

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

Explanatory Notes

Short title

The short title of the Bill is the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023.

Policy objectives and the reasons for them

On 31 January 2022, the Legal Affairs and Safety Committee (LASC) tabled in the Legislative Assembly, its Report *Inquiry into serious vilification and hate crimes* (No. 22 57th Parliament) (the LASC Report).

The LASC Report contained 17 recommendations, all of which have been supported, or supported in principle.

The objective of the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (the Bill) is to give effect to Recommendations 7, 8, 9 and 16 of the LASC Report. These recommendations were set out in the LASC Report as follows:

- **Recommendation 7:** that the Queensland Government investigate the viability of removing the requirement for the written consent of a Crown Law officer before commencing a prosecution for serious racial, religious, sexuality or gender identity vilification under section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) of the *Anti-Discrimination Act 1991* (AD Act);
- **Recommendation 8:** that the Queensland Government introduce a statutory aggravation regarding hate/serious vilification into the *Criminal Code Act 1899* (the Criminal Code) and *Summary Offences Act 2005* (the SO Act) to apply to criminal conduct;
- **Recommendation 9:** that the Queensland Government relocate section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) from the AD Act into the Criminal Code;
- **Recommendation 16:** that the Queensland Government establish a criminal offence that prohibits the display of hate symbols, including those relating to Nazi and ISIS ideology, with considered exceptions.

An additional objective identified through consideration of the LASC Report is to increase the maximum penalty for the offence under section 131A of the AD Act. The increase to the maximum penalty reflects the seriousness of this type of offending and the community's denunciation of such conduct.

Achievement of policy objectives

Amendments to the *Anti-Discrimination Act 1991*

The Bill seeks to amend the AD Act to give effect to Recommendations 7 and 9 of the LASC Report.

The Bill provides for the removal of current section 131A(2) of the AD Act, being the requirement for a Crown Law Officer's written consent to be obtained prior to a proceeding being commenced for an offence under section 131A(1).

The Bill gives effect to Recommendation 9 by relocating section 131A from the AD Act and to the Criminal Code. The relocated offence will be new section 52A of the Criminal Code. The maximum penalty for the offence will be increased from 70 penalty units or 6 months imprisonment to three years imprisonment.

Amendments to the Criminal Code and *Summary Offences Act*

The Bill amends the Criminal Code and the SO Act to give effect to Recommendations 8 and 16 of the LASC Report.

Recommendation 8 of the LASC Report

Clause 12 of the Bill introduces new section 52B (Circumstances of aggravation for particular offences) into the Criminal Code which creates a new circumstance of aggravation for existing offences in the Criminal Code that are prescribed in new section 52B(2).

The circumstance of aggravation is to apply where the offender, in committing the offence, is wholly or partly, motivated by hatred or serious contempt for a person or group of persons based on the person's (or group of persons') actual or presumed race, religion, sexuality, sex characteristics or gender identity (or the actual or presumed race, religion, sexuality, sex characteristics or gender identity shared by members of the group).

Clauses 13 to 20 of the Bill list the specific Criminal Code offences to which the circumstance of aggravation is to apply, being section 69 (Going armed as to cause fear), section 75 (Threatening violence), section 207 (Disturbing religious worship), section 335 (Common assault), section 339 (Assaults occasioning bodily harm), section 359 (Threats), Section 359E (Punishment of unlawful stalking, intimidation, harassment or abuse)¹; and section 469 (Wilful damage). A new maximum penalty is introduced for each of these aggravated offences. No changes to the existing jurisdictional disposition are made to any of the offences where the circumstance of aggravation applies.

The SO Act is also amended to provide that the circumstance of aggravation applies to the existing offences of Public nuisance under section 6 and Trespass under section 11. As an example of the operation of the aggravated offence, if it is alleged that an individual has committed the Public nuisance offence by virtue of having performed a Seig Heil (or Nazi salute) in a public place, it may be further alleged that the individual was motivated to commit the offence, wholly or partly, due to hatred or serious contempt for a person or group of persons based on the person's (or group of persons') race, religion, sexuality, sex characteristics or gender identity. Whether or not the circumstance of aggravation applies to the offence will ultimately depend on the circumstances of the conduct.

Recommendation 16 of the LASC Report

The LASC Report noted that hate symbols can cause significant distress, particularly to persons from persecuted communities. In the context of the Nazi Hakenkreuz, the LASC Report also noted the submission from the Queensland Jewish Board of Deputies that public display of such hate symbols:

impacts the sense of safety and security of all Queenslanders, including those who are members of groups and communities that have historically been the targets of Nazi policies of genocide, mass murder and other forms of persecution, such as Jews, Roma people, the disabled and LGBTIQ people.

