



ATSILS
Aboriginal and
Torres Strait Islander
Legal Service (Qld) Ltd

Brisbane Office | ABN: 1111 6314 562

- 📍 Level 5, 183 North Quay, Brisbane Qld 4000
- 📮 PO Box 13035, George Street, Brisbane Qld 4003
- 📞 07 3025 3888 | Freecall 24/7: 1800 012 255
- ☎️ 07 3025 3800
- ✉️ info@atsils.org.au
- 🌐 www.atsils.org.au



17th March 2023

Ms Adele Bogard
Acting Director
Strategic Policy and Legal Services
Department of Justice and Attorney-General

Delivered by email: adele.bogard@justice.qld.gov.au

Dear Ms Bogard,

RE: Submission in relation to the Consultation Draft of the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023

Thank you for the opportunity to provide comments on the Consultation Draft of the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (**Bill**) which proposes to amend the *Anti-Discrimination Act 1991* (Qld) (**A-D Act**), Criminal Code, *Police Powers and Responsibilities Act 2000* (Qld) (**PPRA**) and the *Summary Offences Act 2005* (Qld) (**SO Act**). We are broadly supportive of the measures contained in the Bill, however, we have identified some opportunities to strengthen the measures so that they may be more effective in achieving their policy objectives. We have sought to outline these opportunities in this submission.

Preliminary consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (**ATSILS**), is a community-based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander peoples across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and

prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander peoples.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives (which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is informed by nearly five decades of legal practise at the coalface of the justice arena and we, therefore, believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

Comments on the Bill

Amendments to the *Anti-Discrimination Act 1991 (Qld)*

We support the following proposed amendments to the A-D Act contained in the Bill:

- the relocation of section 131A of the A-D Act (Offence of serious racial, religious, sexuality or gender identity vilification) (**Serious Vilification Offence**) to new section 52A of the Criminal Code;
- increasing the maximum penalty for the Serious Vilification Offence to 3 years imprisonment; and
- the removal of requirement for the written consent of the Attorney-General or Director of Public Prosecutions before a prosecution can be commenced for a Serious Vilification Offence.

Amendments to the Criminal Code

Clause 11 – Insertion of new pt 2, ch 7A

While we are supportive of the proposed introduction of statutory circumstances of aggravation for hatred or contempt in relation to certain prescribed offences, we do not support proposed section 52B to the extent that it relies upon establishing the perpetrator’s state of mind, i.e., that the “offender was wholly, or to a significant extent, 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 the Queensland Government’s Fact Sheet for this Bill (**Fact Sheet**), there is reference to the Legal Affairs and Safety Committee recognising the psychological harm caused by vilification to a victim¹. However, the proposed offence does not appear to consider the victim’s point of view or state of mind.

In our view, establishing hate or serious contempt (in the manner contemplated by proposed section 52B) as an alleged perpetrator’s motive may be difficult and failure to establish this may result in such an offence not being able to be proven. This may result in a failure to achieve adequate justice for the victim. We are of the view that establishment of the circumstance of aggravation should not rely upon establishing the motivation of the perpetrator, rather proposed section 52B should contain a “harms-based” test, which is both subjective (the alleged victim actually held fears for their safety, security or property) and objective (a reasonably minded person in similar circumstances would be fearful).

Prescribed offences to which the circumstances of aggravation apply

While we support the list of prescribed offences to which the circumstances of aggravation are proposed to apply, in our view, the following offences should also be prescribed offences under proposed section 52B(2):

- section 355 of the Criminal Code (Deprivation of Liberty); and
- section 320 of the Criminal Code (Grievous Bodily Harm).

Clause 20 – Amendment of section 552B (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial)

This amendment proposes to make the offence of assaults occasioning bodily harm (**AOBH**), with or without a circumstance of aggravation, one that must be heard and decided summarily unless the *defendant* elects for a jury trial. However, it would appear that with the proposed increased penalties under this Bill for common assault with or without a circumstance of aggravation, election for a jury trial for the common assault offence would be at the election of the *prosecution*. The Fact Sheet does not appear to explain the reason for this apparent inconsistency and, therefore, we are unsure as to the reason for this approach. In our view, a better approach would be for common assault to remain as an offence that must be heard and decided summarily (with or without a circumstance of aggravation) and AOBH to be heard and decided

¹ Department of Justice and Attorney General, Fact Sheet, *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023*, page 2.

summarily unless the *defendant* elects for a jury trial. Alternatively, if the intention is for both offences to be election offences, then it is our view that amendments be made to the Bill to reflect that common assault with a circumstance of aggravation must be heard and decided summarily unless the *defendant* elects for a jury trial.

Other recommendations for consideration

We support the following additional recommendations that were contained in the Cohesive Communities Coalition Working Group paper on this issue entitled “Options for Reform on Serious Vilification and Hate crime in Queensland” which we co-authored and which the Deputy Premier referred to the Legal Affairs and Safety Committee for review and consultation:

- inclusion of a general provision in the Criminal Code which allows for judicial discretion when hearing a relevant matter such that a court may determine that a circumstance of aggravation exists, where police have not initially identified the circumstance of aggravation;
- provision of additional powers to the Queensland Human Rights Commission (**QHRC**) to support the legislative framework for laws relating to incitement of hate/racial vilification, for example, which enables QHRC to: issue take-down notices to platforms publishing/disseminating relevant material; investigate complaints regarding the same; and issue fines; and
- introduction of a new “order” similar to the Peace and Good Behaviour Order under the *Peace and Good Behaviour Act 1982* to address offending behaviour that falls short of criminal offences, but which, if repeated, could be penalised as a breach of the order (we anticipate that such an order could protect, for example, a previously targeted individual or group or a culturally or religiously significant place, such as, a place of worship).

CONCLUSION

We strongly support measures which strengthen the current approach to addressing hate crimes and racial vilification. This issue has particular gravity in the current climate taking into account very concerning reports that we have received, and which have been widely reported, of vigilante groups mobilising and threatening violence against Aboriginal and Torres Strait Islander youths, including children in out-of-home care, which such individuals consider justified as a response to the current youth justice crisis. While we are broadly supportive of the proposed amendments

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

contained in the Bill, we have identified some opportunities to strengthen the framework proposed which we have sought to outline in this submission.

We thank you for the opportunity to provide feedback on the Bill.

Yours faithfully,

Shane Duffy
Chief Executive Officer