T R A N S C R I P T

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

Ms Jacinta Lewin, Chair, and

Mr Bill Swannie, Member, Human Rights Committee, Law Institute of Victoria.

The CHAIR: Welcome. 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, those comments may not be protected by this privilege. All evidence given today is being recorded by Hansard and is also being broadcast live on the Parliament's website. Please note that 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 and any PowerPoint presentations and handouts will be placed on the Committee's website as soon as possible. I now introduce Jacinta Lewin, the Chair of the Law Institute of Victoria's Human Rights Committee, and also Bill Swannie, a member of the Law Institute of Victoria's Human Rights Committee, for the record. Welcome, and you may proceed with your presentation.

Ms LEWIN: Thank you. Just by way of introduction I will start with a brief opening statement, and I will give you an indication of Bill's and my particular expertise and set out how we can direct our knowledge to the submissions. Today I am appearing in my capacity as Chair of the Law Institute of Victoria's Human Rights Committee. This is a voluntary committee, but in addition to this voluntary role I am also a special counsel at Maurice Blackburn Lawyers in their social justice practice, and before that I was a senior legal adviser at the Victorian Equal Opportunity and Human Rights Commission. Bill today is also a former chair of the Human Rights Committee and a legal academic who teaches and researches in the areas of racial vilification law and free speech issues.

As you may already be aware, the Law Institute of Victoria is Victoria's peak legal body for lawyers and people studying and working in the legal sector. The LIV represents about 19 000 members of the legal community, so it is a broad combination of diversity of thought and opinion. The mission of the particular Human Rights Committee is to be a collaborative peak industry committee that uses our legal knowledge, expertise and networks, and particularly the networks of our members, to promote, influence and advocate for a strong human rights culture in Victoria. This is done through sharing our knowledge, peer networks, legal policy work and through the development of educational tools. We are proud to have a skills-based membership that is made up of a number of leading lawyers, many of whom may have already informed submissions through other organisations.

The Inquiry into Anti-vilification Protections in Victoria goes to the heart of the issues that the committee often deals with, in that the *Racial and Religious Tolerance Act* is one of the three key pieces of the human rights framework in Victoria. We can be proud as Victorians to have a strong human rights framework which really does give us the language, law, skills and potential for education around a lot of the values that we often use to talk about our democratic society.

These laws are particularly important because it is about ensuring that there is a set of standards of behaviour and expectations in our community and recognising that hate speech is contrary to the democratic values of Victoria in that it diminishes the dignity and sense of inclusion and belonging that our diverse community seeks to embody. Really these laws serve a number of purposes. They are a legal enforcement mechanism but also a method of talking about the values and principles that we want to espouse as a Victorian community, and those are picked up very strongly in the *Equal Opportunity Act* and the *Victorian charter of Human Rights and Responsibilities*. Those three pieces of law work very closely together under the role of the commission. In drafting these submissions, we collaborated closely with the Victorian Equal Opportunity and Human Rights Commission. The Law Institute's view is that as one of the leading governing and regulatory bodies responsible for these laws they are well-placed to make recommendations about making the laws accessible and effective.

Today Bill and I will focus particularly on our recommendations concerning the civil provisions, because that is our area of expertise, and all good lawyers will tell you not to comment on areas of law that you are not experts in. We really have four key messages. The first is that these laws should be effective and accessible. Anti-vilification laws are critical to supporting our human rights culture, and they reinforce those community

values. One measure of these laws being accessible is a legal framework that the community is aware of, understands and is able to use to enforce their rights. Laws need to be practical. Accordingly, the LIV supports the proposal that the laws be incorporated into the *Equal Opportunity Act*. That Act lists a number of attributes that would mirror the attributes that we seek to have the laws expanded to protect. The benefits of a combined piece of legislation will allow these laws to be repositioned in a statute or a piece of law that can potentially make it easier to be utilised by both the community at large and courts and tribunals. We also support the introduction of changes to the law to better improve the existing law and to address the harm that individuals that are subject to hate speech experience, both day to day and in online platforms.

