



Queensland
Human Rights
Commission

Inquiry into serious vilification and hate crimes

**Submission
to
Legal Affairs and Safety Committee**

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Summary

The Queensland Human Rights Commission (the **Commission**) welcomes this inquiry into serious vilification and hate crimes, and supports the reform of Queensland's vilification and hate crime laws.

Vilification is unlawful under section 124A of the *Anti-Discrimination Act 1991* (with civil sanctions), and a criminal offence of serious vilification is provided for in section 131A.

Both of these sections are specifically excluded from the terms of reference for the current review of the *Anti-Discrimination Act 1991* that the Attorney-General has asked the Commission to undertake.¹ A report on that review is to be provided by 30 June 2022.

The Commission submits the Committee is able to consider the overall effectiveness of section 124A under the broader terms of reference that requires the Committee to consider the current legal framework, rather than confining its consideration of section 124A to the appropriateness of the conciliation-based anti-discrimination framework in clause 2(f) of the referral.

While the civil prohibition of vilification in section 124A has worked well, there is opportunity to improve its operation by making aspects of the provision clearer. Some recent decisions have departed from the intended meaning of 'incite' and have restricted the meaning of 'public act'.

Conversely, the criminal offence of serious vilification in section 131A has been used rarely, as it presents a number of operational difficulties for police. When offenders are charged with alternate offences, people impacted by the conduct are often left feeling that justice has not been done.

In this submission, the Commission discusses the current legislative framework, identifying gaps and limitations in the legislation, and makes recommendations for reform and suggestions for consideration.

Recommendations

Serious vilification (offence)

- (1) Remove the requirement of the prior consent of the Director of Public Prosecutions or the Attorney-General for a charge under section 131A of the *Anti-Discrimination Act 1991*.
- (2) Increase the maximum penalty for imprisonment to at least three years. This will enable police to secure a warrant to preserve evidence (particularly in relation to online vilification) as well as to reflect the seriousness of the offence and to better act as deterrence.
- (3) Clarify the meaning of 'incite', or replace it with 'urge'.

¹ Clause 4 of the Terms of Reference provides: '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.'

- (4) Clarify the meaning of 'public' and the extent to which the prohibition applies.
- (5) Consider removing the offence from the *Anti-Discrimination Act 1991* to the *Criminal Code* (Qld).
- (6) Consider modelling amendments on the offence of publicly threatening or inciting violence on various grounds in the *Crimes Act 1900* (NSW) section 93Z.
- (7) Consider whether other attributes should be also be protected, and consult with relevant groups and peak bodies.

Aggravated offences

- (8) Create separate aggravated offences for offending based on hostility towards an individual or group based a protected attribute, with penalties that are higher than the base offences.

Penalties and sentencing

- (9) Provide for hostility towards an individual or group based a protected attribute as a circumstance of aggravation for the imposition of higher penalties.

Offences relating to display or possession of certain material

- (10) Consider options to address the display and possession of harmful material, including possible criminal offences and/or powers to search, seize, and dispose.

Vilification (civil complaint)

- (11) Clarify the meaning of 'incite', or replace it with 'urge'.
- (12) Clarify the meaning of 'public' and the extent to which the prohibition applies, such as workplaces, places of education, private land.
- (13) Create a new harm-based prohibition of conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons.
- (14) Introduce a positive obligation on duty holders (for example, employers, service providers, and sporting bodies) to take reasonable and proportionate measures to eliminate vilification as far as possible.
- (15) Consider an option for the tribunal to make a 'vilification order' in the nature of a domestic violence order.

Introduction

1. The Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The Commission has functions under the Queensland *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
3. The Commission also deals with complaints of discrimination, vilification and other objectionable conduct under the *Anti-Discrimination Act 1991*, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the *Human Rights Act 2019*.
4. The *Anti-Discrimination Act 1991* prohibits vilification on the grounds of race, religion, sexuality and gender identity. It also provides for a criminal offence of serious vilification.
5. Over recent years, the Commission has consulted with community representatives and other stakeholders about the effectiveness of current laws in addressing serious vilification and hate crimes. This has included:
 - (a) In 2015, holding a seminar of academics, police, and Commission officers about the effectiveness of vilification laws;
 - (b) In 2016, consulting with Translink and the Queensland Police Service to improve the transport service experiences of groups subjected to vilification. Outcomes included the Commission developing and delivering tailored training for bus operators; and
 - (c) In 2020, facilitating the development and advocacy of the community representative group, the Cohesive Communities Coalition.
6. The Commission has assisted the Cohesive Communities Coalition to develop the Options Paper, *Serious vilification and hate crime: The need for legislative law reform* (the **Options Paper**) that the group has published, and the group has formed a campaign known as Better Laws 4 Safe Queensland.² The terms of reference of this inquiry require the Committee to consider the Options Paper.
7. The Options Paper includes examples of crimes and vilification to which members of the communities have been subjected, and highlights some of the inadequacies of current protections.

² The Options Paper can be downloaded from the campaign website: www.betterlawsforsafeqld.com.au/our-call-for-change/.

Hate speech and hate crime

8. There is no universally accepted meaning of the term ‘hate speech’, however it is generally understood as any means of communication that expresses hostility towards, or contempt for, a person or group on the basis of common characteristics, such as race and/or religion.
9. Hate crime is offending that is motivated by hatred or contempt, and happens in in all types of criminal offences including assault, nuisance, and wilful damage. The ethos of hate is most commonly based on race and/or religion, sexuality, or gender identity, although women and other groups are also the target of hate speech and hate crime.³
10. Extremist and hate groups are on the rise in Australia and around the world, leading to increase in hate speech, which in turn leads to an increase in hate crime.⁴ The Royal Commission of Inquiry into the terrorist attack on Christchurch mosques on 15 March 2019 reported (citations omitted)⁵:
 13. Research shows that there is a link between hate speech and hate crime. A recent study investigated whether there is a link between hate speech online and hate crime offline. Researchers collected Twitter and Police-recorded hate crime data over an eight-month period in London and built a series of statistical models to identify whether there is a significant association. The results of the study indicated ‘a consistent positive association between Twitter hate speech targeting race and religion and offline racially and religiously aggravated offences in London’. What this demonstrates is that ‘online hate victimisation is part of a wider process of harm that can begin on social media and then migrate to the physical world’. The study notes that if ‘we are to explain hate crime as a process and not a discrete act, with victimisation ranging from hate speech through to violent victimisation, social media must form part of that understanding’. There is value therefore in seeking to reduce hate speech online and offline, not only to prevent the direct harm it causes but also to limit escalation of hate speech to hate crime.

³ For example, the online subculture of men united by sexual frustration and a hatred of women, Incel, which is alleged to have radicalised a man in Canada to drive a van into a sidewalk, killing ten people. Source: Zoe Williams, “Raw hatred”: why the “incel” movement targets and terrorises women’ *The Guardian*, 26 April 2018. Researchers in Western Australia have determined that Incels have killed at least 50 people and injured at least 58 since 2014, and present a national security issue. See Sian Tomlinson, Tael Harper and Katie Attwell ‘Confronting Incel: exploring possible policy responses to misogynistic violent extremism’ (2020) 55(2) *Australian Journal of Political Science* 152.

⁴ See, for example, the United Kingdom’s independent Commission for Countering Extremism publication, *COVID-19: How hateful extremists are exploiting the pandemic* (report July 2020); and Matthew I Williams et al, ‘Hate in the machine: anti-black and anti-Muslim social media posts as predictors of offline racially and religiously aggravated crime’ (2020) 60(1) *British Journal of Criminology*, 93.

⁵ Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019, *Ko tō tātou kāinga tēnei* (Report, 26 November 2020) Part 9, 4.1 [13]–[14].

14. It is also plausible to see a link between hate crime and terrorism. Another recent study concluded:

Through the use of multiple data sources, this study uncovers the positive associations between hate crime and terrorism. In the context of intergroup conflict, there appears to be a continuum between the bias-motivated actions of non-extremists to the hate crimes and terrorist acts committed by far-rightists, with the presence of one type of activity seeing an escalation in the next type. As a result, it appears that hate crime and terrorism may be more akin to close cousins than distant relatives.

11. Reports indicate that racially based vilification and discrimination has significantly increased in Australia with the onset of COVID-19.
12. The threat assessment by the Australian Security Intelligence Organisation (ASIO) in February 2020 was that the terrorism threat in Australia now includes a growing and more organised right-wing extremist threat from groups who use Nazi symbols and meet regularly to train in combat.⁶ Commenting on this assessment, the Australian Strategic Policy Institute suggests that in Australia this has been driven ‘by the normalisation and mainstreaming of extreme right and racist discourse in public life’ over the last decade. It also suggests that social media has ‘emboldened the expression of right-wing extremist views and perspectives...’ and enabled extremists to share views and encourage ‘real-world violence’⁷.
13. In its submission to the Parliamentary Joint Committee on Intelligence and Security, Inquiry into extremist movements and radicalism in Australia, ASIO advised that Australians as young as 13 and 14 are involved in onshore terrorism, and the threat from extreme right-wing groups and individuals in Australia has increased. ASIO continues to see more people drawn to and adopting extreme right-wing ideologies.
14. The United Nations warns that globally there is a ‘disturbing groundswell of xenophobia, racism and intolerance’ with ‘Public discourse being weaponised for political gain with incendiary rhetoric that stigmatizes and dehumanises’ many vulnerable groups, and the result that ‘Hate is moving into the mainstream – in liberal democracies and authoritarian systems alike.’⁸ In July 2020, the UN Security Council Counter-Terrorism Committee Executive Directorate (CTED) published a ‘Trends Alert’ that noted that ‘extreme right-wing terrorists are using

⁶ ‘Director-General’s Annual Threat Assessment’, Australian Security Intelligence Organisation (Web Page, 24 February 2020).

⁷ John Coyne, ‘ASIO sounds the alarm’, *Australian Strategic Policy Institute* (Web Page, 3 March 2020).

⁸ United Nations, *Strategy and Plan of Action on Hate Speech* (May 2019) 1.

COVID-19-related conspiracy theories and disinformation to radicalize, recruit and fundraise, as well as seeking to inspire plots and attacks.⁹

15. The United Nations Special Rapporteur on minority issues has reported that 'minorities are overwhelmingly the main victims of hate and incitement to violence and discrimination', and available data on hate speech in social media or on hate crimes shows that 70% of those targeted belong to minorities.¹⁰
16. The Special Rapporteur (above) expressed concerns that dehumanising language normalises violence against the minority groups to which it is directed, and makes their persecution and elimination acceptable. He considered that individuals can become enmeshed in confirmation bias in social media, which is an incubating environment conducive to the expression, strengthening, and confirmation of racist, intolerant, and violent viewpoints against certain scapegoated minorities.¹¹
17. Research shows that anti-crime Facebook groups in Australia 'have the effect of legitimating racial vilification, vigilantism and violence against racialized 'others' and that the current regulation of online racism and racial vilification appears to be profoundly inadequate for addressing these concerns'. It includes examples of direct links between Facebook groups and incidence of violence, and states that the constant reinforcement of racist violence is most troubling.¹²
18. Anti-discrimination legislation has an important role in setting standards of behaviour that are expected in a free and democratic society, and in providing avenues for redress for unacceptable conduct.
19. Vilification that is prohibited under the *Anti-Discrimination Act 1991* is a public act that incites hatred towards, serious contempt for, or severe ridicule of a person or persons on the ground of race, religion, sexuality or gender identity.¹³ A civil remedy is provided for a contravention of this prohibition, which is commenced by a complaint to the Commission that may be referred to a tribunal for hearing and determination. However,

⁹ United Nations Security Council. Counter-Terrorism Committee, 'Member States concerned by the growing and increasingly transnational threat of extreme right-wing terrorism' *CTED Trends Alert*, July 2020.

