



Stopping hate in its tracks

Joint submission to the Victorian Government's Anti-Vilification
Protections Inquiry

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1. Executive summary

1. This Anti-Vilification Protections Inquiry (**Inquiry**) presents a unique opportunity for the Victorian Government to enact best practice anti-hate laws that promote a diverse, safe and harmonious community, and that stop hate in its tracks.
2. The organisations making this submission first came together in response to the Hammered Music Festival being advertised online in late 2019 by white supremacist hate groups Blood & Honour Australia and the Southern Cross Hammerskins. This was part of a much broader and widespread community backlash and public campaign to shut down the event, which peaked with the presentation of a 28,000-signature petition to the Victorian Government last October.
3. At the time, Premier Andrews said the festival was shameful and wrong and warned anti-Semitism was on the rise, but that he was powerless to stop it due to a "deficiency in the law".¹ This Inquiry provides an opportunity for the Victorian Government to remedy this deficiency.
4. Hateful conduct,² including vilification, is on the rise across Australia. Examples of racism, Islamophobia, anti-Semitism, homophobia, transphobia, misogyny and hate towards people with disabilities abound. Hate groups – like those mentioned above – often expound hate that falls into many, sometimes all, of these categories of hateful conduct.
5. When allowed to go unchecked, hateful conduct can escalate into outright violence. The real world consequences of this have been highlighted by a number of examples in very recent history, including the mass murder of 51 Muslim people in New Zealand by an Australian white supremacist just last year.
6. Hateful conduct is harmful and contrary to democratic values. It reduces a person's or group of people's ability to contribute to, or fully participate in, society as equals. It also diminishes their dignity, sense of self-worth and belonging to the broader community.
7. Hateful conduct can be stopped through education, prevention strategies and best practice laws that are accessible to affected people and communities and that hold individuals to account. This submission argues that Victoria's current laws are deficient and addresses what best practice laws look like.
8. Victoria currently prohibits vilification and serious vilification through the *Racial and Religious Tolerance Act 2001* (Vic) (**RRTA**). The RRTA defines vilification as conduct that incites hatred against, or serious contempt for, or revulsion or severe ridicule of, a person or class of persons based on a particular protected attribute.

¹ "White supremacist concert in Melbourne cannot be stopped, Premier says", *ABC News* (online), 8 October 2019 <www.abc.net.au/news/2019-10-08/white-supremacist-neo-nazi-concert-in-melbourne-to-go-ahead/11582120>.

² This submission uses the term 'hateful conduct' to include vilification as defined in the RRTA plus conduct that humiliates, intimidates, offends, or insults a person or group of people based on their attributes.

9. The purposes of the RRTA are to promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground of race or religious belief or activity and to provide a means of redress for the victims of racial or religious vilification.
10. The RRTA has, however, been largely ineffective at meeting these purposes for a number of reasons, including:
 - (a) The legal test for demonstrating that a person has ‘incited hatred’ is too difficult to prove;
 - (b) The law has limited its focus to cases where a person has intentionally incited a third party to hatred and has not paid enough attention to the harm caused to a person targeted by conduct that might not meet the high threshold test for ‘inciting hatred’;
 - (c) The law has been inaccessible to vilified people and communities, as evidenced through its lack of use; and
 - (d) The law has not adequately grappled with the intersectional experiences of people who are targeted by hateful conduct on the basis of more than one attribute.
11. **The organisations making this submission argue for expanded, best-practice anti-hate laws that extend beyond vilification and that include:**
 - (a) Expanding the list of protected attributes to include race, religious belief or activity, gender, sexual orientation, gender identity and gender expression, sex characteristics, HIV/AIDS status and disability;**
 - (b) Improved protections against vilification based on a better civil test;**
 - (c) Enacting new protections against hate-based conduct based on a harm-based civil test;**
 - (d) Enacting a better criminal test for serious vilification;**
 - (e) Enacting a new criminal offence prohibiting the public display of vilifying and intimidating materials, including the swastika;**
 - (f) Consideration the enactment of a new criminal offence prohibiting conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property; and**
 - (g) Expanding the definition of conduct captured by anti-vilification laws.**
12. The Victorian Government should consider how to draft legislation that recognises the reality of intersectional hateful conduct and that makes the complaint process straightforward for people or groups of people who experience vilification on the basis of multiple protected attributes.

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13. During 2019, Fiona Patten of the Reason Party introduced the Racial and Religious Tolerance Amendment Bill 2019 into the Victorian Parliament (**the Patten Bill**). In short, it sought to:
 - (a) extend the attributes protected by anti-vilification laws from race and religion to a broader range of attributes;
 - (b) amend the civil test for vilification, to include conduct that 'is likely to incite'; and
 - (c) amend the criminal test for serious vilification offences to include 'reckless' conduct, and replace the subjective test for this conduct with an objective one.
 14. While the amendments set out in the Patten Bill are a step in the right direction, it is our submission that they do not go far enough.