Bill will talk specifically about any questions on the lowering of the threshold of existing civil and incitement provisions to allow for better utilisation and enforcement of these laws. We also are supportive, in keeping with a number of the submissions, of the introduction of a new civil harm-based test to create laws where the threshold for civil redress is not too high—it is not too inaccessible.

Also we want to extend and support the extension of these laws as set out in the draft bill. Victorian anti-vilification laws should be extended to prohibit vilification on the grounds of other attributes. Such a proposal does not dilute existing protections, but it seeks to expand legal frameworks so that all parts of our community can benefit from a mechanism to call out hate speech. We are happy to elaborate and to provide some specific examples, and we invite questions from the Committee.

The CHAIR: Thank you so much. I might just start with one question. In your submission you talk about including:

> … any form of communication, conduct, distribution or dissemination of material to the public …

and you recommend—

> … the adoption under Victorian law the definition of 'public act' under s 93Z(5) of the Crimes Act 1900 (NSW).

That includes:

> … speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods …to the public …

Would you be able to just talk about that?

Mr SWANNIE: Well, it is important that the legislation, however it defines the conduct which it regulates, does distinguish between private conduct on the one hand and public conduct on the other. There is an argument for getting a detailed definition of what is considered to be in the public realm and what should be regulated by the legislation, and different pieces of legislation have defined that distinction in different ways. There is an argument for providing a detailed definition about what should be considered in the public realm, and therefore regulated by the legislation, or perhaps just providing a simplified definition. But whichever approach is adopted, it is important that there is a clear distinction between the public realm, which is regulated by the legislation, and the private realm. That is important for protecting private discussions, so that they are not regulated by the legislation, and that, I guess, maintains the free speech principles which underlie legislation of this sort—that it regulates public conduct and the harm which is caused by public conduct, but it does not interfere with, for example, one-to-one discussions between individuals.

The CHAIR: I have asked this question a couple times of other submitters: the rise of online vilification and hateful attacks that occur on the social media front, whether it is Twitter or Facebook—do you have any suggestions of how we can better address, and I suppose better protect, people that are victims of these sorts of attacks?

Ms LEWIN: So currently we know, for example in the context of women, that women experience online harassment that could lead to hate at extraordinarily high numbers, and there does seem to be an enforcement gap. Where our submissions pick up on this is where we talk about making the law more accessible through lowering the legal thresholds so that it is a more usable law. I think the intention of the legislation was always to

cover online conduct, but at the moment it is so difficult to actually utilise the laws effectively that is very hard to capture those, and examples like women experiencing discriminatory, vilifying comments would not be caught.

An example of this enforcement gap is recently a major newspaper had to remove an online comment section about the AFLW because the comments were so derogatory and offensive. And you have an instance where you have private entities—private business—having to self-enforce these issues rather than there being a sufficient regulatory framework. So we would welcome the expansion of the attributes, and I might let Bill talk to why changes to the legal test would also improve that issue.

Mr SWANNIE: I think, just to address your specific point, it is important that laws such as these ones are platform neutral. Although it is quite well known that online hate speech is on the rise, it is important that laws of this nature do regulate all types of speech, regardless of the platform on which they are made. And it comes back to the point before about the distinction between private conduct, which should not be regulated, and public conduct, which could be. But it is true that there is one specific improvement which could be made—and we have argued for it in our submission—about improving the effectiveness of the *Racial and Religious Tolerance Act*, and that is by adjusting the test which it sets. Our submission argues that it is a very difficult test to satisfy, whether it is online material or whether it is material published in another format. We argue that the incitement test on which the current legislation is based has two main problems. Practically it is very difficult to for people to enforce that and to prove the incitement requirement, because it does require proving the response which is experienced by a third party—so not the target of the vilification but a third party to the speech. And that is why we are arguing for a test which focuses on the effect of the speech on the target of the speech. So we are arguing for a move from the incitement test to a test which is similar to 18C, where it focuses on the response of the victim rather than the response from the target.

