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# Submission by the Australian Discrimination Law Experts Group (ADLEG)

# to the

# Legal and Social Issues Committee Legislative Assembly Parliament of Victoria

## *Inquiry into Anti-Vilification Protections: Review of the Racial and Religious Tolerance Act 2001 (Vic)*

**24 January 2020**

# 1. Australian Discrimination Law Experts Group

We make this submission on behalf of the undersigned Australian Discrimination Law Experts Group (**ADLEG**), a group of legal academics with significant experience and expertise in discrimination and equality law and policy.

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## 2. Summary

We welcome the decision of the Victorian Parliament to review and update the *Racial and Religious Tolerance Act 2001* (Vic) (**RRTA**). In the 18 years that have passed since the Act was adopted, the environment for public speech has changed substantially with the broadening of use and increasing pervasiveness of the internet and, in particular, the advent of social media and the ability to promulgate anonymous statements and comments online. This has now progressed to a stage where some individuals have been specifically targeted for online attack in very serious ways because, or on the basis, of attributes that would be protected by the *Equal Opportunity Act 2010* (Vic) (**EOA**) if the communication happened in an area of activity covered by that Act.[1] This indicates a clear need for legislative action.

In addition, the scope of protection offered by the RRTA is now inadequate as it is limited to vilification on the basis of race and religion only, while vilification in the modern context extends to many other attributes. We support expanding the Act's scope to deal with the existence of social media and a much less civil public environment in which individuals and groups can be targeted. Where vilification of disadvantaged individuals or groups occurs on the basis of a ground protected by anti-discrimination law, the RRTA should provide an avenue for redress.

This submission focuses on the legal aspects raised by the Committee's terms of reference. It is structured to address four key areas:

- The law's rationale and its success thus far;
- Substantive changes to the law;
- Changes to enforcement and remedies; and
- Other aspects raised by the terms of reference.

## 3. The effectiveness of the operation of the *Racial and Religious Tolerance Act 2001* (the RRTA) in delivering upon its purposes

### *3.1 The function and rationale of anti-vilification laws*

Anti-vilification laws perform the important function of protecting people from harmful speech and other communicative acts that denigrate them, are likely to lower them in the eyes of other members of the community, and can lead, directly or indirectly, to verbal and/or physical assaults on them. Indeed the preamble to the RRTA states that, 'vilifying conduct is contrary to democratic values' as '[i]t diminishes…dignity, sense of self-worth and belonging to the community.' This is an argument supported by prominent authors, such as Waldron.[2] Section 1 of the RRTA further refers to the purpose of providing redress for victims of vilification. Vilifying speech does not come within the category of protected communication (freedom of expression) because of its links to denigration of particular individuals or groups on the basis of protected characteristics, its exposure of them to insecurity and potential fears for their safety and consequent denial of their right to participation in society on an equal basis.

[1] See the examples cited by Fiona Patten MLC in her second reading speech on the Racial and Religious Tolerance Amendment Bill 2019 at Vic Parl Debates 28 August 2019, 2725-2727.
[2] See generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

Individuals and groups who are targeted by vilification frequently have no platform through which to respond to vilifying materials published and promoted about them. This absence of a platform for reply means that the 'marketplace of ideas' or public discourse in general cannot be relied on to establish the falsity or lack of validity of vilifying material. Instead a mechanism is needed to establish that some forms of targeting are so harmful that they cannot be accepted in a modern society that respects equally the rights of all individuals. The claim for equal respect includes an equal right to participate in society, and in practice online trolling can deprive targeted individuals and groups of their right to feel safe in society on the same basis as others. Communications that tend to make their targets unsafe should be the focus of anti-vilification laws, as being clearly outside the scope of protected expression.

