



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

17 June 2020

By email: avpinquiry@parliament.vic.gov.au

Dear Legislative Assembly Legal and Social Issues Committee,

Supplementary Submission to the Inquiry into Anti-Vilification Protections

1. The Law Institute of Victoria ('LIV') is Victoria's peak body for lawyers and represents approximately 19,000 people working and studying in the legal sector in Victoria, interstate and overseas. We welcome the opportunity to provide a supplementary submission to the Anti-Vilification Protections Inquiry ('the Inquiry'). This submission was written in consultation with the LIV's Human Rights Committee which includes lawyers from human rights organisations such as the Victorian Equal Opportunity and Human Rights Commission, Human Rights Law Centre and Liberty Victoria.
2. The LIV has continually advocated for effective anti-vilification laws that are accessible and meaningful for Victorians. We have previously made a submission to the Inquiry advocating to reform the *Racial and Religious Tolerance Act 2001* (Vic) ('RRTA') to improve its accessibility, utility and expand the grounds of protected attributes it seeks to protect.¹ The LIV also provided evidence to the Inquiry on 11 March 2020.² Our position remains the same. It is in our view that

¹ Law Institute of Victoria, 'Inquiry into Anti-Vilification Protections,' (Submission, 31 January 2020) <<https://www.parliament.vic.gov.au/lxic-la/inquiries/article/4333>>.

² Victoria, *Inquiry into Anti-Vilification Protections*, Legislative Assembly Legal and Social Issues Committee, 11 March 2020, (Jacinta Lewin, Bill Swannie) https://www.parliament.vic.gov.au/images/stories/committees/lxic-LA/Inquiry_into_Anti-

the review and reform of the RRTA is vital. Strong and practical human rights protections are especially important during times of emergency, such as the current COVID-19 pandemic. The recently reported increases in racial abuse highlight the need for more meaningful and accessible laws addressing vilifying behaviours.

3. In this submission, the LIV reinforces the recommendations made in our previous submission dated 31 January 2020 and illustrates how the present events of the COVID-19 emergency provide further examples of the ineffectiveness of Victoria’s anti-vilification laws. While the LIV continues to endorse the expansion of the protected attributes by which an individual may be found to be vilified under the RRTA, the remainder of this supplementary submission will primarily focus on the racial vilification experienced by victims linked to COVID-19.³

Recommendations

4. The LIV reiterates the following recommendations set out in its submission dated 31 January:

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| Recommendation 1 | The RRTA should be incorporated into a new part of the <i>Equal Opportunity Act 2010</i> (Vic). |
| Recommendation 3. | The existing civil incitement provisions under sections 7 and 8 of the RRTA, should be amended: |

[Vilification Protections /Transcripts/2020.03.11/11.03.2020 - FINAL TRANSCRIPT - LIV - AVP Inquiry.pdf](#) .

³ Law Institute of Victoria, ‘Inquiry into Anti-Vilification Protections,’ (Submission, 31 January 2020) 4, <<https://www.parliament.vic.gov.au/lvic-la/inquiries/article/4333>>.

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| | <p>a. To provide a single provision which prohibits vilification on the ground of specific attributes; and</p> <p>b. To lower the threshold for incitement.</p> <p>The LIV proposes that the word ‘<i>incites</i>’ be replaced with ‘<i>expresses or is reasonably likely in the circumstances to incite.</i>’ This recommendation is consistent with the ACT’s Law Reform Advisory Council’s Review of the Discrimination Act 1991(ACT).</p> |
| <p>Recommendation 4.</p> | <p>The existing criminal offences under sections 24 and 25 of the RRTA, should be amended:</p> <p>a. To provide a single provision which prohibits vilification on the ground of specific attributes; and</p> <p>b. To lower the threshold for incitement.</p> <p>The LIV proposes the following suggested wording: ‘<i>A person must not, intentionally or recklessly, engage in conduct that:</i></p> <p>a) <i>Is likely to incite hatred, serious contempt for, revulsion or severe ridicule; or</i></p> <p>b) <i>Threatens violence or property damage</i></p> <p><i>Towards another person or group of people on the ground of the following attributes under [‘Section X’].</i></p> |
| <p>Recommendation 9.</p> | <p>The Victorian Government should introduce educational campaigns and resources to ensure affected communities understand their rights, and to increase understanding of anti-vilification laws among the general public.</p> |

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| <p>Recommendation</p> <p>11.</p> | <p>The Victorian Equal Opportunity Human Rights Commission be empowered with regulatory functions and powers to address vilification in the Victorian Community.</p> |
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Racial Vilification Linked to COVID-19

5. The LIV is aware that since the beginning of the COVID-19 pandemic, there have been reports of an increase in racially motivated incidents of verbal and physical abuse towards Asian-Australians.⁴ The Australian Human Rights Commission found they had received more complaints in February than at any time over the past twelve months. One third of these complaints have been related to COVID-19.⁵ Similarly, the Victorian Equal Opportunity and Human Rights Commission (**“the Commission”**) also found that in April, it received eight times more enquiries about racial vilification than in the same period last year. Additionally, the use of their Community Reporting tool has doubled since early March.⁶ The sharp increase in complaints and self-reporting of racially motivated incidents demonstrates the importance of the work of the Inquiry and reinforces the need for timely law reform.

