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Submission by Liberty Victoria

to the

Hate Crime Review

A review of identity motivated hate crime for the Victorian Department of Justice,
by the Hon Geoffrey M Eames AM QC

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Introduction

1. The Victorian Council for Civil Liberties Inc—Liberty Victoria—is an independent non-government organization which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law.

Liberty was pleased to have been able to attend the public consultation held by the Review on 31 March 2010, represented by Michael Pearce SC, President, and Jamie Gardiner, and further thanks the Hon Geoffrey Eames for the opportunity to make this submission.

Structure of this submission

2. We begin with a quick look at the terms of reference, and say why “hate” is not a helpful word. We then discuss the importance of foreseeable harm due to prejudice, and explain how prejudice, leading to harassment, causes harm. We elaborate on the concept of harassment, and how prejudice is taught, and how that teaching might be interrupted. The submission uses homophobia as its exemplar of prejudice, because that is where *With Respect* is, but urges that other harm-laden prejudices, in particular those singled out in the Terms of Reference, will be best combated by the same approach.
3. The submission then follows the questions in the *Consultation Issues* paper, but in a different sequence, in order to put its focus on a civil remedy for harassment through the *Equal Opportunity Act*. This part of the submission finishes with the sections on the criminal law, which does not need major reform, and is in many ways a distraction from the bigger task and opportunity of combating prejudice, in particular by the outlawing of harassment in a civil law mechanism.
4. The submission firmly rejects the view, posed in many parts of the *Consultation Issues* paper, that laws against the causing of harm (or the commission of crimes) should carry “get out of jail free” cards for religious bodies.
5. Finally, the submission summarizes its support for the recommendations in *With Respect* for legislation to outlaw harassment based on prejudice, with modifications as discussed in the body of the submission.

Terms of reference

6. The terms of reference cover three issues: criminal offences and penalties, investigation and prosecution, and “[a]ny civil remedy that may be appropriate to respond to conduct motivated by hatred of, or prejudice against, a particular group”.
7. In the “Background” statement it is clear that the prejudices of greatest concern are “racism, religious intolerance or homophobic attitudes.” Noting that “hate crimes are largely targeted at particular groups defined by their race, religion, ethnicity or sexual orientation” the statement directs that “the review should focus on the needs of such groups.” The review is directed to have “particular regard” to the principles of the *Charter* and to *With Respect*.
8. This submission concentrates for the most part on the third term of reference, namely civil remedies, emphasising both *With Respect* and the *Charter* principles.

Hate or bias?

9. Although the Review is directed to consider “hate crimes” this submission urges that “hate” is too strong a word for most purposes. The real issue is prejudice or bias.¹ Prejudice against a group/persons identified by a characteristic, whether permanent or inherent, such as race or sexual orientation, or one that is socially determined or chosen, such as religious belief or political opinion, is a better marker than “hate”, which may be involved in some prejudice-motivated harmful behavior, but mostly not.

¹ See Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE ODIHR), *Hate Crime Laws – A Practical Guide* (2009) at page 17 (<<http://www.osce.org/item/36671.html>> at 26 April 2010)

10. The holder of prejudiced beliefs about a group characteristic may feel contempt for, or dislike, disapproval or fear of those who share it, and may do much harm as a result, without ever hating.
11. A critical issue in determining the particular prejudices involved is whether the harm done to one is or may be a harm done to all. This depends on the history of discrimination or exclusion suffered by the group. It is not any old (or new) prejudice that is of concern, but rather those against groups with a history of persecution such as to engender fear in many when harm is done to one.

Prevention of harm is the main aim

12. This Review interacts specifically with *With Respect* on one of its two arms only, namely its proposal of a civil remedy, harassment on the basis of prejudice, through the *Equal Opportunity Act*. The other arm, community education for social change, does, however, inform what can be said about “hate crimes” and prejudice.
13. From “hate crime” to harassment to community education is in some senses a continuum. Reversing the order, community education is about preventing harm (and specifically harm caused by prejudice), making harassment unlawful under the *EOA* is about providing a low-key early intervention process with opportunities for conciliation and reconciliation to deal with harms before they become serious, and criminal law methods of dealing with hate crime are about redressing serious wrongs when they have not been prevented, and thereby also contributing to the community education by denouncing the prejudice formally.
14. The point of it all, that is, is to reduce as far as possible the harm that prejudice causes. This submission urges that the strategies in *With Respect*, suitably generalized to other prejudices than homophobia, need the strongest recommendations from the Review, as they are where the greatest progress is to be made. The criminal law, though important, is only mopping up after the most egregious harms have occurred, and has negligible influence on the great bulk of harm caused by the prejudices mentioned with the Terms of Reference.

Harm, not speech, is the issue

15. A principal virtue of *With Respect* is that its focus is on harm done or likely to be done out of prejudice, including by words, spoken or written, rather than on the speaking or writing of those words themselves.
16. Freedom of expression (*Charter* s.15) and the “freedom of thought, conscience, religion and belief” (*Charter* s.14) protect ideas and their expression in words, images and actions—but only so long as they are consistent with the peaceful disputation essentially required by a secular society.
17. A focus on the nature of the words, however, spotlights issues of freedom of speech and of “thought, conscience, religion and belief,” leading to abstract debates far from the physical, psychological or emotional suffering that are the real evil to be countered.
18. *With Respect* has two limbs. One is to try to prevent harm by changing attitudes. The other, where harm has not been prevented, is to redress that harm, by making harassment unlawful within a system that can provide satisfaction to the victim and restitution to the group, and holds the perpetrator of harm accountable for their deeds.

How harassment based on prejudice causes harm

19. Since a key element of the definition of harassment must be the reasonable foreseeability of harm it is vital to consider what forms of harm may be caused by harassment, and what evidence there is for this. Since making harassment unlawful always involves a limitation on the human rights of individual harassers to act as they please, the justification of this limitation must be rigorous, rather than rely on lawyers' intuitions, "common sense" or the like. The available research demonstrates the causation clearly, and is cited, for sexual orientation and gender identity, in *With Respect*, while VicHealth's work² demonstrates the point for racist harassment.
20. The harm that harassment based on prejudice causes can be direct or indirect; homophobic harassment is but one example.
21. Direct harms include emotional distress and physical injury. Indirect harms include the damage to relationships, and the consequences of damaged relationships, with family, friends and others, that result from harassment instilling internalized homophobia and consequent lack of self-esteem and greater vulnerability to depression (and its consequences), as well as the consequences of interrupted or damaged education, lack of workforce attachment and the like; these consequences can also be measured as an economic cost to the community, as with the arguments to increase the response to Family Violence; for example *Coming Forward* highlights lost days to work and school.³
22. Each of these harms tends to be more damaging to children and young people. They are responsible for high rates of depression and self-harm, and attempted suicide rates in same-sex-attracted young people up to six times higher than the average for young people generally.⁴
23. Homophobic harassment is fuelled by homophobic attitudes. Interventions that can reduce the likelihood of harassing action resulting, or the severity of action for a given attitude, will reduce the incidence of harm. That is, the nexus between the attitude and the act needs to be ruptured. This will tend to reduce the harm.
24. Homophobic attitudes are not natural: no-one is born homophobic. Homophobia is taught. Interventions that prevent the teaching of homophobic attitudes, as well as interventions that immunize students against such teaching, will reduce the prevalence of these attitudes. This will tend to reduce the harm.

