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9 July 2021

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
Alice Street
Brisbane QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Committee's Inquiry into serious vilification and hate crimes.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories.

Our Queensland practice has 13 permanent offices and 7 visiting offices spread across both regional and metropolitan parts of the State, with these offices offering legal services across the firm's primary practice areas of personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions. The Queensland arm of Maurice Blackburn has also contributed to recent parliamentary inquiries into labour hire, the gig economy and workers' compensation, and has appeared at numerous parliamentary hearings to advocate for vulnerable Queenslanders on a range of issues including wage theft, silicosis and workplace safety.

Maurice Blackburn congratulates the Committee on instigating this review, the importance of which cannot be understated.

In our experience, the overwhelming majority of people subjected to the sorts of unconscionable behaviours that the Committee will be hearing about are often already oppressed, disadvantaged or marginalised, and will face some form of vilification throughout their lives, whether that be in microaggressions or outright abuse. That those people cannot seek justice or fair recourse through the legal system will only further entrench their negative sense of self-worth and otherness.

We note the two main Terms of Reference that the Committee has been asked to inquire into:

a) the nature and extent of hate crimes and serious vilification in Queensland and whether there is evidence of increasing instances of serious vilification in Queensland; and

b) the effectiveness of section 131A of the Anti-Discrimination Act 1991 (the Act) and other existing Queensland laws responding to hate crimes.

In relation to the first of these Terms of Reference, we are confident that the Committee will hear from a range of individuals and organisations that will be able to provide considered, evidence-based input on the nature and extent of hate crimes and serious vilification in Queensland.[1]

We urge the Committee to not lose sight of the importance of the lived experience of those who have suffered as a result of vilification and hate crimes. It is their stories which will assist the Committee to understand not only the extent and prevalence of these acts, but also the impacts on individuals and communities.

Drawing on our experience and expertise as lawyers representing victims of these wrong-doings, we focus our input on the second of the Terms of Reference.

The effectiveness of section 131A of the Anti-Discrimination Act 1991 (the Act) and other existing Queensland laws responding to hate crimes.

The federal law governing this issue is the Racial Discrimination Act 1975, and specifically, section 18C, which reads:[2]

> *18C Offensive behaviour because of race, colour or national or ethnic origin*
>
> *(1) It is unlawful for a person to do an act, otherwise than in private, if:*
>
> *(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and*
>
> *(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.*
>
> *Note: Subsection (1) makes certain acts unlawful. Section 46P of the Australian Human Rights Commission Act 1986 allows people to make complaints to the Australian Human Rights Commission about unlawful acts. However, an unlawful act is not necessarily a criminal offence. Section 26 says that this Act does not make it an offence to do an act that is unlawful because of this Part, unless Part IV expressly says that the act is an offence.*
>
> *(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
>
> *(a) causes words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the sight or hearing of people who are in a public place.*

[1] We note the section of 'Prevalence' in the *Serious vilification and hate crime: The need for legislative reform* document (from page 8). We also recommend the section on prevalence in the recently released Victorian Parliamentary inquiry into anti-vilification protections. Ref: https://www.parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_Anti-Vilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf: section 4.1.2, page 65

[2] https://www.legislation.gov.au/Details/C2016C00089

> *(3) In this section:*
>
> ***public place*** *includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

The effect of that section is that it makes it unlawful for a person to publicly do an act that is "*reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people*", where that act is done because of the victim's race, colour, or national or ethnic origin.

There are some exemptions to that prohibition, including where the conduct forms part of an artistic work, is made for a 'genuine purpose' in the public interest, or made as part of a report or fair comment (for example, by a journalist).[3] These exemptions represent attempts to strike a balance between freedom from abuse, and freedom of speech.

For those we represent, this cause of action gives rise to several issues.

The first is that the speech must be made in "*not in private*". This may be a problem where the abuse is sent by letter, or over a 'private' Facebook message or Instagram direct message.

The second is that a breach of this section is not a criminal offence. Rather, the aggrieved person may make an application to the Australian Human Rights Commission, and proceed through a process involving conciliation. If the matter proceeds to Court, it becomes very time consuming and expensive.

As the Committee will be aware, there is the Federal Criminal Code for online abuse which makes it a criminal offence to use a carriage service to "*menace, harass or cause offence*".[4] It carries a maximum penalty of 3 years' imprisonment.

However, that offence is not without its own significant limitations. For example, proving a crime requires a higher standard of proof, being beyond a reasonable doubt which is difficult to meet. The offence is not specific to racial abuse and actions causing distress would not be sufficient to be seen as harassment. It does not, therefore, affect the social media platforms that allow anonymous racial abuse to be posted unchecked.

The *Queensland Anti-Discrimination Act 1991* has a particular offence of inciting hatred on the grounds of race, religion, sexuality or gender identity.[5] However a proceeding cannot be started without the consent of the Attorney General or Director of Public Prosecutions[6], a very high bar indeed.[7]

For the majority of victims we represent, none of the current protections is adequate to deal with the possession, distribution or display of hateful material.

To this end, Maurice Blackburn fully supports the recommendations set out in the *Serious vilification and hate crime: The need for legislative reform* document, namely:[8]

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[3] Ibid: s.18D
[4] *Criminal Code Act 1995* (Cth) s. 474.17
[5] Ref https://www.legislation.qld.gov.au/view/pdf/2017-06-05/act-1991-085: s.131A
[6] Ibid: s.131A(2)
[7] We note that the Victorian inquiry identified a similar issue, and that the consent of the DPP be reviewed. Ref Recommendation 21.
[8] Ref p.6

Addressing the gap in current protections:

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

- *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.*

Addressing the under-utilisation of the existing offence:

- *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.*

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

Addressing the distribution or display of hate material:

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

Addressing low levels of reporting and community confidence:

- *Adopt a civil hate crime injunction.*

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

The current system is predicated on a legislative environment where responsibility lies with the victim to make a complaint, and to have sufficient trust in the process that making a complaint will make things better. We note two concepts discussed in the report from the Victorian inquiry which we believe are worthy of consideration:

Section 6.2.3 in the report from the Victorian inquiry discusses the implementation of a positive duty for organisations to take reasonable and proportionate steps to prevent vilification.[9] We believe this would be a worthy consideration for Queensland.

Section 5.3.2 discusses a recalibration of how harms resulting from vilifying conduct are assessed. As mentioned earlier, the overwhelming majority of people subjected to these sorts of unconscionable behaviours are often already oppressed, disadvantaged or marginalised. Recommendations 9 and 10 of the Victorian report read:

> *That the Victorian Government introduce a new civil harm-based provision to assess harm from the perspective of the target group.*
>
> *That the Victorian Government formulate the harm-based provision to make unlawful conduct that 'a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons'.*

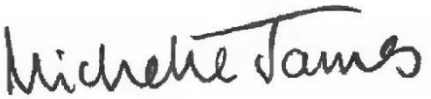
[9] https://www.parliament.vic.gov.au/images/stories/committees/lsic-LA/Inquiry_into_Anti-Vilification_Protections_/Report/Inquiry_into_Anti-vilification_Protections_002.pdf: section 6.2.3, page 142, and Recommendation 18

We believe that these recommendations, if accepted, would make a real difference in the experience of marginalised cohorts.

We would welcome the opportunity to discuss these matters more fully with the Committee, and share our expertise and experience as legal practitioners working in the area.

Please do not hesitate to contact me and my colleague [redacted] if we can further assist with the Committee's important work.

Yours faithfully,



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