Submission

to the

Inquiry into serious vilification and hate crimes

by the

Legal Affairs and Safety Committee

Queensland Parliament
Alice Street
Brisbane QLD 4000
Email: lasc@parliament.qld.gov.au
Website: https://www.parliament.qld.gov.au/work-of-committees/committees/LASC/inquiries/current-inquiries/VilificationandHateCrimes

by

FamilyVoice Australia

4th Floor, 68 Grenfell Street
Adelaide SA 5000
Telephone: 08 7231 2000
Email: office@familyvoice.org.au
Website: www.familyvoice.org.au

7 July 2021

Contents

1. Introduction

FamilyVoice Australia is a national Christian advocacy group – promoting family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

2. Terms of reference

> *The Queensland Parliament's Legal Affairs and Safety Committee is conducting an inquiry into serious vilification and hate crimes.*
>
> *The inquiry will look at whether the current protections are operating effectively, if they are meeting community expectation, and whether they are up to the task of dealing with issues like online vilification.*

Submissions are due, 12 noon, Monday, 12 July 2021.

3. Freedom of speech

One of the most significant characteristics of the human race is our capacity for speech. Through speech people are able to share ideas, discover truth, form communities and develop nations. Human history, including the development of civilisation, owes much to the knowledge, inventions and culture made possible by the capacity of the human species for elaborate speech.

In the development of modern democratic societies, freedom of speech is seen as a natural right arising from the intrinsic nature of humanity and beyond the authority of governments. This is in contrast with legal rights that are bestowed by governments.

The United Nations Human Rights Committee has highlighted the essential nature of freedom of speech:

> *Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.*[1]

Augusto Zimmerman and Lorraine Finlay have pointed out the importance of free speech in protecting minority interests:

> *In fact, freedom of expression is a necessary condition for the protection of minority interests and ought to be viewed as a mechanism against the concentration of power. It is a misconception to assume that free speech disadvantages minority groups and favours those with more power. As Tim Wilson correctly stated, 'anyone who has studied a skerrick of history knows that protecting free speech is about giving voice to the powerless against the majority and established interests'. This so being, the less perceptible consequence of anti-discrimination laws is to prevent people 'from drawing distinctions that are not sanctioned by their government arbiters'. The final result, as Dr Ben O'Neill of the University of New South Wales points out, 'is*

> *the loss of a liberal society—the establishment of governments that act in the name of "human rights" but use this to enforce mandated viewpoints and "acceptable" opinion'.*[2]

Democratic society considers freedom of speech or expression to be one of our most cherished freedoms. The essence of freedom of speech is not merely the freedom to express ideas, but the freedom to disagree, dispute or cause controversy – an idea often witnessed in our political arena. Indeed, a right not to be offended would stifle legitimate debate and limit political freedom – an important concept in a functioning democracy. Speech also includes expression of personal beliefs which might not be supported by evidence, and may be controversial, leading to robust debate.

4. The current law in QLD

The Queensland Human Rights Commission (QHRC) has summarised the law governing vilification currently in that state.[3]

The QHRC points out that there are two types of vilification under the *Anti-Discrimination Act 1991* which prohibits vilification on the basis of race, religion, sexuality or gender identity: unlawful vilification (a civil matter) and serious vilification (a criminal offence).

> ***Unlawful vilification***
>
> *Unlawful vilification is a public act that incites hatred towards, severe ridicule of, or serious contempt for a person or group because of their race, religion, gender identity or sexuality. For an act to be unlawful vilification under the Act it has to be all of the following:*
>
> 1. *A public act;*
> 2. *Capable of inciting;*
> 3. *Hatred towards, serious contempt for, or severe ridicule of;*
> 4. *A person, or a group of people;*
> 5. *Because of their race, religion, sexuality or gender identity.*
>
> *Complaints about unlawful vilification are handled by us at the Commission through our complaints process.*
>
> ***Serious vilification***
>
> *If the unlawful vilification includes a threat of harm to a person or their property, or inciting others to threaten physical harm to a person or their property, it is a criminal offence. This is called serious vilification and is a police matter.*
>
> *A person convicted of serious vilification can face a possible jail sentence of six months or a fine of 70 penalty units (over $9,000). The fine for a company is up to 350 penalty units (over $46,000).*

