

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

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**Submitted by:** Equality Australia  
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# RECOGNISING THE HARMS CAUSED BY HATE:

SUBMISSION TO THE QUEENSLAND LEGAL AFFAIRS AND SAFETY COMMITTEE  
INQUIRY INTO THE CRIMINAL CODE (SERIOUS VILIFICATION AND HATE  
CRIMES) AND OTHER LEGISLATION AMENDMENT BILL 2023

5 May 2023

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## ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

# EXECUTIVE SUMMARY

Equality Australia welcomes the opportunity to make a submission in respect of the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (**Bill**).

## **Everyone deserves to live safely, with dignity and respect.**

Unfortunately, LGBTIQ+ people are among those who continue to be targeted by conduct motivated by hate, including violence, threats of violence, and online abuse. We thank the Queensland Government for taking steps to ensure that people who are targeted because of who they are or whom they love are protected under hate crimes legislation.

Equality Australia welcomes this Bill. Our submission is largely directed at addressing some technical issues to ensure that the Bill realises its potential in protecting survivors of hate crimes. We are concerned that, while the Bill will protect many LGBTIQ+ people who experience hate crimes, it may not necessarily protect those who experience some of the most serious forms of hate crime.

Accordingly, we make the following recommendations to improve the Bill:

1. **Amend the sentencing framework.** Following the approach taken in Victoria, New South Wales, South Australia and the Northern Territory, we recommend introducing a sentencing consideration into section 9 of the *Penalties and Sentences Act 1992* (Qld) that allows a court to increase the severity of a sentence for any offence (other than those offences captured by the aggravated offences framework) where the offence is motivated by prejudice against a group of people. This will plug a gap left by the aggravated offences framework introduced by the Bill which means that prejudice-based motivations can inform sentencing for the most serious offences.
2. **Ensure that the hate crimes framework is fit for purpose** by amending proposed section 52B of the *Criminal Code Act 1899* (Qld) (**Criminal Code**) to:
  - a. **Ensure it captures all commonly experienced hate crimes.** This can be done by expanding the list of prescribed offences for the purposes of proposed section 52B to include all offences directed at a person or their property which are commonly experienced by the groups protected by the legislation. At a minimum, this should include sexual offences, domestic violence offences and property offences such as stealing, robbery and graffiti offences.
  - b. **Ensure that offenders motivated by all forms of prejudice are captured.** This can be done by ensuring offenders who commit crimes motivated by characteristics or stereotypes they wrongly impute to people with particular attributes are also treated as having done so 'based on' hatred or serious contempt.
  - c. **Protect everyone likely to experience hate crimes.** This can be done by:
    - i. clarifying that hate crimes can be motivated by prejudice to people with more than one attribute;
    - ii. ensuring survivors targeted because of their association with a protected person or protected group are also protected; and
    - iii. extending protections to all people who commonly experience hate crimes based on who they are or their protected attributes, such as people with HIV, sex workers, people with disability and people who are homeless.

We have limited our comments to the areas of most importance and which go beyond the submissions we previously made to this Committee as part of its inquiry into serious vilification and hate crimes. We would be happy to provide the Committee with our previous submissions in this regard.

# THE NATURE OF HATE CRIME EXPERIENCED BY LGBTIQ+ PEOPLE

**When designing legislation to address hate crimes and hate-based conduct, it is important first to understand how these crimes manifest and the harms that they cause. Without this understanding, legislation may fail to respond properly to the nature of hate crimes experienced by the particular groups which the legislation seeks to protect.**

Hate-related attacks are, in general, more violent, brutal and vicious and have a deeper psychological effect on the victim and the community to which the victim is a member, compared with other assaults that are not motivated by prejudice.<sup>1</sup> Courts in other states have also acknowledged that there is greater harm caused when an offender intentionally selects a victim based on prejudice towards the victim's identity because these types of attacks not only have an effect on the victim, but on members of the target group as well as other targeted groups in the community.<sup>2</sup>

That is why targeted hate crime legislation is warranted. It both indicates to the targeted group that their safety and dignity matters to the community and it communicates to perpetrators of hate crimes that their actions are not condoned by society at large.

