

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

## Statement of Compatibility

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

## Overview of the Bill

The Bill will amend the *Anti-Discrimination Act 1991* (AD Act), the Criminal Code, *Police Powers and Responsibilities Act 2000* (PPRA) and the *Summary Offences Act 2005* (SO Act).

The main purpose of the Bill is to implement legislative reforms as recommended by the Legal Affairs and Safety Committee's (LASC) Report *Inquiry into serious vilification and hate crimes* (No.22 57<sup>th</sup> Parliament) (the LASC Report). Specifically, the Bill implements recommendations 7, 8, 9 and 16 of the LASC Report.

In addition to addressing these recommendations, the Bill will amend the AD Act to increase the existing penalty for the offence at section 131A (Vilification of serious racial, religious, sexuality or gender identity vilification).

### Overview of amendments in response to the LASC Report

#### *Recommendation 7 of the LASC Report*

Section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) of the AD Act provides that a person must not, by a public act, knowingly or recklessly incite hatred towards, or serious contempt for, or severe ridicule of, a person or persons on the ground of race, religion, sexuality or gender identity of the person or members of the group in a way that includes:

- (a.) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b.) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The written consent of a Crown Law Officer (which is either the Director of Public Prosecutions or the Attorney-General) must be obtained before a proceeding is started for an offence under this section. The offence carries a maximum penalty of 70 penalty units or six months imprisonment for an individual. The maximum penalty for a corporation is 350 penalty units.

Recommendation 7 of the LASC Report was that the Government investigate the viability of removing the requirement for the written consent of a Crown Law officer before commencing a prosecution for the offence under section 131A of the AD Act.

The Bill responds to Recommendation 7 of the LASC Report by removing the requirement for the written consent of a Crown Law Officer.

#### *Recommendation 8 of the LASC Report*

Recommendation 8 of the LASC Report was that the Government introduce a ‘statutory aggravation’ regarding hate/serious vilification into the Criminal Code and SO Act.

To implement Recommendation 8 of the LASC Report, the Bill amends several offences in the Criminal Code, and two offences in the SO Act to provide for circumstances of aggravation, thereby increasing the existing maximum penalty for certain offences, where the offender was motivated, wholly or partly, 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).

The protected characteristics that the circumstance of aggravation will capture are race, religion, sexuality, sex characteristics<sup>1</sup> or gender identity. The application of the circumstance of aggravation is limited to these groups, as it recognises that these groups in society are particularly exposed to hostile behaviour, and experience distinct, additional forms of harm as a result.

The Bill applies the circumstance of aggravation to the following existing offences in the Criminal Code and the SO Act:

1. Section 69 (Going armed so as to cause fear) of the Criminal Code: Current maximum penalty for simpliciter offence: 2 years imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 3 years imprisonment;
2. Section 75 (Threatening violence) of the Criminal Code: Current maximum penalty for simpliciter offence: 2 years imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 3 years imprisonment.

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<sup>1</sup> The Births, Deaths and Marriages Registration Amendment Bill 2022 (BDMR Bill), introduced on 2 December 2022, seeks to amend section 131A of the AD Act to include the additional attribute of *sex characteristics*. The BDMR Bill also seeks to amend the definition of gender identity in the AD Act.

3. Section 207 (Disturbing religious worship) of the Criminal Code: Current maximum penalty for simpliciter offence: 2 months imprisonment or a fine of \$10. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 6 months imprisonment.
4. Section 335 (Common Assault) of the Criminal Code: Current maximum penalty for simpliciter offence: 3 years. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 4 years imprisonment.
5. Section 339 (Assaults occasioning bodily harm) of the Criminal Code: Current maximum penalty for simpliciter offence: 7 years imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 10 years imprisonment.
6. Section 359 (Threats) of the Criminal Code: Current maximum penalty for simpliciter offence: 5 years imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 7 years imprisonment.
7. Section 359E (Unlawful stalking, intimidation, harassment or abuse<sup>1</sup>) of the Criminal Code: Current maximum penalty for simpliciter offence: 5 years. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 7 years imprisonment.
8. Section 469 (Wilful damage) of the Criminal Code: Current maximum penalty for simpliciter offence: 5 years imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 7 years imprisonment.
9. Section 6 (Public Nuisance) of the SO Act: Current maximum penalty for simpliciter offence: 10 penalty units or 6 months imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 25 penalty units or six months imprisonment.
10. Section 11 (Trespass) of the SO Act: Current maximum penalty for simpliciter offence: 20 penalty units or 1 year imprisonment. Proposed maximum penalty for a person convicted with the circumstance of aggravation: 40 penalty units or 1 year imprisonment.