The CHAIR: And just one final question I suppose I have is that we have heard evidence, and I know that especially with ethnic communities and religious groups—and particularly the Muslim community—there has been evidence that the current system is very confusing. The length of any form of resolution is very long and a lot of responsibility is placed on the victim to follow things through. And there is a lack of understanding of the system. That is the real challenge out in communities.

Your submission recommends moving the anti-vilification protections to the *Equal Opportunity Act*, and I think a couple of presenters from today have said, 'Creating a one-stop shop'—I think you used that term. And there has been a little bit of, I suppose, having a standalone act. Would that be less confusing? Would that allow clarity and a much more—I suppose, in basic language—simple process? I am really interested to see your view on that.

Ms LEWIN: I am happy to answer that in the first instance, and thank you for your question. I think when we talk about the effectiveness of our laws you have touched on a number of key points, which is unless people know they exist, unless they are accessible and unless they sit in some sort of framework that can be readily understood and that there is a resolution available that is not always tribunals or court, the effectiveness is probably in question. The *Equal Opportunity Act* is, in my humble opinion, a good piece of legislation that deals with discrimination in Victoria. It sets out a number of attributes that operate very similarly to the attributes that have been suggested in this Bill, and it makes discrimination against the law. So incorporating this law into the *Equal Opportunity Act* would make sense because they naturally are pieces of legislation that already sit alongside each other. It also would be much more consistent with other jurisdictions who have their laws sitting within one piece of legislation. There is a single set of laws that everyone knows they need to refer to.

The *Equal Opportunity Act* has also had a significant amount of complaints-handling work and litigation through VCAT, so courts are also more familiar with the legislation. And I think it might be one small means, when situated in a broader context, of better support for educational initiatives and better support for commission functions and powers around releasing policy and educational guidelines. And having a commission that is well-resourced to really promote the fundamental values that these laws seek to espouse would make the law more accessible and effective.

Mr SWANNIE: Yes, it is worth also noting that the types of harms which vilification causes are very similar to the types of harms which discrimination causes, and they could be described as discriminatory harms in the sense that vilification is often experienced by members of minority communities and that vilification in many of its forms characterises its target as being inferior or subordinate. So it is similar to discrimination in that sense, and also the effect of vilifying comments is to exclude and to marginalise particularly vulnerable groups. So in that sense vilification protections sit well inside equal opportunity law and anti-discrimination law, and that is another reason, perhaps, for including vilification provisions in the *Equal Opportunity Act*.

Mr SOUTHWICK: Thank you for your presentation today and what you have also given us in terms of the briefing here. I want to draw your attention to recommendation 2, and you mention here that the LIV provides the following suggested wording change:

> *If the conduct is reasonably likely in all the circumstances, to offend, insult, humiliate or intimidate a reasonable member of the target group.*

How do you see that working alongside the incitement piece? Do you see that sitting separately or sitting as part of the circumstances to offend, insult and humiliate, which may ultimately—

Mr SWANNIE: No, this is an alternative test to the incitement test, so we are arguing that the incitement test should actually be replaced by some wording which is similar to this. I identified just a bit a moment ago the problems with the incitement test, so we are arguing that that test should be replaced, and we are arguing that it should be replaced by a test in this wording or similar wording, which is similar to 18C of the *Racial Discrimination Act*. So it is a test which is focusing on the response of the target of the vilification rather than focusing on the effect on a third party who happens to be a viewer or a listener who overhears the speech.

Mr SOUTHWICK: But would you have an incitement test for another lot of circumstances, or would you completely replace the incitement with just the offence?

Ms LEWIN: I may not be understanding your question correctly, but I think that there are two points in the submission, which are that there should be a new civil-based harm test and there should be additional reform to the incitement test to lower the threshold.

Mr SOUTHWICK: Okay, that is fine. In the civil part of this recommendation what remedy would you think would follow as part of the change?

