

# Briefing note for the Legal Affairs and Safety Committee

## Inquiry into serious vilification and hate crimes

### Queensland Human Rights Commission

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#### Introduction

1. The Queensland Human Rights Commission (**Commission**) has been asked to provide a written briefing on aspects of the terms of reference that are relevant to the Commission.
2. The Commission is an independent statutory authority established under the *Anti-Discrimination Act 1991* (**AD Act**), and has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**). The Commission's primary functions are to deal with complaints under each of those Acts, and to promote an understanding and acceptance, and the public discussion of, human rights in Queensland.<sup>1</sup> The functions of the Commission under the AD Act include consulting with various organisations to ascertain means of improving services and conditions affecting groups that are subjected to contraventions of the Act.

#### Background to the vilification provisions

3. When the AD Act commenced on 30 June 1992, it included an offence of inciting unlawful discrimination by advocating racial or religious hatred or hostility. Section 126 was headed 'Incitement to racial or religious hatred' and provided:

126. A person must not, by advocating racial or religious hatred or hostility, incite unlawful discrimination or another contravention of the Act.

The maximum penalty for an individual was 35 penalty units, and 170 penalty units for a corporation.

4. There were no prosecutions under that provision.
5. Section 126 was repealed in 2001 when new racial and religious vilification provisions were inserted. A prohibition with a civil complaint remedy was provided for in section 124A, and a new offence was provided for in section 131A of the AD Act.<sup>2</sup> These provisions commenced on 7 June 2001.
6. Amendments that commenced on 31 March 2003 extended the grounds on which vilification is prohibited to include the attributes of gender identity and sexuality.

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<sup>1</sup> *Anti-Discrimination Act 1991* section 235, *Human Rights Act 2019* section 61.

<sup>2</sup> These provisions were modelled on those in the NSW *Anti-Discrimination Act 1977*.

## Vilification – civil remedy

7. Section 124A of the AD Act currently provides:

### **124A Vilification on grounds of race, religion, sexuality or gender identity unlawful**

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of person on the ground of race, religion, sexuality or gender identity of the person or members of the group.
- (2) Subsection (1) does not make unlawful –
  - (a) the publication of a fair report of a public act mentioned in subsection (1); or
  - (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
  - (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

8. A ‘public act’ is defined in section 4A of the AD Act as follows:

### **4A Meaning of *public act***

- (1) A **public act** includes –
  - (a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing tapes or other recorded material, or by electronic means; and
  - (b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.
- (2) Despite anything in subsection (1), a **public act** does not include the distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter.

9. The prohibition in section 124A is not a criminal offence. The remedy is a civil claim that is commenced by complaint to the Commission. The Commission’s role is to assist the parties to resolve the complaint through conciliation. Unresolved complaints may be referred to the tribunal. For work-related complaints the tribunal is the Queensland Industrial Relations Commission, and for all other complaints the tribunal is the Queensland Civil and Administrative Tribunal.<sup>3</sup>

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<sup>3</sup> Before the QCAT commenced in December 2009, complaints under the AD Act were referred to and decided by the former Anti-Discrimination Tribunal.

*Vilification complaints – Commission stage*

10. The number of vilification complaints accepted by the Commission to 30 June 2020 is set out in the table at **Appendix 1**.<sup>4</sup> The table includes a breakdown of the complaints by attribute (race, religion, sexuality, and gender identity).
11. In the period from 1 January 2009<sup>5</sup> to 30 June 2020, the Commission accepted 199 complaints of vilification. Of the 199 accepted vilification complaints in that period, 81 were resolved through conciliation (approximately 41%) and 57 were referred to the tribunal (approximately 29%).
12. In the same period, the average rates for conciliation and referral for overall complaints were 57% and 25% respectively.
13. Commission conciliators report that complaints of vilification between neighbours can be challenging to conciliate due to ongoing animosity. Also challenging are complaints where there are other issues between the parties, for example parenting proceedings between the parties.
14. However, conciliation is not confined to a conference where all parties are present in person or by telephone. Shuttle discussions may be more appropriate for certain complaints. The Commission has a flexible approach to how conciliation may be undertaken for each complaint.

