

# Stronger laws to protect Victorians from hate

## A summary of our submission to the Parliamentary Inquiry into Anti-Vilification Protections

In recent years, racist media coverage, reports of rising antisemitism, and the spread of right-wing extremism online have refocused our attention on the prevalence, nature and impact on hate within the Victorian community. A recent incident of a flag bearing a swastika flying over a house in regional Victoria sparked extensive public conversation about the effectiveness of Victoria's anti-vilification protections and their ability to protect people from hate conduct.

As the regulator for Victoria's current anti-vilification law, the *Racial and Religious Tolerance Act 2001* (RRTA), the Victorian Equal Opportunity Commission has developed a deep understanding of the types of hate directed at Victoria's multicultural and multifaith communities. But we know that there are many other groups who are victims of hate – LGBTIQ people, women and people with disabilities in particular.

While the RRTA has been in operation for over 18 years, its complexity means that it has been under-utilised in practice. To date, there have been two successful cases in the Victorian Civil and Administrative Tribunal (VCAT) and one successful prosecution of serious vilification. There are significant barriers to the RRTA's use, including legal tests for vilification that are too high and too difficult to navigate.

The Victorian Parliament's inquiry into Victoria's anti-vilification protections is a valuable opportunity to create a more robust and expansive framework for protecting Victorians from hate.

### UNDERSTANDING HATE IN VICTORIA

#### Complaints about vilification (2002 to 2019)

**335** complaints of racial vilification

**283** complaints of religious vilification

#### Vilification matters at VCAT (2012–13 to 2018–19)

**6** matters resolved by compulsory conference

**7** matters resolved by conciliation

**25** matters finalised including **9** that were withdrawn, **11** that were struck out and **5** that were dismissed

#### Vilification training delivered by the Commission (2013 to 2019)

**61** education sessions

**1872** participants

# Strengthening protections for vulnerable communities

## **We need clearer, more accessible laws**

While Victoria's vilification protections exist as a standalone Act, many other Australian jurisdictions incorporate such protections in their anti-discrimination laws. Bringing Victoria's anti-vilification protections into the *Equal Opportunity Act 2010* (EOA) would create a holistic suite of equality laws in Victoria, and be more consistent with other jurisdictions. Further, as Victorians already have a good understanding of the EOA, expanding it to include hate laws would also make these protections more accessible to a broader audience.

## **Reflect true inclusion and diversity**

At a conceptual level, the inclusion of 'tolerance' in the name of the RRTA speaks to a now-outdated idea of what we can expect for a diverse and pluralistic society. Community expectations have continued to evolve since the RRTA was enacted – if a standalone anti-vilification law is to be retained the Victorian Government should select a name that more accurately captures a genuine respect for inclusion and diversity.

## **Expand protections**

While the RRTA specifically protects race and religious belief, we know that there are many other vulnerable groups that experience hate in the community. Expanding the scope of our anti-vilification protections to include sexual orientation, gender identity, sex characteristics, gender, disability and personal association would ensure consistency with best-practice jurisdictions, acknowledge the profound harm resulting from hate and provide more effective redress for people who experience high rates of compounding intersectional forms of hate, such as Muslim and African women.

Importantly, expanding the range of attributes protected would allow the Victorian Government to send a strong message about the standards of behaviour expected in the diverse Victorian community.

## **SUMMARY OF RECOMMENDATIONS**

### **Recommendation 1**

Incorporate Victoria's vilification laws in the Equal Opportunity Act 2010. If a standalone Act is retained, change the title to promote respect for diversity.

### **Recommendation 2**

Extend the protections to include race, religious belief or activity, sexual orientation, gender identity, sex characteristics, gender, disability and personal association.

### **Recommendation 3**

Reform the attributes 'sexual orientation' and 'gender identity', and introduce a new attribute 'sex characteristics', under the Equal Opportunity Act.

### **Recommendation 4**

Consult with affected community stakeholders, particularly from the LGBTIQ community, including intersex organisations to finalise the definitions for the attributes 'sexual orientation', 'gender identity', 'sex characteristics' and 'gender'.

# Making the law work more effectively

## Change the test

One of the factors that has limited the number of successful cases under the RRTA is the high threshold it sets to show that vilification has occurred. Amending the threshold from conduct that incites to conduct that expresses or is reasonably likely to incite would simplify the test and ensure the protections are accessible and capable of providing effective redress for the significant harm caused to individuals, target communities and broader society.

## Consider the impact of harm

A second issue with the current vilification test is its focus on incitement rather than harm. It relies on being able to show that the hate conduct incited an often-hypothetical audience to feel hatred, serious contempt, revulsion or severe ridicule for the victim – and this is not always easy to show. Introducing a complementary harm-based test would enable more objective assessment of harm experienced from the perspective of the target group.

## Ensure the balance of rights

To ensure balance, the harm-based test should exempt private conduct and should balance freedom of expression as a fundamental human right. However, it is important to note that freedom of expression is not absolute and the RRTA's current 'religious purpose' exception unreasonably protects a broad range of 'religious purposes' above the protections from hate conduct. Narrowing the religious purposes exception in line with international law would better protect LGBTIQ people under reformed laws.

## SUMMARY OF RECOMMENDATIONS

### Recommendation 5

Simplify civil vilification provisions by introducing a single incitement provision.

