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Office of the President

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
Alice Street
Brisbane QLD 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Inquiry into serious vilification and hate crime

Thank you for the opportunity to provide feedback on the inquiry into serious vilification and hate crime.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Criminal, Industrial and Human Rights and Public Law Committees, whose members have substantial expertise in this area.

As a preliminary point, we strongly consider that any policy or legislative response to serious vilification and hate crime in Australia should be developed in consultation with individuals or groups who have experienced vilification and hate crime. This will ensure that the Government response appropriately considers the impacts of hate crimes and vilification on those experiencing it, and the barriers people face in reporting and responding to vilification.

Further, consideration should be given to the protected attributes that are covered by the current vilification laws. In particular, the inquiry should consider whether there is a need to update or expand these attributes to ensure they are responsive to community needs and reflect contemporary understanding. For example, consideration may be given to the inclusion of attributes such as disability and age and the expansion of the definitions of gender identity and sexuality. In this regard, we also recommend that the inquiry consider the ongoing Queensland Human Rights Commission's review of the *Anti-Discrimination Act 1991* (Qld).¹

¹ QHRC, *Terms of Reference – Queensland Human Rights Commission review of the Anti-Discrimination Act 1991* (Qld) <https://www.qhrc.qld.gov.au/law-reform/about-the-review/terms-of-reference>.

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The prevalence of serious vilification and hate crime in Queensland

Vilification and hate crimes impact a wide range of groups in Queensland, including Aboriginal and Torres Strait Islander Peoples, women, people with disability, older people, people from culturally and linguistically diverse backgrounds, people from minority religious and racial communities and the LGBTIQ+ community. Vilification can take a range of forms and can have extremely harmful psychological and physical effects. In a diverse and multicultural society, anti-vilification laws play a role in protecting the rights of persons to a peaceful existence free from harassment and vilification.

Information provided to the Legal Affairs and Safety Committee by the Queensland Police Service (**QPS**) indicates that, while it is difficult to determine the exact volume of criminal offending containing characteristics of hate or vilification, there has been a steady increase of racial vilification reports in the last five years.² Reports indicate that COVID-19 has exacerbated the racial vilification experienced particularly by people of Asian descent.³

We note that this data is unlikely to provide a complete picture of vilification and hate crime in Queensland and the true rates of victimisation are likely to exceed those reported to QPS or the Queensland Human Rights Commission (**QHRC**). Many people or groups who experience vilification and hate crime are reluctant to formally report their experiences or pursue civil or criminal remedies, for a range of reasons. These include difficulties associated with identifying the perpetrator, fear of consequences and retaliation, and lack of confidence in law enforcement and statutory agencies.

Under-utilisation of existing provisions

Section 131A of the *Anti-Discrimination Act 1991* (Qld) makes it an offence to, by 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. The incitement must be by means of threatening, or inciting others to threaten physical harm towards the person or group or their property. Section 131A requires the written consent of a Crown Law officer before criminal proceedings can be commenced.

² Queensland Police Service, *Briefing to the Legal Affairs and Safety Committee: Inquiry into serious vilification and hate crime* (20 May 2021) 3, <https://www.parliament.qld.gov.au/documents/committees/LASC/2021/VilificationandHateCrimes/cor-QPS-20May2021.pdf>.

³ Cohesive Communities Coalition, *Serious vilification and hate crime: The need for legislative reform*, 10 https://betterlawsforsafeqld.com.au/wp-content/uploads/2020/09/SeriousVilificationAndHateCrime_CohesiveCommunitiesCoalition-1.pdf; Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Strategy* (Concept Paper, March 2021) 3, https://humanrights.gov.au/sites/default/files/document/publication/ahrc_cp_national_anti-racism_framework_2021_.pdf. See also Australian National University, *The experience of Asian-Australians during the COVID-19 pandemic: Discrimination and wellbeing* (28 October 2020) https://csrc.cass.anu.edu.au/sites/default/files/docs/2020/11/The_experience_of_Asian-Australians_during_the_COVID-19_pandemic.pdf.

