

thorneharbour

health*

Submission to the Victorian Parliament's Legal and Social Issues Committee:

Inquiry into anti-vilification protections

20 December 2019

Thorne Harbour Health

Thorne Harbour Health is one of Australia's largest community-controlled health service providers for people living with HIV, and the lesbian, gay, bisexual, trans and gender diverse, and intersex (LGBTI) communities. Thorne Harbour Health primarily services Victoria and South Australia, but also leads national projects. Thorne Harbour Health works to protect and promote the health and human rights of LGBTI people and all people living with HIV.

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1. Introduction

Thorne Harbour Health welcomes the opportunity to provide feedback to the Victorian Parliament's Legal and Social Issues Committee inquiry into current anti-vilification laws, their possible expansion, and/or extension of protections beyond existing classes.

People from lesbian, bisexual, trans and gender diverse, and intersex (LGBTI) communities, as people living with HIV or experiencing AIDS, require protection under Victoria's anti-vilification laws.

A significant body of evidence indicates the sustained verbal abuse experienced by LGBTI people puts them at greater risk of poor mental health. For example, in a study of young LGBTI Australians, twice the number of respondents who had experienced verbal abuse compared to those who had not experienced abuse reported attempted suicide.¹

In its seventeen years of operation, there have been only two successful cases of vilification before VCAT, and only one prosecution of serious vilification by Victoria Police.²

This submission briefly outlines experiences of vilification felt by LGBTI people and relevant Commonwealth and Victorian legislation. It supports the need to expand protected attributes, lower the motivation test for prejudice-motivated crime, lower the incitement test for vilification, add a new vilification test, and suggests ways to improve the investigation and reporting of vilification.

It is likely that within the period of this inquiry, the Commonwealth Government will present a package of bills relating to religious freedom, which will affect the operation of existing Commonwealth and State legislation. This submission refers to one relevant aspect of the second exposure draft of the *Religious Discrimination Bill 2019*.

¹ Lynne Hillier et al, 'Writing themselves in 3: the third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people,' Australian Research Centre in Sex, Health and Society, La Trobe University, Melbourne.

² Victorian Equal Opportunity and Human Rights Commission, 'Fact sheet 1 on reforming hate laws: How does the RRTA work?'

2. Summary of recommendations

1. Conduct an inquiry into instances of historical and current hate conduct against people on the basis of their sexual orientation or gender identity.
2. Anti-vilification protections based on sexual orientation, gender identity, intersex status, HIV and AIDS status, gender and disability should be located in a separate part of the *Equal Opportunity Act 2010* that is not confined to certain areas of public life, rather than extending the *Racial and Religious Tolerance Act 2001*.
3. Refer to “intersex status” or “people born with variations in sex characteristics” instead of “sex characteristics” if the intention is to make having an intersex variation a protected attribute.
4. Adopt the definition of gender identity used in the *Racial and Religious Tolerance Bill 2019*.
5. Consider signal standalone and sentence enhancement provisions for prejudice-motivated crime.
6. Lower the motivation test for prejudice-motivated crime to that which is “reasonably likely to have been motivated” by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.
7. Develop prosecutorial guidelines for prejudice-motivated crime.
8. There should not be criminal penalties for vilification.
9. Lower the incitement test for unlawful vilification to prohibit conduct that is “reasonably likely to incite” hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons.
10. Enact a provision that makes it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or a class of persons.
11. Amend the *Equal Opportunity Act 2010* to reinstate the powers of the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries, issue compliance notices and enter into enforceable undertakings.
12. Consider requiring social media platforms to implement an online reporting tool that enables users to report alleged incidents of prejudice-motivated conduct directly to the Victorian Equal Opportunity and Human Rights Commission.
13. If recommendation 12 is adopted then adequately resource VEOHRC to manage the online reporting caseload.
14. Do not support the use of geoblocking technology to regulate online speech and expression.
15. Fund third party online reporting mechanisms to cover vilification based on sexual orientation, gender identity, intersex status, and HIV and AIDS status, and to provide these reports to appropriate authorities where consent is given.

3. Background

3.1. LGBTI experiences of vilification

Vilification has a significant impact on the mental health of LGBTI people, who have a long history of experiencing vilification based on their sexual orientation, gender identity, or intersex status. The vilification of people living with HIV or experiencing AIDS is also associated with both HIV stigma and the vilification of gay and bisexual men.