The public display of symbols that are solely or substantially representative of an ideology of extreme prejudice against particular groups causes significant harm; such symbols represent hate, genocide, and trauma, regardless of the motivation for the display of the symbol.

To protect the community from the distress and insecurity associated with the display of such symbols, the Bill introduces new section 52C (Prohibited symbols) into the Criminal Code to give effect to Recommendation 16 of the LASC Report. The purpose of new section 52C is to establish a framework to prescribe symbols or images ('prohibited symbols') that are representative of an ideology of extreme prejudice against a relevant group.

¹ As amended by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*.

A ‘prohibited symbol’ is a symbol or image prescribed by regulation, or one that so nearly resembles a symbol prescribed by regulation that it is likely to be confused with or mistaken for that symbol.

Under section 52C(3) of the Criminal Code, the Minister may, after consultation with listed stakeholders, recommend the Governor in Council make a regulation prescribing a prohibited symbol. The Minister can do this only if satisfied that the symbol or image is widely known by the public, or by members of a ‘relevant group’, as being solely or substantially representative of an ideology of extreme prejudice against a relevant group. ‘Relevant group’ is defined to tie in with the attributes protected by the offence under section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) of the AD Act and under new section 52B (Circumstances of aggravation for particular offences) of the Criminal Code.

To give effect to Recommendation 16, the Bill introduces a new offence under section 52D (Display, distribution, or publication of prohibited symbols) of the Criminal Code. The offence prohibits the public display, public distribution, or publication of a prohibited symbol (as prescribed under section 52C) 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 maximum penalty for the offence is 70 penalty units or six months imprisonment. The offence is intended to capture a broad range of circumstances, including the public display of tattoos and the public distribution or publication of prohibited symbols online.

Several excuses to the offence under section 52D are provided. The list is not exhaustive. A person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement purpose; a public interest purpose; or to oppose the ideology represented by the prohibited symbol. The purpose relied on must be showed to have been reasonable in the circumstances.

It is intended that an excuse might be available where the public display is made in books, body art, plays, satire, film and documentaries, museums and universities, on historical models, during historical re-enactments, and for religious or scientific and research purposes.

Although the Bill does not prescribe a prohibited symbol, the Nazi Hakenkreuz (or Hooked Cross) significantly resembles the swastika, which has peaceful and profound meaning in some religions including Hinduism, Buddhism and Jainism. The ‘religious’ excuse is intended to ensure that the display of symbols, such as the swastika, in these contexts is not captured by the offence.

It is also intended that the ‘historical’ excuse be available in relation to the display of historical memorabilia depicting a prohibited symbol for the ancillary purpose of sharing or advertising the item for sale, in circumstances that are genuine and reasonable for this purpose.

To rely on an excuse, the defendant will be required to point to evidence to raise the excuse (evidential burden), which the prosecution must then disprove beyond a reasonable doubt (legal burden).

Amendments to the *Police Powers and Responsibilities Act 2000*

The Bill amends the *Police Powers and Responsibilities Act 2000* (PPRA) to assist in the enforcement of amendments that give effect to Recommendation 16.

The Bill amends sections 30 and 32 of the PPRA to allow a police officer to search a person or vehicle without a warrant where the officer reasonably suspects the person has committed or is committing the offence under new section 52D (Display, distribution, or publication of prohibited symbols) of the Criminal Code. A police officer will therefore have the power to stop, detain and search the person/vehicle and seize all or part of a thing that may provide evidence of the commission of the offence.

Alternative ways of achieving policy objectives

There are no alternative ways to achieve the policy objectives.

Estimated cost for government implementation

Any costs arising from these legislative amendments will be met from existing agency resources. Any funding required beyond existing agency resources will be subject to normal budget processes.

Consistency with fundamental legislative principles

The Bill has been drafted with due regard to the fundamental legislative principles outlined in the *Legislative Standards Act 1992* (LSA) by achieving the appropriate balance between individual rights and liberties and the protection of minorities and the general community. Potential breaches are addressed below.

Amendments to the *Anti-Discrimination Act 1991*

Clause 7 of the Bill increases the maximum penalty for the offence under section 131A of the AD Act. The amendments are potential breaches on the rights and liberties of individuals (section 4(2)(a) LSA), however, the increases are considered justified to protect the general community and minorities from fear and harassment and to ensure that such behaviour is adequately punished in line with community expectations. The proposed penalty is therefore considered proportionate and appropriate.