*How the law has been applied in Queensland*

15. The Queensland tribunals have mostly interpreted and applied the vilification provisions consistently with other jurisdictions with similar provision, in particular New South Wales. For example, the following principles:
  - (a) The communication to the public must be capable of being seen or heard without undue intrusion by a non-participant;<sup>6</sup>
  - (b) It is not necessary to show an intention to incite or actual incitement;<sup>7</sup>
  - (c) The provisions do not make unlawful the use of words that merely convey hatred towards a person or the expression of serious contempt or severe ridicule;<sup>8</sup> and
  - (d) A trivial joke or comment will not be a breach of the provision.<sup>9</sup>

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<sup>4</sup> These statistics are from the Commission's annual reports.

<sup>5</sup> The date of commencement of the Commission's current database.

<sup>6</sup> *Peters v Constance* [2005] QADT 9; *Z v University of A (No. 7)* [2004] NSWADT 81.

<sup>7</sup> *Deen v Lamb* [2001] QADT 20; *Peters v Constance* [2005] QADT 9.

<sup>8</sup> *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701; *Cohen v Hargous*; *Karellicki v Hargous* [2006] NSWADT 209.

<sup>9</sup> *Menzies v Owen* [2008] QADT 20.

16. However, some more recent decisions have indicated that the complainant is required to show that the impugned conduct incited the relevant sentiment towards the complainant.<sup>10</sup> This is contrary to previously decided cases.
17. There have also been decisions where communications within workplaces and classrooms have been considered to not be a communication to the public, and therefore not a public act.<sup>11</sup>

### *Exceptions and constitutional integrity*

18. The exceptions in subsection 124A(2) are an integral part of the vilification provisions, as they provide a balance for freedom of speech, and the 'recognise that there are circumstance in which it is not wrong to do acts which might have the tendency to incite'.<sup>12</sup>
19. The constitutionality of section 124A was challenged in a case stated to the Queensland Court of Appeal in *Owen v Menzies*.<sup>13</sup> The Court of Appeal held that section 124A is not inconsistent with the implied protection of freedom of political communication provided by the *Constitution*.
20. The judges of the Court agreed that if section 124A did burden the implied constitutional freedom, any burden was incidental and reasonably appropriate and adapted to serve a legitimate end. That end is the promotion of equality of opportunity for all members of the community by prohibiting objectionable conduct inconsistent with the purpose of the Act, and the Parliament's desire to improve the quality of democratic life through an educated community appreciative and respectful of the dignity and worth of all its members. Any burden was confined and controlled by section 124A(2) – the exceptions.

### **Serious vilification – criminal offence**

21. The criminal offence of serious vilification is provided for in section 131A of the AD Act. Section 131A was inserted in 2001, and currently provides:

#### **131A Offence of serious racial, religious, sexuality or gender identity vilification**

- (1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes —

<sup>10</sup> *Coenen v Bakers Club Worldwide Pty Ltd & Ors* [2014] QCAT 676, *Bero v Wilmar Sugar Pty Ltd & Ors* [2016] QCAT 371, *Ms RA v NC* [2018] QCAT 94.

<sup>11</sup> For example, *Park v State of Queensland & Anor* [2013] QCAT 183, *Bero v Wilmar Sugar Pty Ltd & Ors* [2016] QCAT 371, *Ms RA v NC* [2018] QCAT 94. See also the NSW decision in *Riley v State of New South Wales (Department of Education)* [2019] NSWCATAD 223, where comments made within school grounds were considered to not be a communication to the public as the public was not entitled to be present on the grounds.

<sup>12</sup> *Deen v Lamb* [2001] QADT 9.

<sup>13</sup> *Owen v Menzies* [2012] QCA 170.

- (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.