#### *Recommendation 9 of the LASC Report*

Recommendation 9 of the LASC Report was that the Government relocate section 131A (Offence of serious racial, religious, sexuality or gender identity vilification) of the AD Act to the Criminal Code.

To implement Recommendation 9 of the LASC Report, the Bill relocates section 131A of the AD Act to new section 52A of the Criminal Code.

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

### *Recommendation 16 of the LASC Report*

Recommendation 16 of the LASC Report was that the Government establish a criminal offence that prohibits the display of hate symbols, including those relating to Nazi and ISIS ideology, with considered exceptions to the prohibition.

To implement Recommendation 16 of the LASC Report, the Bill inserts a new section 52D (Display, distribution or publication of prohibited symbols) into the Criminal Code. The provision prohibits the public display, public distribution or publication of a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, unless the person has a reasonable excuse.

For the purposes of the provision, a person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol and the display of the symbol was 'reasonable' for that purpose.

A prohibited symbol for the purpose of the new offence will be prescribed by regulation. 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 extreme racist or culturally prejudiced ideology. *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.

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.

As part of the implementation of Recommendation 16, the Bill amends sections 30 (Prescribed circumstances for searching persons without warrant) and 32 (Prescribed circumstances for searching vehicle without warrant) of the PPRA to allow a police officer to search a person or vehicle without a warrant where the police officer reasonably suspects the person has committed, or is committing, the offence.

### *Amendment not related to the LASC Report*

The maximum penalty for the offence in section 131A of the AD Act is 70 penalty units or six months imprisonment for an individual. The maximum penalty for a corporation is 350 penalty units.

In addition to implementing the above recommendations of the LASC Report, the Bill will increase the maximum penalty for the offence at section 131A of the AD Act from 70 penalty units or six months imprisonment to three years imprisonment.

## **Human Rights Issues**

**Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)**

In my opinion, the following human rights are limited by the provisions in the Bill implementing Recommendations 8 and 16 (including the ancillary amendments to the PPRA) of LASC Report and the increase to the maximum penalty under section 131A of the AD Act:

1. Recognition and equality before the law (section 15);
2. Freedom of thought, conscience, religion and belief (section 20);
3. Freedom of expression (section 21);
4. Peaceful assembly and freedom of association (section 22);
5. Taking part in public life (section 23);
6. Property rights (section 24);
7. Privacy and reputation (section 25);
8. Cultural rights (sections 27 and 28); and
9. Liberty and security of person (section 29).

A discussion of the limitation on these rights is set out below.

The implementation of Recommendation 16, through the creation of a new offence under section 52D (Display, distribution or publication of prohibited symbols) of the Criminal Code also promotes the right to equality and non-discrimination, freedom of religion and cultural rights in sections 15, 20 and 28 of the HR Act.

**If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)**

**Amendments to implement Recommendation 8 of the LASC Report**

The Bill inserts a new circumstance of aggravation (section 52B) relevant to eight existing offences in the Criminal Code. The circumstance of aggravation is available where the person committing the simpliciter offence was motivated, wholly or partly, 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 29 and 30 of the Bill also amend sections 6 (Public nuisance) and 11 (Trespass) of the SO Act to apply the circumstance of aggravation as set out in new section 52B of the Criminal Code to these two offences.

As the circumstance of aggravation increases the maximum penalty available for offences to which it is applied, the Bill may increase the time that people convicted of these offences will be deprived of their liberty and thereby limit section 29(1) of the HR Act.