Ms LEWIN: That is one where you can draw on existing frameworks very effectively. If you look at the frameworks under the Victorian Equal Opportunity and Human Rights Commission's complaints-handling mechanisms, there is already a complaints-handling mechanism, so you can have a civil remedy which might be going to a conciliation conference convened by the commission where there is an opportunity to have the complaint conciliated with a view to achieving some sort of restorative justice or apology. There may also be other opportunities for redress in keeping with normal breaches of the civil law, such as sometimes compensation is also available.

Mr SOUTHWICK: Finally, recommendation 9 looks at a suggestion of introducing educational campaigns and resources. Can you just elaborate a bit more about what you were thinking there?

Ms LEWIN: Yes. One of the things we know is that to make human rights real and meaningful to our community or to espouse the Victorian values of equal opportunity, diversity—all of the things that are set out in the purposes and objectives of these laws—what we need to really also invest in are models that are not just a legal regulatory framework. So you have the Victorian Equal Opportunity and Human Rights Commission that could take on a greater role to help, particularly if their powers were expanded, which is another of the recommendations. They could help to assist by running educational initiatives, a bit like they do with the *Victorian Charter Of Human Rights and Responsibilities*. They could collect data so that there is better information on the risk that vilification poses to our community. They could also run training for government and public authorities, a bit like they do in the charter education project. Education is, I think, one of these core elements of setting values but also letting people know their rights. What point are rights if we do not know that we have them?

Mr SOUTHWICK: Thank you.

Mr SWANNIE: The importance of education is really that it is directed towards the target communities. The communities who are affected by vilification are the ones, the most important group, that need to receive this education, and that goes hand in hand with simplifying the laws as well. We know that they are extremely complex in the way that they operate at the moment, as they are drafted and as they have been interpreted by the courts. So simplifying the laws, making them more effective, goes hand in hand with the educational purposes. Education has two purposes: educating the community so that they are more aware of their rights and how to enforce them but also educating the general public so that these values are more widely understood within the general public to prevent this type of conduct from happening in the first place.

Mr SOUTHWICK: Sorry, just one last question. In recommendation 2, just back to that again, in terms of the definition, 'reasonably likely to offend, insult and humiliate', how would you propose a definition around what is reasonably likely to offend, insult or humiliate someone? Would you look at that being contextualised around the definition?

Mr SWANNIE: I do not think there is a need to further define 'reasonably likely' in the legislation. There are a whole lot of court decisions particularly surrounding section 18C about 'reasonably likely', and like you said, it is all about taking context into account. There was a lot of discussion with the previous submission about the swastika, and there are certain symbols and certain words which have a long history and are very harmful because of their historical associations. So it is about taking context into account, and that would mean that the history and the associations which a particular word or a particular symbol has, a court can take those into account. I do not think there is a need to further define that in legislation, and perhaps there are actually reasons why it should not be further defined.

We know that the subjects of hate speech change over time and the platforms and the means of hate speech change over time. There is, I think, a strong argument for keeping the legislation framed in broad principles and broad terms in order that courts can apply this legislation to evolving circumstances.

Ms LEWIN: I suppose one of the other advantages of that proposed wording is that the 18C provisions, which it is loosely based on, have been around for a considerable amount of time, and we know that decision-makers are allowed to have reference to those decisions when understanding how the laws apply. Whenever there is a new law that is introduced there is always this period where that law has to be applied and the parameters of that space have to be explored and sometimes debated.

The CHAIR: If there are no further questions, can I thank you on behalf of the Committee, and in particular the Law Institute of Victoria, your Human Rights Committee, for your submission. The next steps will be that we will continue on with our public hearings and gathering evidence. The Committee will deliberate and hand down a report with strong recommendations, taking into consideration your evidence today as well. So again, thank you for taking the time to present to us. It has been fantastic.

Ms LEWIN: Thank you very much.

Mr SWANNIE: Thank you.

Witnesses withdrew.