



LIVING WITH DIGNITY AND WITHOUT FEAR:

EQUALITY AUSTRALIA'S SUBMISSION TO THE QUEENSLAND LEGAL AFFAIRS
AND SAFETY COMMITTEE INQUIRY INTO SERIOUS VILIFICATION AND HATE
CRIMES

July 2021

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LIVING WITH DIGNITY AND WITHOUT FEAR

Equality Australia welcomes the opportunity to make a submission to the Queensland Parliament's Inquiry into Serious Vilification and Hate Crimes.

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people. Borne out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to redress discrimination, disadvantage and distress experienced by LGBTIQ+ people.

OUR GUIDING PRINCIPLE

We start with the guiding principle that every LGBTIQ+ Queenslanders should be able to walk down any street and participate fully in all aspects of public life with dignity and without fear. That means being able to work, study and live without facing or fearing any vilification or hate-based conduct on the grounds of their sexual orientation, gender identity and expression, or sex characteristics.

THE INCIDENCE OF PREJUDICE MOTIVATED ATTACKS AGAINST LGBTIQ+ PEOPLE

Regrettably, harassment, discrimination and violence on the basis of sexual orientation, gender identity and expression, and sex characteristics remains a lived experience for members of our communities.¹ Sometimes that adverse treatment is experienced in laws, but more often than not it finds ugly expression in attacks borne out of prejudice, fear or ignorance which take place in our physical and online neighbourhoods.

This harassment, discrimination and violence does real harm when it occurs, but also while the threat of it remains. Our communities continue to curb the expression of their identities, their lives, and their love in an effort to avoid harassment, discrimination and violence in public.²

Tellingly, in a 2020 national survey of 6,835 LGBTIQ Australians (being the largest survey of its kind), many participants indicated that they did not feel accepted in a number of public venues, including at work, school or in public places. While 68.5% of LGBTIQ participants indicated feeling accepted 'a lot' or 'always' at LGBTIQ events and venues, only 52.2% indicated feeling the same with family members, only 43.4% indicated feeling the same when accessing health or support services, only 30.5% indicated feeling the same in public (such as on the street or in a park) and only 28.7% indicated feeling the same at mainstream events or venues. Non-LGBTIQ dating apps and websites, and faith-based events or services, were the places that the fewest participants felt accepted (21.7% and 10.5% respectively).³

We include with this submission the Human Rights Law Centre's 2018 report, *End the Hate: Responding to prejudice motivated speech and violence against the LGBTI community*, which documents research on the incidence and impact of hate conduct against LGBTIQ+ people, and a number of recent examples of hate-based conduct experienced by LGBTIQ+ people, particularly in the wake of the 2017 marriage postal survey.

Recent research also documents alarming rates of violence and harassment persisting against our communities. For example, the 2020 national *Private Lives 3* survey of 6,835 LGBTIQ Australians reported the following

¹ See, e.g., Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Melbourne: ARCSHS, La Trobe University, at 37-41; Leonard et al (2012) *Private Lives 2: The second national survey of the health and wellbeing of gay, lesbian, bisexual and transgender (GLBT) Australians*, Melbourne: ARCSHS, La Trobe University, at 47-8; Australian Human Rights Commission (2015) *Resilient Individuals: Sexual orientation, gender identity and intersex rights*, Sydney: Australian Human Rights Commission, at 15-16.

² Leonard et al (2012) *Private Lives 2*, Melbourne: ARCSHS, La Trobe University, at 45-7; Australian Human Rights Commission (2015) *Resilient Individuals*, Sydney: Australian Human Rights Commission, at 18.

³ Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Melbourne: ARCSHS, La Trobe University, at 37.

experiences of violence and harassment due to sexual orientation or gender identity in the last year before the survey:

- 34.6% – verbal abuse (including hateful or obscene phone calls);
- 23.6% – harassment such as being spat at and offensive gestures;
- 22.1% – written threats of abuse via emails, social media;
- 14.6% – threats of physical violence, physical attack or assault without a weapon;
- 11.4% – receiving written threats of abuse in other ways;
- 4.8% and 3.7% respectively – deliberate damage to property or vandalism of a house and/or car; and
- 3.9% – physical attack or assault with a weapon (knife, bottle, stones).