¹⁰ Fernand de Varennes, *Report of the Special Rapporteur on minority issues*, UN Doc A/HRC/46/57 (3 March 2021) [21].

¹¹ *Ibid*, [44].

¹² Chris Cunneen and Sophie Russell, 'Vilification, vigilantism and violence: Troubling social media in Australia' in Kim D Weinert, Karen Crawley and Kieran Tranter (eds), *Law, Lawyers and Justice* (Routledge, 2020) ch 5. See also media report of vigilantism in Townsville: Sofie Wainwright, 'Vigilantes chasing stolen cars, patrolling streets, as youth crime rises in Townsville' *ABC News* (online), 29 September 2020, <<https://www.abc.net.au/news/2020-09-29/townsville-vigilantes-hit-the-streets-amid-spike-in-crime/12696864>>.

¹³ *Anti-Discrimination Act 1991* section 124A.

complaints-based civil remedies have limited, if any, effect in deterring more egregious hate speech and incitement that can lead to serious harm and extremism.

20. The criminal offence of serious vilification is where a person knowingly or recklessly vilifies a person or group in a way that includes threatening physical harm to person or property, or inciting others to threaten physical harm to person or property.¹⁴
21. Queensland's prohibitions on racial and religious vilification commenced on 7 June 2001,¹⁵ before the rise of online hate speech.
22. Laws at the federal level also provide criminal offences for certain hate crimes. These are discussed later in this submission.
23. Evidence before the Special Rapporteur on minority issues suggested that minorities hesitate to complain of hate speech for a number of reasons, including that authorities will not intervene, there will be no consequences for those who breach the legislation, or that the use of complaint mechanisms for social media is unlikely to remedy the situation.¹⁶
24. In the Commission's experience, these concerns about reporting or complaining also apply to people who experience other forms of vilification, hate speech, and hate crimes.
25. In the Commission's experience, the extent of hateful conduct that occurs in the community is not reflected in the number of complaints made to bodies such as the Commission or police. In order to develop a better understanding of racism in the community, on 9 June 2020 the Commission launched and promoted an online form for people wanting to report racism without making a complaint. The form can be accessed from the home page of the Commission's website by clicking on a tile called 'Report racism'. A report can be made anonymously, and the website makes it clear that de-identified information may be used in the Commission's work, including submissions, advocacy, and for statistical purposes.
26. In the period from 9 June 2020 to 30 June 2021, there were 68 reports to the Commission, however seven of those were about things that

¹⁴ *Anti-Discrimination Act 1991* section 131A.

¹⁵ When the Act commenced in June 1992, it included a provision making it an offence to incite unlawful discrimination or another contravention of the Act by advocating racial or religious hatred or hostility. That provision was repealed when the prohibitions of vilification on the grounds of race and religion were inserted. The inclusion of the grounds of sexuality and gender identity commenced 31 March 2002.

¹⁶ Fernand de Varennes, *Report of the Special Rapporteur on minority issues*, UN Doc A/HRC/46/57 (3 March 2021) [46].

happened outside Queensland. Of the 61 reported incidents in Queensland:

- (a) In 13 reports, the target was an Aboriginal or Torres Strait Islander person or people;
- (b) In 19 reports, the target was an Asian person or people;
- (c) Of the 19 reports targeting an Asian person or people, six were related to COVID;
- (d) Other targets included Jewish people and Indian people;
- (e) Five reports were about online incidents – three about the same website and the other two on social media;
- (f) The majority of in-person incidents occurred in South-East Queensland. Smaller numbers were reported in the regions of Cairns (seven), Gladstone (one), South-West Queensland (one) and Central Highlands (one);
- (g) 13 reports were by witnesses, and not something that had affected them directly;
- (h) 30 reports were anonymous, and a further seven included only a name or email address (but not both); and
- (i) None of the reports asked for more information about making a formal complaint.

27. Some of the incidents reported to the Commission in response to the 'Report racism' campaign are in set out **Appendix 1**.

Gaps in existing hate crime laws

28. While Queensland has protections under various criminal laws at both the State and federal levels, there are gaps in the coverage of existing criminal laws relating to vilification and hate crimes.
29. Vilification and hate crimes attack the human dignity of the targeted person or group. Targets are attacked for being who they are, impacting their sense of self, and often resulting in fear and withdrawal from society.
30. The Options Paper identifies some of the gaps in the coverage of existing criminal laws. The following is a summary of the gaps in existing criminal laws that are discussed in this submission:
 - (a) The offence of serious vilification is rarely used.
 - (b) Other offences available under the *Summary Offences Act 2006* and the *Criminal Code* of Queensland, do not necessarily reflect the serious impact of vilification and hate crimes, and do not act as a deterrent.
 - (c) The penalty for serious vilification is insufficient for police to obtain a warrant for the investigation of online vilification and the preservation of evidence.
 - (d) Law enforcement agencies are unable to pursue individuals who possess or disseminate abhorrent or violent material that is not instructional, or where other thresholds such as connection to a terrorist act or intent to threaten or incite harm are not met. This means that law enforcement agencies are unable to disrupt individuals and small groups at an early stage.¹⁷
 - (e) The display or possession of symbols and insignia, such as the Nazi symbol, are not criminal offences.
 - (f) There is no mandatory recording of hate crimes, and thus any data about the extent of hate-based offending is not reliable.

¹⁷ Australian Federal Police, Submission No. 5 to Joint Parliamentary Committee on Intelligence and Security, *Inquiry into extremist movements and radicalism in Australia*, February 2021, 9.

Serious vilification (criminal offence)

31. The criminal offence of serious vilification is provided for in section 131A of the *Anti-Discrimination Act 1991*. 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 —
- (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.

32. 'Public act' is defined in section 4A of the *Anti-Discrimination Act 1991*, and the attributes of race, sexuality, and gender identity are defined in Schedule 1, Dictionary, of the Act. Religious belief and religious activity are also defined in the Schedule 1, Dictionary.
33. 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.
34. 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*.¹⁸ 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

¹⁸ *Brosnahan v Ronoff* [2011] QCAT 439.

well as amounting to sexual harassment and gender identity vilification, it also constituted the offence of serious vilification.

35. The Department of Justice and Attorney-General has informed the Committee that as at 30 April 2021, there have been five charges and three convictions under section 131A of the *Anti-Discrimination Act 1991*. The first conviction 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.
36. Another conviction 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. Details of the third conviction, or whether the two other charges were withdrawn or dismissed, are unknown to the Commission.

Deficiencies with the serious vilification offence

37. Five charges of serious vilification in twenty years does not reflect the extent of relevant conduct that occurs in the community. In some cases, the offender is charged with other offences, such as public nuisance or trespass. For example, reports in the media include:
 - (a) A man who yelled obscenities while gesturing with Nazi salutes, and verbally abusing and attempting to assault a man leaving the Brisbane Synagogue in early 2021, was charged with public nuisance.¹⁹
 - (b) A man who racially abused a woman sitting in her car (in public) and then pulled down his pants and turned his naked buttocks to her, was charged with public nuisance and wilful exposure.²⁰
 - (c) Two men who verbally abused and physically attacked a female store owner in Cairns because she was Muslim, were charged with public nuisance.²¹

¹⁹ Peter Kohn, 'Shule-goers screamed at, spat on' *The Australian Jewish News* (online), 18 February 2021 <<https://ajn.timesofisrael.com/shule-goers-screamed-at-spat-on/>>. See also 'Attack at the Brisbane Synagogue', *11 Network Australia* (online video), 16 February 2021, <<https://www.youtube.com/watch?v=yQhtsog9ASc>>.

²⁰ 'Man charged over allegedly mooning and abusing Muslim woman at Logan shops' *9News* (online), 25 September 2015 <<https://www.9news.com.au/national/man-charged-over-allegedly-mooning-and-abusing-muslim-woman-at-logan-shops/17b13dd3-8885-4e31-8a08-2fb79767f795>>.

²¹ Kimberley Vlasic, 'Two charged over alleged hate attack on Cairns Muslim woman; *The Cairns Post* (online), 27 October 2016 <<https://www.cairnspost.com.au/news/crime-court/two-charged-over-alleged-hate-attack-on-cairns-muslim-woman/news-story/c516534d7416c095a2eb192475e3d96a>>.

- (d) A man who grabbed the head-scarf of a woman on the street and then attempted to set it on fire, was charged with common assault.²²
38. Hate-based vilification and other crimes cause harm to the individuals who are immediately impacted, and also have consequential harms to the broader community. When charges are laid against a perpetrator, the communities often consider the charge does not reflect that the crime was based on hatred and that the consequences are inadequate.
39. The Commission understands that the current serious vilification offence poses a number of barriers for police, namely:
- (a) The requirement to first obtain the consent of the DPP means there is a significant delay between the offence and laying charges. A more immediate response reduces the risk of the same type of reoffending, pending a hearing.
 - (b) The maximum penalty is low and a charge with a higher penalty might be preferable in the circumstances of the offence. If the offence is online, police are unable to secure the necessary warrant to establish the author of the conduct and to preserve evidence.
 - (c) The number of elements to the offence make it more difficult to substantiate the offence.
 - (d) The location of the offence in the *Anti-Discrimination Act 1991* rather than in the *Criminal Code*.

Penalty

40. The maximum penalty for serious vilification does not reflect the seriousness and the harm done by the conduct, and is not an adequate deterrent, particularly given the under-utilisation of the offence.
41. The low maximum penalty of six months imprisonment also poses difficulties for police in investigating and laying charges under section 131A. Where the conduct involves the use of telecommunications (for example, Facebook, Twitter) the Crown must prove beyond reasonable doubt the person who was responsible for the communication. Six month imprisonment offences do not meet the threshold for Facebook preservation requests, stored communication requests, and the issuing of a warrant required to secure digital evidence for court proceedings. For online offences, police need to access communications held by a carrier to

²² Brooke Baskin, 'Man who threatened to burn hijab fined \$500, runs from court with head covered' *The Courier Mail* (online), 27 October 2014
<<https://www.couriermail.com.au/news/queensland/man-who-threatened-to-burn-hijab-fined-500-runs-from-court-with-head-covered/news-story/51e06180632e63412054bd6c56cfafad>>.

establish who is responsible for the communication. A stored communication warrant is necessary for police to access and preserve communications. A stored communications warrant is issued under the *Telecommunications (Interception and Access) Act 1979* (Cth), and is only available for the investigation of a serious contravention.²³ In general, the offence must be a serious offence, or an offence punishable for a maximum period of three years.²⁴

42. This means that in addition to a section 131A complaint, there must also be a complaint of an associated three-year imprisonment offence (for example, a telecommunications offence referred to below) to allow for the search and seizure of evidence where the vilification is by electronic means.
43. Members of minority groups are often reluctant to make a complaint to police for fear of further reprisals against them. Although a third party might be a complainant for the issue of a summons,²⁵ the third party cannot be the complainant for an associated telecommunications offence, as the online vilification is not directed at the third party. This means that police would not be able to secure evidence to support a criminal prosecution under section 131A.

Approval to prosecute

44. A factor relevant to the under-utilisation by police of the section 131A offence is that the approval of the Director of Public Prosecutions (the **DPP**) or the Attorney-General is required before a proceeding can be started. By comparison, the summary offence of public nuisance carries the same maximum imprisonment penalty of six months, but does not require prior approval to start a proceeding. The requirement is out-dated, and delays in completing and submitting a brief for approval potentially allows the offending to continue, and the time delay may lessen the impact of a prosecution.
45. The requirement for approval to commence a proceeding was introduced in response to concerns raised by the Scrutiny of Legislation Committee at the time about the decision to prosecute being left to the Anti-Discrimination Commissioner, without an additional filtering process.²⁶ The Committee noted that the then Commissioner had actively lobbied successive Queensland governments for the laws in the Bill.

