Inquiry into serious vilification and hate crimes

Submission by Legal Aid Queensland

Inquiry into Serious Vilification and Hate Crimes

Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make this submission to the Legal Affairs and Safety Committee's Inquiry into serious vilification and hate crimes in Queensland (the **Inquiry**).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997* (Qld), LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the state". Consistent with these statutory objectives, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and based on the extensive experience of LAQ in the day to day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ's Civil Justice Services lawyers have extensive experience providing specialist advice and representation to complainants in discrimination and vilification matters under both State and Commonwealth legislation.

To provide an overview of the anti-discrimination services offered by LAQ's Civil Justice Services, from the first point of contact with LAQ's call centre any individuals who raise concerns about discrimination or unlawful vilification will be offered a one-off advice appointment with LAQ's Civil Justice Services (this service is not means-tested but is subject to in-house solicitor capacity). Minor assistance (such as drafting letters or complaint forms) may also be provided in the course of these advice appointments, although this is again subject to in-house solicitor capacity and the individual client's particular needs.

For clients who meet LAQ's means testing requirements and where their matter has merit (i.e. there is a real prospect of substantial benefit being gained by the applicant and/or the public, or a section of the public), a grant of aid is available for further representation which may involve:

1. preparing and lodging a complaint of discrimination in the AHRC or QHRC where the person has special circumstances necessitating the assistance of a solicitor;

2. preparing for and appearing at a conciliation conference; and

3. preparing for and appearing at a Tribunal/Court Hearing in limited circumstances.

Representation is usually provided on an in-house basis unless there is a conflict of interest or the in-house solicitors do not have capacity to take on additional matters.

In addition, LAQ provides general legal information on our website and via our telephone hotline about other legal avenues that may be available to persons experiencing serious vilification (e.g. applying for a Peace and Good Behaviour Order (PAGBO) or reporting harassment to police). Grants of aid may be avilable for

representation in PAGBO cases but only in extremely perilous situations where the matter is not suitable for referral to a Dispute Resolution Centre.

LAQ's Civil Justice Services are available for discrimination complainants only. LAQ does not provide advice, assistance or representation to respondents in these types of matters.

Accordingly, this submission is informed by our knowledge and experience working with complainants in discrimination matters involving vilification, and is intended to address to those matters being considered by the Inquiry that are relevant to our area of practice.

Executive summary

LAQ provides assistance to people who have experienced vilification in Queensland.

It has been the experience of LAQ that a large subset of these clients have been reluctant to report vilification to the Queensland Police Service (QPS). In cases of serious vilification involving threats of violence, we have observed a lack of trust in QPS's ability to protect the community from hate crimes, and victims may be unwilling to report incidents to the police out of fear of reprisal.

Even in circumstances where vilification is reported to police, it is our clients' experience that police do not recognise that vilification may be a criminal offence, and instead will suggest the issue is a "civil matter" which the individual complainant can address themselves by applying for a PAGBO. Many clients do not consider it practical to seek a PAGBO, particularly where these are not enforced by the police and it is left to the individual to prosecute future breaches.

This leaves complainants with few options to address serious vilification other than through the Queensland Human Rights Commission's (the QHRC) complaint process under s 124A of the *Anti-Discrimination Act 1991* (Qld) (the ADA). This places the onus on the individual to pursue the complaint and, unless the respondent is willing to participate in that process in good faith, the two stages of conciliation conferences (at both the QHRC and later QCAT) may only serve to further distress the complainant and delay the final resolution of the matter. The primary focus of the QHRC complaint process is to provide complainants with redress, rather than protecting victims from ongoing vilification (although there is some scope for QCAT to make orders restraining vilifying conduct). In addition, the tendency for complaints to be settled on a confidential basis means that there is little public accountability or awareness of the anti-vilification provisions of the ADA.

LAQ observes that gaps in the current legal framework and policing of hate crimes fail to adequately address vilification and hate crimes in our community, and allow for online vilification to occur on largely unregulated platforms. These issues could be addressed if community groups and the QHRC were empowered to investigate and prosecute serious vilification offences, and/or if police were adequately trained and equipped to treat vilification as a serious criminal matter at first instance. In addition, broadening the scope of anti-vilification provisions of the ADA to apply to publishers of vilifying content would help to eradicate online hate-speech, an area of growing concern.

For these reasons, LAQ recommends that the Inquiry consider:

- Broadening the wording of s 124A to encompass offensive conduct on the basis of all protected attributes under section 7 of the ADA, or, in the alternative:
    - Adding "impairment" as another recognised basis for vilification under s 124A and s131A of the ADA;
    - Clarifying the meaning of "public act" under s 124A and s 131A of the ADA;
- Amending s 124A and s 131A to allow publishers of vilifying content to be named as respondents;
- Funding community groups to collect examples of online hate speech and vilification and make representative complaints to the QHRC;

- Empowering the QHRC to investigate and prosecute serious vilification offences, and committing additional resources to the QHRC for this purpose;
- Inserting a new provision in the ADA which permits the QHRC to obtain an injunction or court orders to restrain ongoing vilification (with penalties for breaches);
- Removing the time limit for prosecution of s 131A offences under s 226(2) of the ADA;
- Moving the "serious vilification" offence under s 131A of the ADA to the *Summary Offences Act 2005* (Qld) and/or including serious vilification as an aggravating element in other related offences;
- Removing the requirement for a Crown Law Officer's written consent to prosecute the offence of serious vilification;
- Increasing the maximum penalty for serious vilification to 3 years imprisonment;
- Permitting the police and/or QHRC to obtain a warrant for the preservation of online evidence of serious vilification;
- Committing additional resources to train police to identify and respond to vilification and breaches of PAGBOs, including cultural competency training and improving access to and use of interpreters; and
- Amending the *Peace and Good Behaviour Act 1982* (Qld) to include vilification (without necessarily involving threats of harm or property damage) as a basis for the making of a PAGBO.

The nature and extent of hate crimes and serious vilification in Queensland

It is our experience that vilification occurs regularly in Queensland. While instances of hate crimes and serious vilification are less common than other forms of discrimination, they appear to have been increasing in frequency over the past five years.

