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Inquiry into serious vilification and hate crimes

Dear Committee members

Thank you for the opportunity to make a submission to this inquiry. I am an academic specialising in vilification and hate speech, with over 20 years' experience in this field. I have published widely on this topic. My research has involved both theoretical work, and work in the field talking and consulting with target communities about their experiences of hate speech and hate crimes.

My primary focus has been on hate speech, known in Australia as 'vilification'. This intersects with the issue of hate crimes where and when an incident of hate speech is so serious as to fall under the relevant criminal prohibitions on hate speech that exist in numerous jurisdictions in Australia. In Queensland, 'serious vilification' is prohibited under s131A of the *Anti-Discrimination Act 1991* (Qld). A civil prohibition on unlawful vilification exists under s124A of the *Anti-Discrimination Act 1991* (Qld). Both the civil and criminal prohibitions fall under the Terms of Reference of this inquiry.

Term of Reference: The appropriateness of the conciliation based anti-discrimination framework

I have conducted, with Professor Luke McNamara, considerable research into the effectiveness of the civil law approach in combatting vilification in Australia. In our research, we have found that:

- Target communities frequently and routinely experience vilification in both face to face encounters, and in general circulation.¹ They experience these incidences in much the same way in terms of seriousness and harmfulness.²
- Public vilification is frequently experienced as an attack on worth and dignity.³

¹ Katharine Gelber and Luke McNamara, 'Anti-vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided', *UNSW Law Journal* 39(2) (2016): 488-511.

² Katharine Gelber and Luke McNamara, 'Evidencing the Harms of Hate Speech', *Social Identities* 22(1-3) (2016): 324-341.

³ Gelber and McNamara, 'Evidencing the Harms'.

- The harms of vilification are enduring, and not ephemeral. The harms of vilification occur whether or not the vilification includes an incitement to violence element.⁴
- Extant vilification laws do provide remedies in the form of the ability to lodge complaints, and in so far as the laws provide an educative, and precedent-setting, function.⁵
- Extant laws are symbolically very important to target communities, who view them as the state drawing a line in the sand against incitement to hatred.⁶
- Claims that laws combatting the incitement to hatred will inevitably create a ‘chilling effect’ (which means people do not speak for fear of being caught up in unlawful conduct) or a ‘martyr effect’ (in which some hate speakers amplify their platform by being subjected to such laws) are not supported by the evidence of the operation of these laws in Australia for 30 years.⁷

This means that the extant civil law framework is important and should be retained. It recognises the harms incurred by vilification, and sets out some remedies. It does so in a manner that is balanced and does not unduly infringe on freedom of speech.

However, our research has also found that:

- Civil schemes impose a considerable burden on target communities and individuals to enforce the normative standard struck by such legislation, because they rely on victim instigation of complaints.⁸
- The benefits of vilification legislation are unevenly distributed among the communities who are likely to be targeted.⁹

These problems are relatively easily remedied, and I recommend that the committee consider ways to improve the outcomes for target communities. In particular, I recommend that:

- The Queensland Human Rights Commission should have the authority to self-initiate complaints where they become aware of conduct that is likely to be deemed unlawful and no private complainant emerges.¹⁰
- Agencies should be empowered to advocate on behalf of target groups and the wider community to enforce legislative standards.¹¹
- Legislation (s134 of the *Anti-Discrimination Act 1991* (Qld)) should be amended to permit complaints from any individual under s124A.¹²

The last proposal would remove the requirement that a complainant be a person subjected to the alleged contravention, or that a relevant entity complaining on someone’s behalf have as its

⁴ Gelber and McNamara, ‘Evidencing the Harms’; Gelber and McNamara, ‘Anti-vilification Laws and Public Racism in Australia’.

⁵ Katharine Gelber and Luke McNamara, ‘The Effects of Civil Hate Speech Laws: Lessons from Australia’, *Law & Society Review* 49(3) (2015): 631-664.

⁶ Gelber and McNamara, ‘Anti-vilification Laws and Public Racism in Australia’.

⁷ Gelber and McNamara, ‘The Effects of Civil Hate Speech Laws’.

⁸ Katharine Gelber and Luke McNamara, ‘Private Litigation to Address a Public Wrong: A Study of Australia’s Regulatory Response to “Hate Speech”’, *Civil Justice Quarterly* 33 (3) (2014): 307-334.

⁹ Gelber and McNamara, ‘Private Litigation to Address a Public Wrong’.

¹⁰ Gelber and McNamara, ‘Private Litigation to Address a Public Wrong’; Gelber and McNamara, ‘Anti-vilification Laws and Public Racism in Australia’.