²³ *Telecommunications (Interception and Access) Act 1979* (Cth) section 116(1)(d)(i).

²⁴ *Telecommunications (Interception and Access) Act 1979* (Cth) section 5E, meaning of serious contraventions.

²⁵ *Whittaker v Turner* [2004] QCA 191. There is no requirement for the complainant to be aggrieved by or have any direct knowledge of the offence alleged.

²⁶ Scrutiny of Legislation Committee, Queensland Parliament, *Alert Digest* (Issue No. 1 of 2001, 15 May 2001) 14 [71]-[73].

46. The Attorney-General responded to the Committee, noting that the decision to prosecute being with the Anti-Discrimination Commissioner was consistent with other provisions of the Act in relation to criminal proceedings, and said:

... I accept the Office of the Director of Public Prosecutions provides an additional filtering process to ensure prosecutions are seen to be properly brought. It is important that the public be assured that there is a uniform system for the prosecution of criminal offences in Queensland. ... the appropriate amendment to allow the Director of Prosecutions to perform this filtering role will be made to the Bill in Committee.

47. The amendments to the Bill included the existing subsections 134A (2)-(4). Not only was the 'filtering' process of prior consent included, the power of the Anti-Discrimination Commissioner to prosecute was also removed.
48. The Commission considers it is appropriate that the Commissioner does not have the function of prosecuting offences for serious vilification. The decision to prosecute should however be left to police, as is the case with other criminal offences. There is no valid rationale for the requirement of prior DPP approval, and it is not consistent with the prosecution of most criminal offences in Queensland.²⁷ The removal of the prior consent requirement would likely result in greater utilisation of the offence.

Complexity of offence

49. The offence consists of many elements, and there has not been any judicial consideration of the provision, resulting in the meaning of some elements being uncertain. For example:
- (a) whether 'incite' would be interpreted in the same way as in the civil context (discussed later in this submission), namely, no need to prove that a person was in fact incited; and
 - (b) whether the offence is made out if the perpetrator makes an incorrect assumption about the attribute of the target (that is, assumes that person is of a race or religion but the person is of a different race or religion).

Location of offence

50. Another means of increasing police awareness and use of the offence may be to move it from the *Anti-Discrimination Act 1991* to the *Criminal Code*. This has occurred in New South Wales.

²⁷ The prior consent of the DPP is required for Criminal defamation (s365) and an investigation of an offence by an acquitted person in relation to possible retrial. The prior consent of a Crown Law Officer (the Attorney-General of DPP) for certain offences charged on indictment with a serious organised crime circumstance of aggravation.

51. In 2018, the offences of serious racial vilification, serious transgender vilification, serious homosexual vilification, and serious HIV/AIDS vilification in the *Anti-Discrimination Act 1977* (NSW)²⁸ were repealed. In their place, a new offence of publicly threatening or inciting violence was inserted into the *Crimes Act 1900* (NSW).

52. Section 93Z of the *Crimes Act 1900* (NSW) provides:

93Z Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status

- (1) A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence—
- (a) the race of the other person or one or more of the members of the group,
 - (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation,
 - (c) the sexual orientation of the other person or one or more of the members of the group
 - (d) the gender identity of the other person or one or more of the members of the group,
 - (e) that the other person is, or one or more of the members of the groups are, of intersex status,
 - (f) that the other person has, or one or more of the members of the groups have, HIV or AIDS.

Maximum penalty —

- (a) in the case of an individual — 100 penalty units or imprisonment for 3 years (or both), or
 - (b) in the case of a corporation — 500 penalty units.
- (2) In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons referred to in subsection (1)(a)-(f) were correct or incorrect at the time that the offence is alleged to have been committed.
- (3) In determining whether an alleged offender has committed an offence against this section of intentionally or recklessly inciting violence, it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence.
- (4) A prosecution for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions.

²⁸ *Anti-Discrimination Act 1977* (NSW) sections 20D, 38T, 49ZTA, and 49ZXC respectively.

- (5) In this section—

gender identity means the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.

intersex status means the status of having physical, hormonal or genetic features that are—

- (a) neither wholly female nor wholly male, or
- (b) a combination of female and male. Or
- (c) neither female nor male.

public act includes—

- (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and
- (b) any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public, and
- (c) the distribution or dissemination of any matter to the public.

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

race includes colour, nationality, descent and ethnic, ethno-religious or national origin.

religious belief or affiliation means holding or not holding a religious belief or view.

sexual orientation means a person's sexual orientation towards—

- (a) persons of the same sex, or
- (b) persons of a different sex, or
- (c) persons of the same sex and persons of a different sex.

violence includes violent conduct and **violence towards a person or a groups of persons** includes violence towards property of the person or a member of the group, respectively.

- 53. The new offence increased the maximum term of imprisonment from six months to three years, and harmonised the monetary penalty across the protected attributes. It also expanded the range of groups protected against serious vilification and provided that recklessness is sufficient to establish intent.
- 54. While the new offence removed the role of the Anti-Discrimination Board in referring people for prosecution, and of the Attorney-General in approving prosecutions, prosecutions for an offence require the prior approval of the Director of Public Prosecutions.

55. Importantly, the New South Wales offence of publicly threatening or inciting violence clarifies that:
- (a) it is irrelevant whether an alleged offender's assumptions or beliefs about another person or group were correct or incorrect; and
 - (b) it is irrelevant whether or not anyone formed a state of mind or carried out an act of violence in response to the public act.
56. There have been two prosecutions in New South Wales under the offence of publicly threatening or inciting violence (section 93Z of the *Crimes Act 1900* (NSW)). Both defendants were convicted on pleas of guilty, however the convictions had to be annulled because the prior consent of the DPP had not been obtained.

Other offences

57. For the reasons outlined above, offenders are often charged with other offences in the *Summary Offences Act 2005* or the *Criminal Code* rather than section 131A of the *Anti-Discrimination Act 1991*. Offences under federal laws (discussed below) might be utilised in circumstances involving the use of telecommunications against an individual.
58. Relevant offences under Queensland laws and their penalties, are listed in **Appendix 2**.

Existing federal offences

59. The *Criminal Code* under the *Criminal Code Act 1995* (Cth) (the ***Criminal Code Cth***) currently prohibits certain types of hate speech in:

- telecommunication offences;
- offences for urging violence and advocating terrorism or genocide; and
- abhorrent violent material offences.

Telecommunication offences

60. Telecommunication offences are provided for in Part 10.6 of the *Criminal Code Cth*, and include general offences relating to the use of telecommunications in subdivision C. Offences include using a carriage service:

- (a) to threaten to kill a person (Penalty – 10 years imprisonment);²⁹
- (b) to threaten to cause serious harm to a person (Penalty - 7 years imprisonment);³⁰ or
- (c) in a way that reasonable persons would regard as being menacing, harassing or offensive (Penalty - 3 years imprisonment)³¹.

61. In the Commission's experience, police have not been able to use these provisions when threats are made via a carriage service towards groups (e.g. people of a particular religion). Examples of this type of hate speech occurring in Queensland are in **Appendix 3** to this submission.

Urging violence offences

62. Urging violence is an offence where a person intentionally urges violence against a targeted group, or a member of a group, with the intention that force or violence will occur, and where the targeted group is distinguished by race, religion, nationality, national or ethnic origin, or political opinion.³² If the use of force or violence would threaten the peace, order and good government of the Commonwealth, the penalty is seven years imprisonment, and otherwise the penalty is five years imprisonment.

63. These offences have a limited coverage because of the elements of intent, and the designation of limited target groups. In its supplementary submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into extremist movements and radicalism in Australia,

²⁹ *Criminal Code* section 474.15(1).

³⁰ *Criminal Code* section 474.15(2).

³¹ *Criminal Code* section 474.17.

³² *Criminal Code* sections 80.2A and 80.2B.

the Law Council of Australia invited the Committee to consider whether there is a demonstrable gap in the availability of the urging violence offences in sections 80.2A and 80.2B of the *Criminal Code Cth*.³³ The Australian Federal Police informed the inquiry that these offences do not consider the degree of insult felt by a group.³⁴ In evidence, the Australian Federal Police informed the Committee that the fault element of intent can be problematic, and that it may be more appropriate for a fault element to also introduce recklessness into the *Criminal Code Cth*.³⁵

Abhorrent violent material offences

64. The *Criminal Code Cth* defines abhorrent violent material (AVM) as:

- recorded or streamed audio, video, audio-visual material
- that shows a terrorist act involving:
 - serious physical harm or death;
 - the murder or attempted murder of another person;
 - the torture of another person;
 - the rape of another person; or
 - the kidnapping of another person involving violence
- that is produced by a perpetrator or an accomplice.

The AVM regime gives the eSafety Commissioner the power to issue a notice to a website or its hosting service that specified material is abhorrent violent material.³⁶ Failure to remove access to the material may constitute a criminal offence.

65. The AVM offences are aimed at the providers of internet content and hosting services, and prosecution requires the prior consent of the Attorney-General. The offence provisions do not apply to the producers of the material or the perpetrators of the acts.

³³ Law Council of Australia, Submission No. 9 – Supplementary submission to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into extremist movements and radicalism in Australia*, 25 May 2021, 22.

³⁴ Australia Federal Police, Submission No. 5 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into extremist movements and radicalism in Australia*, February 2021, 9.

³⁵ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 29 April 2021, 21 (Scott Lee, Assistant Commissioner, Counter Terrorism and Special Investigations, Australian Federal Police).

³⁶ The regime is provided for in sections 474.30 to 474.48 of the *Criminal Code*.

Options for reform of Queensland criminal laws

Serious vilification

66. The options for reform outlined in this part of the submission draw on issues discussed earlier in the submission, and include the additional issue of whether other attributes should be protected under vilification laws.

Remove approval requirement

67. The Commission appreciates that factors relevant to commencing proceedings for an offence include the sufficiency of evidence and the public interest in taking the proceedings. However, as demonstrated earlier in this submission, the reasons for requiring the prior approval of a Crown Law officer was to provide an added 'filter' and so that the Anti-Discrimination Commissioner (now the Human Rights Commissioner) did not initiate the proceedings. The latter is appropriate given the overall functions and resources of the Commission, which are not presently apposite to the investigation and prosecution of criminal offences.³⁷

68. Under the *Criminal Code*:

(a) The prior approval of the DPP is required for:

- a charge of criminal defamation, which is a misdemeanour with a maximum penalty of three years imprisonment (section 365), and
- the authorisation for police investigations into the commission of an offence by an acquitted person in relation to possible retrial.

(b) The prior consent of a Crown law officer is required for an indictment charging various offences with a serious organised crime circumstance of aggravation.³⁸

69. The offence of serious vilification is currently a 'simple' offence (as opposed to an indictable crime or misdemeanour). Simple offences are usually prosecuted by police in the Magistrates Court, and do not usually require the consent of the DPP or Attorney-General to start proceedings. The alternative offences for conduct that otherwise constitutes serious vilification, do not require this prior approval.

70. The requirement has proved to be a barrier to using the provision in appropriate circumstances. The offence itself contains a high threshold of

³⁷ The functions of the Commission will be considered in the Commission's Review of the *Anti-Discrimination Act 1991* to be delivered to the Attorney-General by 30 June 2022.

³⁸ The meaning of a serious organised crime circumstance of aggravation is defined in the *Penalties and Sentences Act 1992* section 161Q.

threatening or inciting physical violence, and in the circumstances of the nature of the offence, police are motivated to bring an offender before the court as quickly as possible. The process of briefing the DPP and waiting for approval results in delay that increases risk to the community.