LAQ's Civil Justice Services most commonly advise about hate crimes and serious vilification in relation to the attributes of race, religion, sexuality and gender identity, which are currently protected by sections 124A and 131A of the ADA. In addition, we acknowledge that people with other attributes that are recognised under section 7 of the ADA also experience vilification, but that behaviour is not prohibited by sections 124A or 131A of the ADA. For example, we are aware of instances of vilification towards people with impairments[1] or on the basis of age[2], although these instances arise less frequently. In this regard, we note that the vilification may become more serious when intersectional factors compound a person's vulnerability to hate crimes.

From our anecdotal observations, we note that instances of serious vilification on the basis of race, religion, sexuality and gender identity appear to have increased in Queensland in recent years.[3] In part, this increase seems to be attributable to the availability of social media and other internet platforms which provide

[1] See, for example, 'Disability slurs are as damging as racism and homophobia', *Sydney Morning Herald* (Web Page, 1 May 2017) <https://www.smh.com.au/opinion/disability-slurs-are-a-damaging-as-racism-and-homophobia-20170501-gvw8v3.html>, 'Campaign against use of the word 'retard' targets social media', *ABC News* (Web Page, 21 February 2018) <https://www.abc.net.au/news/2018-02-21/anti-retard-campaign-launched-by-wa-government/9470750> and Bridget Cullen Mandikos and Amber Vario, 'Sticks and Stones: The lack of disability vilification law in Australia' [2010] 35(2) *Alternative Law Journal* 72.

[2] See, for example, 'Ageism has reached its use-by date', *Brisbane Times* (Web Page, 21 November 2019) <https://www.brisbanetimes.com.au/national/queensland/ageism-has-reached-its-use-by-date-20191121-p53cps.html>.

[3] It is difficult for LAQ to provide evidence to substantiate these observations because the records management systems at LAQ do not currently allow us to extract data about the number of advices, assistance or representation that has been provided specifically in relation to vilification or hate crimes, or the protected attributes that we most commonly provide anti-discrimination advice about.

opportunities for persons to engage in vilification to large audiences, often using pseudonyms to post anonymously and avoid public accountability. In particular, noticeable rises in online vilification have occurred in response to current events and subsequent media reporting, for example:

1. in 2017 the LGBTI Legal Service collected over 220 examples of online hate speech throughout the Australian Marriage Law Postal Survey, evidencing an increase in vilification on the basis of sexuality and gender identity during that period;[4]

2. the 2019 Christchurch mosque shooting and subsequent public commentary exposed rising levels of serious religious and racial vilification against the Muslim community;[5]

3. in early 2020, a rightwing student group protested a Drag queen story time event at a Brisbane City Council library, disrupting the event by yelling "drag queens are not for kids".[6] Following that protest, two petitions were created on the Brisbane City Council website calling for the Drag queen story time program to be discontinued and making inaccurate and offensive statements about the LGBTIQ+ community;[7][8]

4. in March 2020, reporting of the geographic origin of COVID-19 in China led to a significant increase in racial vilification towards people of Asian ethnicity, and later media coverage of Brisbane women charged with COVID-19 border breaches saw a second wave of racism directed at African Australians;[9]

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[4] ''Like Love' project reveals hotbed of hate speech throughout Marriage Survey period', *LGBTI Legal Service* (Web Page, 7 November 2017) <https://lgbtilegalservice.org.au/2017/like-love-project-reveals-hotbed-hate-speech-throughout-marriage-survey-period/>.

[5] See for example, 'Fury as Australian senator blames Christchurch attack on Muslim immigration', *The Guardian* (Web Page, 16 March 2019) <https://www.theguardian.com/world/2019/mar/15/australian-senator-fraser-anning-criticised-blaming-new-zealand-attack-on-muslim-immigration> and ''Never felt this unsafe': Muslim community pleads for more protection in religious discrimination bill', *Brisbane Times* (Web Page, 8 March 2020) < https://www.smh.com.au/politics/federal/never-felt-this-unsafe-muslim-community-pleads-for-more-protection-in-religious-discrimination-bill-20200227-p544zs.html> .

[6] 'Drag queen storytime at Brisbane library disrupted by rightwing student group', *The Guardian* (Web Page, 13 January 2020) < https://www.theguardian.com/world/2020/jan/13/drag-queen-storytime-at-brisbane-library-disrupted-by-rightwing-student-group>.

[7] 'Petitions put on Brisbane council page call to scrap drag story time', *Brisbane Times* (Web Page, 16 January 2020) <https://www.brisbanetimes.com.au/national/queensland/petitions-put-on-brisbane-council-page-call-to-scrap-drag-story-time-20200116-p53rwy.html>.

[8] The petitions were the subject of a vilification complaint that was lodged with the QHRC, which resulted in a joint statement being published by both the petitioner and the drag performers calling for more responsibility to be exercised by the Brisbane City Council to ensure petitions on their website are compliant with existing vilification and human rights laws – see 'Council 'learning lessons' from petition fallout, Schrinner says', *Brisbane Times* (Web Page, 13 August 2020) <https://www.brisbanetimes.com.au/national/queensland/council-learning-lessons-from-petition-fallout-schrinner-says-20200813-p55lg1.html>.

