

SUBMISSION

Prepared by Springvale Monash Legal Service for the
The Legislative Assembly Legal and Social Issues Committee:
Anti-Vilification Protections Inquiry



**SPRINGVALE MONASH
LEGAL SERVICE Inc.**



CASEY & CARDINIA

Head Office:

POSTAL ADDRESS: PO Box 312, Springvale, VIC 3171
OFFICE ADDRESS: 5 Osborne Avenue, Springvale VIC 3171
T: (03) 9545 7400 E: info@smls.com.au

Branch Office:

POSTAL ADDRESS: PO Box 2543, Fountain Gate VIC 3805
OFFICE ADDRESS: Suite 1, Level 2, 64 Victor Crescent, Narre Warren VIC 3805
T: (03) 9038 8002 E: info_narrewarren@smls.com.au
ABN: 96 206 448 228 Reg: A0013997D

Our organisation

Established in 1973, Springvale Monash Legal Service (SMLS) is a community legal centre that provides free legal advice, assistance, information and education to people experiencing disadvantage in our community. For all of our operation, we have located within the Local Government Area (LGA) of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, the majority who reside within the City of Greater Dandenong, the city of Casey and the Shire of Cardinia.

SMLS operates a duty lawyer service at various courts in Victoria, including Dandenong Magistrates Court, the Children's Court and provides legal representation at courts and tribunals such as the Victorian Civil and Administrative Tribunal, Fair Work Commission, Federal Circuit Court, Family Court and VOCAT. For most of the 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake a practical placement at the legal service as part of their undergraduate degree. Additionally, as a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in. For example SMLS has contributed to reforms in family violence laws and practices, access to civil procedure reforms, discrimination towards young community members in their use of public space and their interactions with the criminal justice system, as well as in highlighting the needs of refugees and asylum seekers, particularly unaccompanied humanitarian minors and women escaping family violence.

This submission was prepared with the contribution of students from Monash Faculty of Law.

Responses to Terms of Reference

1) The effectiveness of the operation of the *Racial and Religious Tolerance Act 2001* (the Act) in delivering upon its purposes

Statutory interpretation and an objective test

Defining racial or religious vilification is complex and may create barriers for a complainant to prove an offence has taken place. This can undermine the capacity of the law to promote racial and religious tolerance. Defining vilification may lead decision makers to compartmentalise the effects of the conduct under review, resulting in disadvantaged complainants and overprotected respondents.¹ This may be mitigated by imposing an objective standard on conduct.

Conduct can be found to 'incite' hatred² without proof that hatred, contempt, revulsion or severe ridicule actually occurred. Conduct or words that are 'capable of causing' or have the 'tendency to incite' hatred, contempt, revulsion or severe ridicule may amount to a breach.³

Judicial statutory interpretation may affect the way conduct is viewed in reference to the Act. Narrow interpretations may significantly reduce the likelihood of successful proceedings if a nexus cannot be drawn between the conduct and a 'capability' or 'tendency' to incite vilification.

SMLS recommends changing the word “incitement” in the legislation to “likely to

‘Good faith’ exemptions

Exemptions for vilification exist where conduct is performed 'reasonably and in good faith' in the public interest, or for a genuine academic, artistic, religious or scientific purpose.⁴ The term 'good faith' is problematic as its meaning can be subjective. In

¹ Debbie Mortimer, 'Vilification legislation: Is it worth the trouble' (2004).

² *Racial and Religious Tolerance Act 2001* (VIC), ss 7(1), 8(1).

³ Katherine Le, 'Racial and Religious Vilification' (Vic Discrimination Law, 31 August 2019).

⁴ *Racial and Religious Tolerance Act 2001* (VIC), ss 11, 12.