² See for example VicHealth 2007, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report*, Victorian Health Promotion Foundation, Melbourne

³ Leonard, W., Mitchell, A., Patel, S., and Fox, C. (2008) *Coming forward: The underreporting of heterosexual violence and same sex partner abuse in Victoria* Monograph Series Number 69. Melbourne: The Australian Research Centre in Sex, Health & Society, La Trobe University, 2 ("The social costs of heterosexual violence and discrimination are now well documented. They include not only poorer health outcomes for GLBT people (Leonard (Ed.), 2002; Pitts, Smith, Mitchell & Patel, 2006) but also the economic costs associated with their reduced social participation and community involvement (Banks, 2001; Florida, 2002; Pitts, Smith, Mitchell & Patel, 2006)."), 29 (nearly 20% of respondents took time off work or study after most recent incident of heterosexual abuse)

⁴ *Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities*, Position Statement, Suicide Prevention Australia, August 2009, at p6

25. Interventions that challenge and dispel homophobia in those who have already learnt it will also reduce its prevalence. This too will tend to reduce the harm.

Where is homophobia taught? By whom? How?

26. In early childhood, homophobic attitudes are taught by parents, relatives and neighbours. The tools are sex-role stereotyping and the constant reinforcing of heterosexist expectations and norms, and the denial, overt or implied, of other possibilities.
27. Homophobic attitudes are taught at school, from kindergarten to year 12, by other children, by parents, by teachers (both by omission and by positive acts) and by the school (by failing to have and to implement counter-homophobia policies, and by failing to support LGBT teachers and other staff to be “out and proud” exemplars of diversity).
28. In society homophobic attitudes are taught, or the teaching reinforced, by public figures who express them, whether as TV sports commentator “comedy” or religious doctrine or as deliberate politics, or in union and workplace culture. In many cases the majority, though they do not share the homophobic prejudices being expressed, are silenced by their own understandable fear of becoming the victim of the prejudiced, and so the cycle goes unchallenged.
29. As Cable sang,⁵ “You've Got To Be Carefully Taught:”
You've got to be taught
To hate and fear,
You've got to be taught
From year to year,
It's got to be drummed
In your dear little ear
You've got to be carefully taught.

You've got to be taught to be afraid
Of people whose eyes are oddly made,
And people whose skin is a diff'rent shade,
You've got to be carefully taught.

You've got to be taught before it's too late,
Before you are six or seven or eight,
To hate all the people your relatives hate,
You've got to be carefully taught!
30. The teaching of homophobia is, in itself, homophobic harassment.
31. For the young same-sex-attracted or gender questioning person, even before they have developed a sense of identity as such, each casual homophobic expression can wound, leading to greatly increased risk of depression, self-harm and indeed suicide.
32. Hence there is the need for whole of lifecycle interventions from pre-natal classes to schools to the workplace to lifelong learning opportunities. Developing and delivering such interventions is another task entirely—the second limb of *With Respect*—but there is no doubt it will be helped by the backstop of a clear legislative direction that harassment, the conduct derived from prejudice, is unlawful and does have consequences.

⁵ Rogers & Hammerstein, *South Pacific*

Response to the Consultation Issues paper's specific questions

Harassment (section G)

33. The conclusion of *With Respect*, a conclusion which this submission strongly urges the Review to endorse and further, is that “harassment” should be made unlawful, as a separate Part of the *Equal Opportunity Act*. This Part should cover harassment on the basis of any attribute for which the criteria of reasonably foreseeable harm and a history of discrimination and persecution are relevant, although *With Respect* is specifically confined to the attributes of sexual orientation and gender identity. As it carefully states:⁶

The joint working group considered whether a general provision responding to homophobic harassment should be included in the [EO] Act [1995]. Such a provision could apply in relation to all of the personal attributes identified in Section 6. However, we were aware that the group's terms of reference related only to the experience of GLBTI people. The extensive research we identified about the experiences of GLBTI people provides a strong foundation for our conclusion that legislative reform is required in this area. However, it may well be that other groups identified by attributes listed in Section 6 also experience unacceptable levels of harassment. If so, we would suggest that the recommendations in this chapter could provide a model for other groups to consider when responding to their particular needs.

Harassment on basis of sexual orientation or gender identity

34. The *With Respect* report presents a dual strategy for “reducing homophobic harassment in Victoria,” with a legislative strand, which is what this submission urges the Review to elaborate and promote, and a public awareness/education strand. The two strands can be implemented independently, but the strategy will be most effective when both work together. In both cases the aim is to change behaviours so that the harms caused by homophobia are minimized. While homophobia is, like racism, a set of beliefs and attitudes, its manifestations are actions, here characterized as harassment. Beliefs and attitudes cannot be directly targeted, by law or by education, but the behavior they lead to or support can be.

35. Harassment is a concept that comes from equal opportunity law. The *Equal Opportunity Act 1995* (“EOA”) makes it unlawful, in circumscribed “areas” of life such as employment, education, accommodation, the provision of goods or services, sport and others, to treat someone unfavourably, and in particular to harass someone, on the basis of a listed attribute, such as sex, race or sexual orientation (and nearly 20 others). In the mid-1980s Victorian equal opportunity law was amended to make “sexual harassment” specifically unlawful in the areas covered. Just before this amendment the Supreme Court had ruled that harassment, including sexual harassment, was covered in employment anyway.

36. The Court said:

It is an act of discrimination to deny to an employee a benefit connected with the employment such as accrues to other employees. A benefit of employment is the entitlement to quiet employment, that is, the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner. If molestation, physical and sexual affronts are permitted by an employer, it is denying a benefit and permitting detriment to those employees who suffer such unwelcome intrusions vis à vis those who do not.⁷

⁶ *With Respect* 36

⁷ *R. v. Equal Opportunity Board and Another; Ex parte Burns and Another* [1985] VR 317, 323 (per Nathan J—3, 4 May 1984).

