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Legal Affairs and Safety Committee
Committee Secretary
Legal Affairs and Safety Committee
Parliament House
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To the Committee

SUBMISSION TO THE INQUIRY INTO SERIOUS VILIFICATION AND HATE CRIMES

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to make the following submission to the inquiry into serious vilification and hate crimes (the **Inquiry**). We note that the Committee is to inquire and report on:

1. The nature and extent of hate crimes and serious vilification in Queensland and whether there is evidence of increasing instances of serious vilification in Queensland; and
2. The effectiveness of section 131A of the *Anti-Discrimination Act 1991* (the Act) and other existing Queensland laws responding to hate crimes.

Relevant to ALHR's work, we note that the Committee is also to consider "*the Human Rights Act 2019 (HR Act) and any rights which are engaged by the current law and any proposals for reform, including a human rights analysis under section 13 of the HR Act for any recommended legislative amendments, as well as constitutional limitations*"

The focus of ALHR's submission will be vilification and hate crimes experiences by lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

Introduction

The subject of vilification and hate crimes is of particular relevance to lesbian, gay, bisexual and transgender (LGBT) people, as one of the groups most at risk of experiencing these problems in Australia.

This is demonstrated by the findings of the recent *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia* Report, released in 2020.

This large-scale survey found that 34.6% of LGBT respondents experienced 'verbal abuse (including hateful or obscene phone calls)' due to their sexual orientation or gender identity in the previous 12 months, while 23.6% experienced 'harassment such as being spat at and offensive gestures'.¹

More seriously, 22.1% reported that they had 'received written threats of abuse via emails, social media', and 14.6% reported 'threat of physical violence, physical attack or assault without a weapon'.²

Almost 1 in every 25 LGBT respondents (3.9%) reported that they had experienced 'physical attack or assault with a weapon (knife, bottle, stones)' due to their sexual orientation or gender identity in the previous 12 months alone.³

Significantly, 'trans and gender diverse participants reported higher levels of harassment and abuse than cisgender participants. For example, a greater proportion of trans women (51.6%, n = 130), non-binary participants (49.4%, n = 412) and trans men (45.0%, n = 118) reported verbal abuse in the past 12 months due to their sexual orientation or gender identity compared to 28.7% (n = 748) of cisgender women and 32.7% (n = 675) of cisgender men'.⁴

Human Rights Law and its application in Queensland

ALHR commends Queensland for its introduction of the *Human Rights Act 2019* (Qld) ("**HRA**").

Section 12 of the HRA dictates that human rights afforded in other instruments are not limited by the HRA, stating:

¹ Adam O. Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia*, La Trobe University, August 2020, page 40.

² Ibid

³ Ibid

⁴ Ibid, 41.

A right or freedom not included, or only partly included, in this Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included.

Examples of another law—

- *the Commonwealth Constitution*
- *a law of the Commonwealth*
- *the common law*
- *rights under the International Covenant on Civil and Political Rights not stated in this Act*
- *rights under the Universal Declaration of Human Rights not stated in this Act*
- *rights under other international conventions*
- *other international laws*

Section 15 of the HRA sets out the important human rights principle that every person has the right to recognition as a person before the law. It states:

- (1) Every person has the right to enjoy the person's human rights without discrimination.*
- (2) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.*
- (3) Every person has the right to equal and effective protection against discrimination.*
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.*

Section 15 of the HRA is akin to Article 26 of the International Covenant on Civil and Political Rights (“**ICCPR**”), which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.

In *Toonen v Australia*, the Human Rights Committee held that the reference to 'sex' in Articles 2 and 26 of the ICCPR includes sexual orientation.

Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its 'other status' grounds.

The effectiveness of section 131A of the *Anti-Discrimination Act 1991* (the Act): The need for amendment

ALHR welcomes the fact that Queensland is one of only four Australian jurisdictions to offer any vilification coverage to at least some members of the LGBTI community, with the others being NSW, Tasmania and the ACT.

However, the vilification provision (section 124A) and serious vilification provision (section 131A) are no longer best practice, particularly in terms of the scope of who is, and is not, covered. ALHR submits that amendments are necessary to ensure that all people are afforded protection, as envisaged by s 15 of the HRA and Article 26 of the ICCPR.

Specifically, while we welcome the inclusion of both sexuality and gender identity in both of these sections, their effectiveness is limited by the narrow definitions of each term in Schedule 1 of the Act.

First, the schedule provides that 'sexuality means heterosexuality, homosexuality or bisexuality'. This non-inclusive definition⁵ therefore may not include other sexual orientations, such as pansexuality, meaning vilification on that basis may not be prohibited.

A more modern definition of sexual orientation can be found in the *Sex Discrimination Act 1984* (Cth), which provides in section 4 that:

'sexual orientation means a person's sexual orientation towards :

- (a) persons of the same sex; or
- (b) persons of a different sex; or
- (c) persons of the same sex and persons of a different sex.'