When compared with the 2012 national *Private Lives 2* survey of 5,476 LGBT Australians, the 2020 results suggest that the incidence of violence and harassment has in fact increased over time. The 2012 national survey reported the following experiences of heterosexual violence and harassment in the last year before the survey:

- 25.5% – verbal abuse (including hateful or obscene phone calls);
- 15.5% – harassment such as being spat at and offensive gestures;
- 8.7% – threats of physical violence, physical attack or assault without a weapon (punched, kicked, beaten);
- 6.6% – receiving written threats of abuse including emails and graffiti;
- 3.3% and 2.4% respectively – deliberate damage to property or vandalism of a car and/or house; and
- 1.8% – physical attack or assault with a weapon (knife, bottle, stones).⁴

This data suggests both an increase in the proportion of LGBTIQ people reporting recent experiences of violence and harassment based on their sexual orientation (and in 2020 also based on their gender identity), and also a significant number of LGBTIQ people (almost 1 in 5) who are now experiencing harassment online.

The research also shows that certain populations within the LGBTIQ+ population have experienced high – and sometimes higher than the broader LGBTIQ+ population – rates of violence and harassment, including:

- In data from the same 2012 national study, LGBT respondents with a disability were found even more likely to have been subject to verbal abuse than respondents without disability in the previous year (32% versus 24%); more likely to have ‘received written threats of abuse including emails and graffiti’ (11% versus 5%); more likely to have been subject to harassment (21% vs 14%); and more likely to have been subject to threats of physical violence or physical assault without weapon such as being punched, kicked, or beaten (13% vs 8%).⁵
- A 2018-19 national survey of 528 trans and gender diverse adults found that 71% reported verbal harassment (74% of which occurred in the last 12 months) and 37% reported physical

⁴ Leonard et al (2012) *Private Lives 2*. Melbourne: ARCSHS, La Trobe University, at 47.

⁵ Leonard and Mann (2018) *The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People Living with Disability*. Melbourne: GLHV@ARCSHS, La Trobe University, at 54.

intimidation and threats (49% of which occurred in the last 12 months). One in five participants had been physically assaulted, with a third of those assaults occurring in the last 12 months.⁶

- A 2016 survey of 272 people with intersex variations (80% of which currently lived in Australia) included data from 77 participants who reporting experiencing bullying while at school, including on the basis of visible physical characteristics associated with a known intersex variation.⁷
- A 2010 national survey of 3,134 same sex attracted and gender questioning young people found that 61% reported verbal abuse and 18% reported physical abuse because of homophobia. School was the most likely place of abuse, accounting for 80% of those who were abused.⁸
- A 2018 national survey of 847 people living with HIV found that more than half of participants (56%) reported experiencing stigma within the last 12 months in relation to their HIV status, including 9% reporting that they ‘often’ or ‘always’ experienced stigma.⁹ One-third also reported negative treatment by health workers.¹⁰

THE NEED FOR ANTI-HATE LAWS PROTECTING LGBTIQ+ PEOPLE

We know that laws are not the only answer. We also know that many LGBTIQ+ people who have experienced harassment, discrimination and violence respond to it in creative and inspiring ways without the backing of statutes providing formal remedies. We’ve marched, we’ve written, we’ve performed, and we’ve spoken out.

But laws do matter. They signal standards below which behaviour becomes socially unacceptable. They also ensure those who breach these minimum standards are held to account, providing survivors with practical remedies such as compensation to support their cost of recovery – but also importantly – an avenue for justice.