There are many laws that limit absolute freedom of expression, including for example defamation laws and summary offence laws concerning offensive speech. Such laws are well-accepted, based on the need to protect reputations against false and demeaning attacks. Anti-vilification laws perform a similar role, often for groups whose members have very little social power or influence. Some people (e.g. journalists, and 'celebrities' and people who can afford to buy advertising or PR services) have platforms that act as megaphones from which to speak, and there may be no real opportunity for people targeted by that speech to reply, seek redress and preserve their rights to full participation in society. Overlaid on this is the opportunity the internet offers for anonymous comment, which can free individuals from a sense of social limits and civility. Given the impact on targets, there is a clear need for legal control in this area. The main issues to be decided are: in what form should that protection be available, and by whom and how should it be enforced?

### *3.2 The success of the laws to date*

It is noticeable that there has been very little litigation under the RRTA since its adoption in 2001. There has been a reasonable number of complaints to the Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**), but there is no published analysis of the character of these complaints over the years, or of how any disputes under this law have been resolved (or not) at conciliation and what types of outcomes have been agreed. In these circumstances, it is very difficult to assess the success of the law. However given the relatively hostile environment that exists on social media, it is surprising that the use of this law is apparently so low.

The lack of litigation under the law is not necessarily a problem in itself, but it may be a problem in indicating that people who need protection against vilification may not be obtaining it. This could be for a range of reasons; they may not be aware of its existence, or of how to use the law or of what it could do to protect them, or even where they are aware of the law, individuals and groups may find it too difficult to use the law given its technicality, the drain that litigating a case would place on them and the lack of any material incentive to bring a claim. Indeed a recent federal parliamentary inquiry found that groups targeted by vilification were largely not aware of relevant laws or how to exercise their rights.[3] For this reason, we argue that any revision of the law should attend to several important elements relating to enforcement (discussed in Part 5, below).

[3] Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Act 1986 (Cth)*, Inquiry Report (Commonwealth of Australia, 2017) [2.110] – [2.113].

## 4. Substantive changes to the law

### *4.1 Who should be protected?*

We strongly support the extension of the RRTA to protect people who are vilified on the basis of sex or gender, disability, sexual orientation, gender identity or any combination of attributes including these. There is little doubt that these attributes each attract trolls and abuse on internet and social media. There should be no objection to these attributes being protected by the RRTA, in view of the toxic communication that is so common for these groups on social media, and which reduces the security and safety of people in these groups.

However, in a society committed to equality and equal opportunity, there may be no valid basis for protecting only some minorities and disempowered groups from vilification and not others. Therefore, for consistency, further inquiry should determine whether protection should be extended to *all* attributes protected by the EOA,[4] or at least *most* attributes as is done under Tasmanian[5] and ACT[6] law. Such a review could consider whether there is evidence of a need to protect a wider group of attributes. There may, though, be principled reasons that some attributes, such as political belief, should not be protected from vilification.

### *4.2 Definitions of vilification: naming and defining the harmful conduct*

While it would be possible to simply extend the scope of the existing RRTA prohibition to new groups and add further provisions to facilitate enforcement (discussed in Part 5, below), this inquiry provides a valuable opportunity to consider whether the current conceptualisation and definition of vilification should be adjusted to allow for contemporary forms of communication.

The terminology of 'vilification' is not overly enlightening, as it does not convey the reasons why the communicative acts are prohibited. In justifying the law in public debate, terminology that more accurately defines the harms involved could be valuable. Revised terminology such as 'seriously harmful communication' or 'seriously harmful behaviour' identifies the harm element in a way that 'vilification' does not. The essential reason for prohibiting such communications is the harm that is caused to target groups. This occurs by the tendency of such communications to elicit and encourage attitudes and behaviours that prevent full participation in society on an equal basis by the individuals and groups targeted, often through threatening or intimidating communications that deter them from using social media channels.