Recommendation 1: That the Committee consider modernising the definition of 'sexuality', with reference to the definition of 'sexual orientation' in the *Sex Discrimination Act 1984* (Cth), to ensure vilification prohibitions apply to all sexualities, including pansexuality.

⁵ In contrast, the Dictionary of the *Discrimination Act 1991* (ACT) provides that 'sexuality *includes* heterosexuality, homosexuality and bisexuality' (emphasis added), thereby allowing protection for additional sexual orientations.

Second, and even more concerningly, the definition of 'gender identity' likely excludes people with non-binary gender identities.

Currently, Schedule 1 of the Act provides:

'gender identity, in relation to a person, means that the person-

(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or

(b) is of indeterminate sex and seeks to live as a member of a particular sex.'

While this definition clearly applies to people who were assigned a gender at birth but whose identified gender is the opposite, the use of term 'opposite sex' in this context may be interpreted as only covering transgender people with binary gender identities (identifying as either male or female, respectively).

This means that the Act's vilification and serious vilification provisions may not protect people whose gender identities are neither exclusively male nor female, including non-binary people.

This is a serious gap, especially given the *Private Lives 3* study finding that almost half (49.4%) of non-binary respondents reported verbal abuse in the previous 12 months alone.

Once again, anti-discrimination laws elsewhere provide options to consider reforming the Act to ensure it covers non-binary people.

For example, section 4 of the *Sex Discrimination Act 1984* (Cth) provides that:

'gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.'

However, ALHR is aware of concerns from some transgender people about unnecessary references to 'medicalisation', which led the ACT Government to adopt the following, simpler definition (and which also has the advantage of covering 'gender expression'):⁶

'gender identity means the gender expression or gender-related identity, appearance or mannerisms or other gender-related characteristics of a person, with or without regard to the person's designated sex at birth.'

Recommendation 2: That the Committee support amendment to the definition of 'gender identity', based on the definition in the *Discrimination Act 1991* (ACT), to ensure vilification prohibitions apply to people with non-binary gender identities.

⁶ Dictionary, *Discrimination Act 1991* (ACT).

The third LGBTI exclusion from current vilification protections in the Act is the largest of them all – the almost complete omission of intersex people.⁷

While the *Private Lives 3* Report's questions relating to experiences of violence and harassment only applied in relation to sexual orientation and gender identity, further questions in relation to 'feelings of acceptance' by intersex people showed alarming results.

This includes only 50% of intersex respondents feeling accepted 'a lot' or 'always' at work, with this figure dropping to 34.1% at social/community events and just 21.4% 'in public (eg in the street/park)'.⁸

Those last figures are a particular cause for alarm, and indicate intersex people may be at high risk of experiencing vilification in public spaces.

Tasmania, NSW and the Australian Capital Territory ("ACT"), being the other three jurisdictions which provide vilification coverage to the LGBTI community, have all established at least some protections for intersex people.

Under the *Anti-Discrimination Act 1998* (Tas), 'intersex variations of sex characteristics' is included as a protected attribute in relation to:

- Section 17(1), which prohibits 'conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute ... in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed', and
- Section 19, which provides that a 'person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of- the gender identity or intersex variations of sex characteristics of the person or any member of the group.'

Under section 67A the *Discrimination Act 1991* (ACT), 'sex characteristics' is included alongside other attributes such as race, gender identity and sexuality for the purposes of its prohibition on unlawful vilification.⁹

Meanwhile, although intersex people are not included in the *Anti-Discrimination Act 1977* (NSW), and therefore cannot access civil vilification protections under that legislation, in 2018 NSW Parliament did include 'intersex status' as a relevant attribute in section 93Z of the *Crimes Act 1900* (NSW), which established the 'offence of publicly threatening or inciting violence on

⁷ While it is possible para (b) of the current definition of 'gender identity' (the person is of indeterminate sex and seeks to live as a member of a particular sex) may offer limited protection to some intersex people, in certain circumstances, the vast majority of intersex people are likely not covered.

⁸ Adam O. Hill et al, *Private Lives 3: The Health and Wellbeing of LGBTIQ People in Australia*, La Trobe University, August 2020, page 93.

⁹ 'It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private...'

grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status' (which replaced the serious vilification offences in the *Anti-Discrimination Act 1977*).

It is therefore clear that, other than Queensland, all states which have vilification protections for the LGBTI community have chosen to offer protection to intersex people.

Where there is the opportunity for Queensland to implement best practice legislation, terminology is vital. There is currently some disagreement about appropriate terminology with respect to this possible protected attribute ('intersex variations of sex characteristics', 'sex characteristics' or 'intersex status').

Intersex Human Rights Australia ("**IHRA**") is the primary voice for intersex human rights advocacy in Australia. ALHR defers to IHRA's expertise on this issue and acknowledges the importance of understanding the distinctiveness and diversity of the intersex community. ALHR commends the work of IHRA for the Committee's consideration..