Clauses 7 and 8 also remove the requirement for a Crown Law Officer's consent to commence proceedings under current section 131A of the AD Act for offences committed, but for which proceedings have not yet commenced at the time of commencement of the Bill. This potentially breaches the requirement for laws not to retrospectively adversely affect rights and liberties (section 4(3) of the LSA). However the retrospective application of the amendment is considered justified as it is largely procedural and, as noted in the LASC Report, is an unnecessary impediment to the expeditious prosecution for an offence under section 131A of the AD Act.

Amendments to the Criminal Code and *Summary Offences Act*

Clause 12 creates a new circumstance of aggravation for prescribed offences, with increased penalties being applied through clauses 13 – 20. Clauses 28 and 29 apply the same circumstance of aggravation to sections 6 and 11 of the SO Act, with increased penalties. The amendments are potential breaches on the rights and liberties of individuals (section 4(2)(a) LSA), however, the increases are considered justified to protect the general community and minorities from fear and harassment, and to ensure that such behaviour can be adequately punished in line with community expectations.

Clause 12 also creates a new offence prohibiting the public display, public distribution or publication of a prescribed symbol, as described above. The amendment is a potential infringement of rights and liberties of individuals (section 4(2)(a) LSA). The potential breaches are considered justified to protect the general community and minorities from fear and harassment and to prevent the spread of harmful extremist ideology. To limit the breach and provide a safeguard, several excuses are provided to the offence. They necessarily reverse the evidential onus of proof as the defendant is best placed to provide evidence of the purpose of their conduct.

Clause 12 provides a head of power to declare symbols as prohibited in a Regulation. This approach may potentially be considered to breach section 4(4)(c) of the LSA, which provides that a Bill must have sufficient regard to the institution of Parliament and should only authorise the amendment of an Act by another Act. This potential breach is considered justified on the basis that the approach is in the public interest, as it will allow the Minister to quickly respond to emerging symbols and images associated with extremist ideology.

There are a number of limitations and safeguards on the proposed Regulation-making power. Before recommending the making of the regulation to prescribe a prohibited symbol, the Minister is required to be satisfied the symbol or image is widely known by the public, or by members of a ‘relevant group’, as being solely or substantially representative of an ideology of extreme prejudice against a relevant group. ‘Relevant group’ is defined by the Bill to mean a group of persons who identify with each other on the basis of an attribute or characteristic that is, or is based on, the race, religion, sexuality, sex characteristics or gender identity of the persons.

Further, before making the recommendation, the Minister will also be required to consult with the chairperson of the Crime and Corruption Commission, the Human Rights Commissioner and the Police Commissioner.

Amendments to the *Police Powers and Responsibilities Act 2000*

Clauses 25 and 26 apply existing powers in the PPRA to stop, detain and search a person or vehicle without a warrant and seize evidence of the commission of the offence created by this Bill. This is a potential breach of the requirement to not confer warrantless search and seizure powers (section 4(3)(e) of the LSA) but is considered justified for the proper enforcement of the offence. The existing limitations and safeguards under the PPRA on this power apply and will appropriately limit the potential breach.

Consultation

A consultation draft of the Bill was provided to key legal and multicultural stakeholders. Stakeholders were invited to provide feedback on the Bill and this feedback has been taken into account in finalising the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland. Although uniformity with other jurisdictions is not required, due regard has been had to the approach taken in other Australian jurisdictions in the development of the Bill.

Notes on provisions

Part 1 Preliminary

Clause 1 states that when enacted the Bill may be cited as the *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023*.

Clause 2 states that the Act will commence on a day to be fixed by proclamation.

Part 2 Amendment of Anti-Discrimination Act 1991

Clause 3 states that this part amends the *Anti-Discrimination Act 1991* (AD Act).

Clause 4 removes section 4A (Meaning of *public act*), which is replicated and inserted into sections 124A and 131A through clauses 5 and 7 of the Bill. This amendment will ensure that the definition of *public act* will continue to apply to section 124A of the AD Act following the relocation of section 131A to the Criminal Code.

Clause 5 amends section 124A (Vilification on grounds of race, religion, sexuality or gender identity unlawful) to insert new subsection (3), which replicates and inserts the existing definition of *public act* which clause 4 removed.

Clause 6 removes the heading of Chapter 5A (Serious racial and religious vilification)

Clause 7 amends section 131A (Offence of serious racial, religious, sexuality or gender identity vilification). Subclause (1) removes the existing penalty and provides the new maximum penalty of 3 years imprisonment.

