

# Inquiry into serious vilification and hate crimes

Submission to Queensland Parliament Legal Affairs and  
Community Safety Committee

7 June 2021



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## Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.<sup>1</sup>

The ALA office is located on the land of the Gadigal of the Eora Nation.

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<sup>1</sup> [www.lawyersalliance.com.au](http://www.lawyersalliance.com.au).

## Introduction

1. The ALA welcomes the opportunity to have input into the Legal Affairs and Community Safety Committee ('LACS') inquiry into serious vilification and hate crimes.
2. The ALA considers that this inquiry presents as an important opportunity to consider how the existing protections against vilification and hate speech in the *Anti-Discrimination Act 1991* (QLD) ('the ADA') can be strengthened. This includes:
  - Expanding the list of protected attributes under ss 124A and 131A of the ADA;
  - Strengthening the civil test for vilification under s 124A of the ADA;
  - Amending the ADA to include an additional, separate provision against hate-based conduct using a harm-based civil test;
  - Expanding the categories of conduct captured by the term 'public act' under s 4A of the ADA.
3. This submission also considers the specific recommendation for reform as outlined in the Options Paper: *Serious vilification and hate crime: The need for legislative reform* ('the SVHC Paper').
4. This submission also considers how the recommendations to strengthen the protections against serious vilification and race hate engage with the *Human Rights Act 2019* (QLD) ('QHRA').

## Existing protections against vilification and hate speech in the *Anti-Discrimination Act 1991* (QLD)

5. Section 124A of the ADA states:
  - (1) A person must not, by a public act, 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.
  - (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.

6. Section 131A(1) of the *ADA* creates an 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—
  - (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.

7. Section 4A(1) states that a ‘public act’ includes:

- (a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means;
- (b) any conduct that is observable by the public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia.

8. Section 4A(2) states that “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”.

## Expanding the class of protected attributes

9. Under ss 124A and 131A the *ADA* identifies the following as protected attributes: race, religious belief or activity, sexuality and gender identification.
10. The ALA submits that the legislation should be amended to ensure that each of the following is identified as a protected attribute for the purposes of ss 124A and 131A:
  - Race;
  - Religious belief or activity;
  - Gender;
  - Sexual orientation;
  - Gender identity and gender expression;
  - Sex characteristics;
  - HIV/AIDS status; and
  - Disability.
11. The ALA notes that other Australian jurisdictions identify the following as protected attributes:
  - Sex characteristics (ACT – ‘intersex status’; Tasmania – ‘intersex variations of sex characteristics’);
  - Gender (Tasmania);
  - Disability (ACT and Tasmania);
  - HIV/AIDS (NSW and ACT);

- Lawful sexual activity, age, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities (Tasmania).

12. The ALA submits that extending anti-vilification protections to additional groups of people is also consistent with the approach adopted in other common law countries:

- In the UK protected attributes include: race, religion and sexual orientation;
- In Canada protected attributes include: colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression and mental or physical disability; and
- In South Africa protected attributes include: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, HIV/AIDS status and any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects the equal enjoyment of rights in a serious manner.

## Strengthening laws that prevent vilification and race hate

### Strengthening the civil test for vilification

13. As noted in the SVHC Paper, the current system in Queensland for reporting vilification allows a person targeted by vilification can make a complaint to the Queensland Human Rights Commission. A complaint about vilification may also be made by an organisation instead of an individual person, if that organisation primarily exists to promote the interests or welfare of people of a particular race, religion, sexuality or gender identity. The Commission usually attempts to resolve complaints through conciliation. Incidents of serious vilification can be the subject of a police report or a Commission complaint, or both. A person may still make a civil claim for vilification even if the matter is pursued by the police, or even if they decide not to complain to the police.

14. The ALA submits that s 124A of the *ADA* should be amended to provide that a person must not engage in conduct that *expresses or is reasonably likely in the circumstances* to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the basis of one or more of the protected attributes.



15. The ALA submits that the Queensland Government should retain a civil incitement provision aimed at preventing the incitement of hatred against others for consistency with other states and territories, which all have civil incitement provisions. This would also be consistent with the requirement in Article 20 of the *International Covenant on Civil and Political Rights* to outlaw vilification of persons on “national, racial or religious” grounds. The ALA notes that Tasmania has retained a civil incitement provision in addition to also enacting a complementary, harm-based test.