71. While the requirement occurs across other Australian jurisdictions, it has resulted in the same barriers to the operational effectiveness of the respective offence provisions in those jurisdictions.
72. The objective of the requirement being a filtering layer has proved to be an unacceptable burden that has rendered the offence provision ineffective and inoperable. In the absence of any compelling evidence for retaining the prior approval requirement, the Commission strongly recommends that it is removed.

Increase the penalty

73. As demonstrated earlier in this submission, the maximum penalty of six months imprisonment is another barrier to police enforcing the offence provision, particularly for online offences.
74. Importantly, the low penalty does not reflect societal views of the seriousness of the conduct, the corrosive effect on a diverse and inclusive society, and the personal harm to those subjected to the conduct.
75. The low penalty is another factor in the lack of deterrence effect of the offence provision.
76. The Commission strongly recommends that the maximum penalty for the offence is increased to at least three years imprisonment.

Meaning of incite

77. While the meaning of incite has been established in case law on the prohibition of vilification in the civil context (explained later in this submission), it has not been judicially considered in the context of the criminal offence of serious vilification. Recently in Queensland there has been a departure from the established meaning of incite in the context of vilification prohibitions, explained later in this submission.
78. In the civil jurisdiction, incite has been given its ordinary meaning, namely to urge on, stimulate or prompt to action; and it has not been necessary to prove that anyone was actually incited, the provision being directed at the nature of the act rather than the result of it. The reasonable person test has been applied, that is, whether an ordinary person consider they are being urged to hate (or as the case may be) the group or person.

79. It is a principle of human rights and international law, that any permissible restrictions on freedom of expression must be expressed clearly and unequivocally.
80. Accordingly, it is not only desirable but also necessary that the offence provision is clear in its application, for the public and for enforcement agencies.
81. The Commission recommends that the meaning of incite is clarified in the provision, or that an alternative term more readily understood is used, such as 'urge' or 'promote'.

NSW provision as a model

82. The Commission considers that the current New South Wales offence of publicly threatening or inciting violence, as provided for in section 93Z of the *Crimes Act 1900* (NSW) provides greater clarity than the Queensland offence of serious vilification, and should be a model for an amended offence provision for Queensland, with some modifications.
83. Subsections 93Z (2) and (3) respectively clarify that it is the offender's belief about the target's attribute that is relevant, and that actual incitement is not a necessary element.
84. As a model provision, the Commission would recommend replacing 'incite' with 'urge' (as being clearer and more readily understood), and not including the requirement for the prior approval of the DPP for reasons discussed above.
85. The Committee should also consider moving the offence of serious vilification from the *Anti-Discrimination Act 1991* to the *Criminal Code*, which is more familiar to police.

Expand the attributes protected

86. The Committee should consider whether there are other groups that need the protection of vilification hate crime laws. In its recent report, the Victorian Legal and Social Issues Committee recommended that the Victorian Government extend anti-vilification provisions in both civil and criminal laws, to cover the attributes of race and religion, gender and/or sex, sexual orientation and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDS, and personal association.³⁹ Currently, the Victorian anti-vilification provisions, both civil and criminal, cover race and religion.

³⁹ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 45-58.

87. In New South Wales the criminal offence of publicly threatening or inciting violence covers the attributes of race, religion, sexual orientation, gender identity, intersex status, and HIV/AIDS;⁴⁰ and the civil provisions cover the attributes of race, being transgender, homosexuality, and HIV/AIDS infection.⁴¹
88. In Queensland the protected attributes under both the criminal and civil provisions are race, religion, sexuality and gender identity. The review of the *Anti-Discrimination Act 1991* is to consider whether there is a need for, and the scope of, any reform of the current definitions of the attributes for discrimination. Any reform to the definitions of the four attributes currently protected under the vilification provisions may impact the coverage of the vilification provisions.
89. The Victorian Legal and Social Issues Committee discusses various additional attributes in its report, including LGBTIQ+, women, and disability. LGBTIQ+ is covered to some extent in the Queensland provisions, however women, or gender, and disability are not currently covered. In relation to women, the research and evidence to the Victorian Committee indicated:
- (a) Gendered hate speech remains common in Australia.
 - (b) Gendered hate speech fuels gender-based violence through the perpetuation of prejudice and hostility towards women.
 - (c) Certain groups of women are more likely to be targeted, such as women who are not in traditional gender roles or who enter traditionally male spaces, and those who are outspoken or active in public debate about women's rights.
 - (d) Online hate towards women has increased in recent years.
 - (e) Online hate speech towards women is intrinsically linked to the social attitudes that allow family violence to prosper.⁴²
90. In relation to disability, the research and evidence to the Victorian Committee indicated:
- (a) Overall there is limited research about the vilification of people with disability.
 - (b) Disability is a protected attribute from vilification in Tasmania and the Australian Capital Territory (ACT). In Tasmania, disability is the

⁴⁰ *Crimes Act 1900* (NSW) section 93Z.

⁴¹ *Anti-Discrimination Act 1977* (NSW) sections 20C, 38S, 49ZT and 49ZXB respectively.

⁴² Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 48-51.

attribute that receives the most complaints, and in the ACT only one complaint each year was made.

- (c) Online hate speech towards persons with disabilities is estimated to be higher than offline conduct.
- (d) Some persons with disability might be more vulnerable to vilification and less likely to be able to self-advocate, for example, people with intellectual disability, autism, or who have high communication needs.⁴³

91. The term 'impairment' is used in the *Anti-Discrimination Act 1991*, rather than 'disability'. Impairment is invariably the attribute with the highest number of discrimination complaints to the Commission. The Commission does not have any data or anecdotal indication of the level of vilification that occurs against people because of their impairments or because of their sex. If harassing or vilifying conduct occurs in an area of activity in which discrimination is prohibited (for example, work, education, goods and services, accommodation) it would be dealt with as a discrimination complaint. The Commission's data does not disaggregate discrimination complaints that might constitute vilification if the relevant attribute was protected under the vilification provisions.
92. The Commission recommends that the Committee investigate whether other groups are experiencing vilification, including by consulting with relevant representative bodies. The Committee might consider the criteria for recognising characteristics or groups in hate crime legislation adopted by the United Kingdom (UK) Law Commission in the consultation paper for its review of hate crime laws in England and Wales. These are:
- (a) Demonstrable need: evidence that criminal targeting based on prejudice or hostility towards the group is prevalent.
 - (b) Additional harm: evidence that criminal targeting based on hostility or prejudice towards the characteristic causes additional harm to the victim, members of the targeted group, and society more widely.
 - (c) Suitability: protection of the characteristic would fit logically within the broader offences and sentencing framework, prove workable in practice, and present an efficient use of resources. Where relevant, also consider any harmful practical consequences that protection of the characteristics might cause and consider that the characteristic is consistent with the rights of others.⁴⁴

⁴³ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 51-54.

⁴⁴ Law Commission (United Kingdom), *Hate crime laws*, A consultation paper (2020) 307.

Other offences

93. The Commission recommends the creation of specific offences for criminal conduct that is motivated by or based on the attributes protected in the vilification provisions. The specific offences would add to the existing base offences such as public nuisance, assault, damage to property, and the like.
94. The approach in the UK includes the creation of separate versions of existing offences for racially or religiously aggravated offending that have higher maximum penalties than the base offences.⁴⁵ An offence is racially or religiously aggravated if the offender demonstrates hostility based on race or religion towards the victim (the demonstration limb), or the offence is motivated by hostility towards members of a racial or religious group based on their membership of that group (the motivation limb). The offences that have aggravated versions are: malicious wounding or inflicting grievous bodily harm; assault occasioning actual bodily harm; common assault; destroying or damaging property; threatening or abusive conduct that is likely to cause harassment, alarm or distress; intentionally causing harassment, alarm or distress using threatening, abusive or insulting words or behaviour; and putting people in fear of violence, and stalking involving fear of violence, serious alarm or distress.
95. The UK Law Commission discusses the demonstration and motivation limbs of hostility in its consultation paper for the review of hate crime laws, and provisionally proposes to maintain the demonstration limb (where the commission of a hate crime can be satisfied through proof of demonstration of hostility towards a relevant characteristic of the victim), and prefers a revision of the motivation to test 'motivated by hostility or prejudice' towards the characteristic group.
96. The Commission recommends separate aggravated offences for those listed in **Appendix 2** (other than serious vilification) with a reservation about an aggravated offence of public nuisance.

Aggravated public nuisance

97. The public nuisance offence is committed if a person's behaviour interferes with, or is likely to interfere with, the peaceful passage through or enjoyment of a public place, and the behaviour is in a way that is disorderly, offensive, threatening, or violent. Behaving in an offensive way includes using offensive, obscene, indecent, or abusive language, and behaving in a threatening way includes threatening language.

⁴⁵ The UK approach also includes enhanced sentencing that apply to hostility on the grounds of race, religion, sexual orientation, disability or transgender identity; and separate offences for stirring up hatred and for racist chanting at a football match.

98. The Commission is concerned that an aggravated offence of public nuisance might be used in circumstances that involve swearing at police officers. Minority groups that are over-represented in the criminal justice system and those who come to the attention of police, might be more inclined to swear at the officers. As swearing at police in public is considered offensive, an additional spoken word might move the offence into the aggravated category.
99. Indigenous people are significantly over-represented in those charged with public nuisance for using offensive language, often in circumstances where they have accused a police officer of racism. Analysis of reported public nuisance decisions indicates that offensive language directed at police officers by Indigenous women reflects their feelings of powerlessness and marginalisation.⁴⁶
100. The Commission considers that offensive behaviour towards police should be excluded from a separate offence of aggravated public nuisance. Limiting an aggravated public nuisance offence in this way is consistent with the United Nations Human Rights Committee General Comment on the right to freedom of expression. There the Human Rights Committee states that 'the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties', and 'laws should not provide for more severe penalties solely on the basis of the identity of the person who may have been impugned'.⁴⁷

Conviction for base offence

101. If aggravated offences are created, it is important to ensure that if the aggravated element of the offence is not proved, it will be open for the Court to convict on the base offence. This should apply to offences that are dealt with summarily.
102. This approach is consistent with the effect of indictment on offences involving circumstances of aggravation provided for in the Criminal Code. Section 575 of the Criminal Code provides:

Except as hereinafter stated, upon an indictment charging a person with an offence committed with circumstances of aggravation, the person may be convicted of any offence which is established by the evidence, and which is constituted by any act or omission which is an element of the offence charge, with or without any of the circumstances of aggravation charged in the indictment.

⁴⁶ Tamara Walsh, 'Public nuisance, race and gender' (2017) 26(3) *Griffith Law Review*.

⁴⁷ Human Rights Committee, *General Comment No 34: Article 19 Freedoms of opinion and expression*, 102nd sess, UN doc CCRP/C/GC/34 (12 September 2011).

Penalties and sentencing

103. A number of jurisdictions have incorporated hate crime provisions into sentencing legislation, including England, Wales, Canada, Victoria, the Northern Territory, and New South Wales. To date, the approach in the Australian jurisdictions is that hate crime provisions are in sentencing legislation, whereas in England and Wales there are both substantive offences and sentencing provisions.
104. Queensland's sentencing legislation does not currently provide for hate-motivation as a circumstance of aggravation. A circumstance of aggravation is one where the offender is liable to a greater punishment than if the offence was committed without the circumstance. Queensland's *Penalties and Sentences Act 1992* provides that certain orders must be made where an offence is committed in a public place while the offender was adversely affected by an intoxicating substance, and for a conviction of a prescribed offence with a serious organised crime circumstance of aggravation.
105. The Commission recommends that Queensland introduce hate-motivation for offending as a circumstance of aggravation and factor that a court is required to consider.
106. The sentencing legislation in Victoria, New South Wales, and the Northern Territory does not clearly limit the characteristics that invoke the circumstance of aggravation. The Victorian legislation requires the court to have regard to:
- whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.⁴⁸
107. Evidence to the Victorian inquiry into anti-vilification protections was that this sentencing provision is rarely used in practice. Reasons include under-reporting, failure to identify and record crimes as hate crimes, difficulties locating perpetrators, and the high threshold of proving prejudice motivation in court.⁴⁹
108. The New South Wales legislation provides that in determining the appropriate sentence, the court is required to take into account aggravating factors that include:
- the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin,

⁴⁸ *Sentencing Act 1991* (Vic) section 5(2)(daaa).