[9] See 'Naming Brisbane women risks 'a second wave of Covid-related racial hostility': commission', *The Guardian* (Web Page, 30 July 2020) <https://www.theguardian.com/australia-news/2020/jul/30/naming-brisbane-women-risks-a-second-wave-of-covid-related-racial-hostility-commission>, 'Racism directed at women charged with coronavirus border fraud ostracises African Australians', *ABC News* (Web Page, 31 July 2020) <https://www.abc.net.au/news/2020-07-31/racism-directed-at-women-charged-with-coronavirus-border-fraud/12510910> and 'Multicultural Australia stands in solidarity with Queensland's African communities', *Multicultural Australia – Media Releases* (Web Page, 5 August 2020) <https://www.multiculturalaustralia.org.au/covid-19_solidarity>

5. in Townsville in late 2020, a man armed with a tyre iron pursued a stolen car driven by young teenagers until they crashed into a power pole.[10] Also in Townsville in early 2021, a motorcyclist was killed in a car accident involving an aggressive pursuit of another stolen vehicle.[11] These incidents prompted police condemnation of local vigilantism, which has been linked with Townsville's large social media anti-crime communities that have been noted to post overtly racialised content and calls to vigilante violence.[12] As Debbie Kilroy, CEO of Sisters Inside has commented: "The vigilantism is out of control and the media lays right over the top of that and drives a fundamentally racist agenda".[13]

In light of these concerns, LAQ consider that there is a need to ensure that online platforms (such as social media sites, news media pages with open comments sections, or public petition websites) take responsibility for the content that they allow to be published, by monitoring discussions and removing content that seeks to incite hatred or violence. In this regard, it is noted that defamation law (upon which vilification laws have been modelled) extends to the publishers of defamatory content, in addition to the original authors.[14] LAQ suggests that both sections 124A and 131A of the ADA could be amended to clarify that owners of online platforms are also accountable for vilifying content that they allow to be shared.

Client experiences of vilification in Queensland: Gary's case

Gary, a 44-year-old male of Chinese ethnicity, lives a rental property in Brisbane.

In February 2020, Gary had an initial confrontation with his neighbour, an elderly woman, who approached him with complaints about where he was parking his car.

A few weeks later, while Gary was walking to his car, the neighbour stood on her balcony and yelled abuse at him, called him a "[redacted]" and stretched her eyelids in a mocking manner. She then proceeded to throw coffee grounds and a vinegar-smelling liquid on Gary's car, which stained the paintwork. Gary called Policelink about this incident because of the damage to his car. He ended up having to pay approximately $500 to have the paintwork repaired.

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[10] 'Townsville man carged with pursuing teenagers in stolen car until they crashed', *The Guardian* (Web Page, 15 November 2020) <https://www.theguardian.com/australia-news/2020/nov/15/townsville-man-charged-with-pursuing-stolen-car-until-it-crashed>, 'Townsville police condmen 'vigilante behaviour' after charging man over alleged pursuit of teens in stolen car that crashed', *ABC News* (Web Page, 15 November 2020) <https://www.abc.net.au/news/2020-11-15/townsville-man-charged-over-alleged-pursuit-of-stolen-car/12885546>.

[11] 'Townsville police condemn vigilante action after death of 22-year-old-woman', *The Guardian*, (Web Page, 6 February 2021) <https://www.theguardian.com/australia-news/2021/feb/06/townsville-police-condemn-vigilante-action-after-death-of-22-year-old-woman>.

[12] See Chris Cuneen and Sophie Russell, 'Social Media, Vigilantism and Indigenous People in Australia' in K. Biber and M. Brown (eds), *The Oxford Encyclopedia of Crime, Media, and Popular Culture,* (Oxford University Press, 2017). Available at SSRN: https://ssrn.com/abstract=3094091 and 'Crime and embellishment in Townsville: how a local 'myth' could swing the Queensland election', *The Guardian* (Web Page, 27 September 2020) <https://www.theguardian.com/australia-news/2020/sep/27/and-embellishment-the-myth-fuelling-queensland-election-debate>.

[13] *The Guardian*, n 11.

[14] Bill Swannie, 'The Influence of Defamation Law on the Interpretation of Australia's Racial Vilification Laws' (2020) 26 *Torts Law Journal* 34.

Again, in March 2020, when Gary was weeding the garden near his car park, the neighbour stood on her balcony and yelled "you [redacted] [redacted]" and spat at him, yelling "that's what you are, a piece of shit". Later that week, when Gary was walking to the car with his male partner, the neighbour yelled "You [redacted] gay, you will die alone. No one will [redacted] you. You will never have children; I have a daughter". These further incidents were reported to the Brisbane [redacted] Beat police station.

The police told Gary that he should apply for a PAGBO against his neighbour, and he went through that process at the local Magistrates Court. The neighbour did not show up to defend the application and an order was made against her for a period of 2 years, however the concerning behaviour continued.

In April 2020 another incident occurred where the neighbour yelled at Gary while pulling her eye lids and saying "I love [redacted], I wish I could be like that". Gary responded by saying "Don't do this to me, it is racist". The neighbour then increased the volume of her voice, continued pulling her eye lids and yelled "I wish I could be like that. I wish I could have an operation, stupid, it's a beauty. You don't know what is a beauty… silly man, you don't proud of who you are".

On other occasions, the neighbour made comments along the lines of "this is not in Japan, stop killing" and "go back to China you coronavirus carrier". She also physically assaulted him by throwing a plate, grapefruit, rubbish and hosing him while he was in the garden, trespassed onto his property and placed a brick under his car, and left a timber pallet and bricks on his driveway.

As Gary's rental property was adjacent to other properties, his neighbour's behaviour was observable by other neighbours and people on the street. Gary ended up getting CCTV cameras installed to record the neighbour's behaviour, and provided copies of this footage to the police.

As a consequence of the ongoing abuse, Gary experienced stress, anxiety and disturbed sleeping and eating habits. He initially called Beyond Blue for support, and later saw his doctor and took time off work for depression.

In April 2020 Gary made a complaint to the QHRC regarding vilification (on the basis of race and sexuality) by his neighbour. The matter was not resolved through conciliation conferences and the complaint proceeded to a QCAT hearing, where Gary was ultimately successful. In June 2021 QCAT ordered the neighbour to pay $30,000 for racial vilification and a further sum of $2,500 for homophobic vilification. The reasons for that QCAT decision have not been published. While this is a significant amount of compensation, Gary has not yet received any payment from the neighbour and it is unclear if she has the financial means to satisfy the order.

In this case, Gary was proactive in obtaining evidence of the vilification, reporting incidents to the police, making a complaint to the QHRC and obtaining his own Peace and Behaviour Order. Despite this, it still took over a year for his complaint to be resolved, and he is not aware of any criminal charges being made against his neighbour (even after the PAGBO was put in place).