37. The reasoning in this judgment has been routinely applied to hold that harassment, not just in employment but on any attribute and in any area, constitutes the sort of detriment, or limitation of benefit, that fulfils the definition of unlawful discrimination. Harassment in this sense includes any actions, including written or spoken words, gestures and the like, that cause a person distress, and where the distress was objectively foreseeable⁸; the motive of the harasser is irrelevant: *EOA* s.10. For a complaint to proceed it is necessary, in the words of s.108(1)(a) of the *Equal Opportunity Act* 1995, that it, and particularly the distress alleged to be at its centre, must not be “frivolous, ... or lacking in substance.”
38. Homophobic harassment, that is, is already unlawful in the limited “areas” covered by the *EOA*. And so for that matter is harassment related to any of the attributes covered in the Act.
39. The proposal in *With Respect* is to detach the concept of harassment from the *EOA*’s “areas” and to focus on the “reasonable foreseeability” of harm or distress as the feature that defines and limits what is to be held unlawful.⁹
40. Under the *Charter* every person has the right to equality, or freedom from discrimination. In particular section 8 states:
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
41. Discrimination, under the *Charter*, is defined to have the same meaning as in the *EOA*, but the human right to freedom from discrimination in *Charter* s.8(2) and (3) is not limited to the “areas” of that Act. It is free-standing. Homophobic harassment of a person involves a violation of some or many of the person’s human rights guaranteed in the *Charter*, including sections 9 (Right to life), 10 (Protection from torture and cruel, inhuman or degrading treatment), 12 (Freedom of movement), 13 (Privacy and reputation), 14 (Freedom of thought, conscience, religion and belief), 15 (Freedom of expression), 16 (Peaceful assembly and freedom of association), 17 (Protection of families and children), 18 (Taking part in public life), 21 (Right to liberty and security of person).
42. Although the *Charter* uses the *EOA* definition of discrimination, it is used very broadly, but with mechanisms for implementation limited to public authorities only; the *EOA*, on the other hand, sets out with specificity some breaches of the human right to freedom from discrimination that are to be made unlawful—for everyone, not just public authorities—and the process for dealing with them.
43. Since the actions that constitute homophobic harassment can include gestures and words, spoken or written, the protection of the human rights of people harmed by such harassment necessarily involves a limitation of the human right to freedom of expression of those who act to cause that harm. Under s.7 of the *Charter* “[a] human right may be subject under law only to such

⁸ *EOA* s.85(1) [Sexual harassment is] unwelcome conduct ... in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated

⁹ *With Respect*, Recommendations 10 to 15. These are set out (with commentary) in the final section of this submission, paragraphs 133–161.

reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.” In addition to this general provision it is important to note that Charter s.15(3) provides that “[s]pecial 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”.

44. It is submitted that the evidence of harm caused by harassment on the basis of prejudice is cogent, based on peer-reviewed research, and amply satisfies the requirements of *Charter* s.7(2), such that even without the “special duties and responsibilities” of the freedom of expression, the proposed limitation on that right is clearly “justified in a free and democratic society.”

What harassment involves

45. Homophobic harassment can take many forms, ranging from silence—the “cold shoulder”—to spreading rumors, outing, words of abuse, denigration or contempt, spoken or written, whether on toilet walls or tabloid newspapers or facebook and sms, in schoolyard taunts or calculated sermons, through to violence, ranging from pushing and shoving at school to beatings and murder. (The definition must also include a failure to stop or counter these acts, where that option is reasonably available and the harm arising from that failure is reasonably foreseeable; indeed the judgment in *Burns*¹⁰ concerned a failure to prevent harassment.) In addition to the direct harm these acts cause, all these forms of harassment have cumulative effects on those who suffer them leading to ill-health, such as depression (including its consequences, including self-harm and suicide).¹¹
46. The cumulative effects of individually slight actions (snide remarks, low-intensity insults or insinuations, etc) can be significant, especially for young people before they come out, who often lack the support of other lesbians and gay men or bisexual or transgender people. A community awareness strategy must include campaigns that tackle such apparently low-grade, but really insidious, harassment; the legal definition should be broad enough to include it too, and the proviso in the *With Respect* recommendation that account must be taken of the history of discrimination and prejudice, together with the objective foreseeability of harm, may suffice.

The *Consultation Issues* paper asks six questions under the heading of “Harassment”.

(a) Should laws concerning harassment, such as those in the United Kingdom, be introduced in Victoria? How might that differ from civil or criminal vilification?

47. The model for the harassment law that should be introduced is substantially that set out, for the particular attributes of sexual orientation and gender identity, in *With Respect*.

¹⁰ Cited above.

¹¹ See, generally, Corboz, Julianne, Dowsett, Gary, Mitchell, Anne, Couch, Murray, Agius, Paul, and Pitts, Marian (2008), *Feeling Queer and Blue: A Review of the Literature on Depression and Related Issues among Gay, Lesbian, Bisexual and Other Homosexually Active People*, A Report from the Australian Research Centre in Sex, Health and Society, La Trobe University, prepared for *beyondblue: the national depression initiative*. Melbourne: La Trobe University, Australian Research Centre in Sex, Health and Society

48. It would differ from “vilification” as currently, and confusingly, set out in the *RRTA* by being concerned with prejudice-motivated harm not prejudice-motivated “speech.” Or, to be more precise, it would be concerned with the reasonable foreseeability of harm based on prejudice against persons with an attribute and having regard to the history of discrimination or persecution suffered by persons with that attribute.

(b) Civil or criminal?

49. Harassment, based on the definition in *With Respect*, should be made unlawful, in a separate Part of the EOA, as a civil, not criminal matter, and subject to all the other processes of the EOA 2010.

(c) Should any proposed new laws concerning harassment exempt religious teaching or practice, at all, or in terms such as those employed in NSW or United Kingdom, or some other terms?

50. As the proposed definition of harassment necessarily involves the doing of harm or having the reasonably foreseeable consequence of doing harm to a person or persons there is no basis for making such harm lawful if it is done for reasons of religious, political, philosophical or any other belief, just as religious bodies are no longer allowed to permit or cover up the sexual, physical or emotional abuse of children, or to endorse rape in marriage, for example.

(d) Should homophobic harassment be the subject of specific legislative treatment as a separate part in the *Equal Opportunity Act*?

51. Yes, and the same Part should cover harassment on the basis of other attributes as well, probably as separate divisions in that Part, or possibly by using a more generic definition.

(e) Should anti-harassment laws identify the groups that are intended to benefit or be left in general terms, as is done in subsection 5(2)(daaa)?

52. See above.

Charter (section H)

53. The terms of reference require particular regard to the principles of the *Charter*. Those principles are stated in the Preamble, as well as to be inferred from the legislative text.