*Islamic Council of Victoria v. Catch the Fire Ministries*⁵ the Victorian Civil and Administrative Tribunal found the respondents had breached ‘good faith’ exemptions under the Act.⁶ This decision was overturned by the Victorian Supreme Court of Appeal when Justice Nettle found the test of ‘good faith’ for religious vilification should first establish whether the “defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose”.⁷ In His Honour’s findings he discussed the complexity of accounting for the subjective beliefs of different religions,

*“the standards of an open and just multicultural society allow for differences in views about religions. They acknowledge that there will be differences in views about other peoples’ religions. To a very considerable extent, therefore, they tolerate criticism by the adherents of one religion of the tenets of another religion; even though to some and perhaps to most in society such criticisms may appear ill-informed or misconceived or ignorant or otherwise hurtful to adherents of the latter faith. It is only when what is said is so ill-informed or misconceived or ignorant and so hurtful as to go beyond the bounds of what tolerance should accommodate that it may be regarded as unreasonable.”*⁸

The problem raised by Justice Nettle’s discussion is identifying when conduct performed in ‘good faith’ moves from ‘ill-informed’, ‘misconceived’ or ‘ignorant’ to ‘hurtful’. An objective test is compromised by the inclusion of conduct performed in ‘good faith’.

SMLS recommends changing the test from conduct that is performed ‘reasonably and in good faith’ to a ‘reasonable person’ test.

Public conduct versus private conduct

Victorian anti-vilification laws provide exemptions for breaches of conduct that occurs in both in public, where the conduct was performed ‘reasonably and in good faith’⁹ and in private.¹⁰ Private conduct is constituted by desire of parties involved to “be heard or seen

⁵ Dermot Feenan ‘Religious Vilification Laws: Quelling Fires of Hatred?’ [2006] 31(3) Alternative Law Journal 153.

⁶ *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2004] VCAT 2510, 390.

⁷ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 [93].

⁸ *Ibid* [98].

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

¹⁰ *Ibid* s 12.

only by themselves”.¹¹ Public and private conduct is legislated under sections 11 and 12 and both require the person engaged in the conduct to bear the burden of proof. Similarly, Western Australia and ACT laws require discriminatory conduct to occur ‘other than in private’.¹² This is contrary to jurisdictions such as New South Wales,¹³ Queensland,¹⁴ South Australia,¹⁵ Tasmania,¹⁶ where there is an explicit requirement that the conduct constitutes a public act, shifting the onus of proof on the complainant.

SMLS recommends that the onus of proof should lie with the respondent.

The above recommendations consider the strength and objectivity of the test for unlawful conduct and where the onus of proof should fall. It may be appropriate to consider opportunities to develop a restorative justice model in the context of legal consequences associated with anti-vilification legislation. Such consideration should proceed thoughtfully and with appropriate preparation that includes extensive community consultation in the development of protocols by restorative justice professionals.

2) The success or otherwise of enforcement of the Act, and the appropriateness of sanctions in delivering upon the Act’s purposes

Case Study 1

During a community legal education session to a group of recently arrived Rohingya Muslim women, various stories emerged of individual experiences of racism, open abuse, and other vilification. As one woman told her story, other participants would add their own, from mildly

¹¹ Ibid.

¹² *Criminal Code Act 1913* (WA), ss 76-80G; *Criminal Code Act 2002* (ACT) s 750; *Discrimination Act 1991* (ACT) s 67A.

¹³ *Anti-Discrimination Act 1977* (NSW) s 20C(1).

¹⁴ *Anti-Discrimination Act 1991* (Qld) s 124A(1).

¹⁵ *Civil Liability Act 1936* (SA) s 73(1); *Racial Vilification Act 1996* (SA) s 4.

¹⁶ *Anti-Discrimination Act 1998* (Tas) s 19.

offensive ‘othering’ statements to deeply painful and upsetting experiences creating real fear among the group.

Despite many in the group knowing about the anti-vilification act, they expressed a sense of hopelessness regarding the complexity of the process and the belief that making a complaint would invite further harm or scrutiny. Many were of the view that proving the offence would be ‘almost impossible’. Overall, it seemed that a ‘head down’ approach to settlement in Australia was the safest for them and their families.

Anti-vilification legislation attempts to promote racial tolerance as well as provide an avenue of redress for victims of vilification. However, it is unclear whether the Act is able to deliver upon its purposes through existing enforcement mechanisms.

In a previous evaluation of the racial vilification laws in Australia, it was suggested that alternative tools are available to combat racial vilification, including education programs, advertising campaigns, and affirmative action policies.¹⁷ One such education program was the Safe Schools Program.¹⁸ The controversy surrounding this program and its eventual defunding in 2016 displays the vulnerability of education programs to moral panic and movements in the political landscape.¹⁹ Less controversially, the Stop it at the Start advertisement campaign, combatting violence against women, was run until the end of 2018 and gained huge exposure, generating 16.3 million views after just two weeks.²⁰ The power of public education programs to effect positive change is immense and should complement and be informed by the objectives of the Act.

