



SUBMISSION TO PARLIAMENT OF QUEENSLAND

LEGAL AFFAIRS AND SAFETY COMMITTEE

INQUIRY INTO SERIOUS VILIFICATION AND HATE CRIMES

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Around the world we are seeing a disturbing groundswell of xenophobia, racism and intolerance – including rising anti-Semitism, anti-Muslim hatred and persecution of Christians. Social media and other forms of communication are being exploited as platforms for bigotry. Neo-nazi and white supremacy movements are on the march. Public discourse is being weaponized for political gain with incendiary rhetoric that stigmatizes and dehumanizes minorities, migrants, refugees, women and any so-called “other”.

This is not an isolated phenomenon or the loud voices of a few people on the fringe of society. Hate is moving into the mainstream – in liberal democracies and authoritarian regimes alike. And with each broken norm, the pillars of common humanity are weakened.

United Nations Secretary-General, Antonio Guterres,

May 2019

United Nations Strategy and Plan of Action on Hate Speech

Recommendations

Townsville Community Law recommends a range of measures need to be taken. A summary of our views follows:

- A There is need for legislative reform within the *Anti-Discrimination Act 1991* (the ADA) including amendment of sections 124A and 131A. Drafting suggestions are provided.
- B There is sufficient, urgent need for a new suite of criminal laws prohibiting hate crimes (including hate speech) including new specific provisions covering aggravation of other offences, aggravated assaults, aggravated criminal damage, aggravated public order offences, aggravated harassment, and specific sentencing options. These new hate crimes should be within the Criminal Code and be given a sufficiently high level of importance and gravity that reflects their likely harm to individuals, groups, and the community
- C Government should investigate the prevalence and harm of hate crimes in Queensland and should make necessary changes to data reporting systems in all relevant agencies to ensure useful, disaggregated data is kept on hate crimes in Queensland
- D The activities of Government, the QHRC, Law Enforcement and Prosecutorial Authorities needs attention to ensure specialist competence is developed and resourcing is adequate to ensure the provisions are used when they are needed. This includes conciliation-based measures and criminal offences. Barriers to reporting, investigation and prosecution should be removed as a matter of urgency.
- E Government should consider implementing the strategies listed in the United Nations Strategy and Plan of Action on Hate Speech (Annexed) at a broad all-of-government policy level
- F Specialist funding should be provided to agencies to support victims of hate crimes through reporting, investigation, complaint, conciliation, and prosecution processes. Community legal centres are well placed to provide the necessary support including to specific vulnerable groups.
- G Specialist victims of crime support programs should be developed given the serious nature of harm caused by hate crimes.
- H The conciliation-based approach of section 124A is appropriate for matters that can be addressed between the parties through a complaint and conciliation system of the QHRC without risk of harm to the complainant including the risk of victimisation or risk of cumulative harm by way of exposure to further acts of hate

Background

- 1 Townsville Community Law is a non-profit, community legal centre located in Townsville and serving North Queensland. Townsville Community Law has significant experience in vilification law and practice.
- 2 Townsville Community Law acted for the applicants in *Gay Lesbian Bisexual Transgender Intersex Anti-Violence Committee Inc. v Wilks & Doe* [2007] QADT 5 and *GLBTI v Wilks & Anor* [2007] QADT 27 which was the first decision on a complaint by a relevant entity pursuant to section 124A of the *Anti-Discrimination Act 1991* (the ADA).
- 3 In *GLBTI v Wilks & Anor*, the use of the ADA was a community coalition-driven response to homophobic violence in North Queensland. Importantly, the case highlighted that hate crimes impact on individuals, and groups and communities as a whole. Homophobic violence in North Queensland endangered the lives of GLBTIQ+ persons, and threatened local tourism, regional economies and the lives and livelihoods of non-GLBTIQ+ persons.
- 4 Townsville Community Law has also acted in cases involving allegations of contraventions of section 18C of the *Racial Discrimination Act 1975* (Cth) and other anti-discrimination matters arising under state and federal laws.

Terminology

- 5 Several terms are used in this response including vilification, serious vilification, hate speech, hate crimes and bias crimes.
- 6 Our current system (the ADA) provides a civil response to vilification (section 124A) and a criminal sanction for serious vilification (section 131A). Both provisions fall within the broad concept of regulated hate speech. Hate speech is a subset of the broader concept of hate crimes.
- 7 Hate crimes (also called bias crimes) are a criminal justice system response to wide-ranging conduct of a criminal nature. While the ADA's serious vilification offence is a hate speech style hate crime, it is limited to 'public acts' in specific circumstances and only applies to limited protected attributes and groups.

TOR 1a: The Nature & Extent of Hate Crimes & Serious Vilification in Queensland

The Nature and Extent of Hate Crimes

- 8 The prevalence of hate crimes in Australia is unknown. Studies suggest the largest obstacle to understanding the prevalence and nature of hate crimes is victim underreporting and police agency misclassification of hate crimes as ordinary crimes (Pezzella et al 2019). This accords with our experience and our clients' lived experience.

