

# **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**

Mr Maxim Thomas, Co-convenor, and

Mr Sean Mulcahy, Committee Member, Victorian Gay and Lesbian Rights Lobby.

**The CHAIR:** Good afternoon. I welcome both Sean Mulcahy, Committee Member for the Victorian Gay and Lesbian Rights Lobby, and also Maxim Thomas, Co-convenor for the Victorian Gay and Lesbian Rights Lobby. 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 to my right and is also being broadcast live on Parliament's website. Please note that footage can only be rebroadcast in accordance with the conditions set out by 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 any handouts will be placed on the Committee's website as soon as they are available. I now invite you to proceed with a brief period of 5 to 10 minutes with an opening statement to the Committee, which will be then followed by some questions. Thank you and welcome.

**Mr MULCAHY:** Thank you and thank you for inviting us to speak today. In my opening statement I might address four key areas of our submission: firstly, the question of protected attributes; secondly, the question of whether this should be placed in the *Equal Opportunity Act* as opposed to the *Racial and Religious Tolerance Act*; tests and sanctions for vilification; and exemptions. I will have some comments on some of the other submissions by those appearing in the hearings that you have already had and hearings later today, tomorrow and into the future.

History shows that gay, lesbian, bisexual, transgender and intersex—or LGBTI—people are frequently vilified and that this vilification has a significant impact on our mental health. In this regard we recommend expanding the anti-vilification protections to address vilification based on sexual orientation, gender identity, sex characteristics and HIV/AIDS status. Dr Holly Lawford-Smith submits that gender identity is not well-defined and indeed that the definition of gender identity in the *Equal Opportunity Act* is out of date. Clause 7 of the *Racial and Religious Tolerance Bill* provides a vastly improved definition of gender identity, which we support. The LGBTIQ Legal Service, the Human Rights Law Centre and Dr Lawford-Smith suggest expanding the list of protected attributes to include gender expression, which is consistent with Canadian law and which we also support.

In terms of the question of the *Equal Opportunity Act* versus the *Racial and Religious Tolerance Act*, we note that the *Racial and Religious Tolerance Act* is seriously limited as a legislative tool, that there are numerous flaws in the *Racial and Religious Tolerance Act* and that there is difficulty in having protections in different legislation in that it makes it difficult for people to understand. In this regard rather than extending the *Racial and Religious Tolerance Act*, which Mr Gardiner from Liberty Victoria described as putting a V8 engine into a Hyundai Getz—I do not drive but I assume that has some resonance—we suggest that instead anti-vilification protections based on sexual orientation, gender identity or expression, sex characteristics and HIV/AIDS status should be located in a separate part of the *Equal Opportunity Act* that is not limited or confined to certain areas of public life, similar to the protections on harassment. If these are to be included in the *Equal Opportunity Act*, there should be a clear purposes clause to the Act, as the current purposes clause, which is section 1 of the *Equal Opportunity Act*, is largely unhelpful for somebody trying to navigate the Act itself.

We also support expanding the definition of harassment in the *Equal Opportunity Act* to include attributes other than sex. We also support a positive duty on organisations to take proactive steps to prevent vilification, which would be largely in line with the *Equal Opportunity Act*, which already contains a positive duty on employers to prevent employees being sexually harassed through, for example, introducing policies, complaints procedures et cetera which can be adjusted for the size of the business itself. Finally, we support liability for authorising or assisting vilification to include corporations, which would again be largely in line with existing provisions in the *Equal Opportunity Act*.

What we would say about the *Equal Opportunity Act* is that it needs reforms in general to increase the powers of the Victorian Equal Opportunity and Human Rights Commission to conduct public inquiries into systemic discrimination, to issue compliance notices and to enter into enforceable undertakings. In this regard we recommend that the Act be amended to reinstate those powers in line with clause 12 of the Equal Opportunity Amendment (LGBTI Equality) Bill that was proposed by the Member for Prahran some years ago.

In terms of tests and sanctions, it is widely accepted that the threshold test for vilification is too high and involves a level of proof almost impossible to satisfy. The Human Rights Law Centre submits that there should be both an incitement provision and a harm-based provision, and we support this as a way forward. Whilst they submit that the harm-based provision should be modelled on section 18C of the *Racial Discrimination Act*, we do believe that this sets the bar too low. In this regard we recommend either prohibiting conduct that is reasonably likely to harm or prohibiting conduct that is hateful, seriously contemptuous, reviling or severely ridiculing of a person or a class of persons. That is largely similar to what was proposed by the LGBTIQ Legal Service.

