

Submission to Victorian Inquiry into Anti-Vilification Protections

The Committee Manager
Legislative Assembly Legal and Social Issues Committee
Parliament House, Spring St
East Melbourne VIC 3002
Submitted via: avpinquiry@parliament.vic.gov.au

Thursday 19 December 2019

To the Committee

Inquiry into Anti-Vilification Protections

Thank you for the opportunity to make a submission on this important subject.

I do so as a long-term advocate for the lesbian, gay, bisexual, transgender and intersex (LGBTI) community, having previously served on the Committee of Management of the Victorian Gay & Lesbian Rights Lobby (2004-05, and 2007).

In this submission, I will primarily focus on term of reference 8: 'Possible extension of protections or expansion of protection to classes of people not currently protected under the existing Act.'

As the Committee is aware, Victoria currently only provides protection against vilification on the basis of two attributes – race (section 7) and religion (section 8) – under the *Racial and Religious Tolerance Act 2001* (Vic).

From an LGBTI perspective this is incredibly disappointing, especially because the similar absence of LGBTI anti-vilification protections under Commonwealth law, which only covers race,ⁱ means that lesbian, gay, bisexual, transgender and intersex Victorians currently have no vilification protections at either level.

This stands in contrast to the laws of several other Australian jurisdictions.

For example, Tasmania protects against 'incite[ment of] hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of sexual orientation,ⁱⁱ gender identityⁱⁱⁱ and intersex variations of sex characteristics.^{iv}

Tasmania's best practice legislation also prohibits 'conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute', which again includes sexual orientation, gender identity and intersex variations of sex characteristics.^v

The Australian Capital Territory protects against 'incite[ment of] hatred toward, revulsion of, serious contempt for, or severe ridicule of' persons on the basis of gender identity,^{vi} intersex status^{vii} and sexuality.^{viii}

Although I note that intersex advocates have called for protection of the attribute of ‘sex characteristics’,^{ix} rather than ‘intersex status’, reflecting both the biological rather than identity-based nature of variations of sex characteristics, and to promote consistency with the *Yogyakarta Principles plus 10*.^x

Queensland also prohibits the ‘incite[ment of] hatred towards, serious contempt of, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.’^{xi}

Meanwhile, NSW has adopted two separate, and in some ways contradictory, approaches to vilification. It provides civil protection against vilification (which includes ‘incite[ment of] hatred towards, serious contempt for, or severe ridicule of’) to binary^{xii} transgender people,^{xiii} and lesbians and gay men.^{xiv}

On the other hand, in 2018 NSW Parliament amended the *Crimes Act 1900* to provide that ‘[a] person who, by public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence’ and nominated sexual orientation,^{xv} gender identity^{xvi} and intersex status.^{xvii}

Overall, then, LGBTI people are protected against vilification in both Tasmania and the Australian Capital Territory, LGBT people are protected in Queensland, and lesbians, gay men and some trans people have access to civil protection in New South Wales, while all LGBTI people are covered by the narrower criminal offence of ‘publicly threatening or inciting violence’ in that state.

Of course, the fact other jurisdictions have adopted a different approach to this issue is not necessarily a compelling argument that Victoria should do the same. However, I do support such an expansion for two main reasons.

First, in principle, there is no reason why vilification on the basis of race or religion should be treated any differently to vilification on the basis of sexual orientation, gender identity or sex characteristics.

Vilification on any of these attributes is serious, and racial or religious vilification is no more serious than anti-LGBTI vilification. This is especially so given the harm caused by each type of vilification can be severe, and therefore the conduct which contributes to this harm should be prohibited, irrespective of whether it is racist, anti-religious or homophobic, biphobic, transphobic or intersexphobic.

Second, in practice, lesbian, gay, bisexual, transgender and intersex Australians remain exposed to unacceptably high rates of discrimination and vilification on the basis of who they are.

This was particularly demonstrated during the Commonwealth Government’s 2017 Same-Sex Marriage Postal Survey, and its lingering aftermath.

This unnecessary, wasteful and divisive vote on the rights of a minority group encouraged people to 'have their say' about LGBTI Australians, and inevitably (and, it should be noted, entirely predictably) stirred up significant amounts of public homophobia, biphobia, transphobia and intersexphobia against us.

