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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
BRISBANE QLD 4000

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

Dear Secretary

Inquiry into Serious Vilification and Hate Crimes

The LGBTI Legal Service Inc. ('the Service') thanks the Committee Members for the opportunity to make a submission to the Legal Affairs and Safety Committee in relation to serious vilification and hate crimes.

The Service is a not-for-profit community legal centre that commenced operation on 7 July 2010, and was officially launched on 1 December 2010 by former Justice of the High Court of Australia, the Hon Michael Kirby AC CMG. The Service recognises the difficulties faced by the lesbian, gay, bisexual, transgender and intersex ('LGBTIQA+') community and assists the Queensland LGBTIQA+ community to access to justice.

The Service provides legal assistance across a broad range of legal areas including criminal, family, domestic violence, employment and discrimination law. The Service also has an active law reform team that advocates for LGBTIQA+-inclusive and focused law reform and for the protection of human rights in Australia.

This submission was compiled on the homelands of the Turrbal and Jagera People. The Service accordingly acknowledges the Turrbal and Jagera people as the Traditional Custodians of this land and recognises their ongoing connection to land, waters and community. This submission was prepared collaboratively by the Service's staff and volunteers all with diverse backgrounds.

The Inquiry

In response to the inquiry announced on 21 April 2021 with reference to serious vilification and hate crimes in Queensland, the Service has identified relevant terms of reference which require particular consideration given the unique experiences and needs of the LGBTIQA+ community. Our submission will therefore focus on the following:

1. Expanding the specific protected attributes pursuant to the *Anti-Discrimination Act 1991* (Qld) to include current definitions of gender and sexual identity, sex characteristics and expression, personal association and HIV/AIDS status;

2. Widening the definition of 'public act' to specifically include social media and other conduct observable by the public;
3. Implement a harm based approach with a focus on whether a reasonable person with a protected attribute suffered harm as a result of the public act;
4. Improving the role and function of the police in prosecuting serious vilification;
5. Expanding the Queensland Human Rights Commission's (QHRC) powers to require information to be disclosed, to issue and enforce compliance notices, and refer complaints to the Queensland Police Service (QPS); and
6. Expanding the Queensland Civil and Administrative Tribunal's (QCAT) powers to enable the issuing of injunctions to prohibit repeated acts of vilification.

The Service assists LGBTIQ+ Queenslanders with cases involving hate and vilification issues and supports the view that these communities are an at-risk group affected by these crimes. The current vilification laws are not sufficient to protect LGBTIQ+ Queenslanders and the Service would welcome changes to the current law to widen and strengthen the current protections.

With the growing prevalence of social media and other online platforms, it is necessary for the current protections to reflect all spaces in which vilification can occur and the need to acknowledge a current and inclusive definition for protected groups of people.

The Service also wishes to highlight the necessity for the committee to consider the intersectionality of the LGBTIQ+ community with communities from culturally and linguistically diverse backgrounds, indigenous and first nation peoples as well as those with disabilities and impairments to recognise that they as a unified community are more likely to be subjected to acts of vilification and hate

Discussion

1. The effectiveness of current legal protections for vilification and hate crimes in Queensland.

1.1. Protected attributes

It is estimated that approximately 773,000 Australians identify as a member of the LGBTIQ+ community.¹ LGBTIQ+ people are also more likely to have experienced discrimination compared to those in the wider public.²

A national survey into the health and wellbeing of LGBTIQ+ people in Australia conducted by La Trobe university found that more than 70% of participants, including 1,239 Queenslanders, experienced verbal and physical assault, harassment and received verbal and written threats via email and social media as result of their sexual or gender identity.³

¹ Australian Bureau of Statistics, General Social Survey: Summary Results, Australia (Catalogue No 4159.0, 29 June 2020) < <https://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release>>

² Ibid.

³ Hill, A. O., Bourne, A., McNair, R., Carman, M. & Lyons, A., 'Private Lives 3: The health and wellbeing of LGBTIQ people in Australia' (ARCSHS Monograph Series No. 122, Australian Research Centre in Sex, Health and Society, La Trobe University 2020) 40.