- 9 Different groups do have different experiences with the enforcement of hate crimes. Vergani and Navarro (2020) noted that participants reported different types of barriers in relation to different types of hate crimes and hate incidents. Their research indicated that hate crimes were more prevalent than other types of criminal experience: Participants reported levels of hate crime and hate incident victimisation that are much higher (between 40% and 87%, depending on the community) than the average levels of self-reported victimisation in the Victorian population (26%, according to a recent Victorian survey) (Vergani and Navarro 2020). Importantly, barriers identified were internal: internalisation and lack of awareness; and external: fear of consequences, lack of trust in public authorities and accessibility (Vergani and Navarro 2020).
- 10 Hate crimes are communicative acts, often provoked by events that incite retribution in the targeted group, toward the group that share similar characteristics to the perpetrators (King & Sutton 2013). Mason (2019) notes that bias crime is an extreme manifestation of intergroup tension, conflict, and animosity; It is a sign of the failure of the nation state to provide targeted groups with the safety and sense of belonging that is intrinsic to full citizenship.
- 11 Hate crimes entailing a prejudicial motive often occur in close temporal proximity to galvanizing events, such as terrorist attacks. It is during this period that decision makers, particularly those responsible for minimizing the risk of social disorder through community reassurance, local policing, and the online governance of hateful and antagonistic content, require additional information on the likelihood of disruption (Burnap and Williams 2015). The community also requires additional resources to respond during these times.
- 12 Hate speech is a subset of hate crimes. Hate speech has been defined in many ways but includes “any speech, which attacks an individual or a group with an intention to hurt or disrespect based on identity” (Chetty and Alathur 2018).
- 13 Hate crimes take a more expansive view of hateful conduct. In the United Kingdom, the Crown Prosecution Service (CPS) notes a hate crime includes:
- ... a range of criminal behaviour where the perpetrator is motivated by hostility or demonstrates hostility towards the victim's disability, race, religion, sexual orientation or transgender identity.*
- These aspects of a person's identity are known as 'protected characteristics'. A hate crime can include verbal abuse, intimidation, threats, harassment, assault and bullying, as well as damage to property. The perpetrator can also be a friend, carer or acquaintance who exploits their relationship with the victim for financial gain or some other criminal purpose. (CPS)*
- 14 This Inquiry asks whether a broader articulation of hate (or bias) crimes should be developed? Townsville Community Law submits that hate crimes do fit within the purview of the ADA and it would be a natural extension of that scheme to ensure broader protections to those with protected

- attributes. As recommended later, this could be achieved through increased grounds (protected attributes) for protections within sections 124A and 131A.
- 15 Alternatively, hate crimes could be developed as a separate suite of criminal offences within Queensland's criminal laws. Presently, Queensland does not have any laws that are designed to deal with hate crimes other than section 131A of the ADA. The New Zealand Cabinet is considering taking similar steps in the aftermath the Christchurch Mass Murders to ensure their vilification laws are effective.
- 16 Townsville Community Law considers it critical that Parliament understands the changed environment of hate crimes since first legislating and subsequent amendments to the ADA. Important changes include significant societal withdrawal from traditional print and television media towards internet based and streaming services for information, entertainment, and social engagement. Obviously, any law that seeks to regulate information or acts in the public domain needs review to ensure its currency and likely future effectiveness. The ADA must be adjusted to ensure it captures the context of where and how hate speech and hate crimes occur now and into the future.
- 17 A legal citator reveals that no section 124A cases involved what might be considered online hate acts or hate speech. Overwhelmingly, complaints under section 124A relate to personal interactions in the physical world. Townsville Community Law is concerned that this means section 124A has been wholly ineffective at moderating online hate acts including hate crimes and hate speech. Obviously, the small number of section 131A prosecutions (and their summary nature) make analysing the nature of the hate crimes in those cases impossible.
- 18 In 2001-2002, at the time of the legislating ADA sections 124A and 131A, the online manifestations and impacts of hate speech and vilification were obvious to most of the community but were also only the tip of the iceberg. Even though online hate speech has been around for some time (Leets 2001), the problem has continued to grow in tandem with the proliferation and pervasiveness of social media platforms (Perry and Olsson 2009).
- 19 There were 20.5 million social media users in Australia in January 2021. The number of social media users in Australia was equivalent to 79.9% of the total population in January 2021 (Datareportal). Significant numbers of social media users are now exposed to cyber hate on various platforms. Instances of cyber hate and racist tension on social media have also been shown to be triggered by antecedent events, such as terrorist acts or acts of violence (Burnap and Williams 2015; 2016).
- 20 Oobler (2014) put online hate crimes in context:

The social media world is an artificial environment created from the content that users share. Speech creates the fabric of the online world, and users have the power to literally embed the twin messages of hate speech into the fabric of the online society. The nature of hate speech therefore changes and becomes far more direct. The repeated passive observance of such

messages results in normalisation, removing any social stigma. Hate speech is rendered no more than another opinion. This allows the hate to be openly expressed not only online, but also in daily life. Hate speech in social media, in the absence of effective control mechanisms, is a much greater ‘environmental threat to social peace’ than hate speech in an offline context. (References omitted)