2. The Rise of Hate

15. Racist laws and policies have played a key role in shaping the Australia we live in today. Aboriginal and Torres Strait Islander people have been subjected to colonisation, land dispossession, the Frontier Wars, Stolen Generations, mass-imprisonment and live with the ongoing impacts of these laws and policies. Racism – and its application in the form of vilification conduct – continues to be a serious and ongoing problem, which can significantly impact the lives of those who experience it.
16. Hateful conduct is on the rise and going largely unchecked in Australia.
17. Only a few years ago, a major Victorian political party ran a racist, dog-whistling election campaign, with a focus on "African gangs" as a "political tactic".³ This followed disproportionate media coverage following an incident at the 2016 Moomba festival. Since then, young South Sudanese-Australians have faced increased racial abuse.⁴
18. Just last year, a Jewish school student in a Melbourne school was verbally abused, physically assaulted and forced to kiss the feet of another student.⁵ In another incident, a child was reportedly called "Jewish vermin", "the dirty Jew" and a "Jewish cockroach".⁶ Just a few weeks ago, a Nazi flag was flown over a home in north-west Victoria.⁷

³ Noel Towell and Benjamin Preiss, "Revealed: how African gangs crime campaign backfired on Victorian Liberals", *The Age* (online), 20 November 2019 <www.theage.com.au/politics/victoria/revealed-how-african-gangs-panic-backfired-on-victorian-liberals-20191120-p53c9v.html>.

⁴ Centre for Multicultural Youth, *Don't drag me into this: Growing up South Sudanese in Victoria*, 31 October 2018 (available at: <https://www.cmy.net.au/sites/default/files/publication-documents/Don%27t%20Drag%20Me%20Into%20This%20-%20Research%20Report%20Oct%202018%20FINAL.pdf>).

⁵ Rebecca Davis, "A rapidly spreading crisis", *Australian Jewish News* (online), 3 October 2019 <ajn.timesofisrael.com/a-rapidly-spreading-crisis/>.

⁶ Guardian staff, "Josh Frydenberg urges more Holocaust education after antisemitic bullying attacks", *The Guardian* (online), 4 October 2019 <www.theguardian.com/news/2019/oct/04/josh-frydenberg-urges-more-holocaust-education-after-antisemitic-bullying-cases>.

⁷ Sean Wales and Leonie Thorne, "Nazi flag taken down from amid calls to strengthen anti-vilification law", *ABC News* (online), 15 January 2020 <www.abc.net.au/news/2020-01-14/nazi-flag-flown-in-north-west-victorian-town-of-beulah/11866096>.

19. Islamophobia in its various manifestations is rife, as documented in the *Islamophobia in Australia* reports.⁸ In the first report, 243 incidents were reported in a 16-month period, while in the second report 349 incidents were reported over a 24 month time period. When looking at offline incidents, the most recent report found that half of the cases considered involved hate speech, while one-quarter consisted of vandalism and physical attacks.⁹
20. Muslim women and children are particularly susceptible to hate conduct. Of the 113 female victims, 96 percent were wearing a headscarf (hijab), 57 percent were unaccompanied and 11 percent were with their children.¹⁰
21. In Australia, sixty four percent of LGBTIQ+ people between the ages of 16 and 27 have been subject to verbal abuse on the basis of their sexual orientation, gender identity or intersex status.¹¹ As documented in the *End The Hate* report, the marriage equality postal survey provided a platform for a small number of people and groups to loudly vilify members of LGBTIQ+ communities, with members of those communities subjected to homophobic slurs, property vandalism and multiple reports of physical assault.¹²
22. Since that campaign, there has been a rise in transphobic discourse in some mainstream media publications, blatantly ignoring scientific evidence that strongly endorses supporting transgender children through social and medical transition to improve their mental health outcomes.¹³
23. The internet is also providing a platform for hateful conduct to thrive. There are a myriad of examples of vilification. On Twitter, the use of the echo symbol around a person's name brands that person a Jew. There was the social media backlash against Adam Goodes being named as a brand ambassador for David Jones.¹⁴ And there are the relentless comments that writer and disability advocate, Carly Findlay, receives in relation to her work like the following:

Seriously? We call them retards because you should never have been born. The sad fact is you were, so why should the able bodied tread on eggshells around you? It is us you should be thanking for the roof over your head the meals that you eat and all the free medical and welfare you get ... the day of the rope draws nearer with every (effing) online whinge post you make.¹⁵

⁸ See Derya Iner (ed), *Islamophobia in Australia (2014-2015)*, Charles Sturt University and ISRA (2016) (available here: www.islamophobia.com.au/Islamophobia-in-Australia-ISRA-Academic-Report.pdf) and Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019) (available here: <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>).

⁹ Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019), 7 (available here: <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>).

¹⁰ Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019), 6 (available here: <http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>).

¹¹ Kerry Robinson, Peter Bansel, Nida Denson, Georgia Ovenden and Cristyn Davies, "Growing Up Queer: Issues Facing Young Australians Who Are Gender Variant and Sexuality Diverse", Young and Well Cooperative Research Centre, Melbourne (available at: www.twenty10.org.au/wp-content/uploads/2016/04/Robinson-et-al.-2014-Growing-up-Queer.pdf).