Subclause (2) removes existing sections 131A(2) – (4) to remove the requirement for the written consent of a Crown Law Officer prior to commencing a prosecution under section 131A. It replicates and inserts the existing definition of *public act* which clause 4 removed.

Subclause (3) relocates the entirety of section 131A of the AD Act to the Criminal Code, part 2, chapter 7A, as inserted by this Act, and renumbers it as new section 52A.

Clause 8 inserts Part 9 (Transitional provision for Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023) into Chapter 11.

Under Part 9, new section 281 (Continued application of former section 131A) is inserted. Subsection (1) states that former section 131A continues to apply where a person is already charged with the offence at the time of commencement.

Subsection (2) states that subsections (3) and (4) apply if immediately before the commencement, a proceeding could have been started under former section 131A and, on commencement, the proceeding has not been started. Subsection (3) provides that the proceeding may be started under former section 131A as if this Act had not commenced. Subsection (4) states that, despite former section 131A(2), the proceeding may be heard and decided without a Crown Law Officer's written consent.

Subsection (5) defines *former section 131A* to mean section 131A as in force before commencement of this Act.

Clause 9 omits the definition of *public act* in Schedule 1, as a consequence of the amendments in clauses 4, 5 and 7 of the Bill.

Part 3 Amendment of Criminal Code

Clause 10 states that this part amends the Criminal Code.

Clause 11 amends section 1 (Definitions) to insert *gender identity, race, sex characteristics* and *sexuality* all with a reference to the definitions in schedule 1 of the AD Act. Also inserted is a definition for *prohibited symbol* with reference to new section 52C(1) of the Criminal Code.

Clause 12 inserts new Part 2, Chapter 7A (Serious vilification and prohibited symbols).

Under new Chapter 7A is section 52B (Circumstances of aggravation for particular offences). Subsection 52B(1) provides a circumstance of aggravation applicable where a person was wholly or partly motivated to commit the offence by hatred or serious contempt for a person or group of persons.

With respect to a person, subsection 52B(1)(a) states that 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 based on the person's race, religion, sexuality, sex characteristics or gender identity or, the person's presumed race, religion, sexuality, sex characteristics or gender identity.

In relation to a group of persons, subsection 52B(1)(b) states that 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 group of persons based on the actual or presumed race, religion, sexuality, sex characteristics or gender identity shared by members of the group.

Subsection 52B(2) defines *prescribed offence* as the offences under sections 69, 75, 207, 335, 339, 359, 359E and 469 of the Criminal Code.

New section 52C (Prohibited symbols) is also inserted under Chapter 7A. Subsection 52C(1) defines *prohibited symbol* to mean a symbol or image that is: (a) prescribed by regulation for this section; or (b) that so nearly resembles a symbol referred to in paragraph (a) that it is likely to be confused with or mistaken for that symbol.

Subsection 52C(2) provides that a regulation mentioned under subsection (1) must prescribe the symbol or image as a graphic representation of the symbol or image, and may not prescribe the symbol or image by describing a class of symbols or images.

Subsection 52C(3) provides that the Minister responsible for the administration of the Criminal Code may recommend to the Governor in Council the making of a regulation under subsection (1). However, the Minister may only do so if satisfied the symbol or image is either widely known by the public as being solely or substantially representative of an ideology of extreme prejudice against a relevant group; or is widely known by members of a relevant group as being solely or substantially representative of an ideology of extreme prejudice against that group.

Subsection 52C(4) requires the Minister to consult with the chairperson of the Crime and Corruption Commission, the Human Rights Commissioner under the AD Act, and the commissioner of the police service under the *Police Service Administration Act 1990* before making a recommendation under subsection (3).

Subsection 52C(5) defines *relevant group* to mean a group of persons who identify with each other on the basis of an attribute or characteristic that is, or is based on, the race, religion, sexuality, sex characteristics or gender identity of the persons.

New Chapter 7A also introduces new section 52D (Display, distribution or publication of prohibited symbols) into the Criminal Code.

New section 52D(1) provides that a person commits an offence if they publicly distribute, publish or publicly display a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended. The offence applies unless the person has a reasonable excuse. The maximum penalty for the offence is 70 penalty units or 6 months imprisonment.

Subsection 52D(2) provides reasonable excuses that apply to the offence under subsection (1). These excuses do not limit what may be considered to be a reasonable excuse. The excuses include where there is a genuine artistic, religious, educational, historical, legal or law enforcement purpose to the conduct; where there is a public interest purpose; or where the conduct is in opposition to the ideology represented by the prohibited symbol. All of these excuses require that the conduct was reasonable in the circumstances.