54. The Preamble opens with the Parliament’s acknowledgment and recognition, echoing the first article of the *Universal Declaration of Human Rights*, that “all people are born free and equal in dignity and rights.” It then states:

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

55. It is significant for the Review, in particular when considering the interaction between the human rights of people subject to crimes or harassment because of prejudice, on the one hand, and the human rights of freedom of expression (*Charter* s.15) and the freedom of thought, conscience, religion and belief

(*Charter* s.14) on the other, that these principles place great stress on human dignity, and on equality and diversity, and the recognition of the responsibilities that come with human rights, which “must be exercised in a way that respects the human rights of others.”

Questions relating to the Victorian Charter of Human Rights and Responsibilities, with responses:

(a) Should there be, or remain, an exemption from prosecution for civil or criminal vilification occurring reasonably and in good faith for genuine religious purposes?

56. Vilification itself should not be criminalized, so the question of exemptions does not arise. If the Government were to criminalize vilification, there should be no exemption for religious bodies or purposes, just as there is no exemption for them from the laws on sexual abuse of children or perverting the course of justice, nor from the law concerning the negligent infliction of loss or damage.

(b) Should what constitutes genuine religious purposes be defined? How?

57. See above. The infliction of harm is a longstanding traditional religious purpose, as many a witch or slave or heretic could attest, and thankfully what once was lawful is now rightly not, at least in Australia.

(c) How can the boundary between free speech and vilification be defined?

58. It has long been accepted, by even the most fervent advocates of free speech, that shouting a four letter word beginning with “F” in some circumstances cannot be permitted. This is not because the word is naughty or taboo or offensive, but because it is reasonably foreseeable that its expression in the context could lead to harm. That is, freedom of speech does not extend to shouting “Fire!” in a crowded theatre. The issue is the foreseeability of harm being caused, not the fact that it is a result of “speech.”

59. Laws against “vilification”, or even more egregiously laws like the *RRTA* which targets not vilification but *incitement* to vilification, are fundamentally misguided because they focus on the speech and not on the foreseeable harm.

60. As in the law of negligence there will still be issues of remoteness, causation, intervening acts and the like when the law targets the harm that is a reasonably foreseeable consequence of prejudiced behavior, including speech and written expression, but that is no barrier to its proscription. Freedom of speech, or in the *Charter’s* words, at s.15, of expression “orally; or ... in writing; or ... in print; or ... by way of art; or ... in another medium [of the person’s choice]”, is not absolute, and is governed in the *Charter* by two limitations. There is both the general provision in s.7(2) regulating when a human right may be limited, invoking the criteria of legitimacy, proportionality, evidence-based justification and minimal limitation, and there is the specific provision in the right itself, *Charter* s.15(3), namely “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.”

Vilification (section F)

3. Serious vilification

(a) Do we need any vilification laws if subsection 5(2)(daaa) applies to all offences?

61. This offence was always a bad idea, and it is not surprising it has never been prosecuted. It criminalizes acts that are already criminal, but with additional evidentiary hurdles. As with the rest of the *RRTA* its focus is misplaced, concentrating on the motivation of the perpetrator rather than the harm to the victim and society itself. The offence of “serious vilification” contained in Sections 24 and 25 of the *Racial and Religious Tolerance Act 2001* (“*RRTA*”) should be repealed, as its appearance on the statute book is for show only, and it confuses and misleads laypersons.

62. The fact that no prosecution has ever been brought under the *RRTA* provisions illustrates that this offence is wholly redundant. Indeed the whole Act should be repealed, and the civil provisions replaced with new *EOA* provisions on harassment, as outlined in *With Respect* and further discussed earlier in this submission.

(b) If additional laws are necessary, are sections 24 and 25 of the *Racial and Religious Tolerance Act 2001* (*RRTA*) appropriate models for criminal vilification offences?

63. No, additional laws are not necessary, and in any case ss.24–25 are not models to be followed. No-one has actually ever been prosecuted for these offences, so they are definitely not effective let alone necessary.

64. Furthermore, they are crimes of *incitement* to vilify, not of vilification. The use of an English word to mean something significantly different from its dictionary definition (“making malicious and abusive statements about” or “speaking or writing about in an abusively disparaging manner”) is folly, and no model for any law.

65. (The two dictionary definitions cited may well describe, however, examples of harassment if they are done for reasons of prejudice and their being made could lead, reasonably foreseeably, to harm, as discussed above.)

(c) Should the penalties for vilification offences in Victoria be increased?

66. No. The offences—indeed the whole *RRTA*—should be repealed.

(d) Should the existing criminal offences under sections 24(1) and 25(1) be amended?

67. No, just repealed

(e) If so, what should be the elements of the offence?

68. Not applicable.

(f) Should the alternative offences under section 24(2) and 25(2) be retained?

69. For the reasons above, they too should be repealed.

(g) Should the grounds for criminal vilification be expanded beyond race and religion?

70. Well, no; and even if contrary to this submission the government were to retain the *RRTA*, it should not be extended to other attributes because its flaws prevent it being of any benefit, and it would be a disservice to victims of other prejudice-motivated offences to be fobbed off with its false promises.

(h) Is there a need for a less serious offence? What?

71. No. As already noted, the *RRTA* is misguided and should be repealed, not fiddled with. Existing criminal offences, with *Sentencing Act* s.5(2)(daaa), cover a full range of criminal conduct, and the pervasive conduct described as “harassment” should be dealt with by amending the civil provisions of the *EOA* 2010 as discussed elsewhere in this submission.

(i) What, if any, additional grounds of vilification should be included? (ie. Vilification on account of sexual orientation, HIV/AIDS, disability, gender, transgender, disability, etc.)

72. None, but instead use harassment, as above.

(j) Should there be any exceptions for criminal offences of vilification?

73. The observation on page 21 of the *Consultation Issues* paper that no basis can be seen for excusing the criminal conduct under discussion on the basis of “religious instruction or like purposes” is heartily endorsed.

74. The very notion advanced in the consultation by religious groups is bizarre: do they want permission to bring back the burning of so-called heretics at the stake? Or just intimidating the people they hate in the manner of the Ku Klux Klan?

4. Civil vilification

75. As the *RRTA* should be repealed, for the reasons given above, there is no need to answer the other paragraphs of Question 4. Brief comments are given here to indicate what would be argued if, contrary to this submission, the *RRTA* were to be retained or amended.

(a) Are remedies available under sections 7 and 8 of the *RRTA* appropriate?