¹² Human Rights Law Centre, "End the Hate: Responding to hate speech and violence against the LGBTI community", 13 December 2018 (available at: <https://www.hrlc.org.au/reports/end-the-hate>).

¹³ Joan Westenberg, "New birth certificate laws spark anti-trans campaign", *The Saturday Paper* (online), 17 August 2019 <www.thesaturdaypaper.com.au/news/politics/2019/08/17/new-birth-certificate-laws-spark-anti-trans-campaign/15659640008617>.

¹⁴ Patricia Karvelas, The racists are exposed, now let's end the stalking of Adam Goodes, *ABC News* (online), 20 October 2015 <www.abc.net.au/news/2015-10-20/karvelas-the-racists-are-exposed/6867926>.

¹⁵ Fiona Patten, Racial and Religious Tolerance Amendment Bill 2019 (2nd reading speech), 28 August 2019 <fionapatten.com.au/speech/racial-religious-tolerance-amendment-bill-2019/>.

24. This is part of a broader international trend, with hateful conduct on the rise across the world.
25. Across the USA, there has recently been a spate of anti-Semitic attacks and killings. In December 2019 alone, there was a stabbing inside a Rabbi's home on the seventh day of Hanukkah and an attack on a kosher supermarket that resulted in three people and a police officer being killed. This followed the Tree of Life Synagogue shooting in Pittsburgh and a shooting in a San Diego Chabad Synagogue.
26. Last year, 51 Muslim people attending Friday Prayers at Al Noor Mosque and Linwood Islamic Centre in New Zealand were murdered by a white supremacist, Australian man. Part of this was live streamed via Facebook. In the week following, the number of anti-Muslim hate crimes reported across Britain increased by 593 percent.¹⁶ Recordings of the attack still exist online.
27. In 2016, 49 people were killed and 58 others were wounded in a mass shooting hate crime inside Pulse, a gay nightclub in Orlando, USA. It was the deadliest incident in the history of violence against LGBTIQ+ people in the US, the deadliest terrorist attack in the US since the September 11 attacks in 2001 and, at the time, was the deadliest mass shooting in the US.
28. These examples are not exhaustive, but illustrate the devastating and real world consequences of what can happen when hate conduct is allowed to go unchecked.
29. The above analysis is even more concerning in the context of low reporting rates for vilification in Victoria. Since 2001, when the RRTA commenced, there have been few complaints of racial vilification, only two successful cases of vilification before the Victorian Civil and Administrative Tribunal (**VCAT**) and only one prosecution of serious vilification by Victoria Police.
30. This is in circumstances where Victoria Police data provided by the Crime Statistics Agency shows that, for the period between July 2018 and June 2019, there were 582 victim reports related to offences where Victoria Police recorded a 'prejudicially motivated crime', plus 81 organisations who made victim reports.

3. Effectiveness of current laws

31. The law has a critical role to play in preventing and addressing hateful conduct and is an important tool that should complement education and early intervention strategies to stop hateful conduct occurring in the first instance.
32. As set out above, the current legal framework is not working. There have been few complaints of racial vilification, only two successful cases of vilification before VCAT and only one prosecution of serious religious vilification. There have been no criminal prosecutions of racial vilification under the RRTA. This is in circumstances where hateful conduct is rife.

¹⁶ Vikram Dodd, Anti-Muslim hate crimes soar in UK after Christchurch shootings, The Guardian (online), 23 March 2019 <www.theguardian.com/society/2019/mar/22/anti-muslim-hate-crimes-soar-in-uk-after-christchurch-shootings>.

33. The *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**the Charter**) provides that all Victorians have the right to equality before the law and to enjoy their human rights without discrimination.¹⁷
34. More broadly, international human rights law provides that the right to equality and non-discrimination constitute basic and general principles relating to the protection of all human rights.¹⁸
35. Australia is a signatory to all these treaties and the obligations within them extend federally and to every state and territory government.
36. Article 19 of the ICCPR explains the balance between the right to freedom of expression and other rights, by providing that everyone shall have the right to freedom of expression subject to certain restrictions that are provided by law and are necessary:
 - (a) for respect of the rights or reputations of others;
 - (b) for the protection of national security or of public order, or of public health or morals.
37. Article 20 of the ICCPR contains mandatory limitations on freedom of expression, and requires countries, subject to reservation/declaration, to outlaw vilification of persons on national, racial or religious grounds. Australia has made a declaration in relation to Article 20 to the effect that existing federal and state legislation is regarded as adequate, and that Australia reserves the right not to introduce any further legislation on these matters.
38. Article 26 of the ICCPR provides that 'all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
39. Article 4(a) of CERD requires countries to criminalise all dissemination of ideas based on racial superiority or hatred and incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any racial or ethnic groups. Australia has made a reservation in relation to Article 4(a).
40. In order to fully realise these rights in Victoria, the current law needs to be amended to protect a broader range of attributes. The legal tests for vilification also need to be amended to help make the laws more accessible and improve their effectiveness.

¹⁷ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 8.

¹⁸ These obligations arise under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities and the Convention on the Rights of the Child.