- 21 Given Australian’s social media use, and the ADA’s obvious intent to target cyber hate, other action must be taken to increase its relevance to the online environment. This includes how the ADA is promoted and enforced. Enforcement may need to shift to specialist policing agencies with experience in cybercrime.
- 22 Critical issues include whether online hate occurs within a private environment such as an online members-only forum. The New South Wales laws provide that an act may be a public act even if it occurs on private land. Whether this will extend to a private virtual environment remains to be seen. The principles in *Dow Jones v Gutnick* (2002) 210 CLR 575 have yet to be tested within the context of online hate speech but there are strong parallels between the treatment of defamation (including national uniformity measures) and hate speech.
- 23 Townsville Community Law is concerned about the urgent need to ensure that all structural inequalities are effectively targeted by the ADA’s scheme, including those not currently covered, including sexism, ableism, and ageism. These cohorts are discussed in turn later in the submission. We note that the United Nations Strategy and Plan of Action on Hate Speech suggest coverage of any ‘identity factor’.
- 24 As noted earlier, the New Zealand Cabinet is considering reforms in the wake of the Christchurch mass shooting murders. This reform process is aimed at better targeting and reducing hate crimes. The measures being considered include:
 - broadening the groups protected by both civil and criminal prohibitions to include sex, age, disability, gender, gender identity and gender expression
 - ensuring that ‘incitement of hatred’ is the focus of the offence provisions
 - relocating hate crimes to the Crimes Act to enhance its gravity and
 - increasing penalties to align with similar crimes and better reflect the harm caused

The Impacts of Hate Crimes

- 25 The impacts of hate crimes are not homogeneous across hate victim types and neither are all hate crime types equal in their subsequent negative impacts upon victims (Williams and Tregigda 2014). Studies show victims of transgender hate crimes feel the impacts of victimization most, when compared to the other six victim types of gender, age, race, religion, disability, sexual orientation and trans (Williams and Tregigda 2014).

- 26 Trans people experienced repeat victimisation at the highest levels and were more likely to experience consequential suicidal ideation at a factor of 10 (Williams and Tregigda 2014). People with disability were also significantly affected by repeat victimisation (Williams and Tregigda 2014). In our view, older persons would also be similarly affected.
- 27 As noted, barriers to reporting hate crimes also varied across groups. For example, fear of consequences can manifest as fear of being outed for LGBTIQ+ communities, fear of affecting their visa status for refugees and migrants, or fear of losing family or carer support for people living with a disability (Vergani and Navarro 2020).
- 28 The phenomenon of hybrid hate speech does not target a particular single identity and can have more than one identity as a target (Chetty and Alathur 2018). In these cases, the hate speech has an intersectional quality and the hatred expressed may be against more than one community and identity (Chetty and Alathur 2018), or it might conflate minority identities.
- 29 Obvious examples include race/religion and disability/age. The ADA fails to capture likely intersectional dimensions because of the limited protected attributes and misses obvious pairings such as age/disability. The Victorian Parliament's Legal and Social Issues Committee report on its Inquiry into Anti-Vilification Protections recommended an intersectional approach covering protected attributes of race and religion, gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDS status and personal association. Regrettably, the Committee omitted the attribute of age and did not even canvass protections for this group, whether as youth or older persons.
- 30 These impacts and considerations provide a strong public policy reason for broadening of the groups protected by the ADA. They also suggest the need for more comprehensive hate crimes, either within the ADA or within Queensland's criminal laws.

Hate Crimes includes a Process of Othering

- 31 Hateful acts such as hate speech, vilification and hate crimes more broadly are "othering" behaviours that remove them (the other) from us (the vilifier). Othering is an established construct in rhetorical narrative surrounding hate speech, and the 'we-they' dichotomy has long been identified in racist discourse (Middaugh and Kay 2009). The other offers a scapegoat not only for the ills of society but also for the ills within each of us (Hooks 1992 cited in Meddaugh and Kay 2009).
- 32 Others have been variously constructed within hateful narratives as tyrannical, manipulators, genocidal, inferior, or false martyrs (Meddaugh and Kay 2009). Racial and religious stereotypes are quickly extrapolated to sympathetic government policies such as multiculturalism, pluralism, immigration, equal opportunity, affirmative action and so on.

- 33 While processes that encourage tolerance, inclusion and community-friendliness (such as age-friendliness) are critical, strong sanctions are also important as part of a suite of responses to hate crimes based on these hateful narratives. Hate crimes undermine Government policy imperatives and a balance must be found between measures that promote community accord and those that prohibit acts of harmful, hurtful or destructive discord.