76. Contrary to the summary on page 23 of the *Consultation Issues* paper, the Commission cannot order any of the listed remedies, though VCAT can. The Commission under its current Act (to be superseded next year by the new *EO Act* 2010, recently enacted) can however facilitate in conciliation any agreement that the parties can agree to.

77. These outcomes are appropriate, and they are the same potential outcomes as may arise from any equal opportunity complaint.

(b) Should section 7 and section 8 be replaced by a provision that (at least for racial and religious vilification) employs the language of section 18C of the Commonwealth *Racial Discrimination Act* 1976 (RDA)?

78. This would be an improvement, but still does not alter the fundamental error of the *RRTA*, which is to concentrate on what is said or written, rather than on the harm done.

(c) Should the relevant grounds for a civil vilification action be expanded, beyond racial and religious vilification?

79. The *RRTA* is fundamentally flawed, and it would be no service to members of other vilified groups to expose them to its false promise.

(d) If the grounds are expanded, what additional grounds/identity groups should be covered?

(e) Who should have responsibility for enforcing/investigating civil vilification?

(f) Should there be an exception for civil vilification of good-faith religious instruction?

80. Apparently, as noted on page 26 of the *Consultation Issues* paper, religious bodies consider it desirable that they be allowed to ‘incite[] hatred against, serious contempt for, or revulsion or severe ridicule’ of others on the basis of race or religion, or of any new attribute added to the Act.
81. Such a request may perhaps be justifiable, on the basis of a Charter s.7(2) balancing of the right to freedom of thought, conscience, religion and belief against the numerous human rights violated by such uncivilized conduct, but only if such hatred inciting speech is confined to consenting adults in private.
82. Such conduct in front of, or worse directed at, children cannot be justified in a free and democratic society, nor is it acceptable for adults not members of the religious body involved.

(g) What other exceptions?

83. The only exceptions that should be permitted to legislation, especially when specifically protecting human rights, are ones that satisfy the *Charter* s.7(2) tests of justifiability in a free and democratic society.

(h) Should a conviction on hate motivated offences give rise to a damages award?

84. The existing principles governing compensation and restitution following criminal conviction should continue to apply.

Criminal law (sections A–E)

85. In summary, this submission opposes any major changes to the criminal law. It is in favor of the sentence enhancement approach, but advocates amending the current sentence enhancement provision, to improve its effectiveness.
86. Where the existing criminal law has hitherto been interpreted in ways that are based on historic prejudice, they must be reinterpreted to be consistent with the *Charter* where possible. General criminal provisions should therefore be prosecuted without prejudice: for example, s.17 of the *Summary Offences Act* seems never to be used against “offensive or insulting” behavior directed against lesbians and gay men or transsexual people, when it clearly could and should be. It may be wondered whether, even today, a sufficient proportion of the police service consider insults against these groups to be legally offensive, or whether even in a trained and disciplined service the pervasive homophobia of the past still lingers on, unconsciously biasing judgment. (Incidentally, s.21 SOA should be replaced with a general provision about lawful assembly, without privileging “worship.”)
87. The forthcoming proposals¹² concerning “personal safety intervention orders” may well be a valuable reform, especially with built-in diversion and mediation.¹³ The Review should recommend that the wording of the yet-to-be introduced legislation needs to be apt to deal with threatened prejudice-based harms in a manner consistent with the recommendations made here.

¹² *1,966 More Police: Brumby’s Frontline Focus*, Premier’s Media Release, 28 April 2010: “The Brumby Labor Government will also invest in a range of programs to give Victorians better access to justice and mediation, including: ... \$4 million to the Magistrates’ Court to implement the Government’s proposed personal safety intervention orders, which will replace stalking intervention orders.
(Viewed 30 April 2010 at <http://www.premier.vic.gov.au/newsroom/10155.html>)

¹³ See also: *Review of the non family violence intervention order system* DoJ 2009 and the submission of the ALSO Foundation to that review.

Threats to kill, and other serious threats¹⁴

88. Although not strictly falling within our general approach to prejudice as being most relevant when there is a history of discrimination, there may well be a need to extend the reach of the criminal law concerning threats to kill or harm persons, or to damage property. We have seen bumper stickers for sale that say or imply “Kill a Greenie” and the like, for example, which in the context of violent altercations between law-abiding environmental activists and their less-principled opponents take on a sinister aspect, giving rise to well-founded fears. There should perhaps be new offence(s) to deal with threats at large or incitement at large to kill or injure members of a disliked group, even if no EOA-style attribute is involved, and even if no specific intention to carry out the threat can be proved.
89. Incitement to commit such offences should be dealt with by the general criminal law incitement provisions, rather than *RRTA*-style laws.

Response to the Consultation Issues paper’s specific Criminal Law questions

1. Sentence enhancement

(a) Is subsection 5(2)(daaa) of the *Sentencing Act 1991* itself a sufficient response to hate crime, or is further hate crime specific legislation needed?

90. Sentence enhancement has the advantage of not only punishing the offender and denouncing their conduct, but it is also claimed to serve as a deterrent to other offenders committing crimes motivated by hatred or prejudice. Whether this latter effect is validly claimed should be the subject of research.
91. The principle of judicial discretion is very important, and the sentencing judicial officer is best placed to impose an appropriate sentence on an offender, taking into account all the circumstances of the offending.

Subsection 5(2)(daaa) provides that:

- (2) In sentencing an offender a court must have regard to—
(daaa) whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated;

92. This is a good start. It would however benefit from the inclusion of a “Note” in the Act giving pertinent examples: in particular, at least four, namely one of ethnic origin, one of sexual orientation, one of gender identity, one of religion.
93. There is a problem, however, with “motivated...by,” an unusual concept in our criminal law, and one which is not given any further definition in the Act.
94. Establishing “motivation” will no doubt require evidence of the offender’s mental state, which may be hard to come by, and is in any case not necessarily relevant to whether the crime has what the *Consultation Issues* paper describes as an “impact, on not only the victim, but also the group with which the victim was identified.” The paper goes on to observe that “[s]uch crime undermines the tolerance and respect for diversity that characterises the Victorian community. It also increases the sense of vulnerability of the victim and members of that particular group and erodes their sense of security.” We endorse this description as a vital characterization of the crimes for which sentence enhancement is appropriate.

¹⁴ *Crimes Act 1958*, ss.20, 21, 198 for example.