6. In addition to data provided by Australia’s peak human rights organisations, there has been numerous reported and publicised incidents of racial vilification directed

⁴ Mr Chin Tan ‘Where’s all the Data on COVID-19 Racism?’ *Australian Human Rights Commission* (Article, 9 May 2020) <https://humanrights.gov.au/about/news/opinions/wheres-all-data-covid-19-racism> .

⁵ Ibid.

⁶ Victorian Equal Opportunity and Human Rights Commission, ‘All Victorians should live free from hate’ – our statement on reforming anti-vilification protections’ *VEOHRC* (Article, 27 May 2020) <https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/1908-all-victorians-should-live-free-from-hate-%E2%80%93-our-statement-on-reforming-anti-vilification-protections> .

primarily towards persons of an Asian background. For example, there have been reports of Chinese students being physically assaulted in Melbourne, taunted about Coronavirus and told to “go back to China.”⁷ A Chinese-Australian family’s home was attacked with rocks and vandalised with graffiti spraying of the words “COVID-19 China die,”⁸ and the Asian Australian Alliance recorded over 400 incidents of racism in since early April.⁹

7. The preliminary findings conducted by Asian Australian Alliance¹⁰ has found the following emerging trends:
- a) Approximately 65% of respondents identified as being female;
 - b) COVID-19 related racism incidents reported was the highest in New South Wales (36%), with Victoria coming in second (30%);
 - c) The majority of COVID-19 related racism incidents occurred on a public street or sidewalk (37%), with incidents happening in a shopping centre or supermarket coming in second (23%) and public transport areas coming in third (15%);
 - d) Online COVID-19 related racism was the highest through Facebook (44%);

⁷ Paul Sakkal, ‘Go back to your country’: Chinese international students bashed in CBD,’ *The Age* (Article, 17 April 2020) <<https://www.theage.com.au/national/victoria/go-back-to-your-country-chinese-international-students-bashed-in-cbd-20200417-p54kyh.html>>.

⁸ Jason Fang, Samuel Yang and Bang Xiao, ‘Racist coronavirus graffiti sprayed on Chinese-Australian Family’s home in Melbourne,’ *ABC News* (Article, 22 April 2020). <<https://www.theage.com.au/national/victoria/covid-19-racism-for-every-case-there-are-10-more-who-remain-silent-20200420-p54lk3.html>>.

⁹ ‘Asian Australian Alliance, COVID-19 Coronavirus Racism Incident Report’, *Reporting Racism Against Asians in Australia coming out of the COVID-19 Coronavirus Pandemic* (Website, April 2020). <https://www.surveymonkey.com/r/AsianAustralian?fbclid=IwAR1NOQMeSPDMGw3mrBe_4DHK_OxvqTz2rJ_1Zfx1oPk6M_8z2bbWFXnO05IQ>.

¹⁰ Ibid.

- e) Over 60% of respondents stated that their experience of racism was in the form of racial slur or name calling, with 24% stating that the racism was “made as a joke” usually by someone or people they knew; and
 - f) Almost 90% of respondents stated that they did not report their experience of racism to the police.¹¹
8. The LIV is concerned by the data and examples provided. Furthermore, given the violent nature of the reported events, it is important to ensure that reform to Victoria’s anti-vilification legislation is sufficiently capable of prohibiting vilifying conduct in all circumstances, including during the COVID-19 pandemic or similar public emergencies.

Effective laws during times of emergency

9. Australia’s peak human rights organisations and media reports have demonstrated that there is a need to examine the utility of Victoria’s anti-vilification laws. The futility of these laws has become notably evident during the COVID-19 pandemic. Effective anti-vilification laws, that are practical and enforceable are part of a suite of human rights protections that are particularly important during times of emergency. The LIV notes that in times of emergency, our human rights legal framework is more necessary than ever to ensure that Victorians are protected.
10. Case law has demonstrated the importance of human rights in times of public emergency.¹² The *Charter of Human Rights and Responsibilities 2006 (Vic)* (**‘the**

¹¹ Ibid.