Arguably this rationale would be better served by amending the definition of the harmful conduct in the RRTA to focus on the effect of the communications on the targets of the speech, rather than the response of the audience to which it is directed. On this point, we support the argument put forward by Mr Bill Swannie of Victoria University in his submission to this inquiry, arguing for a definition of harmful conduct similar to that in s 18C of the *Racial Discrimination Act 1975* (Cth) (**RDA**). This definition more closely serves the human rights rationale for these provisions, which is to protect the rights to live in the community safely and without unreasonable threats on the same basis as people who do not have the protected

[4] *Equal Opportunity Act 2010* (Vic) s 6.
[5] *Anti-Discrimination Act 1998* (Tas) s 17(1), which protects 14 of the 22 attributes listed in the Act.
[6] See ACT Law Reform Advisory Council, *Final Report on the Review of the Discrimination Act 1991 (ACT)* (2015), given effect in s 67A of the Discrimination Act (ACT).

attribute. The current definition of harmful conduct, found in sections 7 and 8 of the RRTA, focuses attention on whether the speech incites the specified responses,[7] while the Racial and Religious Tolerance Bill 2019 (Vic) put forward by Ms Fiona Patten MLC simply extends this definition to whether the speech incites *or is likely to incite* the specified responses (at clause 10, amending section 7 of the RRTA). This is a very high standard of abstraction and virtually impossible for a claimant to prove, which depends on subjective judgement by a court or decision-maker. Further, it is not consistent with the stated purposes of the RRTA in section 1 and the Preamble. Instead, a formulation similar to that in s 18C focuses attention on the (harmful) *effect on the targeted group*, which is something specific about which evidence can be introduced and a judgement made based on that evidence.

If such an approach was adopted, the words used to describe the requisite harm could be adjusted to be more specific. Ms Patten has argued that the words 'offend' and 'insult' in s 18C of the RDA really belong to a definition of harassment rather than vilification, but that terms like 'intimidate' or 'humiliate' accurately capture the harm of vilifying speech.[8] We agree that mere 'offence' is not a matter of vilification. We note, however, that the EOA does not contain definitions of harassment based on attributes other than sex. As such, if the words 'offend' and 'insult' were *not* to be included in an updated definition of 'vilification' in the RRTA, that change should be accompanied by an expanded definition of harassment in section 92 of the EOA that would allow people who experience harassment based on protected attributes other than sex in the protected areas to take action against it.[9]

The current terms used in sections 7 and 8 of the RRTA refer to serious levels of harm: 'hatred, serious contempt, revulsion, or severe ridicule'. These or similar terms could be drawn on in drafting an updated provision based on the structure of s 18C of the RDA, which could include: 'to threaten, intimidate, humiliate, seriously insult, ridicule or denigrate, or express serious contempt for the targeted groups or individuals.'

To make clear that the prohibitions in the RRTA are not absolute, such that a right to freedom of expression is adequately balanced against the need to prohibit harmful statements, we advise that the updated prohibition section in the RRTA (e.g. Ms Patten's proposed section 7) link directly to the defences or exceptions available under the RRTA. The prohibition section could, for instance, be worded as: 'Subject to the defences in s **, a person must not …'. We prefer to refer to the exceptions as 'defences', as this makes clear that it is the defendant/respondent who has the obligation to establish a defence in any particular case.

### *4.3 Should the provisions be moved to the EOA?*

While on its face it would appear neat to move the vilification provisions to the EOA as both laws seek to protect the right to equality and non-discrimination, we are concerned that this might undermine and confuse the purposes of the two laws. Anti-vilification provisions deal with a very different issue from the discrimination and harassment provisions found in the EOA, even though the claims may overlap in some cases. Prohibitions of discrimination and harassment arise within designated relationships, are focused on specific individuals or groups who suffer detriments, and do not raise substantial concerns about conflicts with the right to freedom of expression in the same way as anti-vilification provisions. In contrast, the RRTA

[7] See, eg, *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207.
[8] Fiona Patten and Wayne Taylor, 'Critics misunderstand vilification bill amendment' *The Age* 3 October 2019.
[9] See eg *Anti-Discrimination Act 1998* (Tas) s 17.

deals with almost all expression that is not private, and its central focus is resolving the tension between the right to equal respect and participation in society, and the right to freedom of expression. We are concerned that adding these provisions to the EOA could have the potential to dilute the EOA's central message and purpose by diverting attention to the conflict with freedom of expression which is not otherwise implicated in its main provisions. Retaining the anti-vilification provisions in the RRTA, as a standalone Act, allows for clarity about the purpose of this particular law.