(a) the nature of the right

Section 29(1) of the HR Act states that every person has the right to liberty. This right to liberty means that people must not be arrested and detained, unless provided for by law. Their arrest and detention must also not be arbitrary.

The concept of arbitrariness carries a human rights meaning of capriciousness, unpredictability and unreasonableness in the sense of not being proportionate to the legitimate aim sought.

Arguably, the amendments to increase the maximum penalties for an aggravated offence of Going armed so as to cause fear, Threatening violence, Disturbing religious worship, Common Assault, Assaults occasioning bodily harm, Threats, Unlawful stalking, intimidation, harassment or abuse, Wilful damage, Trespass and Public Nuisance potentially limit a defendant's right to liberty by increasing the period of the time they may be detained in custody.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to promote the protection of victims; recognise the psychological harm caused by crimes where certain offences are wholly or partly, motivated by hatred or serious contempt on the grounds of race, religion, sexuality, sex characteristics or gender identity; and send a message to the community that this offending behaviour is not acceptable.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The maximum sentence for an offence is a reflection of, and a proxy for, its seriousness. Increasing penalties for an offence is a suitable way of showing that the offence is considered to be more serious. By increasing the available maximum penalty, the Bill sends a strong message that the ramifications of this conduct are severe and that individuals who engage in such activities will face serious consequences.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

Alternatives which would be less restrictive on human rights include not increasing the penalties at all, increasing the penalties to a lesser extent, or amending section 9 of the *Penalties and Sentences Act 1992* to introduce an aggravating factor for all offences.

While these alternatives would all have a lesser impact on the right to liberty, they would not be as effective in achieving the purposes of the Bill.

By introducing a circumstance of aggravation, the Bill will increase available maximum penalties, as opposed to introducing an aggravating factor which would only allow for a higher penalty within the existing maximum penalties for the relevant simpliciter offence. Accordingly, there are no less restrictive but equally effective alternatives to achieving the purpose of the Bill.

However, the limitation on human rights is tailored by the fact that introducing a circumstance of aggravation can be restricted in application to specified offences, whereas introducing an aggravating factor would apply to all offences. This allows for a targeted approach to specific offences that are often associated with vilification.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is very serious to deprive a person of their liberty. For this reason, the State must ensure that persons are deprived of liberty only where it is lawful and not arbitrary. By introducing a circumstance of aggravation in sentencing, the Court will retain discretion to determine an appropriate sentence, having regard to all the facts and circumstances of the offending, victim and offender. This includes aggravating and mitigating factors, ensuring that the extent of the limitation (being a potentially longer period of detainment) is constrained and occurs in circumstances that are appropriate and proportionate.

On the other side of the scales, it is a legitimate function of the criminal justice system in a democratic society, as part of its judicial function, to impose appropriate sentences on individuals convicted of a crime, which may include the imposition of punishment by way of imprisonment.

The limitation on the right to liberty is appropriate to ensure that sentences imposed for relevant offences adequately account for the impacts of the behaviour and to meet community expectations. As noted above, the purpose of the limitation is to promote the protection of victims; recognise the psychological harm caused by crimes where the offence is wholly or partly motivated by hatred or serious contempt on the grounds of race, religion, sexuality, sex characteristics or gender identity; and send a message to the community that this offending behaviour is not acceptable. By increasing the available maximum penalty, the Bill sends a strong message that the ramifications of this conduct are severe and that individuals who engage in such activities will face serious consequences.

On balance, having regard to the extent of limitations on the right to liberty, it is considered that the importance of achieving the purposes of the limitations outweighs the harm caused to the right to liberty.

(f) any other relevant factors

Nil.

### **Amendments to implement Recommendation 16 of the LASC Report**

Clause 12 of the Bill inserts a new section 52D (Display, distribution or publication of prohibited symbols) into the Criminal Code. The provision prohibits the public display, public distribution or publication of a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, unless the person has a reasonable excuse.

For the purposes of the provision, a person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol and the display of the symbol was 'reasonable' for that purpose.