In the 1980's and 1990's, the prevalence of gay-bashings became more apparent and commonplace in Australia.³ The first successful use of the homosexual advance (or 'gay-panic') defence in a murder case occurred in 1991.⁴ This, along with the historical criminalisation of homosexual acts, shows how the law once enshrined prejudice and discrimination. Thankfully, the law has changed for the better.

Premier Daniel Andrews and Police Commissioner Graham Ashton have both acknowledged the damage past injustices have had on LGBTI people, and issued apologies on behalf of the Victorian Government⁵ and Victoria Police.⁶ However, we still have some way to go to ensure LGBTI people are equal and adequately protected under the law.

A study conducted by The Australia Institute and National LGBTI Health Alliance of nearly 10,000 LGBTIQ Australians, families and friends reflected on the time of the postal survey.⁷ The study found that verbal abuse and physical assaults experienced by the community more than doubled in the three months following the announcement of the postal survey compared with the prior six months. Subsequently, rates of depression, anxiety and stress increased by a third during the same period.

The pervasive nature of vilification can 'diminish dignity, self-worth and identity, and feelings of safety and belonging.'⁸ 'Almost 80% of young trans people had self-harmed and almost half had

³ Seb Starcevic, 'Streets of shame: The victims of Victoria's secret crime wave' *Herald Sun* (1 March 2019) <<https://www.heraldsun.com.au/truecrimeaustralia/streets-of-shame-the-victims-of-victorias-secret-crime-wave/news-story/07c45cb7b27fd1ae90afcd3b44d0718a>>

⁴ Seb Starcevic, 'Why Victoria needs to confront its homophobic past' *Star Observer* (10 October 2019) <<https://www.starobserver.com.au/news/national-news/victoria-news/why-victoria-needs-to-confront-its-homophobic-past-seb-starcevic/188029>>

⁵ Premier Daniel Andrews, 'State apology to those convicted under unjust laws against homosexual acts – Premier's speech' (24 May 2016) <<https://www.premier.vic.gov.au/apology-to-those-convicted-under-unjust-laws-against-homosexual-acts/>>

⁶ Christopher Kelly, 'Victoria Police Commissioner Apologises for Historical Persecutions of Gay Men', *Star Observer* (19 August 2019) <<https://www.starobserver.com.au/news/national-news/victoria-news/victoria-police-commissioner-apologises-for-historical-prosecutions-of-gay-men/185521>>

⁷ Saan Ecker and Ebony Bennett, 'Preliminary results of the Coping with marriage equality debate survey: Investigating the stress impacts associated with the Australian marriage equality debate during the lead up to the postal survey results announcement' (December 2017) The Australia Institute and National LGBTI Health Alliance.

⁸ *Ibid* pp.3, 13.

attempted suicide, as a result of their experiences of discrimination, violence and bullying'.⁹ The Australian Human Rights Commission recently reported that 6 in 10 LGBTI people experienced verbal homophobic abuse and 1 in 5 experienced physical abuse in a 12-month period.¹⁰

As these examples demonstrate, sexually and gender diverse people are historically, and to some extent still marginalised and vulnerable communities, targeted because of their attributes. These communities require protection.

Recommendation 1

Conduct an inquiry into instances of historical and current hate conduct against people on the basis of their sexual orientation or gender identity.

3.2. Victorian legislation

It is unlawful under the *Equal Opportunity Act 2010* (Vic) (hereafter EOA) for someone to discriminate against a person on the basis of their having an actual or perceived protected attribute. Eighteen personal attributes are protected, alongside personal association within someone who has one of these attributes, including sexual orientation, gender identity, lawful sexual activity, and expunged homosexual conviction. There are no explicit protections for intersex status or HIV and AIDS status although these could fall under other protected attributes. The EOA does not extend protection outside specified areas of public life.

The *Racial and Religious Tolerance Act 2001* (Vic) (hereafter RRTA) makes it unlawful for a person to vilify another person based on their race or religion. Unlike the EOA, the RRTA does not include sexual orientation or gender identity as protected attributes and applies to public spaces more broadly.

The separation of discrimination and vilification legislation in Victoria provides beneficial conceptual clarity. However, the discrepancy of protected attributes between the two is problematic, and there is an argument for why the two should be consolidated. At a minimum, people who are protected from discrimination on the basis of protected attributes in the EOA should also be protected from vilification on the basis of those attributes.

⁹ Anna Brown and Lee Carnie, 'End the Hate: Responding to Prejudice Motivated Speech and Violence Against the LGBTI Community,' Human Rights Law Centre (2018) 14.

¹⁰ Ibid p.8.