The last amendment to vilification laws was in 2003. As such in 2021 it is necessary for the law to reflect the wide and diverse communities living in Queensland and ensure they are sufficiently protected from acts of hate and vilification. It is particularly important for LGBTIQ+ people to feel supported and recognised by the legal system given the historically negative interactions between the two. Queensland's current vilification laws and hate crime protections currently include outdated definitions that do not accurately represent or capture the increasingly diverse community which the Service assists.

Gender and sexuality have and continue to be a variable and emergent aspect for LGBTIQ+ people. Accordingly, amending the protected attributes to specifically include "gender expression" and "sex characteristics" would more accurately reflect, and provide greater protections for, the LGBTIQ+ community. The Service also recommends the inclusion of "personal association" as a protected attribute, as friends and family of LGBTIQ+ community members deserve equal protection from vilification.

Likewise, a person's HIV/AIDS status, needs recognition as a protected attribute. HIV/AIDS is a significant health issue that disproportionately impacts the LGBTIQ+ community. La Trobe University reported that more than half of the participants in their 2019 study of HIV/AIDS had experienced stigma or discrimination in the past 12 months.⁴ It is essential that a person's HIV/AIDS status be protected in line with vilification laws in both the Australian Capital Territory and New South Wales⁵.

In summary, Queensland's vilification laws are currently inadequate to effectively protect the diverse and evolving LGBTIQ+ community. We recommend that the protected attributes under the *Anti-Discrimination Act 1991* (Qld) for both the civil and criminal provisions are expanded to include current language as to gender and sexual identity by way of the specific inclusion of "sex characteristics", "gender expression", "personal association" and "HIV/AIDS status" as protected attributes under the Act.

1.2. 'A Public Act'

A 'public act' in the *Anti-Discrimination Act 1991* (Qld) does not currently apply in the diverse situations and locations where vilifying conduct may occur and should therefore be broadened.

The Service recommends that the wording of 'public act' as it appears at section 90Z(5) of the *Crimes Act 1900* (NSW) be adopted as the section reads:

- 'any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public; and
- any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public; and
- the distribution or dissemination of any matter to the public

By adopting the wording as detailed above (or similar), the current ambiguity of the scope and meaning of 'a public act' is removed.

⁴ Power, J., Amir, S., Brown, G., Rule, J., Johnson, J., Lyons, A., Bourne, A. and Carman, M. 'HIV Futures 9: Quality of Life Among People Living with HIV in Australia' (Monograph series number 116, Australian Research Centre in Sex, Health and Society, La Trobe University, 2019) 6.

⁵ *Discrimination Act 1991* (ACT) s67A (1) (c) and *Anti-Discrimination Act 1977* (NSW) s49ZXB (1)

Hate speech and vilification via online communication platforms, and specifically social media platforms, is a widespread issue not isolated to the LGBTIQ+ community. It is recommended that the *Anti-Discrimination Act 1991 (Qld)* at section 124A be amended to include social media in particular to remove any doubt that communication in that form is 'a public act'.

To highlight the importance of amending the Act to specifically refer to 'a public act' as communication through 'social media' and 'online social platforms', during the postal marriage survey in 2017, the Service, via a State Government funded project, collected 220 examples of hate speech, with the majority occurring online and on social media platforms, examples of which are below.

"Sodomites are the devil, VOTE NO"

"Lock them back in their closets"

"I'll take my daughter out of school if this happens. Be fcked if she is going to be groomed by a mass paedophile syndicate...dirty dogs all need a bullet"

"Gay marriage is a front for paedophilia and sexualisation of children"

"I don't care what or who their attracted to, if it's not female its nothing but pure filth"

We recommend that the definition of 'public act' for the purposes of vilification in Queensland be amended to include that any form of communication to the public, any conduct or gestures observable by the public and any distribution or dissemination of any matter to the public be considered a 'public act' and that communications via 'social media' and 'online social platforms' be specifically included as examples of 'a public act'.