The current laws are extremely broad, as further highlighted by the QHRC:

> ***When and where is vilification unlawful?***
>
> *Unlike discrimination that is only unlawful if it happens in a specified area of activity, vilification is unlawful wherever it happens in Queensland, if it is a public act.*
>
> *A public act includes any form of communication to the public, such as speaking, writing, printing, and displaying notices or messages, either online, in person, or in the media. It also*

includes any conduct which the public is able to observe, such as actions, gestures, and wearing or displaying clothing, flags, emblems or insignia.

If vilification happens in a work environment, an employer may be legally responsible for vilification by their employees, unless reasonable steps are taken to prevent it from happening.

Employers need to take reasonable steps to ensure they protect their staff from vilification and other types of discrimination and harassment, and make sure their workplaces are free of this type of behaviour.

This may include writing policy about vilification and making sure all employees, especially managers and supervisors, are trained in how to reduce or prevent incidents from happening. Employers should also introduce an effective process for dealing with complaints.

Employers or organisations can't avoid their legal responsibility by saying they were not aware of vilification in their workplace.

This means that the employer, as well as the person or persons who engaged in the vilification, can be liable to pay compensation for loss or damage suffered by a person as the result of vilification.

While the application of vilification laws in Queensland is very broad, exceptions are very narrow and therefore freedom of speech is heavily impinged.

Exceptions

The Act aims to balance the right to freedom of speech with the right to be free from discrimination, harassment and harm. Because of this, there are exceptions for some types of public acts.

These are:

- *a public act done reasonably and in good faith: for purposes in the public interest, including discussion and debate; or for academic, artistic, scientific, or research purposes;*
- *a fair report of a public act;*
- *information about a person in proceedings for defamation;*
- *statements made in Parliament, or during the course of proceedings of a parliamentary body (also called parliamentary privilege).*

For the average person, the last three points will not be applicable. That leaves the first as the basis upon which they can rely. But even this exception is very narrow. The public act must be done "reasonably" and "in good faith". But what is "reasonable" and in "good faith" is very subjective. Likewise, whether it is in the "public interest" in highly subjective, too.

Recommendation 1

Queensland vilification laws should be reformed to provide greater protection for free speech so that Queenlanders can more freely communicate political and other views on controversial issues without fear of legal action.

5. Case studies

5.1. Senator Claire Chandler

FamilyVoice has previously reported on the experience of Senator Claire Chandler with anti-discrimination laws in Tasmania and the adverse impact they can have upon free speech:

> *Last month [September 2020], Tasmania's Anti-Discrimination Commissioner Sarah Bolt ordered the senator to attend a "conciliation conference" with a person who claimed to be offended and insulted by a newspaper column she wrote in July.*
>
> *The senator had pointed out the significant danger to women in contact sports from transgender women who, being born male, were significantly bigger and stronger. She also said: "Women's sport, women's toilets and women's changing rooms are designed for the female sex and should remain that way."*
>
> *I believe most Australians would agree. But Sarah Bolt told Senator Chandler that these reasonable words were potentially "prohibited conduct" under Tasmania's Anti-Discrimination Act.*
>
> *Section 17 of this law says a "person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute…" (including race, age, sexual orientation, religious or political belief and gender identity).*
>
> *I've lost count of the newspaper columns that offended and insulted my political or religious beliefs! But I didn't call the thought police.*
>
> *Last week I wrote about Bernard Gaynor being hauled before the NSW Anti-Discrimination Tribunal. Archbishop Porteous had the same experience when he was hauled before the Tasmanian Anti-Discrimination Commissioner in 2015, merely for distributing a booklet about his church's teaching on marriage.*
>
> *…*
>
> *On 30 September she said: "I have written to Tasmania's Anti-Discrimination Commissioner to reiterate that I will not be withdrawing, retracting, modifying or apologising for my comments on women's sport and women's facilities…*
>
> *"All Australians should be free to discuss public policy issues and to acknowledge the realities of biological sex without being silenced by anti-discrimination tribunals and unelected bureaucrats…*
>
> *"The appropriate course of action for the Commissioner to now take is to dismiss this complaint as vexatious, trivial and without substance…"*
>
> *The Commissioner didn't do that. Instead she required Senator Chandler to sign a confidentiality agreement that would have prevented her speaking about the complaint process. Senator Chandler refused to sign.*
>
> *The complainant backed down. He withdrew his complaint. Victory!*
>
> *On 1 October Senator Chandler wrote: "I have learnt this afternoon via the media that the anti-discrimination complaint against me has been dropped by the complainant. I am both relieved at this outcome and furious at the abuse of process which has occurred.*