That is why we call for stronger and better protections in Queensland’s *Anti-Discrimination Act 1991* (the **Act**) against vilification, new provisions dealing with hate-based conduct, as well as better defined and expanded grounds of protection for sexual orientation, gender identity and expression, and sex characteristics. Queensland’s current definitions of ‘sexuality’ and ‘gender identity’,¹¹ and its omission of a specific ground of ‘sex characteristics’, are out of step with other comparable Australian laws. As members of our communities are also members of other communities, we also support expanding the grounds of protection against vilification and hate-based conduct to include attributes such as gender, HIV/AIDS status and disability.

Our recommendations on reforming the Act, insofar as it deals with vilification in sections 124A and 131A, and to address properly other hate-based conduct, are set out below. The Act needs other reforms to ensure it better protects LGBTIQ+ people from discrimination. Given the upcoming Queensland Human Rights Commission review into the Act and the more limited scope of this inquiry, we will not address these wider areas of reform in this submission.

⁶ Kerr et al (2019) *TRANScending Discrimination in Health & Cancer Care: A Study of Trans & Gender Diverse Australians*, Bundoora: ARCSHS, La Trobe University, at 32-33.

⁷ Jones (2016) ‘*The needs of students with intersex variations*’, *Sex Education*, at 13-14.

⁸ Hillier et al (2010) *Writing Themselves In 3*, Melbourne: ARCSHS, La Trobe University, at 39.

⁹ Centre for Social Research in Health (2019) *Stigma Indicators Monitoring Project: People living with HIV*, Sydney: CSRH, UNSW, at 1.

¹⁰ *Ibid*, at 2.

¹¹ *Anti-Discrimination Act 1991* (Qld), Schedule.

THE WAY FORWARD

Changing laws

Updating definitions and including new attributes

The Queensland *Anti-Discrimination Act 1991* (the **Act**) prohibits unlawful vilification, by way of a civil regime (s 124A), and prohibits serious vilification by way of a criminal offence (s 131A). Both provisions rely on definitions of ‘sexuality’ and ‘gender identity’ currently contained in the Act, which are out of step with comparable contemporary Australian definitions. These definitions should be updated to properly protect all LGBTIQ+ people.

‘Sexuality’ is defined to *mean* heterosexuality, homosexuality and bisexuality.¹² By contrast, Victoria, the ACT and Tasmania provide more inclusive and contemporary definitions of ‘sexual orientation’ that more clearly extend to people however they define their sexual orientation. The ACT and Tasmania define ‘sexuality’/‘sexual orientation’ as *including* heterosexuality, homosexuality and bisexuality (meaning, these definitions are not exhaustive).¹³ Victoria has recently adopted the definition contained in the Yogyakarta Principles, an internationally-recognised statement drafted by human rights experts on the application of international human rights law to issues concerning sexual orientation, gender identity and expression, and sex characteristics.¹⁴ We would be comfortable with either approach, with a slight preference for the ACT and Tasmanian definitions because they achieve simplicity while retaining their ability to be inclusive.

‘Gender identity’ is currently defined in the Act by reference to people who live or seek to live as members of the ‘opposite sex’, including those of ‘indeterminate sex’.¹⁵ This definition is problematic for several reasons. First, it does not specifically protect gender-related expression. Second, it defines gender by reference to a binary, meaning non-binary people may be excluded from protection. Third, it conflates gender identity and innate variations of sex characteristics because of the inclusion of ‘indeterminate sex’ in the definition. As Intersex Human Rights Australia explains, and the Darlington Statement warns, this conflation imposes descriptions on the intersex population that marks them out as a ‘third sex’ and assumes that innate variations of sex characteristics determine a person’s gender identity.¹⁶

The ACT, Tasmania and Victoria (and also, to a lesser extent, the Commonwealth and South Australia) have better definitions of gender identity that include gender-related expression, and provide protection to people with intersex variations using standalone protections and more contemporary definitions. ‘Gender identity’ is variously defined in the laws of the ACT, Victoria, Tasmania, South Australia and the Commonwealth to include gender-related expression, and to clarify that people do not need to have undergone medical treatment or updated their

¹² *Anti-Discrimination Act 1991* (Qld), Schedule.