1.3. Incitement and considerations of Harm

In the past 10 years, vilification complaints make up less than 3% of the total complaints made to the QHRC.⁶ Of those, 41% of vilification complaints were resolved by conciliation compared to 57% of non-vilification complaints. In Queensland, actual incitement or intention is not necessarily required to succeed in a vilification complaint.⁷ However, in their briefing paper in 2021, the QHRC noted that recent case law required that the 'public act' incited relevant sentiment to the complainant, thereby making the consideration of incitement inconsistent.⁸

This inconsistency may be one of the reasons for the under-utilisation of the current vilification laws. To remove this inconsistency and improve the utilisation of the civil provisions of the vilification laws, the Service recommends the test for incitement be amended at section 124A

⁶ Human Rights Commission 'Vilification and Hate Crimes Inquiry Consultation Kit Fact Sheet', *Consultation Kit* (Web Page, May, 2021) 2 <<https://www.qhrc.qld.gov.au/law-reform/vilification-and-hate-crimes/consultation-kit#factsheets>>

⁷ Human Rights Commission 'Briefing note for the Legal Affairs and Safety Committee Inquiry into serious vilification and hate crimes', *Inquiry into serious vilification and hate crimes* (Web Page, May, 2021) 3 <<https://www.parliament.qld.gov.au/work-of-committees/committees/LASC/inquiries/current-inquiries/VilificationandHateCrimes>>

⁸ *Ibid* 4.

of the Act by replacing 'incite' with the words 'likely to promote'. Such an amendment would make the test for incitement more effective in capturing a diverse range of vilifying conduct.

Currently, the vilification laws place the onus on the complainant to establish the respondent's conduct caused incitement, rather than whether the respondent's vilifying conduct caused harm to the complainant. A second protection against hate based conduct based on a harm-based test is necessary. This would result in both protections from hate based conduct using a harm based test as well as the existing incitement provision within the current vilification laws.

The harm-based test should be framed from the position of a reasonable person *from the target population* rather than a purely objective test which considers whether the conduct is humiliating or degrading from the perspective of the mainstream population and does not consider it from that of the victim. As such, a harm based approach would consider whether a reasonable person from the LGBTIQ+ community would have felt that, for example, a transwoman, would have felt vilified by the public act complained of. Accordingly, the Service recommends that a harm-based approach be included in addition to the existing incitement provisions.

On the consideration of harm, the Service recommends that the words '*revulsion of*' be added to the wording at section 124A. The sentence would read '*...incite hatred towards, revulsion of, serious contempt for, or severe ridicule of...*'. This appropriately widens the scope of the provision to capture relevant vilifying conduct that aims to encourage revulsion or disgust of members of the LGBTIQ+ community.

1.4. Expanding the role of the Human Rights Commission

Since introducing gender identity and sexuality as protected attributes 17 years ago, there have been only 119 complaints accepted by the QHRC alleging vilification.⁹ By expanding the attributes, it will be necessary to expand the function and role of the QHRC to further support victims of vilification in their access to justice. Changes to the incitement threshold will likely encourage more people to utilise the vilification framework.

Accordingly, the Service recommends that the QHRC be empowered to further investigate complaints alleging vilification by issuing enforceable directions to a complainant or respondent to provide relevant information, to issue compliance notices to respondents and refer matters of non-compliance to QCAT for enforcement.

This will allow the QHRC to investigate vilification matters and where appropriate, enforce decisions made in conciliation conferences facilitated by the QHRC. Improving the role of the QHRC in this way may also limit the matters requiring referral to QCAT for determination.

1.5. Improving the role of QPS in serious vilification

The QHRC identified only 3 cases of serious vilification having been successfully prosecuted in Queensland since 2003.¹⁰ The current laws prohibit the Queensland Police Service (QPS)

⁹ Human Rights Commission 'Briefing note for the Legal Affairs and Safety Committee Inquiry into serious vilification and hate crimes', Inquiry into serious vilification and hate crimes (Web Page, May, 2021) 9 <<https://www.parliament.qld.gov.au/work-of-committees/committees/LASC/inquiries/current-inquiries/VilificationandHateCrimes>>

¹⁰ Human Rights Commission 'Vilification and Hate Crimes Inquiry Consultation Kit Fact Sheet', Consultation Kit (Web Page, May, 2021) 2 <<https://www.qhrc.qld.gov.au/law-reform/vilification-and-hate-crimes/consultation-kit#factsheets>>

Police commencing a prosecution without the prior approval of a Crown Law Officer¹¹ following provision of a full brief of evidence being submitted¹²

Such an administrative requirement arguably inhibits QPS from properly investigating and proceeding to prosecuting allegations of serious vilification. We recommend that section 131A (2) of the *Anti-Discrimination Act 1991* (Qld) be moved to the State's Criminal Code, to better empower QPS to thoroughly investigate and proceed more efficiently to prosecution of serious vilification.