¹¹ Gelber and McNamara, ‘Private Litigation to Address a Public Wrong’.

¹² Gelber and McNamara, ‘Private Litigation to Address a Public Wrong’.

primary purpose the promotion of the interests and welfare of the target group. Complaints should be permissible from any concerned member of the community who has witnessed unlawful vilification.

Term of Reference: The interaction of Queensland and Commonwealth legislation in relation to online vilification

Section 18C of the *Racial Discrimination Act 1975* (Cth) is a useful adjunct to the Queensland civil law on vilification because it relies on a different conception of harm. The harm threshold in the Commonwealth legislation is conduct likely to offend, insult, humiliate or intimidate members of the targeted group. The courts have held that the standard to be met is conduct that has ‘profound and serious effects, not to be likened to mere slights’.¹³

The Commonwealth provision is unique among racial vilification statutes in Australia, and indeed internationally. This is because it focusses on the harms incurred by the target group, as opposed to the capacity of the conduct to incite hatred amongst reasonable members of an ordinary audience. This means that it is the only legislation of its kind that focusses on the targets’ experiences as a way of determining the harm incurred by an allegation of vilification. In this sense, Commonwealth vilification law provides a useful counterpoint to Queensland’s civil law and it is very helpful to have both in place. This provides better coverage for communities targeted by vilification.

Term of Reference: The effectiveness of s131A of the *Anti-Discrimination Act 1991* (Qld)

In our research, Professor McNamara and I note that the criminal laws in Australia are underutilised. Nationally, to date, there has been a total of 7 successful prosecutions under the criminal law. There have been 3 prosecutions in Western Australia, one for possession of racist material in 2005, one for ‘conduct likely to racially harass’ in 2016, and one for ‘conduct intended to incite racial animosity or racist harassment’ and for ‘conduct likely to racially harass’ in 2009.¹⁴ There have been 2 in Queensland: one in 2015 involving racial abuse to which the accused pleaded guilty and received a suspended sentence,¹⁵ and a second in which a transgender woman was verbally threatened with physical harm.¹⁶ There have been 2 in Victoria, the second of which involved one of the same offenders as the first incident, one in 2017,¹⁷ and the most recent in 2021.¹⁸

It is important to note that, even in the absence of successful prosecutions, the fact that the criminal law exists sends a message to the community of what is considered to be unacceptable

¹³ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J).

¹⁴ Gelber and McNamara, ‘The Effects of Civil Hate Speech Laws’, 635-6.

¹⁵ Anti-Discrimination Commission Queensland, *Submission to Religious Freedom Review* (Feb 2018), <https://www.pmc.gov.au/sites/default/files/religious-freedom-submissions/14531.docx>; Australian Associated Press, ‘Teen’s Racist Brisbane Train Rant Disgusting: Magistrate’, *Brisbane Times* (14 Sep 2015), <http://www.brisbanetimes.com.au/queensland/teens-racist-brisbane-train-rant-disgusting-magistrate-20150914-gjm2e7.html>).

¹⁶ As advised by the Anti-Discrimination Commission, Queensland, 19 April 2018.

¹⁷ James Oaten, ‘Far-right Nationalists Found Guilty of Inciting Serious Contempt for Muslims after Mock Beheading Video’, *ABC News* (5 Sep 2017), <http://www.abc.net.au/news/2017-09-05/three-men-found-guilty-of-inciting-serious-contempt-for-muslims/8874804>.

¹⁸ <https://www.abc.net.au/news/2021-05-11/far-right-extremist-jailed-after-disrupting-festival/100130868>.

conduct that crosses a line into criminality. The criminal law therefore has an educative and symbolic effect, even in the absence of numerous successful prosecutions.

Nevertheless, I am also in support of a range of proposals that have been made to this enquiry by targeted community members to improve the statutory framework around, and practices in relation to, monitoring and combatting hate crimes. In particular, I support:

- The introduction of a statutory aggravation for hate crimes, understood as involving the incitement of hatred on recognised, specified grounds, into the *Criminal Code Act 1899* (Qld) and *Summary Offences Act 2005* (Qld).
- Basing the test for determining the bias element on whether the offence includes conduct that incites hatred, serious contempt or severe ridicule on a specified ground.
- Recognising that a crime constitutes a ‘hate crime’ where a crime is done for another reason, but includes an incitement to hatred element.
- Requiring police to keep data on these types of offences, called ‘hate crimes’.
- Increasing the penalty for an offence under s131A’s penalty to 3 years with a financial element, removing the requirement for approval by a Crown Law officer, and moving the offence from the *Anti-Discrimination Act* to the *Criminal Code*.

I would be happy to appear in person before the Committee if you would find that helpful.

Yours sincerely



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