Unfortunately, LGBTIQ+ people remain vulnerable to conduct motivated by hate, and there is evidence that incidents of such conduct are increasing. For example, data on experiences of harassment and violence from the national *Private Lives* reports, being the largest surveys of LGBTIQ+ people in Australia, suggests that there is an increase in the proportion of the LGBTIQ+ community who have experienced violence and harassment due to their sexual orientation or gender identity.<sup>3</sup> The most significant increase was seen in LGBTIQ+ people being targets of written threats and abuse, including via emails and social media.<sup>4</sup>

We have also seen a number of high-profile incidents where LGBTIQ+ people have been targeted with threats and violence. Recent incidents have included:

- violent attacks that have been experienced by LGBTIQ+ people attending, or in the vicinity of queer-identified spaces, such as pride events and LGBTIQ+ venues;
- threats of violence directed at LGBTIQ+ people, particularly transgender people and drag artists, who are involved in performances or events designed to introduce young people to diversity and inclusion;
- campaigns of online abuse targeting LGBTIQ+ people.

Different groups may experience different forms of hate crime or experience hate crimes from a different type of perpetrator. For example, LGBTIQ+ people and women experience particularly high rates of sexualised forms of violence.<sup>5</sup> LGBTIQ+ people are susceptible to violence from both people they know and those who they do not,

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<sup>1</sup> Tasmanian Law Reform Institute (2011) [Racial Vilification and Racially Motivated Offences Final Report](#) at 28; Parliament of Victoria Legal and Social Issues Committee (2021) [Inquiry into anti-vilification protections report](#) at 39.

<sup>2</sup> *DPP v Caratuzzolo* [2009] VSC 305 at 15. In this case, the accused was part of a gang which had set out with the intention of mugging people of Asian or Indian descent.

<sup>3</sup> Leonard et al (2012) [Private Lives 2](#), Melbourne: ARCSHS, La Trobe University at 47. Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University at 40. Note: the research only reports on incidents of harassment and violence based on their sexual identity or gender identity and not sex characteristics or intersex status. For this reason, we have used 'LGBTIQ+' to clarify that intersex people are not included in this data.

<sup>4</sup> Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University at 40.

<sup>5</sup> For example, 1 in 5 women, compared to 1 in 21 men, experienced sexual violence since the age of 15. See Australian Institute of Health and Welfare (2023) [Family, domestic and sexual violence](#). See also Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#) at 40-41; Callander et al (2018) [Australian Trans and Gender Diverse Sexual Health Survey](#) at 10. Both surveys reveal that LGBTIQ+ people experience particularly high rates of sexual violence, with 1 in 10 reporting they had experienced sexual assault due to their sexual orientation or gender identity. This statistic is significantly higher for trans people, who are 4 times more likely to experience sexual violence or coercion compared to the general Australian public.

especially when they are visibly LGBTIQ+.<sup>6</sup> Evidence suggests that some LGBTIQ+ people may also experience more serious forms of assault or even murder.<sup>7</sup>

Overall, the most common types of violence or harassment faced by LGBTIQ people due to their sexual orientation or gender identity include:

- verbal abuse (including over the phone);
- harassment (e.g. being spat on and offensive gestures);
- receiving written threats of abuse (including via emails or social media);
- threats of physical violence, physical attack or assault without a weapon; and
- sexual assault.<sup>8</sup>

To properly protect LGBTIQ+ people from the kinds of hate crimes they are likely to experience, it is important that legislation properly responds to the way in which hate crime manifests for this group. Unfortunately, this is where we think that this Bill has fallen short of its full potential. In the next section, we explore how this can be addressed through technical amendments to the Bill.

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<sup>6</sup> For example, LGBTIQ+ people face significant level of heterosexist sexual violence in addition to intimate partner sexual violence occurring at a similar rate in heterosexual relationships. In a study on safety at gay and lesbian public events, gay men were more likely to be exposed to physical violence, while lesbian women were more likely to experience sexually harassing behaviours in public space, suggesting that there are gendered patterns in the occurrence of heterosexist violence: see Australian Centre for the Study of Sexual Assault (2012) [Sexual Violence and gay, lesbian, bisexual, intersex and queer communities](#) at 4-5. Also, families of origin are a significant source of violence experienced by LGBTIQ+ people, in addition to intimate partners and housemates: M Gibson, G Kassisieh, A Lloyd and B McCann (2020) [There's No Safe Space at Home: Domestic and family violence affecting LGBTIQ+ people](#), Equality Australia: Sydney and Melbourne and the Centre for Family Research and Evaluation, Drummond Street Services: Melbourne at 16-19.