4. The need to protect broader attributes

41. The RRTA currently only provides protection to people or classes of people on the basis of their race and religious belief or activities. Hateful conduct effects, and has profound negative impacts on, other groups of people not currently protected by the RRTA.
42. The Victorian Government should amend the law so that the categories of protection are expanded to include the following attributes:
 - (a) Race;
 - (b) Religious belief or activity;
 - (c) Gender;
 - (d) Sexual orientation;
 - (e) Gender identity and gender expression;
 - (f) Sex characteristics;
 - (g) HIV/AIDS status; and
 - (h) Disability.
43. We recommend the Victorian Government look to the *Yogyakarta Principles* for defining the sexual orientation and gender identify attributes, but note that best practice definitions of all the newly protected attributes should be finalised in consultation with stakeholders from relevant, affected communities.
44. If 'national or ethnic origin' is not included as a standalone protected attribute, the broad definition of 'race' that is currently in the RRTA should be retained to include colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin.
45. The law should also protect someone who has a personal association with a person who is identified by reference to any of above protected attributes, for example, parents or advocates, by including a provision similar to section 6(q) of the *Equal Opportunity Act 2010* (Vic).

Attributes protected in other jurisdictions

46. The introduction of many of the above listed attributes were sought in the Patten Bill, which recommended that gender, disability, sexual orientation, gender identity and sex characteristics be added to the RRTA as protected attributes.¹⁹
47. Extending anti-vilification protections to additional groups of people is consistent with the approach adopted in other Australian states and territories:
 - (a) Sexual orientation is protected in NSW, the ACT, QLD and Tasmania.

¹⁹ Racial and Religious Tolerance Amendment Bill 2019 (Vic), s 1.

- (b) Gender identity is protected in NSW, the ACT, QLD and Tasmania.
 - (c) Sex characteristics are protected in the ACT ('intersex status') and Tasmania ('intersex variations of sex characteristics').
 - (d) Gender is protected in Tasmania (for the purposes of the provisions in section 17(1) of the Tasmanian *Anti-Discrimination Act 1998*).
 - (e) Disability is protected in the ACT and Tasmania.
 - (f) HIV/AIDS status is protected in NSW and the ACT.
 - (g) Lawful sexual activity, age, marital status, relationship status, pregnancy, breastfeeding, parental status and family responsibilities are protected in Tasmania.
 - (h) Race is protected in federal laws, NSW, ACT, Qld, Tasmania and WA.
 - (i) Religion is protected in the ACT, Qld and Tasmania.
48. Extending anti-vilification protections to additional groups of people is also consistent with the approach being adopted overseas:
- (a) in the United Kingdom, protected attributes include race, religion and sexual orientation;
 - (b) in Canada, protected attributes include colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression and mental or physical disability; and
 - (c) in South Africa, protected attributes include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth, HIV/AIDS status and any other ground where discrimination causes or perpetuates systemic disadvantage, undermines human dignity or adversely affects equal enjoyment of rights in a serious manner.

Intersectionality

49. Intersectionality is the overlap of various attributes – for example, race, religion and gender – that contributes to the specific type of oppression and discrimination experienced by a person. The term was coined by Kimberlé Crenshaw in her work helping to explain the particular forms of systemic oppression experienced by African-American women.²⁰
50. People who experience vilification on the basis of more than one attribute are uniquely disadvantaged and should be able to complain about that conduct on the basis of their intersectional experience, as opposed to complaining on the basis of a singular attribute.
51. For example, a Muslim woman who is subjected to hateful conduct targeted at her because she is a Muslim **and** a woman should have the choice to be able to bring **one** complaint that captures both, rather than needing to isolate a particular attribute.

²⁰ See eg, Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) *University of Chicago Legal Forum*.

52. In amending anti-hate laws, the Victorian Government should consider how to draft legislation that recognises the reality of intersectional hateful conduct and that makes the complaint process straightforward for people who identify with multiple protected attributes.
53. For the avoidance of doubt, any potential to bring intersectional complaints should not undermine the ability for people to bring claims based on individual attributes or to run complaints based on individual attributes in the alternative to intersectional complaints.

5. Best practice laws to prevent hate

54. The RRTA currently provides protection to people or classes of people on the basis of their race or religious belief or activities. There are civil protections that aim to address conduct that incites hatred against others and there are criminal provisions that aim to address serious vilification where part of the conduct includes threatening physical harm to others.
55. This submission proposes:
 - (a) Enacting a better civil test for vilification;
 - (b) Enacting a new protection against hateful conduct based on a harm-based civil test;
 - (c) Enacting a better criminal test for serious vilification;
 - (d) Enacting a new criminal offence prohibiting the public display of vilifying and intimidating materials, including the swastika;
 - (e) Consideration the enactment of a new criminal offence prohibiting conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property; and
 - (f) Expanding the definition of the conduct captured by anti-vilification laws.

Change the name of the Act

56. However these protections are enshrined, the current name of the Act – the *Racial and Religious Tolerance Act* – or any other Act containing these protections should not include ‘Tolerance’ in its title. In order to address the increasing levels of hateful conduct, we need to move past the rhetoric where we simply tolerate the existence of others and instead promote respect for, and the celebration of, diversity.

