



Legislative Assembly Legal and Social Issues Committee
Inquiry into anti-vilification protections
Parliament House, Spring St
East Melbourne VIC 3002

17 January 2020

Dear Legislative Assembly Legal and Social Issues Committee

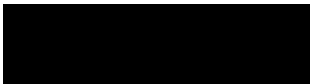
Inquiry into Anti-Vilification Protections

The LGBTIQ Legal Service and Liberty Victoria are grateful for the opportunity to contribute a joint submission to the inquiry into anti-vilification protections.

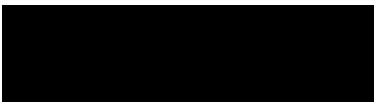
Please find attached our submission, which is intended to be a public submission.

If you require any further information, please do not hesitate to contact us on the details below.

Yours faithfully

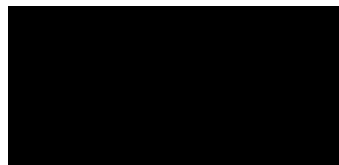


Julian Burnside AO QC
President
Liberty Victoria

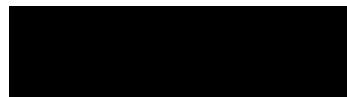


Gemma Cafarella
Chair, Government Regulation &
Equality Committee

Liberty Victoria
Ph: 03 9670 642
Email: info@libertyvictoria.org.au
www.libertyvictoria.org.au



Annie Davis
Principal Lawyer and Executive Officer
St Kilda Legal Service Inc



Sam Elkin
Coordinating Lawyer
LGBTIQ Legal Service

St Kilda Legal Service
Ph: 03 8598 6635
Email: sam@skls.org.au
www.LGBTIQlegal.org.au



Joint submission of Liberty Victoria and the St Kilda Legal Service's LGBTIQ Legal Service to the Victorian Parliament's Legal and Social Issues Committee:

Inquiry into Anti-Vilification Protections

17 January 2020

Introduction

This is a joint submission between Liberty Victoria and the St Kilda Legal Service's LGBTIQ Legal Service (**the LGBTIQ Legal Service**). It is a public submission.

Who are we?

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information can be found at www.libertyvictoria.org.au.

St Kilda Legal Service (**SKLS**) provides free and accessible legal services to members of the community within the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. The Legal Service is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities.

The LGBTIQ Legal Service is a state-wide service that provides advice and representation to the LGBTIQ community on a wide-range of legal issues, including housing, discrimination, employment matters and sexual harassment matters. Further information can be found at www.LGBTIQlegal.org.au

The focus of this submission

This submission will focus upon the impact of vilification on people who are lesbian, gay, bisexual, trans and gender diverse, queer, and people born with variation in sex characteristics (**LGBTIQ**).

There is a wealth of information – in the form of both studies and anecdotal evidence – to demonstrate that LGBTIQ people experience a significant and unacceptable level of vilification and abuse in their daily lives. The examples shared with us by members of the LGBTIQ community and set out in this submission provide current and real-life examples to justify greater protection for this community under Victoria's anti-vilification laws.

While our submission will focus on LGBTIQ people, protection against vilification is a matter that has the capacity to affect a broad range of minority groups in Victoria. We particularly acknowledge the lived experience of Aboriginal and Torres Strait Islander people, people from diverse ethnic and cultural backgrounds, and people with disability, as well as their calls for greater protection from vilification. Importantly, many people from the LGBTIQ community are also members of these communities. Accordingly, we emphasise the importance of any submissions made by individuals and organisations who represent people from these communities.

LGBTIQ experiences of vilification

Vilification is defined as behaviour that incites hatred, serious contempt, revulsion or severe ridicule. It can include derogatory or intimidating behaviour, such as the use of homophobic or transphobic slurs.

A wealth of information demonstrates that LGBTIQ people experience a significant level of vilification in their daily lives. A 2015 report by the Australian Human Rights Commission, for example, found that more than 70% of LGBTIQ people have been attacked, bullied or harassed.¹ The 2006 *Private Lives* survey similarly found that 59.3% of participants who identified as LGBTIQ experienced personal insults or verbal abuse and 13.7% experienced physical attacks or other kinds of violence.²

Vilification has a significant impact on the lives and wellbeing of LGBTIQ people.