Reflecting on this experience, Gary states:

> *It has been a long and arduous process in both dealing with my neighbour and the police.*
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> *I made complaints to the police about 33 times concerning this neighbour's behaviour towards me.*
>
> *Two police officers were actually present and witnessed me being hosed by my neighbour, but did not take action. They told me to go to the station to make a report.*

> *At one stage, I left the police station midway through trying to make a report because the Senior Constable I was dealing with was complaining about his workload and seemed to resent me for making a complaint.*
>
> *I even felt embarrassed to report my case as some of the police told me my case was not on their priority list. Some staff at the [redacted] station even firmly reiterated their stances that I did not need to report it at all, because they bore a similar nature to previous incidents, even though those incidents did not take place on the same day.*
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> *When I spoke to a Senior Sergeant about these issues, they were not aware of or refused to acknowledge the PAGBO that had been made by the Magistrates Court. They insisted that it was a court matter and the police would not take steps themselves to enforce the terms of a PAGBO.*
>
> *I personally believe that in dealing with the breach of PAGBO the Queensland Police force was not well trained in this matter. It is stressful for a layman to find out such legal information for the police, deal with the respondent and complain about the Police. This is not constructive for the whole community and trust we embedded for the Queensland Police.*
>
> *It seems that every time when I talk with the police, they mentioned the court is the only solution or they cannot do anything about it because of my neighbour's elderly age. In my whole year complaint journey, this kind of response has been prevalent.*
>
> *I have now complained to my local member of Parliament and the CCC about the policing response, because the police were not helpful in my case.*

Gary's case illustrates the many practical barriers that complainants encounter when trying to take legal action to address unlawful vilification.

The effectiveness of section 131A of the *ADA*

Currently, section 131A only recognises that vilification is serious enough to be treated as a criminal offence if there is a threat of harm to someone or their property, or incitement of harm to a person or their property. As the Queensland Police Service have noted, prosecuting an offence against section 131A requires proof beyond reasonable doubt that the vilification was:

- a public act;
- knowingly or recklessly (including any proof to negate the proposition that the person did not or could not reasonably be expected to know the content of the message) inciting hatred, serious contempt for, or severe ridicule of a person or group of persons;
- in a way that includes threatening or inciting physical harm towards any person or group of persons (or their property); and
- the conduct is based on the grounds of race, religion, sexuality or gender identity.

In considering the effectiveness of section 131A, it is first necessary to consider the purpose for which it was introduced.

The offence of serious racial and religious vilification under the ADA commenced on 7 June 2001. The Explanatory Notes to the *Anti-Discrimination Amendment Bill 2001*, which introduced the offence, confirm its

purpose was to introduce "laws of wider scope that will strengthen protection against racial and religious vilification and reinforce the social unacceptability of such conduct".[15]

The additional grounds of sexuality and gender identity were added and commenced on 31 March 2003. The Explanatory Notes to the *Discrimination Law Amendment Bill 2002* states that the new vilification provisions were introduced in "response to problems of violence and anti-social behaviour directed towards the homosexual and transgender communities", with the express purpose of "protect[ing] people from vilification that promotes hatred on the basis of a person's sexuality or gender identity and creates social disharmony in the wider community".[16]

On this basis, the "effectiveness" of the serious vilification prohibitions under section 131A will depend on the extent to which it has actually operated to protect people against vilification on the grounds of race, religion, sexuality or gender identity and reinforce the social unacceptability of that conduct.

Information provided by the Queensland Police Service suggests that there have been a total of 1,386 reported offences with hate or vilification characteristics from 2015 to 2020.[17] Similarly, the QHRC report that a total of 326 vilification complaints under section 124A have been accepted since the provisions were introduced.[18] Despite this, information provided by the Department of Justice and Attorney-General (DJAG) confirms that, from the commencement of section 131A up until 30 April 2021, only five persons have been charged with offences under section 131A.[19] While it is accepted that not all of those police reports or QHRC complaints would have been substantiated, and those which were substantiated may not relate to conduct that meets the higher threshold for serious vilification under s 131A, the data suggests that hate crimes and vilification continue to occur in Queensland but are not being dealt with as criminal offences under s 131A.

It is the experience of LAQ that many people who have experienced vilification are unaware of the existence of section 131A, and it is certainly our clients' understanding that many police officers are unaware of those provisions as well. The lack of any public awareness or accountability for these types of offences means that there is little general or specific deterrence for serious vilification and hate crimes in Queensland.

We also note that section 131A does not contain any mechanism that allows the police to obtain court orders that restrain future vilification (as is available in relation to other types of serious violent offences, such as in cases of domestic violence or stalking). As section 131A does not empower the police to prevent future acts of violence, this gives little comfort to victims who are genuinely fearful for their safety, and may contribute to the lack of reporting of serious vilification.

In addition, section 226(2) of the ADA provides that a proceeding for an offence under section 131A must be commenced within 1 year (or within 6 months of the offence coming to the Queensland Human Rights Commissioner's knowledge) and no more than 2 years after the offence was committed. This requires offences to be reported and investigated in a timely manner, which may not be practical given the current delays in the QHRC's processing of complaints.

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[15] Explanatory Note, *Anti-Discrimination Amendment Bill 2001* (Qld), 1.
[16] Explanatory Notes, *Discrimination Law Amendmnet Bill 2002* (Qld), 10.
[17] Queensland Police Service, 'Queensland Police Service Briefing to the Legal Affairs and Safety Committee: Inquiry into serious vilification and hate crime' (Queensland Parliament, 20 May 2021) 3.
[18] Queensland Human Rights Commission, 'Briefing note for the Legal Affairs and Safety committee Inquiry into serious vilification and hate crimes' (Queensland Parliament, 19 May 2021) Appendix 1.
[19] Department of Justice and Attorney-General, 'Letter from the Director-General, Department of Justice and Attorney-General, providing the Department's written briefing on the Inquiry' (Queensland Parliament, 19 May 2021) 2.

