



Vilification and people with disability

**Submission by
Queensland Advocacy Incorporated**

Parliamentary Committee inquiry into serious vilification and hate crime

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“It may be true that morality cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless.”

Martin Luther King

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to advocate for the protection and advancement of the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our three advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law, non-legal advocacy support with the Disability Royal Commission, the justice interface and the education system and social work services); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); and the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

QAI's recommendations

QAI recommends:

1. Impairment be included in the list of attributes protected from vilification and serious vilification.
2. Consideration be given to models of regulation and enforcement that are not solely reliant on individual complainants.
3. Consideration be given to amending the definition of 'public act'.
4. Consistent and timely reporting of vilification decisions.

Background

People with disability face ongoing vilification and harassment on the basis of their disability. This includes physical and verbal abuse and can be perpetrated by strangers, organised groups or people known to them.

One in four people with disability aged over 15 experience discrimination and nearly half of AHRC complaints relate to disability, including by strangers in public.¹ Disability discrimination affects the participation of people with disability in public life.² It is understood that disability is the attribute with the highest number of discrimination complaints in Queensland. However, despite this overwhelming evidence of prejudice in society, disability remains excluded from vilification protections both in law and in practice.

¹ Australian Institute of Health and Welfare, People with disability in Australia 2020, Australian Government, Canberra, 2020, p. 129.

² Ibid, p. 131

Various sections of Queensland's *Human Rights Act (2019)* are engaged by existing and proposed vilification laws. For people with disabilities, the right to equality and non-discrimination³, the right to life,⁴ the right to security⁵ and the right to privacy (including reputation)⁶ are particularly relevant. These rights are also articulated in the Convention of the Rights of People with Disabilities. Our submissions are made in support of these rights.

The inclusion of disability as a protected attribute

Currently, the laws prohibiting discrimination in Queensland provide protection to a list of 15 attributes and to persons associated with those attributes.⁷ This list recognises a range of vulnerabilities, including impairment, which is defined as:

impairment, in relation to a person, means—

(a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or

(b) the malfunction, malformation or disfigurement of a part of the person's body; or

(c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or

(d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or

(e) the presence in the body of organisms capable of causing illness or disease; or

(f) reliance on a guide, hearing or assistance dog, wheelchair or other remedial device;

whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—

(g) presently exists; or

(h) previously existed but no longer exists.

In contrast, the provisions of the *Anti-Discrimination Act (1991)* referring to vilification cover only four attributes: race, religion, sexuality, and gender identity.⁸ QAI recommends that vilification on the grounds of impairment be similarly prohibited under this Act.

Disability is a protected attribute regarding vilification in Tasmania and the Australian Capital Territory and disability harassment is prohibited in certain areas under the Disability Discrimination Act. The terms 'disability' and 'impairment' are used in different jurisdictions but hold similar meaning.

People with disability are more likely to experience violence and abuse compared to others as evidenced by the Australian Bureau of Statistics Personal Safety Survey, which highlights:

1. Since the age of 15, 64% of people with disability (2,375,997 people) report experiencing physical violence, sexual violence, intimate partner violence, emotional abuse and/or stalking compared to 45% of people without disability.

³ *Human Rights Act (2019)* s15

⁴ *Human Rights Act (2019)* s16

⁵ *Human Rights Act (2019)* s29

⁶ *Human Rights Act (2019)* s25

⁷ *Anti-Discrimination Act Qld (1991)*, s7.

⁸ Sections 124A, 131A.

2. People with disability are at 1.8 times the risk of all types of violence in comparison to people without disability.⁹

Violence and abuse of people with disability often happens in open public and in other areas of public life including in care settings or education. Some of this violence and abuse could be characterised as motivated by impairment and includes inciting hatred, contempt or severe ridicule of a person on the basis of their impairment. Instances of disability vilification can be embarrassing and frightening and moreover can cause serious long-term harm. Disability vilification can contribute to other vulnerabilities with devastating effects on a person's life.