A prohibited symbol for the purpose of the new offence will be prescribed by regulation. 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 extreme racist or culturally prejudiced ideology. *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.

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.

As part of the implementation of Recommendation 16, the Bill amends sections 30 (Prescribed circumstances for searching persons without warrant) and 32 (Prescribed circumstances for searching vehicle without warrant) of the PPRA to allow a police officer to search a person or vehicle without a warrant where the police officer reasonably suspects the person has committed, or is committing, the offence.

(a) the nature of the right

The right to recognition and equality before the law in section 15 of the HR Act encompasses the right to recognition as a person before the law and the right to enjoy the person's human rights without discrimination. Section 15(4) provides a right to equal and effective protection against discrimination and entitles every person to a separate and positive right to be effectively protected against discrimination. Whether new section 52D will limit the right to recognition and equality before the law in section 15 of the HR Act is largely dependent on the nature of the prohibited symbol to be prescribed. For example, if the Nazi Hakenkreuz were to be prescribed as a prohibited symbol under new section 52C of the Criminal Code, Buddhists, Hindus and Jains who use the swastika for religious purposes may be placed in the position of having to distinguish the swastika from the Nazi Hakenkreuz and/or show they have a reasonable excuse under proposed section 52D, in circumstances where people of other faiths will not have to justify use of their religious symbols.

The right to freedom of thought, conscience, religion and belief in section 20 of the HR Act confirms that every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. The right encompasses the freedom to demonstrate a religion individually or as part of a group, in public or in private. The right recognises that persons are entitled to have differing beliefs in a pluralistic society. As with the limitation on the right to recognition and equality before the law, whether new section 52D will limit the right to freedom of thought, conscience, religion and belief under section 20 of the HR Act is largely dependent on the nature of the prohibited symbol to be prescribed. For example, the prescription of the Nazi Hakenkreuz may impact the freedom of Buddhists, Hindus and Jains to demonstrate their religion or belief in public.

The right to freedom of expression in section 21 of the HR Act has a wide scope, protecting almost all forms of expression, including verbal (oral, writing, print), or through art or conduct. It protects the right of all persons to hold an opinion without interference, and the right of all persons to seek, receive and impart information and ideas (including verbal and non-verbal communication). The right to freedom of expression and the free flow of information and ideas, particularly about public and political issues, is considered to be a touchstone of a democratic society. The right to freedom of expression under section 21 of the HR Act will be limited by new section 52D as it will limit an individual's right to communicate ideas of all kinds in the medium chosen by the person. People may choose to communicate ideas by visual forms of



protest, symbols and clothing. It will also limit the rights of individuals to receive public communications that display a prohibited symbol.

The right to peaceful assembly and freedom of association in section 22 of the HR Act upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration. The right entitles persons to gather intentionally and temporarily for a specific purpose and is considered essential for the public expression of a person's views and opinions. The protection of the right is limited to peaceful assemblies (and does not protect violent assemblies such as riots). The right to peaceful assembly and freedom of association under section 22 of the HR Act is limited as the offence prohibits individuals who wish to display, publish or distribute a prohibited symbol as a badge of their ideology from doing so in public. Prohibited symbols are used to attract like-minded people who form associations and assemble in meetings and other events. Prohibiting the use of hate symbols may inhibit and disincentivise people from making these connections.

The right to take part in public life in section 23 of the HR Act affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives. Similarly, the new offence at section 52D of the Criminal Code limits the right to take part in public life under section 23 of the HR Act by limiting a citizen's right to participate in the conduct of public affairs by exerting influence through public debate and dialogue. An impact on the ability to communicate political information and ideas will limit this right.

The right to privacy and reputation in section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The right to privacy under the HR Act protects individuals against unlawful or arbitrary interferences with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'. The right to privacy and reputation in section 25 of the HR Act is limited by the new offence at section 52D of the Criminal Code as the right to privacy protects people from unjustified interference with their personal and social individuality and identity. Prohibiting symbols can inhibit the ability of people to identify with the ideas behind a prohibited symbol.