3.3. Commonwealth legislation

Commonwealth anti-discrimination laws include, but are not limited to:

- the *Sex Discrimination Act 1984* (Cth), which deals with direct and indirect discrimination on the grounds of sex, marital or relationship status, pregnancy, potential pregnancy, breastfeeding, sexual orientation, gender identity and intersex status; and
- the *Racial Discrimination Act 1975* (Cth), which was amended in 1995 to include provisions dealing with racial hatred: making it unlawful to insult, humiliate, offend or intimidate another person or group in public on the basis of their race. This is a broader definition pertaining to vilification than that contained in the RRTA.

Commonwealth anti-discrimination laws currently prevent the possibility of incompatibility arising with State or Territory anti-discrimination laws. They do this by specifying that Commonwealth anti-discrimination laws are not intended to exclude or limit the operation of the State or Territory anti-discrimination laws that are capable of operating concurrently with them.

By contrast, section 42 of the second exposure draft of the *Religious Discrimination Bill 2019* would explicitly override State and Territory anti-discrimination laws and prevent concurrent operation, in particular preventing individuals from making complaints about certain 'statements of belief' (for example, offensive, humiliating, or insulting statements aimed at LGBTI individuals or communities), which would otherwise be unlawful in some jurisdictions.¹¹ Thorne Harbour Health does not support s42 of *Religious Discrimination Bill 2019*.

3.4. Vilification enquiries and complaints

Data from the Victorian Equal Opportunity and Human Rights Commission shows that in 2018/19 there were 9,868 issues raised through enquiries, including 47 for racial vilification and 24 for religious vilification (0.7% of total enquiries), and of that 1877 complaints were made, of which 4 related to racial vilification and 5 related to religious vilification (0.5% of total complaints).¹²

¹¹ Notably this provision does not appear to include an explicit override of the RRTA as it is not included in the meaning of anti-discrimination law in the *Fair Work Act 2009*.

¹² Victorian Equal Opportunity and Human Rights Commission, Annual Report 2018/19, Appendix 1: Complaint and enquiries data.

4. Protected attributes

4.1. Scope of protected attributes

Available data indicates a significant need for effective anti-vilification provisions to protect LGBTI people. The Australian Human Rights Commission has found that almost 75% of LGBTI people had experienced some type of bullying, harassment or violence on the basis of their sexual orientation, gender identity or sex characteristics.¹³

A 2010 study found that LGBTI young people report experiencing verbal homophobic abuse (61%), physical homophobic abuse (18%) and other types of homophobia (9%), including cyberbullying, graffiti, social exclusion and humiliation.¹⁴

One criticism of the RRTA is that in its 17 years of operation there have been relatively few complaints made under the Act. We note that broadening the scope of protected attributes will inherently have the effect of increasing the number of complaints made under the RRTA, as it will expand the number of protected attributes for which individuals can lodge complaints.

Vilification and discrimination are conceptually distinct. While having separate anti-discrimination and anti-vilification legislation helps prevent the conflation of the two, the EOA is preferred for its accessible and well-established complaints model, as well as the flexibility it affords VCAT to order remedies to unlawful conduct.¹⁵ It is however essential that if anti-vilification protections in the RRTA are moved to the EOA that they are located in a separate part of the EOA that does not confine these protections to certain areas of public life.

Recommendation 2

Anti-vilification protections based on sexual orientation, gender identity, intersex status, HIV and AIDS status, gender and disability should be located in a separate part of the *Equal Opportunity Act 2010* that is not confined to certain areas of public life, rather than extending the *Racial and Religious Tolerance Act 2001*.

¹³ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report* (2015).

¹⁴ Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010).

¹⁵ Bronwen Gray, William Leonard and Marissa Jack, 'With Respect: A Strategy for Reducing Homophobic Harassment in Victoria' (2006) Joint Working Group of the Attorney-General's and Health Minister's Advisory Committees on GLBTI Issues, 36.

4.2. Terminology

The *Yogyakarta Principles plus 10* 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.”¹⁶ This is broader than the intended coverage of people with intersex variations (also known as *people born with variations in sex characteristics*).

Recommendation 3

Refer to “intersex status” or “people born with variations in sex characteristics” instead of “sex characteristics” if the intention is to make having an intersex variation a protected attribute.

The definition of gender identity in the *Equal Opportunity Act 2010* (Vic) is outdated. A more contemporary definition should be adopted for Victoria’s anti-discrimination and anti-vilification legislation.

Recommendation 4

Adopt the definition of gender identity used in the *Racial and Religious Tolerance Bill 2019*.

