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***Comment on the Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Bill 2024* (Vic)**

Liberty Victoria does not support the *Justice Legislation Amendment (Anti-Vilification and Social Cohesion) Bill 2024* (Vic) (**the Bill**) in its current form and proposes **amending the Bill**.

**Background**

Liberty Victoria has long advocated for strengthening protections against hate speech on the basis that it has the capacity to cause harm, particularly to members of minority groups.

Liberty Victoria made a submission to the 2020 Parliamentary Inquiry into Anti-Vilification Protections (**the Inquiry**) supporting the expansion of the anti-vilification protections contained in the *Racial and Religious Tolerance Act 2001* (Vic) (**RRT Act**) to additional minority groups, including to members of the LGBTIQA+ community.

Two of our Vice Presidents, Jamie Gardiner OAM and Gemma Cafarella, gave evidence at the 2020 Parliamentary Inquiry into Anti-Vilification Protections (**the Inquiry**), with Sam Elkin of the St Kilda Legal Service's LGBTIQ Legal Service. During the Inquiry, we essentially advocated for three things:

1. A focus on harm. We recommended that the definition of vilification be defined as 'conduct that a reasonable person would consider *hateful, seriously contemptuous, reviling or seriously ridiculing*';

2. Expansion of protections beyond religious groups; and

3. Broadening of the investigative powers of VEOHRC so that the system is less reliant on people who have suffered harm prosecuting cases to bring about normative change.

We recognise that this type of legislation can have a serious impact on freedom of speech and freedom of expression. There is a risk that well-intentioned legislation can be sought to be weaponised against forms of legitimate political expression. It is necessary to ensure that the Bill enacts only reasonable and proportionate limits on Victorians' human rights and civil liberties, including those protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**).

For example, we have previously submitted, in the context of the *Racial Discrimination Act 1975* (Cth) (**RDA**), that the test for racial vilification under s 18C of 'offend' and 'insult' sets the bar too low and the words 'humiliate' and 'intimidate' should remain. That is, of course, not because we approve of people from diverse racial backgrounds being exposed to offensive and insulting language. We are, however, concerned that such a low bar does present an opportunity for the provisions to be misused and stifle legitimate political expression. Importantly, cases involving the successful invocation of the RDA would have still succeeded on the higher threshold of 'humiliate' or 'intimidate' (see, for example, the 2011 proceeding against Andrew Bolt and the recent proceeding by Senator Mehreen Faruqi against Senator Pauline Hanson).

For reasons we explain below, we are opposed to the expansion of criminal offences to address vilification (as opposed to improving access to robust civil remedies).

**Parts of the Bill we support**

We support the expansion of anti-vilification protections to protect people who are not currently protected by the RRT Act. Accordingly, we support (and indeed at the inquiry hearing suggested) anti-vilification protections being inserted into the *Equal Opportunity Act 2010* Vic (**EO Act**). We also support the expanded list of protected attributes in cl 102B of the Bill.

We also support robust and strengthened civil remedies and improved education, including information literacy. That includes extending civil protections to trans and gender-diverse people. The horrific banner unfurled by Neo-Nazi actors at the 'Let Women Speak' rally in 2023 provides an example of what should clearly, in our view, be prohibited speech (both as a potential call to violence and clear vilification of a vulnerable cohort).

Liberty Victoria also supports an expansion of VEOHRC's powers to respond to vilification.

However, in our view the Bill fails to strike the right balance between protecting people from harm and protecting freedom of speech and expression in several important ways, and ought to be amended.

**Our concerns**

**The test for vilification**

Liberty Victoria supports the test for unlawful vilification in cl 102D of the Bill and we understand the need to protect vulnerable groups from hate speech. The rise in antisemitism, as well as many recent examples of Islamophobia, homophobia and transphobia demonstrate that we need to do more so that people feel safe in an environment where there appears to be increasing hate speech targeting all these groups, including on social media. We have raised our concerns about these issues for many years now, including when making submissions and when giving evidence to State and Federal Parliamentary Inquires on the (re)emergence of the far-right.