Some examples of violence and abuse that may be disability vilification in some instances include:

- Name calling, such as using terms such as 'retard,' 'vegetable' or 'dummy';
- Jokes about people with disability that incite severe ridicule or contempt;
- Mocking the characteristics of a person with disability, such as the way that person walks or talks;
- Aggressively blocking access to priority seating, services, or parking with comments that the people who use them are a waste of space; and
- Physically blocking or removing a person's equipment or aids to cause them harm.

The DRC has noted that there is no consistent approach to defining or identifying violence and abuse against people with disability as the collected data tells us more about the nature and extent of violence, rather than specific manifestations of violence experienced by people with disability.¹⁰ Therefore, we know that people with disability experience high levels of violence and abuse including in public, but much of this behaviour is not captured. Including protections relating to impairment in vilification laws would provide people with disability with a legal recourse to pursue complaints about this behaviour.

Vilification experienced by people with disabilities is often intersectional. An example of vilification on the basis of disability and gender is found in the Melbourne café that placed a board outside with reading "My girlfriend broke up with me, so I stole her wheelchair...guess who came crawling back."¹¹

QAI has collated case studies that demonstrate vilification experienced by people with disability.

Case study 1

Julia had physical impairments which affected her mobility. She was engaged in regular employment with a large employer. During the course of her employment, her supervisor regularly called her 'the half cripple' as a joke and this name was taken up by other staff members. These comments were made in a variety of contexts including within earshot of the general public. These comments made Julia feel demoralised, belittled and anxious.

Case study 2

Carl has cerebral palsy and mental health conditions. He was arrested after making a mess with a stolen drink in a shopping centre. The attending police officers arrested him by the side of the road using force. He was ultimately placed on a treatment authority under the *Mental Health Act (2016)*. During the course of arrest, the police officers called him a "spastic", "f*cked in the head", "mental case", "psycho" and "retarded". These comments were heard by members of the public and witnessed by the man's support worker.

⁹ Disability Royal Commission, Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia, p9.

¹⁰ Disability Royal Commission Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia, p6.

¹¹ <https://www.news.com.au/lifestyle/real-life/news-life/melbourne-cafe-forced-to-apologise-over-joke-about-disabled-people/news-story/c10284da5e7ed97c274a10f0971edea9>

Other incidents we are aware of include:

- Taunting of a child by fellow students in public, using words like ‘freak’ ‘retarded’ and ‘f*cked in the head’;
- Verbal abuse of a person with disability who was shopping by saying ‘get out of here, retard.’
- Verbal abuse of a non-verbal man who bumped into a passer-by and was told ‘watch where you’re going, you retard.’
- Mocking a man with disability by making noises at him out of the window of a passing car; and
- Throwing rubbish at a person from a passing car while making noises mocking their impairment.

In 2012, the Disability Law Centre in Victoria conducted research into disability vilification in that state. They concluded that:

[D]isability vilification impacts on a person’s self-esteem, confidence and security and therefore limits the capacity of people with a disability to optimise their capabilities, gain equitable access to the benefits of society and participate as ‘equals’ in their community. Disability vilification contributes significantly to the isolation of people with a disability in the community ...

As a result of our own experiences and the outcomes of the research our view is that disability vilification is a widespread concern and contributes strongly to the systemic discrimination of people with a disability. Disability vilification is experienced across the life span, in education, employment and specifically in public and private places where all people, including people with a disability have an equal right to be treated with dignity and respect.¹²

QAI recommends that vilification protections include people with disability so that recourse for public acts that incite hatred, contempt, or severe ridicule of people on the basis of their impairment are prohibited.

Vilification is a public responsibility

Vilification is a public act and should be a public responsibility. Vilification is grounded in broader societal problems such as racism, homophobia, sexism and ablism that are a community responsibility to address. Broader society plays a part in entrenching these problems, whether through unconscious bias, irrational hate or political opportunism.