⁴⁹ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 183.

language, sexual orientation or age, or having a particular disability).⁵⁰

109. The New South Wales Court of Criminal Appeal has confirmed that the provision applied to a false belief that a victim was a paedophile. The offender claimed that the sentencing judge was wrong in taking into account as an aggravating factor that the offences were 'motivated by hatred or prejudice against a group of people to which the offender believed the victim belonged ... because the offender believed the victim to be a paedophile'. The Court said that the examples given in parentheses are merely that, i.e. examples, and do not comprise an exhaustive list of the groups envisaged by the subsection. A significant factor in the offender's motivation was his antipathy towards the victim because he believed him to be a member of a particular group, namely paedophiles.⁵¹
110. The outcome has been criticised. The UK Law Commission considers that paedophilia itself is not an appropriate characteristic to be protected in hate crime, and that an appropriate test for the inclusion of characteristics, based on whether a characteristic causes harm to others, is whether the characteristic is 'worthy of respect in a democratic society, and compatible with human dignity and the fundamental rights of others'.⁵²
111. The New South Wales Law Reform Commission considered that the focus of the legislation should be on the minority and vulnerable or subjugated groups, and has recommended that the provision be confined to cases where the hatred or prejudice relates to 'a group of people of a particular religious belief, racial, ethnic or national origin, age, sexual orientation, transgender status, or having a particular disability or illness'⁵³.
112. There are mixed views as to whether enhanced sentencing for hate-motivated offending should be limited to hate for specified characteristics, or should apply to all forms of hatred. A broad approach would condemn all forms of hatred and prejudice as unacceptable in our society.
113. The Commission considers that enhanced sentencing for hate-based offending should mirror aggravated hate-based offences, and that the characteristics for both the offences and sentencing are confined. The Commission considers the characteristics should be selected from those protected under anti-discrimination legislation and international human

⁵⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) section 21A (2)(h).

⁵¹ *Dunn v The Queen* [2007] NSWCCA 312.

⁵² Law Commission (United Kingdom), *Hate crime laws*, A consultation paper (2020) 207 and 369.

⁵³ New South Wales Law Reform Commission, *Sentencing* (Report 139, July 2013) 112, [4.186].

rights instruments. This approach is consistent with the principle of minimum criminalisation.

Display or possession of symbols and insignia

114. The Options Paper recommends the introduction of a complementary offence to criminalise the possession, distribution, or display of hateful material. It suggests adopting offences under Western Australian legislation such as:
- (a) possession of material for dissemination with intent to incite racial animosity or racist harassment;⁵⁴
 - (b) possession of material for dissemination that is likely to incite racial animosity or racist harassment;⁵⁵ and
 - (c) conduct intended to racially harass⁵⁶ or likely to racially harass⁵⁷.
115. In addition to the offences identified in the Options Paper, the Western Australian offences include:
- (a) possession of material for display with intent to racially harass;⁵⁸ and
 - (b) possession of material for display that is likely to racially harass.⁵⁹
116. The Western Australian offences for possession of material relate to 'written or pictorial material that is threatening or abusive'. This description is not defined, in which case it is likely to be an objective test. It is unclear whether any charges have been prosecuted under the offences relating to the possession of threatening or abusive material, and thus whether the meaning of threatening or abusive material has been judicially considered. The Commission notes that for the offences of possessing threatening or abusive material for dissemination with the intent to, or that is likely to incite racial animosity or racial harassment (section 79 and 80), a prosecution must not be commenced without the consent of the Director of Prosecutions.
117. The scheme in the United Kingdom is to criminalise the wearing or display of certain symbols. It is an offence to publicly wear clothing, or otherwise display the symbols of a proscribed terrorist organisation 'in such as way or in such circumstances as to arouse reasonable suspicion that [they] are a member or supporter of the organisation'. The offence carries a

⁵⁴ *Criminal Code Act 1913* section 79.

⁵⁵ *Criminal Code Act 1913* section 80.

⁵⁶ *Criminal Code Act 1913* section 80A.

⁵⁷ *Criminal Code Act 1913* section 80B.

⁵⁸ *Criminal Code Act 1913* section 80C.

⁵⁹ *Criminal Code Act 1913* section 80D.

maximum penalty of six months imprisonment. This type of prohibition is similar to the prohibitions in Queensland that relate to outlawed organisations that are largely motorcycle groups.

118. The issue of criminalising possession of symbols and hateful material was considered by the Victorian Legislative Assembly Legal and Social Issues Committee (the **Victorian Committee**) in its inquiry into anti-vilification protections. In its report,⁶⁰ the Victorian Committee acknowledged the support among some stakeholders for a broad-based offence targeted at hateful materials, however noting the position of the [Nazi symbol] as a primary symbol of hate, it recommended the Victorian Government establish a criminal offence that prohibits the display of symbols of Nazi ideology, including the Nazi swastika, with considered exemptions to the prohibition. The Victorian Committee recommended that the public display of other hateful symbols be monitored to determine whether they should also be prohibited.
119. The issue is also raised in the current inquiry by the federal parliament into extremist movements and radicalism in Australia. The terms of reference of the inquiry include ‘further steps that the Commonwealth could take to disrupt and deter hate speech and establish thresholds to regulate the use of symbols and insignia associated with terrorism and extremism ... and further steps the Commonwealth could take to reinforce social cohesion, counter violent extremism and address the growing diversification of extremist ideology in Australia’. The Australian Federal Police gave evidence that there is a gap in criminal laws that constrains investigators’ ability to respond to the possession and dissemination of abhorrent material, and to disrupt radicalised individuals in the early stages. The Australian Federal Police strongly supports the criminalisation of public display of flags and other extremist insignia, and ‘to deter actions aimed at harassing and vilifying members of our community’. They said ‘the existing offences do not sufficiently address the possession and sharing of extremist material, nor the display of extremist symbols and insignia, to allow us to disrupt individuals and small groups at an earlier stage of the attack planning continuum’.⁶¹
120. In response, the Law Council of Australia (the **LCA**) argued against criminalisation of ‘mere possession’ and ‘mere dissemination’.⁶² The LCA

⁶⁰ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 180-181.

⁶¹ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 29 April 2021, 15 and 19-21 (Scott Lee, Assistant Commissioner, Counter Terrorism and Special Investigations, Australian Federal Police, and Ian McCartney, Deputy Commissioner, Investigations, Australian Federal Police).

⁶² Law Council of Australia, Submission No. 9 – Supplementary submission to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into extremist movements and radicalism in Australia*, 25 May 2021, 15-22.

said there is a serious question as to whether discrete offences for the private possession, or public wearing or display, of a particular symbol or insignia would effectively deter a person who is predisposed toward an extremist ideology. It considers that criminalisation may simply lead to a perpetual cycle of re-offending and may undermine the objective of preventing the spread of harmful extremist ideology by inflaming the person's grievances and may isolate them from positive influences and social connections. The LCA recommends alternatives such as a stronger and nationally consistent regulation of the sale and commercial distribution of symbols and insignia, and consideration of amending the offences for advocating violence in sections 80.2A and 80.2B of the *Criminal Code Cth*.

121. In South Australia it is an offence to possess extremist material, or to take any step in the production or distribution of extremist material, without reasonable excuse.⁶³ The maximum penalty is \$10,000 or imprisonment for two years. Extremist material is defined as material that a reasonable person would understand as promoting terrorists acts, seeking support for terrorist acts, or has being produced or distributed by a terrorist organisation. While this provision assists law enforcement in terms of counter-terrorism,⁶⁴ it is not likely to capture the mere possession or display of symbols and insignia such as the Nazi symbol.
122. The first step in considering the criminalisation of the possession of symbols and insignia and the dissemination of symbols and insignia, is to determine the objective of doing so. The objectives might range from preventing or interrupting the spread of harmful extremist ideology to reduce the risk of terrorist acts, to preventing the harm to groups and individuals who may feel threatened, intimidated, or insulted by symbols or insignia. The South Australian model might achieve the former objective but not the latter.
123. An alternative to criminalising the possession of symbols and insignia might be to give police the power to search, seize, and dispose of the material, where it is reasonably suspected that the material has been, or may be used, to vilify or harass a group or member of a group based on the attributes in which vilification is prohibited. This would be similar to the powers that the police have for the search, seizure, and disposition of

⁶³ *Summary Offences Act 1953* (SA) section 37, in Part 7A-Extremist material.

⁶⁴ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 29 April 2021, 20 (Scott Lee, Assistant Commissioner, Counter Terrorism and Special Investigations, Australian Federal Police). Individuals who possessed a range of material aligned to ideologically motivated violent extremism were charged with possession of that material under the South Australian legislation.

dangerous attachment devices, even though possession of the devices is not of itself an offence.⁶⁵

124. Any regulation of the possession and display of symbols and insignia must contain appropriate exceptions that include the historical, cultural, and religious significance of some symbols. Of concern is the appropriation of the term 'swastika' in relation to the Nazi Party and its association with genocide, racism, and white supremacy.
125. The swastika is an ancient and revered symbol with profound meaning in Hinduism, Buddhism, and Jainism. These communities feel strongly that the appropriation of this important religious symbol by the Nazi Party, and by other organisations such as the Carlsberg brewery, is highly offensive and cultural theft.
126. The swastika is a 5,000-year-old sacred symbol of peace, and due to almost a century of violation of its symbolism, people feel they are no longer able to practice their religious tradition of displaying the symbol without being exposed to criticism and censorship. For example, in recent years the European Union has attempted to ban all use of the swastika, and in America, the Hindu American Foundation stepped in to help a student avoid expulsion for displaying the Hindu swastika in his fraternity house. In 2019 in Adelaide, a delivery man defaced the Hindu symbol at the home of a customer because he perceived it to be the symbol of Nazism.
127. In the face of movements and incidents such as these, Hindu, Buddhist and Jain communities have been forced to defend the use of their sacred symbol and engage in efforts to counteract the damaging misunderstandings of its origins and meaning.
128. While the Nazi symbol is associated with extremist movements, it is important to remember that it is an adaptation of the swastika.⁶⁶ When considering banning the Nazi symbol it is important to use the correct terminology by not referring to it as the swastika, and to educate the public about the difference between the swastika and the Nazi symbol.

⁶⁵ Under the *Summary Offences Act 2005*, there are offences for using dangerous attachment devices in certain ways. Complementary provisions in the *Police Powers and Responsibilities Act 2000* enable police to search, without warrant, people and vehicles if the police officer reasonably suspects there is a dangerous attachment device that has been, or is to be used, to disrupt activities referred to in the relevant offence provisions of the *Summary Offences Act 2005*. A police officer who finds a dangerous attachment device has the power to deactivate or disassemble the device, or to seize and dispose of the device.

⁶⁶ The swastika is in a 'T' cross appearing in a clockwise direction, and the Nazi symbol is in an 'X' cross appearing in an anti-clockwise direction.

Vilification (civil complaint)

129. Section 124A of the *Anti-Discrimination Act 1991* 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 persons 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.

130. A ‘public act’ is defined in section 4A of the *Anti-Discrimination Act 1991* 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.

