

20 October 2023

Department of Justice and Community Safety

Legislative Reform

By email: reform@justice.vic.gov.au

Dear Legislative Reform Team,

RE: Consultation on strengthening Victoria's Anti-vilification laws

Thank you for the opportunity to contribute to the consultation on strengthening anti-vilification laws in Victoria (the **Consultation**). This letter outlines our response to all three stages of the Consultation.

About the Federation

The Federation is the peak body for Victoria's 47 Community Legal Centres. Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem.

For 50 years, Community Legal Centres have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy. We want a community that is fair, inclusive and thriving: where every person belongs and can learn, grow, heal, participate and be heard.

Introduction

We welcome the Victorian Government's focus on strengthening anti-vilification reform in Victoria. This continues to be a pressing issue in Victoria, particularly given recent national and international issues that have sparked increasing division within Victoria. This includes the recent referendum on the Voice to Parliament in which First Nations communities experienced increased levels of vilification, underscoring the importance of stronger protections.

Community Legal Centres remain committed to strengthening Victoria's anti-vilification framework. Many Community Legal Centres contributed submissions to the [Parliament of Victoria Legislative Assembly and Social Issues Committee Inquiry into Anti-vilification protections](#) (the **Inquiry**).¹ Community Legal Centres assist communities most at risk of vilification, including; First Nations communities, people with disability, women, people experiencing homelessness, LGBTIQ+ communities and others. Many individuals from these communities often encounter intersectional experiences of vilification based on more than one attribute.

¹See submissions from Asylum Seeker Resource Centre, Human Rights Law Centre, Job Watch, Liberty Victoria and LGBTIQ+ Legal Service, Springvale Monash Legal Service (now South-East Monash Legal Service) and Victorian Aboriginal Legal Service. The submissions are available at <https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-anti-vilification-protections/submissions>.

As outlined in the consultation papers, the current civil and criminal frameworks are overwhelmingly underutilised. In addition to ensuring legislative reform aligns with human rights principles, our members have emphasised the importance of public programs and education to support legislative reform. We highlight the role of Community Legal Centres in advancing access to and awareness of rights and protection on vilification and are pleased to work with the Department of Justice and Community Safety (DJCS) towards strengthening anti-vilification frameworks in Victoria.

In addition to amplifying our Members' submissions to the Inquiry, we recently consulted with Inner Melbourne Community Legal, South-East Monash Legal Service and Fitzroy Legal Service (FLS) to inform our response to this Consultation. We endorse the joint submission made to this Consultation by Victorian Aboriginal Legal Service (VALS) and Victoria Legal Aid (VLA). Additionally, we would like to highlight the following key areas for reform.

Expanding the current protections beyond race and religion

We strongly support the expansion of current anti-vilification laws to protect Victorians beyond race and religion. We support the proposed grounds of expansion to include gender and/or sex, sexual orientation, HIV/AIDS status, gender identity and gender expression, disability and personal association. It is important that the definitions for these additional grounds are consistent with the definitions used in the *Equal Opportunity Act 2010* (Vic) (EOA).

We recommend the inclusion of three additional grounds under current anti-vilification laws, based on: sex worker status, homelessness and immigration status. As highlighted in FLS's submission to stage 1 of the Consultation, 54 per cent of the public reported that they would behave negatively towards a person because of their sex work, including 47 per cent of healthcare workers.²

FLS also recommends the inclusion of people experiencing homelessness, which we support. As noted by FLS, the Victorian Government and Victoria Police identify homelessness as a characteristic targeted by 'prejudice-motivated crime' and the mandatory considerations in the *Sentencing Act 1991* (Vic) related to prejudice-motivated crime are intended to include people experiencing homelessness.³

FLS highlights the need to ensure specific reference to immigration status, separate to race, as an additional ground for vilification, citing both Tasmanian⁴ and Australian Capital Territory⁵ anti-vilification laws that include the status of immigration as a protected attribute. We support including immigration status as an additional ground or including express reference to this under the existing ground of race. We support the Tasmanian approach to including previous immigration status as a protected ground, noting the ongoing experiences of vilification encountered by people in Australia

² Timothy Broady et al, *Stigma Snapshot: General Public 2021* (Report, UNSW Centre for Social Research in Health, 2022) 4 <<http://doi.org/10.26190/rc20-kt75>> ('*General Public Stigma Report*'); Timothy Broady et al, *Stigma Snapshot: Health Care Workers 2022* (Report, UNSW Centre for Social Research in Health, 2022) 2 <<http://doi.org/10.26190/p7np-fj60>>.