Alternatively, if it is decided to include the vilification provisions in the EOA, then we recommend that very clear and specific purposes clauses be included to clearly delimit the purposes of the different groupings of provisions dealing with discrimination and harassment, and vilification.

## 5. Enforcement and remedies

The small number of complaints and litigation under the RRTA raises concerns about how effective the law has been as a remedy for individuals and groups targeted by vilifying speech. This is despite section 1 of the RRTA explicitly providing that the purpose of the Act is to provide redress for victims of vilification. We are concerned that there is little incentive for individuals or groups to take action to enforce the law, and this has led to suboptimal levels of enforcement. This in turn leads to limited clarification of the law and lack of public awareness of its operation – and, therefore, a lack of understanding of how to comply with the RRTA. Areas of concern here include:

- the accessibility of the law to those who may need to use it;
- whether there are sufficient incentives to use the law, through providing adequate remedies to those who bring successful claims, including reimbursement for the time and effort and risk of claiming, and ongoing protection from further vilification; and
- enabling organisations to bring claims on behalf of affected groups or individuals.

### *5.1 Accessibility and enforcement*

To the extent that vilification affects groups that share a protected attribute, enforcement of protection can be seen as a group function. The most effective protection under anti-vilification laws in Australia has occurred where protected communities have mechanisms that allow them to act communally to take legal action to protect themselves. This can be seen from the various cases in which Jewish community organisations have brought successful claims of racial vilification.[10]

By contrast, where such organisations are lacking, enforcement tends to rely on motivated individuals to bring claims, and is often less successful and much more challenging for claimants. For example, cases involving vilification of Indigenous people have largely been brought by individuals or small groups.[11] Because not all communities have robust organisations that can undertake this task (often because of the level of their disadvantage), it is important to allow for other methods of enforcement for the most disadvantaged groups or for members of dispersed groups (which might not have a central identity or identifiable

[10] See, eg, *Jones v Scully* [2002] FCA 1080; *Jones v Toben* [2002] FCA 1150.
[11] See, eg, *McGlade v Lightfoot* (2002) 124 FCR 106; *Clarke v Nationwide News* (2012) 201 FCR 389; *Eatock v Bolt* (2011) 197 FCR 261.

organisations in the same ways as minority ethnic communities). This would require the addition of new provisions for public enforcement to enable the development of the law and improve awareness of its norms through strategic enforcement in chosen matters. Such public enforcement could be achieved through selective strategic enforcement, in order to develop the case law in the most effective way, and could involve the bringing or funding of cases by the VEOHRC or Victoria Legal Aid. Specific funding for this public enforcement could be provided by the Victorian government to ensure that there is adequate policing of online trolling in Victoria. The law should also facilitate the bringing of claims by organisations acting to support parties affected by vilifying speech, even if the organisation's membership is not necessarily directly affected.

### *5.2 Remedies*

Anti-vilification laws do not usually result in high quantum awards of compensation to individuals who bring actions, for at least two reasons. First, often such individuals are challenging a harm that may be experienced by all members of the target group, not only the specific members who bring the legal action seeking a remedy. Second, the intangible nature of the harm suffered means that it may be very difficult to quantify it. In a number of high-profile vilification cases, no compensation was ordered.[12] This may be appropriate in a costs jurisdiction where the costs penalty may provide some penalty or discipline on the respondent. However in a no-costs jurisdiction such as the Victorian Civil and Administrative Tribunal (**VCAT**), this type of outcome completely fails to provide an incentive for any individual or group to spend time and effort on enforcing the law through litigation. This situation should be addressed by adopting remedies that compensate claimants for the time and effort involved in bring the claim, perhaps through a special presumption that successful claimants should have their costs reimbursed, as they have undertaken a public function in ensuring human rights are protected, as an exception to the general costs rule in VCAT.

Deterrence could also be considered in remedying certain cases of egregious vilification or if vilification is repeated, for example through continued and repeated serious trolling on social media. Consideration should be given to this in defined and limited circumstances.

