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Submission of Liberty Victoria to the consultation on Strengthening Victoria's Anti-Vilification Laws

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the human rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for the better protection and promotion of civil liberties and human rights. More information about our organisation and activities can be found at: libertyvictoria.org.au.

> *Oxford English Dictionary* 2nd (compact) edition 1989 p.630: **vilification**: The action of vilifying by means of abusive language; reviling; an instance of this. **vilify**: To depreciate with abusive or slanderous language; to defame or traduce; to speak evil of.
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> *The Macquarie Dictionary* (1981) p.1934: **vilify**: to speak evil of; defame; traduce. [Hence: vilification; vilifier]
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> *Oxford Languages* (online, 9-Oct-2023)
> **vilification:** abusively disparaging speech or writing

If you have any queries regarding this submission, please do not hesitate to contact the author, Jamie Gardiner, a Vice-President of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

Liberty thanks the Department for the opportunity to respond to this consultation in a single submission encompassing the three consultation documents.

Introduction

This submission concerns the problem of harms caused by vilification and proposes ways to prevent or deal with those harms and those who cause them.

It begins with the 2019–20 parliamentary inquiry—the Legislative Assembly Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections—and its report on that Inquiry tabled in March 2021 (the "*Committee Report*" or just "*Report*" for short).

Liberty Victoria again thanks the Committee for the opportunity to have given evidence in person in February 2020, and is pleased to see that evidence used well and quoted in several parts of the *Report*. Liberty's evidence then, as now, stressed the importance of approaching the inquiry from the position of those who are hurt and harmed by vilification rather than the narrow legalistic view of the vilifiers and their hostile backers in the mass media. Liberty Victoria urges the Government to see vilification first of all as a problem of harm done to vulnerable people, and only secondly as a freedom of speech issue.

Liberty Victoria welcomes the Committee's recommendation "that the Victorian Government take an ***innovative approach***." This is certainly Liberty Victoria's intended method and goal.

The arcane disputes about which word carries what weight, and how important it is to give vilifiers free rein, and just where the artificial "test" for action against vilification should be put, have long left the victims who are harmed by vilification in the lurch.

Liberty Victoria is grateful to the Committee for its thorough and caring description of victims of vilification set out in the *Report*, and its assertion of the importance of the experience of those who are harmed, and the need "to assess vilification from the perspective of the victim"[1]. Excellent though the *Committee Report*'s victim-centric description and analysis is, however, it does not quite take the necessary final step, as this submission will show.

The Consultation

In relation to the first consultation paper Liberty Victoria makes these observations:

i. The *Committee Report*'s observations reveal a clear need for the harms of vilification to be properly dealt with, not only for the attributes of race and religion but also for the other attributes that it lists.

ii. Liberty Victoria notes that the common factor in all the cases of harmful vilification that the Report describes is that the targets come from or are part of groups that suffer from prejudiced treatment in many ways. The discrimination and prejudice are pervasive and long established. Each such group and prejudice can be identified with one or more "attributes", as they are called in the Victorian *Equal Opportunity Act* 2010 ("EOA"), such as race, religion and gender. Discrimination on the basis of one or more of these attributes is unlawful. Vilification should be too.

[1] *Committee Report* p.xvii

iii. Liberty Victoria recommends that not only the attributes listed in the *Committee Report* but all the EOA attributes should apply to vilification.

The second consultation paper, on criminal offences, is dealt with below under that heading.

Vilification

Vilification—abusively disparaging written or spoken words—is, just like discrimination, harmful in certain circumstances, though not all: vilification of paedophile priests or war-mongering potentates is not to be deprecated, for example.

When vilification becomes "words that wound", however—because of personal attributes such as those already mentioned—it becomes a proper subject for the law to prevent, or failing prevention to prohibit and sanction.

Within the EOA's "areas" words that wound would already constitute unfavourable treatment and be unlawful as discriminatory. Outside those limited areas the prevention or redress of harm is what justifies and requires the law's broader intervention.

Words that Wound: Harms

Words that wound[2] cause harm to people. This fact is abundantly made clear in the *Committee Report*, where Chapter 3 details many sad and distressing examples of such harms. Those who suffer these harms are people who are made vulnerable by their history —individually or in their community—of prejudice and persecution on account of a disparaged feature or attribute: race, religion, disability, sex, gender, sexual orientation for example.

These and further such attributes are those that characterise the conduct that anti-discrimination laws—the EOA in particular—make unlawful, in certain areas of public life, such as employment, education and the provision of goods and services. In those areas, treating a person with one or more of these attributes unfavourably because of it or them is unlawful discrimination.

In the same way, and on the same attributes, words that wound can and do cause harm that should be made unlawful: the law should prohibit doing it.

What are these harms?

In addition to the direct personal harms described in its Chapter 3 the *Report* notes many examples of words that wound reaching, and causing harm to, community members generally.