³ *Sentencing Act 1991* (Vic) s 5(2)(daaa); Victoria, *Parliamentary Debates*, Legislative Council, 17 September 2009, 3358 (Rob Hulls, Attorney-General).

⁴ Anti-Discrimination Act 1998 (*Tas*) s3

⁵ Discrimination Act 1981 (ACT) (n 7) ss 7(i), Dictionary

from refugee and/or asylum seeker backgrounds.

We recommend that the grounds for vilification be expanded to include:

- **Definitions of gender and or sex, sexual orientation, HIV/AIDS status, gender identity and gender expression, disability and personal association that are consistent with the EOA.**
- **Sex worker status, homelessness, and immigration status as additional grounds under Victoria's anti-vilification laws.**

Ensuring Victorians can make complaints on more than one attribute

We support the proposal outlined in the first Consultation Paper enabling Victorians to make vilification complaints for more than one attribute to address the intersectional nature of vilification that is often experienced.

Victoria's anti-vilification framework should recognise the compounding harm of vilification based on multiple and intersecting attributes. As stated in FLS's submission to stage 1 of the Consultation:

'The nature of the vilification and the severity of harm cannot be separated into distinct and exclusive attributes. Rather, vilification of women who wear hijabs is because their religion, gender and race are indivisible. The legal mechanisms and processes to address vilification need to reflect the true nature of the vilification experienced'.⁶

We recommend that anti-vilification laws enable complaints on multiple attributes to address intersectional vilification.⁷ We suggest that decision makers consider the compounding and intersecting nature of multiple attributes when assessing if the threshold for vilification is met. Anti-vilification legislation should also expressly mandate the consideration of compounding effect of vilification based on multiple attributes when determining the appropriate remedy or sentence for the vilifying conduct.⁸ In line with VALS' and VLA's joint submission, these changes should be reflected in the EOA for other types of discrimination to ensure consistency.

Internationally, there are examples of multiple attribute protections in equality statutes including the *Equality Act 2010* (UK) and *Human Rights Act 1985* (Canada). We encourage a consideration of these models in the adoption of an intersectional model of multi-attribute protections in relation to vilification.

⁶ Hamish McLachlan, Verena Tan, Dee Bennett-Spark and Roberto Gerrard-Martinez, 'Submission to Consultation on Protecting more Victorians from vilification' (Submission, Fitzroy Legal Service (including Q+Law), 8 September 2023), 14.

⁷ Ibid, Recommendation 14, p 16.

⁸ Ibid, Recommendation 15, p16

We recommend that anti-vilification legislation be reformed to:

- **Enable Victorians to make complaints for more than one attribute to address intersectional experiences of vilification and for this to be reflected in the EOA for other forms of discrimination.**
- **Mandate that decision makers consider the compounding nature and effect of vilification based on multiple attributes when determining if the threshold for vilification is met and the appropriate remedy or sentence.**

Streamlining anti-vilification laws

We support the creation of a single equality framework consistent with Recommendation 14 of the Inquiry's Final Report which calls for the Victorian Government to streamline anti-vilification legislation.⁹ In line with VALS' and VLA's joint submission to this Consultation, we recommend harmonising the legal framework by moving:

- civil provisions from the *Racial and Religious Tolerances Act 2001* (Vic) (**RRTA**) to the EOA
- criminal provisions from the RRTA to the *Crimes Act 1965* (Vic) (the **Crimes Act**).

The Inquiry's Final Report recommends that the Victorian Government duplicate the criminal offence provisions in the Crimes Act.¹⁰ In line with VALS and VLA's joint submission, we consider that these provisions should be moved rather than replicated in the Crimes Act for greater clarity. Streamlining the anti-vilification legislation would increase public awareness of the protections and enable better access to remedy, particularly for the communities that Community Legal Centres assist who are most at risk of vilification.