Enact better civil tests for vilification

Current laws

57. Sections 7 and 8 of the RRTA currently provide that a person must not engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, a person or class of persons on the basis of their race or religion.
58. To prove a contravention of these provisions, a person must show that a third party – who might be unidentifiable – has been incited to hatred or other strong emotions because of another person’s conduct.
59. Exemptions exist if the conduct was done reasonably and in good faith:
- (a) in the performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for:
 - (i) any genuine academic, artistic, religious or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
 - (c) in making or publishing a fair and accurate report of any event or matter of public interest (**the public conduct exemption**).²¹
60. An exemption also exists for conduct done in private (**the private conduct exemption**).²² This places the onus on a respondent to prove objectively that conduct was intended to be private.
61. In the 17 years the RRTA has been in effect, few complaints of vilification have been made pursuant to these sections. This is because of a myriad of factors, which are compounded by a legal test that sets the bar too high by requiring a person to prove that a third party has been incited to hatred.
62. These provisions by themselves also place the emphasis in the wrong place – whether a third party has been incited to hatred – in circumstances where the emphasis should be the experience of, and the impact on, the person who has been subjected to vilifying conduct and their community.

Proposed changes to current laws

A reformed civil incitement test for vilification

63. The existing incitement provisions in sections 7 and 8 of the RRTA should be amended.
64. There should be a reformed incitement provision that provides that a person must not engage in conduct that **expresses or is reasonably likely in the circumstances** to incite hatred,

²¹ *Racial and Religious Tolerance Act 2001* (Vic), s 11.

²² *Racial and Religious Tolerance Act 2001* (Vic), s 12.

serious contempt for, revulsion or severe ridicule of a person or group of persons on the basis of one or more of the protected attributes set out above.

65. This is consistent with recommendation 17.1 of the ACT Law Reform Advisory Council's Review of the *Discrimination Act 1991* (ACT).
66. The Victorian Government should retain a civil incitement provision aimed at preventing the incitement of hatred against others for consistency with other states and territories, which all have civil incitement provisions. This would also be consistent with the requirement in Article 20 of the ICCPR to outlaw vilification of persons on national, racial or religious grounds. This submission notes that Tasmania has retained a civil incitement provision in addition to also enacting a complementary, harm-based test, which is set out below.

Enact a separate protection against hate-based conduct using a harm-based civil test

67. In addition to reforming the civil test for vilification, the Victorian Government should enact a separate harm-based protection against hate-based conduct. Pursuant to that provision, it should be unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all of the circumstances, to offend, insult, humiliate or intimidate another person or group of people; and
 - (b) the act is done because of one or more protected attribute of the other person or of some or all of the people in the group.
68. This would create a standalone provision where the focus is on the impact of hate-based conduct, and the harm caused by that conduct, on a particular person or group of persons, not whether a third party has been incited to hatred.
69. Whether a provision like this is contravened would be judged by a court according to a reasonable person of the targeted group. This is because, in *Eatock v Bolt* [2011] FCA 1103 (which looked at the interpretation of the equivalent federal provision), it was found that:
- (a) the reference to 'person' is to be interpreted as a reference to an identified person (or persons) that the conduct in question was directed at;²³ and
 - (b) the assessment as to the likelihood of people within a group being offended by an act directed at them in a general sense, is to be interpreted by reference to a representative member or members of the group.²⁴
70. This means that people wishing to rely on the harm based test would no longer need to demonstrate that a third party has been incited to hatred, but would be required to show that it was likely that a reasonable person of the targeted group would have been offended, insulted, humiliated or intimidated by the conduct. This is important because it is people from targeted groups that suffer the impacts of hate, not the Australian community as a whole. It is

²³ *Eatock v Bolt* [2011] FCA 1103, [246].

²⁴ *Eatock v Bolt* [2011] FCA 1103, [251].

inappropriate for a member of the Australian community who has never had the degrading experience – for example being called a terrorist or being told that Hitler should have finished them off – to understand the impact of such statements and the harm, fear and sense of exclusion they create.

71. This proposal is similar, but slightly narrower, than laws that have been introduced in Tasmania. In Tasmania, a person must not engage in conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a protected attribute in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that person would be offended, humiliated, intimidated, insulted or ridiculed.²⁵
72. At the federal level, equivalent harm-based laws have been interpreted sensibly by the courts and are reasonably effective in operation. To contravene the provision, conduct must have “profound and serious effects”, which are “not to be likened to mere slights”.²⁶ While the word ‘offend’ could have a wider meaning than the other terms used, it must be interpreted with the words chosen as its partners.²⁷
73. To the extent the Victorian Government might have concerns regarding the language of the harm-based test proposed in this submission, those concerns could be mitigated by codifying the sensible way that the equivalent section has been interpreted at the federal level and confirm that the separate protection against hate-based conduct only applies to conduct that has a profound and serious effect, not to conduct that has only a minor or slight effect.