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According to QPS data, only eight offences have been recorded against the offence code for section 131A.⁴ Similarly, information provided by the Department of Justice and Attorney-General indicates that five people have been charged and three people convicted of an offence under section 131A since the commencement of the provision in 2001.⁵

The Options Paper *Serious vilification and hate crime: The need for legislative reform* (the **Options Paper**) puts forward a number of recommendations to address the underutilisation of section 131A, including:

- Creating a special power for police to obtain warrants to preserve online evidence, or increase the penalty in section 131A of the *Anti-Discrimination Act 1991* (Qld) to three years' imprisonment;
- Removing the requirement for approval of the Director of Public Prosecutions or Attorney-General in order to commence prosecution under section 131A.

The legislative requirement for written consent from the Crown Law Officer (defined as the Director of Public Prosecutions or the Attorney-General) before a proceeding can be started for an offence of serious vilification presents a notable practical obstacle. We were unable to locate explanatory material for this requirement.

Given this, QLS supports removing the requirement for approval of the Director of Public Prosecutions (**DPP**) or the Attorney-General in order to commence prosecution of section 131A. However, we consider that alternative safeguards should be put in place to guide prosecutions in these matters. We suggest that better guidance in the police operation procedure manuals (OPM's) would remove the cumbersome process of seeking approval from the DPP or Attorney-General while providing a framework with appropriate safeguards.

Similarly, the inability of police to obtain a warrant to preserve online evidence for cases where the maximum penalty would be less than three years' imprisonment (as is the case for section 131A) presents a practical challenge to police investigations. QLS considers there may be some merit in creating a special power to preserve online evidence in investigating offences against section 131A. Amendments supporting evidence preservation powers may be appropriate having regard to modern technology and the prevalent use of the internet and social media. However, any extension of police powers relating to evidence preservation should have regard to important safeguards, including privacy safeguards and other individual rights. Any proposed legislation would need to be carefully considered to ensure that the appropriate balance is achieved.

In addition to these measures, QLS supports significant investment in police training to facilitate appropriate responses to and investigation of serious vilification and hate crimes. Training should also recognise the contribution of racial profiling and practices which disproportionately impacts certain groups and communities and may contribute to low reporting rates.

Whilst we support addressing some of the practical barriers which may contribute to the underutilisation of section 131A as noted above, we do not support increasing the penalty in

⁴ Queensland Police Service, *Briefing to the Legal Affairs and Safety Committee: Inquiry into serious vilification and hate crime* (20 May 2021) <https://www.parliament.qld.gov.au/documents/committees/LASC/2021/VilificationandHateCrimes/cor-QPS-20May2021.pdf>.

⁵ Department of Justice and Attorney-General, *Correspondence* (19 May 2021) 2 <https://www.parliament.qld.gov.au/documents/committees/LASC/2021/VilificationandHateCrimes/cor-DJAG-19May2021.pdf>

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section 131A. As outlined below, we consider there may be merit in introducing an aggravating factor in other offences for acts or omissions which involve serious vilification and hate, which would provide avenues for more significant penalties in appropriate circumstances. A review of the penalty for offences under section 131A of the *Anti-Discrimination Act 1991* (Qld) may be more appropriate after any new measures have been implemented.

Criminal law reform

The Options Paper proposes a number of additional criminal sanctions, including:

- Introducing a specific summary offence or making racial or religious motivation a circumstance of aggravation on existing offences;
- Introducing a complementary offence to criminalise the possession, distribution, or display of hateful material.

At the outset, we consider there is a need for further investigation into the necessity of additional criminal provisions including consideration of conduct which is not captured by existing offences. Further, there already exists broad sentencing discretion to address serious vilification and hate crime.

The barriers to complaints and pursuing redress for serious vilification and hate crimes are unlikely to be resolvable by introducing more or different law. Rather, in our view, community consultation on a systemic response is required.

Aggravating factors

Of the options presented in the Options Paper, QLS supports consideration of vilification and hate speech as a circumstance of aggravation on existing offences, such as assault, public nuisance and wilful damage. When compared with other options, this approach may have practical and operational benefits for police who are already familiar with charging, investigating and prosecuting existing laws. Introducing a circumstance of aggravation also serves to recognise the experiences of victims and acknowledges the serious and unacceptable nature of vilification and hate crime.