<sup>7</sup> See [R v Irving \[2004\] QCA 305](#), where a gay man was violently assaulted by an offender who thought that the victim had given him an 'inappropriate smile' and said 'I'm going to kill you, you dirty poofier. I'm going to kill you faggot.'; see also [R v Johnstone \[2011\] VSC 300](#), where the offender was convicted of the murder of his housemate, who was gay.

<sup>8</sup> Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University at 40.

# PROPERLY ADDRESSING HATE CRIME

The Bill has adopted an aggravated offences framework for addressing hate crime which has the perverse effect of providing less protection when offences are more serious. To remedy this issue, we suggest amending the framework in proposed section 52B of the *Criminal Code* so it properly captures common experiences of hate crime, and introducing a sentencing consideration for crimes which are not captured under this framework. This will ensure Queensland follows the approach taken in several other states and territories in allowing courts to recognise the harm caused by hate no matter the form of crime in which that hate has materialised.

## 1. HATE CRIME AGGRAVATED OFFENCES

Clause 12 of the Bill proposes to introduce certain aggravated forms of offences when a limited list of prescribed offences are wholly or partly motivated by hate towards a person or group of people who have, or are presumed to have, a particular race, religion, sexuality, gender identity or sex characteristics. When these aggravated forms of offences are committed, the maximum penalty is increased.

In principle, we do not oppose the idea of a class of aggravated offences where otherwise general offences have been committed based on hate. However, we believe the framework in proposed section 52B of the *Criminal Code* (which is proposed in clause 12 of the Bill) falls short in three specific ways:

- it fails to capture all types of hate crimes that those groups it covers are more likely to experience;
- it may be difficult to prove a hate crime where the motive for the conduct is mistakenly based on stereotypes, rather than the protected attribute itself; and
- it excludes from protection people who are regularly targeted based on other attributes, as well as the associates of people who are being targeted.

### (a) Not all common types of hate crimes are captured

The aggravated offences framework established by clause 12 of the Bill is limited to a narrow list of prescribed offences. Offences that are currently excluded include serious assaults under subsection 340(1) of the *Criminal Code* and domestic violence offences and sexual offences under subsections 352(1) and (2) of the *Criminal Code*. The experience of hate crimes particularly targeted at people based on their sexual orientation or gender identity often involves severe forms of violence that can include sexualised violence,<sup>9</sup> or can be directed at them based on

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<sup>9</sup> See for example the cases of:

- Mhelody Bruno, a Filipina trans woman who was the victim of a manslaughter in Wagga Wagga: [R v Toyer](#) [2021] NSWDC 69.
- Andrew Negre, a man who was killed by Michael Lindsay after he propositioned Lindsay for sex: [Lindsay v The Queen](#) [2015] HCA 16.
- The spate of killings in NSW that were motivated by the sexuality or gender identity of the victims: Stephen Tomsen (1996) [Gay Killings in New South Wales: Victimisation and the Legal Response](#); Jenny Mouzos and Sue Thompson (2000) [Gay-hate related homicides: an overview of major findings in NSW](#), *Trends & Issues in Crime and Criminal Justice*, no. 155, Canberra: Australian Institute of Criminology.

Further, 12% of LGBTIQ people experienced sexual assault due to their sexual orientation or gender identity, see Hill et al (2020) [Private Lives 3: The health and wellbeing of LGBTIQ people in Australia](#), Melbourne: ARCSHS, La Trobe University at 40.

their sexual orientation or gender identity from family members.<sup>10</sup> The Bill also currently does not cover offences against property such as stealing<sup>11</sup>, robbery<sup>12</sup> and burglary<sup>13</sup>.

These new aggravated offences may therefore not cover some typical crimes where anti-LGBTIQ+ hatred or prejudice is likely to be a motivating factor. Alternatively, this framework may have the perverse effect of meaning that hate-based motives are not appropriately recognised for more serious offences that already have significant maximum penalties (such as life imprisonment) but where a court may not place the offending at that more serious end of the sentencing spectrum. This may have the effect of rendering the hate crimes framework ineffective the more serious the crime being prosecuted, given the prosecutor will usually select the most serious charge which can be established by the evidence.

