QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
Protecting Queenslanders' individual rights and liberties since 1967

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
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Dear Madam/Sir

Inquiry into serious vilification and hate crimes

Kindly accept this submission in relation to the above inquiry

1. General Principles

The QCCL unreservedly condemns all forms of racial vilification and discrimination. However, in the Council's view, it is another thing to make the expression of such views illegal.

In the end then the difference between those who oppose bigotry but who oppose race hatred laws and those who oppose bigotry and support race hatred laws is threefold:

(a) The first puts a high value on freedom of speech and is concerned that any restriction on freedom of speech is itself harmful;

(b) That any restriction of speech is likely to be abused particularly as a precedent for future restrictions on freedom of speech;

(c) A difference over how best to eliminate bigotry. Is it done best by making speech unlawful or by using speech as a weapon to expose and eliminate prejudice?

(a) Autonomy and Equality

One of the corner stone arguments in favour of freedom of speech is that when a state suppresses a person's ideas or when a state suppresses a person's expression of those ideas the state is insulting the person and denying their autonomy.

This also violates the conception of equality because when we suppress a person's ideas, we are violating that basic conception that everybody has an equal right to participate in the decision making process on matters which may affect them.

The limitation on this argument is exposed in the case of this type of law as the harm caused by affronting somebody's dignity may not be greater than the harm which the expression of the idea may cause. It is commonly argued that hate speech is antagonistic to free speech values because it silences its targets. This silence happens, it is argued, with the creation of a climate that discredits members of racial or ethnic minorities.

There are three responses to this argument.

Firstly, Andrew Kopelman[1] has argued, "the advocates of censorship were never able to establish a persuasive causal nexus between silencing and any particular speech act. It was impossible to show

[1] Professor of Law and Political Science and author of an American text on Antidiscrimination Law

that any single instance of racist speech …..could have that kind of devastating effect on a person. Speech is certainly integral to the problem: racism and sexism are ideas in people's heads….. Antidiscrimination law is necessarily committed to the reshaping of culture to eliminate or marginalise such malign ideologies. Censorship is the wrong tool this job. The cost to free speech of a hate speech prohibition – and there is every reason to think that it would be substantial – would not buy much."[2]

Secondly, various different types of harm must be distinguished because to make unlawful certain types of affront to autonomy puts at risk the greatest tool we have in the fight for equality and freedom.

Thirdly, these types of laws, as discussed below, are likely to result in the ideas festering underground.

(b) Words Wound

The case for laws outlawing hate speech often starts with the concept that words wound.

The proposition was well summarised in the Human Rights Commission Report No. 7 *Proposals for Amendments to the Racial Discrimination Act to cover incitement to racial hatred and racial defamation* November 1983 at page 8 where the Commission contrasted the following sayings:

- Sticks and stones may break my bones, but words will never hurt me – English saying;
- Words hurt more than fists – Samoan saying;
- The shaft of the spear may be parried but the shaft of the word cannot – Maori saying.

However, this argument can be taken too far. A clear distance needs to be kept between words and wounds not least because words are usually offered as the alternative to violence. Only words which incite or very closely resemble violence should be unlawful.

The argument that words wound was criticised in this fashion by Jonathan Rauch in his book *Kindly Inquisitors*[3] at page 131:

> "A University of Michigan law professor said: "To me, racial epithets are not speech. They are bullets"…My own view is that words are words and bullets are bullets and that it is important to keep this straight… you do not have to be Kant to see what comes after "offensive words are bullets": if you hurt me with words, I reply with bullets, and the exchange is even."

As Rauch argues this is the logic of the Ayatollah Khomeini when dealing with Salmon Rushdie. There is no doubt that the Ayatollah and many people in Iran were deeply offended by Rushdie's book. They chose to deal with that offence not with more words but with bullets.

(c) Will it work?

We must ask does suppression actually work? We ought not to diminish free speech if doing so will not protect those it is intended to protect.

As civil libertarians we start with the view that no system of suppression yet devised is perfect. In fact, it is noted that these proposed laws do not apply to things that are said in private. It is not at all clear how allowing those who hold racist views to continue to hold them in their head and to express them over the barbecue (most likely with people who hold the same views) is ever going to result in the eradication of those views. Those views can only ever be eradicated by confrontation, argument, and discussion.

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[2] *Revenge, pornography and First Amendment Exceptions* (2016) 65 Emory Law Journal 661 at pages 685-686

[3] University of Chicago Press Expanded Edition 2013.

If that is so suppression has the potential to be counterproductive. There is no persuasive psychological evidence that punishment for name calling changes deeply held attitudes. To the contrary, there are psychological studies that show, as well as the evidence of history, that censored speech becomes more appealing and persuasive to many listeners merely by virtue of being censored.[4]

The act of suppression can also draw the views being expressed to the attention of people who might otherwise not have heard of them or might not have been interested.