¹² *Certain Children v Minister for Families and Children ^ Ors (No2)* [2017] VSC 251.

Charter') provides for protection from torture and cruel, inhumane or degrading treatment.¹³ This provision is a reflection of the Article 7 *International Covenant Civil Political Rights* which provides that even during a public emergency, there is to be no derogation from Article 7.¹⁴ Justice Dixon confirms this reasoning and holds that s 10 of the Charter cannot be derogated from even in times of public emergency.¹⁵ The LIV recommends that anti-vilification provisions are reformed to ensure that targeted groups such as Asian Australians are protected from degrading treatment as upheld in the Charter.

Purposes of RRTA

11. As noted in the LIV's initial submission, the broad purposes of the RRTA provided in the preamble and s 1 are centred on promoting racial and religious tolerance by prohibiting vilifying conduct and providing a means of redress for victims of racial or religious vilification.¹⁶ The RRTA also seeks to protect the dignity and sense of self-worth of people with diverse ethnic, indigenous and religious backgrounds.¹⁷ The RRTA does this primarily through its civil anti-vilification provisions in ss 7 and 8 and criminal provisions under ss 24 and 25. In addition to its enforceability, legislation such as RRTA should also act to set values within the community. It is important these laws recognise that hate speech opposes democratic values of inclusion and diversity, as noted in the RRTA's preamble. The data and examples above suggest that these laws are limited in serving their purpose to protect

¹³ *Charter of Human Rights and Responsibilities 2006* (Vic) s 10.

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7; UN Human Rights Committee (HRC), CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). <https://www.refworld.org/docid/453883fb0.html>.

¹⁵ *Certain Children v Minister for Families and Children ^ Ors (No2)* [2017] VSC 251[254].

¹⁶ Law Institute of Victoria, 'Inquiry into Anti-Vilification Protections,' (Submission, 31 January 2020) 5, <<https://www.parliament.vic.gov.au/lvic-la/inquiries/article/4333>>.

¹⁷ *Racial and Religious Tolerance Act 2001* (Vic) Preamble and s 1.

Victorians from vilifying behaviour and espousing fundamental values of inclusion and diversity within the community.

Accessibility of Anti-Vilification Laws

12. The LIV submits that an effective law is one that is readily accessible, enforceable and known about in the community. A legal framework that is rarely used is not a framework that effectively protects and promotes the objects and purposes that the legislation seeks to achieve. To this end, the LIV reiterates its key recommendation that the RRTA should be incorporated into a new part of the *Equal Opportunity Act 2010* (Vic) (**'the EO Act'**) which governs discrimination in Victoria. The EO Act has a broad range of existing protected attributes that mirror the majority of protected attributes that we seek to have the laws expanded to protect. Anti-vilification laws sit naturally alongside laws promoting and protecting equality, and diversity. Secondly, combining these laws into one piece of legislation will mean the community only has to refer to one set of laws to empower their claims. Finally, the courts and tribunals are also more likely to be familiar with the EO Act from the complaints handling work and litigation that has come from the EO Act.¹⁸

13. Additionally, in order for the anti-vilification laws to be effective and accessible to Victorians, the LIV submits that education initiatives are vital in promoting the

¹⁸ Victoria, *Inquiry into Anti-Vilification Protections*, Legislative Assembly Legal and Social Issues Committee, 11 March 2020, (Jacinta Lewin, Bill Swannie) 40-41.
<https://www.parliament.vic.gov.au/images/stories/committees/lisic-LA/Inquiry_into_Anti-Vilification_Protections_/Transcripts/2020.03.11/11.03.2020_-_FINAL_TRANSCRIPT_-_LIV_-_AVP_Inquiry.pdf>.

fundamental values that the laws seek to champion.¹⁹ This will be discussed in detail below.

Civil Provisions of RRTA - Harm-Based Protection

14. The LIV advocates for a new civil harm-based provision to be inserted under the RRTA (or the EO Act), modelled on the existing harm-based tests in s 18C of the *Racial Discrimination Act 1975* (Cth) and s 17 of the *Anti-Discrimination Act 1988* (Tas). In our initial submission, the LIV noted that the ss 7 and 8 incitement test is solely concerned with whether a third party, who has been exposed to the alleged vilifying conduct, was incited to hatred, serious contempt or other emotions.²⁰ This test does not consider the effect of conduct on the vilified individual, nor account for situations where public statements might not be overheard by other witnesses. The examples of racism as described above may fail to meet the element of third party incitement highlighting the limitations of ss 7 and 8. It also leaves some victims of vilification without a means for redress and therefore unfulfilling the purposes of the RRTA.