> *"If I had not refused to sign a confidentiality agreement, I would be currently sitting in a conciliation conference on the basis of a spurious complaint which the Commissioner had no legal authority to accept…*
>
> *"It's clear that the Anti-Discrimination Act needs to be substantially amended to prevent these tactics being used in the case of frivolous complaints…"*[4]

While the complaint against Senator Chandler was dropped in the end, she should not have had to go through a costly and time-consuming process to begin with for expressing such views.

5.2. Archbishop Julian Porteous

Tasmanian Catholic Archbishop Julian Porteous is another who has had a complaint made against him around matters of human sexuality.

Transgender activist and former federal Greens candidate Martine Delaney complained about a booklet the Church had distributed throughout Catholic schools in Tasmania entitled "Don't mess with Marriage".

While the complaint was subsequently withdrawn, Archbishop Porteous should not have been drawn into a legal process to defend church teaching in relation to marriage.

Archbishop Porteous earlier this year strongly warned about the threat to free speech posed by anti-discrimination laws:

> *An aggressive brand of secular fundamentalism in Australia's media, education, corporate and other institutions is seeking to deny people of faith the right to freely follow and give public expression to their beliefs.*
>
> *Now we are finding that anti-discrimination legislation rather than protect against discrimination has been used to try and silence the Christian voice on important moral issues, on the basis that these beliefs are considered 'offensive'.*
>
> *It is critical to remember that religious freedom is one of the key hallmarks of the civilised and just society. Religious freedom is not just the right to freely participate in religious activities, but it also means that a person has the right to live, speak, and act according to their beliefs, peacefully, within a public setting. It protects their ability to be themselves at work, in class, and at social activities. It means they should not be discriminated against for simply living and expressing their deepest beliefs in a respectful way.*
>
> *The Morrison government has stated its commitment to passing a religious discrimination act to protect religious freedom. This has not eventuated to date, in part due to the need for government to focus on addressing the COVID-19 situation. This legislation was intended to finally give some clear legal protection in Australian law to what has been proclaimed and acknowledged as a fundamental human right since the Universal Declaration as signed in 1948, the right to religious freedom. Such a law would have had particular application here in Tasmania by preventing the state anti-discrimination act being used to limit religious freedom, particular freedom of religious speech.*
>
> *More generally there is an urgent need to more strongly protect freedom of speech and freedom of association in Australia. Anti-discrimination laws are not just being used to silence people of faith but anyone who would challenge radical social theories and positions being promoted by activists. Anti-discrimination laws have become weapons to prevent freedom of speech rather than shields to protect the vulnerable. This is proving to have a 'chilling effect' on freedom of*

> *speech, with people increasingly reluctant to express their position on important moral and social issues, for fear of being prosecuted.*[5]

5.3. The "Two Dannys"

Experience with Victoria's *Racial and Religious Tolerance Act 2001*, which penalises speech that "incites hatred against, serious contempt for, or revulsion or severe ridicule" of a class of persons based on religious belief or activity, illustrates the negative impact of vilification provisions on fundamental freedoms.[6]

The prolonged action against pastors Daniel Scot and Danny Nalliah in relation to a religious seminar on Islam represents a low point of freedom of expression in Australia. The initial adverse decision by Judge Higgins illustrated the profound hazards to freedom of expression posed by laws prohibiting vilification.