SMLS recommends having strong anti-vilification laws alongside public education programs that counter discrimination.

¹⁷ Dan Meagher ‘So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia’ (2004) 32(2) Federal Law Review 225.

¹⁸ ‘Department Program - Safe Schools’, Victoria State Government Education and Training (Web Page) <<https://www.education.vic.gov.au/about/programs/Pages/safeschools.aspx?Redirect=2>>

¹⁹ Wade Zaglas, ‘Looking back at Safe Schools’, In the Classroom (online, 24 May 2019) <<https://www.educationreview.com.au/2019/05/looking-back-at-safe-schools/>>

²⁰ Luke McNamara, ‘Regulating Racism: Racial Vilification Laws in Australia’ (2002) Australian Journal of Human Rights, 185.

5. The role of state legislation in addressing online vilification

Online Behaviour

The Online Disinhibition Effect suggests that people exercise less restraint when communicating online due to factors such as anonymity, empathy deficit (the victim is reduced to a name on a computer screen), and lack of verbal cues, and the ability distance yourself from your online persona.²¹ The lack of restraint can lead people to make extreme and hateful comments that they would not otherwise have made, including those that incite violence (see examples below). It is vital for the State to extend protections to online vilification. Group behaviour within internet subcultures provide online vilifiers with a support system that may motivate them to continue or intensify the vilification.

Examples of Online Vilification

(Warning: The information below includes offensive language and discussion on suicide)

Charlotte Dawson (Protected classes: Disability and Gender): Charlotte Dawson was a television personality who tragically died by suicide in 2014 after being the victim of ongoing online vilification. It was public knowledge that Ms Dawson suffered from depression and had made a suicide attempt in 2012.²² Posts to Ms Dawson's public twitter profile included 'freedom of speech you f*cking bimbo go kill yourself'; 'please do the world a favour and kill yourself'; and 'I heard you can't have children! LOL sucks for you please die c*nt'.²³ The abuse was a collective attack on Ms Dawson from individuals who mostly used pseudonyms. Ms Dawson's tragic death highlights how those with mental health disabilities are particularly vulnerable online and therefore need protection.

²¹ John Suler, 'The online disinhibition effect' (2004) 7(3) *Cyberpsychology & Behaviour* 321-326; Noam Lapidot-Lefler and Azy Barak, 'Effects of anonymity, invisibility, and lack of eye-contact on toxic online disinhibition' (2012) 28(2) *Computers in Human Behaviour* 434-443.

²² Charlotte Dawson's death puts cyberbullying back in spotlight', ABC News (online, 24 February 2014) <<https://www.abc.net.au/news/2014-02-23/charlotte-dawson-death-puts-focus-on-cyber-bullying/5277904>>.

²³ Tahliapritchard, 'When trolls take it too far' on Slip Into Something Invisible, Tumblr (30 August 2012) <<https://withtheleadpipe.tumblr.com/post/30515011694/when-trolls-take-it-too-far>>.

The online vilification also included gendered attacks towards Ms Dawson's calling her 'f*cking bimbo' and taunting her for not having children.²⁴

Incel Online Subculture (Protected Class: Gender): Incel is an abbreviation of the term 'involuntarily celibate'. Members of this internet subculture hold the belief that the behaviour of women denies them a right to sex.²⁵ Some incels have promoted harassment towards women, labelled women as property, circulated information on rape and avoiding allegations, and in extreme cases, have cited the incel movement and targeted women in mass killings.²⁶

Research conducted globally on the effects of cyber-bullying has found increased risk of suicide, self-harm and depression.²⁷ This extends to conduct online that vilifies a person due to their race, religion, gender, sexuality and ability. Much of the onus to protect internet users against this conduct relies on social media companies responding to complaints and filtering content.

SMLS recommends extending anti-vilification law to include conduct that occurs on social media and other internet platforms.