It cannot be the sole responsibility of communities marginalised by these harmful problems to create change and in many instances, they are not empowered to do. This is because the foundation of discriminatory attitudes includes de-humanising and silencing the voices of the affected marginalised communities. The focus of an individual who has experienced vilification should be on recovery from this harm, rather than being required to take action to seek redress and prevent similar harm to others. Relying on the individuals who have experienced the harm of racism, homophobia, sexism and ablism to be the ones to initiate, direct and sustain a lengthy litigation negates the role that broader society plays in these problems. We must find a solution that does not place more pressure on the vulnerable to stand up and fight these issues alone. One such solution is to appoint a public agency to enforce discrimination and vilification law, rather than rely on individuals.

¹² DDLS (2012), Disability Vilification Report, p 46.

The benefits of having a public agency enforcing discrimination law have been described as including:

- Raising the law's profile;
- An agency is better placed than an individual to achieve a remedy which benefits a group;
- Encouraging voluntary compliance by increasing the threat that action will be taken against non-compliant organisations;
- Increasing access to justice by helping complainants to pursue their claim; and
- Reminding the community that discrimination still exists but something is being done to address it.¹³

However, when considering legislative protections against vilification it is also imperative to consider the over-representation of people with disability in the criminal justice system.¹⁴ We are concerned that any enhanced criminalisation will further entrench vulnerability and disadvantage for people with disability. Despite increasing commitment by governments to address and uphold the rights of people with disabilities, over-representation is reportedly *increasing*.¹⁵ A chief cause of overrepresentation is the individual and systemic failure to value, include, and provide opportunities for the participation of people with disability in education, employment, health-care, housing and other fields of endeavour or opportunity.¹⁶ The criminalisation of persons with disability tends to be linked to exclusion across the social spectrum: exclusion from education, training and skills acquisition; from the labour market, and the economic and social benefits associated with it; and from secure and affordable housing. The link is clear: a person who has no home, no job and little money will spend more time in public spaces and is more likely to be linked to public order offences.¹⁷ Often, a person's disability and denial of their appropriate supports is intrinsically linked to and causative of the behaviour that is criminalised.

Apart from the criminal justice system, there are other models of regulation that move away from individual responsibility, and towards a statutory regulator model: evidence of which can be found both in Australia and overseas. The Fair Work Ombudsman and eSafety Commissioner are the present authorities which undertake active investigations and impose civil penalties at a Commonwealth level. Additionally, it is useful to consider the models utilised overseas, such as the USA's Equal Employment Opportunity and the Equality Commissioner of Northern Ireland.

The eSafety Commissioner has powers to investigate and act on complaints about serious cyberbullying material targeted at an Australian child: including maintaining a scheme for the removal of cyberbullying material from participating social media services. A civil penalties scheme empowers the eSafety Commissioner to give enforceable removal notices to social media services, websites, hosting providers and perpetrators, requiring the removal of intimate material.¹⁸

Such schemes, if applied to vilification in Queensland, could allow the investigation and removal of material considered to reach the threshold of vilification, without requiring individual complainants to bear this burden.

Additionally, the civil penalties scheme also gives the eSafety Commissioner a range of powers to take action more broadly, such as by:

- issuing a formal warning;

¹³ Allen (2019). Addressing discrimination through individual enforcement, Monash University, p24.

¹⁴ As recognised by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Criminal Justice System Issues paper* (Issues Paper, December 2020) 2-3.

¹⁵ Ruth McCausland and Eileen Baldry, "'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290, 291.

¹⁶ QAI, *Disabled Justice*, 2015 p 150.

¹⁷ *Ibid.*

¹⁸ *Enhancing Online Safety Act (2015)* Cth.

- giving a remedial direction;
- issuing an infringement notice;
- accepting an enforceable undertaking;
- seeking an injunction or civil penalty order in Court.