We recommend streamlining anti-vilification laws by moving civil protections and offences from the RRTA to the EOA and criminal offences from the RRTA to the Crimes Act.

Establishing a positive duty to prevent vilification

We support Recommendation 18 of the Inquiry's Final Report which calls on the Victorian Government to implement a positive duty for organisations to take reasonable and proportionate steps to prevent vilification. This aligns with the positive duty under the EOA for discrimination, sexual harassment and

⁹ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-vilification Protections* (Final Report, March 2021), Recommendation 14, p 134, available at: https://new.parliament.vic.gov.au/4a7b78/contentassets/56e922dff39041edb5d49ad3d6eaa808/inquiry_into_anti-vilification_protections_002.pdf.

¹⁰ Ibid, Recommendation 23, p.172.

victimisation matters. In line with VALS' and VLA's joint submission to this Consultation, we consider that the positive duty under the EOA should be replicated in relation to preventing vilification.

The positive duty under the EOA applies to employers, local governments, clubs and sporting organisations and providers of accommodation, education or good and services.¹¹ As highlighted by VALS and VLA in their joint submission, this positive duty is particularly important for media organisations and social media agencies that have the power to manage and remove vilifying and discriminatory material.

While this recommendation is a step in the right direction towards instilling a proactive approach on duty holders to prevent vilification, the current EOA does not go far enough in applying this duty to Victoria Police, who are integral in preventing vilification. We support establishing a positive duty on Victoria Police to prevent vilification. Victoria Police is a critical actor in ensuring adequate prevention and protection against vilification. We strongly encourage the Victorian Government to consider and integrate the role of Victoria Police in establishing a robust anti-vilification framework that advances police accountability.

Currently, the EOA prohibits discrimination on a range of grounds. However, there is no ground prohibiting discrimination in the administering of laws, carrying out of police functions or state programs. Those attempting to bring an action against police must rely on section 44(1) of the EOA that prohibits discrimination in the provision of goods and services. Under section 4 of the EOA, 'services include service provided by a government department, public authority, State owned enterprise or municipal council.

There is a sizable body of case law on how and when police actions are considered services.¹² The Federal Court has found the test for an action being a service to be 'whether the act is helpful or beneficial to the relevant class of persons to which the person alleging discrimination belongs.'¹³ In the UK case of *Farah*, police officers were found to be providing a service in their assistance and protection of members of the public.¹⁴ In this case, police were found to have acted discriminatorily in the provision of this service by arresting a Somali woman who was attacked by a dog. This case has been cited several times in Australian jurisdictions.¹⁵ Despite this, the Victorian Civil and Administrative Tribunal has consistently found Victoria Police not to be carrying out a service in investigating a crime, even if this is beneficial to the community at large.¹⁶ The carrying out of arrests or decision not to arrest has also been repeatedly found not to constitute a service as arrests are seen as an action taken to uphold the law not provide a service to those individuals.¹⁷

We raise concern that groups who are most vulnerable to vilification are likely to be at increased risk of discrimination from police without an adequate framework for protection. We draw attention to the

¹¹ *Equal Opportunity Act 2010* (Vic) Part 4, Divisions 1-8

¹² For a strong summary see generally *Djime v Kearnes* [2015] VCAT 941 [44–69].

¹³ *Rainsford v Victoria* (2007) 167 FCR 1, Sundberg J [73].

¹⁴ *Farah v Commissioner of Police of the Metropolis* [1998] QB 65.

¹⁵ See *IW v City of Perth* (n 18) Brennan CJ and McHugh J at 14; *Djime v Kearnes* (n 17) [55–6].

¹⁶ See *Kyriakidis v Victoria* [2014] VCAT 1039 para 21; *Djime v Kearnes* (n 17); *Whittingham v Yeo* [2016] VCAT 2096.

¹⁷ See *Djime v Kearnes* (n 17) [69]; *Whittingham v Yeo* (n 22) [68–70].

[Yoorook Justice Commission's Final Report \(Yoorook Report\)](#),¹⁸ and note that among Victoria's First Nations community, discrimination from and violations of rights by Victoria Police are startlingly common. Most recently, Victoria Police have been criticised for failing to intervene and/or take appropriate action in response to neo-Nazi protests that propagated hate speech and incitement.

