

# TRANSCRIPT

## LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

### **Inquiry into Anti-Vilification Protections**

Melbourne—Wednesday, 11 March 2020

#### **MEMBERS**

Ms Natalie Suleyman—Chair

Mr James Newbury—Deputy Chair

Ms Christine Couzens

Ms Emma Kealy

Ms Michaela Settle

Mr David Southwick

Mr Meng Heang Tak

#### **WITNESSES**

Mr Morgan Begg, Research Fellow, and

Ms Dara Macdonald, Research Fellow, Institute of Public Affairs.

**The CHAIR:** Thank you very much. All evidence taken by this Committee is protected by parliamentary privilege; therefore you are protected against any action for what you say here today but if you go outside and repeat the same things, including on social media, these comments may not be protected by this privilege. All evidence given today is being recorded by Hansard and is also being broadcast live on Parliament's website. Please note any footage can only be rebroadcast in accordance with the conditions set out in standing order 234. You will be provided with a proof version of the transcript for you to check as soon as it is available. Verified transcripts, PowerPoint presentations and handouts will be placed on the Committee's website as soon as available. I now invite Morgan Begg, Research Fellow for the Institute of Public Affairs, and Dara Macdonald, Research Fellow for the Institute of Public Affairs, to make a short brief followed by questions by the Committee.

**Mr BEGG:** Thank you, Chair, and thank you for inviting us to appear at this hearing today. In the interests of time I am simply going to refer to my submission and forgo the right to make a statement, but I will allow Dara to make a statement.

**Ms MACDONALD:** Thank you. The Institute of Public Affairs is a research organisation that promotes the human dignity and freedom of all Australians. The purpose of our appearance today is to highlight our concerns with Victoria's anti-vilification laws as well as our concerns with the proposed Racial and Religious Tolerance Amendment Bill. The IPA is particularly concerned that Victoria's vilification laws are an illiberal and anti-democratic restriction on freedom of speech, which damages social cohesion and individual human dignity; are based on vague and subjective standards that require judges to make arbitrary determinations about lawful and unlawful speech, which is inconsistent with the rule of law; and include serious vilification provisions which are superfluous, poorly defined and set a threshold that is too low for imposing criminal penalties.

Importantly, the proposed Bill would amplify the flaws that are already in Victoria's anti-vilification laws. Freedom of speech is required both for respecting individual human dignity and to enable functioning democracy with civil and thorough public discourse. The Bill infringes on this most fundamental freedom by expanding the *Racial and Religious Tolerance Act*. The Act already stifles freedom of speech. Particularly, sections 7 and 8 of the Act make it unlawful for a person to:

... engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of ...

another person because of their race or religious belief or activity. The Bill would add gender, disability and sexual orientation as new protected attributes. This Bill also introduces for the first time in Australia provisions that will unmask, or dox, social media accounts. The cumulative effect of this is that public discourse will be suppressed by actual and threatened legal consequences. This is known as the law's chilling effect on speech. It is in no-one's interest to prevent the full and frank discussion of any issue of public concern. Issues of gender and sex are frequently topics of public debate. To use the law to shut down or discourage participants from expressing themselves only serves to undermine the legitimacy of public debate.

Since the introduction of the *Racial and Religious Tolerance Act* in 2001 there have been hundreds of complaints under part 2 of the Act. These complaints are dealt with behind closed doors, and there is a general lack of transparency with how legal rights and principles of natural justice are observed by the equal opportunity commission. The complaint resolution process in many ways is the punishment. The operation of anti-vilification laws punishes defendants at a procedural level by imposing costs—both financial and time costs—in defending themselves against a complaint, even those which are ultimately dismissed in the defendant's favour.

Part 4 of the Act contains criminal provisions. Sections 24 and 25 of the Act define and prohibit serious vilification based on race or religion. The Bill seeks to amend sections 24 and 25 by altering the mens rea, or mental elements, required for committing an offence and to expand the number of personal attributes which are

covered under the serious vilification provisions. These amendments lower the threshold and as such are inappropriate restrictions on freedom of speech. The type of behaviour that would be prohibited under these sections is already dealt with within the criminal code. Specifically, all cases that have been successfully prosecuted under part 4 of the existing Act would also be successfully prosecuted under section 17 of the *Summary Offences Act*.

The IPA recommends that the amendments presented in the Racial and Religious Tolerance Amendment Bill be rejected on the basis that they infringe fundamental freedoms and duplicate existing legal obligations.