### **A separate provision against hate-based conduct using a harm-based civil test**

16. The ALA submits that the Queensland Government should also enact a separate harm-based protection against hate-based conduct. Pursuant to that provision, it should be unlawful for a person to do an act, otherwise than in private, if:

- a) the act is reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
- b) the act is done because of one or more protected attribute of the other person or of some or all of the people in the group.

17. This would create a standalone provision where the focus is on the impact of hate-based conduct, and the harm caused by that conduct, on a particular person or group of persons, not whether a third party has been incited to hatred.

18. Whether a provision like this is contravened would be judged by a court according to the test of a reasonable person of the targeted group (as per the Federal Court decision in *Eatock v Bolt*,<sup>2</sup> which looked at the interpretation of the equivalent federal provision).

19. Under such a provision a person or persons wishing to rely on the harm-based test would no longer need to demonstrate that a third party has been incited to hatred, but would be required to show that it was likely that a reasonable person of the targeted group would have been offended, insulted, humiliated or intimidated by the conduct. This is important because it is people from targeted groups who suffer the impacts of hate, not the Australian community as a whole. It is inappropriate for a member of the Australian community who

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<sup>2</sup> (2011) 197 FCR 261.

has never had such a degrading experience to understand the impact of such statements and the harm they create.

## Conduct captured

20. The ALA recommends that the definition of ‘public act’ in s 4A(1)(a) of the ADA should be amended to explicitly include ‘broadcasting and communicating through social media and other electronic methods’, within the description of ‘any form of communication’ The new s4A(1)(a) should read as follows:

(a) any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by broadcasting and communicating through social media and other electronic methods.

21. The ALA recommends that an additional sub-paragraph (c) should be included in s 4A(1):

(c) the distribution or dissemination of any matter to the public.

22. The ALA recommends that the following sub-section should also be included in s 4A:

(3) For the avoidance of doubt, an act may be a public act even if it occurs on private land.

23. The ALA recommends that the reference to ‘...other purposes in the public interest...’ in the exemption provided under sections 124A(2)(c) should be amended to read ‘...other **genuine** purposes in the public interest...’ (emphasis added for the purposes of this submission only) consistent with the wording in the equivalent federal provision.

## Additional reforms regarding serious vilification and hate crimes

24. The ALA notes the recommendations in the Options Paper: *Serious vilification and hate crime: The need for legislative reform* and responds as follows.

## **Addressing the gap in current protections**

### **Recommendation One:**

**Introduce a specific summary offence, or make racial or religious motivation a circumstance of aggravation on existing offences.**

25. The ALA supports the option that, if a protected attribute is the motivation for an existing offence, it be a circumstance of aggravation on existing offence. As noted above, the ALA submits that the relevant protected attributes are broader than racial or religious motivation and should also include gender, sexual orientation, gender identity and gender expression, sex characteristics, HIV/AIDS status and disability.
26. The ALA does not support the introduction of a specific summary offence as it is concerned of the potential for such a new offence to be used against the very marginalised communities who would expect to receive protection from such an offence, namely people in Aboriginal or Torres Strait Islander communities.

### **Recommendation Two:**

**Introduce a new species of Order, created along the same lines as a Peace and Good Behaviour Order or Domestic Violence Order, to address concerning behaviour that falls short of criminal offences but which if repeated, a breach of the order of the court is penalised.**

27. The ALA has in-principle support for this recommendation. However, the ALA is concerned about the potential for a new order to be used against the very marginalised communities who would expect to receive protection from such order, namely people in Aboriginal or Torres Strait Islander communities.

## **Addressing the under-utilisation of the existing offence**

### **Recommendation Three:**

**Create a special power for police to obtain warrants to preserve online evidence, or increase the penalty in s131A of the *Anti-Discrimination Act 1991* to three years' imprisonment.**

28. The ALA has in-principle support for the recommendation to create of a special power for police to obtain warrants to preserve online evidence.

29. The ALA does not support the recommendation to increase the penalty in s 131A of the *ADA* to three years' imprisonment. The ALA is of the view that there is insufficient evidence that an increase in severity of sentences provides a deterrence for the commission of these offences. In the absence of such evidence, the ALA cannot support an increase in the severity of such sentences. Moreover, the ALA considers that increased severity of sentences results in reduced likelihood of offences being resolved by way of a plea of guilty.