Victoria cannot achieve a strong anti-vilification framework without a clear positive duty instilled on Victoria Police and express prohibitions on vilification across functions carried out by Victoria Police. We also strongly encourage the implementation of Recommendation 31 of the Inquiry's Final Report that mandates the recording of prejudice motivated crime by Victoria Police.¹⁹ These reforms are required to ensure greater accountability in police conduct.

As noted above, we support streamlining anti-vilification legislation by moving provisions into the EOA and creating a single equality framework. Importantly, we alert government to Recommendation 29 of the Yoorook Report that calls for the urgent amending of the EOA to prohibit race and other forms of discrimination in the administration of state laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child protection authorities.²⁰ We strongly encourage the Victorian Government to implement the above recommendations in tandem, to ensure Victorians have a strong anti-vilification and anti-discrimination framework that expands the duty Victoria Police have in preventing vilification and ensures vulnerable communities are protected in their interactions with police.

We recommend that the Victorian Government:

- **Establish a positive duty for organisations to take reasonable and proportionate steps to prevent vilification (in line with the current duty under the EOA for discrimination, sexual harassment and victimisation matters).**
- **Establish a positive duty on Victoria Police to prevent vilification.**
- **Urgently amend the EOA to prohibit race and other forms of discrimination in the administration of state laws and programs, including all functions performed by Victoria Police, Corrections Victoria and child protection authorities.**
- **Mandates the recording of prejudice motivated crime by Victoria Police.**

¹⁸ Yoorook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems*, 2023, available at: [Yoorook-for-justice-report.pdf](#).

¹⁹ Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-vilification Protections* (Final Report, March 2021), Recommendation 31, p 211, available at: https://new.parliament.vic.gov.au/4a7b78/contentassets/56e922dff39041edb5d49ad3d6eaa808/inquiry_into_anti-vilification_protections_002.pdf.

²⁰ Yoorook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems*, 2023, Recommendation 29, p 35, available at: [Yoorook-for-justice-report.pdf](#).

Other key reforms

We support the positions put forward by VALS and VLA in their joint submission to the Consultation in relation to reforming the civil anti-vilification provisions and the criminal offences for serious vilification. This includes the introduction of a single criminal vilification offence to address serious conduct rather than multiple criminal offences reflecting the degree of seriousness. As highlighted by VALS and VLA in their joint submission, any reform of the criminal vilification offences needs to have regard to any risks of increasing criminalisation of disadvantaged and targeted groups.

Alongside these legislative reforms, it is critical that there is a focus on engendering cultural change to address the causes of hate speech and hate crimes, as well as enhancing accountability and access to legal representation for people subject to vilifying conduct. This requires the roll-out of community education and awareness-raising campaigns and training for Victoria Police, as well as further investment in the legal assistance sector to represent people subject to vilification. As highlighted above, it is critical that changes to the anti-vilification laws occur alongside intersecting reforms proposed in the Yoorrook Report.²¹

Lastly, we encourage the expansion of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) powers to include prevention and investigation of vilification matters in alignment with the recommendations in the Inquiry's Final Report.²² This will enable greater access and transparency to remedy for the communities most affected by vilification in Victoria.

We recommend that alongside legislative reform, there is:

- **focus on driving cultural change to address the underlying causes of hate speech and crimes (and ancillary resourcing)**
- **investment in the legal assistance sector to ensure people who have been vilified can access legal support**
- **the expansion of VEOHRC's powers to include prevention and investigation of vilification.**

We would welcome the opportunity to discuss this further or provide any additional information.

Yours sincerely,



Louisa Gibbs
Chief Executive Officer

²¹ Yoorrook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems*, 2023, available at: [Yoorrook-for-justice-report.pdf](https://www.yoorrook.org.au/for-justice-report.pdf).

²² Legislative Assembly Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-vilification Protections* (Final Report, March 2021), Recommendation 15-17, available at: https://new.parliament.vic.gov.au/4a7b78/contentassets/56e922dff39041edb5d49ad3d6eaa808/inquiry_into_anti_vilification_protections_002.pdf.