**Mr NEWBURY:** Thank you both. I wanted to ask you a bit of a left-field question, so bear with me. One of the proposals that has been put forward so far, including by the Victorian Equal Opportunity and Human Rights Commission, is moving what is effectively the reasonable person test for harm and making that a subjective test that is based on a victim's own perception of what a person has said. I would be really interested in your view, if you do not mind me putting you on the spot, of what you would think of a subjective test based on what any person perceives of language used.

**Mr BEGG:** Thank you for the question. I have not seen that proposal myself, but my first comment would be that the law is already subjective. I am not sure exactly what the effect of that would be because of that, because the law is already subjective. It is already based on standards which are based on an emotional response of a person, as according to the judgement of a bureaucrat or a judge in any given case. I reject the notion entirely that the law as presently drafted is objective or sets an objective standard or sets a high standard for unlawful speech.

**Ms MACDONALD:** The other aspect of that is the perverse outcomes that could be created by a subjective standard, because obviously each person has a different standard, and therefore when interpreting the law judges will inevitably come to different conclusions for different cases and there will be created a body of case law that would be inconsistent and unable to be applied in a consistent manner.

**Mr NEWBURY:** Thank you for that, and I do also note that the level of harm is often a component of the calculation of damage.

**Ms SETTLE:** The presentation seemed to be largely around the private members Bill that is currently going through the house. This Inquiry is really broader than that, and we are not particularly focused on that at all. It is trying to look at generally what we should be doing. So I guess from the sounds of what you were sort of saying in there, do you hold the view that there should not be an RRTA at all?

**Mr BEGG:** That is correct, yes. We believe that vilification is a concept that is very vague, very uncertain and is a poor basis for being made unlawful.

**Ms SETTLE:** So you do not see that there is room to amend that to be more precise, if precision is your query, or do you think there should be no—

**Mr BEGG:** I personally have a very high bar for what should constitute unlawful speech. I think the history of the common law has generally held that things will be lawful until you affect the physical or proprietary rights of another person. So principles of, say, defamation developed around that, because a person is supposed to have held a proprietary interest in their reputation. I am not even sure if I believe that. I think that is a bit uncertain. I think the problem with vilification laws at their core is that you are not dealing with someone's physical or proprietary interests but the law is try to protect something—what it is trying to protect is vague. That is the source of the vagueness.

**Ms SETTLE:** Given that you do not think there should be one at all, I probably know the answer to this, but there has been a suggestion from a few of the submissions that in fact what needs to change is it becomes a harm base—so vilification at the moment is around the third party, you know, to incite and in fact we should be looking at harm based. If we were looking at harm based, does that fall more within your notion of proprietorial or physical, because if it is a harm base my mental health is a physical attribute?

**Mr BEGG:** Possibly it does. It seems there is still an aspect of subjectivity, just because what you are assessing is the harm, which is expressed on an emotional level. And those emotional responses, I am not discounting them in any way, but as far as protecting them in a legal sense I find it would be difficult to impose a general rule based on that standard.

**Ms SETTLE:** I am not a lawyer at all, and so the proposition that has been put to us is the notion of—what is the expression?—any reasonable person. Is that the Clapham omnibus reasonable person test? Where does subjectivity sit in that, if there is a reasonable person test?

**Mr BEGG:** It is an interesting idea. I have not seen those proposals, so we may not be able to comment, unless Dara would like to.

**Ms SETTLE:** These were just submissions to the Inquiry.

**Ms MACDONALD:** I mean, obviously the devil is in the detail, so to speak. Whether it was a preference as to what we have now or not a preference would be obviously dependent on how it is worded. Obviously making the wording far more objective would be a preference to what is currently in the legislation, but obviously it is hard to say without having the wording in front of us, I would say.

**Mr NEWBURY:** As a general principle, a move to make it more subjective would be an issue?

**Ms MACDONALD:** Yes, definitely.

**The CHAIR:** Okay. We have heard the current system is not working very well. We have heard there has been an increase in hateful attacks, whether it is online or in other forms. We have heard there is a rise in Islamophobia and anti-Semitism, and it continues on. So in your view: if you are suggesting that we do not have a racial and religious tolerance act or anti-vilification laws that protect our community from these sorts of—I would say—hateful acts, what would be your suggestion?

**Mr BEGG:** I would be interested to know more about what you have heard about those trends increasing. I do not have any information myself, but my observation would be that those trends have in fact decreased over time. Of these issues, I think we are overwhelmingly more tolerant. That is an observation. At the fringes you are always going to have people that are not tolerant, but I do not think that those numbers have increased over time. I would argue that those have become more marginal.

