



12 June 2020

Ms Natalie Suleyman
Chair, Legal and Social Issues Committee
Parliament of Victoria
Legislative Assembly, Legal and Social Issues Committee
Parliament House, Spring Street
EAST MELBOURNE VIC 3002

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Dear Ms Suleyman

Supplementary submission regarding the Inquiry into Anti-Vilification Protections in Victoria

Thank you for the opportunity to provide a supplementary submission to the Legal and Social Issues Committee's (the Committee's) Inquiry into Anti-Vilification Protections in Victoria (the Inquiry). On 31 January 2020, the Victorian Equal Opportunity and Human Rights Commission (the Commission) provided a comprehensive written submission to the Inquiry. The Commissioner gave evidence to the Committee on 27 May 2020 at a public hearing of the Inquiry.

This letter briefly overviews the Commission's key recommendations to the inquiry and then provides supplementary information to the Committee based on questions taken on notice at the 27 May hearing. It addresses (1) the impact of the COVID-19 pandemic, (2) the introduction of complementary offences criminalising the possession, distribution or display of hateful material, and (3) the resourcing implications for the Commission should the broader reforms be adopted.

Briefly, the Commission recommends a series of key changes to better protect people from vilification in Victoria including:

- Strengthening and broadening Victoria's vilification laws by lowering the threshold for incitement and introducing a complementary civil protection that captures the harm caused by hate conduct.
- Extending vilification protection to others who experience hate such as people with disabilities, women and LGBTIQ people.
- Expanding the powers of the Commission to reduce the burden on individual complainants and enable the Commission to identify respondents, proactively investigate and take steps to eliminate hateful conduct.
- Ensuring that any legal measures be accompanied by a strong policy response tackling the underlying assumptions and attitudes that breed exclusion and prejudice.

COVID-19 and the need to reform Victorian vilification laws

The COVID-19 pandemic has highlighted the urgent need for reform to anti-vilification protections in Victoria. Throughout the pandemic, the Commission has seen a worrying increase in reports of racism through both our enquiries and complaints functions. People from east-Asian backgrounds have been particularly targeted.

- In April 2020 we received **enquiries** about racial vilification on an almost daily basis; 8 times more than we received in the same period last year. We received 32 vilification enquiries out of 380 enquiries overall, amounting to 8.4% and averaging one enquiry per day. In the same period in 2019 we received 3 racial vilification enquiries which was less than 1% of the total.
- Use of our online **Community Reporting Tool** has more than doubled since early March 2020 with half of all reports regarding racial vilification.
- The number of racial vilification **complaints** were also three times higher this April than last year (3 racial vilification complaints this year compared to 0 in the month of April 2019). The current inadequacies of our anti-vilification laws have been highlighted during this time, with 2 racial vilification complaints being refused because the respondent could not be identified. This included a matter regarding a Facebook group which is explicitly racist towards Chinese people.

These reports are just the tip of the iceberg, reflecting those who are aware of the Commission's functions and who are willing and able to engage. Wide-scale reform is needed to strengthen existing protections against racism, create a system that can hold perpetrators to account, and provide hope for victims that enduring vilification is not just part of life that they must endure.

Introducing legislation to criminalise hate materials

At the public hearing the Committee referred to the Commission's recommendation that the Government consider introducing complementary offences to criminalise the possession, distribution or display of hateful material and asked for overseas examples of this. Current vilification laws in Victoria do not criminalise hate materials. This can be contrasted with the laws of many other western countries, such as Germany, Canada, New Zealand, the United Kingdom, Austria and other European countries that have introduced some legislation criminalising this conduct as well as the promotion of genocide or Holocaust denial.¹ There is, however, disparity between the strength, interpretation, and application of these laws.

Victoria should approach reform in this area by learning from the issues experienced by these comparative jurisdictions, particularly in relation to (1) the breadth of any carve outs and defences to the conduct in the law, and (2) the scope of the symbols and materials that would be captured. These issues are discussed briefly below.

1) Carve outs and defences

Many comparative domestic jurisdictions that criminalise possession, publication or display of hate materials, have built in carve outs and defences to the offences. Some carve outs

¹ Michael J Bazylar, 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism' (2009) *Genocide Prevention Now* 1 <<http://www.ihqjlm.com/wp-content/uploads/2016/01/Holocaust-Denial-Laws-1.pdf>>; Criminal Code, RSC 1985, c C-46, ss 318(1) and (2) respectively; Human Rights Act 1993 (NZ) s 131-132.

include where the materials or conduct is being used for educational, theatrical or research purposes, and defences include where the conduct occurred in private, or is lacking intention. Some countries apply their laws very strictly and give less weight to intention.² Germany has used its Criminal Code to prosecute individuals acting anti-constitutionally by distributing or displaying the Swastika, even where no ill-intention was behind the conduct.³ In 2018 Hans Burkhard Nix was prosecuted for publishing Nazi-era image of an SS chief wearing a swastika armband on his personal blog. He was convicted and sentenced to a suspended sentence which he appealed to the European Court of Human Rights, arguing it violated his right to freedom of expression. The court found that although Nix did not intend to 'distribute totalitarian propaganda, incite violence, or utter hate speech', Nix had still violated German domestic laws by displaying Nazi ideology without clear opposition to it.⁴ This and other cases have been controversial and have raised questions in Germany about protecting individuals from hate crime, and balancing other human rights, such as the freedom of expression.