Sadly, once the genie of anti-LGBTI bigotry was deliberately let out of the bottle by the Turnbull Liberal-National Government, it will take the rest of us many years, if not decades, of concerted effort to put it back in again.

This can be seen by the ongoing hate-based campaign targeting trans and gender diverse people, and especially trans children, which appears on an almost daily basis in our nation's newspapers, and elsewhere.

As we enter the 2020s, the homophobia, biphobia, transphobia and intersexphobia whipped up by the Commonwealth Government in the last decade still haunts us, and will likely continue to do so for some time yet.

For both of these reasons, principled and practical, I urge the Victorian Parliament to follow the lead of other jurisdictions and introduce vilification protections on the basis of sexual orientation, gender identity and sex characteristics.

Recommendation 1: That the *Racial and Religious Tolerance Act 2001 (Vic)* be amended to prohibit vilification on the basis of:

- **sexual orientation**
- **gender identity, and**
- **sex characteristics.**

I note that the Racial and Religious Tolerance Amendment Bill 2019, introduced by Fiona Patten MLC, proposes to do exactly that. It also proposes to add gender, and disability, to the list of attributes that would be protected against vilification under that legislation.

While I am not an expert on gender or disability-based vilification, for (at least) the first of the reasons outlined above, I can see no good reason why Victorians should not also be protected against vilification on the basis of these attributes.

Recommendation 2: That the *Racial and Religious Tolerance Act 2001 (Vic)* be amended to prohibit vilification on the basis of gender and disability.

One final issue I would like to address in this submission also arises through Ms Patten's Racial and Religious Tolerance Amendment Bill 2019, and specifically relates to proposed amendments to section 24 of the principal Act which creates the offence of serious racial vilification.

These amendments would add the words 'or recklessly' to, and remove the words 'the offender knows' from, the fault element of this offence.

I support both changes. The first change would help create consistency with the offences established in other jurisdictions (including the recently-introduced NSW *Crimes Act 1900* provisions).

The second would remove the 'offender knows' subjective test from this offence, which is important because such harmful conduct should be prohibited irrespective of whether the specific offender knew that was the likely outcome.

Recommendation 3: That serious vilification offences in the *Racial and Religious Tolerance Act 2001* (Vic) be amended to prohibit intentionally or recklessly engaging in conduct that is likely to incite hatred, or to threaten, or incite others to threaten, physical harm or harm to property.

Thank you for taking this submission into consideration as part of this inquiry. Please do not hesitate to contact me, at the details provided, should you require additional information.

Sincerely

Alastair Lawrie

████████████████████
████████████████████
██
████████████████████

Footnotes:

- ⁱ Section 18C *Racial Discrimination Act 1975* (Cth).
- ⁱⁱ Section 19(c) *Anti-Discrimination Act 1998* (Tas).
- ⁱⁱⁱ Section 19(e) *Anti-Discrimination Act 1998* (Tas).
- ^{iv} Section 19(e) *Anti-Discrimination Act 1998* (Tas).
- ^v Section 17(1) *Anti-Discrimination Act 1998* (Tas).
- ^{vi} Section 67A(1)(b) *Discrimination Act 1991* (ACT).
- ^{vii} Section 67A(1)(d) *Discrimination Act 1991* (ACT).
- ^{viii} Section 67A(1)(g) *Discrimination Act 1991* (ACT).
- ^{ix} *Darlington Statement*, March 2017, Article 9: ‘We call for effective legislative protection from discrimination and harmful practices on grounds of sex characteristics.’
- ^x Which defines sex characteristics 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.’ *Yogyakarta Principles plus 10*, 10 November 2017.
- ^{xi} Section 124A *Anti-Discrimination Act 1991* (Qld).
- ^{xii} Because the definition of transgender in section 38A only protects a person:
- (a) ‘who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
 - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex...’
- ^{xiii} Section 38S *Anti-Discrimination Act 1977* (NSW).
- ^{xiv} Section 49ZT *Anti-Discrimination Act 1977* (NSW).
- ^{xv} Section 93Z(1)(c) *Crimes Act 1900* (NSW).
- ^{xvi} Section 93Z(1)(d) *Crimes Act 1900* (NSW).
- ^{xvii} Section 93Z(1)(e) *Crimes Act 1900* (NSW).