For these reasons, it appears that section 131A has been largely ineffective in protecting people from serious vilification or reinforcing the social unacceptability of that conduct.

The effectiveness of activities and programs of the Queensland Police Service and Office of the Director of Public Prosecutions in responding to hate crime

In our experience working with people who have experienced vilification, a large subset of these clients are reluctant to report vilification and hate crimes to the police. This can be attributed to several factors, for example:

- discrimination and vilification are so normalised that it does not occur to people that they could complain about the behaviour at all, let alone to the police;
- a lack of public awareness of section 131A of the ADA or other relevant offences;
- people may have difficulty making a police report due to language or cultural barriers;
- people may have negative perceptions of police, based on individual or community experiences (for example, they may have previously been subjected to racial profiling by the police);
- some may previously have attempted to report incidents to the police, and found the police to be dismissive of their complaint (to the extent that it would be frustrating and re-traumatising to try and bring new complaints with the police); and
- as section 131A does not contain any mechanism to restrain future acts of serious vilification, people who have been the victim of violent hate crimes may believe that reporting the incident to police will only serve to inflame the situation and further risk their personal safety.

In addition, in circumstances where our clients have taken steps to report vilification and hate crimes to the police, it is their experience that the police will often dismiss these complaints as a "civil matter" and state that they are unable to intervene (as occurred in Gay's case, summarised above).

It commonly reported that police will tell complainants that the only avenue to deal with the vilifying conduct is by applying for a PAGBO, which is also left to the individual complainant to enforce. Although police have the capacity to charge individuals for breaching the terms of a PAGBO, this appears to be rarely used. In this regard, it would be helpful if QPS and DJAG could provide additional data about the number of PAGBO breaches that have been prosecuted.

Where police do act on these complaints, the evidence suggests that there is a preference for using alternative, lesser charges (e.g. public nuisance) even though section 131A would better reflect the nature of this type of offence.[20] It is not clear if this is because the police are less familiar with the serious vilification offence under the ADA then they are with offences under commonly used legislation such as the *Criminal Code 1899* (Qld) or the *Summary Offences Act 2005* (Qld), or if the short timeframes for prosecution and the requirement for a

[20] For example, "A Muslim woman was accosted by a man in an unprovoked attack on a West End street in Brisbane, when he threatened to set her hijab on fire with a cigarette lighter. He was fined $500" from Cohesive Communities Coalition, 'Serious vilification and hate crime: the need for legislative reform' (Options Paper) 9.

Crown Law Officer's consent under section 131A(2) create practical difficulties for proceeding with these charges. In any event, this approach suggests that the police do not understand that vilification and hate speech can be more serious in nature than other summary offences, and should be dealt with accordingly.

Information provided by the Department of Justice and Attorney-General confirms that, from the commencement of section 131A up until 30 April 2021, there have been a total of five persons charged with the offence of serious vilification.[21] Of those, only three charges have resulted in convictions, and no court decisions have been published in relation to any of those cases.[22] The QHRC has provided some further information about those matters to the Inquiry:

> *The Commission is aware of only two prosecutions under section 131A of the AD Act. The first prosecution related to serious racial vilification of a guard on a train in Brisbane in late 2014, and the person was convicted on a plea of guilty in September 2015. The offender was sentenced to two months imprisonment, wholly suspended for 12 months. 25.*
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> *The other prosecution known to the Commission was a charge of serious gender identity vilification in Townsville, where the offender was convicted on a plea of guilty, and sentenced on 11 April 2018 to 40 hours of community service.*[23]

LAQ are aware of a limited number of decisions regarding civil complaints of vilification that have been brought under section 124A. Of those, some involved threats of violence property damage which could have also amounted to serious vilification in breach of s 131A:

- in *GLBTI v Wilks and Anor* [2007] QADT 27 (30 November 2007) the Gay Lesbian Bisexual Transgender Intersex Anti-Violence Committee Inc (GLBTI Committee) made a representative complaint of sexuality vilification against the editor of a local newspaper and the author of a letter to the editor that was published. The letter stated that groups of vigilantes had been assembled and included threats of physical violence towards homosexuals at the beaches. In that case the Tribunal ordered the respondents to make a public apology and pay the legal costs of the complainant, but there was no order of damages;

- in *Brosnahan v Ronoff* [2011] QCAT 439 the respondent was ordered to pay $10,000 for vilification for wrenching palings off the fence of his neighbour, a transgender woman, and screaming obscenities in the middle of the night including: "You [redacted], you have your [redacted] in a jar" and "Has anyone got a box of matches so we can burn this [redacted] place down?". In that case the Member also found that the respondent's conduct amounted to serious gender identity vilification, however declined to refer the matter to the Attorney General for consideration because, by the time of the QCAT decision, it was outside of the one year timeframe for prosecution under s 131A;

- in *Casey v Blume* [2012] QCAT 627 the respondent was ordered to pay $10,000 compensation for sexual harassment and vilification on the grounds of race, and was further ordered not to by a public act incite hatred towards, serious contempt for or severe ridicule of the complainant on the grounds of her race and gender. The racial vilification aspect of the complaint related to the respondent's comments over CB radio that he was "going to make more wars for her dago [redacted]" and … "I'm going to make her life worse til she's dead", repeatedly distributing the complainant's telephone number and address, and getting his four year old daughter to call the complainant a "[redacted]", "[redacted]", "dago", "dago-[redacted]" and a "gypsy". In that case, the complainant had obtained a PAGBO against the respondent,

[21] Department of Justice and Attorney-General, n 19.
[22] Ibid.
[23] Queensland Human Rights Commission, n 18.

but this did not stop the vilification and sexual harassment from continuing. In the related matter of *Casey v Flanagan* [2011] QCAT 320 the same complainant received a further order of $5,000 compensation for sexual harassment and racial vilification that arose from similar comments made by the respondent over CB Radio; and

- in *Menzies and anor v Owen* [2014] QCAT 661, the complaint concerned the following acts by a local Councillor:
    - including comments in a Council report that "Sodomy is still a valid section of the Criminal Code", quoting excerpts from the Bible which state: "If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination; they shall surely be put to death' and suggesting that homosexuals are more likely to comment sexual offences against children and have sexually transmitted diseases";
    - distributing a newsletter pamphlet that referred to homosexuality using terms such as "un Human activities" and the "Sodomites epidemic"; and
    - publishing an open letter on a website entitled "No Human Rights for Non-Humans" that went on to make various vilifying comments about homosexual people.