The elephant in the room is that this may curtail freedom of political communication, and in this regard we note the recent decision of the County Court in *Cottrell v. Ross*, which held that:

... the preponderance of views in the authorities support the position that anti-vilification ... legislation ... does not burden the freedom of communication about government and political matters, but rather promotes civil political discourse.

We generally oppose criminal offences as there are concerns about the record of the police in LGBT relations and because criminal offences are often ineffective in dealing with vilification. As other submissions have argued, sections 24(2) and 25(2) of the *Racial and Religious Tolerance Act* which criminalise severe ridicule are unjustified and, in the case of the latter concerning religion, could be seen as a de facto blasphemy law. As other submissions have argued, there is a clear difference between the incitement of violence and hatred towards others, and engaging in conduct that is likely to invite severe ridicule of someone. The criminal law should be primarily concerned with deterring acts of violence. Existing laws adequately deal with threats and incitement of harm—so, for example, incitement to harm is already dealt with under the *Crimes Act* and the *Summary Offences Act*—and for this reason we recommend that there should not be criminal sanctions for vilification.

Finally, whilst we support the retention of the exceptions for public conduct based on legitimate public debate, artistic expression, academic research and indeed religious purposes, we strongly object to the exemptions in the *Equal Opportunity Act* that allow religious employers and schools to not only fire LGBT workers but actually expel LGBT students. These exemptions should be removed; otherwise we are in a situation where equality is negotiable.

**The CHAIR:** Was there anything further?

**Mr THOMAS:** No, I think Sean summed it up pretty well.

**The CHAIR:** I might just start then. Can you tell us some of the experience of Victoria's LGBTI communities with vilification and hate conduct? We have seen—and this is something that I am very passionate about—the rise of hate conduct online, and it continues to increase. What is your view and what are some of the experiences that you have heard in relation to specifically online hate?

**Mr THOMAS:** I have been in the role as Co-convener at Victorian Gay and Lesbian Rights Lobby for just over four months now. So as someone who is a millennial, who is 23 years of age, when you go on social media—and I am a prolific user of social media—you see a range of hate across multiple channels, for instance the drama surrounding Victoria Police at the moment and the relations regarding our community and the apology. I had come from a meeting with them where the media adviser was advising us that they were having to manually hide comments that were just pure hate.

There is disagreement and there is putting forward a point of view and then there is just pure vitriol and hatred. So you do not actually have to go very far on social media within Australia—the Western world—to really see hatred on a daily basis. I guess as a member of the LGBTI community you do become somewhat immune to

certain comments because you have to survive, I guess, in that instance. So what has kind of spurred me to become motivated with the Victorian Gay and Lesbian Rights Lobby is particularly this area, doing what we can to limit those harmful comments—the suicide rates in our community are horrific—and really distinguishing between what is harassment, what is freedom of speech, what is opinion and what is just pure hate. And I think the focus is on the hate and how do we stop that. That is what the discussion is about today, and how that fits in law.

**The CHAIR:** Well, I will just continue on to say we have heard that the current system is not really working, and the navigation of the system, the lack of awareness and the definitions are very complex for the average person. On behalf of your organisation, would you agree with those statements?

**Mr MULCAHY:** Yes, absolutely. And it is one thing to raise awareness. LGBTI people are aware of the fact that we do not have anti-vilification protections here in Victoria and that the laws that exist in Victoria do not extend to them. So whilst we can raise awareness about the issue of anti-vilification, what really needs to happen is to get the laws right first before we raise awareness about the issue.

**Mr THOMAS:** Can I just add something on that? I think as well, with our community, the relations between the police and the LGBTI community are improving, and both sides are working to really improve that situation.

The difficulty that we do have for members of the community is when they do encounter a crime—varying types of crime—there is that hesitancy, especially with the elder generation as well, to go to the police and to report that crime. So that is the first step, for people in our community to be comfortable going to the police and reporting the crime. It is a big step in itself, I think, for anyone, really, to go to the police and report a crime. And then the second step is the police—and this is something that I have spoken with varying members of the community about—feeling that they are well equipped, that they have got particular laws and Acts in their toolbox to then prosecute particular acts against certain people within our community. Because as Sean was saying, our community is very well attuned to the issues that go on. And I think that is a particular issue we have got. One, people in our community feeling comfortable reporting a crime to the police. And secondly, the police feeling comfortable that they have got the laws and the Acts to actually prosecute something. Because I think there is that divide where the police go, ‘Great, you’ve come to me. But I can’t actually do a lot with it’. And that is an issue that we are encountering on both sides.

