* [2004] HCA 39; 220 CLR 1.

- (a) Recognition and equality before the law (section 15).
 - (b) Freedom of thought, conscience, religion and belief (section 20).
 - (c) Freedom of expression (section 21).
 - (d) Peaceful assembly and freedom of association (section 22).
 - (e) Taking part in public life (section 23).
 - (f) Property rights (section 24).
 - (g) Privacy and reputation (section 25).
 - (h) Cultural rights (sections 27 and 28) Liberty and security of person (section 29).
 - (i) Liberty and security of person (section 29).
68. The Statement of Compatibility also states that the new offence of displaying, distributing or publishing prohibited symbols promotes the following rights:
- (a) Equality and non-discrimination (section 15).
 - (b) Freedom of religion (section 20).
 - (c) Cultural rights (section 28).
69. The right to freedom of thought, conscience, religion, and belief in section 20 of the HR Act, and the right to freedom of expression in section 21 of the HR Act, are drawn from articles 18 and 19 of the *International Covenant on Civil and Political Rights* (the **ICCPR**) respectively.
70. The rights in article 19 of the ICCPR are referred to as the right to freedoms of opinion and expression. The United Nations Human Rights Committee describes freedom of opinion and freedom of expression as ‘essential for any society’, and as constituting ‘the foundation stone for every free and democratic society’. The Human Rights Committee also states:
- Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
- ...
- The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights.²⁴
71. International law requires that given the significance of the right to freedom of expression, restrictions must be exceptional, subject to narrow conditions, and strict oversight. Any limitations must meet three conditions: legality, legitimacy, and necessity and proportionality.²⁵
72. Article 19(3) of the ICCPR provides that the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to restrictions, only where necessary and provided by law, for:

²⁴ Human Rights Committee, *General Comment No. 34: Article 19 Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).

²⁵ David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc A/74/486 (9 October 2019) 5.

- (a) respect of the rights or reputations of others; and
 - (b) the protection of national security or of public order (ordre public), or of public health or morals.
73. The Commission considers that amendments and new offences provided for in the Bill satisfy the criteria for restricting these rights.
74. Assessing compatibility with human rights includes identifying human rights that are relevant to the proposed statutory provisions. The rights to life, security, privacy, and equality and non-discrimination are also relevant to the protections from vilification, formulating aggravated offences, and introducing a new offence prohibiting the display, distribution and publication of prohibited symbols.
75. The right to life imposes a positive obligation on the State to protect life and take positive steps to do so.²⁶ The right to security imposes a positive obligation to protect security of the person, which concerns freedom from injury to the body and the mind, or bodily and mental integrity.²⁷
76. Everyone also has the right not to have their privacy, family, or home interfered with unlawfully or arbitrarily, and everyone is entitled to equality before the law without discrimination, and the right to protection against discrimination.
77. Regulating speech and restricting other means of expression invariably involves the balancing of competing rights. So too for increasing penalties for certain offences as a defendant's right to liberty may be limited by increasing the time that they may be detained in custody.
78. Also of relevance to the assessment of compatibility is Australia's obligations under the international human rights treaties to which it is a party. Importantly, Article 20 of the ICCPR imposes obligations to prohibit by law any propaganda for war and any advocacy of national, racial, or religious hatred that constitutes discrimination, hostility, or violence.
79. As noted earlier in this submission, there is also an obligation under the CRPD to take legislative and other measures to protect persons with disability from violence and abuse, and to put in place effective legislation and policies to ensure that instances of violence and abuse against persons with disabilities are identified, investigated, and where appropriate, prosecuted.
80. The Commission considers that criminalising conduct that advocates national, racial, or religious hatred that constitutes discrimination, hostility, or violence and violence and abuse of persons with disability, are consistent with the permissible limitation of rights and are demonstrably justified in a free and democratic society based on human dignity, equality, and freedom.
81. In terms of the implied right to freedom of political communication in the *Constitution*, the Queensland Court of appeal has determined that section 124A of the *Anti-Discrimination Act 1991* is not inconsistent with that right.²⁸ The judges of

²⁶ The right to life is drawn from Article 6 of the *International Covenant of Civil and Political Rights*, which contains a formal statement that the right shall be protected by law.

²⁷ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014).

²⁸ *Owen v Menzies* [2013] 2 Qd R 327; [2012] QCA 170.

the Court agreed that is section 124A did burden the implied constitutional freedom of political communication, any burden was incidental and reasonably appropriate and adapted to service a legitimate end. That end is the promotion of equality of opportunity for all members of the community by prohibiting objectionable conduct consistent with the purposes of the Act and the Parliament's desire to improve the quality of democratic life through an educated community appreciative and respectful of the dignity and work of all its members. Any burden was confined and controlled by section 124A(2) (the exceptions).

Conclusion

82. The Commission supports the Bill with the recommendations to:
- (a) Clarify that for vilification and serious vilification a public act may occur in closed environments such as a workplace or educational institution.
 - (b) Simplify the test for circumstance of aggravation by included a 'demonstration' limb in addition to the 'motivation' limb.
 - (c) Add the ground of impairment to both the civil and criminal prohibitions of vilification and to the circumstance of aggravation.
 - (d) Make clear that the public display of prohibited symbols includes closed environments such as workplaces, educational institutions, and hospitals.
 - (e) Provide for a review of the operation of aggravated offences against Aboriginal and Torres Strait Islander peoples.
 - (f) Exclude aggravated offensive behaviour towards police.
83. The reform of Queensland's vilification and hate crime laws in the Bill constitute measures to set community standards and sends a clear and unequivocal message that crime motivated by attribute-based hate is unacceptable and will not be tolerated.