95. While the subjective motivation of the offender may be relevant, and if proven should indeed lead to the s.5(2)(daaa) sentence enhancement, it is at least as important to assess whether the crime, or the selection of victim, took place “because of” the group to which the victim did, or was supposed to, belong.¹⁵
96. The section therefore needs a definition to state that causation (wholly or partly) on the basis of the characteristic(s) in question is sufficient, or the wording could be amended to make this clear. For example, s.5(2)(daaa) could be amended by adding the underlined words to read:
- whether the offence was motivated (wholly or partly) by hatred for or prejudice against a group of people with common characteristics with which the victim was associated or with which the offender believed the victim was associated or was committed because of the victim’s actual or supposed membership or non-membership of such a group
97. An additional problem with the current wording is that it is too open-ended and unduly symmetric. The group impact referred to above must be taken into account. It is not just any group with common characteristics that we should be concerned with, but groups defined by characteristics that have been the subject of historic and ongoing discrimination and persecution.¹⁶
98. The rationale for the extra sentence weight is the group harm or heightened fear that a prejudice-motivated crime engenders in the targeted group. This only makes sense when that group is one with a history of discrimination or persecution on the basis of the characteristic involved. This is the factor that makes, and certainly should make, for the asymmetry that prevents victims of persecution from being charged with hate crimes when they fight back, for example. See *With Respect* at pp45–46 section 4.7.1.2 and Recommendation 14.
99. The sub-section should be amended, or an additional sub-section inserted, to make the history of discrimination or persecution on the basis of the characteristic involved a relevant, or even mandatory, consideration.

(b) Does there need to be any further guidance to:

• **the police investigators**

100. According to the 2008 Gay & Lesbian Health Victoria report *Coming Forward*, gay, lesbian, bisexual, transsexual and transgender (GLBT) people are subject to significantly higher than average levels of violence, harassment and discrimination.¹⁷ The research also shows that many GLBT people underreport incidents of heterosexual violence because they believe that authorities will either not take their claims seriously, or else they will be subject to further discrimination.¹⁸
101. However, where victims of heterosexual violence reported it to Victorian Police Gay and Lesbian Liaison Officers (GLLOs), the reported levels of support and service value were much higher.¹⁹ This demonstrates

¹⁵ See discussion of the “Discriminatory Selection Model” in Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights (OSCE ODIHR), *Hate Crime Laws – A Practical Guide* (2009) at page 48 (<<http://www.osce.org/item/36671.html>> at 26 April 2010)

¹⁶ In this respect we disagree with the OSCE 2009 view on symmetry.

¹⁷ *Coming forward*, p2.

¹⁸ *Coming forward*, p38.

¹⁹ *Coming forward*, p42.

that a cultural change within the police force is possible over a relatively short period of time.²⁰

102. The Review should support further education and guidance of the police force in how best to appropriately respond to identity-motivated offending, and in its recording in LEAP.

103. The police LEAP database has the capability, currently not effectively used, of recording prejudice as a motivational factor in offending. The Review should urge Victoria Police to institute a protocol to record in the LEAP database where identity motivated prejudice will be alleged later in a sentencing hearing.

- **the Prosecutors**

104. In order to rely on prejudice as an aggravating factor to be taken into account in sentencing, prosecutors must prove it as a motivation or cause beyond reasonable doubt²¹. It is essential for the general efficacy and good use of the legislative provision for prosecutors to be educated as to the importance of ss.5(2)(daaa).

105. The provision will serve no useful function in the sentencing process if it is misunderstood and under-utilised.

- **the sentencing judges/magistrates**

106. Should the prosecution wish to rely on hatred or prejudice as an aggravating factor, which the court would then take into account in sentencing, it must prove that factor beyond reasonable doubt²², the highest standard of proof in the law. This provides the offender with the guarantee that only proven allegations of prejudice are taken into account in sentencing. Equally both the victim and the group whose identity motivated the crime will have the satisfaction of knowing that prejudice was established to that standard, giving its formal denunciation greater weight.

107. Currently, a judicial officer must identify any aggravating factor that has been taken into account where it would not otherwise be apparent in the sentencing conclusions²³. This is an appropriate first step, but for ss.5(2)(daaa) to be fully effective, the sentencing Magistrate or Judge must name, and denounce by name, the particular prejudice or prejudices that constitute the aggravating factor. The Court should not be required to quantify the contribution.

108. This naming is important for three reasons. First, the person subject to the sentence is entitled to know upon what precise legal and factual foundation the sentence has been imposed, in order to determine whether or not an application for appeal should be made. Secondly, the victim of the offence must be able to perceive that the significant impact of the offending has been taken into account in the disposition. Thirdly, by naming the prejudice, the court can communicate to the community as a whole the far-reaching nature of identity-motivated offending.

²⁰ A team of GLLOs and a state coordinator were introduced into Victoria Police in 2000–2003. All received special training in dealing with GLBTI issues.

²¹ *R v Storey* (1998) 1 VR 359, 366.

²² *Ibid.*

²³ *R v Ferrer-Esis* (1991) 55 A Crim R 231, 237-8

(c) Should there be new protocols for the investigation and prosecution of suspected hate crimes?

109. Victoria Police should establish a protocol to utilise the already available resource of LEAP to record prejudice as a motivating factor, or cause, including systematic training of all users in how to recognise, without adding to a victim's distress, shame or embarrassment, any factors that might indicate prejudice was involved.

2. Aggravated versions of offences

(a) Given that subsection 5(2)(daaa) applies to all offences, do we need to create any additional offences to deal with hate crimes?

110. This submission urges the Review not to support the creation of new offences, and submits that their creation would be to merely recriminalise those acts which are already criminal, adding unproductively to the complexity of the law.

111. The *Crimes Act* 1958 provides severe maximum penalties for the full range of offences against the person, and property offences. The *Summary Offences Act* 1966 could also be employed with respect to a wide range of offences.

112. New "hate crime" provisions would bring the concept of motivation into the criminal law, which has traditionally only ever been concerned with intent.

113. In the heat of an altercation, for example, strong words of a racist or bigoted kind might be spoken which may imply an identity motivated hate or prejudice, but which have nothing to do with the actual motivation of the offender.

114. Offenders would also be far more likely to refuse to participate in a recorded record of interview, out of concern that their words could be construed as identity motivated hatred or prejudice, where none exists.

115. It is submitted that to bring motivation into the substantive criminal law is dangerous and unnecessarily complicating, especially at a time when the State Government is undertaking a wholesale review of the *Crimes Act*.

116. Furthermore it is highly unlikely that an offender would plead guilty to an aggravated offence when they could negotiate with the prosecution to plead guilty to ordinary *Crimes Act* or *Summary Offences Act* provisions. This would lead to any new provisions essentially being redundant, as it is likely that the police and prosecution would rely on the old "tried and true" offences.

(b) If new offences are required, what offences should be selected for the creation of an aggravated version of the base offence?