15. As detailed in *The Age*, Dr Ern Chang, a family doctor in Geelong was racially abused by a woman. He recounted her saying, “Go home, you have no right to be here,” and after using expletive language she said, “I bet your name is Lee isn’t it?” and drove away.²¹ While the woman’s conduct was likely to offend, insult or

¹⁹ Ibid.

²⁰ Law Institute of Victoria, ‘Inquiry into Anti-Vilification Protections,’ (Submission, 31 January 2020), 7 <<https://www.parliament.vic.gov.au/lvic-la/inquiries/article/4333>>.

²¹ Nicole Precel, ‘COVID-19 racism: For every case, there are ’10 more who remain silent,’ *The Age* (Article, 20 April 2020) <<https://www.theage.com.au/national/victoria/covid-19-racism-for-every-case-there-are-10-more-who-remain-silent-20200420-p54lk3.html>>.

intimidate Dr Chang or a reasonable member of the target group, her conduct would fail to meet the test of “inciting hatred” by a third party, provided for in s 7.

16. This example highlights the limitation of s 7 in ensuring protection against vilifying behaviour. To this end, the LIV reiterates its position that a new harm-based civil provision with wording such as; *‘If the conduct is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate a reasonable member of the target group,’* would create a test that is more likely to apply to situations such as Dr Chang’s.²² This new provision would maintain the dignity and self-worth of victims and provide a means of redress for individuals who are vilified in circumstances where the high standard of incitement of hatred by others, is not met.

Civil Provision of RRTA - Lowering the threshold for incitement

17. The LIV observes that the existing civil incitement provisions under ss 7 and 8 of the RRTA should be amended to lower the threshold for incitement.²³ The current test is highly subjective as a complainant must prove that a third party is to be shown to be incited with hatred, serious contempt or other emotions from the conduct. The LIV submits that the third party test creates an extremely high threshold for victims to meet. Furthermore, the test places weight on the wrong party as it focuses on whether a third party has been incited to hatred. The LIV believes that emphasis should be placed on the impact of the victim who has experienced the vilifying conduct. The LIV advocates that the word ‘incites’ should be replaced with *‘expresses or is reasonably likely in the circumstances to incite.’*

²² Law Institute of Victoria, ‘Inquiry into Anti-Vilification Protections,’ (Submission, 31 January 2020), Recommendation 2 <<https://www.parliament.vic.gov.au/lvic-la/inquiries/article/4333>>.

²³ Ibid, 7.

The LIV notes that the graffiti spraying of the words, “COVID-19 China die,”²⁴ on the garage door of an Asian-Australian family home in Melbourne is unlikely to meet the s 7 test further highlighting the weaknesses of s 7.²⁵ In this example, it would be difficult for a victim to demonstrate how these words affect a third party as they would be unidentifiable. To demonstrate contravention, the victim would have to show how bystanders who may walk past have been incited to hatred or other strong emotions because of the conduct. The above highlights some of the practical limitations with the current laws.

18. In *Catch the Fire Ministries v Islamic Council of Victoria*,²⁶ when determining the relevant audience for incitement, Justice Nettle held that where statements are published generally, the court must have regard to all manner of persons who are likely to see and absorb them.²⁷ In the context of this public graffiti, determining the audience of the conduct and whether individuals who were to witness the graffiti were incited to hatred would be practically difficult and a barrier to the RRTA fulfilling its purposes of preventing vilifying conduct.

19. Amending the threshold to the ss 7 and 8 tests, as recommended above, amends the test to an objective standard, which is easier to apply in the absence of an identifiable audience. Lowering this threshold by removing the practical difficulties aligns with the RRTA’s purpose of ensuring prohibition of vilifying behaviour. It

²⁴ Jason Fang, Samuel Yang and Bang Xiao, ‘Racist coronavirus graffiti sprayed on Chinese-Australian Family’s home in Melbourne,’ *ABC News* (Article, 22 April 2020) <<https://www.abc.net.au/news/2020-04-22/racist-coronavirus-graffiti-sprayed-on-family-home-in-melbourne/12170162>>.

²⁵ *Racial and Religious Tolerance Act 2001* (Vic) s 7.

²⁶ *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284.

²⁷ *Ibid* [16].

suggests that Victorian anti-vilification laws are unsuccessful in their purpose, if conduct similar to this graffiti is not captured by the RRTA or the EO Act.