Recognising the important motivation for the Bill, Liberty Victoria is particularly concerned to ensure that legitimate protest is not stifled. At present, we consider that the Bill may be interpreted to prohibit protest against State actors and/or political ideologies. In that context we also note the Allan Government has announced that it intends to prohibit protest in proximity to places of religious worship which we have significant concerns about given that it might, in reality, stifle protests in commonly used places (such as outside Flinders Street Station and the State Library, for example). If this reform had been enacted previously it might have, for example, rendered unlawful the protests by survivors of religious sexual abuse, the Black Lives Matter protests and/or the response to the COVID-19 pandemic protests.

Returning to this Bill, 'race' is defined in cl 4 to have the definition in s 4(1) of the EO Act. Section 4(1) of the EO Act defines race to include 'nationality or national origin'. We are concerned that those provisions could mean that an anti-war protest sign criticising the actions of the government of Israel, for instance, could fall into a grey area and therefore result in action being taken by authorities and potential prosecution. Further, it may be considered that the current laws prohibit criticism of Zionism as a political movement, as opposed to hate speech targeting Judaism which clearly should be prohibited.

The reported suggestion by Premier Allan that these 'social cohesion' laws could be used prevent planned protests outside the Myer Christmas windows (because that conduct could be regarded as a form of hate speech against Christians), for example, demonstrates the care that must be taken when considering their breadth and whether they could end up being used in unintended ways to quell other protests.

As we submitted recently to the Federal Parliamentary Joint Committee on Human Rights' Inquiry on Antisemitism at Australian Universities, and as have faith-based organisations such as the Jewish Council of Australia, these issues are nuanced and require a very careful balance that gives significant protections to enable people to have robust debate whilst protecting vulnerable communities from hate speech.

Any grey area may have a stifling effect on freedom of expression and peaceful assembly. We therefore consider that it should be made very clear that genuine protests such as anti-war protests should be exempted from the operation of these laws.

Liberty Victoria recommends that the exemptions in cl 102G be expanded to make it clear that conduct that is engaged in for a genuine political purpose is exempted, noting that this is proposed as a defence to a charge of incitement under cl 195N(4).

**Focus on 'social cohesion'**

Liberty Victoria is concerned that the stated intent of the reforms is to enshrine 'social cohesion'. For instance, cl 102A of the Bill proposes inserting a statement into the EO Act that states '[v]ilification harms social cohesion through its inherent divisiveness and perpetuates the unequal distribution of power'.

In our view, the purpose of these laws should be to protect people from *harmful conduct*. The references to 'social cohesion', including reportedly by Premier Allan, are troubling. The concept of 'social cohesion' is vague, broad, and could potentially be used to suppress dissent. People must always be free to express different and unpopular opinions and to disagree. Accordingly, the guiding principle of anti-vilification protections must be to address harm, not create social cohesion.

We are particularly concerned that the Bill may be used to stifle pro-Palestinian protests. Liberty Victoria has registered our disquiet about the growing limitations on the right to free protest under the current Government. Our Immediate Past President, Michael Stanton SC, has recently written at length about how the rushed prohibition of 'terrorist symbols' could be potentially used to stifle legitimate political expression. We have seen in Australia and abroad people calling for the banning of expressions such as 'from the river to the sea', 'free Palestine', and the Palestinian flag. In Victoria, Parliamentarians have been told that they cannot wear the keffiyeh or even watermelon earrings. Liberty Victoria is troubled by this trend, which we consider puts freedom of expression and freedom of assembly (together constituting the right to protest) at serious risk.

The human rights of freedom of expression and peaceful assembly are well recognised under international law and the Charter. These rights are not absolute, but as the United Nations Human Rights Committee has recognised, freedom of opinion and expression are "the foundation stone for every free and democratic society". Any limitation to those rights must be necessary and proportionate.

Liberty Victoria recommends amending cl 102A to remove references to 'social cohesion' and to instead focus on the risk of harm caused by vilification.

**Criminal offences**

Liberty Victoria opposes the Bill's expansion of criminal offences to address vilification.

We know that imprisonment is criminogenic, and taking a punitive approach through the criminal law and incarceration is very unlikely to protect people from hate speech and indeed may make matters worse. Recent examples of conduct in Victoria after the criminal prohibition of the Hakenkreuz (Nazi Swastika) and Nazi Salute demonstrates that some bad-faith actors will actively seek to use criminal prohibition to raise their public profile and bring attention to their causes. Further, these laws can end up being used against protestors who seek to raise concerns about authoritarianism and movements towards fascism. We have addressed these issues at length when making submissions and giving evidence on the deeply concerning re-emergence of far-right extremism.