Women in Queensland

- 34 The absence of protections against gender-based vilification, gendered hate speech and sex-based vilification is a significant gap in our current system. This gap exists in other jurisdictions. In Victoria the Racial and Religious Tolerance Amendment Bill 2019 (Vic) includes gender and sex characteristics, recognising the prevalence and societal impacts of gendered hate speech, however the Bill is not yet passed. The Victorian Parliament's Legal and Social Issues Committee reported back on its Inquiry into Anti-Vilification Protections recommending that gender and sex be protected attributes.

- 35 de Silva (2020) notes sex-based vilification occurs across jurisdictions:

It typically accompanies violence committed against women, is often directed at and about women in positions of political leadership, and occurs prolifically in pornography, advertising, popular culture (including film, music, literature, and other visual and performance arts)⁶ and mainstream news and tabloid media reporting. It is directed at and about powerful women, 'ordinary' women, and women generally. It occurs in person, online (including characteristically as part of the cyber harassment of women), in physical spaces such as workplaces and educational institutions, and via speakers who may themselves colloquially be described as powerful or 'ordinary'.

- 36 Gendered hate speech as described by D'Souza et al (2018) is best understood in its broader socio-political context, as a means by which patriarchal structures and norms are enforced through the policing of women's presence and their behaviour. D'Souza (2018) notes that gendered hate speech produces a range of troubling effects, not only on the individuals who are targeted, but on broader social groups and dynamics; gendered hate speech can be seen as fuelling gender-based violence in Australia, through the perpetuation of gender prejudice and hostility.
- 37 D'Souza et al (2018) argue that legislating against gendered hate speech would not simply be a protective, paternalistic form of state intervention, but one which can support women's agency, especially their discursive and political agency in public spaces. They also assert that the term 'gendered hate speech', recognises the theoretical possibility of gendered hate speech against other genders or groups, including men (D'Souza, et al 2018).
- 38 Both D'Souza et al (2018) and de Silva (2020) note that recognising gender as an attribute within the schematic of section 124A and 131A is only a conservative step as it suggests that hate speech laws are more concerned with protecting 'public order' than preventing harm to victims; they

prohibit gendered hate speech on the basis that it may lead to further criminal acts, rather than prohibiting gendered hate speech because it causes direct harm to the victim. They suggest the text of section 18C of the *Racial Discrimination Act* is more directly aimed at preventing individual harm.

- 39 The question of how vilification laws respond to individual harm as compared with public order was also considered by the Victorian Parliament's Legal and Social Issues Committee. This is an important consideration for this Committee's deliberations as well.

Older Queenslanders

- 40 Older Queenslanders commonly experience conduct that is ageist and at times hateful. The us and them, segregationist narrative is a root cause of ageism (Coleman 1982).

- 41 The World Health Organization's recent report on Ageism noted that one in two people hold moderately ageist attitudes (WHO 31). The WHO noted that "Ageism may increase the risk of violence being perpetrated against older people.", and further that, "Negative stereotypes of older people (e.g., as dependent and burdensome), prejudices and discrimination dehumanize them and could contribute to making violence against older people more permissible" (WHO 54).

- 42 Ageist attitudes do manifest in demonisation and vilification and calls to incite violence against older persons. United Nations Secretary General Guterres noted:

At a time when more solidarity is needed, COVID-19 is escalating entrenched ageism, including age-based discrimination and stigmatization of older persons. It is worrying that remarks and hate speech targeting older persons have emerged in public discourse and on social media as expressions of inter-generational resentment. (UNSG 9)

- 43 The Secretary General also noted the increased incidence of violence, abuse, and neglect against older persons during the pandemic (UNSG 7). This includes hate crimes perpetrated by those who fall outside the typical relational aspects of elder abuse.

- 44 The Secretary-General's concerns for ageist hate speech are supported by significant research during the pandemic including Age Platform Europe (2021) who reported:

The rhetoric of influential decision-makers has been ageist, and we have seen the wilful pitting of generation against generation in claims that responses to the pandemic are harming the young in order to save the old, and that older persons should be taxed to pay for sacrifices younger generations have made. Elsewhere the lives and deaths of older persons have not been afforded the same value as younger people. Casting all older people as highly vulnerable and frail creates an attitude that we have no obligation to prevent their deaths.

- 45 Jimenez-Sotomayor et al (2020) considered ageism on twitter during the pandemic, concluding "[M]ost tweets related to COVID-19 and older adults contained personal opinions, personal accounts, and jokes. Almost one-quarter of analyzed tweets had ageist or potentially offensive