It is further recommended that a framework be developed to enable QPS to work with QHRC in addressing vilification complaints, by ensuring QPS and QHRC have the ability to refer matters between them, with the consent of the complainant, depending on the severity of the conduct complained of.

Ensuring appropriate recognition and remedies for online vilification particularly via social media is a core focus for the Service. Preserving a copy of the vilifying content as evidence prior to it being removed, is one of the difficulties we have encountered while assisting clients. To successfully prosecute serious vilification complaints, it is crucial for QPS to be able to appropriately identify and preserve offending material. To address this issue, we recommend that necessary amendments be made to the relevant Acts, Rules and practice guidelines to ensure QPS have adequate powers to record, preserve and gather offending online material via the issuing of warrants as necessary. We further recommend that there be targeted training provided to QPS members in methods of collecting and preserving online material with a specific focus on collecting offending material and hate speech directed to the LGBTIQ+ community.

1.6. Additional Considerations

The Service acknowledges the difficulty in addressing vilifying conduct between neighbours due to the difficulty of the QHRC to conciliate where the conduct is reoccurring. For example in the case of *Wilson & McCollum v Lawson & Anor*¹³, a couple were forced to move after repeated derogatory statements, including calling them 'faggots', were made by their neighbour more than 50 times.

LGBTIQ+ people have a right to feel safe especially in their homes free from the fear that their neighbour will vilify them and from believing that their only option to escape the conduct is by moving to live somewhere else.

To address this, it is recommended that there be a mechanism inserted into *Anti-Discrimination Act 1991* (Qld) for the making of injunctions by QCAT to prohibit instances of continuing and repeated actions of vilification in particular circumstances where the victim and the vilifier are likely to come into contact with one another repeatedly

¹¹ *Anti-Discrimination Act 1991* (Qld) s131A(2)

¹² QPS, 'Operational Procedures Manual – Chapter 13', *Operational Procedures Manual* (June, 2021) 116 <<https://www.police.qld.gov.au/qps-corporate-documents/operational-policies/operational-procedures-manual>>

¹³ [2008] QADT 27.

2. Other Jurisdictions.

Other Australian States have made amendments to their vilification laws to better reflect the needs of the LGBTIQ+ community. Below is a summary of the recent legislative changes made the Australian Capital Territory (ACT) and Tasmania (TAS).

i. Australian Capital Territory

On the 28 August 2020, the ACT made amendments to the *Discrimination Act 1991* (ACT) implementing reforms that included a new definition for 'gender identity' as well as including 'sex characteristics' as a protected attribute. These amendments are particularly important for individuals who identify as intersex to ensure they are protected from vilifying conduct. It is noteworthy that a person's HIV/AIDS status has been a protected attribute following amendments made to the Act in 2004.

ACT's legislation does not refer to '*a public act*' but rather to an act or conduct done '*other than in private*'. Section 67A of the Act also includes examples of things done '*other than in private*' that will be unlawful vilification. These include:¹⁴

- screening recorded material at an event that is open to the public, even if privately organised;
- writing a publicly viewable post on social media;
- speaking in an interview intended to be broadcast or published;
- actions or gestures observable by the public;
- wearing or displaying clothes, signs or flags observable by the public.

The ACT framework more inclusively recognises the LGBTIQ+ community and recognises a wider scope of where vilifying conduct can occur. The ACT model should be strongly considered as a point of reference for strengthening Queensland's vilification laws to better protect the LGBTIQ+ community.

ii. Tasmania

On 8 May 2019, the *Anti-Discrimination Act 1998* (TAS), was amended to include a definition for '*gender expression*' and '*intersex variations of sex characteristics*'. The amendment specifically identifies gender expression as an element of gender identity with the following definitions of each:¹⁵

- *Gender expression* means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity;
- *Gender identity* means the gender-related identity, appearance or mannerisms or other gender related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual;

These definitions ensure recognition of and inclusion for the diversity of LGBTIQ+ people including those who identify as intersex or non-binary. By including gender expression in the Act is reflective of the contemporary understanding of gender. Consistent with the recommendation at 1.1 of this submission, it is recommended that the Committee consider

¹⁴ *Discrimination Act 1991* (ACT) s67A

¹⁵ *Anti-Discrimination Act 1998* (Tas) s 3

and adopt the Tasmanian definitions for gender identity and gender expression as protected attributes.