131. 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.⁶⁷

⁶⁷ Before the QCAT commenced in December 2009, complaints under the *Anti-Discrimination Act 1991* were referred to and decided by the former Anti-Discrimination Tribunal.

Vilification complaints at the Commission stage

132. The legal framework for enforcement of the prohibition against vilification at the civil level is a claims process that is commenced by complaint, and is progressed by the person making the complaint.
133. A complaint of any contravention of the *Anti-Discrimination Act 1991* must be made in writing to the Commission, and must set out reasonably sufficient details to indicate an alleged contravention of the Act.⁶⁸ After receipt of a complaint, the complaint is assessed as to whether it meets this criteria. Historically, approximately 55-60% of all complaints received are accepted, although over recent years this has dropped to 47% in 2019-2020 and 31% in 2020-2021.⁶⁹
134. The number of vilification complaints accepted by the Commission to 30 June 2021 is set out in the table at **Appendix 4**.⁷⁰ The table includes a breakdown of the complaints by attribute (race, religion, sexuality, and gender identity).
135. The Commission is required to try to resolve accepted complaints through conciliation, and may direct a person to take part in a conciliation conference.
136. In the period from 1 January 2009⁷¹ to 30 June 2021, the Commission accepted 209 complaints of vilification. Of the 209 accepted vilification complaints in that period, 83 were resolved through conciliation (approximately 40%) and 61 were referred to the tribunal (approximately 29%).
137. Over that period, the average rates for conciliation and referral for overall complaints were approximately 56% and 25% respectively.
138. 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.
139. The statistics indicate a level of success in resolving complaints through conciliation, and conciliators also report that the conciliation process has been effective in increasing understanding as to conduct that is unlawful and the impacts of vilification on persons subjected to it.

⁶⁸ *Anti-Discrimination Act 1991* section 136.

⁶⁹ The low percentage for 2020-2021 reflects the increase in the number of complaints received and a resultant backlog.

⁷⁰ These statistics are from the Commission's annual reports.

⁷¹ The date of commencement of the Commission's current database.

140. The conciliation process 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.
141. However, despite the effectiveness of conciliation, community representatives say that people subjected to vilification are often reluctant to make a complaint because the process involves engaging with the person who has vilified them, or the person doesn't participate in the conciliation, and the complainant is left to refer the complaint to the tribunal and proceed to a hearing. This places the onus and burden on the person subjected to the vilification to take action.
142. Pursuing a complaint through the tribunal hearing process requires commitment and can be taxing on the individual, and the outcome might be unrewarding. For example, a woman who experienced verbal abuse and insults based on her race and religion over a period of time from a man, pursued a complaint to hearing in the Queensland Civil and Administrative Tribunal. The man gave evidence at the hearing and admitted saying some of the things and denied others. In a decision comprising eleven paragraphs, the tribunal found that the man had racially vilified the woman. The sole order made by the tribunal in that case was that he 'not make any remark that may constitute racial vilification relating to the Applicant'.⁷²
143. A more proactive approach, in addition to a remedial approach, to strengthen the legal framework and alleviate the burden on individual complainants, is to impose a positive duty on prescribed duty holders (such as employers, service providers, and sporting bodies) to take reasonable and proportionate measures to eliminate vilification as far as possible. This approach is discussed in the section of this submission on options to improve the civil prohibition and framework.
144. Another option is to provide for a 'vilification order' in the nature of the existing domestic violence order framework. A vilification order would enable a complainant to apply to the tribunal for an order in the nature of a domestic violence order as an option or alternative outcome of a vilification complaint. An alleged breach of the vilification order would constitute a criminal offence and be dealt with by the police. This suggestion is also discussed in the section on options to improve the civil prohibition.

How the law has been applied in Queensland

145. The Queensland tribunals have mostly interpreted and applied the vilification provisions consistently with other jurisdictions with similar

⁷² *Donovan v Tobin* [2015] QCAT 332.

provisions, in particular New South Wales, and include the following principles:

- (a) The communication to the public must be capable of being seen or heard without undue intrusion by a non-participant.⁷³
- (b) It is not necessary to show an intention to incite or actual incitement.⁷⁴
- (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.⁷⁵
- (d) A trivial joke or comment will not be a breach of the provision.⁷⁶

146. 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.⁷⁷ This is contrary to previously decided cases.

147. When section 124A was introduced, the Explanatory Notes for the Bill said, in respect of the proposed new section 124A:

... Consistent with the interpretation that has been accorded 'incite' in other jurisdictions, the section will not require proof that anyone was actually incited to be satisfied. The test of whether incitement has occurred is an objective one based on a hypothetical listener or viewer. ...⁷⁸

148. 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.⁷⁹

149. The decided complaints of vilification (where reasons have been published) are listed in **Appendix 5** (complaint upheld) and **Appendix 6** (complaint dismissed).

150. The decisions indicate that the application of section 124A of the *Anti-Discrimination Act 1991* has not resulted in any inappropriate impingement

⁷³ *Peters v Constance* [2005] QADT 9; *Z v University of A (No. 7)* [2004] NSWADT 81.

⁷⁴ *Deen v Lamb* [2001] QADT 20; *Peters v Constance* [2005] QADT 9.

⁷⁵ *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701; *Cohen v Hargous; Karelicki v Hargous* [2006] NSWADT 209.

⁷⁶ *Menzies v Owen* [2008] QADT 20.

⁷⁷ *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.

⁷⁸ Explanatory Notes, Anti-Discrimination Amendment Bill 2001 (Qld) 5.

⁷⁹ 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.

on freedom of expression. The complaints that have been upheld have involved conduct that is unacceptable in a society that values dignity and worth of all individuals. These include:

- (a) a woman being subjected to racial epithets and abuse over a CB radio, encouraging others to do the same, to 'give her as much [REDACTED] as you like' and giving out her address as a place to go for sex;⁸⁰
- (b) publishing in a local newspaper that homosexuals must leave local beaches, saying [REDACTED] beware' and threatening vigilante action;⁸¹
- (c) a student at a hospitality college being humiliated in front of his peers and teachers by reference to his race.⁸²

151. The exceptions in subsection 124A (2) are an integral part of the vilification provisions, as they provide a balance for freedom of speech, and they 'recognise that there are circumstances in which it is not wrong to do acts which might have the tendency to incite'.⁸³

152. The exception most commonly dealt with by the tribunals and courts is the exception for acts done reasonably and in good faith for various public interest purposes.

153. In Queensland, this exception applied to the dissemination by a candidate in a federal election of a pamphlet that Muslims were prone to disobey Australian laws to the extent of being prepared to commit murder. The tribunal held that the exception was effective to ensure that a candidate in an election is free to make statements of a political character without fear of offending the prohibition against vilification, provided the candidate publishes words in good faith and acts reasonably.⁸⁴

Options to improve the civil prohibition and framework

154. Inconsistencies and questions have emerged in the application of section 124A. These include the meaning of incite and the extent to which gatherings of people are considered to be part of the public, for example, workplaces and educational settings.

Meaning of incite

155. The difficulties with the meaning of incite (discussed above) could be resolved by replacing it with the word 'urge' or 'promote', or including a note or other form of clarification that it is not necessary to show that

⁸⁰ *Casey v Flanagan* [2011] QCAT 320; and *Casey v Blume* [2012] QCAT 627.

⁸¹ *GLBTI v Wilks* [2007] QADT 27.

⁸² *Singh v Shaftson Training One Pty Ltd & Anor* [2013] QCAT 8.

⁸³ *Deen v Lamb* [2001] QADT 9.

⁸⁴ *Ibid.*

anyone was actually incited by the conduct. This is how the provision has traditionally been interpreted.

Workplaces etc. as part of the public

156. It is necessary to clarify whether the prohibition is intended to apply to environments such as workplaces that are not open to the public generally. In his second reading speech for the Bill that introduced the vilification provisions, the Premier at the time noted that the prohibitions targeted statements in public, and that the government considered it was not appropriate to proscribe private behaviour.⁸⁵
157. That the prohibitions were intended to, or should, extend to workplaces and places of education, is consistent with the approach that only private communications are excluded from the prohibitions.
158. If the prohibitions are intended to apply broadly so that only private communications are not covered, then in view of the recent decisions that communications in workplaces and schools are not communications to the public, it is essential to clarify this position.
159. In New South Wales, the definition of public act in the *Crimes Act 1900* (for the offence of publicly threatening or inciting violence on various grounds) provides: 'For the avoidance of doubt, an act may be a public act even if it occurs on private land'.
160. The Commission considers that it should be made clear that 'public acts' include acts that occur in workplaces and the like, and should be reflected in the definition of 'public act' in section 4A of the *Anti-Discrimination Act 1991*.

Extending protections to other attributes

161. The Committee should also consider whether there is a need to extend protections from vilification to people and groups with other attributes, such as attributes that are, or should be, protected from discrimination.

Harm-based prohibition

162. A criticism of prohibitions of vilification at the civil level is that they do not place enough emphasis on the harm experienced by victims, and the harm caused to the broader society in terms of social cohesion.
163. It was suggested to the Victorian inquiry into anti-vilification protections a harm-based provision would reflect the ordinary understanding of the

⁸⁵ Queensland, *Parliamentary Debates*, House of Representatives, 22 March 2001, 67 (Peter Beattie (Premier and Minister for Trade)).

meaning of vilification⁸⁶ as an expression of hatred or abuse, and reduce the evidentiary burden on complainants to prove incitement.⁸⁷

164. The Victorian Committee considered that incorporating a harm-based test would enhance the legal and operational effectiveness of the legislation by prohibiting all forms of vilification and increasing the utilisation and awareness of the Act through more complaints and enquiries.⁸⁸ The Committee recommended the introduction of a new civil harm-based provision, and to formulate the provision to make unlawful conduct that ‘a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing a person or a class of persons’.⁸⁹
165. The Commission considers that introducing a similar harm-based provision in Queensland would complement the current prohibition against inciting conduct and strengthen the law by prohibiting conduct that causes significant harm to others.
166. The reasonable person test proposed by the Victorian Committee maintains a high threshold for restricting freedom of speech, and avoids misunderstanding between the ordinary meaning of the words ‘offend’ and ‘insult’ and the judicial interpretation of those terms as used in the *Racial Discrimination Act 1975* (Cth) section 18C.

Introduce a positive duty to eliminate vilification

167. There is a growing push to strengthen legal frameworks, and to reduce the burden on individuals in having to use complaint mechanisms, by providing explicit positive duties in legislation. The Australian Human Rights Commission recommended that the *Sex Discrimination Act 1984* (Cth) be amended to include a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation, as far as possible.⁹⁰ This approach is supported by organisations such as the Law Council of Australia⁹¹ and the Victorian Equal Opportunity & Human Rights Commission⁹².

⁸⁶ The Macquarie Dictionary meaning of ‘vilify’ is to speak evil of, defame, traduce – to make vile’.

⁸⁷ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 119.

⁸⁸ Ibid, 120.

⁸⁹ Ibid, 120 and 123.

⁹⁰ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, 2020, Recommendation 17, 44 and 470-481.

⁹¹ Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (32 December 2020).