**Mr SOUTHWICK:** Can I just pick up there. Firstly, I just wonder if you would not mind just elaborating on that first issue that you mentioned about the police and you having to then sit in on the review in terms of the online stuff. Could you just elaborate a bit further about that?

**Mr THOMAS:** Yes, sure. That was the first time I actually attended a panel meeting with Victoria Police to improve relations with our community and vice versa. And it was largely around the apology that the police recently put out on social media and the response that they received on social media to that. Do not quote me on the statistics, but numbers like 60 000 are coming to my head in terms of views, people looking at this online content.

**Mr SOUTHWICK:** The apology was for—

**Mr THOMAS:** Sorry?

**Mr SOUTHWICK:** The apology that they put on was—

**Mr THOMAS:** Yes.

**Mr SOUTHWICK:** Just elaborate what that—

**Mr THOMAS:** And just in general whenever there is something that is of LGBTI nature on their channel the media advisers both use software to track this and also just look at the feed and the comments, and this particular adviser was saying that she had to physically—and her team—go in and manually hide some of these comments. Because, as I mentioned earlier, there is disagreeing with something and using fact and basis and

logic to disagree, and then there is just trolling and hatred—and that is what is harmful. I think our community can very much tolerate debate about us in the media and in politics, and we have for some time and we do engage in that, but there is no place for hatred. Victoria Police have been doing an excellent job on their social media channels of hiding that. It is just really equipping our authorities with the tools to be able to do something about it so that we lead to stopping the high rates of suicide in our community, the impacts on mental health, which then impact—it is a revolving door and a circle, and we have got to stop it.

**Mr SOUTHWICK:** So Victoria Police currently have LGBTI liaison workers, as with multiculturally different groups. How effective is that, and do you think there is a broader role required as part of that education and that process? I am trying to also understand—you mentioned before in terms of Victoria's police and the difficulty of many from the LGBTIQ community reporting situations—what is the role of Victoria Police when it comes to this hate?

**Mr THOMAS:** Sure. So it was only my first meeting, but what I can say from that first meeting is I was really impressed by all the people at Victoria Police who are really committed to improving relations with our community first and foremost. I think the fact that they have got people employed on a full-time basis there to improve relations with our community says a lot. There is a long way to go—there is no hiding that—but it is progress. So that is definitely something to look at as a positive. And as a member of the younger generation, I look forward to seeing in time to come how that comes to fruition and improves those relations.

Now, the second part of your question, sorry, just glossed over me.

**Mr SOUTHWICK:** That is okay.

**The CHAIR:** I think you have answered it.

**Mr NEWBURY:** I was just going to say thank you for being so frank. It is actually the second time today we have heard that your community is completely aware that they do not feel protected by the law.

**Mr MULCAHY:** That is because they are not.

**Mr NEWBURY:** Sorry, I did not mean to suggest otherwise. Conversely, we have heard quite a lot of organisations and people, I think, express a lack of awareness of the law, but that clearly is not the case here. You have suggested a strong public awareness campaign. Do you sense that a strong public awareness campaign would not only help in terms of awareness but also build trust?

**Mr THOMAS:** Yes, sure. I think any type of awareness campaign is of benefit to our community, but I do think it needs to be done in such a way that is very careful. We have seen media campaigns that have been coming out lately, not naming any campaigns in particular, that are using words that can be quite triggering for members of our community. Obviously I am not going to go into what words they are, but I am sure we can all guess. So I think any awareness campaign benefits our community, benefits the police and benefits any authority that is involved in these kinds of situations, but I do think it just needs to be done in a manner that is reflective and takes into account language, because language is very important in our community. So that is kind of what I would just add on that.

**Mr MULCAHY:** One thing I would say is that it is one thing to have an awareness campaign; what we also need to address is the fact that there is under-reporting and that LGBTI people do not feel comfortable to report to the police and other agencies instances of vilification that they have experienced. There is work being done to improve that, but that is still a reality. So we need to look at other alternative reporting and support mechanisms. We have suggested in recommendations 12 and 13 of our submission some community-based reporting mechanisms and some support mechanisms, so ensuring that LGBTI health services are equipped to help people deal with the ramifications of vilification that they have experienced.