Judge Higgins ordered Pastor Daniel Scot to publish, in a large newspaper advertisement (at cost of $70,000), a statement admitting error.

VCAT found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith.[7]

Pastor Scot was also prohibited from repeating in speech or writing anywhere in Australia or on the internet any of the statements, and, or alternatively, information, suggestions and implications, to the same or similar effect as those found by the Tribunal to have breached the *Racial and Religious Tolerance Act 2001*.

If Pastor Scot had breached this order he could have faced imprisonment.

The massive financial burden, along with the time and stress imposed on these two pastors were an intolerable assault on freedom of religion and freedom of speech.

Notably, the VCAT findings and orders against the pastors were eventually quashed by the Court of Appeal in the Supreme Court of Victoria.[8]

The Supreme Court found Judge Higgins made numerous errors in his consideration of strictly religious matters and at times had completely misrepresented Pastor Scot's comments. For example, the Court of Appeal found that Judge Higgins had wrongly asserted that Scot had claimed that "Muslims are demons". Judge Higgins had failed to understand Scot's citations from the Quran about jinns (demons) becoming Muslims.

The Supreme Court also found Judge Higgins had ignored significant sections of Pastor Scot's seminar which were favourable to Muslims "and ex facie calculated to persuade an audience of non-Muslims to love … Muslims".[9]

If the pastors had not had the courage, determination and financial support to initiate a court appeal, Judge Higgins' orders would have had a chilling effect on any future public statements about Islam, whether accurate or not. The freedom to make statements of a religious nature, not in breach of the provisions of the *Racial and Religious Tolerance Act 2001*, would have been severely inhibited.

5.4. Bernard Gaynor

Bernard Gaynor has suffered from anti-discrimination "lawfare", as the Honourable Mark Latham pointed out in a speech to the Parliament of New South Wales:

> *In the four decades since the Anti-Discrimination Act was legislated the political environment has changed substantially. We now live in an era of heightened political activism, much of it driven by the intense polarised and at times obsessive nature of social media, and tactics such as "de-platforming" and "cancelling culture" have become common.*
>
> *…*
>
> *The clearest example of this new reality is the long-running feud between Garry Burns and Bernard Gaynor—the 2020 New South Wales equivalent of the Hatfields and McCoys. In this case the aggressor has been Burns, a self-described gay rights activist, who has stated publicly his "work"—he says that—is to lodge complaints with the Anti-Discrimination Board. Hundreds have gone in, the vast majority accepted under section 89.*
>
> *Burns has also sent scores of abusive emails to those he has complained against. Many MPs have received correspondence from Mr Burns going back to the days of the Carr Government. There is no doubt that he is very obsessive about this agenda and is someone who, in the eyes of many MPs—myself included—is not genuine in the pursuit of justice through the Anti-Discrimination Board. At a time when the New South Wales court system has a huge backlog of matters it is incredible that someone like Burns has been able to eat up resources elsewhere in the legal system, at the Anti-Discrimination Board and NCAT. He has been treated as a credible complainant for these hundreds of matters when the scores of items he has forwarded to my office since March 2019 clearly show he is not of sound mind.*
>
> *He frequently condones and advocates violence, such as the bashing death of George Pell. He displays many of the characteristics of a fantasist, inventing meetings that never took place, making up conversations that plainly did not happen. I could cite other examples to the House—many of them—they are indeed erratic. I am willing to make my hefty file of Burns emails available to any MP who wants to understand the seriousness of what we are dealing with here, but I know that other MPs have a comparable file. Rather than being given a platform by the Anti-Discrimination Board and appearing at New South Wales tribunal and court hearings, Burns needs assistance of a different kind.*
>
> *One of his many emails was directed at Bernard Gaynor, a Catholic blogger and father of eight who lives in Queensland. Gaynor once said he did not want his children taught by gay teachers, and Burns has been at him ever since. The Burns email states:*
>
> *Mr Gaynor has an asset, namely his house. So if there's enough complainants and the complaints are substantiated, we can look at taking his house through bankruptcy.*
>
> *Gaynor has had to sell his house to pay the legal bills racked up by his fight against Burns. This is clearly an example of "lawfare". Burns is not looking for natural justice; he is looking to financially ruin the Gaynor family for no other reason than that they have become antagonists and hold political and moral beliefs different from his own. His vilification complaints are a form of counter-vilification. In public opinion they would clearly be regarded as vexatious.*
>
> *We can be certain they are not what the founders of the Anti-Discrimination Act intended in the functions of the board. Mr Gaynor has faced 36 complaints from Mr Burns, with 18 going to the New South Wales Civil and Administrative Tribunal. None has been substantiated but it has cost Gaynor hundreds of thousands of dollars to defend them. Some people would fold but Gaynor has fought on as a matter of deep principle and religious belief. He has been tied up in litigation since 2014, with no end in sight. Burns has even been able to lodge homosexual vilification complaints against Gaynor, even though Gaynor is a Queensland resident. The New South Wales*