- content toward older adults.” Similar research by Ayalon (2020), Ong and Burrow (2020), and Brookes and Jackson (2020) confirms the presence of serious ageism during the pandemic.
- 46 Lichtenstein’s (2021) research showed a pandemic driven spike in intergenerational animosity, as captured in internet epithets such as “grandma/grandpa killer,” boomer remover,” “boomer doomer” (pre-Covid-19) and “coffin dodger”. Australia had its own ugly and dangerous debate with the question posed “. . . older Australians over 70 who aren’t worth as much as younger Australians” (Smith 2020)
- 47 Ageism is not confined to social media. Ageist messages can also be found in print and television advertisements, television programs, politics, and even from healthcare professionals who may harbor misconceptions that older patients are demented, frail, and somehow unsalvageable (Jimenez-Sotomayor et al 2020).
- 48 One of the main barriers to the creation of content that is age friendly and does not contain ageist stereotypes is the lower use of social media among older persons. In the United States, for example, Twitter is more popular among adults aged 18 to 29 years, and only 7% of Twitter’s users are 65 years of age and older (Pew 2019).
- 49 Studies suggest that promoting the inclusion of older voices in social media could have beneficial consequences, such as an increase in health-related knowledge. Additionally, social media could be useful for providing and receiving social support, promoting inclusion, overcoming loneliness (particularly during long periods of physical distancing), and enhancing feelings of self-efficacy and control (Leist 2013).
- 50 Broadening the ADA’s response to hate crimes to the protected attribute of age would also send a strong message to older Queenslanders that ageism in its most extreme forms is unacceptable within the community. Currently the ADA (and the HRA to an extent) prohibits age discrimination but does not take the further step of providing protections against hateful acts such as vilification.

Queenslanders with Disabilities

- 51 Queenslanders with disabilities are also likely to experience hateful acts. Even though persons with disabilities are more vulnerable to hate violence, the hate reporting mechanisms are less common than other protected characteristics like gender/race (Chetty and Alathur 2018).
- 52 Studies in the United Kingdom concluded that the online environment has facilitated and increased concerns about the nature and prevalence of disability hate crimes and cyber-harassment of people with disability. This has manifested in increased challenges in supporting victims and managing responses including legal system responses (Alhaboby et al. 2016). People with disability’s access to legal remedies is hampered by actual and perceived complexity and barriers to service provision (Alhaboby et al 2016). Similar considerations apply to older persons.

- 53 Disablist hate speech can be more prevalent during times of austerity (Burch 2018) and during the pandemic as have other instances such as anti-Asian hate crimes (Gover et al. 2020).
- 54 In an ‘offline’ context, people with disabilities are more likely to face harassment and hate than people without disabilities (Emerson and Roulston 2014). Victimisation was linked with having a health condition (Blake et al. 2012; Dixon 2006), stigma (Emerson and Roulstone 2014), or adopting a different lifestyle than peers (Sentenac et al. 2011). The traditional view is that greater hate and harassment are due to the vulnerability of people with disabilities.
- 55 Recent reworking suggests people without disabilities may expose people with disabilities to vulnerable acts and situations. This could explain the results from a recent UK-based survey exploring the motivation of offenders in disability hate crimes, where 87.2% self-defined people with disabilities experienced a hate crime or incident. Reported motivations ranged between hate, jealousy, stigma, stereotypes (of life not worth living), and accusations of fraud in cases of invisible impairments (Quarmby 2015). These perceived motivations reflected a prejudice created by linking disability benefits with impairments.

TOR 1b and 2f: Specific Issues with Sections 124A & 131A

- 56 In *Park v State of Queensland & Anor* [2013] QCAT 183 Member Favell concisely described section 131A:
- [36] Section 131A relevantly prohibits serious racial vilification. It has many of the same elements as section 124A but also requires that the public act includes threatening physical harm to a person or property or inciting others to so threaten.*
- 57 Section 131A has been subject of limited prosecutorial action. In the case of *GLBTI v Wilks & Anor* prosecution authorities raised concerns that crimes of incitement (section 131A) required a higher evidentiary burden, and that the ADA also required evidence that the public act had led to (actually incited) hatred, serious contempt or severe ridicule. In our view, confusion over this additional, causal requirement may have rendered the provision wholly ineffective.
- 58 In our view, given the ordinary meaning of incite includes encourage, stir up, urge, persuade etc, the provision does not require such actions to manifest. It is the invitation to take action that is the focus of sections 124A and 131A of the ADA.
- 59 The Queensland Human Rights Commission (QHRC) has noted this same issue in its Briefing to the Committee:

16. However, some more recent decisions have indicated that the complainant is required to show that the impugned conduct incited the relevant sentiment towards the complainant.¹⁰ This is contrary to previously decided cases.

60 The QHRC notes that the Tribunal has applied this more conservative construction to applications under section 124A, and referred to the decisions in *Coenen v Bakers Club Worldwide Pty Ltd & Ors* [2014] QCAT 676, *Bero v Wilmar Sugar Pty Ltd & Ors* [2016] QCAT 371, and *Ms RA v Mr NC* [2018] QCAT 94. These cases were decided by different members.