**Mr NEWBURY:** I just wanted to note also that you were talking about Victoria Police and the proactive way that they are managing social media. There has been quite a lot of discussion today about social media and how we manage this and whether you put in place proactive requirements. But you have, I think, highlighted

well that there is an organisation who has taken it upon themselves to do something, so I just wanted to note that as positive feedback. Thank you.

**Mr THOMAS:** Yes, and I think the police as well, that is obviously one account on social media, but you do not have to go far. If I go into the comments of the banks when they feature a lesbian couple or a gay couple—you have just got to read the comments. Organisations, I think, largely, on the whole—especially large organisations—are doing their best to stamp out these comments. But it is very disheartening when you go onto, say, a bank and you just read the comments and it is hatred. I come from a conservative family background where we do have disagreements on certain issues in the community. And I can tolerate disagreements—in fact I welcome them. But there is hatred, and we need to stop the hatred. It is harmful.

**Ms SETTLE:** Mine is sort of fairly technical, Sean. What I am trying to grapple with is this discussion around whether we bring the RRTA into the EOA. I noticed you were in the room before when we were hearing from the previous submission, and they were suggesting that they did not think it was a good idea because it gave the option to bring in freedom of speech if they both sat together in the same bill. I am looking for the best way to do it, and you certainly think they should come in.

**Mr MULCAHY:** We do think so, and we respectfully disagree on that point. There are a number of reasons for doing that. I suppose we come from the perspective of community members that are trying to access and navigate our complex legal system. Having it be a one-stop shop which contains provisions on discrimination and harassment, as the EOA currently does, plus provisions on vilification would be preferable in that regard. A lot of the enforcement mechanisms in the *Racial and Religious Tolerance Act* tie back to the *Equal Opportunity Act* in any case. But I think there are a number of reasons on top of that why we would prefer them to be located in the *Equal Opportunity Act*. Firstly, there are already existing anti-discrimination protections for our community in the *Equal Opportunity Act* on gender identity, sexual orientation and lawful sexual activity. It is also a well-established and accessible complaints model. Our community is aware of it and utilises it. It also provides flexibility to the Victorian Civil and Administrative Tribunal to order remedies in relation to conduct which is proved to be unlawful. So the remedies that exist under the powers of VCAT in the *Equal Opportunity Act* are another reason why we think it is important that they be contained in the *Equal Opportunity Act*. But it is important that vilification not be conflated with discrimination and harassment, as those before us pointed out. So that is why we suggest it should be contained in a separate part of the *Equal Opportunity Act* that is not limited to certain areas of public life, like discrimination currently is.

**Ms SETTLE:** Yes, so it is keeping that separate, because I think their concern was only around it being watered down by arguments of freedom of speech.

**Mr MULCAHY:** There are always going to be arguments for freedom of speech in this particular area, and that is why we have suggested ensuring that the test, which is currently too high for civil remedies, is lowered but still not so low as to impinge on freedom of speech. But we have also suggested that perhaps we need to reconsider the criminal sanctions, especially subsection (2) of the criminal areas, which criminalise severe ridicule.

**The CHAIR:** Your submission discusses the exemptions currently contained in the *Racial and Religious Tolerance Act*. Can you elaborate on your views on this?

**Mr MULCAHY:** We think the existing exemptions as they currently are in the *Racial and Religious Tolerance Act* are perfectly fine and we are happy for them to continue in place. In particular, the Racial and Religious Tolerance Amendment Bill suggested removing the provision on proselytising, but we believe that if the term ‘proselytising’ is given its ordinary meaning and if it is done in good faith, no form of proselytising should include the vilification of LGBTI people.

**The CHAIR:** I think that concludes the questions. Thank you so much, Sean and Maxim, for presenting today. It has been a really insightful submission. The next steps will be: we will continue on with our public hearings and gathering evidence, and then the Committee will deliberate on all the evidence gathered, and we will be putting forward a report with some strong recommendations to Government. But again, thank you for taking the opportunity, and all the very best in the work that you do.

**Mr MULCAHY:** Great. Thank you very much. Thank you for your time.

**Mr THOMAS:** Thank you so much for your time.

**Witnesses withdrew.**