⁹² Victorian Equal Opportunity & Human Rights Commission, Submission to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces*, February 2019, 33

168. In Victoria, the *Equal Opportunity Act 2010* (Vic) requires various duty holders (employers and others) to take preventive action to eliminate discrimination, sexual harassment, and victimisation, by imposing a positive duty on employers to take reasonable measures to eliminate discrimination, sexual harassment, or victimisation as far as possible.⁹³ While there is not a corresponding duty to eliminate vilification in the *Racial and Religious Tolerance Act 2001* (Vic)⁹⁴, the Victorian Legal and Social Issues Standing Committee has recommended in its recent report that the Victorian Government introduce a positive duty on organisations to take reasonable and proportionate steps to prevent vilification, as is currently the case for discrimination, sexual harassment, and vilification.⁹⁵
169. Under the existing Queensland framework, the liability for vilifying conduct rests with the person who does the act that constitutes vilification. If the person does the act in the course of work or while acting as the agent of another person, the employer or principal of the person will also be liable for a civil claim. This means that a person subjected to the vilification can make a complaint against the person who does the act, their employer or agent (if the act is done in the course of work or while acting as agent), or both of them. This vicarious liability is provided for in section 133 of the *Anti-Discrimination Act 1991*. An employer or principal has a defence if they can prove that they took reasonable steps to prevent the worker or agent from contravening the Act. So, in order to avoid being responsible for unlawful vilification by a person's workers or agents, the person (employer or principal) must take reasonable steps to prevent the vilification from happening.
170. If vilification happens in circumstances where a person should take steps to stop it or eliminate it, the person might be liable for a claim of indirect discrimination. For example, if a service providers knows that customers of a certain race are being vilified, the service provider might be indirectly imposing a term or condition that in order to access the services, people of the certain race will be publicly abused because of their race. This might constitute indirect discrimination on the basis of race.
171. The operation of vicarious liability and indirect discrimination results in an implied duty to take reasonable steps to prevent conduct that is unlawful under the *Anti-Discrimination Act 1991*, including vilification. However, being implied, the obligation is not clear.

⁹³ *Equal Opportunity Act 2010* (Vic) section 15.

⁹⁴ In Victoria, vilification on the basis of race or religion is prohibited in the *Racial and Religious Tolerance Act 2001* (Vic).

⁹⁵ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 142-144.

172. A positive duty provides clarity and puts the responsibility onto the duty holder, rather than the obligation being implicit by way of vicarious liability and indirect discrimination. It also relieves the burden on a person making a complaint, where there is an appropriate regulatory framework. The Victorian Legal and Social Issues Standing Committee stated in its report that it considered 'establishing a positive duty is essential to the effective operation of anti-vilification laws, as it is concerned with addressing issues from a systemic perspective.'⁹⁶
173. An issue raised by the Victorian Equal Opportunity and Human Rights Commission is that the prohibition of vilification applies to everyone in the State, and that it would be impractical to place a legal duty on every individual in the State to take positive steps to prevent vilification in the community. It was suggested, and accepted by the Committee, that the duty be restricted to those that have obligations not to engage in discrimination, sexual harassment, and victimisation.
174. In Queensland, given the broader application of the prohibitions of sexual harassment and victimisation, the duty should be restricted to those that have obligations in the areas of activity where discrimination is prohibited. For example, duty holders would include employers, service providers, education providers, government services.
175. Positive duties need to be accompanied by a regulatory framework for enforcement. A body such as the Commission should establish minimum standards and be able to investigate compliance and non-compliance with the obligations.

Provide for the making of a 'vilification order'

176. As noted above, a further option for consideration would be to provide a process for the making of an order in the nature of a domestic violence protection order. The order, referred to here as a **vilification order**, would require the person not to engage in vilifying conduct, with conditions similar to those in a domestic violence order. Disobeying a vilification order would be a criminal offence that would be dealt with by the police.
177. The process for this option might be:
- (a) A complaint of vilification is made to the Commission.
 - (b) The complaint is accepted as meeting the threshold of indicating an alleged contravention of the Act.
 - (c) The complainant applies to the tribunal for a vilification order.

⁹⁶ Legislative Assembly Legal and Social Issues Committee, Victorian Parliament, *Inquiry into anti-vilification protections* (2021) 144.

- (d) If an order is made, the complainant may elect that the complaint process ends.

178. A benefit of this process would be that the parties do not participate in a conciliation process, and that if the tribunal is satisfied there is sufficient reason to make an Order, it will become a police matter if the Order is disobeyed.

179. Currently, a person who has made a complaint to the Commission may apply to the tribunal for an order to stop a person from doing something that might prejudice the investigation or conciliation of the complaint or an order that the tribunal might make after a hearing.⁹⁷ The application is made before the complaint is referred to the tribunal. The purpose of the order is to preserve the status quo so as not to interfere with the complaint process. The suggested vilification order has a different purpose. That purpose is to stop the conduct as a potential outcome of the complaint, and to deter continuation of the conduct.

⁹⁷ *Anti-Discrimination Act 1991* section 144.

Human rights and constitutionality

180. Laws to address hate speech, hate crimes, and vilification, must not unreasonably impinge on human rights, such as the right to freedom of expression, nor unreasonably burden the implied constitutional right to freedom of political expression.

Constitutionality

181. Queensland's prohibition of vilification in section 124A of the *Anti-Discrimination Act 1991* has been found not to burden the implied freedom of political communication under the *Constitution*.⁹⁸
182. The constitutionality of section 124A was challenged in a case stated to the Queensland Court of Appeal in *Owen v Menzies*.⁹⁹ The Court of Appeal held that section 124A is not inconsistent with the implied protection of freedom of political communication provided by the *Constitution*.
183. 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.

Human Rights Act 2019

184. The obligations under the *Human Rights Act 2019* (the **HR Act**) operate to ensure that laws, policies, and decisions are made and applied in a way that is compatible with human rights. The expression 'compatible with human rights' is defined in the HR Act as meaning, either, that a human right is not limited, or, a human right is limited only to the extent that is reasonably and demonstrably justified in a free and democratic society based on human dignity, equality, and freedom.
185. The first step in assessing compatibility of proposed legislation is to identify the human rights affected by it. The human rights in the HR Act that are most relevant to laws that regulate speech and vilification are the rights to freedom of religion, freedom of expression, privacy, security, to life, and to equality and non-discrimination.

⁹⁸ *Owen v Menzies* [2013] 2 Qd R 327; [2012] QCA 170.

⁹⁹ *Ibid.*

186. The right to freedom of thought, conscience, religion, and belief in section 20 of the HR Act, and the right to freedom of expression in section 21 of the HR Act, are drawn from articles 18 and 19 of the *International Covenant on Civil and Political Rights* (ICCPR) respectively.
187. The rights in article 19 of the ICCPR are referred to as the right to freedoms of opinion and expression. The United Nations Human Rights Committee describes freedom of opinion and freedom of expression as ‘essential for any society’, and as constituting ‘the foundation stone for every free and democratic society’. The Human Rights Committee also states:
- Freedom of expression is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.
- ...
- The freedoms of opinion and expression form a basis for the full enjoyment of a wide range of other human rights.¹⁰⁰
188. International law requires that given the significance of the right to freedom of expression, restrictions must be exceptional, subject to narrow conditions, and strict oversight. Any limitations must meet three conditions: legality, legitimacy, and necessity and proportionality.¹⁰¹
189. Article 19(3) of the ICCPR provides that the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to restrictions, only where necessary and provided by law, for:
- (a) respect of the rights or reputations of others; and
 - (b) the protection of national security or of public order (ordre public), or of public health or morals.
190. Queensland’s vilification provisions would satisfy these exceptions. Any new laws or changes to the current provisions must also satisfy these exceptions.
191. The right to freedom of thought, conscience, religion and belief means that everyone has the right to think and believe what they want, and to have a religion and to demonstrate the religion in worship, observance, practice and teaching.
192. Everyone has the right to life and the right not to be arbitrarily deprived of life (section 16 of the HR Act) and the right to security (section 29 of the HR Act). The right to security concerns freedom from injury to the body

¹⁰⁰ Human Rights Committee, *General Comment No. 34: Article 19 Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011).

¹⁰¹ David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc A/74/486 (9 October 2019) 5.

and the mind, or bodily and mental integrity. The rights to life and to security create obligations to take measures to protect life and security of the person.

193. Everyone also has the right not to have their privacy, family, or home interfered with unlawfully or arbitrarily, and everyone is entitled to equality before the law without discrimination, and the right to protection against discrimination. The right to equality and freedom from discrimination requires that all individuals have the same rights and deserve the same level of respect, regardless of their person attributes.
194. In the context of regulating speech and other means of expression, these rights have competing interests, and finding the balance will invariable limit one or more of the rights.
195. The proportionality test under international human rights law is reflected in section 13 of the HR Act. In determining whether an existing or proposed limitation on human rights is reasonable and demonstrably justified, the Committee needs to consider and balance the following factors:
 - (a) the nature of the human right;
 - (b) the nature of the purpose of the limitation and whether it is consistent with a free and democratic society based on human dignity, equality, and freedom;
 - (c) the relationship between the limitation and its purpose'
 - (d) any less restrictive and reasonably available ways to achieve the purpose'
 - (e) the importance of the limitation;
 - (f) the importance of preserving the human right, taking into account the nature and extent of the limitation.

Reviews and inquiries in other jurisdictions

196. The terms of reference require the Committee to consider relevant reports, reviews and inquiries in other Australian and international jurisdictions. The Commission considers that material relating to the following reviews and inquiries will assist the Committee:

- (a) *Inquiry into extremist movements and radicalism in Australia*, Australian Parliamentary Joint Committee on Intelligence and Security, ongoing. Submissions closed in February 2021 and some public hearings were held in April 2021.
- (b) *Inquiry into anti-vilification protections*, Victorian Legislative Assembly Legal and Social Issues Committee, Report issued March 2021.
- (c) *Hate Crime Review*, UK Law Commission, ongoing. Consultation paper was launched on 23 September 2020.
- (d) *Racial vilification law in New South Wales*, New South Wales Standing Committee on Law and Justice, Report issued December 2013.

197. The Commission also recommends the Committee consider the General Comments of the UN Human Rights Committee on each of the rights relevant to the current laws and proposals, as well as the following Special Rapporteur reports:

- (a) *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, UN Doc A/74/486 (9 October 2019).
In this report, the Special Rapporteur evaluates the human rights law that applies to the regulation of online hate-speech and explains how standards under international human rights provide a framework for governments considering regulatory options.
- (b) *Report of the Special Rapporteur on minority issues*, UN Doc A/HRC/46/57 (3 March 2021).
In this report, the Special Rapporteur provides a thematic report in which he addresses the widespread targeting of minorities through hate-speech in social media.

Conclusion

198. Australia is a party to a number of human rights treaties, including the *International Covenant on Civil and Political Rights* (the **ICCPR**) and the *Convention on the Rights of Persons with Disabilities* (the **CRPD**).

199. Article 20 of the ICCPR imposes the following obligations on Australia:

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

200. Article 9 of the ICCPR provides that everyone has the right to liberty and security of person. Under international law, the right to security is recognised as separate to the right to liberty, and imposes positive obligations to protect security.

201. Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity. Article 9 of the ICCPR guarantees this right to everyone. The right to personal security also obliges Australia to take appropriate measures in response to death threats against persons in the public sphere, and more generally to protect individuals from foreseeable threats to life or bodily integrity, and to respond to patterns of violence against categories of victims.¹⁰²

202. Article 2 of the ICCPR imposes an obligation to ensure to all individuals within the jurisdiction, all rights in the ICCPR without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

203. Additionally, article 16 of the CRPD imposes these obligations:

Article 16 – Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
- ...
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies to ensure that instances of exploitation, violence, and abuse against persons with disabilities are identified, investigated, and where appropriate, prosecuted.

¹⁰² United Nations. Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [3] and [9].

204. While anti-discrimination legislation has an important role in setting standards of behaviour in a free and democratic society and providing avenues for redress for unacceptable conduct, complaints based civil remedies have limited, if any, effect in deterring more egregious hate speech, hate crimes, and vilification.
205. Criminalising conduct described in article 20(2) of the ICCPR is consistent with the permissible limitation of rights as being demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.
206. Reform of Queensland's vilification and hate crime laws is imperative to set community standards, and to send a clear and unequivocal message that crime motivated by attribute-based hate is unacceptable and will not be tolerated.
207. The Commission envisages making a further submission after the Committee has conducted its public hearings.