61 In *Bero*, Member Pennell noted the burden on the applicant as follows:

[103] It is for the Applicant to show that there was a public act undertaken in either the boiler room incident or the Nigerian Scammer incident, and those activities incited hatred, serious contempt or severe ridicule of the Applicant on the grounds of his race. The evidence does not support the existence of any of those characteristics. (Emphasis added)

62 This approach is inconsistent with Parliament's intention, which was clearly expressed in the Explanatory Note to the Anti-Discrimination Amendment Bill 2001:

Clause 8 inserts a new Chapter 4 Part 4 which establishes a new ground of complaint of racial or religious vilification. The section makes unlawful a public act which incites hatred towards, serious contempt for or severe ridicule of a person or group of persons on the ground of the race or religion of the person or group. Consistent with the interpretation that has been accorded "incite" in other jurisdictions, the section will not require proof that anyone was actually incited to be satisfied. The test of whether incitement has occurred is an objective one based on a hypothetical listener or viewer. The section contains a range of exceptions which are designed to strike a balance between the right to freedom of expression and freedom from racial and religious vilification. (Emphasis added)

63 Further, there is no bright line between sections 124A and 131A other than the descriptor 'serious' and the requirement in section 131A that the incitement must be towards physical harm or harm to property. Many of the public acts that satisfy section 124A will also satisfy section 131A, however the absence of judicial consideration has meant the offence provision has languished in obscurity and ambiguity. This is remarkable given the almost daily occurrences of hate speech in Queensland, particularly in the online environment.

64 In our view, at the time and now, *GLBTI v Wilks & Anor* satisfied those elements because the incitement was for acts of physical violence towards homosexual men. It remains an example of where section 131A could have been used but wasn't based on an incorrect construction of the provision.

65 An additional problem with section 131A was highlighted a decade ago in *Brosnahan v Ronoff* [2011] QCAT 439 in that the time taken to identify that the acts were serious vilification meant the time limit to commence proceedings had passed. Dr Madikos's findings bear repetition here:

[30] It is clear from the words "has anyone got a match so we can burn this [REDACTED] house down," that Mr Ronoff posed a threat of physical harm towards the property of Ms

Brosnahan, inviting his acquaintances to join with him. Use of the words “anyone” and “we” leaves me with no doubt that Mr Ronoff encouraged the participation of others. When I am considering the relative ages of the parties, the fact that (as described by Ms Brosnahan) Mr Ronoff was a young man at the peak of his physical prime, it was the middle of the night, and that Ms Brosnahan was outnumbered by Mr Ronoff and his acquaintances, I consider this to be a form of gang-style violence.

[31] The gravity of Mr Ronoff’s conduct is further exacerbated by the fact that Mr Ronoff was seen by Ms Brosnahan splitting her fence paling in half, causing damage to the property. I am satisfied that Mr Ronoff’s senseless and threatening conduct also fulfils the higher requirements to establish serious gender identity vilification under the ADAQ Act. Although the ADAQ Act would allow me to refer this matter to the Attorney General, for his consideration in commencing a complaint against Mr Ronoff under the Justices Act 1886 (Qld), I find that this would be futile. This is for the reason that a prosecution in relation to an offence under subsection 131A(1) of the ADAQ Act, must be commenced within a year, and therefore any prosecution in this matter would be out of time.

The Effectiveness of Section 131A

66 In our view, section 131A has some fundamental flaws:

- Its scope and reach are limited in where it applies: it only applies to public acts (narrowly defined by section 4A)
- Its scope and reach are limited in what it applies to: it only applies to threats of physical harm or property damage
- Its scope and reach are limited in who it protects: attributes of racial, religious, sexuality or gender identity
- Its application is limited by unnecessary qualifiers: the need for Crown Law consent to commence proceedings
- Its application is regularly misconstrued including by QCAT
- Its social utility is limited by its relative lack of importance: it is rarely prosecuted and is a summary offence subject to a 12-month time limit
- Its use is limited by a lack of awareness among the affected groups, law enforcement, prosecutors, and courts.

TOR 2c: The Options Paper

- 67 In respect of Inquiry Reference 2c the Options Paper: *Serious vilification and hate crime: The need for legislative reform* Townsville Community Law supports the calls made by the Cohesive Communities Coalition to improve the system's ability to respond to racial vilification. Importantly, we also submit that the scope of vilification laws should be broadened in respect of the scope of protected attributes and more comprehensively against the commission of hate crimes.
- 68 Other Australian jurisdictions provide limited assistance given their similarly constrained laws, though the Australian Capital territory does present an example of a broader cohort of protected attributes as does the West Australian Law Reform Commission's proposal.
- 69 Despite New South Wales legislating Australia's most contemporary model (*Crimes Amendment (Publicly Threatening and Inciting Violence) Act 2018*), it is limited in scope to the grounds of race, religion, sexual orientation, gender identity, or intersex, or HIV/AIDS status. It fails to protect against the most pervasive structural inequalities (isms) of sexism, ableism and ageism. It does however make clear that vilification does not require an incited response to the public act (section 93Z(3)). It also asserts that public acts can occur on private land (section 93Z(5)). Like the ADA, DPP approval is required prior to prosecution action being taken (section 93Z(4)).
- 70 Arguments such as Wilkie's (2019) that other jurisdictions should adopt the model outlined in the NSW Act, because it ensures minorities are protected without unduly infringing on free speech is flawed because it does not actually achieve that end, unless one takes a very narrow view of contemporary, minority group membership.