3. Recommendations

The following is a summary of the Service's recommendations for the committee's consideration:

1.	That the protected attributes under the <i>Anti-Discrimination Act 1991</i> (Qld) for both the civil and criminal provisions are expanded to include: <ul style="list-style-type: none"> • HIV/AIDS status; • specific definition of 'gender' and 'sexual identity' by including a definition for: <ul style="list-style-type: none"> ○ sex characteristics; and ○ gender expression • personal association; • disability or impairment.
2.	That the committee consults the LGBTQIA+ community as to the specific definitions to be included in implementing the first recommendation.
3.	That any amendments made address the intersectionality of the LGBTQIA+ community with other protected groups.
4.	4.1 That the definition of ' <i>public act</i> ' at section 124A be replaced with the wording 'other than in private'; 4.2 Alternatively, should the above recommendation not be accepted that section 124A be amended to include that any form of communication to the public, any conduct or gestures observable by the public and any distribution or dissemination of any matter to the public be considered 'a public act'.
5.	Further to recommendation 4, whether recommendation 4.1 or 4.2 is adopted, that examples are detailed at section 124A including (but not limited to) 'publically viewable social media posts' and 'statements made in interviews intended to be broadcast or published'.
6.	That the word 'incite' be removed from section 124A and instead the words ' <i>likely to promote</i> ' be inserted.
7.	That a harm-based test be added to the incitement provisions so there is a second protection against hate based conduct which would consider whether a 'reasonable person from the targeted population' would consider the conduct or communications vilifying.
8.	That 'revulsion' be included at section 124A the wording so the first sentence of section 124 reads: " <i>A person must not, by a public act, incite hatred towards, <u>revulsion of, serious contempt for....</u></i> "
9.	That the QHRC be enabled to further investigate vilification complaints by issuing an enforceable direction to a person to provide information relevant to a complaint.
10.	That the QHRC be enabled to issue compliance notices to a respondent following conciliation of a vilification complaint.

11.	That consistent with recommendations 9 and 10, a mechanism be devised permitting QHRC to make an application to QCAT enforcing compliance notices issued by QHRC.
12.	That section 131A (2) of the <i>Anti-Discrimination act 1991</i> (Qld) be removed to empower QPS to determine whether to proceed with prosecution of serious vilification.
13.	That section 131A of the <i>Anti-discrimination act 1991</i> (Qld) be incorporated in the <i>Criminal Code 1899</i> (Qld) to promote and enable utilisation by the police.
14.	That QPS and QHRC have a formal process, with the consent of the complainant, to refer matters between them depending on the severity of the conduct complained of.
15.	That appropriate powers are available to QPS to record and/or gather potentially vilifying material online via the issuing warrants.
16.	That police are given appropriate training in the methods available to them to gather offending online material with a specific focus on preserving hate speech and vilifying material as directed to the LGBTIQ+ community.
17.	That a mechanism be included in the <i>Anti-discrimination act 1991</i> (Qld) to enable QCAT to issue injunctions to prohibit continuing and repeated vilification.

Our Clients

The Service continues to assist clients who have received or had hate speech and vilifying material published about them. Queensland has recently made reforms to more accurately and appropriately recognise the LGBTIQ+ community in many areas of law however there is much improvement which continues to be required. The Service will continue to advocate for legislative reforms until the inequalities in Queensland's vilification laws are addressed and the laws appropriately acknowledge the diversity of the community and the legal barriers the Service's clients face.

This submission was drafted by Ellie Hansson and Polly Richardson with assistance of volunteers within the Service.

We consent to this submissions being made available to the public.

Please, if you have any queries regarding the submissions outlined in this correspondence we encourage you to contact our office.

Yours faithfully



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