In a similar way, the Fair Work Ombudsman has a compliance and enforcement function. This office can conduct investigations, issue compliance or infringement notices, require enforceable undertakings, and conduct litigation. This enforcement power includes taking action to remedy prohibited discriminatory practices in the workplace.¹⁹

In overseas jurisdictions, more active statutory regulatory models can be found in Human Rights bodies either linked to a complaint handling function or separate from it. For example, a combined function can be found in the USA's Equal Employment Opportunity Commission (EEOC) which makes findings of fact and decides if there is reasonable cause that the discrimination occurred. This process is followed by conciliation and the EEOC may then litigate on the complainant's behalf.

In a different model, the Equality Commissioner for Northern Ireland does not undertake conciliation but has the power to enforce discrimination laws.²⁰ This power is exercised by way of investigations and issuing 'non-discrimination' notices, effectively directing a party not to commit unlawful acts. There is procedural fairness around these notices and an appeal process. The ECNI can also apply to the courts for a determination about whether there has been compliance.

It is noted that the Queensland Human Rights Commission (QHRC) already has investigative powers under Division 2 of the *Anti-Discrimination Act 1991* (Qld), to request information or documents. The QHRC may then enforce the direction by way of the courts, however, this power is not commonly used in relation to vilification complaints beyond obtaining contact details and limited evidence. This is perhaps due to the function of QHRC as a neutral arbitrator of complaints. These existing powers fall far short of any of the above examples.

Consideration should be given more broadly to the role of a statutory regulatory body for the compliance and enforcement of vilification laws in Queensland.

Vilification in areas of public life

Violence and abuse experienced by people with disability commonly takes place across various areas of public life, including schools, workplaces, residential care facilities and other institutions. This violence and abuse could at times be considered vilification or discrimination.

The *Anti-Discrimination Act 1991* (Qld) currently prohibits discrimination in certain areas of activity. These areas of activity reflect public life, such as employment, education and accessing goods and services. In contrast, the vilification provisions of this Act limit prohibitions to 'public acts', including communication to the public and conduct observable by the public.²¹ Unfortunately, while both protections aim to curb certain behaviours in public settings, there are gaps that affect the enforcement of rights for people with disabilities.

This means that some harmful incidents experienced by people with disability may fall outside the scope of discrimination and vilification protections, even if this attribute were to be included in vilification provisions. Some examples include of potential gaps include:

¹⁹ *Fair Work Act (2009)* Cth, s351.

²⁰ *Race Relations (Northern Ireland) Order 1997*.

²¹ *Anti-Discrimination Act (1991)* s4A.

- A university student with disability who is called names and bullied because of their impairments in a tutorial. Such an act is arguably not a ‘public act’. A potential indirect discrimination complaint against the university would arguably require a level of complicity from the tutor, making litigation difficult.
- A person with disability who attends a work conference where a speaker makes jokes about cripples would not be able bring a vilification complaint: as the speech is arguably not a public unless it is broadcasted, or available outside of the workplace. In this example, it would be difficult for a person with disability to bring forward a complaint for discrimination.
- A person with disability living in a residential care facility where vilifying comments are made by other residents would have difficulty bringing a vilification complaint, as this setting is not observable by the public. There are no vicarious liability provisions for co-residents, and an indirect discrimination complaint would arguably require a level of complicity from the service that may be complex to establish.

In each of these scenarios the person with disability would face significant barriers seeking a remedy for these incidents that could be overcome by legislative change. QAI recommends further consideration of the definition of ‘public act’ is necessary to ensure vilification protections include areas of public life affecting people with disability.

Consistent and timely reporting of vilification decisions

QAI is aware that some QCAT decisions regarding the *Anti-Discrimination Act (1991)* are not made publicly available in a timely manner. Given the small number of these matters that are decided in QCAT, compared to the large number of complaints initially lodged, the publishing of these decisions has added importance. The consistent and timely publishing of more decisions would aid in the community understanding of vilification and the development of legal practice in this area of law through increased precedent value. By way of example, only the appeal and some procedural matters regarding the case of *Rowan v Beck* [2021] QCATA 20 are currently available, and other decided matters discussed in submissions to this parliamentary inquiry are similarly unavailable.

QAI thanks the Parliamentary Committee for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.