The LGBTI Health Alliance notes that LGBTIQ young people aged 16 to 27 are five times more likely to attempt suicide in their lifetime, that transgender people aged 18 and over are nearly eleven times more likely to attempt suicide, and that LGBTIQ young people who experience abuse and harassment are even more likely to attempt suicide.³ LGBTIQ people experience significantly higher rates of mental health disorders including depression and anxiety, and those who have experienced verbal abuse, physical abuse or harassment experience high levels of psychological distress.⁴

The statistics are reinforced by the stories provided to us by members of the LGBTIQ community. For example:⁵

- Hoa, a transgender woman, used a public women's bathroom in her workplace to see that there were stickers on the back of toilet doors that described transgender women as "men in dresses". She was emotionally distressed by the experience, was unable to work for several weeks after the incident, and incurred significant counselling costs.
- Vincent (a cis-gender man) and his partner (also a cis-gender man) were both dressed in feminine attire on public transport. A person approached them and publicly abused them,

¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights* (2015), p 16, at https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf.

² Marian Pitts, Anthony Smith, Anne Mitchell and Sunil Patel, Gay & Lesbian Health Victoria and Australian Research Centre in Sex, Health & Society, *Private Lives: A Report on the Health and Wellbeing of GLBT Australians* (2006), p 51.

³ LGBTI Health Alliance, *The Statistics at a Glance: the Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* (2016), p 2, at <https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>.

⁴ LGBTI Health Alliance, *The Statistics at a Glance: the Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* (2016), pp 4-6, at <https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>.

⁵ Names have been changed to protect confidentiality.

saying that they were “disgusting faggots who should die”. Vincent reported it to the police, who said that it was a “civil matter” and that they could not help.

- Aleksej is a non-binary person who runs a community organisation to support and advocate for trans and gender diverse young people. They received a public message in an online forum that said that “trans people don’t really exist, and they are all just really mentally ill”.
- Abdella is an elderly gay man who lives in a rented flat in a large Victorian country town. He found extremely homophobic and threatening graffiti on the notice board in the common area of his apartment building with a crude drawing of an anal sex act, which was not removed by building management for 3 months, despite his requests. Abdella believed the graffiti was drawn by his neighbour, who had also left abusive messages under his door. The experience left Abdella feeling fearful of his neighbours and increasingly socially isolated.
- During the 2017 marriage equality postal survey it was widely reported in the media that far-right political groups had erected posters around Melbourne that falsely claimed that homosexuality was a “curse of death” and that 92% of children of gay parents suffer abuse.⁶

Vilification, harassment and discrimination reduces the ability of some Victorians to fully participate in and contribute to society. This affects their social outcomes, as experiences of vilification, harassment and discrimination in settings such as healthcare facilities, schools, and housing providers contribute to poor general health and life outcomes, and overall social exclusion.⁷ It also means that the Victorian community loses the opportunity for societal contribution from a diverse range of people.

Current protections

There are currently two primary pieces of legislation that protect people in Victoria from harmful behaviour on the basis of certain personal attributes - the *Racial and Religious Tolerance Act 2001* (Vic) (the RRTA) and the *Equal Opportunity Act 2010* (Vic) (the EOA). The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Victorian Charter**) supplements the protections in the RRTA and the EOA. There are also some protections at the Commonwealth level.

Racial and Religious Tolerance Act

The RRTA makes it unlawful for a person to engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of a person or group of people because of their race or religion.

As the above makes clear, the RRTA provides only limited protections against vilification, namely on the basis of race and religion. The RRTA does not provide any protection for LGBTIQ people, women, or people with a disability – all of whom are the targets of vilification. Accordingly, while LGBTIQ

⁶ <https://www.theguardian.com/australia-news/2017/aug/21/homophobic-anti-marriage-equality-material-surfaces-in-postal-survey-campaign>

⁷ See for example Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights* (2015), p 17 - 19, at https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf.

experienced heightened levels of verbal abuse and physical attacks in the three months following the announcement of the marriage equality postal survey, they could not access legal mechanisms to prevent or address vilification.

The test for vilification

Under the RRTA, conduct is unlawful if it incites hatred, serious contempt, revulsion or severe ridicule about the affected person or class of persons.⁸

Any conduct can constitute vilification. Examples include verbal abuse, online abuse, graffiti, statements at a public meeting or rally, or mocking a race or religion.

This is a relatively high bar that focuses upon the impact of the behaviour on third parties. Importantly, the test does not involve consideration of the impact of the hate on the affected person.