Conduct captured

74. The term ‘conduct’ in both civil provisions should adopt the reformed definition of ‘public act’ under section 93Z(5) of the *Crimes Act 1900* (NSW) so that it includes:
 - (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public;
 - (b) any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public; and
 - (c) the distribution or dissemination of any matter to the public.
75. For the avoidance of doubt, an act may be a public act even if it occurs on private land.

Exemptions

76. The current private conduct exemption and public conduct exemptions in the RRTA should apply to both of the above civil provisions, subject to amending the exception for “any purpose

²⁵ *Anti-Discrimination Act 1988* (Tas), s 17(1).

²⁶ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007.

²⁷ *Eatock v Bolt* [2011] FCA 1103.

in the public interest” to “any **genuine** purpose in the public interest” consistent with the wording in the equivalent federal provision.²⁸

77. The definition of ‘religious purpose’ in the exemption should also be narrowed and replaced with a definition that reflects the manifestation of freedom of religion and belief under Article 18 of the ICCPR to “worship, observance, practice and teaching”.

Enact better criminal tests for serious vilification

Current laws

78. Section 24 and 25 of the RRTA currently provide that a person must not, on the basis of the race or religion of another person or class of persons, intentionally engage in conduct that the offender knows is likely:
- (a) to incite hatred against that other person or class of persons; **and**
 - (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons.²⁹
79. A person also must not, on the ground of the race or religion of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.³⁰
80. There are no exemptions to these provisions.
81. These sections of the RRTA set an extremely high threshold to meet by requiring a person to demonstrate incitement and a threat of physical harm to person or property.
82. To our knowledge, there has only been one prosecution of serious vilification by Victoria Police, whereby Blair Cottrell, the former United Patriots Front leader, was convicted of inciting hatred, contempt and ridicule of Muslims after making a 2015 video beheading of a dummy in protest of a Bendigo mosque.

Proposed changes to current laws

A reformed criminal vilification test

83. The law should be amended so that there is a single criminal offence that prohibits serious vilification on the ground of the protected attributes set out above.
84. The threshold for that criminal offence should be lowered. This should be done by:
- (a) amending the fault element to ‘intentionally **or recklessly**’, to cover circumstances where there is a significant risk that a person’s conduct is likely to incite hatred, but who proceeded with that conduct notwithstanding that risk;

²⁸ *Racial Discrimination Act 1975* (Cth), s 18D.

²⁹ *Racial and Religious Tolerance Act 2001* (Vic), ss 24(1) and 25(1).

³⁰ *Racial and Religious Tolerance Act 2001* (Vic), ss 24(2) and 25(2).

- (b) replacing the subjective test of conduct that ‘the offender knows is likely to incite’ with an objective test of conduct that ‘is likely to incite’; and
- (c) prohibiting threats **or** incitement (rather than threats **and** incitement), so that conduct is captured which incites hatred against another person or class of persons on the basis of the protected attribute(s) **or** threatens violence or property damage to another person or class of persons on the basis of the protected attributes.

Conduct captured

85. The term ‘conduct’ in the criminal provision should adopt the reformed definition of ‘public act’ under section 93Z(5) of the *Crimes Act 1900* (NSW), as set out above.

Exemptions

86. The criminal offence should include an exception for ‘private conduct’ modelled on the private conduct exception for the civil protections, as set out above.

Awareness raising

87. The Victorian Government should duplicate the criminal vilification offence in the *Crimes Act 1958* (Vic) to raise its visibility within Victoria Police.
88. Police must also be provided with improved education and training so that they can better identify and respond to cases of serious vilification.
89. Education and training should also be provided to prosecutors and judges to raise awareness of, and support the consistent application of, the prejudice-motivated sentencing provision in the *Sentencing Act 1991* (Vic).

Specific provision prohibiting the public display of vilification materials

90. In response to the rise in anti-Semitism and Islamophobia, the emergence of hate groups and the increasing use of the swastika, we recommend that the Victorian Government create a standalone criminal offence prohibiting the public display of vilifying and intimidating material, such as the swastika.³¹
91. A provision was proposed in 1992, when the Victorian Government tried to pass a *Racial and Religious Vilification Bill 1992* (Vic), which lapsed before being passed by the Victorian Parliament. That Bill contained the following provisions:

6. Distribution or display of threatening or vilifying material

- (1) A person must not publish, distribute or display written or pictorial material that is threatening or vilifying with the intention of thereby creating, promoting or increasing hatred of any group of persons on the ground of their race or religion.

³¹ *The Age* newspaper agrees with this position: Editorial, “The swastika is a symbol that must be banned”, *The Age*, 16 January 2019 <www.theage.com.au/national/victoria/the-swastika-is-a-symbol-that-must-be-banned-20200116-p53s5p.html> as does the former Race Discrimination Commissioner, Tim Soutphommasane: Tim Soutphommasane, The law against racial hatred that can't be used to stop the advocacy of Nazism, *Sydney Morning Herald*, 18 January 2020 <www.smh.com.au/national/the-law-against-racial-hatred-that-can-t-be-used-to-stop-the-advocacy-of-nazism-20200117-p53sb6.html>.