**The CHAIR:** Well, we have seen evidence to suggest the opposite to that—from the ICV, and we have heard from various groups that there continues to be an increase. Just recently—and David would be able to assist me on this—we heard the head of ASIO make a very public speech about the increase of far right groups and potentially that this was becoming pretty much a high priority for the country, let alone Victoria. So in all of our evidence we have heard there continues to be an increase, and we are not counting the many more that do not report and go through the system. But I suppose you have answered on your position.

**Ms MACDONALD:** If I could add to that, I mean, we already have drafted anti-vilification laws and we have still an increase in these kinds of incidents. I mean, working briefly in the European area, they have far more restrictive speech codes et cetera et cetera, particularly around anti-Semitism, and yet there is still a rise in the numbers of hate incidents in this regard. No-one is disputing that this a bad thing and that we need to stop it, but the question is what the role of the law should be. And the second question is—even if we do have speech codes, whether they are actually effective. From what I have seen, you cannot actually stop people from holding views because of a law, basically. If they are going to hold an abhorrent view, they are going to hold it, regardless of whether the law says it or not.

**The CHAIR:** I suppose it is taking that next step and talking about: yes, I appreciate that people will hold views, but I suppose it is when they take that next step of affecting someone both physically and emotionally in a hateful way that causes harm, adding on to what Michaela said. So appreciating the views, yes—we live in a democratic society and we cannot control someone's views. But when they reach the next step of a hateful or a harmful attack on someone based on their race, religion, sexual orientation and so on—I mean, you have answered the question that I asked originally, so I will leave it at that point and I will move on to David.

**Mr SOUTHWICK:** Thanks for your submission and presentation today. What role do you think education plays in the overall ability to help reduce the amount of racial and religious attacks on the individual?

**Ms MACDONALD:** I would say it is probably more of a role—as you said, for education—for civil society to inculcate values as opposed to a top-down approach where we tell people. The law has limited effect in this respect, and actually in terms of changing attitudes it is more of a role for civil society to take effect there. That would be my view, personally.

**Mr SOUTHWICK:** So accepting the point of the racial and religious attacks, and I think the issue at the moment is not necessarily the quantity of them, but it is more at the pointy end, where there are a lot more targeted and aggressive instances of trying to incite hate and violence in their attempt. What is your view on how we go about managing those situations, particularly for those that do not have the ability to necessarily be able to combat that with their own free speech? Let me give you an example of a situation that we had with the Holocaust survivor in Beulah. He effectively had a Nazi swastika flag raised above the back of his house, and the 83-year-old Holocaust survivor for over a week did not leave his home because of being confronted with that flag at the back of his house. How would you suggest that be managed in terms of a way forward, where in that particular case that individual could not combat that situation with his own free speech because of his situation from the past?

**Mr BEGG:** Yes, that is a very hard case. You are dealing with a few issues. You know, it is a very high bar in order to intervene, in effect, in what someone does in their own house or their own backyard. Clearly that is an obviously hard case. I find it difficult to form a law based on that hard case. What is the saying? ‘Hard cases make bad law’, or something like that. I am not sure if you can form a law based on hard cases like that. Maybe Dara has an extra view?

**Ms MACDONALD:** I would give probably more the cultural understanding of this event. There are two points really. The first being that obviously he could not particularly speak out on his behalf, but there was lots of media coverage around that, which did the job for him, so just because the person is not in a position to speak out, it does not mean that there are not organisations that can take the case for them and prosecute the case as to why this is obviously offensive. The other aspect of this is that to the extent that there is incitement to violence, this is all pretty much covered in the criminal code anyway. We have existing criminal provisions for incitement to violence as well as offensive conduct in the *Summary Offences Act 1966*. To the extent that it does cross that line into inciting violence, there are already provisions in legislation that would be able to be relied upon in this instance.

**Mr SOUTHWICK:** Obviously you would be suggesting that where there are acts that are inciting hate or inciting violence, they would need to be incorporated into some form of law to protect individuals?

**Ms MACDONALD:** Well, they are already in the law, so the additional legislation is not really required because we have these protections in the law already.

**Mr SOUTHWICK:** Thank you.

**The CHAIR:** Any further questions? Thank you so much, Morgan and Dara, for presenting today. Our next steps will be that we will continue deliberating and receiving evidence in the coming weeks, and then we will be putting forward some strong recommendations to the Government on this matter. Thank you again for taking the time to present to us.

**Mr BEGG:** Thank you for having us.

**Ms MACDONALD:** Thank you.

**Witnesses withdrew.**