8. Possible extension or expansion of protections to classes of people not currently protected under the existing Act

Case Study 2

'Zahra' runs an organisation supporting Afghan women with settlement needs in Australia, including English classes, driving programs, mothers programs and support for women experiencing family violence. A partner organisation suggested to Zahra that they apply to

²⁴ Suz, 'Charlotte Dawson Hospitalised After Twitter Troll Abuse', Pedestrian TV (online, 30 August 2012) <<https://www.pedestrian.tv/news/charlotte-dawson-hospitalised-after-twitter-troll-abuse/>>.

²⁵ Stephane J Baele, Lewys Brace, and Travis G Coan, 'From "Incel" to "Saint": Analysing the violent worldview behind the 2018 Toronto attack' (2019) *Terrorism and Political Violence* 1-25.

²⁶ Ibid.

²⁷ Sam Cook, 'Cyberbullying facts and statistics for 2016-2019', *Comparitech* (November 29, 2019). Accessed 23/1/2020: <https://www.comparitech.com/internet-providers/cyberbullying-statistics/>

Bunnings Warehouse to run a barbeque as a fundraiser for their community projects. This is a common fundraiser for community groups. The suggestion shocked Zahra, who said that she would never expose herself or her workers in that way. ‘We would be on display, in a group, all wearing headscarfs. It wouldn’t be safe for us; it would be like being a target’.

Legislation in several other Australian jurisdictions protects a broader range of attributes than the Victorian Act. Vilification based on a person’s sexual orientation or gender identity is prohibited in New South Wales, the ACT, Queensland and Tasmania.²⁸ New South Wales and the ACT²⁹ also prohibit vilification based on intersex or AIDS/HIV status, while vilification based on a person’s disability is prohibited in New South Wales, the ACT and Tasmania.³⁰ As a result, the racial and religious protection offered by the Victorian Act is limited in comparison with other jurisdictions.

Case study 2 demonstrates how racial vilification can intersect with other identities. Zahra is concerned not only because the group of people participating in the proposed fundraising event are Muslim, but are Muslim women. Women who wear head scarfs are highly visible in the community due to their dress and can experience vilification not just on religious grounds but based on their gender.

Legal protection for LGBTIQ+ people and people with disabilities exists in federal legislative frameworks. However, the protection is limited in preventing hate speech and a means of redress. For example, the *Sex Discrimination Act 1984 (Cth)* intends to eliminate discrimination on the basis of sexual orientation in the public spheres of work, accommodation, education, clubs, disposal of land and provision of goods and services.³¹ The *Disability Act 2006 (Vic)*³² protects people with disabilities from discrimination in relation to the provision of services and treatment.³³

²⁸ *Criminal Code Act 2002 (ACT)* s 750; *Discrimination Act 1991 (ACT)* s 67A; *Crimes Act 1900 (NSW)* s 93Z; *Anti-Discrimination Act 1991 (Qld)* ss 124A, 131A; *Anti-Discrimination Act 1998 (Tas)* s 19.

²⁹ *Criminal Code Act 2002 (ACT)* s 750; *Discrimination Act 1991 (ACT)* s 67A; *Crimes Act 1900 (NSW)* s 93Z.

³⁰ *Criminal Code Act 2002 (ACT)* s 750; *Discrimination Act 1991 (ACT)* s 67A; *Crimes Act 1900 (NSW)* s 93Z; *Anti-Discrimination Act 1998 (Tas)* s 19.

³¹ *Sex Discrimination Act 1984 (Cth)* s 3.

³² *Disability Act 2006 (Vic)* s 1.

³³ *Disability Act 2006 (Vic)* s 1.

Garry Burns, a gay rights activist, was successful with a complaint in 2014 against a former candidate of the Katter's Australian Party regarding homophobic comments. The ruling was unenforceable against a Victorian candidate who was not under the jurisdiction of the New South Wales legislation.³⁴ It is important to broaden the scope of protection to those who identify as LGBTIQ+, as having a disability, and other communities' who would ordinarily be precluded from the Act's protections.³⁵

SMLS supports amending the anti-vilification legislation to include sexuality, gender and disability to protect groups against vilification.

³⁴ *Burns v Corbett* (2018) 353 ALR 386.

³⁵ Fiona Patten, 'Racial and Religious Tolerance Amendment Bill 2019' (Web Page, 28 August 2019) < <https://fionapatten.com.au/speech/racial-religious-tolerance-amendment-bill-2019/>>.