117. This submission urges the Review to find that no new offences are required or desirable, and that the existing sentence enhancement provision in the *Sentencing Act* (subject to the proposals made above) is sufficient to deal with identity motivated hate crimes, as long as the sentencing Magistrate or Judge is required to name the specific prejudice and denounce it and the harm it causes to a named group, which is the basis for the aggravating factor in sentencing.

(c) Should aggravated versions of offences have a higher maximum penalty than the equivalent non-aggravated offence? Or should there be different penalties available, such as additional community service on top of the base sentence?

118. Aggravated versions of offences are not required and would be made redundant if created.
119. Offences that attract higher maximum penalties for what are otherwise already criminal behaviour would lead to fewer pleas of guilt, greater court delay, and more unnecessary complication in the criminal law.

(d) How can we overcome the difficulties of proving the hate motivation of offenders?

120. Amending ss.5(2)(daaa) *Sentencing Act 1991* as proposed above will enable it to safely and adequately address the issue of proof and would satisfy the purposes of denunciation, punishment and deterrence if the Magistrate or Judge was required to name and denounce the aggravating factor in sentencing.

The Review must resist the religious lobby's special pleading

121. The *Consultation Issues* paper asks several questions about religious exemptions and the notion of "genuine religious purposes." We have made some brief comments on these matters where relevant in our specific answers to the questions posed; this section of the submission sets out the argument for the proper place of religion in a secular society that respects human rights and in particular "the principles of the *Charter*", to cite the terms of reference.
122. The very recent English Court of Appeal judgment²⁴ by Lord Justice Laws summarizes the situation persuasively and with great authority. His Lordship said:

22. In a free constitution such as ours there is an important distinction to be drawn between the law's protection of the right to hold and express a belief and the law's protection of that belief's substance or content. The common law and ECHR Article 9 offer vigorous protection of the Christian's right (and every other person's right) to hold and express his or her beliefs. And so they should. By contrast they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society.

23. The first of these conditions is largely uncontentious. I should say a little more, however, about the second. The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious *imprimatur*, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law: the prohibition of violence and dishonesty. The Judaeo-Christian tradition, stretching over many centuries, has no doubt exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply

²⁴ McFarlane v Relate Avon [2010] EWCA Civ B1 (15, 29 April 2010)

unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to the force of subjective opinion. This must be so, since in the eye of every one save the believer religious faith is necessarily subjective, being incommunicable by any kind of proof or evidence. It may of course be *true*; but the ascertainment of such a truth lies beyond the means by which laws are made in a reasonable society. Therefore it lies only in the heart of the believer, who is alone bound by it. No one else is or can be so bound, unless by his own free choice he accepts its claims.

24. The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational, as preferring the subjective over the objective. But it is also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.

25. So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime.

123. Australia is a secular society. Unlike the United Kingdom, Australia does not have an established Church, nor can it: *Constitution* s.116. As Laws LJ's words are written for and apply in a country with an established religion, the Church of England, they are all the more pertinent for Australia, with none.
124. In a secular society such as Australia religious bodies, religions, sects and cults however defined or described are essentially what are in other contexts termed clubs or associations. They have rules, membership criteria, and so on. People can join. People can leave, voluntarily or otherwise.
125. Adults who freely subject themselves to the rules of a club are entitled to do so: it is a fundamental aspect of freedom of association, both at common law and under the *Charter*, s.16(2).
126. The rules, however, must comply with the law, subject of course to the *Charter* s.7(2) requirement that the restrictions on the rules, and hence on freedom of association, be legitimate, proportional, effective and minimal so as to be "demonstrably justified in a free and democratic society". The rules cannot, for example, be allowed to require or condone sex with children, physical or emotional abuse of children, rape (in marriage or otherwise), assault, fraud, extortion, blackmail or torture within the club, let alone harming, or conspiring or inciting others to harm, members of other, or no, clubs.
127. Every organised religious body believes the others are wrong. Most organized religious bodies try to poach members of the others by convincing them that those bodies are in error, while resisting the attempts of those other

bodies to poach the first body's members in their turn. The essence of a secular society is to prohibit these contests from escalating to the violence and indeed warfare that characterized religious disputes before the Enlightenment and the rise of secular society, and is sadly still the norm in many parts of the world.

128. The secular state does not take sides in these probably irreconcilable tussles of belief, but insists on their conduct by fair and peaceful means. This indeed is the meaning of freedom of religion. It is only under a secular state that respects human rights that freedom of religion subsists.

129. Freedom of religion includes, of course, the freedom to have no religion. Nevertheless, some religious bodies argue that they should have special rights to harm those who do not accept their beliefs or belong to their club by the harsh rules they apply to their own believers. This special pleading is an attempt to have secular laws give special status to the content of their beliefs over those of others, and is therefore unacceptable in a free and democratic, secular society, as Laws LJ, in the judgment quoted above, so eloquently points out.

130. As Liberty Victoria has written before, there are quite recent examples in other, now democratic, countries of religious bodies preaching harmful doctrines emphatically incompatible with the principles of our *Charter* and seeking, successfully at the time, to impose their gross violations of human rights on others not of their religious beliefs. Liberty said:²⁵

4.3 Charlesworth *et al.* point out that if religious groups sought exemption from laws preventing racial discrimination there would be public consternation. Substituting the word 'black' for women and homosexuals illustrates the point: modern Australia would find such discrimination unacceptable.

4.4 An example of this is provided by the case of the Dutch Reformed Church in South Africa and its absolute support of *apartheid*. The Church insisted on the total separation and segregation of the races, holding strong views on miscegenation and prohibiting inter-racial marriage. The Church Congress stated that 'only carrying out the policy of apartheid in the light of God's Word and with God's blessing would provide deliverance from the dark danger of colour mixing and bastardization'.

4.5 If a Church wished to teach such views in its schools to its believers' own children, should the state intervene to stop the teaching of these views or should the state refrain because of freedom of religion and belief? In this example we would expect the state to intervene and apply anti-discrimination laws. The teaching of racial discrimination to children surely amounts to child abuse.

4.6 It is a disgrace that when religious groups assert that to treat lesbians and gay men without discrimination would violate their religious beliefs the state supinely allows them exemption from such laws. The indoctrination of children in homophobia, or sexual prejudice, is as much child abuse as the teaching of racial prejudice in *apartheid* South Africa was.

131. The *Consultation Issues* paper notes at page 24 that some religious bodies indicated, in consultations, that they did not want the law²⁶ to encumber their desire to "to preach against homosexuality." Where such

²⁵ Liberty Victoria submission to the Australian Human Rights Commission Inquiry into Freedom of Religion and Belief in the 21st Century, 28 Feb 2009, paragraphs 4.3–4.6. (Footnotes omitted. Paragraph 4.4 cites Susan Rennie Ritner, 'The Dutch Reformed Church and Apartheid,' *Journal of Contemporary History*, (1967) 2:17, 24.)