To overcome this limitation, we suggest that the list of prescribed offences is widened to include all offences directed at a person or their property which are commonly experienced by the groups being targeted, including sexual offences. In addition, or alternatively, we think the better approach is to introduce an additional sentencing consideration, as New South Wales, Victoria, the Northern Territory and South Australia have done, which allows sentencing to be increased within the maximum range where hate-based motives form part of any offence (see further at section 2 below).

### RECOMMENDATION 1

Extend the 'prescribed offences' for the purposes of proposed section 52B of the *Criminal Code act 1899* (Qld) to include all offences committed against a person or their property which are commonly experienced by the groups being protected by the legislation. At a minimum, this should include sexual offences, domestic violence offences and property offences such as stealing, robbery and graffiti offences.

#### (b) Hate based on mistaken beliefs or stereotypes

We are concerned that it may be difficult to establish the circumstances of aggravation requirement under proposed section 52B where the offender is motivated by characteristics mistakenly associated with particular attributes, regardless of whether the person has or is presumed to have that attribute. This is because of the 'based on' test, which is proposed as part of section 52B.

Take for example an offender who attacks a drag artist by wrongly associating them with paedophilia or grooming. This has been a common basis of attack recently experienced by members of our communities. For example, in January 2020, a group of university students charged into the Brisbane Square Library where a Drag Queen story time event was being held, chanting "drag queens are not for kids". The event caused extreme distress for children and parents in attendance.<sup>14</sup>

Currently, the Bill requires the prosecution to establish that the offender was motivated wholly or partly by the victim's sexual orientation or gender identity or presumed sexual orientation or gender identity. The difficulty with this may be the disconnect in the available evidence between the offender's mistaken belief and the attribute of the victim. The evidence may only show that the offender believes they are proceeding against someone because they are a risk to children, and it is the offender's motivation that frames how the provision will apply.

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<sup>10</sup> Families of origin are a significant source of violence experienced by LGBTIQ+ people, in addition to intimate partners and housemates: see M Gibson, G Kasssieh, A Lloyd and B McCann (2020) *There's No Safe Space at Home: Domestic and family violence affecting LGBTIQ+ people*, Equality Australia: Sydney and Melbourne and the Centre for Family Research and Evaluation, Drummond Street Services: Melbourne at 16-19. See also M Carman et al (2020) *Pride in Prevention: A guide to primary prevention of family violence experienced byGBTIQ communities*, Rainbow Health Victoria, La Trobe University at 6.

<sup>11</sup> *Criminal Code 1899* (Qld) s 398.

<sup>12</sup> *Criminal Code 1899* (Qld) ss 411(1) (robbery), 412(1)-(2) (attempted robbery), 413 (assault with intent to steal).

<sup>13</sup> *Criminal Code 1899* (Qld) ss 419(1) (burglary), 421(1)-(2) (entering or being in premises and committing indictable offences).

<sup>14</sup> L Edmiston (2020) '[Lawsuits and suicide: The shocking fallout of Drag Queen Storytime fiasco](#)', *The Courier Mail* (online, 18 September).



The *Anti-Discrimination Act 1991* (Qld) solves this issue by extending the definition of discrimination to conduct which is based on characteristics which are commonly (although wrongly) associated with those who have a protected attribute.<sup>15</sup> So for example, if you attack a person based on the mistaken belief that all LGBTIQ+ people are a risk to children, you are discriminating against people based on their sexual orientation or gender identity – regardless of whether your motivation was actually to protect children from harm.

We suggest that proposed section 52B of the *Criminal Code* is amended to include a provision, similar to provisions used in section 8 of the *Anti-Discrimination Act 1991* (Qld), which makes clear that an offender's conduct is 'based on' an attribute or presumed attribute, if the offender is motivated by characteristics or stereotypes that they wrongly impute to people with that attribute.

## RECOMMENDATION 2

Amend proposed section 52B of the *Criminal Code Act 1899* (Qld) by inserting a new sub-clause, such as:

- (3) *In determining whether the motivation for an offence was based on the attributes or presumed attributes in (1)(a) or (1)(b), any characteristics or stereotypes imputed by the offender to those attributes or presumed attributes are to be treated as being based on those attributes or presumed attributes.*

### (c) Protection for everyone who experiences a hate crime

The Bill currently proposes that the aggravated offences require prejudice against a person or group of people based on a narrow list of protected attributes, namely race, religion, sexual orientation, sex characteristics or gender identity. This may limit the protections in two key respects.