Data collection

Including a circumstance of aggravation may also improve opportunities for greater data collection by QPS. In its brief, QPS acknowledges that there are a number of criminal offences that may involve 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). When these charges are pursued by police without recording elements of vilification, it obscures data about the nature and prevalence of vilification and hate crime in Queensland.

Even in the absence of introducing vilification and hate based factors as aggravating factors, QLS considers that better data collection and publication by QPS (or other government crime and statistical research agencies) should be a priority reform. Gaps in QPS's data collection compromises 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.

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New offence provisions

QLS cautions against introducing new offence provisions without sufficient assessment of the efficacy of new provisions and unintended consequences that may flow.

While the criminal law serves to denounce wrongdoing and protect the community, it has significant limitations as an instrument of social change. We acknowledge that some of these issues also exist in the civil law context. Limitations of the criminal law include:

- Barriers to reporting and engaging in criminal proceedings. Victims of vilification and hate crime face a number of barriers in reporting, including difficulties identifying the perpetrator who may be a stranger, fear of retaliation, sustained adverse attention (online and in traditional media),⁶ and the perception of police as tolerant of vilification. In this context, the burden on people seeking to make complaints about vilification and hate crime is significant, and many will not wish to engage in potentially lengthy and re-traumatising criminal proceedings. Introducing additional offence provisions will not resolve these challenges.
- The potential for criminal sanctions, including prison, to entrench rather than discourage discriminatory ideologies. Unproductive contact with the criminal justice system can lead to further offending.⁷ The imposition of serious criminal sanctions, including incarceration, risks isolating perpetrators from positive influences and support systems within the community. By contrast, where victims and offenders are suited to restorative justice practices, there is evidence that these practices can reduce recidivism.⁸

Experiences in the United Kingdom suggest that where an offence has been introduced, concerns remain about the number of matters which are ultimately referred for prosecution and the inability of police and other organisations to respond appropriately.⁹ Systemic barriers to reporting must also be considered to ensure that criminal offences are used appropriately.

Any amendments to the law, particularly the introduction of new offence provisions, should be carefully drafted to ensure they are appropriately targeted. They should also be accompanied by an assessment of the impacts on the justice system. It is especially important that the introduction of any offence provisions be accompanied by an assessment of the impacts on legal assistance funding for victims and offenders.

Civil Law Reforms

The Options Paper proposes to:

⁶ We note the case brought by Cindy Prior in 2016 resulted in racist threats and hate mail directed towards her and other Aboriginal people. See e.g. Josh Robertson, 'Rape threats and racist hate followed discrimination case but police not investigating' *ABC News* (News Article, 30 March 2019) <https://www.abc.net.au/news/2019-03-30/cindy-prior-rape-threats-and-hate-mail-followed-court-case/10954822>.

⁷ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Summary Report, February 2019) 24 <https://qpc.blob.core.windows.net/wordpress/2019/01/Imprisonment-and-recidivism-Summary-Report.pdf>

⁸ Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Final Report, August 2019) xxxii, <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>.

⁹ University of Leicester, *The Leicester Hate Crime Project: Findings and Conclusions* (Full Report, September 2014) 67-8, <https://www2.le.ac.uk/departments/criminology/hate/documents/fc-full-report>

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- Introduce a new species of Order, created along the same lines as a Peace and Good Behaviour Order or Domestic Violence Order, to address concerning behaviour that falls short of criminal offences but which, if repeated, a breach of the order of the court is penalised.
- Adopt a civil hate crime injunction.
- Introduce hate crime scrutiny panels, based on the United Kingdom model.

QLS considers that civil law reform, including a civil hate crime injunction and introducing a new Order scheme to target vilification and hate crimes may offer victims redress where their experiences fall short of meeting the threshold of the criminal offence. Given this, civil orders, in particular an injunctive power (for example, through QCAT) and scrutiny panels, may prove useful to stop harmful behaviour.