It is often said that these types of laws are necessary to prevent things like the development of Adolf Hitler. In fact, Weimar Germany had anti-hate laws. Those laws were in fact enforced with some vigour. During the 15 years before Hitler came to power there were more than 200 prosecutions based on anti-Semitic speech. Furthermore, there is evidence that what happened is that the Nazis made use of the trials to promote their cause. [5]

(d) Collateral Damage

Any legislation of the type proposed under discussion relies on the ability of the state to impartially and effectively identify threatening groups.

Censors have stifled the voices of oppressed persons and groups far more than those of their oppressors. Censorship has traditionally been the tool of state and federal governments seeking to subordinate minorities and silence dissenting voices.

The history of regulating speech has been littered with errors of its persecutions; Galileo, suppression of trade unions, banning great works of art, etc.

But of course, this argument applies in many areas of life and government regulation. However, we would argue that the distinctions required to regulate speech are harder to make than in other forms of conduct, because of the vagueness of language.

In addition, when regulating speech which interferes with its activities government is in essence in a conflict of interest situation. This is not meant to be some conspiracy theory. It derives from the fact that in the words of Lord Acton "All power tends to corrupt."

The first individuals prosecuted under the *British Race Relations Act 1965* were black power leaders. It was also used against the Anti Nazi League.

2. Proposals in the discussion paper

We now address the proposals contained in the discussion paper.

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

We do not oppose a law that prohibits harassment on the basis of race as that concept involves conduct which is closer to violence than to words. However, it is our view that the offence of public nuisance would cover that type of conduct.

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[4] Nadine Strossen *Regulating Racist Speech on Campus – a modest proposal* 1990 Duke Law Journal 484 at page 512

[5] A. Alan Borovoy *When Freedoms Collide – The Case for our Civil Liberties* – Lester & Orpen Dennys 1988 at page 50. Mr Borovoy was the General Counsel of the Canadian Civil Liberties Association for 30 years and a Jew.

We have no objection to making racial or religious motivation a circumstance of aggravation to existing offences such as assault and the public nuisance offence, where it involves threats of violence or actual violence.

A physical assault or threat of such is not by any stretch of the imagination a type of speech protected by any concept of free speech.

It is quite common for sentencing judges to consider a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on an offender.

In addition, hate-motivated crimes are more likely to provoke retaliatory crimes and inflict distinct emotional harms on their victims. These features of such crimes provide justification for adding a further penalty in those situations over and above mere disagreement with offenders' beliefs.

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

It is difficult to comment on these proposals without seeing the proposed legislation. However the first point is that the analogy with Domestic Violence and Peace and Good Behaviour orders is not apposite as those orders relate to behaviour between people who are related to or at least known to one another and for that reason are quite narrow in their scope.

Orders which potentially apply to a broad range of conduct by a person in public raise serious issues of principle relating to the delegation of broad powers to Courts, the making of overly broad orders and proportionality.

Finally, the paper makes no attempt to explain why existing police powers to order people to move on and prevent breaches of the peace are not sufficient to deal with the situation of people being harassed outside of places of worship.

(c) Addressing the under-utilisation of the existing offence in s131A of the Anti-Discrimination Act 1991

In our view section 131A of the *Anti--Discrimination Act* (QLD), is from a free-speech point of view a perfectly appropriate provision, which deals with serious conduct and impinges on free speech to a very limited and acceptable extent.

The need for aggravating factors and proof of incitement is intended to ensure that only conduct amounting to serious cases of racial vilification threatening violence is subject to criminal sanctions

As a matter of principle, generally, criminal liability should only be imposed where it is proved the person had a guilty mind. We acknowledge that the section extends liability to cases where the conduct is reckless. In this case we accept this lower standard having regard to the fact that it requires proof of threatening violence or inciting violence and the law is designed to, in part, ensure the community feels safe.

We would support increasing the penalty to 3 years and moving the offence to the *Criminal Code* as an indictable offence.

(d) Create a special power for police to obtain warrants to preserve online evidence

The discussion paper does not articulate in any serious fashion the case for this measure. We see no reason for thinking this type of crime, as distinct from any other type of online crime, requires a specific warrant

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

We have no objection to this proposal, if the offence is moved to the Code, as proposed above.

(f) Addressing the distribution or display of hate material. Introduce a complementary offence to criminalise the possession, distribution, or display of hateful material.

It follows from our comments above that we would not support such a law.

The very test of freedom of speech is that it must be given to those who disagree with you otherwise it is meaningless.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
12 July 2021