Free speech protections

Section 11 of the RRTA provides that public conduct that is reasonable and done in good faith is not unlawful.⁹ This includes conduct engaged in:

- in the performance, exhibition or distribution of an artistic work;
- in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in:
 - for any genuine academic, artistic, religious or scientific purpose;
 - any purpose that is in the public interest; or
 - in making or publishing a fair and accurate report of any event or matter of public interest.

The RRTA also excepts conduct that occurs in circumstances that may reasonably be taken to indicate that the parties desire it to be heard or seen only by themselves.¹⁰

The consequences of engaging in vilification

As a general rule, the RRTA does not create criminal sanctions for vilification. Instead, a person who claims that another person has engaged in vilification against them is empowered to do two things:

1. Bring a dispute to the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**).¹¹
2. Apply to the Victorian Civil and Administrative Tribunal (**VCAT**).¹² If VCAT is satisfied that a person has engaged in vilification, it may make a range of orders including an order that the

⁸ *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 8.

⁹ *Racial and Religious Tolerance Act 2001* (Vic) s 11.

¹⁰ *Racial and Religious Tolerance Act 2001* (Vic) s 11.

¹¹ *Racial and Religious Tolerance Act 2001* (Vic) Pt 3, Div 1.

¹² *Racial and Religious Tolerance Act 2001* (Vic) Pt 3, Div 2.

person refrain from committing any further vilification or an order that the person compensate the affected person.

The RRTA does, however, impose criminal consequences for ‘serious vilification’.¹³ Serious vilification occurs where a person intentionally engages in conduct that the person knows is likely to:

- Incite hatred and threaten or incite others to threaten physical harm to a person or group of people or their property; or
- Incite serious negative contempt for, revulsion or severe ridicule of a person or group of people.

If a person is found guilty of serious vilification, they face up to 6 months’ imprisonment and/or up to 60 penalty units (\$9,913 as at 1 July 2019).

[Equal Opportunity Act 2010](#)

The EOA makes it unlawful for someone to discriminate against a person on the basis of protected attributes.

Who is protected?

There are eighteen protected attributes set out in s 6 of the EOA. Relevantly to the LGBTIQ community, protected attributes include:

- Gender identity. This is defined to mean:¹⁴
 - the identification on a bona fide basis by a person of one sex as a member of the other sex by:
 - by assuming characteristics of the other sex, whether by means of medical intervention, style of dressing or otherwise; or
 - by living, or seeking to live, as a member of the other sex; or
 - the identification on a bona fide basis by a person of indeterminate sex as a member of a particular sex (whether or not the person is recognised as such):
 - by assuming characteristics of that sex, whether by means of medical intervention, style of dressing or otherwise; or
 - by living, or seeking to live, as a member of that sex.

Due to the definition focusing on living as “one sex” or the “other sex”, it does not include non-binary or gender diverse people who do not identify as either male or female.

The test focuses on the identification of the person who experiences discrimination, rather than the gender expression of that person.

- Lawful sexual activity;
- Sex;
- Sexual orientation; and
- An expunged homosexual conviction.

¹³ *Racial and Religious Tolerance Act 2001 (Vic)* ss 24, 25.

¹⁴ *Equal Opportunity Act 2010 (Vic)* s 4.

It is also unlawful to discriminate against a person based on their association with a person with one of those attributes.

There are no explicit protections for discrimination against people who are born with variations in sex characteristics or people with HIV and AIDS.

The test for discrimination

Discrimination occurs where a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.¹⁵

Discrimination can be direct or indirect. Direct discrimination occurs where a person is treated unfavourably because of a protected attribute. For example:

Lisa is a person who identifies as a lesbian. She applies for a job and is unsuccessful. When she asks for feedback she is told that she wasn't chosen for the job because the employer feels that she would make the other women uncomfortable in the lunch room. Lisa has been discriminated against on the basis of being a lesbian.

Indirect discrimination takes place when an unreasonable requirement, condition or practice is imposed that disadvantages a person or group because of a personal characteristic. For example:

A venue imposes a rule that people with long hair cannot enter. Because a large proportion of women have long hair, this may be indirectly discriminatory against women. Assuming that such a requirement is not reasonable, it will be indirect discrimination.