  The resolution of this matter was delayed by several years of litigation concerning the constitutional validity of s 124A of the ADA. Ultimately, seven years after the complaint was initially lodged with the Anti-Discrimination Commission Queensland (now the QHRC), the Tribunal found that this conduct amounted to vilification on the basis of homosexuality in breach of s 124A, but as no damages were sought by the complainants, and the only remedy ordered was a retraction and apology.

On the information that is available to us, we are unable to determine if any of those instances of vilification resulted in criminal charges under section 131A. Certainly in the case of *Brosnahan v Ronoff* [2011] QCAT 439 it appears that no charges were laid, as the Tribunal noted in its decision that while the conduct may have amounted to an offence under section 131A, by the time it reached the hearing stage at QCAT it was out of time to be prosecuted.

It is also significant to note that no instances of online vilification are known to have been prosecuted under section 131A, despite growing concerns about the rise of online vilification and its links to vigilantism and far-right terrorism.[24]

At present, the fact that section 131A is rarely used to charge and prosecute instances of vilification suggests that it has been largely ineffective in achieving its legislative purpose. While some amendments could be made to the legislation to improve its usefulness (e.g. by relocating the s 131A offence to the *Summary Offences Act 2005* (Qld), removing the requirement for a Crown Law Officer's consent under section 131A(2), removing the time limits under section 226 and increasing the penalty to 3 years to allow for police to obtain warrants for online evidence), these practical issues do not appear to be the only barrier preventing QPS and the ODPP from pursuing serious vilification charges. It is apparent that additional measures are needed to improve policing responses to hate crimes, and while this is a complex problem that warrants further consideration, it is suggested that greater diversity in the police force, improved access to and use of interpreters, and additional training for police officers in relation to cultural competency, discrimination and human rights may help to address some of these issues.

We note that, while many of our clients are reluctant to report vilification to police, they often do not have the same reservations about contacting the QHRC. In part, this may be due to the fact that the QHRC employs staff who are skilled at engaging with culturally and linguistically diverse communities and people who have

[24] 'To shut down far-right extremism in Australia, we must confront the ecosystem of hate', *The Conversation* (Web Page, 8 February 2021) <https://theconversation.com/to-shut-down-far-right-extremism-in-australia-we-must-confront-the-ecosystem-of-hate-154269>.

experienced discrimination, and also the nature of the QHRC's role means that they are not perceived by the community in the same negative manner as the police. While the QHRC has general powers to investigate complaints under the ADA, at present those powers do not extend to investigating or commencing proceedings for serious vilification under s 131A. It is submitted that, rather than continuing to rely on the police as the only authority that is able to investigate hate crimes, there is scope to expand the QHRC's powers so that they have the capacity to investigate and prosecute serious vilification offences. This would of course require additional resources to be allocated to the QHRC to allow them to fulfil this function.

In addition, LAQ recognises that many community groups (such as those who form the Cohesive Communities Coalition) have a grassroots-level understanding of the types of vilification that affect their communities and are often the first point of contact for people who experience vilification. If funding was granted to those community groups to collect examples of vilification and make representative complaints regarding hate crimes to the QHRC (as occurred with the LGBTI Legal Services' "Like Love" project[25]), this type of justice reinvestment may help to overcome some of the institutional barriers that currently prevent hate crimes from being investigated and prosecuted.

The effectiveness of other existing Queensland laws responding to hate crimes

As noted above, our clients are often directed by police to seek a PAGBO against the person engaging in vilification. However, for many of these clients it is not practical to seek a PAGBO because:

- vilification does not always fall within the scope of conduct that can form the basis for a complaint under the *Peace and Good Behaviour Act 1982* (Qld);
- even where acts of vilification may provide grounds for seeking a PAGBO, it is difficult for a layperson to navigate that process in the Magistrates Court;
- often the client's specific attributes which formed the basis for their vilification (e.g. if they are from a minority racial or religious background) will mean that there are additional language or cultural barriers to engaging in the Magistrates Court process;
- for those experiencing financial disadvantage, the Magistrates Court filing fee and costs risk may make that process prohibitive; and
- the complainant may have difficulty identifying the respondent (e.g. if the vilification occurs anonymously online, or is perpetrated by an unknown assailant in a public place) and gathering sufficient evidence of the conduct (unlike police who can investigate alleged offences and obtain witness statements, CCTV footage, etc.);
- grants of aid are available for representation in a PAGBO matter but only in extremely perilous situations and where the matter is not suitable for referral to a dispute resolution service, so complainants may have to self-represent before the Magistrates Court in these cases. Usually this will require them to personally serve the respondent with the court documents, and later be cross-examined by the respondent (if the

[25] 'Palaszczuk Government announces funding for LGBTI Legal Service ahead of postal survey', *Queensland Government – the Queensland Cabinet and Ministerial Directory* (Web Page, 14 September 2017) <https://statements.qld.gov.au/statements/82682>.

evidence is contested), which forces the complainant to continue to interact with the person who vilified them; and

- even if they are successful in obtaining a PAGBO, this may not provide any practical benefit if the police are unwilling to investigate or prosecute breaches (as in Gary's case study provided above).

This leaves complainants with few options to address serious vilification other than through a QHRC complaint under section 124A of the ADA. Again, section 124A places the onus on the individual to pursue the vilification complaint themselves, and as with the PAGBO process, the strength of their complaint may depend on their ability to property identify the respondent and gather evidence.

The appropriateness of the conciliation-based anti-discrimination framework

Once a complaint of vilification has been filed with the QHRC, the complainant will be required to participate in a QHRC conciliation with the respondent. At present we understand that due to the QHRC's limited resources and backlog since COVID-19, there is a wait time of approximately 6 months before a matter proceeds to conciliation (though there is some scope to have this process expedited for urgent matters).

