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RE: INQUIRY INTO SERIOUS VILIFICATION AND HATE CRIMES

We welcome and appreciate the opportunity to make a submission in relation to the inquiry on Serious Vilification and Hate Crimes. We note the considerable work of the Cohesive Communities Coalition Working Group and the Legal Sub=group of the Working Group in compiling, considering and weighing the options contained in their options paper. In our view, subject to some protections described below, there is a clear need for further legislative provisions to address current manifestations of racial and religious hate based crime and harassment.

Preliminary Consideration: Our background to comment

The Aboriginal and Torres Strait Islander Legal Service (Qld) Limited (ATSILS), is a community- based public benevolent organisation, established to provide professional and culturally competent legal services for Aboriginal and Torres Strait Islander people across Queensland. The founding organisation was established in 1973. We now have 24 offices strategically located across the State. Our Vision is to be the leader of innovative and professional legal services. Our Mission is to deliver quality legal assistance services, community legal education, and early intervention and prevention initiatives which uphold and advance the legal and human rights of Aboriginal and Torres Strait Islander people.

ATSILS provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Whilst our primary role is to provide criminal, civil and family law representation, we are also funded by the Commonwealth to perform a State-wide role in the key areas of Community Legal Education, and Early Intervention and Prevention initiatives

(which include related law reform activities and monitoring Indigenous Australian deaths in custody). Our submission is are informed by four and a half decades of legal practise at the coalface of the justice arena and we therefore believe we are well placed to provide meaningful comment, not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

OVERVIEW

It has been twenty years since the enactment of s 131A of the *Anti-Discrimination Act 1991* (Qld) ("the Act") The provision criminalises serious instances of racial and religious vilification. Its operation is constrained by the requirement for a certificate from the Attorney-General or Director of Public Prosecution for charges to be preferred[1] The Act also has a heavy focus on conciliation processes and while in principle that is positive, the difficulties experienced in achieving effective conciliation make it timely to reconsider how well these provisions work for instances of racial and religious vilification.

Current protections under the Act include a level of protection for free speech, a reliance on a particular model of conciliation to address the underlying causes of anti-social behaviour, and a cautious approach to laying criminal charges to ensure that instances of racial and religious vilification are properly characterised as criminal. We seek changes to the law, which continue to reflect those underlying principles but which would create a better legal framework to protect communities from unacceptable harassment, harm and violence.

The second reason for a re-think about the efficacy of current laws is the impact of social media[2] and its ability to mobilise large numbers of people in a virtual space and the use of it by extremist groups or individuals to promote racial and religious vilification. The impact of that is not to be underestimated. It is telling that the awful mass shootings conducted in Christchurch in 2019 were accompanied by social media broadcasting, something which it took authorities far too long to take down. Any measures to address serious vilification that occurs both in physical space and cyber space necessarily entail an examination of how existing Commonwealth laws interact with Queensland laws.

[1] 131A(2)

[2] See for example the example of the online vilification of Adam Goodes described in G Mason, N Czapski,*Regulating Cyber-Racism* [2017] MelbULawRw 26; (2017) 41(1) Melbourne University Law Review 284 available at http://classic.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2017/26.html. In terms of amplification of messages, good or bad, the major social media platforms typically have a billion active users a day,

The effectiveness of the existing criminal offences

In Queensland, s 124A of the *Anti-Discrimination Act 1991* (Qld) makes vilification on grounds of race, religion, sexuality or gender identity unlawful, and under s 131A serious racial vilification may amount to a criminal offence

> *131A (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.*

Section 131A additionally requires that the act of vilification be a public act and that the public act threatening physical harm to a person or group of persons or their property or the act includes inciting others to so threaten. The maximum penalty for an individual under section 131A is six (6) months jail. Legislation in other states and the ACT followed much the same pattern.[3] Despite the provision of criminal offences for serious vilification, the provisions have not been effective.

The effectiveness of the existing conciliation model

The Royal Commission into Aboriginal Deaths in Custody recommended that governments which have not already done so legislate to proscribe racial vilification and provide a conciliation mechanism for dealing with complaints of racial vilification. It recommended that penalties for racial vilification should not involve criminal sanctions.