### *5.3 Obtaining information to facilitate enforcement*

We strongly support the provisions of Ms Patten's Bill that provide for the VEOHRC to obtain information from online publishers about the identity of the person who originated the communication (clause 17, adding sections 22A to 22E to the RRTA). The definition of relevant publishers should be as wide as possible, to ensure that the RRTA is not outdated as a result of rapid and ongoing technological change.

### *5.4 A duty on online platforms?*

Consideration should be given to imposing a duty on online platforms to take all reasonable steps to ensure that communications on their platforms comply with anti-vilification laws as well as anti-discrimination laws. This could include a duty to collect and publish data on the use of their services. Platforms are likely to be already collecting and analysing data about usage and which postings attract more views, and already moderate content to some extent. A

[12] See, eg, *McGlade v Lightfoot* (2002) 124 FCR 106 (where only costs were awarded); *Eatock v Bolt* (2011) 197 FCR 261 (where a public notice of the court's finding was the only remedy sought).

requirement for accountability could include publishing policies and processes on some or all of how online platforms:

- are addressing and eliminating discrimination and vilification in online communications;
- will facilitate the identification of purveyors of expression that breach the law when required to and within specific time limits;
- will provide a right of reply for those criticised or vilified on the platform; and
- plan to eliminate discrimination and achieve equality in the platform's operations.

### *5.5 Clear responsibility for enforcing the criminal prohibitions*

In regards to the imposition of criminal penalties for serious vilification, the recent conviction for religious vilification upheld in the Victorian County Court indicates the importance of having effective monitoring of these provisions.[13] Victoria Police must be clearly identified as the body responsible for such detection and enforcement of breaches, perhaps acting in cooperation with the VEOHRC. The fact that it has taken over 15 years to bring the first prosecution for an offence under the RRTA suggests that there may have been a failure to adequately plan for the law's enforcement.

## 6. Other issues raised by the Committee's terms of reference

### *6.1 Interaction between the Act and other state and Commonwealth legislation*

The impact of the Religious Discrimination Bill (Cth), in particular its override of state and territory anti-discrimination laws in clause 42 of its second exposure draft, is not yet clear. If this clause becomes law, its interaction with the RRTA and any proposed changes must be considered, and appropriate responses adopted. Clause 42(1)(c) of that Bill would allow the relevant federal Minister to prescribe the RRTA, meaning that 'statements of belief' would not contravene the RRTA even where they meet the relevant RRTA test. Clause 42(1)(b) of the Religious Discrimination Bill already explicitly overrides Tasmania's anti-vilification provision. Exempted from this override are statements that are malicious or would, or be likely to, harass, threaten, seriously intimidate or incite hatred or violence towards a person or group, however this does not capture all conduct that is currently prohibited by the RRTA, or would be prohibited under Ms Patten's Bill or under our proposals above.

### *6.2 Comparisons in the operation of the Victorian Act with legislation in other jurisdictions*

Many other state and territory laws provide much wider personal scope in protecting against vilification, including New South Wales[14] and Tasmania.[15] In this sense, amendments to the RRTA would simply be catching up with changes adopted in other Australian jurisdictions regarding the attributes on which vilification is now prolific, in view of the rise of the internet and social media.

[13] See *Cottrell v Ross* [2019] VCC 2142.
[14] See *Anti-Discrimination Act 1977* (NSW) ss 20C (racial vilification), 38S (transgender vilification), 49ZT (homosexual vilification), 49ZXB (HIV/AIDS vilification).
[15] *Anti-Discrimination Act 1998* (Tas) s 19.

### *6.3 The role of state legislation in addressing online vilification*

The recent High Court of Australia judgment in *Burns v Corbett* made clear that state tribunals, such as VCAT, have territorially limited jurisdiction.[16] This might be a concern in relation to online vilification if it originates in another state. If the person who promulgated the vilification is interstate or overseas, Victorian laws may therefore have limited or no capacity to affect them. This underlines the importance of the Commonwealth acting in this area, particularly to protect people targeted by online vilification, but it nevertheless leaves a substantial field within which Victorian law can be effective against vilification originating and causing harm in Victoria.

[16] *Burns v Corbett* [2018] HCA 15.