If the matter is not able to be resolved at conciliation, the complainant can elect to have their complaint referred to QCAT, at which point it is the usual practice that QCAT will set the matter down for a QCAT conciliation conference. Again, we understand that QCAT is affected by similar delays due to resourcing constraints and COVID-19 backlog. In our experience this process usually takes another 3-6 months for the conciliation conference unless the matter is particularly urgent.

In many cases, the vilification will be ongoing during these waiting periods. This can create practical difficulties because additional complaints about further vilification may need to be added to the original QHRC complaint, or brought as a fresh complaint.

In our experience, vilification complaints are less likely than other discrimination complaints to be resolved at the conciliation stage. In many cases, the benefit of the conciliation conference is that it provides the complainant with a safe environment in which they can speak to the person who vilified them and explain why their conduct was so damaging. It is rare for the respondent to admit to wrongdoing or offer a genuine apology, but when this does occur it can be a healing and restorative process for both parties. These outcomes usually require the parties to be present in-person at the conciliation, and it is our experience that the use of teleconferencing can limit the possibility for meaningful resolution of complaints.

Unfortunately, in cases involving serious vilification, the relationship between the parties may be so fraught that there is no prospect of meaningful resolution at conciliation, and the requirement that a complainant participate in at least two conciliation processes (first at the QHRC and then at QCAT) may only serve to further inflame the situation and retraumatise that complainant by forcing them to meet and engage with the person who vilified them.

In our view, it would be helpful if the QHRC and QCAT processes recognised that conciliation is not always appropriate in cases involving vilification, and allowed the complainant to elect to bypass the two stages of conciliation where it is clear that the matter involves serious vilification and is not conciliable (noting that there could still be scope for a QCAT member to exercise their discretion to refer the matter for conciliation if they considered that to be necessary). In addition, it would be helpful if the complainant was able to choose whether they wanted the conciliation to proceed in person or via teleconference.

When a settlement that is reached at conciliation conference, the terms of that settlement may be unsatisfying to the complainant, but the complainant may decide that it is preferable to settle rather than face another 6

months or longer of litigation in QCAT. Also, due to the limitations of the grants process and capacity of LAQ's Civil Justice Services solicitors, our clients are often unable to secure ongoing LAQ representation for those further stages at QCAT, and this may influence their decision to settle at conciliation (or abandon their complaint if it is unconciliable).

In addition, we note that the tendency for complaints to be settled on a confidential basis means that there is little public accountability or awareness of the unlawful vilification provisions of the ADA.

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

Commonwealth offences

Online vilification will frequently fall within the scope of the Commonwealth offence of using a carriage service to menace or harass under s 474.17(1) of the *Criminal Code 1995* (Cth), which carries a maximum penalty of 3 years imprisonment. However it is unclear if instances of online vilification are regularly investigated and prosecuted under the Commonwealth legislation. We are not aware of any cases where our clients' experiences of vilification were dealt with under this provision.

In addition, it is noted that – as with other summary offences under the Queensland legislation – s 474.17(1) does not recognise the more serious nature of vilification (when compared to other menacing, harassing or offensive behaviour) in that it has the potential to cause significant individual harm but also broader social disharmony, and is an aggravated type of offending.

Civil complaints

As an alternative to bringing a QHRC complaint under s 124A, clients who have experienced racial vilification may consider bringing a complaint to the Australian Human Rights Commission (AHRC) under section 18C of the *Racial Discrimination Act 1975*. Section 18C(1) offers broader protections because it prohibits acts, other than those done in private, that are:

- reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

Under section 18C, it is only necessary to show that the acts complained of were "reasonably likely… to offend, insult, humiliate or intimidate", which is a lower threshold than the definition of vilification under s 124A, which requires the act to "incite hatred…serious contempt… or severe ridicule".

Section 18C goes on to clarify:

> *(2) For the purposes of subsection (1), an act is taken not to be done in private if it:*
>
> *(a) causes words, sounds, images or writing to be communicated to the public; or*
>
> *(b) is done in a public place; or*
>
> *(c) is done in the sight or hearing of people who are in a public place.*

(3) In this section:

***public place** includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.*

This can be contrasted with the definition of "public act" under the ADA:

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 of 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.

The ADA therefore requires a "public act" to be a communication to the public and/or conduct that is observable by the public, whereas the RDA recognises that it is sufficient to show that the act occurred in a public place (whether or not other persons were able to observe the incident).

In cases involving racial vilification, it is often easier for complainants to show that the conduct complained of meets the definition of "offensive conduct" under s 18C, as contrasted with "vilification" under s 124A. However the AHRC complaints process may not be recommended for complainants for other reasons, namely:

- the prohibition on offensive conduct under section 18C only prohibits offensive racist conduct, and there is no equivalent Commonwealth prohibition on offensive conduct in relation to other attributes that are protected by s 124A (religion, sexuality or gender identity);
- the time limit for bringing a complaint to the AHRC is 6 months from the date of the conduct (compared to 12 months with the QHRC), this means that complainants may often be out of time before they have had the opportunity to obtain legal advice;
- for complainants located in Queensland, AHRC conciliation conferences are typically conducted via telephone;
- if the AHRC complaint is not resolved at conciliation and progresses to the Federal Court or Federal Circuit Court, it can be more difficult for self-represented complainants to navigate that process (compared to QCAT, where the jurisdiction is designed for self-represented litigants and the rules of evidence do not apply);

- there is a higher risk of costs being ordered against the complainant if the complainant is unsuccessful in the Federal Court or Federal Circuit Court (as costs usually follow the event in the Federal jurisdiction).[26] This can be extremely intimidating for complainants who are self-represented and do not have the financial resources to meet those potential costs.

In practice, this means that most matters will progress through the QHRC rather than the AHRC, because complainants are simply unable to risk a costs order being made against them in the Federal jurisdiction. Here, it is relevant to note that anti-discrimination legislation in some other jurisdictions directly adopts the wording used in section 18C but extends the prohibition on offensive conduct to all protected attributes (such as section 17(1) of the *Anti-Discrimination Act 1998* (Tas)), although we are unable to comment on the effectiveness of that approach in addressing less serious acts of vilification.