Cultural rights in section 27 of the HR Act are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. They affirm the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or in community with others who share their background. The right protects persons from being denied the right to enjoy their culture, to declare and practice a religion and to use their language. The extent to which cultural rights in section 27 of the HR Act are limited by the new offence at section 52D of the Criminal Code is largely dependent on the type of symbol(s) prescribed. Depending on the nature of the symbol, the offence may impact the ability of people of a particular cultural background to control their cultural heritage and practise their religion.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Clause 12 of the Bill inserts a new section 52D (Display, distribution or publication of prohibited symbols) into the Criminal Code. The provision prohibits the public display, public distribution or publication of a prohibited symbol in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, unless the person has a reasonable excuse.

The purpose of the offence is to reduce racism, prejudice and vilification in the community by preventing prohibited symbols from being displayed, distributed or published in circumstances that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended. It is designed to promote social cohesion and the equal dignity, safety and security of all individuals. The new offence will deliver on the Government's commitment to implement Recommendation 16 of the LASC Report which noted that such symbols can cause distress to individuals from persecuted communities.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The LASC 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.

For example, the LASC Report noted that during the period of its inquiry, a flag depicting the Nazi Hakenkreuz was flown over a synagogue in Brisbane and, although there were limitations to the data collected by the Queensland Police Service (QPS) on hate crimes, the QPS concluded that the data shows an increase in hate crime. Prohibiting the public distribution, publication or public display of prohibited symbols in a way that might reasonably be expected to cause a member of the public to feel menaced, harassed or offended, will address the harm caused by members of minority groups and the general public.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

Legislating a new criminal offence is the only way of achieving the purpose of the limitation. Alternative approaches to the structure of the offence have been considered, however, would arguably not achieve the purpose of the limitation.

For example, alternative drafting of the offence could include an ‘intent’ element that requires the finder of fact to be satisfied that the display of the hate symbol was intended to cause fear or harassment to a person or group of people.

This alternative approach is arguably less restrictive due to the operation of the higher threshold (being intent to cause harm), which would allow for the display of hate symbols in circumstances that do not reach that threshold. Whether or not a person would be criminally liable would require an assessment as to the intent of the person in displaying the prohibited hate symbol.

This alternative approach is likely less restrictive from a human rights perspective as the offence would only capture those who are intending to display symbols of hate with intent to cause fear or harass a person or group of people. This is an objectively higher threshold than the current approach which only requires an assessment as to whether the public display of the symbol would reasonably cause any person or group of people to feel menaced, harassed or offended.

However, the alternative approach does not achieve the purpose as effectively or to the same extent, which, while recognising that the purpose is to reduce distress caused to particular groups and individuals, is also to prevent the spread of harmful extremist ideologies.

The proposed framework in new sections 52C and 52D of the Criminal Code is tightly confined. For example:

- 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 extreme racist or culturally prejudiced ideology. *Relevant group* is defined in 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.
- 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.
- The offence does not capture private communication or activity and does not capture all public displays of the symbol. Rather, the offence only captures public displays that ‘might reasonably be expected to cause a member of the public to feel menaced, harassed or offended’.
- For the purposes of the provision, a person will not commit the offence if they engaged in conduct for a genuine artistic, religious, educational, historical, legal, law enforcement or public interest purpose, or to oppose the ideology represented by the prohibited symbol and the display of the symbol was ‘reasonable’ for that purpose.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, the right to recognition and equality before the law; freedom of thought, conscience, religion and belief; right to freedom of expression; right to peaceful assembly and freedom of association; right to take part in public life; right to privacy and reputation; and cultural rights are important.

On the other side of the scales, whilst limitations on human rights are acknowledged, it is considered the offence strikes a fair balance between the benefits gained by the public in fulfilling the purpose of the limitation, and the limitations imposed on human rights through the creation of a criminal offence banning hate symbols in circumstances where public display would reasonably cause any person or group of people to feel menaced, harassed or offended. The proposed offence has been drafted as narrowly as possible, with appropriate safeguards in the form of the reasonable excuse provisions and the Regulation-making power relevant to the prescribing of prohibited symbols.