### Recommendation 6

Reform the civil vilification provision by replacing the word 'incites' with the words 'expresses or is reasonably likely in the circumstances to incite'.

### Recommendation 7

Introduce a complementary civil harm-based provision that assesses harm objectively from the perspective of the target group.

### Recommendation 8

Narrow the public conduct exception by replacing 'religious purpose' with a definition that reflects the limited ability for a person to manifest a religious belief under human rights law in 'worship, observance, practice and teaching' and specify that the conduct must have genuine public interest purpose.

# Policing hate conduct

## Hate as a crime

In its current form, the RRTA provides both civil and criminal offences and this is an important element in protecting Victorians from the spectrum of hate conduct. While criminal offences should only apply to the most serious conduct, the current criminal test is too high.

The criminal offences threshold should be revised to prohibit intentional or reckless hate conduct and should prohibit threats or incitement, rather than requiring both.

Currently the criminal offences are listed in the RRTA. To improve the visibility of hate as a crime, the serious vilification offences need to be incorporated into the Crimes Act 1958. This would make it easier for Victoria Police to recognise and enforce these protections.

## Hate symbols

Consideration should also be given to making it a crime to publicly display symbols, images and materials that are designed to incite or spread hate, such as Nazi symbols.

## Strengthening the Commission's role

The Commission can currently receive and resolve complaints of vilification. However, in many circumstances a person will not be able to identify the perpetrator of hate conduct which frustrates the complaints process. In certain circumstances, the Commission should be empowered to compel the provision of documentation to help identify potential perpetrators and resolve complaints.

## Representative complaints

Another important way to strengthen our ability to resolve vilification complaints is to enable representative complaints without naming individual complainants. This would encourage reporting, alleviate the fear of victimisation and improve the redress available for groups who experience hate.

## SUMMARY OF RECOMMENDATIONS

### Recommendation 9

Introduce a single criminal offence for serious vilification focused on intentional or reckless conduct that is likely to vilify someone or threaten violence or property damage; and include an exception for 'private conduct'.

### Recommendation 10

Consider introducing complementary offences to criminalise the possession, distribution or display of hateful material and conduct that is intended or reasonably likely to cause fear for safety or security of property.

### Recommendation 11

Adopt the definition of 'public act' under section 93Z(5) of the Crimes Act 1900 (NSW) for both civil provisions and criminal offences.

### Recommendation 12

Empower the Victorian Equal Opportunity and Human Rights Commission to make an enforceable direction to a person to provide information relevant to a complaint.

### Recommendation 13

Enable representative vilification complaints without the need to name an individual complainant or for individual consent.

### Recommendation 14

Move the serious vilification offences into the Crimes Act 1958 and allow the Commission and Victoria Police to cross-refer matters.

### Recommendation 15

Increase penalties for serious vilification in line with comparable offences in Victoria and other Australian jurisdictions.

# Driving systemic change

## Shifting the burden

The current provisions under the RRTA place a significant burden on individual complainants who have experienced vilification. Giving the Commission a greater role in investigating the underlying causes of hate would help shift the burden away from individuals and help drive systemic change.

Under the EOA, all duty holders have an obligation to try to prevent discrimination, not just deal with complaints when they arise. A similar positive obligation on employers and others to try to prevent hate before it occurs should be included and enforceable in the new anti-vilification framework.

## SUMMARY OF RECOMMENDATIONS

### Recommendation 16

Amend the *Equal Opportunity Act 2010* to extend the Commission's functions and powers to the regulation of vilification, including to issue practice guidelines, undertake research, conduct legal interventions, undertake compliance reviews, prepare action plans and conduct investigations.

### Recommendation 17

Reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers, including own-motion public inquiries, the power to compel attendance, information and documents for any purposes of an investigation or public inquiry, and to seek enforceable undertakings and issue compliance notices.

### Recommendation 18

Consider extending the positive duty under the *Equal Opportunity Act* to vilification, accompanied by strengthened functions and powers for the Commission to effectively regulate vilification.

# A strong policy response to prevent hate

## Greater awareness and education

Our work with communities to reduce racism, help members of Victoria's multicultural and multifaith communities understand Victoria's legal framework and exercise their rights has shown the important role of education in dealing with discrimination and vilification. Supporting reforms to Victoria's anti-vilification protections with education and a public awareness campaign would be vital for people to understand what hate is, its impact and what protections and pathways are available to seek redress.

Tailored training, too, will be vital for Victoria Police members, to help them understand the reforms, identify hate conduct and address it effectively.

## Analysing data and understanding trends

Underpinning these proposed reforms is the need for ongoing research, data collection and analysis to understand the prevalence and impact of hate. Agencies will need to work together to collect and share relevant data to inform their decisions and initiatives.

## SUMMARY OF RECOMMENDATIONS

### Recommendation 19

Fund the Commission and other relevant organisations to provide education and support, and develop targeted educational resources.

### Recommendation 20

Fund a public awareness campaign to promote diversity and social cohesion in Victoria.

### Recommendation 21

Fund tailored education for police, prosecutors and judicial officers on hate conduct and vilification laws.

### Recommendation 22

Fund ongoing research on hate conduct and crime in Victoria, including emerging issues such as online hate.

### Recommendation 23

Develop a comprehensive strategy for collecting, monitoring and reporting government data on hate conduct and crime in Victoria.

## Contact us

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