Maximum penalty —

- (a) for an individual — 70 penalty units or 6 months imprisonment; or
  - (b) for a corporation — 350 penalty units.
- (2) A Crown Law Officer's written consent must be obtained before a proceeding is started by complaint under the *Justices Act 1886* in relation to an offence under subsection (1).
  - (3) An offence under subsection (1) is not an offence for section 155(2) or 226.
  - (4) In this section—

**Crown Law Officer** means the Attorney-General or Director of Public Prosecutions.

- 22. The effect of subsection (3) is that the Human Rights Commissioner is not able to initiate an investigation into an offence of serious vilification, and is not able to prosecute the offence.
- 23. A person may however make a complaint under section 124A, as a civil claim. An example of this is the decided case of *Brosnahan v Ronoff*.<sup>14</sup> A transgender woman was woken late one night by yelling of abuse at her from the footpath, and a neighbour wrenched a wooden paling from the fence calling out for a match so the group could burn her place down. The tribunal described the behaviour as gang-style violence, and noted that as well as amounting to sexual harassment and gender identity vilification, it also constituted the offence of serious vilification.
- 24. The Commission is aware of only two prosecutions under section 131A of the AD Act. The first prosecution related to serious racial vilification of a guard on a train in Brisbane in late 2014, and the person was convicted on a plea of guilty in September 2015. The offender was sentenced to two months imprisonment, wholly suspended for 12 months.
- 25. The other prosecution known to the Commission was a charge of serious gender identity vilification in Townsville, where the offender was convicted on a plea of guilty, and sentenced on 11 April 2018 to 40 hours of community service.

## Human rights

- 26. The *Human Rights Act 2019* (**HR Act**) consolidates a number of human rights recognised in international human rights agreements and in the common law, and imposes obligations on the three arms of government. Parliament is

<sup>14</sup> *Brosnahan v Ronoff* [2011] QCAT 439.

required to consider the compatibility of new legislation with human rights, the Courts are required to interpret statutory provisions compatibly with human rights where possible, and public entities are required to act and make decisions that are compatible with human rights, and to properly consider human rights when making decisions.

27. The HR Act recognises that human rights are not absolute and that they may be subject to reasonable limits that are justified in a free and democratic society. The interplay of human rights in a particular situation may result in one or more of them being limited by another, and it is the principles of a free and democratic society that will guide where the balance of those rights should land.
28. A number of rights are affected by the prohibition against vilification, with some overlapping and some competing. The main rights that are affected are:
  - (a) freedom of thought, conscience, religion and belief (section 20);
  - (b) freedom of expression (section 21);
  - (c) privacy and reputation (section 26);
  - (d) right to liberty and security of person (section 29);
  - (e) right to life (section 16); and
  - (f) recognition and equality before the law.
29. Some of the human rights are proscriptive, whereas others impose positive obligations. For example, the right to life and the right to security create obligations to take measures to protect life and security of the person.
30. The prohibitions against vilification do not prohibit people from holding and expressing their views. Rather, they prohibit people from urging others to hold the specified harmful negative sentiments towards individuals or groups because of their race, religion, sexuality, or gender identity.
31. Consistent with the constitutional integrity of section 124 of the AD Act, arguably the exceptions in section 124A provide a balance between the right of freedom of expression and the rights to protection and freedom from discrimination. A free and democratic society is one that is inclusive, and where everyone has substantive equality and is treated with respect and dignity.
32. The criminal offence of serious vilification in section 131A of the AD Act does not contain the same exceptions, as threatening or inciting physical harm to person or property is not tolerated in a free and democratic society.

### **Consultations by the Commission**

33. In performance with its functions under section 235(e) of the AD Act, the Commission has consulted with various organisations with a view to improving services and conditions for groups affected by vilification. This has included

Queensland Police Service, Translink, and the leaders of various community groups.