Subsection 52D(3) provides that an evidential burden is placed on the defendant in relation to showing a reasonable excuse to the offence in subsection (1).

Subsection 52D(4) provides circumstances for which *publicly displays* under subsection (1) applies. This includes if the person displays the symbol in a place that public is entitled to use, is open to members of the public or is used by the public,

whether or not on payment of money; or in a place the occupier of which allows, whether or not on payment of money, members of the public to enter. Also included is if a person displays the symbol in a way that is visible from any of these places.

Subsection 52D(5) provides that the offence under subsection (1) is committed at the time when the person distributes, publishes, or displays the prohibited symbol; and it is irrelevant whether a member of the public has seen the prohibited symbol because of the distribution, publication or display.

Clause 13 amends section 69 (Going armed so as to cause fear) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 3 years imprisonment is provided for the aggravated offence.

Clause 14 amends section 75 (Threatening violence) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 3 years imprisonment is provided for the aggravated offence.

Clause 15 amends section 207 (Disturbing religious worship) to remove the words ‘on summary conviction’ and insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 6 months imprisonment is provided for the aggravated offence.

Clause 16 amends section 335 (Common assault) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 4 years imprisonment is provided for the aggravated offence.

Clause 17 amends section 339 (Assaults occasioning bodily harm) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 10 years imprisonment is provided for the aggravated offence.

Clause 18 amends section 359 (Threats) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 7 years imprisonment is provided for the aggravated offence.

Clause 19 amends section 359E (Punishment of unlawful stalking, intimidation, harassment or abuse) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 7 years imprisonment is provided for the aggravated offence.

Clause 20 amends section 469 (Wilful damage) to insert the circumstance of aggravation introduced through new section 52B. A maximum penalty of 7 years imprisonment is provided for the aggravated offence.

Clause 21 amends section 552A (Charges of indictable offences that must be heard and decided summarily on prosecution election) to provide, under new section 552A(1)(b), that section 552A does not apply to the new aggravated offence of Common assault under section 335(2)(a).

Clause 22 amends section 552BA (Charges of indictable offences that must be heard and decided summarily) to amend the definition of *relevant offence* in section

552BA(4) to include an offence against section 335 (Common assault) alleged to have been committed with the circumstance of aggravation under new section 335(2)(a).

Part 4 Amendment of Police Powers and Responsibilities Act 2000

Clause 23 states that this part amends the *Police Powers and Responsibilities Act 2000*.

Clause 24 amends section 29 (Searching persons without warrant) to remove, under section 29(2)(c), reference to section 30(b) and replace it with a reference to section 30(1)(b).

Clause 25 amends section 30 (Prescribed circumstances for searching persons without warrant) to expand, under section 30(1), the prescribed circumstances for searching a person without a warrant to include where, under new subsection (ha), the person has committed, or is committing, an offence against the Criminal Code, section 52D.

Clause 26 amends section 32 (Prescribed circumstances for searching vehicle without warrant) to expand, under section 32(2)(a), the prescribed circumstances for searching a person without a warrant to include an offence against new section 52D of the Criminal Code.

Clause 27 amends Chapter 2, Part 6A to remove reference to section 30(i) and replace it with reference to section 30(1)(a).

Part 5 Amendment of Summary Offences Act 2005

Clause 28 states that this part amends the *Summary Offences Act 2005* (SO Act).

Clause 29 amends section 6 (Public nuisance). Subclause (1) removes the current wording of section 6(1)(a) and provides that, if the offence involves a circumstance of aggravation, the maximum penalty for the offence is 25 penalty units or 6 months imprisonment.

Subclause (2) introduces the new circumstances of aggravation for the offence under section 52B of the Criminal Code, in addition to relocating the existing circumstances of aggravation of being within licensed premises, or in the vicinity of licensed premises.

Clause 30 amends section 11 (Trespass). Subclause (1) replaces the current wording of section 11(1) and provides that, if the offence involves circumstances of aggravation, the maximum penalty for the offence is 40 penalty units or 1 year's imprisonment.

Subclause (2) replaces the current wording of section 11(2) and provides that, if the offence involves circumstances of aggravation, the maximum penalty for the offence is 40 penalty units or 1 year' imprisonment.

Subclause (3) inserts a new subsection (4) to provide that, for the purposes of section 11, the circumstance of aggravation under new section 52B is a circumstance of

aggravation for this offence as if section 11 of the SO Act were a prescribed offence mentioned in that section.