Conduct that is not covered by the EOA

The EOA does not prohibit all discrimination. The Act works by defining discrimination, and then prohibiting it only in certain defined areas of public life. This includes employment,¹⁶ education,¹⁷ the provision of goods and services,¹⁸ accommodation,¹⁹ clubs,²⁰ sport,²¹ and local government.²²

Accordingly, abusive or harassing behaviour by an individual in public life is not usually covered. For example, discriminatory behaviour by a fellow commuter on public transport - as experienced by Vincent (above) - is not prohibited by the EOA. Similarly, there is no remedy for conduct by a neighbour in Abdella's case (above).

The EOA also provides for a range of general exceptions, including conduct engaged in by a religious body if that conduct is based on the doctrines, beliefs or principles of the religion, or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.²³

¹⁵ *Equal Opportunity Act 2010* (Vic) s 4.

¹⁶ *Equal Opportunity Act 2010* (Vic), Part 4, Div 1.

¹⁷ *Equal Opportunity Act 2010* (Vic), Part 4, Div 3

¹⁸ *Equal Opportunity Act 2010* (Vic), Part 4, Div 4.

¹⁹ *Equal Opportunity Act 2010* (Vic), Part 4, Div 5.

²⁰ *Equal Opportunity Act 2010* (Vic), Part 4, Div 6.

²¹ *Equal Opportunity Act 2010* (Vic), Part 4, Div 7.

²² *Equal Opportunity Act 2010* (Vic), Part 4, Div 8.

²³ *Equal Opportunity Act 2010* (Vic), s 82.

A person may also make an application for an exemption to the EOA. For example, an organisation that provides support to women who have experienced sexual assault may seek an exemption to consider candidates for a job vacancy only if they identify as women.

The consequences of engaging in discrimination

A person who claims that another person has discriminated against them may do two things:

1. Bring a dispute to VEOHRC.²⁴ VEOHRC may provide dispute resolutions services. The dispute resolution process is voluntary and non-binding.
2. Apply to VCAT.²⁵ If VCAT is satisfied that a person or institution has discriminated against another person, it may make a range of orders, including an order that the person or institution refrain from engaging in further discrimination, or an order that the person pay compensation.

The Victorian Charter

The Victorian Charter legislates a range of human rights that may provide some protection to LGBTIQ people. Most centrally, s 8 provides:

8. Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

The Victorian Charter does not, however, regulate the behaviour of all Victorians. It applies only to the Parliament, courts and tribunals, and public authorities.²⁶ This means that if a person is the subject of homophobic slurs from a real estate agent, for example, they cannot utilise the Victorian Charter to enforce their right to be free from discrimination.

Commonwealth legislation

Protection from discriminatory conduct against LGBTIQ people is also available under Commonwealth anti-discrimination laws, including:

1. The *Sex Discrimination Act 1984* (Cth) (**the SDA**), which prohibits discrimination on the grounds of sex, marital or relationship status, pregnancy, potential pregnancy, breastfeeding, sexual orientation, gender identity and intersex status; and

²⁴ *Equal Opportunity Act 2010* (Vic), s 113.

²⁵ *Equal Opportunity Act 2010* (Vic), s 125.

²⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6.

2. the *Racial Discrimination Act 1975* (Cth) (**the RDA**), which makes 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.

At present, the SDA and the RDA state that Commonwealth anti-discrimination laws are not intended to exclude or limit the operation of State-based laws that are capable of operating concurrently with them.²⁷

We note that if the second exposure draft of the *Religious Discrimination Bill 2019* (Cth) (**the RD Bill**) is passed in its current form, State and Territory anti-discrimination laws will be affected. Section 42 of the RD Bill provides that a statement of belief (for example, insulting statements about LGBTIQ people) does not constitute discrimination for the purpose of any anti-discrimination law within the meaning of the *Fair Work Act 2009* (Cth). While this will have the capacity to significantly impact upon State-based anti-discrimination legislation, it would not appear to specifically oust the operation of anti-vilification legislation.

The RD Bill faces significant opposition and it is not certain that it will be passed in its current form. Liberty Victoria and the LGBTIQ Legal Service both oppose the passage of the RD Bill in its current form. Further, it is our view that the erosion of these fundamental rights at a federal level provides a significant impetus for greater protections at a state level.

What reforms are needed?

[Racial and Religious Tolerance Amendment Bill 2019 \(Vic\)](#)

We welcome the amendments proposed in the *Racial and Religious Tolerance Amendment Bill 2019* (Vic) (**the RRTA Amendment Bill**) introduced by Fiona Patten MLC.