In our view, the current statutory test for *criminal* offences under the RRT Act, considered at length by Chief Judge Kidd in *Cotterell v Ross* [2019] VCC 2142 (***Cotterell***), gets the balance right in terms of the test for criminal vilification.

While we support expanding those criminal law protections to other vulnerable groups include trans and gender-diverse people, we oppose any weakening of the test for serious vilification under the criminal law.

As Chief Judge Kidd explained in *Cotterell* at [64]:

- The legislation reflects an earnest and considered attempt by the legislature to balance or weigh the policies of preventing vilification and allowing appropriate avenues of free speech. On its face, it has sought to ensure that any restriction occasioned by s 25(2) on the freedom of expression would be limited only to the extent necessary to prevent that harm (serious vilification), and to achieve those social benefits. In that sense the legislature has strived to tailor s 25(2) to its purpose. I accept the arguments advanced by both the respondent and by the Attorney that the relevant legislative context and Parliamentary Debate reflects that much consideration was given to 'freedom of expression' and 'freedom of speech' before the enactment of the RRT Act.

- The field of operation of s 25(2) is narrow, it being directed only towards the most extreme, obnoxious and intentional forms of vilifying conduct.

Given the seriousness of potential imprisonment (and the well-known criminogenic effects of imprisonment), the current statutory test gets the balance right.

The Bill seeks to expand the criminal offence provisions relating to vilification in at least the following three ways:

1. First, the maximum penalties assigned to the offences under ss 195N and 195O of the Bill are 3 years and 5 years respectively. Whilst there is no directly comparable offence for s 195O, the penalty for the comparable offence to s 195N in the RRT has a maximum penalty of 6 months' imprisonment or a fine or both. The Bill proposes a significant expansion of the scope of punishment for these respective offences. Any period of imprisonment imposed for an expression-based offence is incredibly significant. Liberty Victoria is concerned about the expansion of criminal penalties without any evidence based justification;

2. Secondly, pursuant to cl 3 of the Bill the definition of 'incite' in s 195N of the Bill is far broader than the currently established definition in s 2A of the *Crimes Act 1958* (Vic). In the context of significantly increased penalties, creating such a broad definition of incite – as opposed to a more clearly defined and articulated one – risks creating uncertainty in the legal application and catching conduct or speech that was not intended to be captured by this legislation. In this regard, we note the Explanatory Memorandum suggests that this will 'provide greater flexibility so that the new section 195N can respond to a broad range of incitement conduct, both overt and subtle'. Given the serious consequences that would attach to a finding of guilt in relation to the new offence, Liberty Victoria is concerned of any legislative aim to capture subtle speech as part of a criminal provisions; and

3. Thirdly, the Bill reduces the mental element test for criminal vilification to one of 'recklessness'. In our view this simply sets the bar too low for matters that involve potential imprisonment for acts of expression. As noted above, the current test has enabled the successful prosecution of hate speech in cases such as *Cotterell*. The reality is that hate speech is a crime of intent, and usually the intention of the actors will be clear. Merely making the offence easier to prove is not a proper justification to reduce the threshold.

**Prosecution**

Section 25(4) of the RRT Act requires the consent of the Director of Public Prosecutions (**DPP**). In our view, given the seriousness of these matters and the significant opprobrium of a person having been found to have engaged in hate speech, the DPP should need to consent before such charges are brought against an accused person.

**Summary of Recommendations**

1. The Bill be amended so that it is made clear that legitimate protest is protected;

2. The Bill be amended so that it is made clear that it is intended to address incidents actual harm rather than to build 'social cohesion';

3. In relation to criminal vilification, the Bill be amended so that:

    i. The maximum penalties are reduced;

ii. The definition of 'incitement' mirror the definition in the *Crimes Act 1958* (Vic);

iii. The mental element test for serious vilification be one of intent rather than recklessness; and

iv. The consent of the DPP be required in order to commence prosecutions for these types of offences.

With thanks to Michael Stanton SC, Gemma Cafarella and Zubin Menon for assisting with preparing this comment.

**Michelle Bennett**

**President, Liberty Victoria**