¹³ *Discrimination Act 1991* (ACT), Dictionary (definition of ‘sexuality’); *Anti-Discrimination Act 1998* (Tas), s 3 (definition of ‘sexual orientation’).

¹⁴ See <https://yogyakartaprinciples.org/>. *Equal Opportunity Act 2010* (Vic), s 4 (definition of ‘sexual orientation’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic)].

¹⁵ *Anti-Discrimination Act 1991* (Qld), Schedule.

¹⁶ Intersex Human Rights Australia (2019), ‘Intersex is not a gender identity, and the implications for legislation’, <https://ihra.org.au/17680/intersex-characteristics-not-gender-identity/> [accessed 16 July 2021]; [Darlington Statement](#) (2017), [8]. The Darlington Statement is a joint statement by Australia and Aotearoa/New Zealand intersex community organisations and independent advocates, including the Androgen Insensitivity Syndrome Support Group Australia (AISSGA), Intersex Trust Aotearoa New Zealand (ITANZ), Organisation Intersex International Australia (OIIAU), Eve Black, Kylie Bond (AISSGA), Tony Briffa (OIIAU/AISSGA), Morgan Carpenter (OIIAU/Intersex Day Project), Candice Cody (OIIAU), Alex David (OIIAU), Betsy Driver (Bodies Like Ours), Carolyn Hannaford (AISSGA), Eileen Harlow, Bonnie Hart (AISSGA), Phoebe Hart (AISSGA), Delia Leckey (ITANZ), Steph Lum (OIIAU), Mani Bruce Mitchell (ITANZ), Elise Nyhuis (AISSGA), Bronwyn O’Callaghan, Sandra Perrin (AISSGA), Cody Smith (Tranz Australia), Trace Williams (AISSGA), Imogen Yang (Bladder Exstrophy Epispadias Cloacal Exstrophy Hypospadias Australian Community – BEECHAC) and Georgie Yovanovic.

legal gender in order to be protected.¹⁷ An independent protection for people with innate variations of sex characteristics is achieved through a separate ‘sex characteristics’ ground in the ACT, Victoria and Tasmania, which is the more contemporary and preferred approach.¹⁸ ‘Intersex status’, as defined in the Commonwealth and South Australia, also provides protection to intersex people, but now reflects outdated definitions.

In addition to protecting LGBTIQ+ people properly, we would also support expanding protections to other groups that may experience vilification or hate-based conduct, including based on gender, HIV/AIDS status and disability. Gender is protected in Tasmania; HIV/AIDS status is protected in NSW and the ACT; and disability is protected in the ACT and Tasmania. Tasmania also provides protection on several other grounds, such as age, marital status, pregnancy and parental status.

Introduce a new harm-based protection against hate-based conduct

The key issue with vilification protections is that they tend to focus on the potential effects of the conduct in inciting hatred, contempt and ridicule in a hypothetical audience, ignoring the very real and direct harm that they cause to the person who is targeted by that conduct. For example, in considering whether anti-LGBTIQ+ graffiti painted on someone’s fence amounts to vilification, the current legal provisions focus on whether that conduct incites hatred, serious contempt or severe ridicule of persons on the ground of their sexual orientation, gender identity or sex characteristics. It does not consider whether the person whose fence has been graffitied has suffered any harm, such as the experience of being humiliated, intimidated, or being made to feel unsafe in their own home.

For this reason, we support enacting a new protection against hate-based conduct which uses a harm-based legal standard, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee *Inquiry into Anti-Vilification Protections*.¹⁹ We would support a provision which makes unlawful public conduct on the basis of a protected attribute that humiliates or intimidates a person or group of persons, or which has profound and serious effects on their dignity or sense of safety, and which is not done reasonably and in good faith for a legitimate purpose. The formulation proposed by the Victorian Parliamentary Legal and Social Issues Committee provides a good way forward, which builds on the strengths of existing Commonwealth and Tasmanian laws.