¹⁶ Yogyakarta Principles plus 10, preamble, p.6. <https://yogyakartaprinciples.org/wp-content/uploads/2017/11/A5_yogyakartaWEB-2.pdf>

5. Prejudice-motivated crime

The Human Rights Law Centre's *End the Hate* report detailed the lived experiences of LGBTI people who have been victims of hate, and suggested legislative reforms to combat hate conduct. The report found gaps in legislative protection¹⁷ and regulatory responses, including issues of under-reporting, failure to identify and record crimes as hate crimes by police, difficulties locating perpetrators, reluctance by prosecutors to raise the provision and the high threshold of proving prejudice motivation in court.¹⁸

We support signal standalone and sentence enhancement provisions for prejudice-motivated crime. Currently, however, the motivation test for prejudice-motivated crime under s5(2)(daaa) of the *Sentencing Act 1991* (Vic) is too high and difficult to prove. We support a reasonableness test for determining whether a crime was prejudice-motivated. For example, if someone shouts a homophobic or transphobic slur while assaulting someone they believe to be gay or trans or gender diverse, then it can reasonably be assumed that their motivation was prejudice-motivated.

In general, and as evidenced by the fact there has only been one successful prosecution of serious vilification by Victoria Police in the 17 years the RRTA has been in operation, the criminal law is ineffective at dealing with vilification. We do not support new criminal laws for vilification, or lowering the bar or test for the offence of serious racial and religious vilification in the RRTA.

Recommendation 5

Consider signal standalone and sentence enhancement provisions for prejudice-motivated crime.

Recommendation 6

Lower the motivation test for prejudice-motivated crime to that which is “reasonably likely to have been motivated” by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated.

¹⁷ Anna Brown and Lee Carnie, op cit. 9 pp.22-25.

¹⁸ Ibid p.2.

Recommendation 7

Develop prosecutorial guidelines for prejudice-motivated crime.

Recommendation 8

There should not be criminal penalties for vilification.

6. Vilification tests

6.1. Incitement test for vilification

The RRTA's incitement test for vilification is too high and difficult to prove.

Freedom of speech and expression is a human right and fundamental liberal principle, and is essential to the maintenance of free, pluralistic societies. That said, this right is not absolute and it is appropriate to limit freedom of speech and expression, within reason and in certain circumstances, in order to protect people from harm. Importantly, any limit imposed on public speech and expression should set a high bar for unlawful conduct.

While over time psychological harm can manifest from statements that are merely offensive and insulting, one cannot definitively link *specific instances* of such statements *made in isolation* to psychological harm, as this harm may not manifest for some time afterward, and could be the result of many other confounding factors.¹⁹ However, this is largely beside the point, as the aim is to prevent harm as much as it is to provide justice for harm already done, so it is enough to – within reason and in certain circumstances – prohibit foreseeably harmful public speech and expression. However, such conduct ought to be likely to result in tangible, immediate or near immediate harm that can be clearly linked said conduct. This is only possible in reference to egregious conduct that the current high bar for vilification provisions in the RRTA makes unlawful.

One-off or infrequent, offensive or insulting statements made by different individuals at different times in different places all remain foreseeably harmful, however, to seek to prohibit such conduct merely for being foreseeably harmful risks charges of 'political correctness gone mad', which would undermine the reform process. It also raises the question of how laws prohibiting such conduct, engaged in frequently and by many people, could be enforced, let alone enforced in a balanced way. Something being foreseeably harmful in itself is not a sufficient condition for it being unlawful, so foreseeable harm is not an appropriate test for what should constitute vilification. Rather, certain public speech or expression should be unlawful because it carries with it a *high risk of immediate or near immediate harm*.

While we support a high bar in the context of limiting public speech and expression (i.e. serious contempt, revulsion or serious ridicule), we believe the incitement test for meeting this bar is currently too high and difficult to prove. We note that the private member's bill introduced by Fiona Patten MLC seeks to alter the incitement test by amending section 7(1) of the Act to change "incites" to "is likely to incite".

¹⁹ If such statements were made repeatedly, and over a sustained period, by one person against another person or group of persons – for example, by someone who is emotionally abusive towards a partner, or someone who repeatedly verbally harasses members of the Jewish community – then any psychological harm felt by the victim or victims could more clearly be linked to the statements made by the abuser.

In general, low bars with a low threshold for prohibited conduct would appear to necessitate broad exceptions. We support the approach of maintaining a high (qualifier) bar with a lower (threshold) test for meeting that high bar. It is notable that this lower “likely to incite” threshold is currently enacted for the offences of serious racial and religious vilification under ss25-26 of the Act.