**Recommendation Four:**

**Remove the requirement for approval of the Director of Public Prosecutions or Attorney-General in order to commence prosecution under s131A.**

30. The ALA does not support this recommendation. The ALA considers it necessary for the DPP or Attorney-General to retain the responsibility for commencing prosecution under s 131A. The ALA is concerned of the potential for police to use a prosecution against the very marginalised communities who would expect to receive protection from this provision, namely people in Aboriginal or Torres Strait Islander communities.

## **Addressing the distribution or display of hate material**

**Recommendation Five:**

**Introduce a complementary offence to criminalise the possession, distribution, or display of hateful material.**

31. The ALA has in-principle support for this recommendation.

## **Addressing low levels of reporting and community confidence**

**Recommendation Six:**

**Adopt a civil hate crime injunction.**

32. The ALA has in-principle support for this recommendation.

## **Recommendation Seven:**

### **Introduce hate crime scrutiny panels, based on the United Kingdom model**

33. The ALA supports this recommendation. The ALA considers that it is important for the police response to anti-vilification and race hate offences to attract a strong level of scrutiny and accountability. The ALA also recommends that the Queensland Human Rights Commission have the power to receive and investigate any individual or community complaint about the police response to anti-vilification and race hate offences.

## **Engaging the *Human Rights Act 2019* (Qld)**

34. The ALA asserts that the right to freedom of expression is an essential component of a democratic society and should be limited only to the extent that can be justified by an open and democratic society. This right is protected in s 21(2) of the *QHRA*.
35. The ALA submits that ss 124A and 131A of the *ADA*, and the proposals for amendment outlined in this submission, do not unreasonably limit the right to freedom of expression. The ALA submits that the limitations on freedom of expression are reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, in accordance with s 13 of the *QHRA*. The ALA notes that the allowable exemptions in s 124A(2) of the *ADA* strike an appropriate balance between the rights in the *QHRA* that are protected by these provisions – including the right to equality before the law (s 15); the right to freedom of thought, conscience, religion and belief (s 20); the right to peaceful assembly and freedom of association (s 22); and cultural rights (ss 27 and 28) – and the right to freedom of expression).
36. The ALA submits that anti-vilification legislation also attempts to ensure that all people are able to exercise their freedom of expression, recognising that hateful conduct diminishes that right for people and groups of people who are targeted by vilifying conduct.
37. The ALA further submits that anti-vilification and hateful conduct is not a form of expression protected by the implied freedom of political communication, which comes from judicial interpretation of the *Australian Constitution*.

38. The ALA notes that in 2019 the Chief Judge of the Victorian County Court determined that anti-vilification laws do not necessarily burden the implied freedom of political communication.

The preponderance of views in the authorities support the position that anti-vilification or antidiscrimination legislation does not burden the freedom of communication about government and political matters, but rather promotes civil political discourse.<sup>3</sup>

39. According to the Chief Judge:

... racial and religious vilification speech – especially of an extreme kind – is antithetical to the fundamental principles of equality, democratic pluralism and respect for individual dignity which lie at the heart of the protection of human rights. Such legislation positively promotes people of different religions to participate in public life and discourse, free from vilification.<sup>4</sup>

40. The Chief Judge also found that expression that manifests in vilifying conduct is not protected by the right to freedom of expression set out in s 15 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*.<sup>5</sup>

41. The ALA submits that anti-vilification legislation strikes an appropriate balance that does not unreasonably limit the right to freedom of expression. Such legislation seeks to prohibit hateful conduct, not to suppress political dialogue. People are free to express their views about political matters or activities of others, in any way as long as such communication is done in a way that does not incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the basis of one or more protected attributes.

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<sup>3</sup> *Cottrell v Ross* [2019] VCC 2142 [145] (Kidd CJ) citing *Sunol v Collier (No 2)* (2012) 289 ALR 128 [89]; *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571 [72]; *Eatock v Bolt* (2011) 197 FCR 261 [239] (Bromberg J quoting *R v Keegstra* [1990] 3 SCR 697, 764 (iii)).

<sup>4</sup> *Cottrell v Ross* [2019] VCC 2142 [98].

<sup>5</sup> *Ibid* [95-98].

## Conclusion

42. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the inquiry into serious vilification and hate crimes being conducted by the Legal Affairs and Community Safety Committee. The ALA is available to appear before the Committee to provide further information regarding the issues raised in this submission.

**Greg Spinda**



**Queensland President**

**Australian Lawyers Alliance**