34. In 2015 the Commission hosted a forum attended by academics and police about the effectiveness of Queensland's vilification laws. This was preceded by consultations with the Queensland Police Service and community groups, and in late 2015 the Commission wrote to the Attorney-General suggesting changes to Queensland's criminal laws in relation to vilification and hate crimes.
35. In early 2016 the Commission received a report that a Muslim woman had been harassed on a bus to such an extent that she had to disembark before her destination, and was then too afraid to travel on a bus. It meant she was confined to her home as the bus was her only means of transport. In response, the Commission consulted with Translink and the Queensland Police Service to work together to improve transport services. The consultations resulted in the development of strategies that included a training package that the Commission delivered to bus operators in South East Queensland.
36. More recently, the Commission brought together leaders of various religious and racial communities, to work together with the goal of addressing vilification and hate crimes. The Commission provided secretarial support and information about the current legal framework and assisted in formulating the Options Paper: *Serious vilification and hate crime: The need for legislative reform*. The group became the Cohesive Communities Coalition, and launched the Better Laws for Safe Queensland campaign in September 2020.

### **Matters identified by the Commission**

37. In undertaking its functions of dealing with complaints and engagement with the community and consulting with other organisations, the Commission has identified the following matters should be considered in reviewing Queensland's vilification laws and hate crime:

*Extending the grounds of the prohibitions* – For example, women and people with impairments are subjected to vilification.

*Meaning of public act* – Clarifying that communications within a workplace of more than two people, may constitute a public act, even though the general public may not have access to the workplace.

*Incitement* – Should this be re-worded to 'promoting' so that it is better understood? Should it be replaced with a harm-based approach.

*Test for incitement* – In light of conflicting decisions, should this be clarified as an objective test rather than actual incitement?

*The requirement for prior approval to prosecute serious vilification* – Is this an administrative hurdle for police that hinders investigation and deters prosecution under section 131A of the AD Act?

*The maximum penalty for serious vilification* – Does this reflect the seriousness of the offence? The penalty is insufficient for police to obtain a warrant for the preservation of evidence.

*Moving the offence of serious vilification to the Criminal Code* – This has occurred in other jurisdictions such as Western Australia, the Commonwealth, New South Wales, the United Kingdom, and Canada.

*New offences such as assault, damage to property, harassment, and public order, that are racially or religiously aggravated* – Would this better reflect the gravity of crime that is racially or religiously motivated( or on other prohibited grounds), and aid in the recording of data?

### **Terms of reference of the inquiry**

38. In April 2021, the Attorney-General asked the Commission to undertake a review of the *Anti-Discrimination Act 1991*, with terms of reference that state:

In light of the Government's Commitment for a Parliamentary Committee inquiry on serious vilification and hate crime, the Commission is directed not to consider as part of this review vilification or sections 124A or 131A of the AD Act.

39. In light of this direction, the Commission suggests that the Committee reads terms of reference 2(f) broadly, so as to include the overall effectiveness of section 124A of the AD Act. That term of reference deals with 'the appropriateness of the conciliation-based anti-discrimination framework (s124A of the Act)'.



## Appendix 1

### Vilification complaints accepted by the Queensland Human Rights Commission (formerly the Anti-Discrimination Commission Queensland)

Year	Race*	Religion*	Sexuality^	Gender identity^	Total	Total – all accepted grounds
2001-02	7	4	Not applicable	Not applicable	11	658
2002-03	14	1	0	0	15	830
2003-04	13	4	1	0	18	908
2004-05	16	1	5	2	24	1,118
2005-06	14	2	14	1	31	812
2006-07	9	1	6	1	17	821
2007-08	1	2	1	1	5	667
2008-09	5	0	3	1	9	728
2009-10	10	1	0	2	13	600
2010-11	15	1	17	2	35	789
2011-12	11	3	6	0	20	604
2012-13	6	5	1	0	12	610
2013-14	4	1	6	0	11	617
2014-15	7	3	1	3	14	548
2015-16	9	0	7	1	17	508
2016-17	5	2	3	1	11	649
2017-18	5	1	0	7	13	685
2018-19	6	3	4	3	16	885
2019-20	13	2	12	7	34	846
<b>Totals</b>	<b>170</b>	<b>37</b>	<b>87</b>	<b>32</b>	<b>326</b>	<b>13,883</b>

\* Racial and religious vilification prohibition commenced 7 June 2001

^ Additional grounds of sexuality and gender identity commenced 31 March 2003