The Queensland Human Rights Commissioner has recognised that the Anti-Discrimination conciliation based framework cannot deliver the safest or most appropriate process (or outcomes) in certain cases where the respondent is unwilling to engage or conciliate. The Commissioner has also noted the

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[3] in New South Wales, s 20C of the *Anti-Discrimination Act* 1977 (NSW) prohibits racial vilification and s 20D provides that racial vilification may in serious cases amount to a criminal offence. In Victoria, racial vilification is unlawful under the *Racial and Religious Tolerance Act* 2001 (Vic) s 7, and particularly serious incidents may be treated as criminal matters under s 24.In the Australian Capital Territory, s 66 of the *Anti-Discrimination Act* 1991 (ACT) makes racial vilification unlawful, and s 67 provides that serious incidents of racial vilification may be treated as criminal acts. In South Australia, s 4 of the *Racial Vilification Act* 1996 (SA) s 4 makes racial vilification a criminal offence. In contrast in Western Australia, racial harassment and incitement to racial hatred are made criminal offence under Chapter XI of the *Criminal Code* 1913 (WA).

financial and personal cost burden imposed on victims and victim communities. The observations of the Cohesive Communities working group are in agreement with the Commissioner's perception and also add that many victims and victim communities are discouraged by these costs and fearful of repercussions.

SERIOUS VILIFICATION AND HUMAN RIGHTS STANDARDS

Under international human rights conventions, obligations to address racial and religious vilification arise under , under article 20(2) of the *International Covenant on Civil and Political Rights* ("the ICCPR")[4] and article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination ("*CERD*")*.[5]

Article 20(2) of the ICCPR provides that:

> *'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law*'.

And Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. provides that:

> *'States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention*'.

international obligations under the *International Convention on the Elimination of all Forms of Racial Discrimination* do not stop at outlawing racist violence. The Convention also imposes obligations to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred'.

We note that this form of behaviour is not necessarily covered by existing provisions which address direct threats of physical harm or property damage or which directly incite others to threaten physical harm or property damage.[6]

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[4] The ICCPR entered into force for Australia on 13 November 1980. Provisions of the ICCPR are enacted in the *Human Rights Act* 2019 (Qld).

[5] *International Convention on the Elimination of All Forms of Racial Discrimination,* United Nations, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)Provisions of CERD are enacted in the *Human Rights Act* 2019 (Qld)

[6] And it should be noted that Article 4a of CERD refers to "national, religious or racial hatred".It is not intended to

OTHER JURISDICTIONS RESPONSE TO THE SAME PROBLEMS

The rise of hate groups and their activities has caused a number of jurisdictions to re-evaluate the efficacy of their provisions dealing with serious vilification.

As we understand it:

a) The Western Australia Criminal Code[7] uses a statutory aggravation format for assault, threats, and property damage, and additionally requires a perpetrator's hate motive to be established. We understand that few prosecutions are brought under this provision.
b) New Zealand in the wake of the shootings in Christchurch has announced a new, clearer hate speech offence in the Crimes Act, removing it from the Human Rights Act. This new provision was announced on 25 June 2021 and would mean anyone who "intentionally stirs up, maintains or normalises hatred against a protected group" by being "threatening, abusive or insulting, including by inciting violence" would break the law. The only protected attributes are colour, race or ethnicity. This definition could however set a vey low bar in certain instances: for example, so-called Australian jokes about the penchant that New Zealanders might have for sheep could potentially be caught (would such be consistent with intent?).
c) In England and Wales, and in Scotland, statutory aggravation has been added to existing base offences.
d) In Victoria, from a recent inquiry and report by the Parliament of Victoria, *Inquiry into anti-vilification protections* (March 2021), the Committee's recommendation was that their Act moves towards a 'harm-based test' to improve the legal effectiveness of the Act and shift the burden away from victims. The circumstance of aggravation to attach to offences focuses on the consequence of the act, not the intent of the perpetrator.

BALANCING FREE SPEECH, A HARM BASED APPROACH

While there are racial vilification laws in almost every jurisdiction in Australia, there remain a divergence of views about where to set the legal threshold between acceptable and unacceptable speech.

One approach would be to recognise behaviour which is likely to cause fear for personal safety or security of property as harm which passes the threshold, Thus the most dangerous forms of hate would

mean the expression of personal dislike,

[7] *Criminal Code Act 1913* (WA).

be criminalised. Such a test would need to be both subjective (the alleged victim actually held such fears) and objective (a reasonably minded person is similar circumstances would be fearful).

Additionally, a statutory defence to the offence could be created along similar lines to that contained ins section 124A(2) of the Anti-Discrimination Act:

(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.