ALHR understands from consultation with IHRA that 'sex characteristics' is the preferred attribute from the perspective of intersex advocates. This is as articulated in Article 9 of the historic March 2017 *Darlington Statement*:¹⁰

'We call for effective legislative protection from discrimination and harmful practices on grounds of sex characteristics'.

'Sex characteristics' is also the relevant attribute referred to in the *Yogyakarta Principles Plus 10*,¹¹ defined as:

'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.'

The use of 'intersex variations of sex characteristics' as used in the *Anti-Discrimination Act 1998* (Tas) is not language found in other instruments and is not language IHRA wishes to see carried forward. 'Intersex status', as used in the *Crimes Act 1900* (NSW), has imputations of identity, and is a definition which reflects a deficit model, i.e. inferring there is something that intersex people lack. This is therefore also not supported terminology.

On this basis, ALHR supports inclusion of 'sex characteristics' as a protected attribute in sections 124A (vilification) and 131A (serious vilification) of the Act, with a similar definition to that contained in the Dictionary of the *Discrimination Act 1991* (ACT) (which we believe was developed in consultation with Intersex Human Rights Australia):

¹⁰ Darlington Statement: <https://darlington.org.au/statement/>

¹¹ *Yogyakarta Principles Plus 10: Additional principles and state obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement the Yogyakarta Principles*, as adopted on 10 November 2017, Geneva: http://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf

‘sex characteristics-

(a) means a person’s physical features relating to sex; and

(b) includes-

- (i) genitalia and other sexual and reproductive parts of the person’s anatomy; and
- (ii) the person’s chromosomes, hormones and secondary physical features emerging as a result of puberty.’

Our further recommendation, again in consultation with IHRA, is that subparagraph b(ii) be subject to a minor amendment to include an Oxford comma as follows:

the person’s chromosomes, hormones, and secondary physical features emerging as a result of puberty.’

The reason being that the text otherwise implies that chromosomes otherwise emerge as a result of puberty.

Recommendation 3: That the Committee support the inclusion of ‘sex characteristics’ for the purposes of sections 124A and 131A, based on the definition in the *Discrimination Act 1991 (ACT)*, to ensure vilification prohibitions apply to intersex people.

While potentially beyond the scope of the current inquiry, we suggest that, should the Committee accept Recommendation 3 and support the inclusion of ‘sex characteristics’ for the purposes of vilification and serious vilification, it should also support the inclusion of this protected attribute for the purposes of general anti-discriminations protections under the Act.

This would bring the *Anti-Discrimination Act 1991 (Qld)* into line with the majority of Australian jurisdictions which offer anti-discrimination coverage to intersex people:

- The *Sex Discrimination Act 1984 (Cth)*, which protects ‘intersex status’
- The *Anti-Discrimination Act 1998 (Tas)*, which protects ‘intersex variations of sex characteristics’
- The *Equal Opportunity Act 1984 (SA)*, which protects ‘intersex status’
- The *Discrimination Act 1991 (ACT)*, which protects ‘sex characteristics’, and
- The *Equal Opportunity Act 2010 (Vic)*, with the Victorian Parliament passing amendments in early 2021 to add ‘sex characteristics’ as a protected attribute (although those amendments are yet to commence).¹²

For the same reasons articulated earlier in the submission, we support the use of the term ‘sex characteristics’ and a definition based on that in the *Discrimination Act 1991 (ACT)*.

¹² Section 59, *Change or Suppression (Conversion) Practices Prohibition Act 2021 (Vic)*.

Recommendation 4: That the Committee support the inclusion of ‘sex characteristics’ for the purposes of discrimination under the Act generally, based on the definition in the *Discrimination Act 1991 (ACT)*, to ensure intersex people are protected against discrimination.

Finally, ALHR suggests that the drafting of the current Act requires some finessing to ensure that it is clear and accessible to all.

Specifically, while the provisions regarding vilification (section 124A) and serious vilification (section 131A) both refer to race, religion, sexuality or gender identity in their titles, the Chapters or Parts in which they are found do not (even though sections 124A and 131A are the only provisions in each).

For example, the title for Chapter 4, Part 4 only refers to ‘Racial and religious vilification’, while the title for Chapter 5A only refers to ‘Serious racial and religious vilification’.

It is therefore possible that a casual reader of the legislation may see the headings for the respective Chapters and/or Parts and not understand that vilification on the basis of sexuality and gender identity (and hopefully in future sex characteristics) is also prohibited.

It is also possible that a victim of such vilification may be left unaware they enjoy protection under the Act.

Recommendation 5: That the Committee support re-drafting of the titles for Chapter 4, Part 4, and Chapter 5, to remove confusion about which attributes are protected against vilification and serious vilification.

Thank you in advance for your consideration of this submission and the recommendations ALHR has made.

If you would like to discuss any aspect of the submission with us, please do not hesitate to contact us.



Kerry Weste

President

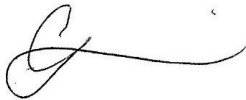
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ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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