[Who should be protected?](#)

As outline above, Victorian laws currently only address vilification on the grounds of race and religion. Given the significant level of vilification experienced by people from LGBTIQ communities, and the impact of that vilification upon them, the law should protect LGBTIQ people (in addition to other groups) from vilification.

We therefore fully support the list of protected attributes that would be included by s 3A of the RRTA Amendment Bill, subject to the following comments and recommendations:

Gender identity

The RRTA Amendment Bill includes “gender identity” as a protected attribute.²⁸ It is our view that it is preferable to make the protected attribute “gender identity or gender expression”, and to adopt the definitions contained in the Tasmanian *Anti-Discrimination Act 1998* (Tas), which are as follows:²⁹

²⁷ *Sex Discrimination Act 1984* (Cth) s 10; *Racial Discrimination Act 1975* (Cth) s 6A.

²⁸ *Racial and Religious Tolerance Amendment Bill 2019* (Vic) s 8.

²⁹ *Anti-Discrimination Act 1998* (Tas), s 3.

gender expression means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity;

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual;

The Tasmanian definitions are inclusive of people who are non-binary or gender-non-conforming, and do not utilise outdated binary notions of gender. The inclusion of gender expression also creates a focus on the expression of the affected person rather than the identity of that person. This would include, for example, a person who engages in “drag” performances but who does not identify as transgender or non-binary.

Sex characteristics

We fully support protection for people who are born with variations in sex characteristics (often referred to as intersex people) from vilification.

The RRTA Amendment Bill defines “sex characteristics” as:³⁰

A person's physical, hormonal or genetic features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, genes, 20 hormones, and secondary sex characteristics.

This is consistent with the principles contained in the *Yogyakarta Principles Plus 10*, which are preferable to the outdated references to “people of indeterminate sex” contained in the EOA.

Recommendation 1: That s 8 of the RRTA Amendment Bill be amended so that s 3A(f) of the Principal Act include “gender expression or gender identity” as a protected attribute.

Recommendation 2: That s 7 of the RRTA Amendment Bill be amended to define “gender expression” and “gender identity” as per the Tasmanian *Anti-Discrimination Act 1998* (Tas), as follows:

gender expression means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity;

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual;

³⁰ *Racial and Religious Tolerance Amendment Bill 2019* (Vic) s 7.

Recommendation 3: Subject to the amendments in recommendations 1 and 2, that the categories of protected attributes in s 8 of the RRTA Amendment Bill be passed into law.

The test for vilification

The incitement test for vilification in the current RRTA is inappropriate for the following reasons:

1. It is too high a bar, and too difficult to prove.
2. It inappropriately focuses on the impact of conduct upon third parties, rather than focusing upon the harm that is caused to the affected person as a result of the conduct.

The RRTA Amendment Bill appropriately intends to address behaviour that “diminishes a person’s dignity, sense of self-worth and belonging to the community”. It also aims to ensure that Victorians from diverse backgrounds and with diverse attributes are able to engage fully in society.³¹ To facilitate that purpose, the definition of vilification should more appropriately focus upon the risk of harm to the affected person.

Accordingly, it is our view that the Act should define ‘vilification’ as:

conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or severely ridiculing of a person or a class of persons.

While it is our view that such conduct should be unlawful, we do not consider that this broader definition be the basis for criminal offending. It is appropriate that criminal offending be reserved for behaviour in which a person intentionally or recklessly engages in conduct that the person knows is likely to incite hatred or threaten physical harm towards a person with a protected attribute, as per s 24 and 25 of the RRTA as amended by s 18 of the RRTA Amendment Bill.

In the alternative, we support the inclusion of “likely to incite” in the place of the current incitement test, as per s 10 of the RRTA Amendment Bill.

Recommendation 4: That the test for vilification contained in s be amended to include conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons.

Recommendation 5: Alternatively to recommendation 4, that the test for vilification be amended to include conduct that is “likely to” incite hatred against, serious contempt for, or revulsion or severe ridicule of, a person or class of persons, as per s 10 of the RRTA Amendment Bill.

Recommendation 6: That the amendments to the offence of serious vilification contained in s 18 of the RRTA Amendment Bill be passed into law.

³¹ *Racial and Religious Tolerance Amendment Bill 2019* (Vic) s 5.