(f) any other relevant factors

Nil.

### **Amendment to sections 30 and 32 of the Police Powers and Responsibilities Act 2000**

As part of the implementation of Recommendation 16, the Bill amends sections 30 (Prescribed circumstances for searching persons without warrant) and 32 (Prescribed circumstances for searching vehicle without warrant) of the PPRA to allow a police officer to search a person or vehicle without a warrant or vehicle without a warrant where the police officer reasonably suspects the person has committed, or is committing, the offence.

(a) the nature of the right

Property rights in section 24 of the HR Act protect the right of all persons to own property and provides that people have a right not be arbitrarily deprived of their property. The right includes the protection from the deprivation of property. The term ‘deprived’ is not defined by the HR Act, however deprivation in this sense is considered to include the substantial restriction on a person’s use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it). The concept of arbitrariness in the context of the right to property carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’. The amendment limits property rights as a police officer will, as a result of the amendment, be able to stop and detain a person (or search a vehicle) based on a reasonable suspicion (without a warrant) that the person has committed, or is committing, an offence against new section 52D of the Criminal Code. As a result of the search, a police officer may seize an item that may provide evidence of the commission of an offence.

The right to privacy and reputation in section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The right to privacy under the HR Act protects individuals against unlawful or arbitrary interferences with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. The concept of arbitrariness in the context of the right to privacy

carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’. The right to privacy and reputation in section 25 of the HR Act is limited by the Bill as a police officer will, as a result of the amendment, be able to stop and detain a person (or search a vehicle) based on a reasonable suspicion (without a warrant) that the person has committed, or is committing, an offence against new section 52D of the Criminal Code.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The amendments in Clause 25 and 26 of the Bill are ancillary to the successful operation of new section 52D of the Criminal Code. The purpose of the amendments is to ensure a police officer can stop, detain and search a person, or a vehicle and subsequently seize an item that may provide evidence of the commission of the offence in a timely and efficient way, prevent loss of evidence, and to prevent further display of the prohibited symbol. The amendments will contribute to achieving the purpose of the new offence in section 52D of the Criminal Code.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation will achieve the purpose of the limitation. There is a rational connection between the limitation on the human rights and the purpose of that limitation. The limitations are intended to support the effective and practical enforcement of the offence and to prevent or minimise any harm caused by the public display of prohibited symbol. For example, allowing police officers to search vehicles and seize prohibited symbols will prevent their display and aid in the prosecution of the offence.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

The only less restrictive, reasonably available alternative would be for a police officer to utilise existing powers in the PPRRA. This may include first obtaining a search warrant before a search of the vehicle could be conducted. However, this option would not satisfy the purpose of the limitation, which is to seize the item in a timely way to prevent the potential loss of evidence and immediate further display of the prohibited symbol.

Before exercising the search powers, the police officer must first hold a reasonable suspicion that the person has evidence of the commission of the offence in their possession or the driver or a passenger in the vehicle has committed, or is committing, an offence against section 52D of the Criminal Code.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The proposed offence has been drafted as narrowly as possible, with appropriate safeguards in the application of the defence and the regulation-making power relevant to the prescribing of prohibited symbols.

Whilst limitations on property rights and the right to privacy and reputation are acknowledged, it is considered the offence strikes a fair balance between the benefits gained by the public in fulfilling the purpose of the limitation, and the limitations imposed on human rights through the creation of a criminal offence banning hate symbols in circumstances where the public display would reasonably cause any person or group of people to feel menaced, harassed or offended.

(f) any other relevant factors

Nil.

**Amendment to increase the maximum penalty for the offence in section 131A of the AD Act**

The maximum penalty for the offence in section 131A of the AD Act is 70 penalty units or six months imprisonment for an individual. The maximum penalty for a corporation is 350 penalty units.

In addition to implementing the above recommendations of the LASC Report, Clause 7 of the Bill increases the maximum penalty for the offence at section 131A of the AD Act from 70 penalty units or six months imprisonment to three years imprisonment.

