



12 June 2020

LA LSIC - AVP INQUIRY
SUBMISSION NO. 27
SUPPLEMENTARY SUBMISSION

The Committee Manager
Legislative Assembly Legal and Social Issues Committee
Parliament House
Spring Street
East Melbourne, Victoria 3002

Dear Committee Manager,

The Victorian Gay & Lesbian Rights Lobby (**VGLRL**) provides the following supplementary submission in response to the Inquiry into Anti-Vilification Protections.

The VGLRL is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same sex attracted Victorians. We work constructively, cooperatively and respectfully with transgender, bisexual, intersex and other organisations that support our organisation's mission and vision.

Our submission addresses our proposal for a legislative one-stop shop to address discrimination, harassment and vilification; the test for vilification to be used; the questions of criminal penalties versus social reform; and appropriate terminology to capture anti-LGBTI vilification.

This submission can be made public and we would be pleased to make ourselves available to the Committee at any stage to discuss the matters therein. We thank you for taking the time to review this submission.

Yours sincerely,

Ms Nevena Spirovska
Co-Convener, VGLRL

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Mr Maxim Thomas
Co-Convener, VGLRL

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Inquiry into Anti-Vilification Protections

A one-stop shop to address discrimination, harassment and vilification

1. As we flagged in our original submission, we believe it would be better for anti-vilification protections to be located in the *Equal Opportunity Act 2010* rather than extending the *Racial and Religious Tolerance Act 2001* to cover additional attributes. The *Racial and Religious Tolerance Act 2001* is “seriously limited as a legislative tool” and has numerous flaws.¹ As a report of the then Joint Working Group of the Attorney-General’s and Health Minister’s Advisory Committees on GLBTI Issues noted, the *Equal Opportunity Act 2001* is preferable due to:
 - *its existing operation in relation to the protected attributes of gender identity, sexual orientation and lawful sexual activity;*
 - *its well-established and accessible complaints model; and*
 - *the flexibility it provides to VCAT to order remedies in relation to conduct which is proven to be unlawful.*²
2. Furthermore, as we stated in our evidence to the Committee, from the perspective of community members trying to access and navigate our complex legal system, having protections in different legislation makes it difficult to understand. Our community is aware of the *Equal Opportunity Act 2010* and utilises it, whereas there is not broad community awareness of the *Racial and Religious Tolerance Act 2001*.
3. The Commonwealth, New South Wales, Queensland, the Australian Capital Territory and Tasmania all have anti-vilification protections in their equal opportunity laws rather than in a stand-alone law. Victoria should follow their example.
4. The *Equal Opportunity Act 2010* should be a one-stop shop that contains provisions on discrimination and harassment, as it currently does, plus provisions on vilification.

Recommendation 1: Additional anti-vilification protections should be located in the *Equal Opportunity Act 2010* rather than extending the *Racial and Religious Tolerance Act 2001*.

The test for vilification

5. The *Racial and Religious Tolerance Act 2001* prohibits ‘conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of... [a] person or class of persons.’³ This is the same as the New South Wales law, except for the addition of ‘revulsion.’

¹ Bronwen Gray et al, *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria* (Joint Working Group of the Attorney-General’s and Health Minister’s Advisory Committees on GLBTI Issues, 2006) 36.

² Bronwen Gray et al, *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria* (Joint Working Group of the Attorney-General’s and Health Minister’s Advisory Committees on GLBTI Issues, 2006) 36.

³ *Racial and Religious Tolerance Act 2001* ss 7(1) and 8(1).

6. The problem is: this threshold test is too high and “involves a level of proof almost impossible to satisfy.”⁴
7. As we flagged in our original submission, the test could be changed to ‘is reasonably likely to incite’, which is in keeping with Commonwealth law. This would be the clean and easy option. However, it requires proof that a third party would be reasonably likely to be incited by the conduct.
8. Our preference would be to focus on the conduct itself, rather than its effect on an abstract third party. In this vein, the test could be changed to ‘conduct that is hateful, seriously contemptuous, reviling or severely ridiculing.’

Criminal penalties versus social reform

9. As we flagged in our original submission and further elaborated in our evidence to the Committee, we oppose criminal penalties for vilification as there are concerns about the record of the police in LGBT relations and because criminal offences are often ineffective in dealing with vilification. There is often a long time from the offence to the prosecution; a conviction can have a deleterious effect on people’s livelihoods; the matter must go through the courts rather than a tribunal with the ability to provide alternative dispute resolution; and a conviction often leads to no change to the offending behaviour. The criminal law does not operate as an effective deterrent.
10. However, if criminal penalties are to exist, they should be in the *Crimes Act 1958*, as they are in New South Wales and the Australian Capital Territory. Furthermore, there should not be any lowering of the threshold currently in the *Racial and Religious Tolerance Act 2001* or the addition of stand-alone criminal offences prohibiting the public display of vilifying material.
11. We want to stress that we strongly oppose vilification in any form, but strongly believe that the criminal law is not an effective mechanism to deal with offensive behaviour.

Recommendation 2: There should not be criminal sanctions for vilification, but if they are to exist, they should be located in the *Crimes Act 1958*.

12. Legislative reform is not enough to combat vilification. As we have previously argued, vilification “cannot easily be stopped by introducing new laws and tougher penalties for offenders, given the circumstances of many incidents.”⁵ Aside from legislative reform, what is also needed is social reform.
13. LGBTI people are more likely to report vilification if they can speak to people with specific LGBTI experience and knowledge in the issues affecting them and if they have confidence in the people they speak to. A successful example of this is the Anti Violence Project was established, which offers an online reporting mechanism that supports LGBTI victims of crime by liaising between them, Victoria Police and other agencies. The

⁴ Bronwen Gray et al, *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria* (Joint Working Group of the Attorney-General’s and Health Minister’s Advisory Committees on GLBTI Issues, 2006) 43.