The personal harms that are spoken of here are both psychological harms and also other violations of human rights. In particular, as noted in Chapter 3, the silencing effect[3] of words that wound violates victims' human right of free speech.

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[2] The "words that wound" triplet is not original, being in the title of a Human Rights Commission anti-racism conference in 1983, for example, and several times since. Its value is both its simplicity, and its focus on harms, rather than "speech." The word "vilification" is ungainly and poorly understood, especially given its misuse in the *Racial and Religious Tolerance Act* 2001 ("RRTA") to mean "incitement" (see also final section), and the common term "hate speech" is an emotive but unhelpful exaggeration in many cases. "Words that wound" is used expansively, including images and gestures, and words both spoken and written, etc.

[3] At *Committee Report* p.41 section 3.2.2, for example.

(Many of the racist and other incidents described in Chapter 3 involve physical attacks and other non-verbal harmful actions in addition to words that wound; they are beyond the scope of the present inquiry and submission.)

Since it may be considered by some that the harms referred to above are too subjective, or too vague, to be the subject of effective legal prohibition, it is appropriate to refer to published, peer-reviewed research on the matter.

A specific event that enabled the clearer measurement of the types and extent of harms done by words that wound is the 2017 Marriage Law Postal Survey and the extensive vilification of LGBTIQ folk that accompanied it.

This vilification involved written and spoken words as well as images (such as media cartoons and pasted-up posters) from numerous sources and through numerous channels. The harms that would be, and were, caused by the expected torrent of hostile, prejudiced commentary, publications, street posters—namely psychological distress and the aggravation of other mental health issues—were anticipated and warned against by LGBTQI organizations, as well as governments.

As the study by Stefano Verrelli and colleagues noted[4]:

> "Many marriage equality advocates argued that the opposing side of these public debates, which often promoted prejudice and discrimination, would have adversely affected the mental health of lesbian, gay, and bisexual (LGB) Australians (Knight *et al*., 2017). Similar concerns were also voiced by numerous mental health authorities and government agencies, including the Australian Psychological Society (2016) and the National Mental Health Commission (2017).[5]"

The subsequent research by Verrelli *et al*. concluded that "legislative processes related to the rights of stigmatised, minority populations have the potential to adversely affect their mental health."

Likewise a study by Saan Ecker and colleagues[6] found that the "[d]ebate-related stress predicted psychological distress [symptoms of depression, anxiety, and stress] for both LGBTIQ people and allies. Findings suggest that the marriage equality debate represented an acute external minority stress event that had measurable negative impacts on mental health of LGBTIQ people and their allies." These impacts, they conclude, "present a serious public health issue."

The harmful effects of racial vilification, religious vilification, gender vilification and that of other attributes are also well known, as indeed Chapter 3 of the *Committee Report* displayed.

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[4] Verrelli S, White FA, Harvey LJ, Pulciani MR. "Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey". *Aust Psychol.* 2019;54:336–346. https://doi.org/10.1111/ap.12380

[5] Cited by Verrelli *et al*.: National Mental Health Commission (2017, September 11). Statement on marriage equality. Retrieved from http://www.mentalhealthcommission.gov.au/our-work/statement-on-marriage-equality.aspx

[6] Saan Ecker, Ellen D.b. Riggle, Sharon S. Rostosky & Joanne M. Byrnes (2019) "Impact of the Australian marriage equality postal survey and debate on psychological distress among lesbian, gay, bisexual, transgender, intersex and queer/questioning people and allies", *Australian Journal of Psychology*, 71:3, 285-295, DOI: 10.1111/ajpy.12245

In general, for historically or currently persecuted or stigmatised minorities, each such exposure adds, like a death of a thousand cuts (the ***stress of a thousand slurs***, perhaps) to "minority stress[7]," in turn leading to serious health consequences, mental and physical.

Legislation?

When it comes to legislation relating to the harms that words that wound are likely to cause it will be advisable for the statute to state clearly how the Parliament sees the harm. In a similar, recent context the *Change and Suppression (Conversion) Practices Prohibition Act* 2021 contained, in s.3(2), an express declaration of the Parliament's view—recognition and denunciation—of the harms involved.

Following that precedent it will be desirable to include a provision such as:

> In enacting this Act, it is the intention of the Parliament—
>
> (a) to denounce and give statutory recognition to the serious harm caused by **words that wound**; and
>
> (b) to affirm that **words that wound** are harmful not only to the person subject to the **words that wound**, but also to other persons who have the characteristics the subject of the particular prejudice or prejudices involved, and to the community as a whole.

The expression "words that wound" is used just for those instances of vilification that can cause harm, being defined by their being used on the grounds of one or more attributes that characterise persons or groups who have been or are subject to prejudice or persecution. The attributes are listed in section 6 of the EOA.