(a) the nature of the right

Section 29(1) of the HR Act states that every person has the right to liberty. This right to liberty means that people must not be arrested and detained, unless provided for by law. Their arrest and the detention must also not be arbitrary.

The concept of arbitrariness carries a human rights meaning of capriciousness, unpredictability and unreasonableness in the sense of not being proportionate to the legitimate aim sought.

Arguably, Clause 7 of the Bill limits a defendant's right to liberty by increasing the period of the time they may be detained in custody.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to promote the protection of victims; recognise the psychological harm caused by serious vilification; and send a message to the community that this offending behaviour is not acceptable. Further, more appropriately weighted penalties are commensurate with the seriousness of the offence in recognition of the significant societal harms that flow from this type of conduct.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The maximum sentence for an offence is a reflection of, and a proxy for, its seriousness. Increasing penalties for an offence is a suitable way of showing that the offence is considered to be more serious. Increasing the maximum penalty for the offence in section 131A of the AD

Act will permit a sentencing court to impose higher sentences after assessing all of the circumstances surrounding the offending.

The devastating harm caused by this offending is known; the LASC Report noted that the impacts of hate crimes and vilification for the victim at the time of the incident can include feeling scared, vulnerable, helpless, unsupported, confused, embarrassed, shocked, angry, horrified and being disappointed at the failure of others around to stand up for them. Subsequent impacts can include depression, anxiety, feeling humiliated, pain from physical injury, feeling inferior, feeling insecure in driving (such as following an incident in a car park), becoming cynical, warier of other people, not wanting to return to work (if it is the location of the vilification), and feeling unsafe and unwelcome.

The amendment is designed to reflect the seriousness of such conduct in recognition of the severe impact vilification has on members of the community.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

Less restrictive alternatives include not increasing the penalty at all, or increasing the maximum penalty to a lesser extent. However, as noted above, maximum sentences are a reflection of the intended seriousness of the offence and it is the Government's intention that the penalty levels proposed reflect the seriousness of the offence.

Increasing the maximum penalty to three years imprisonment will ensure that sentences adequately reflect the seriousness of the offending and meet community expectations. The proposed increase would be broadly consistent with:

- section 474.17 (Using a carriage service to menace, harass or cause offence) of the Commonwealth Criminal Code offence which provides a maximum penalty of five years imprisonment;
- section 93Z (Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status) of the *Crimes Act 1900* (NSW), which provides a maximum penalty of three years imprisonment or 100 penalty units (or both);
- section 4 (Racial vilification) of the *Racial Vilification Act 1996* (South Australia), which provides a maximum penalty of three years imprisonment or \$5,000 (or both); and
- section 335 (Common assault) of the Queensland Criminal Code, which provides for a maximum penalty of three years imprisonment.

Further, in sentencing, the Court will retain discretion to determine an appropriate sentence having regard all the facts and circumstances of the offending, victim and offender. This includes aggravating and mitigating factors, ensuring that the extent of the limitation (being a potentially longer period of detainment) is constrained and occurs in circumstances that are appropriate and proportionate.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, the right to liberty is important. However, as noted above, the Court will retain discretion to determine an appropriate sentence having regard all the facts and circumstances of the offending, victim and offender. This includes aggravating and mitigating factors, ensuring that the extent of the limitation (being a potentially longer period of detainment) is constrained and occurs in circumstances that are appropriate and proportionate.

On the other side of the scales, the limitation on the right to liberty is appropriate to ensure that sentences imposed for vilifying conduct account for the impacts of the behaviour and to meet community expectations. As noted above, the purpose of the limitation is to promote the protection of victims; recognise the psychological harm caused by vilification; and send a message that this offending behaviour is not acceptable.

On balance, having regard to the extent of limitations on the right to liberty, it is considered that the importance of achieving the purposes of the limitations outweighs the harm caused to the right to liberty.

- (f) any other relevant factors

Nil.

## Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

**SHANNON FENTIMAN MP**  
Attorney-General and Minister for Justice, Minister for Women and Minister for the  
Prevention of Domestic and Family Violence