Proposals for reform

For the reasons set out above, LAQ recommends that the Inquiry consider:

- Broadening the wording of s 124A to encompass offensive conduct on the basis of all protected attributes under section 7 of the ADA, or, in the alternative:
    - Adding "impairment" as another recognised basis for vilification under s 124A and s131A of the ADA;
    - Clarifying the meaning of "public act" under s 124A and s 131A of the ADA;
- Amending s 124A and s 131A to allow publishers of vilifying content to be named as respondents;
- Funding community groups to collect examples of online hate speech and vilification and make representative complaints to the QHRC;
- Empowering the QHRC to investigate and prosecute serious vilification offences, and committing additional resources to the QHRC for this purpose;
- Inserting a new provision in the ADA which permits the QHRC to obtain an injunction or court orders to restrain ongoing vilification (with penalties for breaches);
- Removing the time limit for prosecution of s 131A offences under s 226(2) of the ADA;
- Moving the "serious vilification" offence under s 131A of the ADA to the *Summary Offences Act 2005* (Qld) and/or including serious vilification as an aggravating element in other related offences;
- Removing the requirement for a Crown Law Officer's written consent to prosecute the offence of serious vilification;
- Increasing the maximum penalty for serious vilification to 3 years imprisonment;
- Permitting the police and/or QHRC to obtain a warrant for the preservation of online evidence of serious vilification;
- Committing additional resources to train police to identify and respond to vilification and breaches of PAGBOs, including cultural competency training and improving access to and use of interpreters; and
- Amending the *Peace and Good Behaviour Act 1982* (Qld) to include vilification (without necessarily involving threats of harm or property damage) as a basis for the making of a PAGBO.

[26] As in the Cindy Prior case, which was ultimately unsuccessful and resulted in the complainant being bankrupted by a costs order – see 'Cindy Prior declared bankrupt years after telling QUT students to leave computer lab', *News.com.au* (Web Page, 1 February 2019) <https://www.news.com.au/finance/work/at-work/cindy-prior-declared-bankrupt-years-after-telling-qut-students-to-leave-computer-lab/news-story/a9cd1be1c3d2eaaa3357bb06980924c3> and 'Rape threats and racist hate followed discrimination case but police not investigating', *ABC News* (Web Page, 30 March 2019) <https://www.abc.net.au/news/2019-03-30/cindy-prior-rape-threats-and-hate-mail-followed-court-case/10954822>.

Balancing human rights and constitutional limitations with any recommended legislative amendments

Various cases have touched on the question of whether anti-vilification laws encroach on the implied freedom of political communication under the *Constitution* (and, by extension, the right to freedom of expression that is now protected by the *Human Rights Act 2019* (Qld) (the HR Act)).

In *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) [46]-[53], the New South Wales Court of Appeal found that anti-vilification laws were not incompatible with the implied freedom of political communication. As Justice Katzmann has summarised when discussing that case:

> *no matter how robust, debate need not descend to public acts which incite hatred, serious contempt or severe ridicule of a particular group of persons*.[27]

In the Queensland context, the same question arose before the Court of Appeal in the homosexual vilification case of *Owen v Menzies*, where Justice McMurdo commented that section 124A of the ADA:

> *set parameters to enhance communications about government and political matters in a civilised, diverse democracy, which values all its members, irrespective of race, religion, sexuality or gender identity… I cannot see that the incitement of hatred towards, serious contempt for, or severe ridicule of others on the grounds of race, religion, sexuality or gender can amount to political and government communication of the kind contemplated by the implied freedom under a diverse, modern democracy*.[28]

Although the decision in *Owen v Menzies* predated the HR Act, the HR Act itself recognises at section 13(1) that human rights may be subject to "reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom", having regard to the various factors listed under section 13(2). The test under section 13 is intended to align generally with the proportionality test that has been applied by the courts in the previous caselaw.[29]

Further, section 14 provides that nothing in the HR Act gives a person a right to limit another person's human right. It is important to recognise that vilification potentially limits a range of other human rights, such as the right to recognition and equality before the law (section 15) and freedom of religion (section 18). Where physical harm is incited, this also threatens the right to life (section 16), the right to protection from torture and cruel, inhuman or degrading treatment (section 17), and potentially other human rights.

For these reasons, LAQ is of the view that the legislative amendments that have been proposed are reasonable and proportionate in the circumstances.

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[27] Justice Katzman, 'The Federal and State Courts on Constitutional Law' (Speech, 2013 Constitutional Law Conference, 15 February 2013) <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-katzmann/katzmann-j-20130215>.
[28] [2012] QCA 170 at [72]-[73].
[29] Explanatory Notes, *Human Rights Bill 2018* (Qld) 5.

Conclusion

LAQ confirms that unlawful vilification continues to occur in Queensland, and it is likely that instances of vilification are significantly more widespread than is reflected in the current policing data.

LAQ acknowledges that vilification can cause significant distress to individuals who, because of their attributes, may already have reduced general wellbeing as a consequence of direct and systemic discrimination in their lives. Vilification is also damaging to our communities as it threatens social harmony, encourages vigilantism and violent extremism, erodes public confidence in the ability of police to protect individuals from hate crimes, and results in the inefficient use of our legal system to bring civil claims in lieu of protecting individuals and prosecuting criminal offences.

LAQ recognises that preventing discrimination and vilification is the responsibility of everyone in our community, and it should not be left to individual victims to take action against this offensive behaviour. In this regard we recognise that the current system needs to shift this burden away from individual victims and empower communities and the appropriate authorities to address vilification and hate crimes on a broader scale.

The reforms that have been suggested in this submission aim to address some of the practical barriers that prevent vilification from being reported or prosecuted, while noting further systemic changes that could be implemented to better achieve the underlying aims of the ADA (and the international human rights instruments that underpin that legislation).

Thank you for providing us with the opportunity to make this submission.