While the lower standard of proof may improve accessibility to civil claims, we note that there remain significant barriers. Civil actions require individuals to incur the costs associated with running the action, which, for many, may prove prohibitive. This particular impost would be lessened if there was a greater availability of free or subsidised legal assistance services for these types of matters. In our view, any new civil remedies would need to be accompanied by targeted funding to, for example, Legal Aid Queensland, Aboriginal and Torres Strait Islander Legal Services and Community Legal Centres.

Further, many of the barriers to reporting behaviour to QPS (including fear of retaliation) persist in civil actions, and may be exacerbated as the plaintiff does not have benefit of the protection and endorsement of the State that is present in criminal actions commenced by the DPP or QPS.

Expanding the powers of QHRC

The current burden on victims of serious vilification and hate crime to report and fund civil proceedings can undermine the efficacy of the civil system as a response to vilification and hate crime. QLS considers that there may be merit in exploring increasing the powers of the QHRC or an equivalent body to assist complaints and/or hold a regulatory function. This could resemble the functions of the Commonwealth Fair Work Ombudsman or eSafety Commission. The QHRC may be provided powers to issue warnings, give directions and seek injunctions or civil penalties in QCAT.

Empowering a body such as the QHRC to conduct both proactive investigations and investigations in response to requests for assistance may ameliorate some of the burden on individuals and police.

However, as noted, any proposition to expand the powers of the QHRC or an equivalent body in this way should be explored in consultation with victims of serious vilification and hate crimes, to ensure an expansion of QHRC's role would, in fact, address the needs of victims and would be consistent with its other roles and functions.

Workplace remedies

We note that there are a number of provisions that may apply to vilification within the workplace. For example, the *Fair Work Act 2009* (Cth) section 789FC provides for a 'stop bullying order', whereby a worker who reasonably believes that he or she has been bullied at work may apply to the Fair Work Commission for an order under section 789FF. The limitations of these orders

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include that bullying necessitates repeated conduct and will not necessarily capture singular incidents of vilification and harassment.

The *Work Health and Safety Act 2011* (Qld) imposes a positive duty on employers to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. This extends to taking preventative steps in relation to psychiatric injuries. From a risk management perspective, an employer should be taking steps to limit its liability in respect of claims, which may include ensuring their workplace is free from vilification that may lead to psychiatric illness.

Consideration could be given to the accessibility and efficacy of these provisions as a response to vilification in the workplace.

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

Section 18C of the *Racial Discrimination Act 1975* (Cth) makes it unlawful for a person to publicly do an act that is 'reasonably likely in all the circumstances to offend, insult, humiliate or intimidate another person or group of people' where that act is done because of the victim's race, colour or national or ethnic origin. The provision gives rise to a civil cause of action, which can be pursued by making a complaint to the Australian Human Rights Commission. The limitations of section 18C have been noted and debated in the past.

Section 474.17 of the federal *Criminal Code 1995* (Cth) makes it a criminal offence to use a carriage service to 'menace, harass or cause offence', which carries a maximum penalty of three years. While this provision may serve to capture instances of online vilification, it does not have specific regard to elements of hatred or vilification.

QLS considers that there is a need to harmonise procedures across different State and Federal frameworks in response to vilification and hatred. This will assist individuals, particularly self-represented individuals, to navigate the processes and reach a resolution. It will also assist to ensure consistency in matters concerning intersectional issues, including vilification on the basis of race and gender.

The appropriateness of the conciliation-based anti-discrimination framework (section 124A of the Act)

Conciliation can provide victims with a valuable opportunity to be heard and reach a private outcome. Conciliation supports diversion from the criminal justice system and, in some cases, represents a highly beneficial and restorative process for both victims and perpetrators. However, we note there is a lack of resources for alternative dispute resolution processes. In our view, the Government should consider increasing resourcing for the Queensland Dispute Resolution Centre and the QHRC.

We strongly consider that conciliation conferences should be carefully selected for appropriate matters only. In cases involving self-represented individuals, threats of violence or actual violence and/or an imbalance of power, conciliation will be an inappropriate, and potentially dangerous, forum. In these cases, there is a need for early diversion to an adjudicated dispute resolution process that will better give effect to the needs, including the safety needs, of the parties.

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If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED]

Yours faithfully



Elizabeth Shearer
President