Recommendation 9

Lower the incitement test for unlawful vilification to prohibit conduct that is “reasonably likely to incite” hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons.

6.2. Harassment model

Some who view it as being preferable to the incitement test have proposed the harassment model.²⁰ However, there is a risk that this model sets too low a bar for prohibited conduct. If the goal is to cover actual particular behaviour rather than merely the incitement or likely incitement of said particular behaviour, then provisions could be enacted that make it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or class of persons. This would retain the high bar that currently exists for limiting public expression and speech while also dealing directly with particular problematic behaviour.

Recommendation 10

Enact a provision that makes it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or a class of persons.

²⁰ Bronwen Gray, William Leonard and Marissa Jack (2006) op cit.14 p.43.

7. Investigations and reporting

7.1. Restoring VEOHRC's powers

The Victorian Equal Opportunity and Human Rights Commission has an important role enforcing Victoria's human rights legislation. The rolling back of VEOHRC's powers in 2011 has hindered this role. This has diminished VEOHRC's ability to protect LGBTI Victorians. The powers enabling VEOHRC to investigate system discrimination and take enforcement action should be fully restored.

Recommendation 11

Amend the *Equal Opportunity Act 2010* to reinstate the powers of the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries, issue compliance notices and enter into enforceable undertakings.

7.2. Online and third party reporting

An LGBTI Legal Services report found an 'increasing prevalence of hateful comments on [social media] newsfeeds'.²¹ However, it also noted that 'the "virtual status" of these offences renders people less likely to take action',²² and that the 'lack of confidence that a sympathetic response will be achieved' or complaints taken seriously renders people less likely to take action and causes distress.²³ The online vilification of LGBTI and other vulnerable communities necessitates a response.

Recommendation 12

Consider requiring social media platforms to implement an online reporting tool that enables users to report alleged incidents of prejudice-motivated conduct directly to the Victorian Equal Opportunity and Human Rights Commission.

²¹ Emma Fell et al, *Like Love Project: Vilification Protections for LGBTIQ People* (LGBTI Legal Service, 2017) 3.

²² Emma Fell et al, *Like Love Project: Vilification Protections for LGBTIQ People* (LGBTI Legal Service, 2017) 5 referencing Matthew Williams, 'Virtually Criminal: Discourse, Deviance and Anxiety within Virtual Communities' (2000) 13 *International Review of Law, Computers and Technology* 103.

²³ Emma Fell et al, *Like Love Project: Vilification Protections for LGBTIQ People* (LGBTI Legal Service, 2017) 6 referencing Katherine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 29(2) *UNSW Law Journal* 507.

Recommendation 13

If recommendation 12 is adopted then adequately resource VEOHRC to manage the online reporting caseload.

Recommendation 14

Do not support the use of geoblocking technology to regulate online speech and expression.

The *End the Hate* report noted that, in reference to hate crime, speech and conduct against LGBTI people, “the majority of prejudice motivated conduct is not reported to police (and therefore not recorded as a prejudice motivated crime or incident), the exact prevalence of this type of behaviour remains unclear.”²⁴

LGBTI people are more likely to report vilification through people and systems they trust will be understanding and responsive. For example, Victoria’s Anti-Violence Project established in 1997 offers an online reporting mechanism. Third party reporting mechanisms such as this one should be supported to improve reporting of vilification against LGBTI people.

Recommendation 15

Fund third party online reporting mechanisms to cover vilification based on sexual orientation, gender identity, intersex status, and HIV and AIDS status, and to provide these reports to appropriate authorities where consent is given.

²⁴ Anna Brown and Lee Carnie, op cit. 9 p.1.

8. Conclusion

Victoria has the opportunity to protect LGBTI people and people living with HIV or experiencing AIDS from vilification. To that end, this submission has proposed the expansion of the scope of protected attributes under Victoria's anti-vilification legislation to include sexual orientation, gender identity, intersex status, and HIV and AIDS status. It has also recommended the inclusion of gender and disability as protected attributes.

It is essential that if the RRTA is combined with the EOA that its vilification provisions are contained in a separate part of the EOA and are not limited to certain areas of public life. The incitement test for vilification should be lowered to that which is "reasonably likely to incite" hatred against, serious contempt for, or revulsion or severe ridicule of a person or class of persons. However, limitations of the incitement test necessitate a fresh approach to anti-vilification laws. We have recommended a new provision that targets particular behaviour rather than incitement, namely one that makes it unlawful vilification to engage in conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or a class of persons. Finally, reinstatement of the powers of the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries, issue compliance notices and enter into enforceable undertakings is necessary.