²⁶ The specific reference was to the law against [incitement to] vilification, the *RRTA*.

preaching is, on the objective test proposed, likely to cause harm to a person, their desire should indeed be encumbered. It may be that such preaching can be done without causing harm if done between consenting adults in private, but there is no doubt on the scientific evidence that such preaching does cause harm to same sex attracted or gender questioning young persons at least, by increasing, directly and via the influence of those adults who adopt or defer to such preaching, the risk of depression, self harm and (attempted) suicide.²⁷

132. The desire of these bodies to “to preach against homosexuality” is eerily similar to the Dutch Reformed Church’s preaching against “the dark danger of colour mixing.” They undoubtedly have the right to believe such things. They have no right to have the law endorse the content of their beliefs.

Legal reform recommendations from *With Respect*

133. To summarize the arguments made throughout this submission, we urge the Review to adopt the Recommendations for legislative change contained in *With Respect*, subject to some modifications.

134. With Respect Recommendation 10:

That the Equal Opportunity Act 1995 be amended to address homophobic harassment against GLBTI people.

Submission

135. This recommendation is strongly endorsed, with two updates.

136. The first is that the Act to be amended is now the *Equal Opportunity Act 2010*, though it is not yet in force. The 2010 Act contains new measures to deal with systemic discrimination which will greatly enhance its effectiveness; these new features must also apply to the proposed homophobic harassment provisions, where they will be particularly important, and greatly enhance the value of the original recommendation.

137. The second is that “against GLBTI people” must be understood as including persons thought to be in this class, or associated with them.

138. With Respect Recommendation 11:

That provisions to address homophobic harassment be included in a separate part of the Equal Opportunity Act 1995.

Submission

139. A separate Part of the *Equal Opportunity Act 2010* is now the goal.

140. This Part should contain separate Divisions for each attribute on which harassment is to be proscribed, namely (1) sexual orientation and (2) gender identity in the original, and in the context of the Eames Review, (3) race, national or ethnic origin and (4) religious belief or non-belief.

141. Further Divisions may be appropriate for other attributes, or even a general provision, where the criteria of (1) reasonable foreseeability of harm, and (2) history of discrimination or persecution do apply.

142. With Respect Recommendation 12:

That the harassment provisions should operate as broadly as possible and should not be confined to the areas of public life identified in Part 3 of the Equal Opportunity Act. The approaches warranting further consideration include:

²⁷ See Suicide Prevention Australia 2009, cited above.

- *Applying the harassment provisions to public acts;*
- *Excluding private acts from the operation of the provisions;*
- *Limiting the operation of the provisions to circumstances where the harm done is reasonably foreseeable; and*
- *Applying the provisions to harassment wherever it occurs.*

Submission

143. The Eames Review has been the opportunity for the further consideration that Recommendation 12 said was warranted.

144. The four points proffered for further consideration in Recommendation 12 are to some extent mutually exclusive; the third and fourth, however, are mutually supportive and are definitely the desirable policy. The first two reflect the earlier focus, rejected firmly in this submission, on the perpetrator's conduct and motivation rather than on the harm done.

145. We urge the Review to recommend strongly that the primary limitation should be the objective test of point three, with the observation that point four necessarily applies. The second point for consideration, namely the exclusion of "private acts" must be firmly rejected.

146. With Respect Recommendation 13:

That the Equal Opportunity Act 1995 be amended to make it unlawful to harass another person on the basis of their sexual orientation or gender identity.

Submission

147. The submission in relation to Recommendation 11 applies here too. That is:

148. Amendment of the *Equal Opportunity Act 2010* is now the goal.

149. The Act should separately make it unlawful for a person to harass another on the basis of each relevant attribute, namely (1) sexual orientation and (2) gender identity in the original, and in the context of the Eames Review, (3) race, national or ethnic origin and (4) religious belief or non-belief.

150. Further provisions may be appropriate for other attributes, or even a general provision, where the criteria of (1) reasonable foreseeability of harm, and (2) history of discrimination or persecution do apply.

151. With Respect Recommendation 14:

That, in the Equal Opportunity Act 1995, harassment be defined as 'conduct that offends, humiliates, intimidates, insults or ridicules another person'.

That other features of the definition include:

- *that harassment be assessed against an objective standard, requiring that a reasonable person (having regard to all the circumstances including the history of discrimination or otherwise against persons of that sexual orientation or gender identity) would have anticipated that the other person would feel offended, humiliated, intimidated, insulted or ridiculed*
- *that, consistent with existing Victorian provisions, harassment be capable of being constituted by a single act.*

Submission

152. This recommendation is the one that we do strongly urge the Review to endorse and recommend to the Government for implementation with celerity.

153. As before, it is the new Act that we would amend, though there would be no objection to amending the current Act—but with immediate effect—in the same way.
154. We have concerns that the proposed defining words, however, may not be the most appropriate. In particular, the word “offends” and its correlates do not clearly evoke the issue of harm that is the essential element, nor perhaps does “insulted.”
155. What matters, we submit, is that the policy position must be clear: it is conduct that causes or may cause harm that is to be proscribed. Whether a list of verbs is the best way to implement this is a technical issue, though if so we should prefer a list like “humiliates, intimidates, ridicules, threatens or distresses.”
156. The other elements of the recommendation are strongly endorsed: the objective standard, the regard to history of discrimination (and we might add, persecution) and the “single act” clarification.

157. With Respect Recommendation 15:

That limited exceptions be made in relation to the new harassment provision, to include:

- *the fair reporting of a harassing communication*
- *circumstances which would be subject to absolute privilege in proceedings for defamation*
- *statements made in good faith for academic, artistic, scientific or research purposes; or in the public interest.*

Submission

158. This recommendation is problematic, as it sits in the “speech” frame rather than the “foreseeable harm” frame.
159. Things said in Parliament or in Court are not going to be actionable, except by their own processes, whether they are exempted or not, regardless of the harm they might be going to cause. The third one is not so simple, and is anyway probably unnecessary. There is, after all, no exemption from the general provisions of the *Equal Opportunity Act* for things done by academics, in the areas the Act covers, nor for things done by researchers, scientists or artists, nor things done in the public interest.
160. It is therefore submitted that only the first two dot points of Recommendation 15 are now appropriate.
161. The most important element of this Recommendation 15, however, is what is not there: it correctly does not recommend an exemption for causing harm in the course of religious instruction or for religious purposes or by religious bodies. As argued in more detail elsewhere in this submission, pressure to include such an exemption must be strongly resisted.

• **Jamie Gardiner**
30 April 2010