- (2) A person must not publish, distribute or display written or pictorial material that is threatening or vilifying with the intention of thereby intimidating any group of persons on the ground of their race or religion.

7. Possession of threatening or vilifying material

A person must not possess written or pictorial material that is threatening or vilifying with the intention of publishing, distributing or displaying it and thereby:

- (a) creating, promoting or increasing hatred of any group of persons on the ground of their race or religion; or
(b) intimidating any group of persons on the ground of their race or religion.

92. Western Australia has similar provisions, which were introduced to their *Criminal Code Act Compilation Act 1913 (WA)* in 2004. Those provisions provide that:

Possession of material for dissemination with intent to incite racial animosity or racist harassment

Any person who —

- (a) possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
(b) intends the publication, distribution or display of the material to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

is guilty of a crime and is liable to imprisonment for 14 years.³²

Possession of material for dissemination that is likely to incite racial animosity or racist harassment

If —

- (a) any person possesses written or pictorial material that is threatening or abusive intending the material to be published, distributed or displayed whether by that person or another person; and
(b) the publication, distribution or display of the material would be likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group,

the person possessing the material is guilty of a crime and is liable to imprisonment for 5 years.³³

93. While not necessarily recommending provisions identical to those above, the Victorian Government should enact laws which effect prohibitions on the use and dissemination of material which is used to incite hatred. These provisions should explicitly prohibit public display of the swastika for such purposes and cover material that incites hatred against all protected attributes to the extent possible. Laws like these need to be carefully drafted so that only the most harmful and egregious forms of hate material – such as the swastika – are banned.

³² *Criminal Code Act Compilation Act 1913 (WA)*, s 79.

³³ *Criminal Code Act Compilation Act 1913 (WA)*, s 80.

94. The enactment of laws that prohibit the public display of hateful materials is important because it would enable members of Victoria Police to take action. For example, laws like these could allow for members of Victoria Police to intervene if another family in Victoria decides to fly a Nazi flag, with a swastika on it, on top of their house in full public view.
95. This law reform is needed because the swastika symbol represents hate, genocide and trauma for many people around the world, including members of Victoria's Jewish community – which has one of the largest populations of Holocaust survivors and descendants in the world. It has also become a calling card for the Far Right. Neo-Nazi groups sport swastika iconography on armbands and flags. From two men wearing shirts with the swastika on them during the ChillOut Festival in Daylesford, to children's playgrounds in Melbourne being spray-painted with the swastika, its use in public spaces is on the rise. There should be no place for this symbol in Australia, except in educational settings or for artistic purposes.
96. While the most effective means of countering hate and symbols associated with it is through education, the law plays an important standard setting role through the regulation and condemnation of unacceptable behaviour. Prohibiting vilifying material like the swastika is an important first step and would send a powerful message to the people and groups who use it.

Specific provision on causing a person to have a reasonable fear

97. The Victorian Government should also consider introducing an offence to criminalise hate conduct that is intended or is reasonably likely to cause a person to have a reasonable fear for their safety or security of property.
98. In this regard, during the Inquiry into Racial Vilification Law in NSW, Professors Simon Rice and Neil Rees recommended introducing a criminal offence in NSW that prohibits an act that:

is intended, or is reasonably likely, to cause a person to have a reasonable fear in the circumstances for their own safety or security of property, or for the safety or security of property of their family or associates.³⁴
99. An offence like this would require proof either of intent to generate fear in another person or that a reasonable person would be aware of the likelihood that fear would be caused.
100. As explained by Professor Simon Rice and Professor Neil Rees, “the alternative to intent – a reasonable person's awareness of the likelihood – ensures that a perpetrator of racial vilification is not able to rely on their own lack of awareness, insight or wilful blindness as to the effect of their conduct, or on a belief that what they said was true”.³⁵

³⁴ Professor Simon Rice and Professor Neil Rees, Submission to the Legislative Council Law and Justice Committee Inquiry into Racial Vilification Law in NSW, 19 March 2013, 2.

³⁵ Professor Simon Rice and Professor Neil Rees, Submission to the Legislative Council Law and Justice Committee Inquiry into Racial Vilification Law in NSW, 19 March 2013, 12.