TOR 2d: Consistency with Human Rights

- 71 Townsville Community Law agrees with the QHRC's formulation of the technical issues that require resolution. We agree with the QHRC's contention that the ADA's existing vilification provisions are not inconsistent with the *Human Rights Act 2019* (HRA). However, we note that the ADA's current scheme of protections against vilification are inadequate when viewed through the lens of human rights.
- 72 Indeed, the HRA at section 15(4) requires that every person has the right to equal and effective protection against discrimination. In the case of the HRA, 'discrimination' is not defined as it is in the ADA and is therefore likely to have a potentially broader meaning than it does within the ADA. Further, the HRA at section 15(4) might be seen as lending support to measures that advance the interests, safety and wellbeing of groups who are subject of hate crimes.
- 73 The critical question is whether the right to freedom of expression (s.21) takes absolute priority over hateful acts that potentially contravene a multiplicity of individual's rights including equality before the law (s.15), life (s.16), free thought, conscience, religion, and belief (s.20), free expression,

assembly, and association (s.22) privacy and reputation (s.25) and cultural rights (ss.27-28). In our view, the need to protect people from hate crimes (and thereby preserve their human rights within that context) warrants reasonable and proportionate limitations on free expression in cases of hate speech.

- 74 It is unclear whether our vilification laws would infringe the implied constitutional freedom of political communication. Aroney (2006) has suggested some difficulties remain but nonetheless, on balance, it seems likely that religious vilification laws will be upheld by the courts. This is because, properly construed, the laws only apply to the most extreme forms of hate speech. If amendments to the ADA are introduced, considerations about compatibility should also be taken in respect of relevant constitutional matters.
- 75 In our submission, the ADA should provide protections against vilification in respect of all protected areas described by section 7 of the ADA. The HRA at section 15 requires recognition and equality before the law. This principle is severely undermined by differential protection offered by the ADA to race, religion, sexuality or gender identity. In our submission, equal protections must be offered to any protected attribute.
- 76 If a complaint raised the human rights implications of public entity inaction on an attribute not yet protected by section 124A or 131A, the public entity may be able to rely on section 58(2) – that is the vilified attribute was not covered by law, and they were simply applying that law. However, a complainant may still be able to rely on section 15 of the HRA and assert that the public entity had a duty to protect them in any event, even in the absence of explicit protections, because of their human rights or another statutory duty.

TOR 2e: Data & Record Keeping Practices

- 77 We note aggravation provisions may also improve opportunities for greater data collection by QPS. QPS acknowledges that there are other offences that may apply to hate or vilification type behaviour, for example, common assault (*Criminal Code Act 1899* (Qld) section 335), wilful damage (section 469), threatening violence (section 75) or public nuisance (*Summary Offences Act 2005* (Qld) section 6). However, without the hate crimes context, the data cannot help us to understand the societal context and prevalence of hate crimes.
- 78 We note the QLS has called for better data collection and publication by QPS (or other government crime and statistical research agency) and this should be a priority reform. We agree with their assertion that data gaps compromise the ability of the Government to reach an informed understanding of hate crime and vilification, its impact on the community and the extent of the need for legislative reform.

Drafting Suggestions

Section 124A of the ADA is amended to read:

124A Vilification on grounds of certain attributes unlawful

(1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of one or more of the attributes in section 7 of this Act.

Section 124A is amended to include the following sub-section:

(3) In determining whether a person has contravened this section, it is irrelevant whether or not, in response to the public act, any person formed a state of mind or carried out any act of hatred towards, serious contempt for, or severe ridicule of, a person or group of persons.

A new provision Section 124B should be introduced:

124B Meaning of vilification on the basis of an attribute

Vilification on the basis of an attribute includes vilification on the basis of—

- (a) a characteristic that a person with any of the attributes generally has; or*
- (b) a characteristic that is often imputed to a person with any of the attributes; or*
- (c) an attribute that a person is presumed to have, or to have had at any time, by the person vilifying; or*
- (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.*

Section 131A of the ADA is amended to read:

131A Offence of serious vilification

(1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of one or more of the attributes in section 7 of this Act 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 is amended to include the following sub-section:

(5) In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act described by Subsection (1).

A new provision Section 131B should be introduced:

131B Meaning of serious vilification on the basis of an attribute

Serious vilification on the basis of an attribute includes vilification on the basis of—

- (a) a characteristic that a person with any of the attributes generally has; or*

- (b) a characteristic that is often imputed to a person with any of the attributes; or*
- (c) an attribute that a person is presumed to have, or to have had at any time, by the person vilifying; or*
- (d) an attribute that a person had, even if the person did not have it at the time of the discrimination.*