2) Scope of symbols recognised as hate materials

Victoria should also consider whether to legislate against specific hate symbols and materials that are commonly recognised (such as the Swastika), or to criminalise hate materials in a way which enables the law to evolve and capture new and emerging symbols. In the case of Germany, neo-Nazi groups have used new less recognised hate materials and symbols to convey messages of hate, to avoid being captured under Germany's strict laws.⁵

Any drafting should also be careful to ensure that only the most egregious and harmful forms of hate material are captured by new laws. These laws would need to be properly balanced with other fundamental human rights, also taking care not to discriminate against members of certain religious groups.

Criminalising hate materials in Victoria

The experience of countries such as Germany in criminalising hate materials tell us that any reform in Victoria must be nuanced and balanced. Reform in Victoria should also be guided by the framework in the *Victorian Charter of Human Rights and Responsibilities*, ensuring that it protects and promotes peoples' right to equality and to be free from discrimination, right to freedom of thought, conscience, religious and belief and cultural rights, whilst also striking a balance with freedom of speech.

We recommend that any legislation to criminalise hate materials should also be accompanied by the suite of reforms outlined in our submission.

² Michael J Bazylar, 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism' (2009) *Genocide Prevention Now* 1 <<http://www.ihqilm.com/wp-content/uploads/2016/01/Holocaust-Denial-Laws-1.pdf>>.

³ Bazylar, above n 2; Mara Bierbach Karsten Kaminski, *Germany's confusing rules on swastikas and Nazi symbols* (14 August 2018) Deutsche Weller <<https://www.dw.com/en/germanys-confusing-rules-on-swastikas-and-nazi-symbols/a-45063547>>.

⁴ Sarah Hort, European Court of Human Rights upholds German anti-Nazi propaganda law (13 May 2018) Human Rights Law Centre <<https://www.hrlc.org.au/human-rights-case-summaries/2018/7/26/european-court-of-human-rights-upholds-german-anti-nazi-propaganda-law>>; Nix v Germany (European Court of Human Rights, Chamber, Application no. 35285/16, (13 March 2018).

⁵ Bazylar, above n 2, p 5.

Resourcing implications for the Commission

The Commission offers an information service to the community which receives over 8,000 enquiries each year via telephone, email, webchat, letter and in-person. This service educates community members about racial and religious vilification in addition to discrimination, sexual harassment, victimisation and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The Commission also provides a free, confidential and timely dispute resolution service under the *Equal Opportunity Act 2010* (Vic) and *Racial and Religious Tolerance Act 2001* (Vic). In the 2018 to 2019 financial year we finalised 910 complaint files referred through our dispute resolution service. Our accredited and highly skilled conciliators strive not only to resolve individual complaints but also to achieve systemic change, for example, by educating workplaces regarding their legal obligations, or facilitating changes to policies and practices.⁶

Reforms that have the potential to impact on the Commission's services include:

- expanding the attributes protected by vilification laws to enable, for example, people with disabilities or members of the LGBTIQ to bring vilification complaints;
- lowering the legal threshold of the civil test to make remedies more accessible to people who are harmed by vilification;
- enabling the Commission to compel information to identify respondents to complaints; and
- permitting representative complaints without naming individual complainants.

These reforms would extend vilification protection to communities not currently protected by the law and would lower the current barriers to making a complaint which is likely to increase the number of people accessing the Commission's services. We also expect that if reforms were introduced to strengthen the scope of the Commission's enforcement powers, the Commission would require corresponding resourcing.

While our services and functions would undoubtedly be impacted by the reforms proposed, it is not possible to provide modelling of specific resourcing impacts without knowing the extent of the reforms to be implemented.

Please contact Aimee Cooper, Legal Manager on 0438 775 822 if you require further information. The Commission consents to this submission being published as a public document.

Yours sincerely



Catherine Dixon
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⁶ Victorian Equal Opportunity and Human Rights Commission Annual Report 2018–19, pp 10, 13. Submission to the Parliamentary Inquiry into Anti-Vilification Protections, p 25.