⁵ *Enough is Enough: A Report on Discrimination and Abuse Experienced by Lesbians, Gay Men, Bisexuals and Transgender People in Victoria* (Victorian Gay and Lesbian Rights Lobby, 2010) 36.

Government should look at community reporting mechanisms such as that by the Anti-Violence Project and ensure that they are adequately funded to do their work

Recommendation 3: The Government should fund a ‘No To Homophobia’ style public education campaign to challenge vilification based on sexual orientation, gender identity, sex characteristics and HIV/AIDS status.

Recommendation 4: The Government should fund the Anti Violence Project to expand its online reporting mechanism to cover vilification based on sexual orientation, gender identity, sex characteristics and HIV/AIDS status and – where consent is given – to provide these reports to appropriate authorities.

Terminology

14. As we flagged in our original submission, we believe there are strong and compelling reasons why anti-vilification protections should be expanded to address vilification based on sexual orientation, gender identity, sex characteristics and HIV/AIDS status.
15. As we stated in our evidence to the Committee, we also support anti-vilification protections being extended to address vilification based on gender expression. Furthermore, we support anti-vilification protections based on sex.

Recommendation 5: Anti-vilification protections should be expanded to address vilification based on sexual orientation, gender identity, gender expression, sex, sex characteristics and HIV/AIDS status.

16. There have been some submissions that these terms are not well-defined. Indeed, the definitions in law are out-of-date and in need of improvement. Here, we will step you through all the terms.

Sexual orientation

17. ‘Sexual orientation’ refers to a person’s romantic and/or sexual attraction to others.
18. The definition of ‘sexual orientation’ in the Racial and Religious Tolerance Amendment Bill 2019 and the *Equal Opportunity Act 2010* is out-of-date as it does not include asexual people. We recommend that the definition of ‘sexual orientation’ be updated to reflect the definition in Commonwealth law.

Recommendation 6: The definition of ‘sexual orientation’ in the *Equal Opportunity Act 2010* and any anti-vilification protections should be the same as that in the *Sex Discrimination Act 1984* (Cth).

Gender identity and expression

19. ‘Gender identity’ refers to a person’s deeply felt internal and individual experience of gender, with or without regard to the person’s designated sex at birth. This can include transgender people whose gender identity differs from their designated sex at birth, and who have a long history of social exclusion. Those that want to be able to vilify

transgender people, through slurs, misgendering, bullying, online abuse and other forms of hate speech, oppose the inclusion of 'gender identity' in anti-vilification legislation or maintain that 'gender identity' - and, by extension, transgender status - is part of some abstract culture war.

20. 'Gender expression' refers to a person's presentation of their gender through physical appearance and mannerisms, speech, behavioural patterns, names and personal references, with or without regard to the person's designated sex at birth.
21. Sometimes these terms are used interchangeably. Canadian law uses both.
22. The definition of 'gender identity' in the *Equal Opportunity Act 2010* is out-of-date as it does not include non-binary who identify outside the binary gender identities of male or female. We recommend that the definition of 'gender identity' be updated in consultation with trans and gender diverse organisations.
23. 'Gender expression' is currently not a protected attribute under the *Equal Opportunity Act 2010*. We recommend that 'gender expression' be included as a protected attribute under equal opportunity and anti-vilification law, which would reflect Canadian law.

Recommendation 7: The definition of 'gender identity' in the *Equal Opportunity Act 2010* and any anti-vilification protections should be developed in consultation with trans and gender diverse organisations.

Recommendation 8: 'Gender expression' should be included as a protected attribute in the *Equal Opportunity Act 2010* and any anti-vilification protections.

Sex and sex characteristics

24. 'Sex' refers to a person's biological characteristics that define their assignment as male, female or other, particularly at birth.
25. 'Sex characteristics' refers to a person's physical, hormonal or genetic features relating to sex, including genitalia, chromosomes, genes and hormones.
26. 'Sex' is different from gender identity or expression. We recommend that 'sex' be included as a protected attribute under anti-vilification law, as it is already in the *Equal Opportunity Act 2010*, but not at the expense of gender identity or expression.
27. 'Sex characteristics' is currently not a protected attribute under the *Equal Opportunity Act 2010*, meaning that people with intersex variations are not protected under Victorian law. We recommend that 'sex characteristics' be included as a protected attribute under equal opportunity and anti-vilification law, with the definition the same as that in the Racial and Religious Tolerance Amendment Bill 2019.

Recommendation 9: 'Sex' should be included as a protected attribute in any anti-vilification protections.

Recommendation 10: 'Sex characteristics' should be included as a protected attribute in the *Equal Opportunity Act 2010* and any anti-vilification protections, with the

definition the same as that in the Racial and Religious Tolerance Amendment Bill 2019.

HIV/AIDS status

28. 'HIV/AIDS status' refers to a person living with HIV/AIDS.

29. 'HIV/AIDS status' is currently not a protected attribute under the *Equal Opportunity Act 2010*, meaning that people living with HIV/AIDS are not protected under Victorian law. We recommend that 'HIV/AIDS status' be included as a protected attribute under equal opportunity and anti-vilification law, which would reflect Australian Capital Territory law.

Recommendation 11: 'HIV/AIDS status' should be included as a protected attribute in the *Equal Opportunity Act 2010* and any anti-vilification protections, with the definition the same as that in the *Discrimination Act 1991 (ACT)*.