Striking the right balance

101. The right to freedom of expression is an essential component of a democratic society and should be limited only to the extent that can be justified by an open and democratic society.
102. It is our view that the proposed laws set out above do not unreasonably burden the right to freedom of expression. They only apply to public conduct and are subject to exemptions that apply to conduct done reasonably and in good faith in a number of appropriate circumstances.
103. Further, it is our view that hateful conduct is not a form of expression protected by the implied freedom of political communication, which comes from judicial interpretation of the Constitution, nor is it protected by the right to freedom of expression set out in section 15 of the Charter.
104. In the recent case of *Cottrell v Ross* [2019] VCC 2142, Chief Judge Kidd found that anti-vilification laws do not necessarily burden the implied freedom of political communication:
- the preponderance of views in the authorities support the position that anti-vilification or anti-discrimination legislation of this kind [the RRTA] does not burden the freedom of communication about government and political matters, but rather promotes civil political discourse.³⁶
105. Chief Judge Kidd also found that expression – that manifests in vilifying conduct – is not protected by the right to freedom of expression set out in section 15 of the Charter:
- In my view, ‘expression’ that constitutes religious vilification – especially serious or extreme religious vilification – is excluded from the concept of ‘expression’ protected by s 15 of the Charter.³⁷
106. Anti-hate legislation like the RRTA promotes civil political discourse by setting parameters to enhance communications about government and political matters in a harmonious, diverse and open democracy which values all its members, irrespective of their attributes.³⁸
107. Anti-hate legislation also attempts to ensure that all people are able to exercise their freedom of expression, recognising that hateful conduct diminishes that right for people and groups of people who are targeted by vilifying conduct. As said by Chief Judge Kidd:
- racial and religious vilification speech – especially of an extreme kind – is antithetical to the fundamental principles of equality, democratic pluralism and respect for individual dignity which lie at the heart of the protection of human rights. Such legislation positively promotes people of different religions to participate in public life and discourse, free from vilification.³⁹
108. The amendments proposed in this submission are aimed at prohibiting hateful conduct, not at stifling political discussion. Outside of hateful conduct, people are free to communicate with each other and representatives about political matters and hold governments to account.

³⁶ *Cottrell v Ross* [2019] VCC 2142 [145], citing *Sunol v Collier (No 2)* (2012) 289 ALR 128, [89]; *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, [36]-[46], [49]; *Owen v Menzies* (2012) 293 ALR 571, [72]; *Eatock v Bolt* (2011) 197 FCR 261, [239] where Bromberg J extracts *R v Keegstra* [1990] 3 SCR 697, 764 (iii).

³⁷ *Cottrell v Smith* [2019] VCC 2142, 95-98.

³⁸ See *Owen v Menzies* (2012) 293 ALR 571, [72].

³⁹ See *Cottrell v Ross* [2019] VCC 2142, [98].

People are free to express their views about others, or activities of others, in any way whatsoever, provided they do so in a manner that does not:

- (a) incite hatred, serious contempt for, revulsion or severe ridicule a person or group of persons on the basis of one or more protected attributes;
- (b) offend, insult, humiliate or intimidate a person or group of persons on the basis of one or more protected attributes; or
- (c) threaten violence or property damage against a person or group of persons on the basis of one or more protected attributes.

6. Improved enforcement provisions

- 109. In order to make the laws easier to enforce, the law should be amended to allow for representative complaints. Currently, the RRTA relies on individual people making individual complaints which can expose them to further vilifying conduct.
- 110. The law should be amended to allow representative complaints with the ability to suppress the identity of complainants in appropriate contexts. This would help to encourage affected people to come forward. This could be modelled on section 46PB of the *Australian Human Rights Commission Act 1986* (Cth), which allows representative complaints that 'describe or otherwise identify the class members'.
- 111. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) should be given broader enforcement powers. The law should be amended so that the Commission is empowered with a range of regulatory functions and powers to address hateful conduct in the Victorian community. This should include reinstating the Commission's full range of regulatory powers and functions, including powers to undertake own motion public inquiries and investigate serious matters than indicate a possible contravention of anti-hate laws.

7. Addressing online vilification

- 112. For the purposes of the current RRTA, 'engage in conduct' includes the use of the internet or email to publish or transmit statements or other materials.
- 113. In addition, the *Criminal Code Act 1995* (Cth) makes it is an offence to menace, harass or cause offence using a 'carriage service'. There is also a web of federal and state laws that prohibit threats to kill, threats to cause serious harm and stalking that apply to online conduct.
- 114. The Patten Bill seeks to grant new powers to the Commission to apply to VCAT for orders so that they are able to request information from any relevant person or business (such as Facebook or Twitter) to identify online 'trolls' after a vilification complaint has been made. Such

requests could require, for instance, social media companies to hand over information on individuals who engage in online abuse through 'anonymous' accounts. We support this.

115. In addition, section 15 of the RRTA should be amended to extend liability for authorising or assisting vilification or victimisation to corporations (in addition to natural persons and unincorporated associations in the current provision).

8. The need to prevent hate-based conduct

116. The rise of hateful conduct is partly because the broader community ignores or accepts its presence and tolerates an increasingly discriminatory discourse. The Victorian Government needs to accept this reality in order to properly reckon with it and must urgently work with communities who experience hate to design strategies to prevent it.
117. Any law reform efforts must be accompanied by the Victorian Government working with communities who are targeted by hateful conduct to develop strategies – including public awareness campaigns and education resources and more effective data collection – to change the deep-seated, negative attitudes that feed hate-related behaviour.
118. Part of preventing hateful conduct includes building a more enduring Victorian human rights culture. The most recent review of the Charter in 2015 said this could be done by strengthening the Charter's scope and operation, and including stronger remedies and more rights.⁴⁰ The Victorian Government should action these recommendations. Strengthening the scope and operation of the Charter could go a long way towards creating a culture in Victoria where people better understand and respect each other's human rights.

⁴⁰ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006, State of Victoria (2015)* (available at: www.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights-and-responsibilities-act-2006).