The "words that wound" are harmful because single or repeated exposure to indications of prejudice leads to or aggravates minority stress, causing adverse health effects including anxiety disorders, depression, self harm, suicidal ideation or worse. (The Explanatory Memorandum for the reform bill should contain relevant references to the research, such as cited above and more, that supports these declarations.)

Depending on other aspects of the drafting it may be appropriate to replace "words that wound" by "vilification" or by "vilifying conduct" or some other terminology for the relevant conduct. It may also be necessary to explain the inclusive nature of the term by adding "words written or spoken, or images, or gestures, however communicated" etc.

Innovative Approach

This submission takes seriously the Committee's desire to use "the opportunity to take an innovative approach in its drafting of a harm-based provision that is clear and accessible on its face to those who seek its protections."[8] This submission's approach is more innovative still.

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[7] Ilan H Meyer, "Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence" *Psychol Bull*. 2003 Sep; 129(5): 674–697. See also Verrelli *et al.* (cited above)

[8] *Report* p.122

While Liberty Victoria agrees with the Committee that the *Racial Discrimination Act* 1975 (Cth) s.18C is not the way to go, the Committee does not quite get to the genuinely harm-based approach that this submission now[9] urges. Liberty Victoria considers that a true harm-based approach should follow the VGLRL proposal of "prohibiting conduct that is 'reasonably likely to harm,' drawing from *With Respect: A Strategy for Reducing Homophobic Harassment in Victoria"*.[10]

Putting these considerations together Liberty Victoria recommends that the words in the amended EOA should begin with something like "A person must not …" and be clear that the "reasonable foreseeability of harm" is key.

Streamlining Discrimination and Vilification

Liberty Victoria strongly endorses the proposal in *Committee Report* Chapter 6 to move the (civil) anti-vilification provisions into the EOA.

Liberty Victoria rejects the misleading and inaccurate suggestion[11] in Consultation Paper 3, at p.6, that "Vilification is different from **discrimination**."

In fact the two are very similar, as other evidence in the *Report* shows, noting that "vilification should be understood as a form of discrimination". Professor Katharine Gelber, Head of School at the School of Political Science and International Studies at the University of Queensland, advised in her evidence that "it is very helpful for civil vilification provisions to be co-located in law with other anti-discrimination provisions, because it makes it very, very clear that they are an anti-discrimination provision, that that is their *raison d'être*."[12]

There are parallels that help to make the point.

In the EOA discrimination is unlawful
where a person "experiences being treated unfavourably"
when in an "area of public life"
because of an attribute.

In the EOA vilification is to be unlawful,
where a person "experiences the harms of words that wound"
when there is "reasonable foreseeability of harm"
because of an attribute.

Given the "intention of Parliament" clauses proposed above, the reasonable foreseeability provision will be easier to understand and more effective. The attributes identified in the *Committee Report*[13] are essentially the same as corresponding ones in the EOA's longer list, and would easily be aligned. The "areas" (like local government, education, employment, provision of goods and services etc) are constraints for the law's reach. The corresponding constraint for vilification is the "**reasonable foreseeability of harm**."

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[9] Liberty Victoria withdraws the position put in submission 39, p.12, noted in the *Report*, p.122 footnote 77

[10] *Report* p.122 footnote 79

[11] See The Incitement Error, below.

[12] Ch 6 p.133 see footnote 15

[13] Race and religion, gender and/or sex, sexual orientation, gender identity and/or gender expression, sex characteristics and/or intersex status, disability, HIV/AIDS status, personal association.

This streamlining will mean that the powers of the VEOHRC in relation to complaints (or "disputes") of vilification will be the same as those of discrimination, and the opportunities for redress likewise. It will be important, therefore, that the powers under the EOA be reviewed, harmonised and updated.

Discrimination/Vilification where harm is foreseeable

Liberty Victoria suggests a sketch of a possible legislative response to this question here, in the form of a new Division of Part 4 of the EOA, but aware a different placement may prove more effective.

(1) A person must not [discriminate against]/[vilify] another person or persons by conduct likely to cause harm.

(2) For the purposes of subsection (1) conduct means—

(a) words written or spoken

(b) gestures

(c) images

(d) words or images shared by social media, published in traditional media, or both—

that a reasonable person would foresee as capable of causing harm having regard to all the circumstances including the prejudice or persecution suffered by the other person or persons, or a group or community of which the person is a member, on the basis of the attribute or attributes concerned.

(3) Sub-section (1) does not apply to conduct made unlawful by another Division of this Part.

Note: Studies have shown that single or repeated exposure to indications of prejudice leads to or aggravates minority stress causing adverse health effects including anxiety disorders, depression, self harm, suicidal ideation or worse.

Sub-clause (1) is the primary action making conduct unlawful; (2) expands and clarifies; (3) prevents double dipping when the conduct would be unlawful under both regimes.