References

- AGE Platform Europe's response to the consultation on the roadmap on Hate speech & hate crime – inclusion on list of EU crimes Brussels, 20 April 2021 https://age-platform.eu/sites/default/files/Hate_speech%26crime-AGE_reply_to%20EC-Apr2021.pdf
- Aroney, N. (2006). 'The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation', *FedLawRw* 10, 34(2) *Federal Law Review*, 287
- Ayalon L. (2020). 'There is nothing new under the sun: ageism and intergenerational tension in the age of the COVID-19 outbreak'. *International psychogeriatrics*, 32(10), 1221–1224. <https://doi.org/10.1017/S1041610220000575>
- Brooke, J., & Jackson, D. (2020). 'Older people and COVID-19: Isolation, risk and ageism'. *Journal of Clinical Nursing*, 29(13-14), 2044–2046. <https://doi.org/10.1111/jocn.15274>
- Burch, L. (2018) 'You are a parasite on the productive classes': online disablist hate speech in austere times, *Disability & Society*, 33:3, 392-415, DOI: 10.1080/09687599.2017.1411250
- Naganna., C, Sreejith A. (2018) 'Hate speech review in the context of online social networks, *Aggression and Violent Behavior*', Volume 40, 2018, Pages 108-118, ISSN 1359-1789, <https://doi.org/10.1016/j.avb.2018.05.003>.
- Coleman, J. S. (1982). *The asymmetric society*. Syracuse University Press.
- D'Souza, T., Griffin, L., Shackleton, N. and Walt, D., (2018) 'Harming Women with Words: The Failure of Australian Law to Prohibit Gendered Hate Speech' 41(3) *University of New South Wales Law Journal* 939.
- de Silva, A. (2020) 'Addressing the Vilification of Women: A Functional Theory of Harm and Implications for Law' 43(3) *Melbourne University Law Review* (advance)
- Hon Kris Faafoi Minister of Justice Proactive release – Proposed changes to the incitement provisions in the Human Rights Act 1993 Date of issue: 13 April 2021
- Jeffries, S., Wood, W., and Russell, T., (2021) 'Adult Restorative Justice and Gendered Violence: Practitioner and Service Provider Viewpoints from Queensland, Australia' (2021) *Laws* 2.
- King, R.D., and G.M. Sutton. (2013) 'High Times for Hate Crime: Explaining the Temporal Clustering of Hate Motivated Offending.' *Criminology* 51 (4): 871–94.
- Leets. L (2001) 'Responses to Internet hate sites :is speech too free in cyberspace?' *Commun Law Policy* 6:287-317
- Leist AK. 'Social media use of older adults: a mini-review'. *Gerontology*. 2013;59:378-384.
- Mason, G. 2019. 'A Picture of Bias Crime in New South Wales'. *Cosmopolitan Civil Societies: an Interdisciplinary Journal*, 11:1, 47-66. <https://doi.org/10.1080/14467688.2019.1641111>
- Office of the High Commissioner of Human Rights, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', *United Nations Human Rights Office of the High Commissioner* (Web Page, 2021)
- Ong A, Burrow A. (2019) 'As COVID-19 spreads, so do negative stereotypes of the young and the old'. *Scientific American*. <https://blogs.scientificamerican.com/observations/as-covid-19-spreads-so-do-negative-stereotypes-of-the-youngand-the-old/>.
- Oobler, A. (2014) 'Legal Doctrines Applied to Online Hate Speech' *Computers & Law* July 2014
- Perry B, Olsson, P (2009) 'Cyberhate: the globalisation of hate'. *Inf Commun Technol Law* 18:185-199
- Pew Research Center. 'Social Media Fact Sheet'. <https://www.pewinternet.org/fact-sheet/social-media/2019>. Accessed April 7, 2020.

Pezzella FS, Fetzer MD, Keller T. 'The Dark Figure of Hate Crime Underreporting'. *American Behavioral Scientist*. January 2019. doi:[10.1177/0002764218823844](https://doi.org/10.1177/0002764218823844)

Smith, R. (2020, April 22). 'The ugly and dangerous debate simmering in Australia'. *News.com.au*. Retrieved from <https://www.news.com.au/finance/economy/australian-economy/the-dangerous-and-ugly-debate-simmering-in-australia/news-story/d4ab7b84ffa0d3dde23f1bc2fb8b336d>

Vergani, M., Navarro, C. (2020) 'Barriers to Reporting Hate Crime and Hate Incidents in Victoria'. Centre for Resilient and Inclusive Societies, 30 June 2020.

Weston-Scheuber, K. (2012) 'Gender and the Prohibition of Hate Speech' 12(2) *Queensland University of Technology Law and Justice Journal* 132.

Wilkie, M. (2019) 'Criminalising Hate Speech: Australia's Crusade Against Vilification', Centres for Independent Studies, Analysis Paper 6, September 2019

Williams, M.L., and J. Tregidga. (2014). 'Hate Crime Victimization in Wales: Psychological and Physical Impacts Across Seven Hate Crime Victim Types.' *British Journal of Criminology* 54 (5): 946–67.

Zhraa A., Alhaboby, Haider M., al-Khateeb, Barnes J., Short E. (2016) 'The language is disgusting and they refer to my disability: the cyberharassment of disabled people', *Disability & Society*, 31:8, 1138-1143, DOI: 10.1080/09687599.2016.1235313