Investigative powers of VEOHRC

There is currently an under-utilisation of anti-vilification laws. In 2018/19, Victorians raised the issue of racial discrimination in only 47 enquiries to VEOHRC, and the issue of religious discrimination was raised on 24 occasions. Of 1,877 complaints made to VEOHRC, only four related to racial vilification and five related to religious vilification. These figures represent less than 0.5% of the total number of complaints received by VEOHRC.³²

The expansion of the range of people who are protected by the laws will likely go some way to addressing the effectiveness and usefulness of anti-vilification laws. The expansion of the test for vilification beyond the current incitement test will also arguably make it a much more useful piece of legislation for people who experience vilification.

In addition to the expansion of the legislative definitions, though, we also support measures to reduce the burden placed on individuals who suffer vilification and discrimination to enforce the law and thus bring normative change. This may be done by:

1. Restoring VEOHRC's powers under the EOA (removed before commencement of the 2010 Act) to conduct public inquiries and issue compliance notices; and
2. Extend these powers to allow inquiries and compliance notices in relation to vilification, including the power to undertake own motion reviews and public enquiries.

Recommendation 7: Reinstate VEOHRC's powers under the EOA to conduct public inquiries and issue compliance notices.

Recommendation 8: Give VEOHRC the power under the RRTA Amendment Act to undertake own motion reviews and public enquiries.

Balancing freedom from vilification with other human rights

Liberty Victoria and the LGBTIQ Legal Service both believe that freedom of expression is an essential component of a democratic society and an essential human right. It is a right that is contained in both international human rights documents such as the International Covenant on Civil and Political Rights (the ICCPR)³³ and in the Victorian Charter.³⁴

Importantly, though, the right to freedom of expression is not an absolute right. It is a right that carries with it special duties and responsibilities due to its capacity, when exercised, to impinge upon other human rights. There are therefore situations in which the right to freedom of expression is necessarily and justifiably limited in order to protect the exercise of other human rights. This is explicitly acknowledged in both the ICCPR and the Victorian Charter, which both provide for lawful

³² Victorian Equal Opportunities and Human Rights Commission, Annual Report 2018-19, appendix 1, at <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/annual-reports/item/1845-victorian-equal-opportunity-and-human-rights-commission-annual-report-2018-19>.

³³ United National International Covenant on Civil and Political Rights, art 19.

³⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

limits on the freedom of expression where (among other criteria) it is necessary to protect the rights and reputation of other persons.³⁵

It is our view that the passage of the Bill is necessary to preserve the ability of other people - including LGBTIQ people - to exercise other human rights, including:

- The right to equality before the law (art 16)
- The right to freedom of expression (art 19)
- The protection of the family (art 23);
- The protection of children (art 24);
- The protection from cruel, inhuman or degrading treatment (art 7);
- The freedom from arbitrary or unlawful interference with privacy or family, and the freedom from unlawful attacks on their honour and reputation (art 17).

Accordingly, passage of amendments to the RRTA to include the prohibition of vilification based on the protected attributes in s 8 of the RRTA Amendment Bill are consistent with the preservation and promotion of human rights in Victoria.

Summary of recommendations

Recommendation 1: That s 8 of the RRTA Amendment Bill be amended so that s 3A(f) of the Principal Act include “gender expression or gender identity” as a protected attribute.

Recommendation 2: That s 7 of the RRTA Amendment Bill be amended to define “gender expression” and “gender identity” as per the Tasmanian *Anti-Discrimination Act 1998* (Tas), as follows:

gender expression means any personal physical expression, appearance (whether by way of medical intervention or not), speech, mannerisms, behavioural patterns, names and personal references that manifest or express gender or gender identity;

gender identity means the gender-related identity, appearance or mannerisms or other gender-related characteristics of an individual including gender expression (whether by way of medical intervention or not), with or without regard to the individual's designated sex at birth, and may include being transgender or transsexual;

Recommendation 3: subject to the amendments in recommendations 1 and 2, that the categories of protected attributes in s 8 of the RRTA Amendment Bill be passed into law.

Recommendation 4: That the test for vilification contained in s be amended to include conduct that a reasonable person would consider hateful, seriously contemptuous, or reviling or seriously ridiculing of a person or a class of persons.

³⁵ United National International Covenant on Civil and Political Rights, art 19(3); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15(3).

Recommendation 5: Alternatively to recommendation 4, that the test for vilification be amended to include conduct that is “likely to” incite hatred against, serious contempt for, or revulsion or severe ridicule of, a person or class of persons, as per s 10 of the RRTA Amendment Bill.

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