Criminal Provisions of RRTA

20. Some of the recent events of racism and vilifying conduct associated with the COVID-19 crisis have been of a physically violent nature, such as the physical assault and taunting of two Chinese students in the Melbourne CBD (see above).²⁸ The LIV advocates that the existing criminal incitement provisions under ss 24 and 25 of the RRTA should be amended to lower the threshold for incitement, to ensure that vilifying conduct of a violent nature is caught within its ambit. The replacement of the subjective test of '*conduct that the offender knows is likely to incite*' with an objective test of '*conduct that is likely to incite*,' allows the criminal provisions to capture reckless or violent conduct the perpetrator may not willingly intend, or the perpetrator could otherwise understand to incite hatred or serious contempt in the target group.
21. The LIV also recommends amending the wording of the criminal provisions, altering the test to conduct that is "intentional **or** reckless," and to cover "threats **or** incitement," as opposed to both "threats **and** incitement." By altering the provisions in this manner, it enables the RRTA to apply to reckless threats of serious violence on the basis of a protected attribute, without the need for the incitement of hatred in others.

²⁸ Paul Sakka, 'Go back to your country': Chinese international students bashed in CBD,' *The Age* (Article, 17 April 2020) <<https://www.theage.com.au/national/victoria/go-back-to-your-country-chinese-international-students-bashed-in-cbd-20200417-p54kyh.html>>.

Educational Resources and Campaigns

22. The COVID-19 pandemic has demonstrated that there is a clear need for the Victorian Government to implement educational campaigns and resources informing the public on Victoria's anti-vilification laws. In order to give these legal frameworks more meaning and efficacy, it is vital that the community is educated on the values of equal opportunity and diversity. The LIV recognises that education and effective laws work simultaneously in providing redress and setting community values.
23. The LIV observes that education and resources for victims seeking redress is even more necessary during a public emergency. The steep increase in incidents of vilification documented by the Asian Australian Alliance²⁹ and the Commission³⁰ suggests a lack of clarity and understanding surrounding Victoria's anti-vilification laws, particularly the seriousness of the criminal vilification provisions.
24. Additionally, the LIV recommends that the Victorian Government target specific resources to vulnerable communities and areas of high vilification complaints, in order to ensure victims of vilification have accessible pathways to seek redress, and to lower the bar to reporting. These resources should be informed by the Commission and the Victorian Multicultural Commission. Individuals who experience vilification are often vulnerable and impacted in multiple ways by an

²⁹ 'Asian Australian Alliance, COVID-19 Coronavirus Racism Incident Report', *Reporting Racism Against Asians in Australia coming out of the COVID-19 Coronavirus Pandemic* (Website, April 2020).

https://www.surveymonkey.com/r/AsianAustralian?fbclid=IwAR1NOQMeSPDMGw3mrBe_4DHKOxvqTz2rJ_1Zfx1oPk6M_8z2bbWFXnO05IQ.

³⁰ Victorian Equal Opportunity and Human Rights Commission, 'Reducing Racism During COVID-19,' *VEOHRC* (Article)

<https://www.humanrightscommission.vic.gov.au/component/k2/item/1893-reducing-racism-during-covid-19>.

emergency such as COVID-19. In light of the recent incidents of racial vilification, the availability of resources and education to assist vulnerable Victorians to understand and enforce their rights is integral.

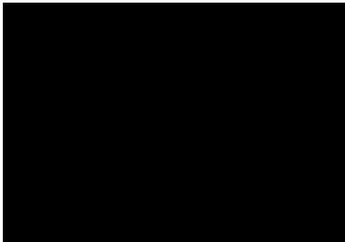
The Commission's Regulatory Functions and Powers

25. The LIV observes that there is a need for regulatory functions and powers to address vilification in Victoria. The LIV recommends that the Commission is well placed to help to promote the RRTA and to provide redress. Currently, the Commission have been serving the community during this emergency through their enquiries and complaints functions. The LIV appreciates the work of the Commission and advocates that as the regulator of the RRTA, strengthening the Commission's functions and role will better serve Victoria.
26. Through the large number and varied nature of recent incidents of vilification, the COVID-19 pandemic has established that the Commission needs stronger powers to receive and resolve complaints in a cost-effective and timely manner. Reforms should resource and empower investigatory functions of the Commission to compel provision of documents to assist in identifying anonymous internet perpetrators, and enable representative complaints without identifying individual complainants, to protect the anonymity of vulnerable and victimised persons and groups who experience hate.

Conclusion

27. Should you wish to discuss these matters further, please contact Nethmi Perera, Policy Officer for the LIV's Administrative Law and Human Rights Section [REDACTED] [REDACTED] or Alex Moses, Paralegal for the LIV's Administrative Law and Human Rights Section [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Yours sincerely



Sam Pandya

President

Law Institute of Victoria