Introduce an aggravating sentencing factor when crimes involve prejudice

Many commonly committed crimes, such as assaults or damage to property, can be motivated by prejudice, and that motivation can make a real difference in the impact it has on victims long after the crime has been committed.

For example, it is a very different thing for someone to have their car or fence vandalised with a meaningless slogan, than it is for someone to have their car or fence vandalised with words that express condemnation or disgust about their sexual orientation, gender identity or sex characteristics. The first act of vandalism results in economic loss. The second act results in both economic loss and the loss of safety, dignity and sense of belonging which may have once been felt by the victim of that crime.

¹⁷ *Discrimination Act 1991*(ACT), Dictionary (definition of ‘gender identity’); *Anti-Discrimination Act 1998*(Tas), s 3 (definition of ‘gender identity’ and ‘gender expression’); *Acts Interpretation Act 1915*(SA), s 4(1) (definition of ‘gender identity’); *Sex Discrimination Act 1984*(Cth), s 4(1) (definition of ‘gender identity’); *Equal Opportunity Act 2010*(Vic), s 4 (definition of ‘gender identity’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021*(Vic)].

¹⁸ *Discrimination Act 1991*(ACT), Dictionary (definition of ‘sex characteristics’); *Equal Opportunity Act 2010*(Vic), s 4 (definition of ‘sex characteristics’) [as amended by the yet to commence *Change or Suppression (Conversion) Practices Prohibition Act 2021*(Vic)]; *Anti-Discrimination Act 1998*(Tas), s 3 (definition of ‘intersex variations of sex characteristics’). See also, now out of date definitions in *Acts Interpretation Act 1915*(SA), s 4(1) (definition of ‘intersex status’) and *Sex Discrimination Act 1984*(Cth), s 4(1) (definition of ‘intersex status’).

¹⁹ Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into Anti-Vilification Protections](#), Melbourne: Parliament of Victoria, Recommendations 9 and 10.

Similarly, it is a very different thing for someone to drive their car dangerously, than it is for someone to do so at a group of people with the intention of harming them because of who they are. Both acts are deplorable, but the latter causes additional harms for victims who know they were specifically targeted because of who they are. These prejudice-motivated aspects of a crime mean that victims of hate crimes can experience long lasting trauma beyond the economic or physical effects of a crime.

NSW, Victoria and the Northern Territory recognise these harms in their sentencing laws. They require courts to consider – often as an aggravating factor when imposing sentences – whether an offence was motivated (whether wholly or partly) by hatred for or prejudice against a group of people that the offender believed the victim belonged.²⁰

We would support adding a sentencing consideration to section 9 of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people with variations of sex characteristics or a particular disability). This would ensure that whatever the offence, prejudice-motivated conduct is recognised as part of appropriate sentencing.

Improve protections against vilification

Section 124A of the Act prohibits public acts which incite hatred towards, serious contempt for, or severe ridicule of, a person or group based on the protected grounds. Section 131A goes further in criminalising such conduct that also includes threats of physical harm towards other people or property, or inciting others to threaten physical harm to other people or property.

We would support:

- revising the definition of a ‘public act’, consistently with the definition in section 93Z(5) of the *Crimes Act 1900* (NSW), to make it clear that it extends to social media (as proposed by the LGBTI Legal Service);
- improving the civil and criminal tests for vilification, to clarify that it does not require proof of actual incitement or intention and is satisfied by public conduct which is *‘likely to incite hatred towards, revulsion of serious contempt for, or severe ridicule of’*, as recently recommended by the Victorian Parliamentary Legal and Social Issues Committee.²¹

Improve processes for enforcement

Our experience of anti-vilification protections across the country is that they have rarely been utilised, and where they have been utilised, individuals who have brought them have not always understood the legal, financial and other costs involved in bringing such claims. This is partly because the procedure for bringing such complaints relies principally on individuals who are not always legally represented or well-funded, and who may not have had the benefit of legal advice regarding the extent of protections these laws provide and the costs implications of losing their claim. In addition to individual-led actions, we would support considering additional functions and powers that enabled the Victorian Human Rights Commission to investigate and initiate its own civil proceedings against people who breached the civil vilification and proposed civil hate-based conduct provisions.

²⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 21A(2)(h) (aggravating factors); *Sentencing Act 1995* (NT), s 6A(e) (aggravating factors); *Sentencing Act 1991* (Vic), s 5(2)(daaa).

²¹ Legislative Assembly Legal and Social Issues Committee (2021) [Inquiry into Anti-Vilification Protections](#), Melbourne: Parliament of Victoria, Recommendations 8 and 20.

RECOMMENDATIONS

1. Expand the list of protected attributes in anti-vilification and anti-hate laws to include at least race, religion, gender, gender identity, sexual orientation, sex characteristics, HIV/AIDS status and disability.
2. Define 'sexuality' in the Act consistently with definitions in ACT, Tasmanian or Victorian laws, which are inclusive in protecting people of different sexual orientations.
3. Define 'gender identity' in the Act consistently with definitions in ACT, Victorian, Tasmanian, South Australian and Commonwealth laws, to include gender-related expression and to clarify that people do not need to have undergone medical treatment or update their legal gender in order to be protected.
4. Introduce a new protection in the Act and define 'sex characteristics' consistently with definitions in ACT, Victorian and Tasmanian laws, ensuring protections for people with innate variations of sex characteristics.
5. Enact new protections in the Act against hate-based conduct based on a harm-based civil test. The provision should protect people who experience public conduct, on the basis of a protected attribute, that humiliates or intimidates them, or has profound and serious effects on their dignity or sense of safety, and which is not done reasonably and in good faith for a legitimate purpose.
6. Provide the Queensland Human Rights Commission with powers to launch civil proceedings against people who breach the anti-vilification and proposed hate-based conduct protections.
7. Revise the definition of a 'public act' in the Act, consistently with the definition in section 93Z(5) of the *Crimes Act 1900* (NSW), to make it clear that it extends to social media.
8. Improve the civil and criminal tests for vilification in the Act, to clarify that it does not require proof of actual incitement or intention and is satisfied by public conduct which is '*likely to incite hatred towards, revulsion of, serious contempt for, or severe ridicule of*'.
9. Introduce a sentencing consideration into section 9 of the *Penalties and Sentences Act 1992* (Qld) that requires courts to consider whether any offence was motivated (wholly or partly) by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular race, religion, sex, sexual orientation, gender identity, age, or people with variations of sex characteristics or a particular disability).

Changing attitudes

Removing the threat of vilification and hate-based conduct requires changing attitudes, not merely redressing it through legislation when it occurs. To that end, we adopt the recommendations from the 2018 *End the Hate* report, which include the following.

FURTHER RECOMMENDATIONS

10. Fund a broader public awareness campaigns and strategies to change deep-seated negative attitudes towards LGBTIQ+ people (see *End the Hate* recommendation 1.1).
11. Fund more research into, and reporting mechanisms to capture the incidence of, prejudice-motivated conduct towards LGBTIQ+ people, including through a public reporting app or website (see, e.g., recommendations 1.2-1.6).
12. Fund more support and resources for LGBTIQ+ people affected by prejudice-motivated conduct (see, e.g., recommendations 2.2, 2.4).
13. Strengthen the relationship between Queensland Police and our communities, including through more training and better data collection to support law enforcement efforts (see, e.g. recommendations, 3.1-3.6).

FURTHER INFORMATION ABOUT OUR SUBMISSION

Equality Australia has no objection to its submission being made public and is prepared to give further evidence at a public hearing.

Further questions regarding our submissions can be addressed to:

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.