Similarly, we understand that in New South Wales to achieve a balance between freedom of speech and the right to an existence free from racial vilification, the new law allows fair reports of public acts of racial vilification, as well as works of art or other acts done "reasonably" and "in good faith" for academic, scientific or research purposes.

Another formulation would allow a defence for:

An artistic work or performance

An academic publication, discussion or debate

A fair and accurate report on a matter of public interest

A fair comment on a matter of public interest, provided the comment is an expression of the person's genuine belief

OTHER EFFECTIVE APPROACHES – PROTECTIVE ORDERS ISSUED BY THE COURT

A frequent problem is the mentally unwell person who develops a fixation with a particular group and continually threatens and harasses members of the group or places where they congregate. We would recommend the creation of a new species of Order, created along the same lines as a Peace and Good Behaviour Order or Domestic Violence Order, to address behaviour that falls short of criminal offences, but which if repeated, a breach of the order of the court is addressed and penalised. We propose that such an order could protect:

A previously targeted individual or group identified by an attribute;

A culturally or religiously significant place (e.g., a place of worship)

ADDING A CIRCUMSTANCE OF AGGRAVATION TO ALREADY CRIMINAL BEHAVIOUR

Some specific types of abusive and threatening behaviour already form part of the criminal law in the form of commit public nuisance charges and more serious offences of violence such as Threatening Violence, Stalking, Going Armed so as to cause fear, Assault, Assault occasioning bodily harm and Grievous bodily harm, and Deprivation of liberty. Similarly, vandalism and defacement of spaces with hate messages and symbols are already encompassed under Wilful Damage charges. Adding a circumstance of aggravation of racial vilification would properly reflect the criminality of the offence.

This is particularly apposite for public nuisance offences. The public nuisance model is very appropriately focused on maintaining safe public spaces for all members of the community to pass through and enjoy, a core concern of communities. It also fits with the existing approach taken with more serious forms of public nuisance such as public nuisance offences committed near licensed premises. This approach would also be consistent with the provisions of the CERD and the ICCPR that a State Party should legislate to "nip in the bud" the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred.

OTHER EFFECTIVE APPROACHES – RESTORATIVE JUSTICE STRATEGIES

The Cohesive Communities Working Group paper identifies options for restorative justice approaches and the studies that support the success of this approach. We agree that early intervention and diversion is an ideal approach in many cases. We are also conscious of the scarcity of mediators available for justice conferencing and would recommend a flexible model that would allow access to a greater range of mediation and healing services. We support the use of restorative justice strategies to complement the strengthening of the laws.

> *Option 15. Develop a restorative justice strategy in relation to hate crimes in consultation with affected communities.*
>
> *Option 16. Invest in diversion options and community justice conferencing options for hate crime offenders and encourage academic partnerships that evaluate these initiatives to allow for improvement over time.*

In many instances it would be more appropriate to send the parties to mediation, for example when trading of racial or religious insults has led to an escalation of behaviour leading to one party being charged but another only slightly less 'guilty' party escaping censure. We are aware of many instances when court ordered mediation is both appropriate and effective. It may also lead to better outcomes in terms of better understanding and respect from all parties moving forward.

OTHER EFFECTIVE APPROACHES – A HATE CRIME SCRUTINY PANEL

The Cohesive Communities Working Group has also drawn on the United Kingdom experience for a successful model of community policing..

> *Option 17 - Legislate a hate crime scrutiny panel involving police and community advocates as an ongoing mutual education process to guide improvements in practice and increase communication on high impact cases.*

These panels have seemingly proven effective in assisting police to understand the significance of symbols to properly identify witnesses and to follow up with inquiries, and to assist with referrals to appropriate sources of expertise such as academic exports or to assistance available from the affected community itself.

One concern however is that the actual make-up of the group could have a disproportionate effect. For example if individuals from the far right or the far left made it their business to endevour gaining panel membership – and in so doing, influence what is or is not considered acceptable. "Political correctness" is already seen in some quarters as a form of social engineering – and via such, an instrument of public control. It is absolutely crucial to appropriate levels of free speech that a fair, equitable and balanced approach is adopted.

CONCLUSION

We note the interest of the inquiry to seek ways to improve the response to racial and religious vilification. These problems are productive of significant social harm and should not go unchecked. We thank the Committee for the opportunity to comment on a raft of practical options to consider

Yours faithfully,

Shane Duffy
Chief Executive Officer