- *First*, we are concerned that the drafting of proposed subsections 52B(1)(a) and (b) may fail to protect people associated with other people who have the protected attributes or presumed attributes, and who are also the victims of the hate crime. For example, consider an attack on an LGBTIQ+ venue or event. Not all of the people who are hurt in such an attack will share (or be presumed to share) the same attribute of sexual orientation or gender identity by the offender. It should be enough that the offender was motivated by the sexual orientation or gender identity of any person, or any member of the group. We think this matter could be clarified in the explanatory memorandum or by clarifying the drafting of subsections 52B(1)(a) and (b) which currently frame the circumstances 'in relation to' a particular person or group of persons with the attributes or presumed attributes.
- *Second*, this framework does not currently protect people who are frequently the target of hate crimes based on other attributes, such as people who are HIV positive, sex workers, people who are homeless, or who have a disability.

For these reasons, we consider that the Bill should be amended to clarify that the protections exist for all victims who are associated with a person or group with the protected attributes or presumed attributes, as well as offences motivated by hatred for any combination of the protected attributes. We also believe that these protections should be extended to all people who commonly experience hate crimes based on who they are or their protected attributes, including people with HIV, sex workers, people with disability and people who are homeless.

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<sup>15</sup> *Anti-Discrimination Act 1991* (Qld) s 8(b).

### RECOMMENDATION 3

To protect people who are targeted because of their association with others with any combination of the protected attributes, we suggest amending section 52B as follows:

- (1) *It is a circumstance of aggravation for a prescribed offence that the offender was wholly or partly motivated to commit the offence by hatred or serious contempt for a person or group of persons based on **any one or more of the following** –*
  - (a) *in relation to a person – the race, religion, sexual orientation, sex characteristics, gender identity of the person **or any person**, or presumed race, religion, sexual orientation, sex characteristics or gender identity of the person **or any person**; or*
  - (b) *in relation to a group of persons – the race, religion, sexuality, sex characteristics or gender identity shared, or presumed to be shared, by ~~the~~ **any** members of the group.*

### RECOMMENDATION 4

Extend the protections afforded under section 52B to all people with attributes that are commonly the target of hate crimes, including people with HIV, sex workers, people who are homeless and people with disabilities.

## 2. SENTENCING CONSIDERATIONS

In addition to amending the aggravated offences framework in the Bill, we suggest proceeding with an alternative approach that has been already adopted elsewhere in Australia and overseas.

Victoria, New South Wales, South Australia and the Northern Territory each include a sentencing consideration as part of their sentencing framework which allows courts to increase the severity of a sentence for any offence when it has been motivated by prejudice towards a person or group of persons.<sup>16</sup> There are also international examples in New Zealand, Canada and the United Kingdom.<sup>17</sup>

These sentencing considerations can be framed so that, if a prejudice motivation is already an element of the offence, the sentencing consideration does not apply. For example, after specifying the sentencing consideration, section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) relevantly provides:

*The court is not to have additional regard to any such aggravating factor in sentencing if it is an element of the offence.*

Such a provision would allow the Bill to proceed with both the aggravated offences framework in proposed section 52B *and* a sentencing consideration for offences which are not prescribed or which have maximum penalties of life imprisonment. This will remove the perverse effect of having more serious hate crimes from falling outside the scope of the framework by allowing courts to still take into account the harm caused by hate when making sentencing decisions.

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<sup>16</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h); *Sentencing Act 1991* (Vic) s 5(2)(daaa); *Sentencing Act 1995* (NT) s 6A(1)(e); *Sentencing Act 2017* (SA) s 11(1)(ca).

<sup>17</sup> See *Criminal Justice Act 2003* (UK) s 66; *Sentencing Act 2002* (NZ) s 9(h); *Criminal Code* (Canada) s 718.2.

## **RECOMMENDATION 5**

Introduce a new sentencing consideration into section 9(2) of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider hate-based motivations, for example:

*(gb) where the offence does not involve the circumstances of aggravation under section 52B of the Criminal Code – whether the offence was motivated wholly or partly by hatred or serious contempt for a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sexual orientation, sex characteristics or gender identity); and*