> *Parliament has no jurisdiction over other countries, States and Territories yet this madness marches on.*[10]

6. Mark Latham approach

Latham has introduced the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* into the NSW Parliament, which according to the Explanatory Note:

> - *Make[s] further provision with respect to the declining of certain complaints by the President of the Anti-Discrimination Board; and to*
> - *remove the requirement for the President to refer certain declined complaints to the Civil and Administrative Tribunal.*[11]

The Queensland Parliament should take on board aspects of the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* to tighten the process around the handling of anti-discrimination complaints.

As a matter of distinction, under section 140 of the Queensland law, the commissioner may (discretionary) reject a complaint if it has been dealt with elsewhere but under Latham's *Anti-Discrimination Amendment (Complaint Handling) Bill 2020,* the President "must decline" (mandatory) the complaint if it has been dealt with elsewhere.

Recommendation 2

The Queensland Parliament should take on board aspects of the Honourable Mark Latham MLC's Anti-Discrimination Amendment (Complaint Handling) Bill 2020 to tighten the process around the handling of complaints.

7. Conclusion

Freedom of speech is essential in a robust and open democracy. Currently, this fundamental right is infringed by anti-discrimination laws. Rather than further curtail this important freedom by expanding anti-discrimination laws, the existing laws should be reformed to provide greater protection for free speech.

8. Endnotes

[1] "General Comment No.34: Article 19: Freedoms of opinion and expression", Human Rights Committee, https://www.refworld.org/docid/4e38efb52.html

[2] Augusto Zimmermann and Lorraine Finlay, "A forgotten freedom:
Protecting freedom of speech in an age of political correctness", Macquarie Law Journal, Volume 14, http://www.austlii.edu.au/au/journals/MqLawJl/2014/21.pdf

[3] Queensland Human Rights Commission, "Vilification", https://www.qhrc.qld.gov.au/your-rights/discrimination-law/vilification

[4] 'Sen. Chandler: "I am furious at the abuse of process"', FamilyVoice Australia, 8 October 2020, https://familyvoice.org.au/news/sen-chandler-i-am-furious-at-the-abuse-of-process

[5] "Archbishop Julian's 2021 Australia Day message", 27 January 2021, https://hobart.catholic.org.au/2021/01/27/our-freedom-of-speech-is-under-threat/

[6] Section 8

[7] Islamic Council of Victoria v Catch the Fire Ministries Inc (Anti Discrimination - Remedy) [2005] VCAT 1159 (22 June 2005), Annexure, http://www.austlii.edu.au/au/cases/vic/VCAT/2005/1159.html

[8] Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006), http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html

[9] Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284 (14 December 2006), http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html, para 77

[10] The Honourable Mark Latham MLC, Second Reading Speech, *Anti-Discrimination Amendment (Complaint Handling) Bill 2020,* 27 February 2020, https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81481

[11] *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, https://www.parliament.nsw.gov.au/bill/files/3735/XN%20Anti%20Discrimination%20(Complaint%20Handling).pdf