Systemic powers are vital

As discussed in Chapter 6 of the *Committee Report*, the 2011 amendments to the *EOA* 2010 removed the Commission's intended systemic powers, including those for "enforceable undertakings and compliance notices." Without these systemic powers the value of the present proposal, or any similar provision, would be greatly handicapped. The systemic discrimination provisions of the EOA as originally enacted in 2010, but removed (before coming into force) by the 2011 amendments, must be restored.

In this matter the evidence that Liberty Victoria gave to the Committee over three years ago[14] is all the more relevant, and urgent, now. The *Committee Report* does also recommend restoration of these systemic powers.

Liberty Victoria commends the Recommendations in Chapter 6, notes the favourable *Government Response*, and urges their full and prompt acceptance and implementation.

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[14] See *Committee Report* pp 140–141, Liberty Victoria and LGBTIQ Legal Service (submission 39) and evidence of Jamie Gardiner, Liberty Victoria (footnotes 53 and 54)

Practical matters

The law is an important part of the social framework, but fixing it is only a small part of the social change required to end the scourge of prejudice, discrimination, vilification and their consequences, not to mention the violence and physical harm they can lead to or inflame. The Committee and its *Report* are to be congratulated on their careful emphasis on the many important initiatives apart from the legal framework that need serious work.

Human Rights

The proposal in this submission aims to enhance the enjoyment of human rights by people who might have suffered the harms that would otherwise have been done. It aims to prevent the harms due to words that wound by prohibiting their use, and providing convenient avenues of redress when prohibition fails.

The human right to freedom of expression of those who would use the deprecated speech will be restricted.

Article 15(2) of the *Charter of Human Rights and Responsibilities* states

> Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds… whether (a) orally; or (b) in writing; or (c) in print; or (d) by way of art…
>
> [and] (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary— (a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.

Article 15(3) clearly permits the "restrictions reasonably necessary" to prevent the harms done by words that wound so as "to respect the rights… of other persons"; and also possibly "for the protection of… public health," given the opinion of Ecker *et al.* cited above.

Criminal Offences

This submission is principally concerned with the civil law aspects of anti-vilification measures. If the proposal above is implemented, using words that wound contrary to the EOA will be unlawful, just as discrimination contrary to the EOA is unlawful.

Organising, recruiting, encouraging, inciting or conspiring with others to break the law, to do unlawful acts, will be proper subjects of the criminal law, and if they are not already in breach of the *Crimes Act* 1958 or the *Summary Offences Act* 1966 it should be a routine matter to make it so. Liberty Victoria supports Recommendation 22.

The existing "serious vilification offences" should be retired in favour of existing offences with more serious penalties than the *Racial and Religious Tolerance Act* 2001 ("RRTA") provides, and the prejudice-motivated crime purpose of section 5(2)(daaa) of the *Sentencing Act 1991* (Vic) should be strengthened and streamlined, with proper police and prosecutor training, and made more usable in general.

With criminal matters moved to the Acts just noted, and civil matters moved to the EOA , there is no place for the RRTA, and it should be repealed.

The incitement error

Vilification and incitement are not the same. They are very different. The meaning of "vilification" is clearly shown in the dictionary references at the beginning of this submission, and in the absence of any dictionary reference to incitement there.

The RRTA states:

> ## Division 1—Unlawful vilification
>
> ## 7 Racial vilification unlawful
>
> (1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.
>
> (2) For the purposes of subsection (1), conduct—
>
> (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
>
> (b) may occur in or outside Victoria.
>
> **Note**
> ***Engage in conduct*** includes use of the internet or e-mail to publish or transmit statements or other material.

Section 8, the religious vilification version, is essentially identical.

This obtuse wording had, and has, the effect of using the word "vilification" in the heading, but forbidding (thus making unlawful) something else, namely "engaging in conduct that incites hatred… ," which is not vilification. The heading to the section refers to "Racial vilification", but the section does not make vilification or vilifying unlawful, but instead prohibits "engaging in conduct that incites hatred…"

This is an error. An egregious error.

It is obvious from the RRT Act's Preamble (paragraph 3 in particular) and Objects (s.4) that this is not what was sought.

Unfortunately the words of sections 7 and 8 are clear: the offence the Act defines is not the harm caused by vilifying a person or class, but instead it is the act of inciting someone or some group to vilify a person or class.

So vilifying a person or class of persons on the grounds of an attribute is not unlawful, but inciting a person to vilify other people is.

This absurd situation is why the RRTA has been so unsuccessful, and is the truth behind all the over-polite suggestions in the *Report,* and in submissions and public evidence that it was hard to use, less known, etc.

The recent invention of the neologism "incitement-based vilification" is a woeful attempt to pretend the incitement error did not exist. It does its inventors no credit.