Appendix 1 – ‘Report racism’ examples

(As reported in the person’s own words)

- Elderly women attack me with her walking stick and verbally. She approach me by saying to go F out of this country, no one wants me here and I didn't F belong here. proceed continuously with more verbal and offensive words and at the end she ask me to go and take my Virus/disease where I came from. (she thinks I am Asian even though I am Latin.
- I was informed by a body corporate committee member that my Aboriginal flag was devaluing the property hanging in my carspace. The carspace is in a secured lot away from public viewing.
- I am Aboriginal. I was asked if on Mother's Day I went out and threw the boomerang. I was asked this by my regional director in a team meeting.
- A patient appeared disgusted by being around Asian clinicians and refused to receive her injection by Asian nurses, openly stated she fears of CV-19 and will receive her treatment by Caucasians only.
- On the bike path there's multiple instances of graffiti tagged '88 Gang'. I recognise the significance of the number 88 in White Supremacist literature.
- Last night I was leaving Synagogue and walking a few steps down the hill with a few other people from the Synagogue when I noticed three men fighting in the driveway of a building on my left. One man had a shaven head and dressed in black and the other two I recognized as members of the Synagogue who had been at the service. People who knew them told me that as they walked out of the Synagogue the man with the shaven head had given them a Nazi salute but they ignored it and walked on. This morning heard that the shaven headed man had spat on the two men leaving the Synagogue who then retaliated. I heard the police came.
- I was walking to the bus stop and a group of teenagers (5-8 people) approached me and shouted '████ go back to your country!!!'
- I was walking across Queen Street Mall to catch bus home after work when suddenly a white man stood in front of me, held his hand in a gun gesture at my forehead and said, 'is that a target on your forehead?'. I had a bhindi on my forehead. I was stunned and do not recall who else was around. When he walked away, I proceeded to the bus station.
- I am very concerned about a young Aboriginal boy in the u16 division side at my child's football club who was called a '████' by two boys in the same team. The coach of the team knows about the incident and has turned a blind eye to it.

Appendix 2 – Offences and penalties

Offence	Penalty units / fine	Imprisonment
Assault (common) ¹⁰³		Three years
Assault occasioning bodily harm ¹⁰⁴		Seven years
Disturbing religious worship ¹⁰⁵	\$10 fine	Two months
Going armed so as to cause fear ¹⁰⁶		Two years
Grievous bodily harm ¹⁰⁷		14 years
Public nuisance ¹⁰⁸	10 penalty units	Six months
Serious vilification ¹⁰⁹	70 penalty units (individual) 350 penalty units (corporation)	Six months
Stalking ¹¹⁰		Five years (seven years in certain circumstances)
Threatening violence ¹¹¹		Two years (five years if at night)
Trespass ¹¹²	20 penalty units	12 months
Wilful damage to property ¹¹³		Five years

¹⁰³ *Criminal Code* section 335.

¹⁰⁴ *Criminal Code* section 339.

¹⁰⁵ *Criminal Code* section 207.

¹⁰⁶ *Criminal Code* section 69.

¹⁰⁷ *Criminal Code* section 320.

¹⁰⁸ *Summary Offences Act 2005* section 6.

¹⁰⁹ *Anti-Discrimination Act 1991* section 131A.

¹¹⁰ *Criminal Code* Chapter 33A.

¹¹¹ *Criminal Code* section 75.

¹¹² *Summary Offences Act 2005* section 11.

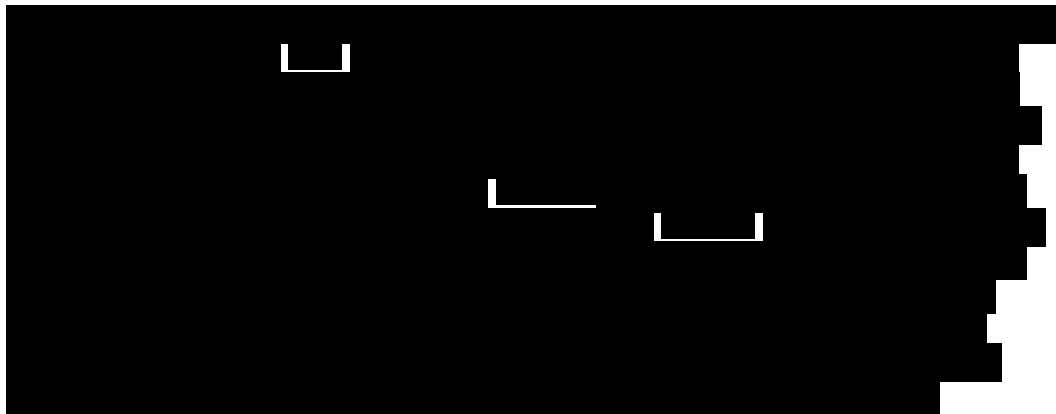
¹¹³ *Criminal Code* section 469.

Appendix 3 – Examples of online hate speech and vilification¹¹⁴

[REDACTED] uses the following names online: [REDACTED] and [REDACTED]. He has had several Facebook accounts, Youtube accounts and Gab accounts. [REDACTED] has stated he plans to stand for the Senate at the next election. He believes that white genocide is occurring, and calls for the expulsion of those of non-European ethnicity (apart from Indigenous Australians), and also calls for the killing of Jews, homosexuals, and others. He also claims to be a supporter of Christianity and Jesus. [REDACTED] lives in Queensland.

[REDACTED] produces hip-hop style videos with his own political and hateful lyrics. Many of the lyrics express violence against particular minorities. [REDACTED] Youtube channel was terminated by Youtube on c. 29 June 2019. [REDACTED] then established another Youtube channel, under the name [REDACTED]. In the first video below, the video lyrics vilify Jews (“[REDACTED]”), blacks, Muslims, homosexuals (“[REDACTED]”), and women (“[REDACTED]” = “[REDACTED]” or “[REDACTED]”).

[REDACTED]
[REDACTED] · Published on Jun 16, 2019 / [REDACTED] – Aussie Independent



[REDACTED]
[REDACTED] · Published on Jun 20, 2019



¹¹⁴ These examples are extracted from the Options Paper described in paragraph 6 of the submission.

¹¹⁵ Nathan, J (2019) *Report on Antisemitism in Australia 2019* Executive Council of Australian Jewry, p120-122.

[REDACTED]

[REDACTED] · Published on Jun 21, 2019 By [REDACTED].

[REDACTED] [REDACTED] [REDACTED],

[REDACTED]

[REDACTED] · Published on Jul 12, 2019

[REDACTED]

[REDACTED]

[REDACTED] · [REDACTED]

[REDACTED] · Aug 24, 2019:

[REDACTED]

[REDACTED]

[REDACTED] · Sep 09, 2019:

[REDACTED]

[REDACTED] · Sep 24, 2019 :

[REDACTED]

[REDACTED] · Sep 28, 2019:

[REDACTED]

[REDACTED]

[REDACTED] lives in Queensland. The following is a post from his Facebook page on 10 January 2015, accompanying a link to an ABC article [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Appendix 4 – Statistics (vilification complaints)

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
2020-21 ¹¹⁶	5	0	5	1	11	391
Totals	175	37	92	33	337	

* Racial and religious vilification prohibition commenced 7 June 2001

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

¹¹⁶ The statistics for the period 2020-2021 are provisional at this time.

Appendix 5 – Queensland vilification decisions – where complaint succeeded

Case	Type	Conduct
<i>Peters v Constance</i> [2005] QADT 9	Sexuality	Verbal abuse outside home – ‘paedophile’, asked if had any weapons
<i>GLBTI v Wilks</i> [2007] QADT 27	Sexuality	Publication in local newspaper – [REDACTED] Beware’ – vigilante threats
<i>Wilson & McCollum v Lawson</i> [2008] QADT 27	Sexuality	Verbal abuse by neighbours in front of others, [REDACTED], [REDACTED], ‘princess’
<i>Casey v Flanagan</i> [2011] QCAT 320	Race	Abuse over CB radio – [REDACTED], ‘import’, dago’, ‘give her a much [REDACTED] as you like’
<i>Brosnahan v Ronoff</i> [2011] QCAT 439	Gender Identity	Verbal abuse outside home – [REDACTED] in a jar’, with threats of violence
<i>Casey v Blume</i> [2012] QCAT 627	Race	Verbal abuse over CB radio – [REDACTED], [REDACTED], ‘dago’, ‘gypsy’ – place to go for sex
<i>Singh v Shaftson Training One Pty Ltd & Anor</i> [2013] QCAT 8	Race	Student at hospitality college – [REDACTED] Indian’ – ‘go back to your country’ – ‘Rudi’ (an insult in Punjabi)
<i>*Menzies v Owen</i> [2014] QCAT 661	Sexuality	Report to local council, newsletter & letter published on website – [REDACTED] and severely derogative
<i>Donovan v Tobin</i> [2015] QCAT 332	Race	Neighbours – verbal abuse - ‘you in-bred Muslims’, ‘go back to your cage you [REDACTED] monkeys’ etc.

Appendix 6 – Queensland vilification decisions – where complaint dismissed

Case	Type	Conduct
<i>Deen v Lamb</i> [2001] QADT 20	Religion	Pamphlet denigrating Koran and Muslims disseminated as part of campaign for election to Federal Parliament Public act done reasonably and in good faith
<i>M v S & G</i> [2008] QADT 24	Gender Identity	'That's a boy' in a shop Not a public act nor incitement
<i>Sailor v Hubbocks and Black & White (Quick Service) Taxis Ltd (No. 2)</i> [2008] QADT 33	Race	Racial insults by taxi driver to member of public 'incitement' requires communication directed to a 3 rd party
<i>Conde v Hunter & Karakan Hostels</i> [2009] QADT 11	Race	Verbal racial abuse – personal insults Not communication to public
<i>Park v State of Queensland & Anor</i> [2013] QCAT 183	Race	Alleged comments (found not to have been made) were not capable of inciting hatred towards, serious contempt for, or severe ridicule of the complainant. Whatever was said in the classroom was not a communication to the public, and there was no evidence that what was said was heard by anyone else other than the complainant.
<i>Chen v Groom & Lozcas Investments Pty Ltd</i> [2013] QCAT 511	Race	Verbal abuse by neighbour, not the respondent Active conduct on the part of the respondent needs to be shown
<i>*Coenen v Bakers Club Worldwide Pty Ltd & Ors</i> [2014] QCAT 676	Race	Statement made in a conciliation conference at the Fair Work Commission. Statement not made in public, and not made to incite hatred, serious contempt, or severe ridicule of the complainant.*
<i>*Bero v Wilmar Sugar Pty Ltd & Ors</i> [2016] QCAT 371	Race	Comments with racial connotation within private employment – not communicated to the public. Tribunal not convinced that comments incited hatred, serious contempt or severe ridicule towards the complainant.
<i>Smith v Sanreef</i> [2020] QCAT 353	Race	Aboriginal man in hotel with wife – alleged barperson said '... you black [REDACTED]'. Found that comments not made.

Case	Type	Conduct
* <i>Ms RA v Mr NC</i> [2018] QCAT 94	Religion	Comments made in an elevator with another person present was a communication to the public, and therefore a public act. The words were spoken in Arabic – not satisfied the third person understood or that they were incited.
<i>Rowan v Beck</i> unpublished 27 February 2019	Gender identity	Emails to members of a club derisive of the person, and suggesting they 'burn the witch'. (Decision delivered orally – these details are from the QCAT appeal decision <i>Rowan v Beck</i> [2021] QCATA 20. Other aspects of the appeal decision are under appeal to the Court of Appeal.)

* Indicates decision appealed.